REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WM. WIRT VIRGIN,
REPORTER TO THE STATE.

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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. THOMAS B. REED.

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ERRATA.

Page 19, 15th line, for "union," read "revision."
" 95, 97, 99, 1st line, for "OXFORD," read "YORK."
" 220, 9th line, for "just," read "first."
" 229, 4th " " "definitely," read "definitively."
" 276, 22d " " "*A. Libby*," read "*C. W. Larrabee.*"
" 416, 17th " " "mortgager," read "mortgagee."
" 518, 8th " from bottom, for "assigned," read "signed."
" 519, 1st " for "LINCOLN," read "OXFORD."

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

ARTHUR LOVEGROVE *vs.* GEORGE S. HUNT.

Manufacturing corporations—individual liability of stockholders.

By R. S. of 1857, c. 48, § 9, manufacturing corporations are prohibited to contract debts exceeding, at any one time, the amount of their capital invested within the State in real estate and fixtures thereon, including machinery; and from becoming indebted to an amount exceeding one-half their capital paid in and remaining undivided, and of their other property and assets. When they comply with these prohibitions and limitations, their stockholders are relieved from all individual liability for their debts. When either of these limitations is violated, their stockholders become individually liable for debts of the corporation in the manner provided in c. 46.

The liability arising under c. 48, § 9 is to be made available to creditors of the corporation in the manner prescribed in c. 46, § 24.

ON EXCEPTIONS.

CASE against a stockholder of the Portland Shovel Manufacturing Company, chartered Feb. 28, 1863, to recover the amount of his individual liability under R. S. of 1857, c. 48, § 9.

The writ contained six counts, the first of which alleged, substantially,

That the plaintiff, on October 28, 1867, recovered judgment against the Portland Shovel Manufacturing Company, a manufacturing corporation, having its place of business in Portland, for

$18,108.48 debt, and $21.87 costs; that the execution, issued on the judgment, was, on Jan. 1, 1868, levied on the right in equity which the Shovel Company had of redeeming a certain parcel of land, situated in Portland, and the judgment satisfied in part, to wit, for the sum of $274.34; and, for want of other attachable property of the corporation, the execution was returned satisfied in part only.

That on March 6, 1868, the plaintiff demanded of the defendant, who, at the time the original indebtedness on which the judgment was founded accrued to the plaintiff, was, and ever since has been, a stockholder in the corporation, to disclose and show attachable property of the corporation, sufficient to satisfy the execution; that the defendant did not then, nor has he since, disclosed attachable property of the corporation sufficient to satisfy the execution; and that the judgment is in full force.

That the Portland Shovel Manufacturing Company is a manufacturing company, incorporated by the legislature of this State, after the first of January, 1858, and is not a banking corporation, nor a corporation for literary or benevolent purposes; that the defendant, at the time of the original indebtedness upon which the judgment was founded, was, and still is, a stockholder in the Portland Shovel Manufacturing Company, and then was, and ever since has been, the owner of seven shares of the capital stock thereof, of the par value of one hundred dollars for each share; that the corporation has not complied with the prohibitions and limitations of the statutes of this State relating to manufacturing corporations; but has contracted debts exceeding, at one time, the amount of its capital invested within the State, in real estate and fixtures thereon, including machinery; [and have become indebted to an amount exceeding one-half of their capital paid in and remaining undivided, and of its property and assets;] whereby the defendant has become individually liable for the debts of said corporation (to an amount equal to the par value of his said stock therein), and an action has accrued to the plaintiff to have and recover of the defendant the amount of seven hundred dollars.

The second count is same as the first omitting the clause within the brackets.

The third count is same as the first omitting the clause next preceding the clause within the brackets.

The fourth count, after setting out the recovery of the judgment and levy as in the first, then alleged, substantially,

That the plaintiff, on March 5, 1868, purchased an alias execution upon the judgment, which was placed in the hands of a deputy-sheriff, named, who made the following return thereon:

CUMBERLAND, SS.: March 6, 1868.

I hereby certify, that James D. Fessenden, as attorney to the within-named creditor, on the days and at the places herein below mentioned, made demand in my presence upon each of the following named persons, who were stockholders in the within-named Portland Shovel Manufacturing Company, at the time the within-named debt accrued, and ever since have been and now are stockholders in said corporation, to disclose and show attachable property of said corporation sufficient to satisfy this execution; that I had said execution in my hands for collection and service, and then and there exhibited it to each of said stockholders (the former execution having been returned into the clerk's office of the within-named court, unsatisfied for want of attachable property of said corporation, except for the sum of two hundred and seventy-four dollars and thirty-four cents), and each of said stockholders then and there neglected and refused to disclose and show sufficient attachable property of said corporation, viz., George S. Hunt . . . and for want of attachable property of said corporation, I return this execution in no part satisfied, (Signature),

as by the execution and officer's return thereon appears.

That after the return of the first execution, in part unsatisfied for want of attachable property of such corporation, to wit, on March 6, 1868, the plaintiff made demand of the defendant, who, at the time the original indebtedness upon which said judgment was founded accrued to the plaintiff, was, and ever since has been, a stockholder in the corporation, to disclose and show attachable prop-

erty of said corporation sufficient to satisfy said execution; and that the said defendant did not then, nor has he since, disclosed attachable property of said corporation sufficient to satisfy said execution, and neglected and refused, and still neglects and refuses so to do; that said judgment is in full force, and not reversed, annulled, or satisfied, except as aforesaid.

That said Portland Shovel Manufacturing Company is a manufacturing company, incorporated by the legislature of this State, after the first day of January, A. D. 1858, and is not a banking corporation, nor a corporation for literary or benevolent purposes; and that the defendant, at the time the original indebtedness upon which said judgment was founded, was, and still is, a stockholder in said Portland Shovel Manufacturing Company, and then was, and ever since has been, the owner of seven shares of the capital stock thereof, of the par value of one hundred dollars per share, and all of the value of seven hundred dollars; and that the said corporation has not complied with the prohibitions and limitations of the statutes of this State relating to manufacturing corporations, but have contracted debts exceeding, at one time, the amount of their capital invested within the State, in real estate and fixtures thereon, including machinery, and have become indebted to an amount exceeding one-half of their capital paid in and remaining undivided, and of their other property and assets; whereby this defendant has become individually liable for the debts of said corporation (to an amount equal to the par value of his said stock therein), and an action has accrued to this plaintiff to have and recover of the defendant the amount of the aforesaid execution still remaining unpaid, or the deficiency thereof, not exceeding the amount of his stock, viz., seven hundred dollars.

The fifth count is same as fourth, with the same words omitted as in the second.

The sixth count is same as the fourth with the same words omitted as in the third.

To this declaration the defendant filed a general demurrer at the first term, which was joined by the plaintiff.

The presiding judge sustained the demurrer, *pro forma*, and adjudged the declaration bad, and the defendant alleged exceptions.

J. D. & F. Fessenden, for the plaintiff.

1. Plaintiff is entitled to this action. R. S., c. 48, § 9; R. S., c. 46, §§ 25, 26, 27; Public Laws of 1859, c. 76; Charter of Portland Shovel Manufacturing Company, Private Acts of 1863, c. 236.

Reference in c. 48 to c. 46 is to the remedy, not to the extent of stockholders' liability.

2. The individual liability, imposed by c. 48, is not affected by c. 46, § 24.

The latter part of said section, relieving stockholders from all liability beyond the loss of their stock, applies only to such stockholders as are liable by the first part of the same section.

There is no liability imposed on stockholders in manufacturing corporations by that section, as they are exempted by a general law of the State. Laws of 1856, c. 271; *Milliken* v. *Whitehouse*, 49 Maine, 529.

3. The liability of stockholders in manufacturing corporations is radically distinct from that provided in c. 46, § 24.

W. L. Putnam, for the defendant.

I. In equity, stockholders are holden to make up, in behalf of creditors, capital withdrawn or not paid in. This principle has been reaffirmed in our statutes in many places. R. S., c. 46, §§ 24, 34; R. S., c. 49, §§ 9, 11.

This is just, since the credit given corporations is given upon their apparent capital as the fund from which creditors are to be paid.

Further than as above creditors have no equity, and can claim only by positive provision of statute. *Gray* v. *Coffin*, 9 Cush. 199.

II. The legislation in this State on this matter has been substantially as follows:

1. By the statutes of 1821, stockholders in insurance companies were made liable on the equitable principles above stated. Ch. 139, §§ 2, 7.

And stockholders in banks, whose liability has always been considered a peculiar one, to the extent of their stock for bills and deposits. Ch. 145, § 4.

And in manufacturing corporations *in solido*. Ch. 60, § 31.

2. By statute 1836, c. 200, afterwards codified in 1840, c. 76, § 18, the liability was reduced to amount of stock and extended to all corporations.

3. In 1841 a party with more liberal views came into power, and by c. 192, stockholders in manufacturing corporations were exempted from liability when the debts did not exceed one-half of the paid up capital.

4. In 1843, c. 16, the liability of such stockholders was again revived to the amount of the stock without exception.

5. In 1844, c. 109, such stockholders and none other were again made liable *in solido*, subject, however, to certain exceptions, which, if complied with, exempted them entirely, and which were similar to those contained in the statute of 1841, and which with some amendments are codified in R. S., c. 48, § 9.

All the above statutes were many times amended in details which need no mention.

6. In 1856, c. 271, all corporations were placed substantially on the same footing, banks excepted. *Vide Hathorn* v. *Calef*, 53 Maine, 484–5, for the meaning of the clause: "unless otherwise excepted in their charter, etc." Stockholders in manufacturing corporations were no longer liable *in solido;* but they retained the privileges given them by the statute of 1844. *Vide Hathorn* v. *Calef*, *supra.* When the conditions of that act were not complied with, they became liable for an amount equal to their stock.

The disastrous effect of all the above legislation on our manufacturing interests, were as sure as would be the like effect of a decision of this court in favor of plaintiff in this suit. Even the statute of 1856 was exceedingly unjust and impolitic in a State where the lack of private capital compels the formation of corporations and encouragement to foreign capital, and where most manufacturing corporations are formed as much for local improvement as for indi-

vidual profit. Even the provision of entire exemption, where the corporation does not become indebted beyond certain amounts, is of no avail, as many stockholders can have no practical control of the operations of a corporation, and all would be deterred from venturing their personal liability on conditions practicably beyond their direction.

7. In 1857, c. 58, the whole matter was put on a correct basis, and all stockholders in the corporations, except banks, whose stock remained all paid up, were thenceforth relieved from personal liability. *Whitney* v. *Hamnond*, 44 Maine, 320.

Thus after many struggles and bitter experience on the part of those who were laboring for the manufacturing advancement of Maine, this just result was reached, which no one will deny was in 1857 and has been ever since, in accordance with the views of the great mass of the people. And no argument is necessary to support the allegation, that, under the circumstances, nothing but the clearest and most specific language would induce any one to believe that the legislature has intended to change the principle of the law of 1857.

III. The act last referred to was approved April 15, 1857, to go into practical effect June 1, 1857.

Before the latter date, the revision of 1857 was passed, and approved April 17, 1857, to go into effect Jan. 1, 1858. *State* v. *Hobbs*, 39 Maine, 214; *Hughes* v. *Farrar*, 45 Maine, 72.

On this particular point the commissioners' revisions can throw no light, as they were both prior to the passage of this statute.

But the general repealing act of 1857, repealed by express mention, c. 58, of act of 1857; so it was not overlooked.

The purpose of that repealing act was limited by its title to repealing such acts as had been "consolidated, etc."

The second section expressly provides that the "repeal of the acts aforesaid does not revive any of the acts repealed by them." Yet plaintiff claims that the act of 1856 was revived contrary to this provision of the statute.

Sect. 3 declares, "the following acts are not included in the Re-

vised Statutes," etc., and "are not thereby repealed," thus giving a reason which embraces the implication that the others were repealed because included.

Now the statute of 1857, c. 58, was clearly reënacted in R. S., c. 46, § 24. Even the exception relating to banks was carefully retained. The words in the same section: "unless otherwise specified in their charter, etc.," we have already explained the meaning of, and were a part of the act of 1856, c. 271, which was also codified in the revision, because it was to remain in force to describe rights existing prior to Jan. 1, 1857, and the remedies therefor.

Now stopping with c. 46, it would not be claimed that any change had been made in the law. The statute of 1856 was codified there to cover debts incurred previous to June 1, 1857, and that of 1857 for those incurred on and after that date.

Plaintiff, however, relies on c. 48, § 9, which perhaps is inaptly expressed; but in connection with the great fact that the whole book is a codification, is sufficiently clear in its application.

The fact that it alludes at all to any limit of indebtedness unexplained by the history of cognate legislation, would leave an implication that where the corporation indebtedness exceeded the limitation, there was individual liability beyond that of loss of stock as provided by statute 1857, c. 58.

The true construction of the section is this:

It refers to c. 46. Now on turning to that we find codified the statute of 1857, fixing one degree of liability for debts incurred on, or after June 1, 1857; and we find in the same section codified the law of 1856, fixing a different degree of liability for debts incurred prior to that date.

Under the statutes as they stood in 1856, and for debts contracted previous to June 1, 1857, stockholders in manufacturing companies were favored, and were entirely relieved, when there was a compliance with certain provisions of law limiting the indebtedness of the corporation. *Hathorn* v. *Calef*, *supra.*

When, therefore, the general liability, fixed by statute of 1856, was codified in the general chapter on corporations, it became nec-

essary to codify the exceptions existing in 1856, in favor of manufacturing corporations, in the chapter relating specially to manufacturing corporations. When c. 46 should be called into action with reference to old debts, c. 48, § 9 would find reason for the full application of all its provisions; but so long as the reference was only to debts incurred on or after June 1, 1857, section 9 would remain quiescent. In this way only, the expression therein, viz., "in the manner provided in c. 46, could be understood; as the "manner" of liability described in that chapter varied as dates varied.

But it may be asked why was section 9 reënacted, if the only purpose was to preserve old rights which were already fixed? For the same reason that statute, 1856, c. 271, was reënacted in c. 46, § 24, and as a necessary consequence thereof, as we have already explained. The act of 1856, though rendered obsolete as to future contracts by statute 1857, c. 58, was not thereby in terms repealed, but remained in force to determine rights previously fixed; and thereupon with all qualifying statutes relating to manufacturing corporations was properly codified.

IV. But if notwithstanding the probabilities and reason of the case, the letter of the statute is insisted on, plaintiff stands no better.

Ch. 48, § 9, says nothing specially about remedy. It does not provide that the remedy shall be "in the manner provided in c. 46." Now if it had intended to provide a greater liability than was imposed by c. 46, its reference to that chapter would have been necessary for the purpose of pointing out the remedy only. But it refers back entirely for the purpose of determining the "manner" or "extent" of liability. In doing this it refers to the whole chapter and no particular portion, section, or portion of section, can be selected as the only part of the chapter referred to, or as giving a fixed liability, when the liability imposed by the whole chapter is one varying with reference to the date of the contract.

The language of this part of the same section in Judge Shepley's revision was as follows: "Stockholders become individually liable for debts of the corporation *for the time, and to be enforced* in the

manner provided in c. 46, *without the benefit of the limitation of amount.*"

Now that imposes a liability greater in extent than c. 46 now imposes; and the legislature struck out the last words italicized, without inserting other words to fix any different liability from that fixed by the general law of corporations.

But what is specially noticeable is, that the legislature also struck out the other italicized words, showing clearly that they refused to allow the reference to c. 46, to stand merely for the purpose of determining the form of remedy.

In this case, as also in c. 52, Judge Shepley overlooked the applicability of the law of 1856. The oversight was remedied in c. 48, but apparently not observed in c. 52. *Hathorn* v. *Calef*, *supra.*

Even in the worst state of the law at any time within thirty years, the legislature has always made an express qualification in favor of manufacturing corporations, by exempting them entirely in the manner provided in § 9, c. 48; and so it continued, as no one will dispute, to April 15, 1857, when c. 58, already cited, was approved, and till April 17, when the Revised Statutes were approved. But the effect of the plaintiff's position is, that on April 17, two days after the approval of the act relieving all stockholders in all cases, the legislature not only reversed the act of April 15, but reversed the settled policy of years, made that discrimination an injury which had before been a benefit, and entirely relieved all other stockholders except those whom before the State had always favored.

V. This writ cannot be sustained, as it does not allege any demand to disclose to the officer attachable property.

By the express language of the statute and by the reason of the thing, the defendant is to know to whom he should disclose; and if to an officer, to have him designated.

The return of the officer is evidence; but setting it out in the writ cannot supply the place of proper allegations. And even that does not show a distinct request to disclose to the officer.

P. Barnes, on the same side, elaborately reviewed the past statutes relating to corporations, citing the following:

R. S. of 1841, c. 76, § 18 *et seq.*; c. 78, § 14 (repealed 1844).

Special Laws of 1844, c. 138, approved Feb. 18, 1844, c. 139, approved Feb. 16, 1844.

Public Laws of 1844, c. 109, approved March 21, 1844, c. c. 174, 178, 182, approved March 21, 1844.

Public Laws of 1845, c. 154.

Public Laws of 1850, c. 157, amending c. 109 of 1844, by adding the words "and of their other property and assets."

Public laws of 1856, c. 271, "stockholders of all corporations became liable."

C. J. Shepley's union made in 1856.

Special Laws of 1857, c. 122, § 14, approved April 15, 1857.

Public Laws of 1857, c. 58, exempted stockholders in corporations from personal liability after June 1, 1857. Approved April 15, 1857.

R. S. of 1857, approved April 17, 1857, to take effect Jan. 1, 1858. Ch. 46, § 24, defining and limiting liability of stockholders is in two parts:

1. As to debts incurred prior to June 1, 1857.

2. As to debts incurred after that date.

The second is in substance a transcript of c. 58 of the Public Laws of 1857, approved April 15.

R. S. of 1857, c. 48, § 9, defines liability by referring (in terms of Shepley's revision) to c. 46.

This reference must be understood to carry along with it the discriminations of *ante* June 1, and *post* June 1, which are expressed in § 24, c. 46; Public Laws of 1861, c. 24; of 1862, c. 152, §§ 2, 20.

Appleton, C. J. The Portland Shovel Manufacturing Company was incorporated by an act, c. 236, approved Feb. 28, 1863, "with all the powers, privileges, and subject to all the duties and liabilities contained in the laws of the State relating to manufacturing corporations."

The general rights, duties, obligations, and liabilities of corporations are prescribed and defined by R. S., 1857, c. 46. But there are various kinds of corporations and for different purposes and objects, as for banking, manufacturing, insuring, etc. In the statutes relating to the corporations, created for special purposes, are found special prohibitions and limitations applicable to each different kind of corporation. The provisions applicable to all corporations, and those to the different corporations for special purposes, are to be construed together. The general provisions apply to all corporations, except when modified by prohibitions and limitations specially applicable to some of the different varieties of corporations. It is obvious that there was no conflict intended between the general and the special legislation. While the general law, as enacted in c. 46, is to be deemed binding as long as it remains without modification, its applicability must obviously cease, when there are other and variant provisions enacted for the different kinds of corporations. In other words, the special laws for a particular species of corporations, when variant from the general law, must be regarded as paramount and withdrawing the kind of corporation to which it applies from the operation of the general law, which would control were it not for this modification.

The statutes as revised in 1857 must be held as being then the true expression of the legislative will. The individual liability of corporators for the debts of the corporation had been the subject of fluctuating and contradictory legislation; but the final and conclusive will of the legislature is to be found in the revision of 1857, unless where the provisions therein contained have been since modified or repealed.

By R. S., c. 48, relating to manufacturing corporations, § 9: "These corporations are prohibited to contract debts, exceeding at any one time the amount of their capital invested within the State in real estate and fixtures thereon, including machinery, and from becoming indebted to an amount exceeding one-half their capital paid in and remaining undivided, and of their other property and assets. When they comply with these prohibitions and limitations,

their stockholders are relieved from all individual liability for their debts. When either of these limitations are violated, their stockholders become individually liable for debts of the corporation in the manner provided in chapter forty-six."

The object of this provision is apparent. It was to protect the public by making the corporators personally liable for the illegal acts of the officers of the corporation. It was to enforce prudent management under a penalty. It was to compel corporators to look after the doings of the officers of the corporation, and see that they neither neglect their duties, mismanage its funds, nor violate the law. The legislature deemed it more just that the loss resulting from official mismanagement should fall upon those who intrusted the affairs of the corporation to the hands of incompetent, negligent, or dishonest officials, than upon individuals who had nothing to do with their appointment, and who could not enforce their removal, upon those who would not have been benefited by their speculations if prosperous, and should not be injured by them if unprosperous. The influx of foreign capital is desirable, but it is equally desirable that it should look after its own interests. It is not desirable that our own citizens should suffer the penalty which may arise from a violation of law by the foreign capitalist or his agent. Those by whom or by whose agents the law is violated should suffer for such violation rather than those who are free from fault or blame. Such seems to be the will of the legislature, as indicated by this section, in relation to members of manufacturing corporations.

Nor is this to be regarded as changed by the reference to chapter forty-six. The last sentence of § 9 is "when either of these limitations are violated, these stockholders become individually liable for debts of the corporation, in the manner provided in chapter forty-six." The manner relates only to the mode of enforcement. The liability is individual. It is the consequence of and the penalty for violated law. The forty-sixth chapter prescribes the manner of proceeding in the cases within § 24. It is in this manner that the liability arising under § 9 is to be made available to the creditors of the corporation. Adopting this view, there is no conflict between the two statutes.

But by the terms of c. 46, § 24, the liability of stockholders of corporations is defined, "excepting banking corporations, unless it is otherwise specified in their charter, or by any general law of the State." Now by the general law of the State relating to manufacturing corporations it is "otherwise specified," so that the liability of corporators when "otherwise specified" is specially recognized as different from that provided for in § 24.

The intention of the legislature is to be deduced from a comparison of the two statutes under consideration. The special provision of § 9 is a limitation of the general law. It is a modification of the preceding general law so far as it differs from it. The ninth section of c. 48 was enacted for some purpose. It is unnecessary, unless for the purpose of creating a different liability for manufacturing corporations from that of corporations generally. It means nothing unless it means what it purports,—that is, the imposition of personal liability on corporators, when its prohibitions and limitations are violated. The writ sets forth a violation of the "prohibitions and limitations" of § 9. The demurrer thereto is general. The only specific objection made is that it does not allege any demand to disclose to the officer attachable property. If so, the amendment could be easily made and would be allowed on motion. The return, however, on the execution is made part of the writ, and we think the writ taken as a whole does show a demand upon the defendant to disclose attachable property to the officer having the execution.

Exceptions sustained.

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

NOTE.—The same question was very fully examined by Judge Fox, of the United States District Court of Maine, and the same conclusion arrived at in a very able opinion published in the Eastern Argus of March 29, 1871.

PORTLAND & OXFORD CENTRAL RAILROAD CO., petitioners for mandamus, *vs.* INHABITANTS AND MUNICIPAL OFFICERS OF HARTFORD.

Vote of town in aid of railroads—construction of—mandamus.

A town, by virtue of Public Laws of 1867, c. 119, by two-thirds of the voters present at a legal meeting, voted to loan its credit to aid in the extension of a railroad, by issuing interest-bearing bonds to a certain amount in exchange for a like amount of preferred stock in the railroad, "at such time as the railroad company shall build its railroad to Canton Mills, provided it shall be completed to Canton Mills, and the cars are running and transporting freight and passengers over the road from Mechanic Falls to Canton Mills, on or before Jan. 1, 1870;" otherwise the vote should be void. *Held*, that the condition required a completion of the road, as well as a running of the cars, before the aid could be demanded.

And where the town, at a subsequent legal meeting, by a majority of the inhabitants present and voting, voted, "To issue bonds to the Portland & Oxford Central Railroad Company, for the sum named in the previous vote, taking a like amount of preferred stock in said road, in exchange, as contemplated in" the former note; *Held*, (1) That as the vote passed by only a majority, the company could claim no rights under it, as a vote under c. 119; (2) That the majority could not waive the condition of the former vote; and (3) That the latter vote does not, in terms, purport to modify the conditions of the former.

Whether mandamus would be a proper remedy for the raiload company to compel the issuing of the bonds of the town, in case the conditions of the vote had been complied with by the railroad company, *quære*.

PETITION FOR MANDAMUS.

The petitioners alleged, substantially,—

That at a legal meeting of the inhabitants of Hartford, held Sept. 12, 1868, under Public Laws of 1867, c. 119, two-thirds of the legal voters present and voting, voted, "That the town loan its credit to the Portland & Oxford Railroad Company, for the sum of six thousand five hundred dollars, to aid in the extension of said road from Hartford Center to Canton Mills, said loan to be issued to said company, in interest-bearing bonds, payable in twenty years, the interest to be paid annually at any national bank in Portland,

in exchange for a like amount of preferred stock in said road, at such time as said company shall build, or cause said road to be built, to Canton Mills, provided that said road shall be completed to Canton Mills, and the cars are running and transporting freight and passengers over said road, from Mechanic Falls to Canton Mills, on or before Jan. 1, 1870, and provided, also, that the amount of preferred stock issued on said road shall not exceed the sum of one hundred thousand dollars. Should the road not be completed to Canton Mills, and cars running, Jan. 1, 1870, and should the amount of preferred stock, issued on said road, exceed one hundred thousand dollars, making the whole stock in said road exceed the sum of three hundred and forty thousand dollars, the above vote, loaning the credit of the town, shall be null and void;" that said loan did not exceed five per cent of the valuation of said town; that the vote was communicated to the company, on Sept. 14, 1868, which, by its president, notified the inhabitants of Hartford, in writing, that the company accepted their proposal of aid.

That, relying upon the contract thus made, the company proceeded to complete the road from Hartford Center to Canton Mills, so that the cars were running over the same, and transporting freight and passengers on Jan. 1, 1870; and that the preferred stock, issued by the company, on the road, does not exceed the sum of one hundred thousand dollars, nor the whole stock three hundred and forty thousand dollars.

That, on Jan. 15, 1870, at a legal meeting of the inhabitants of Hartford, they voted, "To issue to the Portland & Oxford Central Railroad Company, bonds for the sum of six thousand five hundred dollars, taking a like amount of preferred stock in said road in exchange, as contemplated in a vote passed Sept. 12, 1868," and, in addition thereto, at the same meeting, it was voted to instruct the selectmen of said town to issue said bonds.

That the petitioners have requested the respondents to issue said bonds, as stipulated in the vote of the town, offering them an equal amount of the preferred stock of the company; but that the selectmen and treasurer refuse so to do.

Prayer that a rule be issued to the inhabitants of the town, and to certain persons named as selectmen and treasurer of the town, to show cause why a writ of mandamus should not issue, etc.

The answer of the respondents alleged, among other things, that the terms of the vote of Sept. 12th had not been complied with,— that the road was not completed; that the vote of Jan. 15th being passed by a majority only, was not valid; and that mandamus is not the proper remedy.

The presiding judge found, as matter of fact, that the road was not completed so as to entitle the petitioners to the bonds under the vote of Sept. 12, 1868; but ruled, as matter of law, that the vote of Jan. 15, 1870, entitled the petitioners to the bonds therein named. The ruling was made with the express agreement that either party should have the right to except, and that the whole case should thereupon go to the full court for revision.

The respondents alleged exceptions.

Smith and *Bradbury & Bradbury*, for the petitioners, elaborately argued the following propositions:

That the parties intended such a completion of the road as a first condition, as was necessary for running cars to Canton Mills by Jan. 1, 1870, as a second condition. The road to be substantially completed. When this was done, all other essentials would duly follow. That the town has enjoyed its benefits.

That the vote of Jan. 15, 1870, was a completed and binding acceptance of the road, and the running of the trains as contemplated by the vote of Sept. 12, 1868.

That an acceptance would operate as a waiver of all exceptions on the part of the respondents, and constitute a binding agreement for a legal consideration, to issue its bonds in discharge of the pre-existing indebtedness of the town therefor.

The original contract was entered into by a two-thirds vote, but the law has not altered the majority power of the town to control its recognition, subsequently, as a valid existing obligation, and based upon a fulfilled contract. The two-thirds power was exhausted in

the first vote. It was competent for the majority afterwards to construe the original vote, and to recognize a fulfillment of its conditions by the other contracting party. Two-thirds not necessary to raise the tax to pay bonds, voted under c. 119. If two-thirds vote was necessary after the original vote, a minority larger than one-third could defeat its execution.

Ch. 119 requires a two-thirds vote only when voting upon the sum to be raised "to aid in the construction of any railroad." By § 2, the town by majority vote may settle all questions of contract in respect to such aid. Same of § 3.

Davis & Drummond, for the respondents.

APPLETON, C. J. By the Public Laws of 1867, c. 119, any city or town was authorized to raise money to aid in the construction of any railroad in this State, "provided that two-thirds of the legal voters present, and voting at such meeting, shall vote therefor."

The inhabitants of Hartford, at a regular town meeting, duly held on 12th Sept., 1868, by the vote of two-thirds of the legal voters, present and voting, voted, "That the town loan its credit to the Portland & Oxford Central Railroad Company for the sum of six thousand five hundred dollars, to aid in the extension of said road from Hartford Center to Canton Mills, said loan to be issued to said company in interest-bearing bonds, payable in twenty years, the interest to be paid annually, at any National Bank in Portland, in exchange for a like amount of preferred stock in said road, at such time as said company shall build, or cause said road to be built, to Canton Mills, provided that said road shall be completed to Canton Mills, and the cars are running and transporting freight and passengers over said road, from Mechanic Falls to Canton Mills, on or before Jan. 1, 1870, and provided also that the amount of preferred stock issued on said road shall not exceed the sum of one hundred thousand dollars. Should the road not be completed to Canton Mills, and cars running, Jan. 1, 1870, and should the amount of preferred stock, issued on said road, exceed one hundred thousand

dollars, making the whole stock in said road exceed the sum of three hundred and forty thousand dollars, the above vote, loaniug the credit of the town, shall be null and void."

The vote is conditional. It is to be null and void, if the road is not completed to Canton Mills, and the cars running, Jan. 1, 1870. It is not enough that the cars are running. They may run over a road not completed. The condition is not that they should be so far completed that cars may run over it. The condition requires its completion equally with the running of cars.

The case finds that the railroad was not completed so as to entitle the petitioners to the bonds of the town under this vote.

At a town meeting duly notified and called on 15th Jan., 1870, a majority of the inhabitants of Hartford, present and voting, "Voted to issue bonds to the Portland & Oxford Central Railroad Company for the sum of six thousand five hundred dollars, taking a like amount of preferred stock in said road in exchange, as contemplated in a vote passed Sept. 12, 1868."

As this vote was passed by only a majority, the petitioners can claim no rights under it as a vote under the provisions of c. 119.

Can a town by the vote of a majority waive, change, or modify the terms and conditions of a vote of two-thirds, so as to bind the town by such waiver, change, or modification, in cases where, as under c. 119, the vote of two-thirds was required to bind the town?

The vote of Sept. 12, 1868, was an unit. The town had a right to prescribe the terms and conditions upon which it would render its aid to the petitioners. Its liability was conditional. It arose only by and through a vote of two-thirds. It could have no existence save by and through such vote. A majority at the September meeting could not have waived, changed, or modified any of the terms and conditions prescribed by the vote of two-thirds. If they could not at that meeting, they could not at any subsequent meeting, for the power of a majority is as great at one town meeting as at another. If they could change the contract in one essential, they might in another,—in all. If a majority could waive or change one condition, they could another. If they could waive or

modify the terms and conditions upon which the credit of the town was to be loaned, they might equally well change the sum to be so loaned.

But does the vote of Jan. 15, 1870, waive, change, or modify any of the conditions prescribed in the vote of Sept. 12, 1868?

The vote was to issue bonds, "as contemplated in a vote passed Sept. 12, 1868." But what was contemplated by that vote? Most assuredly, that the bonds of the town should be issued only upon the terms and conditions therein expressed, and upon none other, for it expressly provides, in case of a failure of the conditions precedent, that "the above vote, loaning the credit of the town, shall be null and void." To say that the bonds should be issued on terms and conditions other than those specified in the vote, would be to decide that they should be issued not as contemplated in the vote of September 12th. If the bonds were issued without a performance on the part of the petitioners of the conditions, to be by them performed, they most clearly would not be issued as contemplated by the vote. The vote, therefore, of January 15th, upon a fair construction of its terms, does not waive, change, or modify the vote of Sept. 12, 1868, nor does it purport so to do. It directs the issuing of the bonds as therein contemplated, and as all the conditions precedent, therein contemplated, have not been performed, it cannot reasonably be construed as requiring their issue when not contemplated by that vote.

It may well be doubted whether mandamus can be regarded as the proper remedy in a case like the present, when the liability of the defendants is contested, it being what is termed a prerogative writ and not a writ of right; but of that we give no opinion, inasmuch as upon the facts as proved, or as found by the justice presiding at *nisi prius*, we are satisfied that it should be denied. *Dane* v. *Derby*, 54 Maine, 95. *Writ denied. Costs for respondents.*

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

TAPLEY, J., concurred in the result.

Simeon Nichols *vs.* Eben N. Perry.

Attachment of mortgaged goods—notice to officer.

Under Public Laws of 1859, c. 114, § 1, the mortgagee of personal property attached on a writ against the mortgager, could not commence an action against the attaching officer until forty-eight hours after he had given him a "written notice of his claim, and a statement of the amount actually due to him on the mortgage."

The fact that the officer knew there was such a mortgage on record, and took a bond of indemnity from the attaching creditor, would not excuse the mortgagee's omission to give the statute notice.

A written notice to an attaching officer that "there is now actually due me" from the mortgager "on note and account, exceeding nine hundred dollars," is a sufficient "statement of the amount."

The notice need not allege, in so many words, that the amount stated is "actually and justly due on the mortgage," if it appear from the whole notice.

On exceptions.

Trespass *de bonis asportatis* against the defendant as deputy-sheriff of the county of Cumberland, for attaching a stock of goods as the property of one Charles Nichols.

The plaintiff claimed the goods by virtue of a mortgage from Charles Nichols to him, dated April 13, 1868, and duly recorded the next day.

The attachment was made May 11, 1868, on a writ against Charles Nichols.

On the 16th May, 1868, the plaintiff gave to the defendant a written notice of the following tenor:

"Sir,—You are hereby informed that the provisions, groceries, and other goods in store occupied by Charles Nichols, on the corner of Clark and Salem streets, are mortgaged to me to secure the payment of nine hundred dollars,—that there is now actually due me from said Nichols, on note and account, exceeding nine hundred dollars, as at the time said mortgage was given. Understanding that you have attached said stock of goods (mortgaged to me) as

the property of said Charles Nichols, I hereby request you to either release said attachment forthwith, or take said goods, that I may seek a legal remedy for your act in attaching said property."

(Signature.)

It appeared that the defendant knew the plaintiff's mortgage was on record, and obtained from the attaching creditors a bond of indemnity.

The plaintiff testified that there was more than nine hundred dollars due him on the mortgage, given him by Charles Nichols, and that he received no verbal or written notice from the officer after the attachment.

The only question was as to the necessity of any, and the sufficiency of the notice given by the plaintiff to the defendant before commencing the action; and the presiding judge ruled *pro forma*.

1. That no notice to the officer was required before the commencing of the action; or if otherwise,

2. That the notice proved was sufficient.

To these rulings the defendant alleged exceptions.

McCobb & Kingsbury, for the defendant.

The conditions mentioned in Public Laws of 1859, c. 114, § 1, are precedent. *Wing* v. *Bishop*, 9 Gray, 223; *Moriarty* v. *Lovejoy*, 23 Pick. 321; *Johnson* v. *Sumner*, 1 Met. 172; *Haskell* v. *Gordan*, 3 Met. 268; *Harding* v. *Coburn*, 12 Met. 333; *Hills* v. *Farrington*, 3 Allen, 427. After notice by the officer, the statement is to be made in ten days; without such notice, in a reasonable time, the statement to the officer is not to be dispensed with at any rate.

The statement does not recite how much is due, so that the officer may pay or tender the amount,—a sum "exceeding $900" is too indefinite. A fixed sum and interest could be ascertained.

The sum is not claimed to be "due on the mortgage." The facts do not show that the mortgage debt was "note and account," or either. The words "as at the time said mortgage was given," do not necessarily imply that $900 were due on the mortgage then, or that that sum is "due on the mortgage" now; both statements

might be true, and nothing due at the time of the statement, or at the time of the mortgage.

If the statement were wholly false, what remedy has the officer under § 3? The statute is penal, and certainty is required as to the debt due on the mortgage.

"Statement" in the statute implies more than writing down a sum total. The legislature intended to use the word in its technical sense, R. S., c. 1, § 4. To "state" is "to make known specifically, to explain particularly; as, to state an account, or to show the different items in an account."—Bouvier's Dict.

The aggregation of different debts does not meet the requisition of Massachusetts Statutes of 1836, c. 90; *Dictum* of C. J. Shaw in *Johnson* v. *Johnson*, 1 Met. 178. This has not been overruled, *Hills* v. *Farrington*, 3 Allen, 427.

The policy of the law requires full and open accounts of the debt in such cases.

J. O'Donnell, for the plaintiff.

BARROWS, J. The statute of 1859, c. 114, § 1, requires every one who claims by virtue of a mortgage any personal property that is attached or seized by an officer on a writ or execution, to give to the officer in writing a notice of his claim, and a statement of the amount actually and justly due to him on the mortgage, at least forty-eight hours before he shall commence any action against the officer therefor; and provides further that the officer or creditor may within that time discharge the mortgage by payment or tender of the amount due thereon, or may restore the property to the debtor or mortgagee.

If the party claiming such property by virtue of a mortgage omits for ten days, after written notice of such attachment given him by the officer, to give the officer such a statement of the amount due on the mortgage, he shall be deemed to have waived his right to hold it under the mortgage.

Section 2 of the same chapter as amended by c. 168 of the laws of 1860. If he makes a false statement of the amount actually and justly due, he forfeits and shall pay to the attaching creditor, under

the provisions of § 3, double the amount of the excess, to be recovered in a special action on the case.

The statute is to be fairly and liberally construed in furtherance of its object. It was designed to prevent the assertion, by a suit involving cost and expense, of an outstanding title, the existence of which was unknown to the officer making the attachment, and the setting up of claims merely colorable and fraudulent, having no just foundation, and to give the officer or attaching creditor an opportunity to pay the mortgage debt if he chose, or to release the attachment without being subjected to cost for an inadvertent and harmless interference with the rights of the mortgagee. It was not designed to furnish a defense to an officer who, having knowledge of the existence of the mortgage, and of the mortgagee's intention to assert his claim, and such information from the mortgagee as to the amount of the mortgage debt as will enable him or the attaching creditor to discharge it if he thinks it worth while, and to avail himself of any false statement of the mortgagee in relation to it, nevertheless prefers to hazard a contest, and so knowingly and intentionally denies the right of the mortgagee altogether in the outset, and puts him to the proof.

Yet a substantial performance of the requirements of the statute by the mortgagee is a condition precedent to the maintenance of his action. That the officer knows there is such a mortgage on record, and fortifies himself in advance with a bond of indemnity from the creditor, will not excuse the neglect of the mortgagee to give the statute notice. Mortgages are sometimes spread upon the records, or allowed to remain undischarged, when nothing is due upon them, for the purpose of preventing an attachment. The officer must have not only knowledge of the fact that there is such a mortgage in existence, but information from the mortgagee himself that he has such a claim upon the property attached, and coupled with this a statement of the amount actually and justly due, made with such definiteness as shall enable the officer or attaching creditor to tender the proper sum in discharge, and to hold the mortgagee for the penalty, if his statement is discovered to be false or exaggerated.

The *pro forma* ruling of the presiding judge that no notice was necessary in this case, was not correct.

But it was purely immaterial if the notice given is found to answer the requirements of the law. We think that a fair construction of the written notice given by the plaintiff to the defendant, May 16, 1868, is that the plaintiff therein makes known to the defendant that he has a mortgage claim upon the property attached to the amount of nine hundred dollars, upon which that sum (and more) is actually due him, and that unless the officer releases the attachment, he shall hold him responsible.

The defendant's counsel objects that it does not state what amount is due, but only that it is "exceeding $900." Doubtless after such a notice, a tender of $900, if the attaching creditor has seen fit to make it, would have relieved the officer from any further claim on the part of the mortgagee, who, not having specified any amount beyond that, would, after tender by the creditor, be estopped from claiming any more by his statement that the goods "are mortgaged to me to secure the payment of nine hundred dollars." To that amount the claim is distinct and certain, and sufficient to enable the officer or creditor to have made a payment or tender which would have discharged the mortgage.

The defendant cannot complain that the mortgagee precluded himself from something which he might have been entitled to had he stated the full amount due him.

A more formidable objection is, that the plaintiff does not say in so many words that this amount is due on the debts secured by the mortgage. But taking the whole notice together, how could it be construed otherwise? We think that is the true construction of the language employed, and that the creditor, if he had paid the $900, and could prove that the claim was false or excessive, could recover, under the provisions of § 3, double the amount wrongfully claimed. If so, all his rights are preserved, and he cannot justly complain that the notice is indefinite in this particular.

Again, it is urged in defense that "the notice gives the sum due, made up of different demands in the aggregate only," and that

"the word statement in the statute implies particulars—explanations—items" of the debt, and certain Massachusetts decisions and dicta are relied on.

But the difficulty here is that our statute only requires of the mortgagee a written "notice of his claim, and a statement of the amount actually and justly due to him on the mortgage," while the Massachusetts statute goes further, and provides that a mortgagee of chattels which are attached "shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him." * On the points which the defendant here makes, then, the Massachusetts decisions are plainly not applicable to cases arising under our statute. It may well be that the direct demand of payment, and the more specific "account of the debt or demand" required in Massachusetts would be more serviceable in preventing attempts at fraud, or in furnishing means of detecting them, than our simple notice of claim and statement of amount due; but it is for the legislature, in the first instance, and not for us to say that they shall constitute conditions precedent to the maintenance of an action by a mortgagee for the taking of his property.

Finally, defendant's counsel complains that the plaintiff in his notice requested the officer to "take" the goods, and then sued him for doing precisely as he himself had requested.

But this curious request must be construed with the threat of prosecution which accompanies it. We are not persuaded that the plaintiff has thereby brought himself within the scope of the maxim, "*volenti non fit injuria.*"

Looking at the pregnant and suggestive matter that goes with it, the language is not that of invitation, but, on the contrary, it is that of defiance and warning. Upon the whole, we think that the defendant substantially had from the mortgagee all the notice and information to which our statute entitles him,—all that was necessary to the preservation of his rights had he desired to make a tender. He chose not to do this, but to ignore the

* See change of phraseology in R. S., 1871, c. 81, §§ 42 and 43.—*Reporter.*

plaintiff's claim entirely, supposing, we presume, that he could procure evidence which would defeat it. Not having succeeded in establishing any valid defense, the entry must now be

Exceptions overruled.

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

JOSEPH W. MANSFIELD *vs.* NEW ENGLAND EXPRESS COMPANY and trustee.

Trustee—when charged on disclosure.

A person summoned as trustee will be charged when he declines, in answer to an interrogatory calling therefor, to state the facts which may be important in determining his true legal position towards the principal defendant, and in testing the correctness of his own legal conclusion that he does not owe the principal defendant, or has nothing in his hands for which he is legally accountable to him.

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

ASSUMPSIT on account annexed for three hundred and thirty-nine dollars.

Ezra Carter, summoned as trustee, after pleading and putting in his general denial, disclosed as follows:

Interrogatory 1. State when and where the New England Express Company was organized,—when did it obtain its act of incorporation,—how was it organized,—who was its president,—who were the directors in the several States? State fully its history. When did you resign your office as president or director of said company?

Answer. I decline to answer the above as irrelevant, except by direction of court.

Int. 2. Give a full statement of your connection with said company.

Ans. I decline to answer for same reason as above.

Int. 3. Were you in any way connected with said company? If so, in what? How much stock of the company stood in your name? What funds have you held of said company? What property have you had in your possession belonging to said company? State fully.

Ans. I was a director, and at one time president. I received no funds nor property as inquired of, and had neither in my possession at any time before service of writ. I never owed the company anything. What stock stood in my name, if any, I consider irrelevant to this matter, and decline to answer unless ordered by the court. I held no stock as collateral, or as pledged to me, or for which I was in any way accountable.

Int. 4. What money have you received, directly or indirectly, from said company, or any person connected with it?

Ans. Previous to service of writ, none.

Int. 5. What personal property, rights, or credits, belonging to said company, have you had in your possession? When did you resign your office as president?

Ans. None previous to service of writ. I decline to answer last part of question.

Int. 6. What pecuniary consideration induced you to resign? State fully.

Ans. I decline to answer as wholly irrelevant. My previous question relates to the time prior to the service of this writ.

Int. 7. Was said company a corporation or a joint-stock company, or voluntary association of individuals?

Ans. I refer you to your own writ for an answer. I do not understand that such matters are relevant to this examination.

Int. 8. Who purchased the horses, teams, harnesses, wagons, and other property in this State, used by the New England Express Company? What part did you have in it?

Ans. I decline to answer upon any such irrelevant matters.

Int. 9. What had you to do with hiring the men and managing the business of the company, in this State, within the time inquired of? Who received the funds of the company? What part passed through your hands? What part remained in your hands for any purpose, from and at the time of said service? What amount did you realize for the stock you held in said company? To whom and when did you convey the same? What did it represent? Answer fully.

Ans. I have answered fully upon all the foregoing matters that are relevant. No money or property of any kind ever came into my hands, directly or indirectly, before service of this writ.

Int. 10. Did any money or other property come into the hands of any other person for you, from the sale of stock, or otherwise, within the time inquired of? What have you received, or what are you by agreement to receive as a consideration for your resigning your place as president?

Ans. As to first part of question I answer, No, so far as any money of the company, or any money paid by or in behalf of the company was concerned. As to the balance of the question I decline to answer, unless ordered by the court.

Int. 11. When did you resign your office as president?

Ans. That I decline to answer.

Int. 12. What money have you had in your hands growing out of the affairs of the New England Express Company, or its members, after its dissolution, at any time?

Ans. I decline to answer, except that I had none prior to service of this writ.

Upon the disclosure the trustee was charged for the full amount claimed in the writ; and the trustee alleged exceptions.

A. A. Strout, for the plaintiff.

W. L. Putnam, for the trustee.

Barrows, J. The trustee excepts to a ruling, charging him as such, on what is styled in the exceptions a disclosure, but which

proves, on examination, to be a general denial of his liability as trustee, and a series of refusals to answer all questions respecting his business relations with the principal defendant, so as to enable the court to ascertain his true position.

He was a director, and, at one time, president of the defendant corporation. When asked to make a full statement of his connection (*i. e.* his business transactions) with it, he peremptorily declines to answer the question as irrelevant. It is but fair to infer from his subsequent refusals to answer that he never paid anything for his stock; that he was concerned in the purchase of the very property for which the debt to the plaintiff was incurred; that he received money for his stock; that that stock represented nothing but the property obtained on credit from the plaintiff and others; that he received money to resign his office as president; but when he resigned, or when or from whom he got his money for that or for his stock he refuses to answer, and falls back on his general denial that he ever owed the company anything, or that he ever had any money or property of theirs previous to the service of the writ.

It is manifest that these latter statements (which is all that he presents in the way of answer to the questions propounded) embrace his conclusions, or those of his counsel, as to matters of law; and that, as to all the facts from which it might be determined whether those conclusions are correctly drawn or not, the disclosure leaves the court entirely in the dark.

If such a disclosure can entitle the alleged trustee to a discharge, it may enable those connected with corporations, and having the management of their affairs, to appropriate to themselves the property of others in a manner which savors strongly of absolute dishonesty; but it will not be consistent with the policy of our law regulating the process of foreign attachment. That policy is declared, in *Whitney* v. *Munroe*, 19 Maine, 42, to be "to render the effects and credits of the principal debtor, in the hands of the trustee, available for the benefit of the creditor. The law should receive a liberal construction in furtherance of this object."

It is no part of the duty of the court to direct the trustee what

questions to answer, and what he may safely decline to answer. If he declines, he assumes the risk of an inference that the truth would not be favorable to his position, and his claim to be discharged, and acts at his peril. *Smith* v. *Cahoon*, 37 Maine, 288.

If the interrogatory calls for facts which may be important in determining his true legal position towards the principal defendant, and in testing the correctness of his own legal conclusion, that he does not owe the principal defendant, or has nothing in his hands for which he is legally accountable to him, and he declines to state the facts, he cannot complain because an unfavorable inference is drawn.

His general denial is in the nature of a plea to be sustained by his answers, if the plaintiff propounds interrogatories giving him a full opportunity to disclose the true business relations between himself and the defendants; "otherwise," as *Cutting*, J., justly observes, in *Toothaker* v. *Allen*, 41 Maine, 325, "the trustee would be constituted the judge of the law as well as of matters of fact, with the exclusive privilege of drawing inferences and conclusions which more properly belongs to the court."

The trustee, who has had business transactions with the principal defendant, is not to shut his hand and his mouth and attempt to substitute his own legal inferences and conclusions for the facts which might enable the court to draw correct ones, if he expects to be discharged. To hold otherwise would be to enable men, in many cases, to defy a prosecution for perjury in a disclosure which might, notwithstanding, be essentially false, and to deprive creditors of all remedy, while they had in their pockets the fruits of transactions with principal defendants, which the court, upon a full disclosure, might deem legally attachable in this mode.

It is not impossible that this trustee might have truthfully answered the interrogatories here proposed, in a manner which would have entitled him to a discharge, but he has not seen fit to do so.

Upon *scire-facias* he may have the opportunity, by a statement of facts relative to his transactions with the defendant, to give the

court the means of determining whether his legal conclusion, as to his liability as trustee, was rightly drawn.

Until he does this he cannot complain that he stands charged.

Exceptions overruled.

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

ROBERT O. FULLER & another *vs.* JOHN S. MILLER & another.

Costs.

By R. S. of 1857, c. 82, § 12 (R. S., c. 82, § 11), when there are two or more defendants, the writ may be amended by striking out one or more of them on payment of costs to him to that time.

Thus, where at a certain term, one of two defendants was defaulted, and, at a subsequent term, the plaintiff discontinued as to the defaulted defendant, and recovered judgment against the other,—the former was held entitled to costs to the time of the discontinuance.

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

ASSUMPSIT on an account annexed, tried by the justice without the intervention of a jury, subject to exceptions in matters of law.

At the March term, 1869, J. O'Donnell, Esq., the attorney who had previously appeared for both defendants, having withdrawn his further appearance for B. B. Miller, one of the defendants, the latter was defaulted.

At the September term, 1870, the plaintiffs had leave to discontinue as to B. B. Miller.

At the following October term, a trial was had, and decision rendered in favor of the plaintiffs against John S. Miller, who carried the case up on exceptions. *Vide*, 57 Maine, 168.

Thereupon, the same attorney claimed costs for B. B. Miller

against the plaintiffs, from the time of the entry of the action to the time of discontinuance as to him, which was disallowed by the clerk. From this decision of the clerk an appeal was taken, and upon the appeal the justice ruled as matter of law,

I. That B. B. Miller was not entitled to costs; and,

II. That the appeal be disallowed.

J. O'Donnell, for B. B. Miller.

Davis & Drummond, for the plaintiffs.

APPLETON, C. J. At the March term, 1869, of the superior court, B. B. Miller, one of the defendants, was defaulted. It having been held in *Fuller* v. *Miller*, 57 Maine, 168, that upon the evidence the action was not maintainable against the defendants jointly; the plaintiff, at the September term, 1870, discontinued their suit by leave of court against B. B. Miller, and at the subsequent October term recovered judgment against John S. Miller for the amount in controversy.

The defendant, B. B. Miller, claims costs to the time when the action was discontinued as to him.

The allowance of costs in suits at common law is regulated by statute.

By R. S., 1857, c. 82, § 95, "In all actions, the party prevailing shall recover costs, unless otherwise specially provided."

There is no special provision otherwise. By c. 82, § 10, all errors and defects for want of form only, or for circumstantial errors or mistakes, which by law are amendable, may be amended on motion by either party on such terms as the court orders.

By the common law, in assumpsit against two or more, the plaintiff could not amend his writ by striking out the name of one of the defendants. *Redington* v. *Farrar*, 5 Greenl. 379. But the common law on this subject was changed by Stat. 1835, c. 178, § 4, which was reënacted in the revisions of 1841 and 1857, and is found in c. 82, § 12, in these words: "When there are two or more defendants, the writ may be amended, by striking out one or more

of them, on payments of costs to him to that time." The court was not authorized to allow the amendment by striking out the defendant's name, or discontinuing against him at common law. The authority is by statute, and by that it is allowable only on payment of costs to the party whose name is stricken from the writ by a discontinuance. Notwithstanding his default, B. B. Miller was still a party to the suit, and judgment could not be had against the other defendant without striking out his name.

Exceptions sustained.

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

ABIJAH WOODWARD & others *vs.* JAMES I. LIBBY.

Contract—goods sold and delivered.

On May 12th, the defendant purchased by sample of the plaintiffs sixty-six barrels of sound beans. On the 24th June, the defendant ordered, and on the 26th received from the plaintiffs fifteen barrels of medium beans, and thereupon, for the first time, notified the plaintiffs that fifteen barrels of the former lot were mouldy, and he had ordered the latter lot to replace the mouldy ones, which he then returned. In an action to recover for the latter lot, *Held*, that the latter lot could not be substituted for the mouldy beans without the assent of the plaintiffs, and that the plaintiff could recover their value on account annexed.

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

ASSUMPSIT on an account annexed for fifteen barrels medium beans.

Plea, general issue, with a brief statement that the defendant would rely upon an agreement of the plaintiffs made in relation to a certain lot of beans which were sold to the defendant as sound, but which were, in fact, unsound, and which the plaintiffs agreed with the defendant to replace by sound beans; that the beans men-

tioned in the writ were substituted for the unsound beans, and that they had been paid for.

On the part of the plaintiffs, a letter to them from the defendant, dated June 24, 1869, was put in, of the following tenor:

"Gents,—Please send me, by steamer, fifteen barrels good medium beans."

It also appeared that fifteen barrels, good medium beans were sent by the plaintiffs to the defendant on June 25, 1869, as ordered, and that they were worth the price named in the bill.

The letter from the defendant to the plaintiffs, dated June 26, 1869, of the following tenor, was put in, together with an invoice of fifteen barrels of beans, of same date:

"Gents,—May 12th, I bought of you sixty-six barrels medium beans by your showing four or five barrels good sound beans as sample. The agreement was, if not as good as the sample barrels, they were to be made as good; I have just got through them, and find fifteen barrels of them soft, mouldy, and musty—damaged—not being in any respect as good, or anywhere near as good as sample barrels shown me. I ordered fifteen barrels good ones to replace them, and have this day returned you the fifteen barrels damaged ones, by P. & B. Steamboat Co., as per invoice inclosed. I want you just to examine them way through, and see what poor stuff they are. If I should sell such stuff to any one by showing them a good sample, I should expect them to send it back, if it was as far off as California. They seem to be all one mark, '*Pease.*' The fifteen barrels I received from you this morning by boat, to replace them, are poor, not such as I ordered, or such as I want."

The defendant testified substantially that on May 12, 1869, he purchased of the plaintiffs, at their storehouse, sixty-six barrels of medium beans, by sample, they to make them all as good as the sample; received them the next day in Portland; that fifteen barrels of a certain brand were mouldy; but it was not ascertained until June 24th, following; that he headed them up, copied the invoice, and sent them, with the letter of June 26th, to the plaintiffs; that he received the fifteen barrels of beans in suit; that when

they were sent, there was no agreement with the plaintiffs that these fifteen barrels were sent as a substitute of the fifteen barrels of bad beans.

The justice instructed the jury, *inter alia*, that if they find that defendant was entitled, upon the evidence and the law as already given them, to return fifteen barrels of the beans which he had bought of plaintiffs, and paid for, and to demand and receive back the price paid, and he did seasonably return them to plaintiffs, and in the mean time defendant had come lawfully and by plaintiffs' consent into possession of these fifteen barrels, for the price of which this suit is brought, without any express promise to pay for them, or any promise other than may be implied by law, and defendant saw fit to accept them in place of the other fifteen barrels, and appropriated them for that purpose, and immediately notified plaintiffs of that appropriation and acceptance; that in that case defendant had a right so to accept and appropriate them without any assent expressed by plaintiffs, provided the value of the beans so accepted and appropriated was no greater than the price he had paid plaintiffs for the beans returned.

The jury rendered a verdict for the defendant, and the plaintiffs alleged exceptions.

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

A. A. Strout, for the defendant.

Appleton, C. J. On 24th June, 1869, the defendant by letter requested the plaintiffs to send him, "by steamer, fifteen barrels good medium beans," which the plaintiff forwarded, as requested, on the next day, and they were received by the defendant on 26th June. Upon proof of these facts the plaintiffs were entitled to recover, no objection being made to their quality.

The defense was, that on the preceding 12th May the defendant had purchased sixty-six barrels of beans, of which fifteen were defective; but he had not given the plaintiffs notice of their quality until after the beans in controversy had been received by him.

Upon their being received, on 26th June, he wrote plaintiffs, complaining for the first time of the worthlessness of fifteen barrels of those purchased in May, and claiming to hold the fifteen barrels received that morning, to replace the fifteen barrels of poor beans, which he returned that day, but which the plaintiffs testified had not been received in the following October, when this suit was commenced.

It is manifest, from the dates of the correspondence, that the beans, to recover the payment of which this suit is brought, were not sent by the plaintiffs to replace the poor beans, purchased in the preceding May, for the defendant still retained those, without having made any complaint, or given any notice of their defectiveness. They were sent in pursuance of an order, and when received, the sale was perfected.

To authorize the defendant to hold the beans last sent, to replace the defective ones on hand, there must have been a contract of exchange. But the defendant proposed no such contract, and the plaintiffs knew of no complaint on the defendant's part, or any wish that he would send good beans to replace the alleged bad ones. There was no account in set-off, if such account would have availed the defendant. This is not a case for recoupment, for there is nothing from which to recoup, and the bargains of 12th May, and of June 24th were as distinct, though relating to the same kind of produce, as if they had been for different articles of merchandise.

If the defendant has a claim against the plaintiffs, arising out of the sale of May 12th, his remedy is by suit, but it is no defense to this action that the plaintiffs may have violated some other and different contract made long prior. The consent of the parties to an exchange is as necessary as to a sale. The instruction that the defendant had a right to appropriate the beans sold on 24th June, in satisfaction of his outstanding claim for damages, without the plaintiff's assent, was erroneous. *Exceptions sustained.*

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

STATE OF MAINE *vs.* PORTLAND, SACO, & PORTSMOUTH RAILROAD COMPANY.

Railroad crossing—when a nuisance—indictment.

By virtue of R. S. of 1857, c. 51, § 15 (R. S., c. 51, § 13), a railroad crossing not made in the "manner" "determined in writing by the county commissioners," is to be regarded as a nuisance.

An indictment founded on R. S., c. 51, § 13, is fatally defective unless it allege substantially that the railroad crosses the highway in a manner not determined in writing by the county commissioners.

An allegation that the defendants "did unlawfully and injuriously lay, place, and put down, and cause to be laid, placed, and put down three certain tracks with iron rails in, upon, across, and over said highway," is not sufficient.

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

Indictment, alleging that there now is, and at the time of the obstruction and nuisance hereinafter mentioned, there was a certain common and public highway and county bridge leading from the foot of Brackett street, in said Portland, across the upper part of Portland harbor to Cape Elizabeth, in said county of Cumberland, for all the citizens of the said State to go, return, pass, and repass in and along the same at their will and pleasure; and that the Portland, Saco, & Portsmouth Railroad Company, a corporation duly established by the laws of said State, and whose office and place of business is in Portland aforesaid, in said county, on the first day of July, in the year of our Lord one thousand eight hundred and sixty-six, with force and arms at Portland aforesaid, in the county aforesaid, did unlawfully and injuriously lay, place, and put down, and cause to be laid, placed, and put down three certain tracks with iron rails, in, upon, across, and over said highway and bridge, about sixty feet south of the place where the main track of said railroad company crosses said highway and bridge. And the said tracks so as aforesaid laid, placed, and put down in, upon, across, and over

said highway and bridge aforesaid, the said railroad company from the said first day of July, in the year of our Lord one thousand eight hundred and sixty-six, until the day of finding this indictment, unlawfully and injuriously did keep up, maintain, continue, and use by running their engines, cars, and trains along and over the same, and still doth keep up, maintain, continue, and use as aforesaid, whereby the said common and public highway and county bridge aforesaid, hath been for and during all the time aforesaid, and still is greatly obstructed and stopped up, so that the citizens of said State could not, during the time aforesaid, nor can they now go and return, pass, and repass in and along said common highway and county bridge as they were before used and accustomed, and still of right ought to do, the great damage and common nuisance of all citizens of this State in and along the common and public highway and county bridge aforesaid, going, returning, passing, and repassing, and against the peace of said State, and contrary to the form of the statute in such case made and provided.

The jury returned a verdict of guilty, whereupon the defendants moved in arrest of judgment because of want of certain allegations in the indictment. The presiding judge overruled the motion, and the defendant alleged exceptions.

N. Webb, for the defendants.

T. B. Reed, attorney-general, for the State.

TAPLEY, J. This is an indictment against the defendant company for erecting and maintaining a nuisance by laying and putting down and using certain tracks, with iron rails across and over a highway situate in Portland, about sixty feet south of the place where the main track of said railroad company crosses said highway.

Sect. 15, of c. 51, R. S., provides that "railroads may cross highways in the line of the road," but "the conditions and manner of crossing are to be first determined in writing by the county commissioners," and "crossings not so made are to be regarded as nuisances, and may be so treated."

This statute (upon the provisions of which this indictment was drawn) makes that a nuisance which was not one under any other provision of law. Its object was to secure the action of the county commissioners in certain cases. Want of such action alone constitutes the nuisance. The track and its use may have none of the elements of a nuisance at common law, or a nuisance as defined by c. 17 of the R. S.; if this action is wanting, it is under this chapter a nuisance. If this act is not wanting, no matter what the character of the erection, or use, it is not under this statute a nuisance. In a proceeding under this act it is the material inquiry.

To bring the case within the provisions of this statute, it must appear that the railroad crosses in a manner not determined by the county commissioners. No such allegation appears in the indictment in this case. Without it, it is fatally defective. It is the material matter, without which the act has necessarily no more of the element of nuisance than of assault and battery. There is an allegation in the indictment that the defendants "did unlawfully and injuriously lay, place, and put down, and caused to be laid, placed, and put down three certain tracks with iron rails, in, upon, across, and over said highway, etc." This is not equivalent to an averment that the railroad crosses in a manner not determined by the county commissioners, nor that the county commissioners have never taken action thereon. The allegations made may all be true, and yet the commissioners may have imposed, as required, the manner and conditions of crossing, and their requirement fulfilled by the defendants to the letter. The "unlawfulness" may consist in something else. This is a statutory offense, and enough must be alleged to show it has been committed.

In the court below, the jury were substantially instructed that unless the defendants had complied with the statute regulating railroad crossings, they would be liable upon this indictment if the way was a highway.

The respondents requested the instruction "that the statute of 1853, embodied in the R. S., in reference to railroad crossings, does not apply." This the judge declined to give, and did instruct them

"that the defendants are not exempt from the duty of complying with the requirements of the statute regulating crossings." He further stated "that the respondents are not indicted for unreasonably obstructing the alleged highway, or for unreasonable conduct, but for unlawfully placing certain side-tracks across the alleged highway, and unlawfully sustaining, using, and maintaining them."

The indictment being insufficient for a proceeding under this statute, the exceptions must be sustained. *Exceptions sustained.*

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

ELIAKIM C. LONG *vs.* JABEZ C. WOODMAN, Jr.

Deceit—action for.

An action on the case for deceit will not lie for inducing the plaintiff to convey to the defendant certain real estate in consideration of a loan of a certain sum of money, and a promise on the part of the defendant to execute to the plaintiff a bond for the reconveyance, on payment of the loan, and a refusal to execute the bond after the conveyance.

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

The declaration, omitting the description of the land, was as follows:

In a plea of the case; for that the said defendant, on the 6th day of March, 1868, with intent, then and there, to cheat and defraud the plaintiff, together with one George W. Reed, induced the plaintiff to convey to them, the defendant and said Reed, certain real estate of the property of the plaintiff, and of the value of fifteen hundred dollars, described in the plaintiff's deed to the defendant and said Reed, as follows: . . . by then and there lending to the plaintiff a certain sum of money, to wit, the sum of two hundred

and thirty-six dollars, to be repaid to them, the defendant and said Reed, with interest in two years from said 6th day of March, 1868, and by promising and causing the plaintiff to believe that they, the defendant and Reed, would then and there, as a part of the same transaction, make, execute, and deliver to the plaintiff, a good and sufficient bond or obligation, stipulating that they, the defendant and said Reed, would reconvey to the plaintiff said real estate upon the payment by him, to them, of said sum of two hundred and thirty-six dollars and interest, at or before the expiration of said two years; whereupon the plaintiff made, executed, and delivered to the defendant and said George W. Reed, a good and sufficient warrantee deed of said real estate, describing it as herein before recited; said deed being made "subject to two mortgages, given by said Joseph Reed, and George W. Reed, to William H. Baxter," which mortgages, since said sixth day of March, A. D. 1868, to wit, on the twenty-first day of August, A. D. 1869, have been paid and satisfied by the mortgagers; yet the said defendant intending wickedly and fraudulently to cheat, deceive, and defraud the plaintiff at the time of said conveyance to him and said George W. Reed, after obtaining said deed from the plaintiff, as aforesaid, refused then and there to make, execute, and deliver such bond or obligation, and ever since has refused, though then, immediately thereafter, and frequently since thereto, requested by the plaintiff; and on the first day of May, A. D. 1868, he, the said defendant, and said George W. Reed, conveyed to Nathan M. Woodman, by quitclaim deed, one undivided third part of said real estate, and on the seventeenth day of September, A. D. 1868, said George W. Reed conveyed to defendant all his right, title, and interest in said property, and the said defendant, on said sixth day of March, A. D. 1868, refused and still refuses to reconvey said real estate to the plaintiff, although the plaintiff was ready, and on the fifth day of March, A. D. 1870, offered to pay and tendered to defendant the sum of three hundred and fifty dollars, being said sum of two hundred and thirty-six dollars and interest thereon, and all charges and expenses to which defendant had been put on account of said property, including taxes,

and all other sums due from plaintiff to defendant, and thereupon requested the defendant to release and reconvey said premises to him, the plaintiff, which the defendant, with the same intent to cheat and defraud the plaintiff thereof, refused to do.

To this declaration the defendant specially demurred, and the plaintiff joined the demurrer. The presiding judge sustained the demurrer and adjudged the declaration defective; and the plaintiff alleged exceptions.

Davis & Drummond and *Bonney & Pullen*, for the plaintiff, cited *Towle* v. *Lovett*, 6 Mass. 394; *Somes* v. *Brewer*, 2 Pick. 184; *Green* v. *Tanner*, 8 Met. 411; *Blood* v. *Hayman*, 13 Met. 231.

A Merrill, for the defendant, cited 1 Chitty's Pl. 229; Gould's Pl., c. 4, § 12; *Everstone* v. *Miles*, 6 Johns. 141; *Bayard* v. *Malcomb*, 1 Johns. 461; *Tryon* v. *Whitmarsh*, 1 Met. 5, 6; *Coffin* v. *Coffin*, 2 Mass. 363; *Reed* v. *Smith*, 1 Allen, 520; 1 Hill. on Torts, 11, 12; *Cunningham* v. *Kimball*, 7 Mass. 65; *Hanson* v. *Edgerly*, 9 Foster (N. H.), 358; *Pace* v. *Parker*, 40 N. H. 70; *Petigrew* v. *Chillis*, 41 N. H. 102; *Weeks* v. *Barton*, 7 Verm. 70; *Ide* v. *Gerry*, 11 Verm. 617; *Young* v. *Covill*, 8 Johns. 25; *Hazard* v. *Irvin*, 18 Pick. 96; *Pedrick* v. *Porter*, 5 Allen, 327; *Fuller* v. *Hodgdon*, 25 Maine, 248; *Collins* v. *Denison*, 12 Met. 549; *Larrabee* v. *Larrabee*, 34 Maine. 483.

Appleton, C. J. This is an action on the case for deceit. The defendant has filed a special demurrer to the declaration, which has been joined. The only inquiry arising is whether it sets forth any cause of action.

When stripped of all inculpatory phraseology, the declaration alleges the following facts: that on the 6th day of March, 1868, the defendant, and one George W. Reed, induced the plaintiff to convey to them certain real estate, described in the writ, by lending to him (the plaintiff) two hundred and thirty-six dollars, and by promising to give him a bond to reconvey the property in two years, upon the payment of said sum and interest; that after obtaining

said deed they (the defendant and said Reed) refused to give said bond; that on the 5th day of March, 1870, the plaintiff tendered to the defendant the sum of three hundred and fifty dollars, being said sum of two hundred and thirty-six dollars and interest thereon, and all other charges and expenses to which defendant had been put, on account of said property, including taxes and all other sums due from the plaintiff to the defendant; and that he demanded a reconveyance of said property, which defendant then and there refused to make.

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation, relating to the subject-matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard* v. *Irwin*, 18 Pick. 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the expected contingency may never happen; the expectation may fail. An action of tort, for deceit in the sale of property, does not lie for false and fraudulent representations concerning profits that may be made from it in the future. *Pedrick* v. *Porter*, 5 Allen 324. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid by the vendor. *Hemmer* v. *Cooper*, 8 Allen, 334.

So in criminal law, to sustain an indictment for cheating by false pretences, there must be direct and positive assertion as to some existing matter of fact, by which the victim is induced to part with his money or property. A false representation, promissory in its nature, as to pay money or do some other act, has never been held to be the foundation of a criminal charge. *Ranney* v. *The People*, 22

N. Y. 413. In an indictment for obtaining goods under false pretences, no statement of anything to take place in the future will constitute a pretence within the meaning of the statute. *Glackan* v. *Com.*, 3 Met. (Ky.), 232. A representation or assurance in relation to a future event is not a statutory false pretence. *State* v. *Magee*, 11 Ind. 154.

Here the defendant, when or after he obtained his deed, promised "to make, execute, and deliver a good and sufficient bond," to reconvey, upon certain conditions, the land conveyed to him and Reed, which upon request he refused to do. Here is no false representation or concealment of an existent fact. Yet this is the gist of the plaintiff's complaint, that a promise made has not been performed. Had it been performed, the plaintiff had no case.

Here is a promise to do some future act; but whether it be to pay money or give a bond is immaterial. If the promise had been to pay a sum of money instead of giving a bond, no action for deceit could have been maintained, though the money was not paid at the stipulated time. This case in no respect differs from a broken promise to pay for goods sold. The goods are delivered upon the expectation that the promise to pay will be performed. The deed was given upon the expectation that the bond would be delivered in accordance with the promise of the grantee.

The declaration sets forth a promise to deliver a certain bond as therein described. It does not state whether it is in writing or not. There is no special plea denying it to be in writing. *Lawrence* v. *Chase*, 54 Maine, 196. If the promise was in writing, it was for a sufficient consideration, and the plaintiff may maintain an action thereon.

If not in writing it would be void by the statute of frauds. *Lawrence* v. *Chase*, 54 Maine, 196. But a verbal promise within the statute is no false representation. It is a promise, for the violation of which the law fails to provide a remedy, in case of its non-performance. In *Fisher* v. *New York C. P.*, 18 Wend. 608, the facts were somewhat similar to those in the case at bar. The plaintiff below leased certain premises to the defendant, and promised to

make repairs thereon, which he refused to do. Mr. Justice Cowan, in delivering the opinion of the court, uses the following language. "Fraud cannot be predicated of a promise not performed, for the purpose of avoiding a written instrument, or a bargain of any kind. This case is no more. A contrary doctrine would avoid almost every contract for a breach of which a suit is to be brought. I have only to say that the tenant and defendant below were content to take the plaintiffs' word. If that was not legally obligatory, then there has been a mistake of the law; but the defendant could not set that up as fraud." The case of *Com.* v. *Brennerman*, 1 Rawle, 314, resembles the present. In delivering the opinion of the court, Rogers, J., says, "There is no doubt that in the breach of promise, Henry Brennerman, in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust or promise. There was no false representation or concealment of any existing fact, which constitutes the legal idea of fraud."

Exceptions overruled.

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

CHARLES T. GREEN *vs.* INHABITANTS OF NORTH YARMOUTH.

Injury to wife's property—action for.

A husband cannot, even with his wife's consent, maintain an action in his own name alone, for an injury to his wife's horse occasioned by a defect in a highway, while he, having exclusive possession and control of the horse with the wife's consent, was driving along the road alone.

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

CASE, for injury to a horse occasioned solely by a defect in a highway, which the defendants were bound to keep in repair.

The case was tried by the justice without the intervention of a jury, subject to exceptions in matters of law.

The justice found that the plaintiff was carefully driving the horse at the time of the injury; that the injury was occasioned solely by a defect in the road; and that the defendants had reasonable notice of the defect.

He further found that the horse was the property of the plaintiff's wife, but that the plaintiff was at the time alone, and having exclusive possession of the horse, exercising full control over it with the consent of his wife, and that this action is brought with her consent.

The justice ruled, among other things, that the plaintiff, having exclusive possession and full control of the horse at the time of the injury, and the suit being brought by his wife's consent, may maintain the action in his own name.

To which ruling the defendants alleged exceptions.

Davis & Drummond, for the defendants.

T. H. Haskell, for the plaintiff.

WALTON, J. The question is, whether a husband can maintain an action in his own name alone for an injury to his wife's property, provided he has the exclusive possession and full control of the property at the time of the injury, and the action is brought with the wife's consent.

We feel constrained to answer that he cannot. The law expressly forbids it. The wife may prosecute and defend suits at law, or in equity for the preservation and protection of her property, either alone or jointly with her husband; but the law expressly declares that the husband alone can maintain no action respecting his wife's property. R. S., c. 61, § 3; Act 1852, c. 227; *Collen* v. *Kelsey*, 39 Maine, 298; *Woodman* v. *Neal*, 48 Maine, 266.

Exceptions sustained.
New trial granted.

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

JONATHAN MATHEWS & another *vs.* JAMES KELSEY, appellant.

Railroad corporations—rights of in highways—temporary obstructions of streets.

A railroad corporation, whose track is located within the limits of a highway, may load and unload one of its cars while temporarily standing for that purpose in the street, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the way for the ordinary purposes of travel.

And for the purpose of unloading a car of flour, a merchant, whose store is on the street, may use skids, temporarily elevated above the ground and extending from the car-door, fifty feet to the store, provided there is ample room between the car and the opposite side of the street to accommodate the travel of the street.

ON FACTS AGREED.

TRESPASS for damage to personal property.

The case came to this court by appeal from a judgment of the municipal court of Portland.

Commercial street, in Portland, extending from the depot of the Atlantic & St. Lawrence Railroad Company, on India street, south-westerly, along the head of wharves, across the city to the depot of the Portland, Saco & Portsmouth Railroad Company, was laid out in 1850 by the city authorities.

The plaintiffs' store is upon the north-westerly side of Commercial street, where, at the time of the alleged trespass, they were carrying on business as wholesale flour dealers. In 1850, the Atlantic & St. Lawrence Railroad Company duly located their railroad along Commercial street, between the two depots.

The street is one hundred feet wide, and the track is laid on the extreme north-westerly side of the location. The distance from the plaintiffs' store to the nearest rail is fifty feet, and the distance from the other rail, to the opposite side of the street, is forty-four feet. The track is planked between the rails, and that portion of the railroad location outside of the track is wrought for a street like the remainder of it.

Since the construction of the railroad along the street, it has been customary for merchants, having flour arrive by the railroad, to have the car placed on the track opposite their store, and to place skids elevated above the ground some three feet, and extending from the car to the store, and upon them to roll the barrels of flour from the car to the store. When the skids are up, they prevent the passage of teams between the car and the store.

On the day of the alleged trespass, the plaintiffs had a car of flour arrive in front of their store, and thereupon put up their skids and commenced unloading the flour in the customary manner. Some teams came along, among them the defendant's, and the plaintiffs took down the skids and let them pass. The defendant went down street a few rods and returned, driving his team to the skids, then up, and requesting the plaintiffs' agent to remove the skids, which he refused to do; whereupon the defendant threw them down, drove his team through, thereby breaking down a wooden horse of the plaintiffs, which supported the skids, and the skid between the horse and the car.

The street between the car and the opposite side of the street was unobstructed, and there was nothing to prevent the defendant's team, which was not loaded, from crossing the railroad track and passing along on the other side.

It takes from ten to fifteen minutes to unload a car of flour by using skids; and from an hour and a half to two hours, to unload one and remove the flour from the street into the store, without skids.

If the plaintiffs were entitled to recover, judgment to be entered for one dollar damages and costs, as provided in the report.

Davis & Drummond, for the plaintiffs.

W. L. Putnam, for the defendant.

DANFORTH, J. It is undoubtedly true that the location of a railroad within the limits of a highway would give the corporation using it only the rights of transit such as are necessarily connected

therewith, or incidental thereto. This would not include the right to build permanent structures which would interfere with the public travel. But, in this case, the illegality complained of is not the erection of any such structures, but the temporary stopping of the cars for the purpose of unloading, and the use of such appliances as were found useful and convenient for that purpose. There was sufficient space of way left unincumbered, to accommodate the public travel, and the incumbrance was of but a few minutes' duration. The legal location of the railroad is not questioned. The corporation, then, had the right to carry passengers and freight in their cars along that way. The loading and unloading would seem to be but a necessary incident to the right of carrying. It is true that railroads ordinarily have depots as useful and convenient for this purpose, but no law compels them to build such appliances or precludes them from loading or unloading in other places. The only limit to their pleasure or convenience, in this respect, is a due and reasonable regard to the rights of others. They would not, of course, be allowed to infringe upon private property; but in this case their car was in the public way, and one in which, by law, they have the same right as others. Their right is one of transit, and such is the right of the public, and no more.

As an incident to this right of transit, the public have a right to load and unload such vehicles as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others. Why should not the railroad corporation have the same right to load and unload, doing it in such a manner as not unreasonably to interfere with the rights or convenience of those having occasion to use the way for ordinary purposes of travel, and having regard to the different vehicles used, and the different means of propelling them?

But this case does not present so much the rights of the railroad company, as those of the plaintiffs. It seems that they were doing business upon the line of the way, and had occasion for an addi-

tional supply of merchandise. This could be obtained only over the highway, in some kind of a carriage, and could be got into the store only by unloading from the street. While so doing the carriage must be stationary, and often other instruments must be used to assist. In the mean time the way must be more or less obstructed, and the convenience of travelers, especially those who have occasion to pass over the side-walk, interfered with. If the plaintiffs had elected this course and performed their work in a reasonable manner, no one would have questioned their right, and the passers would have submitted to the temporary obstruction without a murmur.

But instead of this they procured their goods to be brought in front of their door by a car, and there unloaded. The time of occupying the road by the latter method was much less than by the former. There was ample room for the accommodation of the travel; in fact, the obstacle was much less than would have arisen from the use of trucks and drays ordinarily employed on such occasions,—and the inconvenience to the defendant was rather diminished than increased. Under these circumstances we see no illegality in the acts of the plaintiffs, and, according to the agreement of the parties, judgment is to be rendered in their favor for one dollar damages and costs, as provided in the report.

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

ZENAS F. PLUMMER & another *vs.* JOSEPH ERSKINE.

Payment—appropriation of.

If enough of the payments made on an account be subsequently applied by the creditor to liquidate the items consisting of liquors sold in violation of law; and a statement of the account, omitting therefrom the liquor items, and their equivalent in credits be sent to the debtor, who thereupon replies that he will pay the same—the appropriations will be deemed made by mutual assent, and they cannot be revoked without such assent.

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

ASSUMPSIT on account annexed for a balance of ninety-eight dollars and fifty-six cents.

At the trial the plaintiffs offered to prove that on different dates from Oct. 6, 1868, to Oct. 12, 1869, they sold and delivered to the defendant goods to the value of $2204.37, including the items specified in the account annexed to the writ, and intoxicating liquors to the amount of $345.76.

That at various times between the 17th day of Oct., 1868, and Oct. 12, 1869, the defendant paid to the plaintiffs sums of money amounting in the aggregate to $1668.60; that on Oct. 12, 1869, a balance was struck on the plaintiffs' books, and the defendant was found owing the plaintiffs $535.77; that on the 12th of Nov., 1869, the defendant paid the plaintiffs $300, and on the next day $100; that the plaintiffs allowed the defendant $47.21 discount on flour; that early in 1870, three months after last payment, the plaintiffs appropriated the payments made since the striking of the balance in October, 1869, to the payment of the liquor items, and sent a statement of the account omitting the items of liquors together with the amount of credit necessary to balance them, to the defendant, who replied that he would pay the same as soon as convenient.

That subsequently the bill was sent to Damariscotta for collection; that the defendant then offered to pay $50, and no more.

The judge ruled *pro forma*, as matter of law, that upon the evidence the plaintiffs would not be entitled to recover; and the plaintiffs thereupon alleged exceptions.

Geo. C. Hopkins, for the plaintiffs.

The payments having been made generally upon account, the law applies the payments to extinguish the earliest items until the payments be exhausted, and for the remaining items the plaintiffs are entitled to recover. *McKenzie* v. *Nevins*, 22 Maine, 148; *Thurlow* v. *Gilmore*, 40 Maine, 380; *Readfield* v. *Shaver*, 50 Maine, 44; *Treadwell* v. *Moore*, 34 Maine, 114.

The appropriation made within three months to the liquor items, and the defendant's assent, extinguished them, and the plaintiffs may recover the balance of the account. *Treadwell* v. *Moore*, *supra*, and cases there cited. *Starrett* v. *Barber*, 20 Maine, 457–461.

S. L. Carlton, for the defendant.

APPLETON, C. J. The plaintiffs sold and delivered the defendants goods to the amount of $2204.37, of which $345.74 were for spirituous liquors. On 13th Nov., 1869, there was due the plaintiffs $98.56 on a balance of the whole account.

In the early part of 1870, the plaintiffs appropriated enough of the payments received to liquidate the bill of liquors, and sent a statement of their account, excluding therefrom the bill for the liquors, to the defendant, who replied that he would pay the same. The account not being paid, this suit was commenced July 25, 1870. The account annexed to the writ is the same forwarded the defendant, and which he promised to pay.

It has been repeatedly held, that in a suit upon an account, some of the items of which were for spirituous liquors sold in violation of law, that after suit brought, the plaintiff might amend by striking out the items for liquor, and recover on the account thus amended. *Drew* v. *Blake*, 38 Maine, 528; *Boyd* v. *Eaton*, 44 Maine, 51.

The law is well settled that a debtor, making a payment, may determine conclusively the appropriation of such payment. By receiving the money, the creditor assents to such appropriation, and cannot change it.

If the debtor neglects to state any specific claim to which his payment shall be applied, his right to control its application is gone, and it remains for the creditor to determine the application. This he may do at any time. *Mayor of Alexandria* v. *Patten*, 4 Cranch. 268. In *Starrett* v. *Barber*, 20 Maine, 457, it was held that the appropriation must be made within a reasonable time, and that one three months before the commencement of the suit was seasonably made. The weight of judicial authority seems to be, that the creditor, when the right of appropriation has devolved upon him, may

make it at any time before suit brought. *Philpott* v. *Jones*, 2 A. & E. 41; *Mills* v. *Fowkes*, 5 Bing. 455; *Moss* v. *Adams*, 4 Iredell's Eq. 42.

It would seem that if the debtor should neglect to make any appropriation at the time of payment, that the creditor might apply the money received, in payment of a demand which could not be enforced at law in preference to one which could be. *Philpott* v. *Jones*, 2 A. & E. 41; *Treadwell* v. *Moore*, 34 Maine, 112. But if this were doubtful, it is well settled the creditor may make such application, with the consent of the debtor, and that when made, he cannot revoke such consent. *Richardson* v. *Woodbury*, 12 Cush. 279. Where an account consisted in part of charges for liquor sold in violation of law, and there were payments credited on the account, and it had been agreed between the parties that the payments as they were made should be applied first upon the charges for liquor sold, it was held that though the agreement was one which could not be enforced, and though the amount paid for the liquors could be recovered back by statute, in a suit for that purpose, yet so far as the payments had been so already applied under the agreement, they could not be diverted from that application, and applied to other items of the account. *Tomlinson Carriage Co.* v. *Kinsella*, 31 Conn. 269.

The plaintiff made his application of the payments received long before the suit was brought. He duly advised the defendant thereof. He stated his account upon the basis of such application. The defendant promised to pay the same as thus stated. The application of the payments having been made by mutual assent, it cannot be revoked or changed without such assent.

It is true, that an appropriation once made by the party having the right to make it, is binding. But it is equally true, that it may be changed by mutual agreement; when the payments have been applied in conformity with such new agreement, the application is equally conclusive as if made when the money was received.

If the defendant has a right by statute to recover back money paid for liquors sold in violation of law, he must resort to his ac-

tion. If he could offset the money so paid in answer to this suit, he has not attempted to do it by filing any claim in offset.

Exceptions sustained.

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

ANDREW H. LEIGHTON & another, petitioners for partition, *vs.* ALFRED L. LEIGHTON & another.

Will—construction of—vested remainder.

A will, after devising the testator's property to his wife Jane, "during her natural life," continued: "After the death of my wife Jane, it is my will that my son Reuel have all the property, both real and personal, which may then remain, by paying out" "in six months after her death" to each of the testator's two sons by a former wife, a certain legacy, and in one year after their mother's death, a certain bequest to each of two children by his wife Jane, a brother and sister of Reuel. Jane survived her son Reuel, who, without paying any of the bequests, died intestate and unmarried, and she remained a widow until she died intestate. On the trial of a petition for partition brought by the testator's children by the former wife against the surviving children by the latter, *Held*, (1) That the will gave to the wife, Jane, a life-estate; (2) To his son Reuel a vested remainder in fee-simple, liable to be devested only by non-payment of the bequests to the other children as a condition subsequent and an actual entry on the part of those entitled to claim a forfeiture by reason of a breach of the condition; (3) On the death of Reuel, the property descended in equal shares to his mother, brothers, and sister; and that, (4) On the death of his mother, her fifth descended to her children.

ON REPORT.

PETITION FOR PARTITION.

The material facts are all stated in the opinion.

A. Merrill, for the petitioners.

If Reuel S. Leighton took under his father's will a vested remainder, then the petitioners' share in the estate is one-fifth; but if a contingent remainder, their share is one-fourth.

I. Reuel's interest under the will was a contingent remainder,—dependent upon the contingency (1) that he survived his mother, and (2) that he paid the legacies to the other heirs named in the will. These were conditions precedent; and his own death happening before the termination of the life-estate of his mother rendered their performance impossible; that in consequence of the non-performance of the conditions, and the occurrence of an event that rendered their performance an impossibility, the devise over to Reuel never vested in him, but lapsed into the undevised estate, and descended to the heirs at law of the testator (the two petitioners and the two respondents) in equal shares of one quarter each, in the same manner as if the will had made no mention of the remainder. *Varney* v. *Stevens*, 22 Maine, 231.

"The intention of the testator is the great and governing guide for the construction of wills." *Morton* v. *Barrett*, 22 Maine, 265; *Fisk* v. *Keene*, 35 Maine, 354. "After the death of my beloved wife Jane, it is my will that my son, Reuel S. Leighton, have all the property, both real and personal, which may then remain, by paying out the following bequests," is the language of the will. The testator manifestly never intended that Reuel should have the whole property, "both real and personal," without paying "the bequests," or he would not have imposed the conditions. It was only upon the contingency that Reuel should survive his mother, combined with the condition that he should pay the bequests, that he was to take the estate at all. The happening of the contingency was just as effectual to render the remainder a contingent one, as if it had been to pay the bequests after his "return from Rome." *Non constat* that he would survive his mother, so he could pay.

If the remainder never vested in Reuel, it never descended from him.

II. If the intention of the testator was otherwise, the will failed to express it, and the court will not supply omissions for such a purpose. *Pickering* v. *Langdon*, 22 Maine, 429, 431.

III. There is no second devise over to meet the contingency of the first, to wit, of Reuel's not surviving his mother. And the oc-

currence of his death before his mother changed the contingency into a certainty that payment was an impossibility, and the devise to him lapsed, and the remainder descended to the heirs at law of his father. Redfield on Wills, part II, §§ 50, 505, 506; §§ 64, 694, 695; §§ 57, 631; §§ 65, 649, 663, 664.

IV. A contingent remainder is limited so as to depend on an event which is dubious or uncertain, and may never happen or be performed, or not until the determination of the particular estate. It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent remainder. 4 Kent's Com. 206; 2 Black. Com. 169. The event of Reuel's surviving his mother was "dubious and uncertain," and might never happen. If it did not happen, the condition could never be performed, and hence the "right to the enjoyment" was "uncertain." The uncertainty of survivorship, accompanied by the possible impossibility of performing the condition, rendered the "right to the enjoyment" of the estate dubious and uncertain, and hence the remainder contingent. The contingency could not cease until he had survived his mother, and the remainder could not vest while his mother lived. *Olney* v. *Hull*, 21 Pick. 311; *Hunt* v. *Hall*, 37 Maine, 363.

V. Although the law favors vested rather than contingent remainders, yet "this preference is not to be so pressed as to defeat the intention of the testator." *Hurlburt* v. *Emerson*, 16 Mass. 244; *Richardson* v. *Wheatland*, 7 Met. 171. *Stark* v. *Smiley*, 25 Maine, 201, is not in point; for there was no life-estate, and consequently no question of vested or contingent remainder.

VI. The devise to Reuel being upon condition, could not vest until he accepted the condition; and the acceptance evidenced by some positive, affirmative act or declaration, for it cannot be presumed or inferred in the absence of proof. Redfield on Wills, §§ 67, 686; *Bowker* v. *Bowker*, 9 Cush. 524; *Marwick* v. *Andrews*, 25 Maine, 529.

Even if the condition were subsequent (which is not admitted), it must be accepted before it can vest in Reuel; for until accepted,

the legatees would have no lien on the estate for the payment of the legacies; and if it vested without such acceptance, he could devise or convey it, and thus defraud the legatees of the legacies.

VII. The widow had the power to dispose of the whole estate for her own support, had she found it necessary; for Reuel was to have "after the death" of his mother all the property "which may then remain." *Non constat* that any would remain, so that he would ever have the "right to the enjoyment" of any of the estate. His "right to the enjoyment" was rendered uncertain by this power of disposal by his mother. What the first taken has the power to dispose of at will, or on a certain event, or for a certain purpose, is contingent. The widow had the power of disposal. *Harris* v. *Knapp*, 21 Pick. 416; *Ramsdell* v. *Ramsdell*, 21 Maine, 288.

Davis & Drummond, for the respondents.

Barrows, J. Petition for partition. Edward Leighton, the former owner of the premises, died testate Feb. 22, 1850, leaving a widow, Jane Leighton, and five children, viz., the two petitioners, his children by a deceased wife, the two respondents, and Reuel S., who were the children of Jane. By his will he gave to his wife Jane, after the payment of debts, etc., "all the residue and remainder of my property during her natural life, she not making unnecessary strip or waste." The will proceeds as follows: "Second. After the death of my beloved wife Jane, it is my will that my third son, Reuel S. Leighton, have all the property, both real and personal, which may then remain, by paying out the following bequests, viz.: To (the two petitioners) forty dollars each in six months after her decease; to my daughter, Hannah H. Leighton (one of the respondents), forty dollars in one year after her mother's decease; and to my son, Alfred L. Leighton (the other respondent), forty dollars in one year from his mother's decease, if he should be twenty-one years of age, if not, to be paid when he arrives at that age, and also the expense of his bringing up and support to that time."

Reuel S. Leighton died intestate and unmarried in 1857. Jane Leighton remained a widow until her death, intestate, Feb. 3, 1869.

No administration has ever been had upon Reuel's estate, and none of the legacies above referred to have been paid. Alfred was twenty-one years old at the time of his mother's death. Upon these facts agreed, the single question submitted to us is, What share are the petitioners legally entitled to in the estate,—and their right to a judgment for partition accordingly is not disputed.

The petitioners claim that no estate vested in Reuel by the devise,—that the remainder given to him by the will was contingent, depending entirely upon his surviving his mother, accepting the devise, and paying the legacies to his brothers and sister as a condition precedent, and that they are entitled, as heirs of their father, to half the estate, or one-fourth each. The respondents contend that the remainder vested in Reuel, descended from him to his heirs at law, one of whom was their mother, Jane Leighton, whose fifth of the premises thus inherited from her son, descended at her decease to these respondents, thereby giving them three-fifths, and the petitioners two-fifths of the whole estate, or one-fifth instead of one-fourth to each of the petitioners, and three-tenths to each of the respondents.

Though not couched in choice technical terms, we think that Edward Leighton's intention to dispose of his whole estate by will, and to leave no portion of it undevised or subject to any contingency as to its final disposition, is clearly manifested, and that in and by that will he gave to his wife Jane a life-estate, and to his son Reuel a vested remainder in fee-simple, liable only to be devested by non-payment of the legacies to the other children as a condition subsequent, and an actual entry on the part of those entitled to claim a forfeiture by reason of a breach of the condition.

The remark of Parsons, C. J., in *Dingley* v. *Dingley*, 5 Mass. 535, that "a remainder is not to be considered as contingent when it may be construed consistently with the testator's intention as vested," presents a rule which has been practically enforced as uni-

formly as any that can be found in the books. Compare the language which was held in that case, to carry a vested remainder descending on his decease to the heirs of the remainder-man, with that used by Edward Leighton.

The uncertainty whether Reuel S. Leighton would outlive his mother (who had the estate for life), and so come into the actual possession and enjoyment of the estate, would not make the remainder a contingent one if he had by the will a present absolute right to have the estate as soon as her life-estate should determine.

See 2 Washburn on Real Property, p. 227, ed. of 1862, Book 2, c. 4, §§ 14, 15, 16, 17, where the doctrine applicable to this point is discussed and illustrated with great clearness, and with copious references. See also, *Williams* v. *Amory*, 14 Mass. 20.

In *Olney* v. *Hull*, 21 Pick. 311, relied upon by the petitioners, the testator gave the improvement of his farm to his wife during her life, or widowhood, and remainder to his surviving sons, to be equally divided between them. And the court held that he intended those who survived the termination of the intermediate estate, and that nothing vested, because, until the termination of the wife's estate, it was uncertain who, or how many, would be alive to take.

But they are careful to say, and to reiterate, that "had he given to his sons generally," the result would have been different, implying that in that case the heirs of a son dying before the widow, would have inherited a vested remainder from their father.

And in *Hunt* v. *Hall*, 37 Maine, 363, the provision was that after the decease of the tenant for life, the executor was to make an equal division between the children of the testator, "and the heirs of such as may then be deceased." And the court held that if the estate were to be construed as vesting at the death of the testator, then one of the heirs might convey his share by deed, and if he died before the termination of the life-estate, leaving heirs, his conveyance would defeat their estate, which would be contrary to the express provisions of the will.

In both these cases the remainder was "limited to dubious and uncertain persons," and therefore was held to be contingent. Not so in the case at bar.

Yet if Reuel's estate could be deemed subject to a condition precedent, it would not vest, and it is therefore to be determined whether the payment of the legacies constituted such a condition. We think not, because Reuel was to have the property at his mother's decease, and none of the legacies were to be paid until months afterwards.

In distinguishing between conditions precedent and subsequent, the time fixed for the performance, whether expressly or by implication, is a matter of no slight importance. And see 1 Washburn on Real Property, 449, as to what will be regarded as a condition subsequent. The fact that an estate is subject to a condition subsequent, cannot affect its capacity for descending in the same manner as an indefeasible one, for the heir will take it *cum onere.*

As to what will constitute a breach of a condition for the payment of legacies annexed to a devise, see *Bradstreet* v. *Clark*, 21 Pick. 389.

But it was competent for the heirs of Reuel to perform the condition, and save a forfeiture. There had been no demand for the payment of the legacies, and consequently no forfeiture. *Bradstreet* v. *Clark*, *ubi supra.* And if there had been a demand and refusal, there had been no entry for the breach of condition, which would be necessary to work a forfeiture.

Finally, the counsel for the petitioners contends that Reuel took no vested interest, because, according to his construction of the will, Jane Leighton might lawfully consume or dispose of it all, and he cites *Harris* v. *Knapp*, 21 Pick. 412, and *Ramsdell* v. *Ramsdell*, 21 Maine, 288. But in those cases the testators expressly directed the sale of their real estate.

It may indeed be a somewhat difficult problem to carve out a life-estate in personal property, and save a remainder which the law can find means to protect, because the personalty is liable to perish in the using. But that is not this case. In the real estate of Edward Leighton, under the provisions of this will, Jane Leighton took only a life-estate. It was not even an estate for life without impeachment of waste. There was no power to dispose of the

realty, in which, as we have seen, Reuel took a vested remainder, which on his decease descended in fifths,—two-fifths to his half brothers, the petitioners, two-fifths to his own brother and sister, the respondents, and one-fifth to his mother, which last has now vested in her children, the respondents.

The result is that the petitioners are entitled to one-fifth each.

Judgment for partition accordingly.

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

GEORGE W. PARKER, in equity, *vs.* DAVID T. MOODY.

Interest—special agreement.

In the absence of any special agreement to that effect, interest cannot be lawfully claimed on partial prepayments made on a promissory note payable on time, without interest.

Where the payee of a promissory note, payable on time, without interest, upon being asked by the maker if he would accept partial prepayments, and allow interest on them, replied, "I think it will be all right, there will be no trouble about it," the maker might thereby understand the payee as assenting to the allowance of interest.

BILL IN EQUITY, heard on bill, answer and proofs.

The prayer of the bill was, that if the mortgage should be found to be wholly paid, that the respondent be compelled by a decree to release to the complainant.

The case is sufficiently stated in the opinion.

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

W. B. Snell, for the respondent.

APPLETON, C. J. The complainant, owning the equity of redemption of a mortgage, bearing date July 5, 1867, and given by one

Oscar Fairbanks, to the defendant, to secure a note of even date for eight hundred and thirty-seven dollars and fifty cents, without interest, one-half payable in one year, and one-half in two years, brings this bill for the redemption of said mortgage.

On the 10th of July, 1869, the complainant made a demand, in writing, on the defendant, to render a true account of the sum due on the mortgage, and of the rents and profits, etc.

On or about that time, said defendant rendered to the complainant an account of the sum due on the mortgage, it being the amount due on the note after deducting the several indorsements, without allowing interest on the same.

Fairbanks, the mortgagee, made several payments, before the maturity of the note, which were indorsed on the same at their respective dates.

The complainant claims that interest should be allowed on those payments from the time they were made, notwithstanding the mortgage note was on time, without interest. When a payment is made on a note payable at a future time without interest, before its maturity, in the absence of any special agreement to that effect, the payee is not entitled to have interest allowed him on the payments thus made. "It could not be inferred," remarks Wood, C. J., in *Drew* v. *Towle*, 10 Foster, 535, "that it was agreed by the parties, that interest was to be paid by the payee upon the sum paid, from the date of it to the time when the residue should become due and payable. No such contract could be implied from the transaction. It could be understood only as the payment and receipt of the money, in part discharge of the principal, and to the extent of the payment, and no more."

But it is insisted in the present case, that there was a special agreement for the allowance of interest on the several prepayments made by the mortgager. The only witnesses are the mortgager and mortgagee. Fairbanks, the mortgager, testifies most fully and unqualifiedly that there was such an agreement, and that, in pursuance thereof, he made the payments in question. The defendant qualifiedly, but not unequivocally, denies any such agreement

as Fairbanks states, but admits conversations on the subject of the allowance of interest, and that he told him "he thought it would all be right, and that there would be no trouble about it," but he adds he did not intend to allow him interest, though he did not disclose such hidden intention.

When the defendant made the above remarks, Fairbanks might well understand him as acceding to his proposition. The defendant knew he was so understood, and received the money without undeceiving him. If a man occupies the house of another, and the owner asks for rent, and the occupant says he will do what is right,—there will be no trouble, is not that an implied promise to pay rent? Interest is as equitably due for the loan of money as hire for the loan of a horse, or rent for the use of a farm. It is compensation for the use of the lender's capital. It is immaterial what may be the form of the capital loaned, though money is the most convenient, for any object of desire can be obtained by it, by means of one exchange, while, in other cases, more than one will ordinarily be required. When, therefore, the defendant promised to do what was right in regard to the allowance of interest on the prepayments made by Fairbanks, he must be understood as having assented to his proposition. If he did not so mean, he should at once have undeceived him. Instead of so doing, he received the payments when made, and indorsed the amount on his note, and has had the use of so much capital before he was entitled to it. It would be a fraud on Fairbanks to permit him to set up his undisclosed intentions when so at variance with his words and acts. He must be held to their fair meaning as understood by Fairbanks, and as he knew they were understood, and as he intended they should be.

Allowing interest on the prepayments, the mortgage note is overpaid.

The defendant did not disclose the true state of facts, and is liable for costs. *Bill sustained, and decree as prayed for, with costs for complainant.*

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

JAMES R. OSGOOD & others *vs.* WILLIAM H. ABBOTT & another.

Condition subsequent—breach of—entry for forfeiture—by whom. Estoppel—who can assert.

Where, "in consideration of having a meeting-house erected and continued upon it," the owner of a certain lot of land duly executed and delivered to the "proprietors of the South Chapel, in Fryeburg," a deed thereof, with the stipulation therein that the "lot being given for a meeting-house lot, is to revert to me, unless it should be improved for that purpose," *habendum* "to the said proprietors and their successors forever, provided it be improved for the above purpose,"—an estate in freehold upon condition subsequent passed.

What facts fall short of constituting a breach of such condition.

Notwithstanding the breach of such condition, the estate will continue in the grantee until defeated by an actual entry made for the purpose of claiming a forfeiture by some one having the right so to do.

The heirs of the grantor, after the death of the latter, and after breach, may make such entry.

What facts fall short of constituting such an entry.

In February, 1845, the plaintiffs' father with others, having undertaken to organize themselves into a corporation, under the name of the "Proprietors of the South Chapel in Fryeburg," for the purpose of procuring a site and erecting thereon a meeting-house, and owning, managing, and disposing of the pews therein, signed, with his associates, a subscription paper, wherein it was stipulated that the meeting-house should "be for the use of the Methodist Episcopal church and society, so long as they shall furnish preachers acceptable to a majority of the proprietors," and wherein he agreed to be responsible for three of the twenty-five shares, "and a meeting-house lot." In June following, he, "in consideration of having a meeting-house erected and continued" on a certain lot, "by the proprietors of the South Chapel in Fryeburg," conveyed it to them, with the stipulation that the "lot being given for a meeting-house lot, is to revert to me, unless it should be improved for that purpose," *habendum* "to the said proprietors and their successors forever, provided it be improved for the above purpose." The same year, the proprietors erected and suitably furnished a meeting-house on the lot, in which there was regular preaching by Methodists from the time of its completion until 1859, when the preaching ceased, the house was suffered to get out of repair, and the stoves and furniture were removed for safety to neighboring dwellings. In 1864, the plaintiffs' father died, intestate. In 1866, the defendants, under the direction of persons acting as the superintending committee of the proprietors, entered, reshingled, and otherwise repaired the house, since which time there has been regular preaching therein by the Methodists. In trespass for entering to repair the house, *Held*, (1) That the plaintiffs are estopped by their father's deed to deny the existence of the "Proprietors of the South Chapel in Fryeburg;" (2) That the defendants can assert the estoppel.

ON REPORT.

TRESPASS *quare clausum*, for breaking and entering a parcel of land conveyed by the father of the plaintiffs, by his deed of June 19, 1845, to the "Proprietors of the South Chapel in Fryeburg."

Numerous witnesses, among whom was one of the ministers who had frequently preached in the meeting-house, testified that the house began to get out of repair before the preaching was discontinued; that between 1859 and 1865, the house had become much dilapidated, so that some portions of the roof had become so rotten, that the snows and rains had leaked through, and in consequence thereof the plastering had fallen off in many spots, and soiled the pews; that a dozen panes of the glass were broken; that some of the blinds were torn off; that the carpet, lamps, stoves, chairs, and sofa were carried into neighboring dwellings for safety; that when the house was repaired in 1866, the whole ceiling overhead was replastered, and the house reshingled, by subscription.

The defendants, in committing the acts complained of in the writ, acted under the direction of Eliphalet Weeks, Isaac Abbott, and Philip Eastman, who claimed to be the superintending committee of the South Chapel in Fryeburg.

Numerous extracts from the records of the proprietors were put into the case; but the view of the court renders a report of them unnecessary.

The remaining facts are sufficiently stated in the opinion.

Howard & Cleaves, for the plaintiffs.

I. There never was any such corporation or body politic as the "Proprietors of the South Chapel in Fryeburg."

II. But if otherwise, the property reverted to the grantor before his death.

The grantees were to erect, continue, and improve it forever.

The proprietary wholly abandoned the meeting-house from March 17, 1852 (when they held their last meeting as a corporation), until December, 1865, when some of them undertook to get up a meeting. The house became dilapidated,—patched up; afterwards shingled by subscription,—not by the "proprietors."

Methodists preached there, but not in connection with the proprietary. Abandoned for preaching in 1859.

The proprietary not caring for it, the grantor took possession and claimed the forfeiture.

The defendants acted in their own wrong, not acting under the authority of persons having any authority.

III. Estoppels affect and bind parties and privies only. The defendants are neither. The deed is made to a corporation only, and not to any individuals who might compose it. There being no corporation, there could be no one to set up the doctrine of estoppel against the grantor or his heirs.

The defendants were neither parties nor privies, nor were those under whom the defendants assumed to act.

If the deed had been made to a bank chartered but not organized, could the incorporators or their servants plead the deed in estoppel under analogous circumstances?

D. Hammons, for the defendants.

Barrows, J. Trespass *quare clausum*. The plaintiffs are the surviving children and heirs at law of Edward L. Osgood, who in 1845 was the owner of the *locus in quo*. He united with an association, who undertook to organize as a corporation, under the name and style of "The Proprietors of the South Chapel in Fryeburg," for the purpose of procuring a site, and erecting thereon a meeting-house, and owning, managing, and disposing of the pews therein. He agreed under his own hand, in a subscription paper containing numerous other subscriptions, to be responsible for "three shares and a meeting-house lot." This paper provides for the formation of a corporation, as above stated,—for the payment of assessments not to exceed sixty dollars a share,—each proprietor to be entitled to two votes for every share he owns; said chapel to be for the use of the Methodist Episcopal church and society so long as they shall furnish preachers who shall be acceptable to a majority of the proprietors; but when they fail so to do, the chapel to be considered proprietors' property, according to the law, and the proprietors who

are not Methodists shall purchase the pews of the Methodists at an agreed or an appraised value, or set them off their full share of their time in said chapel according to their property therein, whether they own a tenth part therein or not." To this association of which he was himself a member, the father of the plaintiffs conveyed the *locus* by deed duly executed June 19, 1845, in which the grantees are described as "The Proprietors of the South Chapel in Fryeburg."

In this conveyance the grantor declares that it is made "in consideration of having a meeting-house erected and continued on the lot of land hereafter described;" and he further stipulates as follows: "This lot being given for a meeting-house lot, is to revert to me, unless it should be improved for that purpose." Then comes the *habendum*, "to the said proprietors and their successors forever, provided it be improved for the above purpose." The same year a meeting-house was erected, well built of the best materials, fifty pews subscribed for, and sold for enough to complete the furnishing of the house in a comfortable and commodious manner as a place of worship, and the whole paid for when finished; and from that time forward there was regular preaching in the house, under the auspices of the Methodist denomination, until the spring of 1859. After that the Methodists ceased to furnish preachers; the house was suffered to get out of repair; the stoves and furniture were removed for safe-keeping to neighboring dwelling-houses, and up to the time of the death of Colonel Osgood, the grantor, in April, 1864, it does not appear to have been occupied for religious services, except upon the occasion of a funeral. Colonel Osgood does not appear ever to have taken any formal possession of the house, claiming a forfeiture; but there is testimony from which it may fairly be inferred that he took one of the keys from the door while a member of the executive committee of the proprietors was in the house, for the purpose of cleaning it up, and that the committeeman did not consent to the taking, nor know by whom it was taken.

t would seem that thereafterwards Colonel Osgood gave permission for the holding of political meetings and other gatherings in the

house, and that some of the proprietors knew that he asserted that the lot had been forfeited, by the failure to occupy the house for religious services. But the other key remained in the possession of the sexton, employed by the proprietors, until it was borrowed by Colonel Osgood's administrator in 1866, and McNeil, a witness for the plaintiffs, testifies among other things, that he was one of the proprietors, and a member of the executive committee, and in that capacity was frequently in the house, between 1859 and 1865, for the purpose of cleaning it up; that the key was frequently in different men's hands; that whenever one of the proprietors wanted it, he gave it to him; that some slight repairs amounting to $10 were made in 1864; that he had charge of the house, as one of the committee, up to 1865; that he never paid any attention to Colonel Osgood's claim of the house, but that he abandoned it after H. H. Smith, Esq., the administrator on Colonel Osgood's estate, took a formal possession of it in 1865, in the presence of witnesses claiming a forfeiture. It is in proof that in August, 1864, Mr. James R. Osgood, one of the plaintiffs, and Mr. Smith, the administrator, went into the house, and that Mr. Osgood then and there said that he took possession of it in behalf of himself and the other heirs; but there was no one present except Smith, and no reason was assigned for the claim. In April, 1865, Colonel Osgood's administrator, having been licensed to make sale of the real estate belonging to his intestate, made a formal entry in the presence of witnesses, for the declared purpose of reinvesting the title in the estate of the grantor, claiming that it had reverted by reason of having ceased to be improved by the proprietors as a meeting-house lot. In the spring of 1866, these defendants, under the direction of certain individuals, who were acting as the superintending committee of the proprietors, entered the house against the protestations of Mr. Smith, new shingled and repaired it generally, and since that time Methodist preachers have held regular services on Sunday in it as before. It is this entry for the purpose of repairing, in behalf of the proprietors, which is the trespass complained of.

Much of the elaborate and ingenious argument of the plaintiffs'

counsel is devoted to establishing the propositions that the records of the proprietors fail to show a legal organization as a corporation, that nothing passed by Colonel Osgood's deed, there being no such legally organized body as "The Proprietors of the South Chapel in Fryeburg," capable of taking as grantees; that there was no legal election of the committee, under whose direction the defendants acted, and hence the defendants cannot justify under the proprietor's title, and that (however these things may be) the estate of the proprietors was forfeited by the failure to have preaching maintained in the house from 1859 to 1866, and to keep it in repair during that time, and that it reverted to Colonel Osgood, according to the provisions of the deed.

But in view of the facts above recited, we hold:

1. That Colonel Osgood and his heirs must be considered as estopped by his deed to deny the existence of his grantee. Having made this conveyance, and his associates in the undertaking having contributed their money and materials and labor for the erection of the meeting-house, and then sold and conveyed the pews therein to purchasers for value, who thereby became associated with them in the proprietorship, neither he nor his heirs can be heard to assert in a suit against these associates, or their servants, that there is no such corporation, as he, by his solemn act of conveyance, once affirmed there was; on the strength of which affirmation those parties invested their money, and received the deeds of their pews. Nor can it be maintained that these defendants, acting as it is admitted they did under the direction of those who were at all events *de facto* the superintending committee of the proprietors (and a majority of them among the original associates and proprietors), are such mere strangers and wrong-doers as to deprive them of the right to assert this estoppel.

2. Colonel Osgood's deed conveyed an estate upon condition subsequent.

It cannot be reasonably supposed that he expected his associates to place a meeting-house upon a lot, the title to which remained in him, or that they intended to accept a conveyance which vested no

interest in the proprietary. "If from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent." *Underhill* v. *Saratoga Railroad*, 20 Barb. N. Y. 455.

3. The estate having thus vested in Colonel Osgood's grantee, although liable to be forfeited by non-performance of the condition subsequent, would, notwithstanding a breach of the condition, still continue in the grantee, with all of its original qualities and incidents, until defeated by an actual entry made for the purpose of defeating it, by some one having the right to claim for such forfeiture. Here is no conditional limitation of the estate granted.

The language of the conveyance is not such as to carry an estate only *durante*, *dum*, *donec*, *quousque*, *tamdiu*, which would terminate by the breach of the condition, *ipso facto*. It is purely an estate in freehold, defeasible by a breach of the condition, if the parties entitled to require the performance of the condition choose to assert their rights.

In order to avoid the estate of the grantee, or subject his servants to an action of trespass for acts done upon it, or cause it to revest in the grantor, or those who have succeeded to his rights, an entry is essential, and not dispensed with by any of our statute provisions. *Marwick* v. *Andrews*, 25 Maine, 525; *Tallman* v. *Snow*, 35 Maine, 342.

4. Such entry may be made after breach of the condition by the grantor or his heirs. We do not think that the positions taken by the counsel for the defendants that the heirs of Colonel Osgood can have no right to reënter for a breach of the condition, because the language of the deed is, "to revert to me, unless," etc., without mention made of the heirs,—and that the fee became absolute in the grantees by the mere erection of the meeting-house,—can be maintained.

Where the estate is granted upon an express condition, as this manifestly was (for the *habendum* also contains the language of

proviso), it is unnecessary to stipulate also for a right of entry for a breach of the condition. That follows without an express reservation to that effect. *Thomas* v. *Record*, 47 Maine, 500; *Gray* v. *Blanchard*, 8 Pick. 291, 292. And the heir, though he be not expressly mentioned in the deed, may take advantage of the breach by entry. 2 Greenl. Cruise, 42, tit. xiii, c. 2; 1 Washburn on Real Property, 452, ed. of 1860.

"For an heir shall take advantage of a condition, though no estate descend to him from the ancestor." Shephard's Touchstone, fol. ed. 489. *Jackson* v. *Topping*, 1 Wend. 388.

This property was donated by Colonel Osgood for a meeting-house lot, and "in consideration of having a meeting-house erected and continued upon it," and "is to be held by the proprietors and their successors forever, provided it be improved for the above purpose."

If the proprietors pervert the gift to other uses, or fail to improve it for the purpose for which it was given, by abandoning it for such a length of time as shall be plainly inconsistent with the fair performance of their duty in the premises, it cannot be doubted that Colonel Osgood's heirs would have the right to claim a forfeiture, and the right to enter for a breach occurring after the death of their ancestor. It is not merely the erection, but the continuance of a meeting-house upon the lot, which will constitute a performance of the condition.

5. Had there been such an entry, by any party entitled to make it, as would defeat the estate of the grantees, prior to the doing of the acts by the defendants, which are the subject of this suit? The evidence is altogether insufficient to show such an entry by Colonel Osgood. His acts and declarations about the matter seem equivocal, and rather minatory than indicative of a positive intention to assert a forfeiture and reclaim the estate. He was a counsellor at law, and doubtless aware of the necessity of a distinct and decisive act on his part to revest the estate in himself. If he had fully made up his mind to assert his claim, it is reasonable to suppose that when he took one of the keys from the door while the plaintiffs' witness,

McNeil, was in the house, he would have made known the act, and the design of it, to him. His other acts are precisely those which one having a large interest in proprietary property is likely enough, in the loose way in which such property is commonly managed, to assume to do, without feeling that he thereby infringed on the rights of the other owners. They fall short of establishing an entry for breach of the condition, and so they seem to have been regarded by his heirs and administrator. Whether the entries made by them respectively could be deemed sufficient, we need not now stop to consider; because,

6. We think upon the whole that the evidence fails to show a breach of the condition.

The grant is to be construed most strongly against the grantor, and to prevent a forfeiture. *Hooper* v. *Cummings*, 45 Maine, 359; *Merrifield* v. *Cobleigh*, 4 Cush. 178.

The condition is not to be enlarged by construction, so as to cover what is not necessarily implied by the terms used. It imposes upon the grantees the duty of erecting, and continuing upon the lot, a house for public worship. But these proprietors were not a parish, nor a religious society. It would not seem that there was any unanimity of religious sentiment among them. The original subscription paper and agreement devotes the house to the use of the Methodist denomination, so long as they furnish preachers who are acceptable to a majority of the proprietors; but when they fail to do so it would not seem, from the character of the arrangements made, that anybody stood charged with the duty of supplying preachers, and all must have contemplated the probability that the house, which the proprietors were bound to maintain, would often be, for longer or shorter periods, unoccupied. At all events, construed strictly as the law requires us to construe it, the condition in the deed does not require the proprietors, upon pain of forfeiture, to maintain preaching in the meeting-house, which they were to erect and continue upon the lot. There is some evidence of neglect, which doubtless hazarded the rights of the proprietors, and gave color to the claim of forfeiture which the plaintiffs assert. But ab-

solute dereliction is not proven. Slight repairs were made from time to time, and the sexton and committee-man, McNeil, seem to have in some sort attended to their duties.

Some repairs were made upon the belfry in 1861, or 1862, and the shingling was patched up in 1863, and, notwithstanding some degree of remissness, a repetition of which would lend additional force to any future claim of forfeiture, we are disposed to hold that the case does not show an absolute breach of the condition.

Plaintiffs nonsuit.

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

DANIEL F. BEAN *vs.* ATLANTIC & ST. LAWRENCE RAILROAD COMPANY.

Case—damages.

Where, in an action under R. S., c. 51, § 31, to recover damages for property injured by fire, communicated by a locomotive engine, the plaintiff has an absolute title to the whole property destroyed, he may recover for the whole injury although he held the title as security for a debt, and had agreed, that, upon payment of the debt, he would reconvey.

And where the plaintiff had a policy of insurance upon a building thus destroyed, and, upon payment of the amount of the debt for which he held the property as security by the insurers, he assigned to them the statute claim with a stipulation on their part, that any excess recovered by the insurers, beyond the amount paid to him by them, should belong to him,—the insurers may recover, in the name of the plaintiff, for the whole injury.

ON EXCEPTIONS.

CASE under R. S. of 1857, c. 51, § 38 (R. S., c. 51, § 31), to recover the value of a building destroyed by fire communicated, as alleged, by a locomotive engine of the defendants.

It appeared that the plaintiff held the legal title of the property, at the time of the loss, by an absolute deed from his son, Alpheus S. Bean; that this conveyance was, in fact, made to secure a debt of six hundred dollars due from the grantor to the plaintiff, under an agreement that, upon payment of that sum, the property should be reconveyed.

It further appeared, that, at the time of the fire, there was a subsisting policy of insurance on the building, for the sum of six hundred dollars, issued by the Ætna Insurance Company, in favor of the plaintiff; that after the loss, and before the commencement of this action, the insurance company had paid the plaintiff the six hundred dollars insured and taken from him an assignment in writing, of his claim under the statute, against the defendants, with a stipulation therein, that any excess recovered beyond that sum should belong to the plaintiff. And at the trial, on motion of the defendants, the name of the insurance company was indorsed on the writ as assignee.

It also appeared that the building, at the time of the loss, was worth nine or ten hundred dollars.

The defendants requested the presiding judge to give such instructions, as he might deem appropriate, respecting the amount which the plaintiff might recover, if anything, with reference to the several interests of the nominal plaintiff, the insurance company, and the plaintiff's grantor.

The presiding judge instructed the jury that if they should be satisfied that the loss of the building was caused by fire communicated by the defendants' locomotive engine, their verdict should be for the plaintiff as if no other parties in interest were disclosed; and for such sum as they should find the building was worth at the time of the loss.

The verdict was for the plaintiff, for seven hundred and seventy-five dollars; and the defendants alleged exceptions.

P. Barnes, in support of the exception.

"When a building . . . is injured by fire, communicated by a

locomotive engine, the corporation using it is responsible for such injury." R. S. of 1857, c. 51, § 38.

To make this responsibility effectual, there must be a party, by whom the "injury" is sustained, and one who holds such relations of title to the property as the law can recognize.

Derelict property could not be compensated for under this statute. And there are various kinds of interests which a party might have, in property so destroyed, which would not entitle him to the remedy under this statute.

The insurance company may recover the loss it has paid, which is, in fact, the "injury" it has sustained. This recovery may be either by right of subrogation, or, as in this case, by contract with the nominal plaintiff.

The insurance company could not recover, for itself, any more than a compensation for its own "injury."

The agreement between the insurance company and the plaintiff, relating to the excess, is of no effect as against the defendants, because neither had any power to help the other to a large sum.

The nominal plaintiff sustained "injury" only to the amount of his debt, which has been fully paid. He cannot, by assignment, authorize the plaintiff in interest to recover any more. If either could recover more, it would be profit and speculation and not an equivalent for the "injury" sustained.

Although the plaintiff's title was absolute in form, it was but a security title in fact; and six hundred dollars being the extent of his interest in the property, it was the exact measure of his "injury" sustained.

This case is one of statutory insurance; and the liability, as in the case of contract insurance, is only for the loss sustained by the party who brings the suit. And as between the nominal plaintiff and these defendants, the former is limited to strict compensation for his "injury."

No recovery can be had for the plaintiff's grantor, because (1) he has no interest and hence has sustained no "injury;" or (2) because his interest is not such as can be vindicated by the law, by

suit in the name of his grantee. There is no right of subrogation, nor any analogous right between those parties.

D. Hammons, for the plaintiff.

KENT, J. The corporation was liable for the injury, the whole injury. The plaintiff had an absolute title to the whole property destroyed. The facts that he actually held the title as security for a debt and had agreed that upon payment of the debt he would reconvey, cannot affect his right to recover for the whole injury. If a man has given a bond to convey a house, upon payment to him by his obligee of a sum named, the title remains unaffected until payment and conveyance; and if insured and burned he may recover the amount of his insurance. And so under R. S. of 1857, c. 51, § 38, he may recover for the injury to his estate, whatever it is. No one else certainly can. If he recovers more than the amount of his debt, it is a matter to be adjusted between him and his debtor. The corporation has no interest and no right to interpose this as an objection to a recovery for the whole injury.

It was held in the case of *Hart* v. *Western Railroad*, 13 Met. 106, that where the owner has received from the insurers the sum insured upon the building, and that sum is equal to the whole value of the property, he holds the whole claim against the railroad in trust for the insurers, and he cannot refuse or prevent the use of his name, by the insurers, in a suit to recover the amount of the injury from the railroad, nor can he release or discharge such action. See, also, *Concord M. Ins. Co.* v. *Woodbury*, 45 Maine, 447.

But in this case, the plaintiff has made an assignment to the insurance company, and interposes no objection to the suit.

We see no reason why the action in his name may not be sustained for the whole injury. The division of the money, paid on the judgment, is of no consequence to the defendants. There can be but one action by or in the name of the plaintiff, and in that all the injury may be recovered. *Exceptions overruled.*

Judgment on the verdict.

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

EDWARD A. LITTLE, administrator, *vs.* THOMAS THURSTON.

Bond for conveyance of land. Promissory note.

Where the obligor of a bond, for the conveyance of certain land to the obligee, upon the latter's payment of certain notes, at maturity, conveys away the land, upon the failure of the obligee to pay the notes according to their tenor, the administrator of the estate of the obligor cannot enforce payment of them.

ON FACTS AGREED.

ASSUMPSIT on a promissory note, given by the defendant and one Washington Garland, dated Nov. 4, 1861, for $112.50, payable in one year, with interest. The plaintiff discontinued as to Garland.

It appeared that the note in suit, and one other of like amount and date, payable in two years, were given Nov. 4, 1861, by Washington Garland to Edward T. Little, in his life-time, now deceased, for Little's bond of same date as the notes conditioned for the conveyance of a certain lot of land, of which Little then had the legal title, to Garland, provided the notes were paid at maturity, and if not so paid the bond was to be void. The defendant signed the note in suit with Garland.

Neither Garland nor Thurston ever received any rents or profits from the land, it being timber land, situated in Errol, N. H.

The only consideration of the notes was the bond mentioned, which has never been surrendered, and the conditions of which have never been performed. After breach of the conditions of the bond on the part of Thurston and Garland, Little conveyed away the land to other parties, and had no title thereto when this action was commenced.

After the conveyance by Little, he deceased, and the plaintiff was appointed and duly qualified as administrator of his estate.

The full court to render such judgment as the legal rights of the parties require.

S. F. Gibson, for the plaintiff.

The bond was a sufficient consideration for the notes. *Smith* v. *Sinclair*, 15 Mass. 171; *Reed* v. *Cummings*, 2 Greenl. 82; *Manning* v. *Brown*, 10 Maine, 49. There can be no claim for an equitable set-off, for nothing has been paid.

E. Foster, jr., for the defendant, cited Edwards on Bills, etc., 329*; *Winter* v. *Livingston*, 13 Johns. 54; *Frost* v. *Frost*, 11 Maine, 235, 238; *Manning* v. *Brown*, 10 Maine, 49.

APPLETON, C. J. This was an action on a note, signed by the defendant and one Washington Garland, dated Nov. 4, 1861, and payable to Edward T. Little, or order, in one year from date. The consideration for the same was a bond of even date, given by said Little to said Garland, for the conveyance to him of a certain lot in Errol, N. H., to which said Little then had a good title, upon the condition that the notes described therein, of which the note in suit was one, were paid at maturity. The bond to be void if the notes were not so paid.

The land, mentioned in the bond, remained in the possession and under the control of the obligor. The notes of the obligee not being paid at maturity, the obligor conveyed away the land by deed. His administrator now seeks to enforce the notes referred to in the bond given to Garland, notwithstanding his intestate had, by deed, incapacitated himself from making the conveyance of the land stipulated by the bond to be conveyed.

The obligor, in a bond like the one in this case, has a right to require a strict compliance with its conditions on the part of the obligee, and, in case of non-compliance therewith, to enforce a forfeiture. The obligee, by a failure on his part, does not necessarily put an end to the contract and make it void. He only gives the obligor a right to terminate it if he choose. Or he may waive a strict compliance and continue it in force. Thus he may waive a forfeiture by receiving or enforcing payment of the notes of the obligee, and if he does so, the bond is held as still valid and obligatory.

In the present case the obligor, Edward T. Little, conveyed away

the land upon the failure of Garland to pay at maturity the notes, the consideration for which was his bond. This must be deemed an election, on his part, to insist upon a forfeiture, as he had a right to do. The bond, then, ceasing to be obligatory, there is no remaining consideration for the notes mentioned therein, and they cannot be enforced.

These views seem to be in accordance with the uniform current of authority, as well as with the equities of the case. In *Winter* v. *Livingston*, 13 Johns. 54, the facts were substantially the same as in the case at bar. In giving their opinion the Court say: "The notes in question were given as the consideration for the reconveyance of the land by Winter to Livingston, according to the covenant entered into between them. By this covenant, however, it was provided that the agreement was to be void, unless Livingston paid his notes as they fell due. He did not pay them; and, of course, the agreement was void, if Winter elected so to consider it. And the case fully shows that he availed himself of this forfeiture, for he went on and sold the land for his exclusive benefit, and Livingston has, therefore, received nothing for his notes; and Winter has a complete and perfect title to the lands." The nonsuit of the plaintiff, who sought to recover the amount due on the notes, was sustained. In *Frost* v. *Frost*, 2 Fairf. 239, this court held that after taking the land, the plaintiff could not enforce further payments, when he availed himself of a forfeiture arising for the defendant's neglect. In *Manning* v. *Brown*, 10 Maine, 49, the defendant relied on the case of *Winter* v. *Livingston*, but the court distinguished that case from the one then under consideration. "Manning," remarks Parris, J., "did not elect to consider the agreement void. He did not enter into or sell the land, but permitted the defendant to retain the undisturbed possession. He has not, therefore, availed himself of the forfeiture, but, by enforcing the payment of the notes, has waived it." This case cannot be regarded as adverse to the defense. In *Chandler* v. *Marsh*, 4 Vermont, 161, Hutchinson, C. J., in delivering the opinion of the court, says, "The bond was the security for the title when the full payment should be made.

The plaintiff has his remedy on each note, when payable, and the defendants cannot take away this right by any neglect of their duty, nor by any act of theirs, short of actual payment. The plaintiff might destroy his right of action by conveying away his title to the land, and rendering himself unable to convey such title to the defendants."

The plaintiff's intestate having elected to claim a forfeiture by having conveyed the land, his administrator cannot now enforce the payment of the note in suit. *Plaintiff nonsuit.*

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

BETHEL & HANOVER TOLL-BRIDGE COMPANY *vs.*
FRANCIS C. BEAN.

Pleading.

In assumpsit by a toll-bridge corporation against a stockholder therein to recover certain assessments on his stock, it must be alleged that the assessments sought to be recovered were due and payable when the action was commenced.

ON EXCEPTIONS.

ASSUMPSIT.

"For that the said plaintiffs, by an act of the legislature of the State of Maine, approved on the eighth day of February, in the year of our Lord one thousand eight hundred and sixty-six, were made and constituted a corporation, or body corporate, by the name of 'The Bethel & Hanover Toll-bridge Company,' for the purpose of erecting and keeping in repair a bridge over the Androscoggin river at Hemlock Island, between the towns of Bethel and Hanover, in the county of Oxford, in the direction and manner described in said act of incorporation, and thereafterwards, to wit, on the

seventh day of May, in the year of our Lord one thousand eight hundred and sixty-six, at said Bethel, in consideration that the plaintiffs, at the request of the said defendant, had admitted him to take one share of the par value of fifty dollars each in the capital stock of said corporation, and to become a proprietor therein; he, the said defendant, then and there undertook and faithfully promised and agreed with the plaintiffs that he would pay all assessments on the same for the purpose of constructing a toll-bridge across the Androscoggin river at Hemlock Island, connecting Bethel and Hanover.

"And the plaintiffs aver, that they, relying on the said promise and undertaking of the said defendant, thereafterwards made, constructed, and erected said toll-bridge across the Androscoggin river, at Hemlock Island, connecting Bethel and Hanover; and after the making of said promise by the said defendant, to wit, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, the plaintiffs made an assessment of five dollars upon each and every share in the said stock so agreed to be taken, to be paid into the treasury of said corporation agreeably to the by-laws of said corporation; and thereafterwards, to wit, on the eleventh day of March, in the year of our Lord one thousand eight hundred and sixty-seven, the plaintiffs made a second assessment of ten dollars on each and every of the shares so agreed to be taken in said stock, to be paid as aforesaid; and thereafterwards, to wit, on the eighth day of June, in the year of our Lord one thousand eight hundred and sixty-seven, the plaintiffs made a third assessment of thirty-five dollars on each and every of the shares in said stock so agreed to be taken, to be paid as aforesaid; and thereafterwards, to wit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, the plaintiffs made a fourth assessment of twenty-five dollars upon each and every of the shares in said stock as agreed to be taken, to be paid as aforesaid; and thereafterwards, to wit, on the fourth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, the plaintiffs made a fifth assessment of fifteen dollars on

each and every of the shares in said stock so agreed to be taken, to be paid as aforesaid; all which assessments amounted in the whole on said defendant's share to the sum of ninety dollars; of all which said assessments, to wit, on the said days on which the same were respectively made as aforesaid, the said defendant had due notice, and was requested to pay the same; and after thirty days from the notice thus given on each of said assessments so made as aforesaid, the defendant was requested by the plaintiffs to pay the same. Yet the said defendant, although the times for the payment of the said assessments are all long since passed, hath not paid said several sums of money assessed as aforesaid, nor either, nor any part thereof to the plaintiffs, or their treasurer, but neglects and refuses so to do."

To the foregoing declaration the defendant filed a general demurrer, which was joined by the plaintiffs.

The presiding judge ruled *pro forma*, that the declaration was insufficient in law, and sustained the demurrer; whereupon the plaintiffs alleged exceptions.

E. Foster, jr., for the plaintiffs.

1. The defendant, having filed a general demurrer, can take advantage only of defects in substance. Story Pl. 340; 1 Chit. Pl. 664; Gould Pl. 431, 2, 3; 10 East, 359.

And on such demurrer matters of form, not especially shown, shall be aided on the part of him who joins. Story Pl. 340; Gould Pl. 431, § 9.

General demurrers are not favored in law. Gould Pl. 431; 1 Chit. Pl. 663; R. S., c. 82, § 10.

2. Argumentative pleading is aided by verdict, or on general demurrer. For the defectiveness of such pleading is not in the matter pleaded, but in the manner of pleading it; and it is therefore only a fault in form. Gould Pl. 56, § 30; consequently the form of pleading the facts cannot be taken advantage of under a general demurrer. 1 Chit. Pl. 664, 236; Gould Pl. 433, § 14; 44 Maine, 484.

3. In a declaration, less degree of certainty is required than in a plea; and "certainty to a certain intent in general," is all that is required, even under a special demurrer. 1 Chit. Pl. 302.

The consideration in assumpsit, though of the gist of the action, may be stated indirectly, and it will be good on special demurrer even. Gould Pl. 64, §§ 42, 47, 68.

The only facts required in a declaration to be directly and positively stated, to be held good even under a special demurrer, are those which may be denied by the terms of the general issue. Gould Pl. 64, § 42.

4. It is not necessary to allege that the contract is in writing. 1 Chit. Pl. 303; Gould Pl. 177, § 43; *Worcester Turnpike Co.* v. *Willard*, 5 Mass. 80.

5. It is not necessary for the plaintiff to allege more than will constitute, *prima facie*, a sufficient cause of action. Gould Pl. 155, § 193; 1 Chit. Pl. 222.

6. The defendant, by his general demurrer, has confessed everything that is sufficiently pleaded, among which is, that he has taken one share, and become a proprietor in the corporation; for if argumentatively stated, or otherwise, it is good on general demurrer. 4 Mass. 452; Gould Pl. 436, § 21.

7. "The right acquired by the defendant to become the owner of one share, and to be entitled to the privilege of a stockholder, was a sufficient consideration for his promise to pay for it." *Ken. & Portland R. R. Co.* v. *Jarvis*, 34 Maine, 360.

8. A corporation may, in an action at law, recover for assessments made upon shares when the holder has made an express agreement to pay for them. *Ken. & Portland R. R. Co.* v. *Kendall*, 31 Maine, 474; *Bangor Bridge Co.* v. *McMahon*, 10 Maine, 478; *Worcester Turnpike Co.* v. *Willard*, 5 Mass. 80.

9. There is no condition precedent in the defendant's promise; it is absolute; he agrees to pay his share in assessments; the assessments are averred. Angell and Ames on Corp. 490, § 517.

"For the purpose of constructing a toll-bridge, etc.," is not a condition, limiting the defendant's liability, but an expression of the

purpose or object for which he contributed,—as though it had read thus: "The object being the construction of a toll-bridge, etc.,"—and that object is averred to have been accomplished.

10. A declaration, though consisting of a single count, may be good as to part of what the plaintiff demands, and ill for the residue; in which case, if the whole be demurred to, the plaintiff may have judgment for the part which is good. Gould Pl. 181, § 49; 1 Chit. Pl. 665.

Consequently, though more assessments were made than the par value of the share, the declaration is good to hold to the amount of that par value; it is no detriment that more than a *prima facie* case is alleged, as it is only a matter of form, and not reached by general demurrer.

11. If the declaration exhibits, *prima facie*, a cause of action, no matter how defective in form, then the plaintiff should have judgment final as at common law, *quod recuperet*. Gould Pl. 444, § 42.

If the declaration does not, *prima facie*, show a cause of action, and is amendable, then the plaintiff should be allowed to amend upon payment of costs, only from the time of filing the demurrer. R. S., c. 82, § 19.

Deane & Verrill, for the defendant.

The declaration is bad and insufficient, for the following reasons:

1. No time of payment of the alleged assessments is set forth, and no promise is stated which was to be performed before the date of the writ.

The action can only be maintained upon an express contract (*Andover & Medford Turnpike Corp.* v. *Hay*, 7 Mass. 102), and the contract should be stated according to its legal effect, and with certainty and precision as to all its material parts. 1 Chit. Pl. 257, 303, and 305; 1 Greenl. on Ev. § 66; *Hotchkiss* v. *Judd*, 12 Allen, 447.

2. No sufficient consideration is set forth, and there is no averment that the corporation admitted the defendant to take shares; nor does it appear that the corporation was organized prior to the

making of the alleged contract, or that the transaction was ever ratified or assented to by the corporation. 1 Greenl. on Ev. § 66; *Eustis* v. *Kidder*, 26 Maine, 97; *New Bedford & Bridgewater Corp.* v. *Adams*, 8 Mass. 130; *Taunton & South Boston Turnpike Corp.* v. *Whiting*, and editor's note, 10 Mass. 327; *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 172.

3. It does not appear that the corporation ever fulfilled the conditions of the contract, or performed on its part what its charter and by-laws required for the benefit of its members. *K. & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360; *People's Ferry Co.* v. *Balch*, 8 Gray, 303.

4. It is not stated that the stock was all subscribed for or taken, or even that there was any number of shares fixed by charter or by vote before the assessments were made; but the plain inference is, that the prescribed number of shares was largely diminished. *Troy & Greenfield R. R. Co.* v. *Newton*, 8 Gray, 596; *Kennebec & Portland R. R. Co.* v. *Jarvis*, 34 Maine, 360; *Worcester & Nashua R. R. Co.* v. *Hinds*, 8 Cush. 110; *Central Turnpike Corp.* v. *Valentine*, 10 Pick. 142; *Oldtown & Lincoln R. R. Co.* v. *Veazie*, 39 Maine, 571; *N. H. Central R. R.* v. *Johnson*, 30 N. H. 390.

5. There is no force in the averments that certain notices of the assessments were given to the defendants, because it does not appear what notice, if any, was required by the terms of the contract, and because there is no averment that at the times of the alleged notices the assessments were due and payable. *Curtis* v. *Hubbard*, 6 Met. 186.

6. The par value of the shares was fifty dollars, and the alleged assessments amount to ninety dollars on each share; but it does not appear that the assessments were all or any of them made for the purposes stated in the alleged contract.

In law, the whole amount assessed on each share must not exceed the par value of the shares, and must be all for the purposes stated in the contract. The assessments must be legal assessments. *Salem Mill Dam Co.* v. *Ropes*, 6 Pick. 23, and *Proprietors of Newburyport Bridge* v. *Story*, in note at end of last-named case; *Ches-*

ter Glass Co. v. *Dewey*, 16 Mass. 94; *Contoocook Valley R. R.* v. *Barker*, 32 N. H. 363; *Littleton Manufacturing Co.* v. *Parker*, 14 N. H. 543.

7. A declaration bad in part is bad in the whole.

APPLETON, C. J. This is an action against the defendant, who is a stockholder in the plaintiff corporation, to recover the amount of certain assessments.

The declaration alleges that the assessments respectively set forth therein, were "to be paid into the treasury of said corporation, agreeably to the by-laws of said corporation." To this declaration the defendant has demurred.

It nowhere appears that the assessments "agreeably to the by-laws" were due and payable when this action was commenced. There is no allegation when the assessments became due. It does not, therefore, appear that there is any promise or contract unperformed which by its terms should have been performed before this action was commenced. *Curtis* v. *Hubbard*, 6 Met. 186; *Hotchkiss* v. *Judd*, 12 Allen, 447.

Exceptions overruled.

Declaration adjudged bad.

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

RICHARD MCCABE, *in rem*, *vs.* JAMES MCREA AND SHIP EMPIRE AND NATHANIEL L. THOMPSON, claimant.

Lien on vessels—writ for enforcing.

The writ for enforcing a laborer's lien on a vessel, under Public Laws of 1858, c. 15 (R. S., c. 91, § 7), need not allege whether the labor was done before or after she was launched.

The lien attaches, notwithstanding the labor was performed for one who contracted with the owner.

If the claimant would avoid the lien, he must show that the laborer has knowingly surrendered or waived it.

A person claiming a lien, for labor on a vessel, is required to state in his specification, the name of the owner only when he knows it.

It is no defense, to an action for enforcing a lien on a vessel after she is launched, that the officer making the attachment took a receiptor.

Where, in an action to enforce a lien upon a vessel, brought by a laborer against one who contracted with the owner, the defendant is defaulted, such default is not evidence against the claimant as to the amount of the lien on the vessel.

The question, "For how much of the amount due from the defendant, the laborer has a lien on the vessel attached," is, under R. S., c. 91, § 16, at the request of either party, to be determined by a jury; and if a jury-trial be waived, this question shall be decided by the court, on a hearing or report of an auditor appointed by the court.

ON REPORT.

ACTION to enforce a lien for a balance due for labor, performed while in the employ of the defendant, on the ship Empire.

The vessel was launched Dec. 4, 1869, at eleven, A. M.

The writ was dated December 9th, and the attachment was made on the same day.

Nathaniel L. Thompson appeared as owner, and defended so far as it related to the validity of the lien claimed by the plaintiff.

There was evidence to show that the plaintiff was hired to labor on the vessel, at $1.50 per day, by the defendant, who had contracted to fasten the vessel by the job. There was also evidence tending to show that the plaintiff was to look to the principal defendant for his pay, and not to have a lien on the vessel. And there was evidence to the contrary. There was no evidence as to the number of days which the plaintiff worked.

There was no affirmative testimony that the plaintiff positively knew the name of the owner. The only evidence, bearing indirectly upon that point, was the following, to wit,—

The owner testified, substantially, among other things, that he had several conversations with the plaintiff on board the Empire while she was building, and frequently told him he must look to McRea for his pay; that witness had contracted with McRea, and

others named, for carpenter work by the job. McRea, called by the owner, testified substantially to the same.

The plaintiff testified that he had no such conversations in regard to wages with Thompson or McRea; that Thompson never told plaintiff he had let the vessel out to McRea, and that plaintiff must look to the latter for pay; that plaintiff never had any conversation with Thompson until after the vessel was launched, when plaintiff asked Thompson what he (plaintiff) should do about pay, as he understood McRea was not going to pay, to which Thompson replied, "hang him."

It appeared that McRea paid plaintiff twenty dollars before the commencement of this action.

An alternative receipt, in the usual form, to pay a certain amount or deliver the vessel to the attaching officer, etc., was put into the case.

The principal defendant was defaulted.

The action was continued on report, the full court to render such judgment and pass such decree, in the case, as the law and evidence required.

Stone & Haley, for the plaintiff.

Dane & Bourne, for Thompson.

The terms of the lien statute must be strictly complied with, by a party seeking the benefits of its provisions. *Bicknell* v. *Trickey*, 34 Maine, 281; *Robinson* v. *Bunker*, 38 Maine, 131.

The statute provides for two classes of cases,—one for work performed before the vessel is launched, and the other after. R. S., c. 91, § 7. It is the privilege of the owner to know under which he claims, and the allegation should be in the writ.

There is no evidence of the number of days worked, how much is due, or when he worked. The default of the principal defendant fixes his liability, but has no effect upon the question between the laborer and owner. *Thompson* v. *Gilmore*, 50 Maine, 435; *Miller* v. *Robinson*, 2 Allen, 610.

The names of the owners, if known, must be stated in the speci-

fication. Public Laws of 1838, c. 15, § 3 (R. S., c. 91, § 9). The statute is peremptory. Absolute knowledge can be had of but few things. Plaintiff did know the owner's name, but alleged in the specification that his name was unknown. This dissolved the lien. *Story* v. *Buffum*, 8 Allen, 35.

APPLETON, C. J. The plaintiff brings this action to enforce his lien for labor done by him, on the ship Empire, while in the employ of the defendant. The defendant has been defaulted. The owner resists the claim for a lien on various grounds, which will be considered in their order.

1. By statute of 1858, c. 15, § 1, a lien is given on vessels for labor thereon, both before and after launching. It is objected that the writ does not distinctly state whether the labor, for which a lien is sought to be enforced, was done before or after the vessel was launched. But the statute does not require that it should. It is enough that it is in the form prescribed by the statute. Were it necessary to be more specific, an amendment would be allowed if desired.

2. It is urged that the plaintiff was employed by the defendant, to whom he looked for pay, and to whom he was told to look for pay by the claimant. But this is the very case provided for in the form of the writ given by statute, which sets forth a claim for a lien for work done for the defendant, "who owes the same, neglects and refuses to pay."

By § 1, "any person, who furnishes labor and materials for building a vessel, shall have a lien upon such vessel therefor, which may be enforced, by attachment of the vessel, within four days after she is launched," etc.

The plaintiff having labored upon the Empire, has a lien thereon unless he has waived it by agreement or lost it by neglect. The lien is the result of labor. It is the statute security for labor. It attaches unless there is an agreement that it shall not. It attaches notwithstanding the labor is performed for a contractor, to whom it is charged. In *Purinton* v. *Hull of a New Ship*, 2 Curtis, 416, Mr. Justice Curtis, referring to the statute of this State, R. S., c. 125,

§ 35, says, "upon the whole, I cannot avoid the conclusion, that the workmen on a vessel are entitled to a lien under this act, though they be employed by one who contracts with the owner." The act of 1858, c. 15, § 1, does not materially vary from R. S., c. 125, § 35, to which Mr. Justice Curtis refers. In the Sam Slick, 1 Sprague, 289, it was held that a charge for material made against the builder alone, without naming the vessel, did not constitute a waiver of the lien, nor was it conclusive evidence of an intention to rely upon the personal responsibility of the builder. In *Page* v. *Hubbard*, 1 Sprague, 335, Mr. Justice Sprague held that a maritime lien, for materials furnished a vessel built in Massachusetts, is not lost by the creditors taking the debtor's negotiable promissory note, which is produced at the hearing, and offered to be cancelled.

But in this case the plaintiff denies that any notice was given him that he must look to the defendant alone. The statute gives to the laborer a lien. It is for the claimant to prove that he has knowingly surrendered or waived such lien. This the evidence fails to show. It does not even show that the question of an abandonment of lien was distinctly presented for his consideration.

3. It was decided in *Story* v. *Buffum*, 8 Allen, 35, that a lien on a ship will be dissolved, if the person claiming it, in his statement says, that the owner of the vessel is unknown, when he has been informed, and believes, that she was owned by the person who, in fact, owned her. Assuming, but without assenting entirely to the correctness and applicability of that decision, yet the claimant fails to establish the facts within the principle of that case. It does not appear that the plaintiff knew the claimant owned the vessel. The inquiry was not made of him. The claimant does not even state that he informed the plaintiff of his title. Mere conjecture is not enough. The statute requires knowledge, before the owner's name is to be inserted. The proof does not satisfy us that the plaintiff knew in whom the title was.

4. By § 5, "If the vessel has been launched at the time of the attachment, she shall be attached in the manner provided by law for the attachment of personal property.

The attachment was made in the usual mode. It appears, however, that the officer making the attachment took a receiptor. But that has nothing to do with this case. The issues, presented by § 14, are the amount due the defendant, and for how much of that amount the plaintiff has a lien. Whether the officer retains the vessel in his possession, or not, are facts totally irrelevant. If the officer has omitted or neglected his duty, the plaintiff has a remedy against him for such neglect. It would be a novel defense against a just claim, that an officer, over whom the plaintiff has no control, has defeated the suit by his official neglect in not retaining the possession of property as he should have done. If the officer cannot sell the vessel according to the provisions of § 17, he may be liable to the plaintiff, if such inability is the consequence of his neglects or omissions of duty, but it is no answer to the plaintiff's claim.

5. The defendant has been defaulted. But this default will not be evidence against the claimant. The evidence shows labor done on the Empire, by the plaintiff, but it fails to show the amount and value of such labor. By § 15, "If the parties waive a trial by jury, the questions in the fourteenth section hereof shall be decided by the court, upon a hearing, or upon the report of an auditor to be appointed by the court."

The evidence is satisfactory that the plaintiff has a lien for the amount of his labor. That amount is to be determined, if the parties cannot agree, by the judge at *nisi prius*.

Judgment for the plaintiff that he has a lien upon the Empire for his labor upon the same,—the amount to be fixed by the judge at nisi prius.

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

JOHN HAMILTON, by guardian, *vs.* DANIEL WENTWORTH.

Will—construction of. Real action.

A testator devised unto his grandson certain land, "to have and to hold the same to him, the said" devisee, "for and during the term of his natural life, without impeachment of waste; and after his decease, to the heirs male of his body; and in default of heirs male, to the heirs female of his body; and for want of heirs female, to" the testator's son M. during the term of his natural life; and after his decease, to his heirs in tail. *Held*, That the grandson of the testator named took an estate for life, and that at his decease, his eldest surviving son an estate in fee-tail.

The words "heirs male" in such case are to be construed as words of purchase and not of limitation.

By virtue of R. S., c. 104, §§ 3 and 8, a real action in which the writ claims an estate in fee-simple, cannot be maintained by proof of one in fee-tail only.

ON FACTS AGREED.

REAL ACTION to recover a tract of land in Lebanon, in this county, the plaintiff claiming in his writ an estate in fee-simple. He claims title under and by virtue of the will of Jonathan Hamilton, his great grandfather. Rufus Hamilton died May 30, 1865.

The defendant pleaded the general issue and statute of limitations.

If the plaintiff has no title or right to recover in this action, he is to become nonsuit.

The remaining facts sufficiently appear in the opinion.

Wells & Eastman, for the plaintiff.

W. J. Copeland, for the defendant.

APPLETON, C. J. Jonathan Hamilton, the great grandfather of the plaintiff, died seized of the demanded premises, in 1811. By his will, dated July 6, 1810, and duly proved and allowed June 18, 1811, he devised the premises, after sundry devises, to his son, Millet Hamilton, as follows: "Also I give and bequeath to my

grandson, Rufus Hamilton, one hundred and twenty acres of land in Lebanon, in said county of York, adjoining to land formerly belonging to John Kenney, Esq., deceased, and to land of Jonathan Burrows, and others, with the buildings thereon, and the appurtenances thereto belonging, to have and to hold the same to him, the said Rufus, for and during the term of his natural life, without impeachment of waste, and after his decease, to the heirs male of his body lawfully begotten, and in default of heirs male, to the heirs female of his body, and for want of heirs female to my said son, Millet Hamilton, during the term of his natural life, and after his decease, to the heirs male of his body lawfully begotten, and in default of heirs male, to the heirs female of his body, and for want of heirs female to the heirs of the body lawfully begotten of my daughter, Hannah Carr, and in default thereof to the heirs of the body of my daughter, Sukey Haggans."

After sundry devises to said Hannah Carr and Sukey Haggans, the will contains the following clause:

"Also, it is my will that the within and foregoing legacies and bequests to my said son, Millet Hamilton, my said grandson, Rufus Hamilton, my said daughter, Hannah Carr, and my said daughter, Sukey Haggans, and their respective heirs, and each and all their heirs, male and female, lawfully begotten as aforesaid, inherit the same as in each bequest is particularly expressed. But in case of default, or want of such lawful heirs, male and female, for the space of two hundred years from and after my decease, I will and order that all the property mentioned in the bequests aforesaid vest in the officers and overseers of the Congregational church in the first or south parish in the town of Berwick, in said county, and their successors, to have and to hold the same forever."

Rufus Hamilton married, and had sons and daughters. The plaintiff, his oldest son, was born in April, 1817. Rufus Hamilton resided on the demanded premises until Nov. 24, 1824, when by deed of warranty he conveyed a part of the demanded premises to Samuel Wentworth. On the 2d April, 1824, by deed of warranty, he conveyed the remainder of the demanded premises to Benjamin

Gerrish. Said Wentworth and Gerrish entered into the possession of the tracts respectively conveyed to each, and they, or those claiming under them, the tenant included, have remained in open and peaceable possession, thereof claiming to hold the same in fee-simple to the date of the writ.

The material question to be determined is, What was the estate Rufus Hamilton took under the will?

The language of different wills is as variant as the purposes to be subserved, or the objects to be gained by its use. It is an uniform rule in their construction that the intention of the testator is to govern. That intention is to be gathered not merely from the language of a particular devise, but from all the different provisions of the will under consideration. It may be assumed that the testator did not intend opposite and contradictory provisions. They are, therefore, to be considered in determining the meaning of a particular devise. The intention, when gathered from the specific language of the devise, in connection with the other parts of the will, is to control.

There would seem to be little doubt of the intention of the testator in his devise to his grandson. He did not intend to give him the power of alienation. His primary intent was to keep the estate in his own blood. Accordingly, the devise is to Rufus Hamilton "for and during the term of his natural life." The estate is one for life by its specific terms. There can be no misconstruction of the meaning of the words used. It was to be "without impeachment of waste." This shows a life-estate was intended. If it was the intent of the testator to give an estate in fee or fee-tail, this provision could be of no use. The estate devised would be forfeitable for waste, and the intention was to guard against such forfeiture. "After his decease," the estate was to vest, according to the terms of the devise, in the heirs male of his body.

Nor is this all. By recurring to the other devises, it is obvious that the testator was careful in the use of language. In the devise to Millet Hamilton, he gives him one tract "to hold the same to him, the said Millet, for and during the term of his natural life,

" without impeachment of waste; and after his decease, to the heirs male of his body, lawfully begotten, and in default of heirs male, to the heirs female of his body, and for want of heirs female, to the heirs of the body of (my) his daughter, Hannah Carr, lawfully begotten, and in default thereof, to the heirs of the body of (my) his daughter, Sukey Haggans." Other tracts are devised to him to hold "in fee-simple." He devises a portion of his estate to Hannah Carr in fee-tail, with a remainder to his son Millet "in fee," and another portion to Sukey Haggans in fee-tail, with remainder over to his son Millet in fee. It is apparent that these different forms of expression were adopted to produce different results—corresponding with the difference of language. When the testator intended an estate in fee-tail or in fee-simple, he used the appropriate language to convey such intention. When he intended a life-estate, he used words most manifestly indicating such purpose. To remove all doubt, he declares that each devisee shall "inherit the same as in each bequest is particularly expressed."

It has been argued that an estate tail was devised to Rufus Hamilton, and not an estate for life. But the testator knew and adopted the language aptly fitted to give an estate tail in his devises to his daughters. If he had intended to devise an estate tail to Rufus and to Millet, he would have used the same language as in the devises to his daughters. When he gives a fee-simple, he so says. Now, using different language in his devises, that difference was adopted to carry into effect different intentions. Had he intended a fee-tail for Rufus and Millet, he would have used the appropriate phrases. Not intending to give them an estate in fee-tail, but intending that estate for their heirs, he gives them an estate for life, with remainder over to their heirs in fee-tail, etc., except as to the portion which he devised to Millet "in fee-simple."

That this construction is in strict accordance with the intention of the testator, hardly admits of a doubt. A strict legal construction, or the technical sense of words, is never to prevail against the superior force of intention apparent in the will. The result is that Rufus Hamilton took an estate for life, and the plaintiff an estate

tail. The word "heirs" being used not as a word of limitation, but of purchase.

In *Pratt* v. *Leadbetter*, 38 Maine, 9, the testator made the following devise: "I give and bequeath unto my son, O. P., the land he is now in possession of, also one-half of lot No. 5 to him during his natural life to improve, and then to his heirs after him for their sole right. *Held*, that as the other clauses in the will furnished no evidence of an intention to give the devisee an estate of inheritance, he took only thereby an estate for life." In *Canedy* v. *Haskins*, 13 Metcalf, 389, the devise was in the following words: "I give to my brother W.'s son, N., during his natural life (after the decease of my wife), and to his eldest male heir, and after his decease, and to said male heirs and assigns forever, all and singular, my homestead," etc. At the time of making the devise, N. had no children; afterwards he had several children, of whom the third son alone survived him. It was held that N. took a life-estate only, and that at his decease his surviving son took an estate in tail male. In *Blake* v. *Stone*, 27 Vermont, 475, the deed under consideration was to A. B. for life, and in remainder to the heirs of his body, except C. B., one of the sons of A. B., forever. It was held that this deed conveyed only a life-estate to A., and that the remainder vested in the persons, except C. B., who would become heirs of A. B. if they survived him,—they taking by purchase. "Now it is certain," says Wilmot, J., in *Long* v. *Lansing*, 2 Bur. 1100, "that in some cases, and under some circumstances, they (the words, heir or heirs), may be construed words of purchase, either upon a will or upon a deed. . . . They are not to be construed as words of limitation, either upon a will or upon a deed, when the manifest intention of the testator or of the parties is declared to be, or clearly appears to be, that they shall not be so construed." It is apparent from the devise and from the whole will, that the words "heirs male" are to be construed as words of purchase and not of limitation.

The plaintiff in his writ claims an estate in fee-simple. The evidence shows one in fee-tail. By R. S., 1857, c. 104, § 3, the demandant is to set forth the estate claimed. This he having failed to

do, the action is not maintainable. *Rawson* v. *Taylor*, 57 Maine, 343.

No motion to amend was made at *nisi prius*, as was the case in *Howe* v. *Wildes*, 34 Maine, 566. It does not appear that the counsel for the tenant was aware of the existence of any request for an amendment in the argument of the plaintiff's counsel. The amendment under the circumstances is not allowed. *Plaintiff nonsuit.*

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

JOSEPH A. STICKNEY *vs.* ICHABOD G. JORDAN.

Promissory note. Lex loci contractus.

When no place of payment is named in a promissory note, it must be construed according to the law of the place where it is made.

Compound interest is recoverable in this State, in an action on a promissory note given in New Hampshire, to a payee, resident there, and made payable with interest annually.

ON REPORT.

ASSUMPSIT on a promissory note payable to one William Bedell or order, on demand, with interest annually, and by him indorsed to the plaintiff. Several payments had been made at different times, and indorsed.

The note was executed and delivered by the defendant, in the State of New Hampshire, at the defendant's place of business there, he having then, and ever since, resided in Maine, but had an office, as a place of business, in New Hampshire. The payee, at the time the note was given, was, and ever since has been, a resident of New Hampshire. The plaintiff, at the time the note was indorsed to him, was, and ever since has been, a resident of New Hampshire. And the payments were made there.

Plaintiff claimed that interest should be cast, and the payments appropriated according to the rule adopted by the courts of New Hampshire; and the defendant contended that interest should be cast according to the law of this State.

The court to decide which mode of computing interest should be adopted, and render judgment according to law.

W. J. Copeland, for the plaintiff.

Jordan, pro se.

APPLETON, C. J. This is an action of assumpsit upon a promissory note, payable to one Wm. Bedell, or order, on demand, and interest annually. The note was made and delivered in New Hampshire where the payee resided, and the maker had his place of business.

By the law of New Hampshire, as evidenced by the judicial decisions of its highest tribunal, where there is an agreement to pay interest annually, the rule is, that for the detention of the annual interest, simple interest is to be computed from the time such annual interest becomes due. *Pierce* v. *Rowe*, 1 N. H. 179; *Little* v. *Riley*, 43 N. H. 113; *Townsend* v. *Riley*, 46 N. H. 300. In this State interest upon interest is not allowed, though the contract is to pay interest annually. *Doe* v. *Warren*, 7 Greenl. 48; *Bannister* v. *Roberts*, 35 Maine, 75. The rate of interest as established in each State is the same, but a different construction is given to a contract to pay annual interest in New Hampshire, from that given to the same contract by the courts of this State. In other words, the same contract is followed by other and more onerous results in that State than in this.

As the contract in suit was made in New Hampshire, the law of the place must govern as to the validity and interpretation and legal effect of the contract. If the parties have used technical terms, it is the technical sense applied to such words, at the place where the contract is entered into, that must govern. The parties, as to the construction of their contract, must be deemed as having contemplated the law of the place, not any foreign law. Thus, if by the *lex loci* the day of performance of a contract is extended to Monday, when the contemplated day of performance falls on Sunday, the rule will be so applied in Massachusetts, where the contract was

to be performed. *Stebbins* v. *Leowolf*, 3 Cush. 137. So the rate of interest of the *lex loci contractus* controls, though it may be higher than that of the *lex fori*. But it is not merely the statute law by which the validity and binding force of a contract is to be determined. The *lex loci contractus* governs as to its construction. Now the promise of the defendant was to pay interest annually, according to the construction given to the contract in question, in New Hampshire. It was as much a part of his contract to do so, as to pay interest. It was a valid contract by the law of that State, and would be there enforced. If the defendant promised to pay interest, it was the interest prescribed by the statute; when he added the word annually and promised to pay annual interest, he equally made the judicial decisions of that State a part of his contract, and must be deemed as having contracted with reference to them. His promise thus made is to be everywhere enforced according to its legal effect when and where it was made. When no place of payment is named, it is payable at the place where it is made, and it must be construed according to the law of that place. *Thompson* v. *Ketcham*, 8 Johns. 189.

When the *lex loci contractus* recognizes the validity of compound interest, and the contract, according to its terms as there construed, gives it, if enforced in another jurisdiction, it will be there allowed. *Little* v. *Riley*, 43 N. H. 109. The English cases repudiate the limitation of interest to the measure of the *lex fori*, and Lord Cottenham in *Fergusson* v. *Fyffe*, 8 Cl. & F. 121, in reference to an alleged agreement to pay compound interest on the balance of an account stated, said that its validity depended on the place where the debt was contracted. Westlake on Private International Law, 192, § 206. The defendant cannot complain that he is required to perform the contract according to his understanding of it when entered into.

Judgment for plaintiff, and interest to be computed and payments appropriated according to the law of New Hampshire.

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

EZEKIEL AUSTIN, *scire-facias*, *vs.* WILLIAM GOODALE.

Scire-facias against trustee.

The return of "unsatisfied" made before the return-day upon an execution against the principal defendant, will not authorize the issuing of a writ of *scire-facias* after the return-day against the person adjudged trustee.

ON EXCEPTIONS.

Scire-facias, dated Feb. 19, 1869, against the defendant, as trustee of one Staples, brought under R. S., c. 86, § 67.

The declaration alleged, *inter alia*, that the original judgment was recovered Oct. 9, 1868, execution issued Oct. 10, 1868, against Staples as principal, and the defendant as trustee; that an officer, having the execution, made a demand on the trustee, Nov. 6, 1868, for the goods, effects, and credits of the principal in his hands, to be taken on the execution, but the trustee refused to deliver them; that on Jan. 5, 1869, the officer returned that he had made diligent search for the goods, chattels, rights, and credits whereon to levy the execution, and could not find any in his precinct.

To this declaration the defendant filed a general demurrer, which was joined.

The presiding judge overruled the demurrer, and adjudged the declaration good; whereupon the defendant alleged exceptions.

G. C. Yeaton, for the plaintiff.

I. *Scire-facias* against a trustee differs from *scire-facias* against bail, in this: the former is simply a sequel to the original action to perfect the plaintiff's remedy; the latter is a new and distinct action. *Adams* v. *Rowe*, 11 Maine, 95. *Scire-facias* against bail is founded upon a contract between the plaintiff and defendant; in *scire-facias* against a trustee there is no privity of contract whatever between the parties. In the one, the relation with all the rights arising therefrom is voluntary, self-imposed; in the other, involuntary. Bail are sureties; their contract is conditional. The law cannot

enforce such contract without requiring a strict and full performance of all its conditions, the principal one of which is to respond only in the event of the avoidance of the principal, after every reasonable effort of the plaintiff to collect of him, and until this be shown, the plaintiff has no claim on the surety. The statute alone, without consulting the trustee, or giving him any voice in fixing the conditions, imposes certain duties upon him. The law makes him a mere "stakeholder," and he, in the absence of any statute provision to that effect, cannot require the plaintiff to use any diligence in collecting of the principal defendant. The only real defense he can have to *scire-facias* is *nul tiel record*, or satisfaction of the judgment. *Davidson* v. *Thornton*, 7 Barr, 128. And the satisfaction must be actual. No want of diligence to obtain it from the principal defendant is equivalent, or can avail a defendant in *scire-facias*, if the plaintiff has complied with the statute by demanding of him within thirty days after judgment in the original action.

The only prerequisites to the maintenance of *scire-facias* against a trustee is judgment, execution, demand, refusal; and "he cannot avail himself of that which was not and could not be the reason of his omission to surrender the property in bar of this action." *Franklin Bank* v. *Bachelder*, 23 Maine, 66.

This distinction is recognized in *Adams* v. *Cummiskey*, 4 Cush. 420, where the court say, "We cannot distinguish this case in principle from that of a writ of *scire-facias* against bail," which is a simple antithesis for "we do distinguish *scire-facias* against a trustee generally from that against bail." In that case the execution, dated June 8, was returned unsatisfied June 20; *scire-facias* issued June 22. The Massachusetts statute (differing in this particular from ours), allowed *scire-facias* only where "the execution is not otherwise satisfied." It could not be known, therefore, whether or not the execution would be "otherwise satisfied until its return-day;" for "it may be otherwise satisfied at any time while it remains in force."

Had *scire-facias* issued after the return-day of the execution, in that case it would have resembled the case at bar, and the reason-

ing there have been applicable here. But when the execution ceased to be in force, it could not be satisfied; and *cessante ratione legis, cessat ipsa lex.*

That case was not "to be distinguished in principle from *scire-facias* against bail," because the statute had in terms given *scire-facias* only upon conditions which his case did not fulfill; and he then stood as to that action which rested solely upon the statute, as a plaintiff to his *scire-facias* against bail, which rests solely upon his own conditional contract, the conditions of which he has not fulfilled.

It is believed that no case can be found wherein it has been held that *scire-facias* against a trustee commenced after the return-day of the execution was prematurely brought.

Roberts v. *Knight*, 48 Maine, 171, is no authority in the case at bar; for there the writ was issued before the return-day. In *Whitney* v. *Hammond*, 44 Maine, 319, which was *scire-facias* against a member of a corporation, the writ issued before the return-day. So in *Page* v. *Smith*, 25 Maine, 25, which was *scire-facias* against a trustee, the writ was issued before return-day, the question was discussed in argument, but not adverted to by the court. In *Franklin Bank* v. *Bachelder*, 23 Maine, 66, the writ was issued before the return-day, and the plaintiff prevailed.

II. The nature and purpose of trustee process and *scire-facias*, its sequel, accord with this view.

If *scire-facias* will not lie until all means of realizing from the other estate of the original defendant have been exhausted, then a plea in the trustee suit by the principal defendant or trustee of other sufficient visible property would be a bar; and whether trustee holds funds or not, he must be discharged; for the law would not provide trustee process when the judgment therein could not be made productive by direct enforcement against the trustee.

All of a debtor's property may be attached, and a plaintiff may satisfy his judgment from such as the creditor and not the debtor elects. *Gray* v. *Chase*, 57 Maine, 558. The only restraint the law imposes upon the creditor's absolute choice is in favor of the

debtor's person, which is to be a last resort. All his property not specifically exempted, whether in his or another's possession, is open to attachment, either directly, or indirectly by trustee process. Drake on Attachment, 451; *Wheeler* v. *Bowen*, 20 Pick. 564.

"Trustee process operates as a species of compulsory statute assignment, by which a creditor may obtain that by operation of law which the debtor might voluntarily assign to him in payment of his debts." *Strong* v. *Smith*, 1 Met. 476.

III. R. S., c. 86, § 67, does not contain the clause "if not otherwise satisfied," as did the Massachusetts statute, when *Adams* v. *Cummiskey* was decided. Our statute of 1821, c. 61, § 9, provided, "When the execution is returned unsatisfied, by reason of the trustee not dicovering and exposing sufficient goods," etc., the plaintiff may have *scire-facias*. This statute received judicial construction in *Patterson* v. *Patten*, 15 Mass. 474, where the court says that the legislative intention was that "no trustee shall be held personally liable on execution until he has had opportunity to discharge himself by exposing goods," etc., or paying over the money; and the return was to be "unsatisfied for the reason expressed in the statute." Modern transcripts of this statute are abbreviated in phraseology; still it is manifestly in consonance with the whole theory of the action, as also with the remarks of Tenney, J., in *Franklin Bank* v. *Bachelder*, that "unsatisfied" should bear precisely the same significance.

IV. Statutes in *pari materia*, and particularly every section of the same statute, must be construed together. R. S., c. 86, § 73, provides for the dissolution of the attachment if no demand be made within thirty days. *McAlister* v. *Furlong*, 36 Maine, 307. §§ 44 and 45 require the trustee to deliver specific articles to the officer. When? Of course when demanded. Section 67. "This is done that the property may be converted into money by the officer, . . . or if not delivered, that the foundation for a writ of *scire-facias* may be laid." *Bachelder* v. *Merriam*, 34 Maine, 73. This decision was made under R. S., 1840, c. 60, § 74, which is identical with R. S., 1857, c. 86, § 67. Now the goods so delivered up

must be sold after being kept at least four days. R. S., c. 84, § 3, and c. 86, § 44. And this within the life of the execution, which is manifestly impossible if the trustee is to take the whole life of the execution, in which to see if it is not otherwise satisfied before he answers the demand of the officer upon him. Section 67 makes no difference in the duty of the trustee, whether he has goods or money in his hands.

Dane & Bourne, for the defendant.

KENT, J. It has been decided in this State and in Massachusetts, that *scire-facias* will not lie against a trustee, until "the execution is returned unsatisfied," and that the return intended by the statute is one made on the return-day, and that, until after such return, no suit against the trustee can be instituted, although a demand had been made on him, and he had neglected or refused to pay over or deliver the property. *Roberts* v. *Knights*, 48 Maine, 171; *Adams* v. *Cummiskey*, 4 Cush. 420.

The point made by the plaintiff in this case is a single one, and that is, that, although the return of the execution was made before the day named in it for its return, yet that the three months in which it was in force had expired before this suit was commenced.

An examination of the cases cited, and other cases bearing upon the question, satisfies us that the point is not well taken. The reason why such *scire-facias* could not issue is that the law intends that the creditors shall look primarily to the property in possession of the debtors, and that the trustee shall not be called upon, until it is shown by a return of *nulla bona* that the execution could not be satisfied otherwise during the time it was in force. The statute (R. S., c. 86, § 67) is express, that before *scire-facias* can issue, it must be shown that "the execution is returned unsatisfied." This court, in *Roberts* v. *Knights*, say, "Until this is done, it is uncertain whether it may not be satisfied by the principal defendant. Nor can this uncertainty be removed until the return-day of the execution. It is only when the officer has used the powers con-

ferred by the process, during the whole time given to him, that he can return it unsatisfied within the meaning of the statute."

The same principle is stated in the case of *Adams* v. *Cummiskey*. The court in that case say, "The trustee cannot be held liable to a *scire-facias* before the return-day, because the execution may be 'otherwise satisfied' at any time while it remains in force, although he has refused to pay over to the officer, goods, effects, or credits sufficient to satisfy it."

The fact that the three months had expired before suit, cannot take the case out of the principle of these cases. The objection is that the execution was not in the hands of an officer or party for three months, but was returned while in force, and that the return contemplated by the statute could only be made on or after the return-day. The date of the writ of *scire-facias* is not the material point, but the date of the return. *Exceptions sustained.*

Demurrer sustained.

Judgment for defendant.

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

CHARLES KELTON, administrator, *vs.* EBENEZER HILL & others.

Evidence. Fact for jury. Instruction.

A cash item of six dollars and sixty-seven cents is the largest amount that can be proved by a party's book and suppletory oath.

Where the amount of an item of credit in a plaintiff's account, annexed to the writ, is conceded by both parties to be erroneous, and no specific amount is agreed upon, it is for the jury to fix the amount from the evidence.

And it is erroneous in such case to instruct the jury that they may allow the defendants' account in set-off, inasmuch as its amount is less than the plaintiff's item of credit.

ON EXCEPTIONS.

ASSUMPSIT on account annexed for the labor and services of the plaintiff's intestate, amounting to $263.82, with an item of credit of "cash and sundries at sundry times," $156.

The defendant filed an account in set-off, comprising an item of "cash, goods, and merchandise delivered and paid in settlement of" the intestate's account, to Dec. 2, 1863, $95.88, and three other items amounting to $7.17.

The plaintiff objected to the introduction of the defendants' book of account for the purpose of proving items of cash of more than forty shillings, or any other item not properly a book charge.

The defendants' counsel declared that they had never paid Joseph Thompson so much money as was credited in the account sued ($156), and the plaintiff said it was an estimate of the amount which he supposed to have been received from the defendants, by the intestate.

All the items of the account, in set-off, were proved by book and suppletory oath of the defendants, and one item of $75 by another witness.

The presiding judge instructed the jury,—

That, ordinarily, a man was concluded by the statement of credit, entered by him, upon an account sued; but that, as it was here confessed that so much money had not in fact been paid by the defendants to Joseph Thompson, he should instruct them that they might consider that the plaintiff was not concluded, by the credit in the writ, to the whole amount of $156; but they might allow the defendants the amount of their account in set-off, inasmuch as it was less than the amount of credit given on plaintiff's account annexed.

There was, in fact, no evidence of the amount paid by the defendants to the intestate (Thompson), except what could be obtained from the book-account.

The jury returned a verdict for the plaintiff for $26.82, and the plaintiff alleged exceptions.

E. B. Smith, for the plaintiff.

Drew, for the defendants.

APPLETON, C. J. This was an action brought by the plaintiff, as administrator of the goods and estates of Joseph Thompson, on the balance of an account annexed, to which an account in set-off was duly filed.

As the suit is by an administrator, the defendants are not admissible as witnesses generally. They could not testify as to payments, except within the limitations allowed in book-accounts, nor as to any settlements made with the plaintiff's intestate.

The account-books of a party are admissible, with his suppletory oath to prove a charge of money to the amount of $6.67. As the defendants could not testify generally, their testimony must be restricted to what can be proved by their books and suppletory oath.

The credit of the plaintiff was conceded by both sides to be erroneous. No specific credit was agreed upon. It was left indefinite and uncertain. The amount was left to the jury, and it was for them to fix the amount due from the evidence. There was nothing else upon which they could rely.

The presiding justice instructed the jury "that the book ordinarily would not prove any item of cash payment, above forty shillings, or $6.67; but that as he had instructed them that the plaintiff was not concluded by the entry of credit upon his account annexed, he should and did tell them that they might allow the defendants the amount of their account in set-off inasmuch as it was less than the amount of credit given upon the plaintiff's account annexed; that the plaintiff would be held to a credit to this amount, and the judge stated the credit, as per book, to the jury, to be about $106."

As the credit was admitted to be erroneous, and as no sum was agreed upon, it remained for the defendants to prove the items of their account. The jury could not properly allow the defendants' account, unless established by proof, merely because it was less than the amount of a credit which had been inadvertently and erroneously given, if there was no proof to sustain it, and when it was denied by the plaintiff. *Exceptions sustained.*

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

SARAH H. TROWBRIDGE, in equity, *vs.* AARON B. HOLDEN, administrator & another.

Witness. Gift.

In the hearing of a bill in equity, brought to compel the administrator of the estate of the plaintiff's husband to indorse a note alleged to have been given to her by her husband, the deposition of the plaintiff, to prove the gift, is inadmissible.

To establish a gift of the note of a third person, from a husband to his wife, the evidence should be such as to satisfy the court not only that the donor said and did what is necessary to constitute a valid gift, but that it was, in very deed, his intention, at the time, to part with his own property in it, and bestow it upon the donee, for her independent and individual use.

BILL IN EQUITY, heard on bill, answer, and proofs.

The bill is against the administrator of the estate of the plaintiff's husband and his only child and heir at law, and, after setting out the death of her husband and the appointment of the defendant, Holden, alleges substantially:

That in November, 1866, Charles Trowbridge, who was then, and for more than thirty years had been her husband, owning certain land (described), and buildings thereon, situate in Portland, conveyed the same to Caroline M. Fosdick, for one thousand dollars cash, and a note for one thousand dollars, payable in six years, signed by herself and husband, and secured by a mortgage upon the premises; and that the plaintiff joined in her husband's deed for the purpose of releasing her right of dower in the premises.

That in consideration of the plaintiff's release of dower in the premises, and also in their homestead, in a certain mortgage deed of the same, and in consideration of love and affection, her husband, at the time the said note was given, gave the same to her, to be her own property, with the right to collect the same to her own use, when it should become due; that she has always had, and still has, possession of the same; and that when it was given her, her husband promised and intended to indorse it, but neglected so to do; that he never assigned to her the mortgage, securing the note, but that he, until his death, held the mortgage in trust for her.

That in August, 1869, since the appointment of the respondent, Holden, the plaintiff notified him that she owned the note, and requested him to indorse it and assign the mortgage in his official capacity; that he declined, and claimed the note and mortgage as part of the assets of her husband's estate.

That the said administrator, in June, 1869, commenced proceedings to collect the note by foreclosing the mortgage, by an action at law against the mortgager, which is now pending.

Prayer, that the respondent may answer; and that the administrator be required to indorse the note and assign the mortgage to the complainant; and that he be ordered, in case he shall recover in the action upon the mortgage, to hold the land and the money (if any), paid upon the conditional judgment therefor, in trust to the use of the complainant, etc.

The answers denied the gift.

Plaintiff put in the deposition of herself tending to prove the gift.

Also, the depositions of Charles S. Trowbridge, nephew of the complainant, and of Anna Latham, a boarder there, from which it appeared that one day at dinner, about two weeks after the sale of the house, the deponent saw Charles Trowbridge hand his wife a paper, saying to her at the same time, "Here is a present for you;" that she asked what it was, and her husband answered, "Look and see;" that she thereupon read it and remarked, "This seems to be a note;" that Mr. Trowbridge rejoined, "Yes; it is a note for a thousand dollars, secured by a mortgage on the house which I sold Fosdick;" that Mrs. Trowbridge expressed her thanks to her husband, and he told her to put the note away where she could find it, and take care of it; and that some time afterwards, deponent heard Mr. Trowbridge ask his wife when she was going to collect the interest on that note.

From the deposition of Rhoda N. Young, it appeared, that, in the fall of 1867, while taking care of her daughter at Mr. Charles Trowbridge's, he came in and asked his wife (complainant) for the mortgage note of Mrs. Fosdick; that he said "he could not find it among his papers at the factory;" that the complainant went up

stairs and came down and said, "here it is;" that it was in a little box with some other papers; that the deponent passed into another room and did not see whether the complainant handed any paper to her husband; and that her impression was that Mr. Trowbridge thereupon went out of the house.

From the deposition of Daniel P. Young (husband of the other respondent), it appeared that about ten days after Charles Trowbridge's death, the deponent had a conversation with Charles S. Trowbridge (witness for plaintiff), and asked him if he knew how much Charles Trowbridge was owing; that C. S. Trowbridge replied that he did; that witness then asked him if he probably had enough to pay what he was owing; that Trowbridge responded that "there was one bill due to the estate which would be enough to pay all the estate owed;" that witness asked what bill, and Trowbridge replied, "Mrs. Fosdick's note of one thousand dollars, secured by a mortgage on the place."

Davis & Drummond, for the complainant, contended that the complainant's deposition, and other proof, with her possession, established her title.

1. The assignment or delivery of a note, though it is payable "to order," without indorsement by the payee, will pass the property. 2 Parsons on Notes and Bills, 52, 53; *Littlefield* v. *Smith*, 17 Maine, 327; *Grover* v. *Grover*, 24 Pick. 261.

2. The administrator has power in such case to indorse the note for his intestate. 1 Parsons on Notes and Bills, 157; Byles on Bills, 40; *Rand* v. *Hubbard*, 4 Met. 252, 258; *Malbone* v. *Southard*, 36 Maine, 147.

3. He may be compelled to indorse, by a bill in equity. 1 Parsons on Bills and Notes, 159, 160; Byles on Bills, 119; *Walkins* v. *Marsh*, 2 Jac. & Walk. 242.

4. And he may also be compelled, in equity, to assign the mortgage. *Johnson* v. *Candage*, 31 Maine, 28; *Moore* v. *Ware*, 38 Maine, 496; *Stone* v. *Locke*, 46 Maine, 445.

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

BARROWS, J. Sarah H. Trowbridge, widow of Charles Trowbridge, claims that a certain promissory note, in her possession, for $1000 and interest, payable to the order of said Charles, and not indorsed by him, and a certain mortgage given to the said Charles to secure the payment of said note, and never assigned or delivered by her husband to her, do in fact belong to her, and not to the estate of her deceased husband; and she brings this bill in equity against the administrator on her husband's estate, joining the sole heir at law, as a defendant therein, to compel the administrator to indorse said note, and assign and deliver said mortgage to her, in order that she may collect the note for her own use.

If she shows a clear title to the note, as her own property, no reason is perceived why the administrator should not be required to do it.

The defendant's counsel do not controvert this, and the authorities cited for the plaintiff seem fully to warrant it.

But the defendants, in their answer, say that they have no reason to believe, and do not believe that she has such title. The burden of proof is upon her to establish it. To do this she offers, with other testimony, her own deposition. Her testimony, tending to establish a gift of this note to her, by her husband in his life-time, and relating to matters occurring before his decease, is plainly inadmissible under any of our statutes authorizing the examination of parties as witnesses "in any civil suit, or proceeding at law, or in equity." In a suit at common law there is no pretense that her testimony would be admissible, but the suggestion is that it may be in equity.

In general, the rules of evidence, and those determining the competency or incompetency of witnesses, and other proofs prevailing at law, are recognized in equity. *Manning* v. *Lechmere*, 1 Atkyns, 453; *Glynn* v. *Bank of England*, 2 Vesey, 41.

While under the civil law, and also in proceedings in equity, it was always competent for a party, in some form, to obtain the testimony of the adverse party, in relation to the matter in controversy, if he chose to take it; we do not understand that a party in equity was

ever allowed to volunteer his own testimony, in support of his own claim, until it was authorized by express legislative enactment. As before remarked, our statutes do not reach this case, and the testimony of Mrs. Trowbridge, as to the alleged gift, must be excluded.

One may doubtless make a valid gift of a note and mortgage, without indorsing or assigning them by any written instrument. *Borneman* v. *Sidelinger*, 15 Maine, 429; *Wing* v. *Merchant*, 57 Maine, 383.

But those who desire to make a disposition of their property, different from that which the law would make in the event of their decease, have it in their power to leave written evidence of their intentions, for the guidance of survivors; and claims of this description, especially when preferred by wives who are so often the depositaries of their husband's papers and valuables, ought always to be supported by evidence of a thoroughly convincing character,—evidence which shall satisfy the court, who are to pass upon it, not only that the deceased said and did what is necessary to constitute a valid gift, but that it was, in very deed, his intention, at the time, to part with his own property, in the subject of the gift, and bestow it upon the donee for his or her independent and individual use.

The depositions of the plaintiff's nephew and niece go to show that one day at the dinner-table, about the time Mr. Trowbridge received this note and mortgage, he took the note out of his pocket and handed it across the table to his wife, saying, "here is a present for you,—take it and take care of it." It is true this may import a gift; but neither this, nor the wife's reply, nor the whole conversation which occurred at the time as detailed by the nephew, nor the time, place, or circumstances of the transaction seems to us to resemble what would be likely to occur between husband and wife, if the husband was designing to devest himself of so considerable a sum, and to bestow it on the wife to be held by her thereafterwards as her own property.

That the nephew did not so understand this conversation, is man-

ifest from his statement to the defendant's witness, after Trowbridge's death, that he left one bill due to him which would be enough to pay all he was owing,—the note of Mrs. Fosdick, secured by a mortgage on the house. The statement of complainant's witnesses, that the husband put off the wife's calls on him for money, by asking her why she did not collect the interest on the note, is more than offset by the conversation which occurred between the husband and wife at the house in the fall of 1867, as testified to by Rhoda N. Young; Mr. Trowbridge came in and asked his wife for the mortgage note of Mrs. Fosdick,—said he could not find it among his papers at the factory. She went upstairs and came down and said to him, "here it is;" it was in a little box with some other papers. It is reasonable to suppose that if the wife had at that time regarded it as her separate property, she would, at least, have asked him what he was going to do with it.

This certainly seems more as if they both understood that the wife was the custodian rather than the owner of the note.

In fine, we think a business man like this decedent, if he had intended to transfer property to this amount, from himself to his wife to hold as her own, if he did not indorse the note and assign the mortgage, would, at least, have left some better evidence of his intention to make the gift, than this loose talk at a dinner-table.

We do not like to place on record so mischievous a precedent for claims of this sort, as we must do if we lightly sustain one that is supported by evidence so dubious and so liable to misinterpretation. We have no reluctance in reaching this conclusion, because, where there is personal property sufficient to do it, it is always in the power of the probate judge to make reasonable provision for a widow by way of allowance.

We have no occasion to determine whether it was necessary or proper to join the heir at law as defendant, as the entry must be

Bill dismissed with costs.

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

TAPLEY, J., did not concur.

STATE OF MAINE *vs.* BENJAMIN D. PECK & others.

Bond of treasurer of State—pleading—replication—judgment.

A bond in a penal sum, given by the treasurer of State, with sureties, to the State, conditioned for the faithful performance of the official duties of the treasurer; that he will render an account, when required by the legislature, of all sums of money he shall receive into the treasury, and pay to his successor, or any other person appointed by the legislature to receive the same, all such sums of money and property upon settlement of his accounts as shall be found due from him, as treasurer, to the State; "that during his continuance in office, he will not engage in any business of trade or commerce, or as a broker, nor as agent or factor for any merchant or trader;" "that he will render a true account . . . to the legislature . . . on the first Wednesday of January" following the date of such bond, and faithfully and without delay deliver to his successor all the moneys, books, property, and appurtenances of said office remaining in his hands, and pay over all such balances as shall appear due, etc., is a "contract in a penal sum for the performance of covenants or agreements" within R. S., c. 82, § 16.

To a plea of general performance of the conditions of the bond of the treasurer of State, the plaintiff replied that the principal defendant "continued to hold and exercise the office of treasurer of State, to which he was chosen, as in said condition of said writing obligatory mentioned, . . . from Jan. 13, 1858, to Feb. 4, 1859; that during said time, . . . on Jan. 14, 1858, and on divers other days and times between that day and the said Feb. 4, 1859, at," etc., the principal defendant, "as such treasurer, had and received divers sums of money amounting in the whole to the sum of thirty-nine thousand, two hundred and thirty-one dollars and nineteen cents, belonging to the State, and hath not accounted for or paid to the State the same, or any part thereof, although often requested so to do, but hath therein wholly failed, and made default;" "and that the same is still wholly unpaid and unsatisfied, contrary to the form and effect of the said condition of the said writing obligatory." On special demurrer, *Held*, that the replication sets out the breach with sufficient particularity and precision.

In such cases, general pleading is allowable when the facts constituting the breach lie more in the knowledge of the opposite party than of the party pleading.

Where the aggregate amount of the breaches is set out in the replication, and the replication is adjudged good on demurrer, judgment must go for the amount thus claimed, unless the demurrer is, with the consent of the other party, and by leave of the court, withdrawn under R. S., c. 82, § 19.

ON EXCEPTIONS.

DEBT on the official bond of Benjamin D. Peck, treasurer of State, dated Jan. 28, 1858.

The writ was dated Jan. 15, 1861; and the action was entered April term, 1861.

At the April term, 1868, the defendants filed the following plea:

And the said defendants, except Wm. Chase, come and defend, etc., when, etc., and crave oyer of the said writing obligatory, and it is read to them; they also crave oyer of the condition thereof, and it is read to them, in the words following: "The condition of this obligation is such, that whereas the said Benjamin D. Peck was, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, in the manner prescribed by the constitution, duly chosen treasurer of said State. Now, therefore, if the said Benjamin D. Peck shall duly and faithfully discharge the duty of this trust according to law, and render an account when and so often as he shall be required by the legislature of all such sum or sums of money as he shall from time to time receive into the treasury, and shall well and truly pay to his successor in office, or to any other person that may be appointed by the legislature to receive the same, all such sums or sum of money, books, property, and appurtenances, as upon such settlement of his accounts or otherwise shall be found due and payable from him or his agents or servants to this State as treasurer aforesaid; and that during his continuance in office, he will not engage in any business of trade or commerce, or as a broker, nor as agent or factor for any merchant or trader; and that he or his executors or administrators or sureties, or their respective executors or administrators shall and will render a true and just account of all his and his agents and servants doings and transactions in said office to the legislature or such committee as they shall appoint, on the first Wednesday of January, eighteen hundred and fifty-nine, and previous to a new treasurer being chosen, and at any other time that shall be required by the legislature or the governor and council, and that he will settle and adjust said accounts, and faithfully and without delay deliver over to the treasurer then to be chosen, or such person or persons all and singular the moneys, books, property, and appurtenances of said office being and remaining in his hands, or in the

hands of his agents and servants, and truly and without delay to pay over all such balances that shall appear due upon the adjustment of the accounts of said office, then the foregoing obligation to be void and of no effect, but in default thereof, to remain in full force and effect;" all which being read and heard, the said defendants say that the plaintiff his action aforesaid against them, ought not to have and maintain, because they say that the said Benjamin D. Peck, from the time of the making of said writing obligatory, well and truly kept and performed all the covenants and conditions therein on his part to be kept and performed, according to the form and effect of the said writing obligatory. And this they are ready to verify; wherefore they pray judgment, if the plaintiff his action aforesaid against them ought to have or maintain, and for their costs.

To this plea the plaintiff replied as follows:

And the said State of Maine, as to the said plea of the said defendants Peck, Carter, Cummings, Haines, Dyer, and Dow, by them above pleaded, saith that the said State of Maine, by reason of anything by the said Peck, Carter, Cummings, Haines, Dyer, and Dow, in their plea alleged, ought not to be barred from having and maintaining its said action thereof against them, the said Peck, Carter, Cummings, Haines, Dyer, and Dow; because said State of Maine saith that the said Benjamin D. Peck remained and continued in the service and employment of the State of Maine, as such treasurer of said State, as in the said condition of said writing obligatory mentioned, and continued to hold and exercise the said office of treasurer of State to which he was chosen, as in said condition of said writing obligatory mentioned, for a long space of time, to wit, from the thirteenth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, until and upon the fourth day of February, in the year of our Lord one thousand eight hundred and fifty-nine; and that during the said time, that he, the said Benjamin D. Peck, so remained and continued in the service and employment of said State of Maine as its treasurer, and continued to hold and exercise the said office of treasurer, as afore-

said, to wit, on the fourteenth day of January, in the year of the Lord one thousand eight hundred and fifty-eight, and on divers other days and times between that day and the said fourth day of February, in the year of the Lord one thousand eight hundred and fifty-nine, to wit, at Augusta, in the county of Kennebec in said State, he, the said Benjamin D. Peck, as such treasurer of said State, as aforesaid, had and received divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of thirty-nine thousand two hundred and thirty-one dollars and nineteen cents, belonging to the said State of Maine, and hath not accounted for or paid to the plaintiff the same, or any part thereof, although often requested so to do, but hath therein wholly failed and made default; and the said sum of money, so had and received by the said Benjamin D. Peck as aforesaid, is still wholly unpaid and unsatisfied to the said State of Maine, contrary to the form and effect of the said condition of the said writing obligatory; and this the said State of Maine is ready to verify, wherefore said State prays judgment and its debt aforesaid, together with its damages by it sustained, on occasion of the detention thereof, to be adjudged to it, and costs.

To this replication the defendants demurred specially as follows:

And the said defendants, Peck, Carter, Cummings, Haines, Dyer, and Dow, come and say that the replication of the said State of Maine in manner and form aforesaid made, and the matters therein contained, are not sufficient in law for the said State of Maine to have or maintain its said action, and that they, the said defendants, are not bound by law to answer the same in manner and form aforesaid made. And this they are ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendants pray judgment if the said State of Maine ought to have or maintain its action aforesaid against them, and for their costs.

And for causes of demurrer in law to the said replication, the said defendants state and show to the court here, that the said State of Maine has not and does not in and by its said replication set

forth and state with particularity and precision the breach of condition by said Benjamin D. Peck in their said writing obligatory, and the particular items thereof; and the assignment of a breach of said writing obligatory, and the condition thereof in the said replication of the said State of Maine is insufficient and defective in law, in particularity, and precision; and also that the said replication is in other respects uncertain, informal, and insufficient.

Upon joinder of the demurrer, the presiding judge sustained the demurrer, and adjudged the replication bad; whereupon the plaintiff alleged exceptions.

T. B. Reed, attorney-general, for the State.

After elaborately arguing that the plea was bad, made the following points:

I. The replication is sufficient.

1. Because "any replication is good in answer to a plea substantially bad." *Frost* v. *Hammatt*, 11 Pick. 75.

2. Because it is good without reference to the plea. *Calvert* v. *Gordon*, 7 B. & C. 809; *Shum* v. *Farrington*, 1 B. & P. 640; *Barton* v. *Webb*, 8 T. R. 459; *Jones* v. *Williams*, Doug. 214; *Cornwallis* v. *Savory*, 2 Burr. 772; *American Bank* v. *Adams*, 12 Pick. 303; *Morris Can. & Banking Co.* v. *Van Vorst*, 3 Zab. 98; *Davis* v. *Roach*, 9 Grat. 13; *People* v. *Dunlap*, 13 Johns. 437; 3 Chit. Pl. 178, and note b; 1 Chit. Pl. 585, notes and cases cited.

When a subject comprehends multiplicity of matter and much detail, then, to avoid prolixity, general pleading is allowable. 2 Wms. Saund. 410, note 4; *J'Ansen* v. *Stuart*, 1 T. R. 753; *Finley* v. *Ashley*, 15 Pick. 553; Steph. Pl. 535, and cases cited; *Braham* v. *Bacon*, Cro. Eliz. 916.

General pleading is also allowed when the facts lie more in the knowledge of the opposite party, than of the party pleading. *Gale* v. *Reed*, 8 East. 80.

II. If the plea be bad, or the replication good, judgment must be final for the State. R. S., c. 82, § 9; compare Public Laws of 1856, c. 211, § 1, and Public Laws of 1857, c. 55, § 3.

And for $39,231.19; for the demurrer confesses that amount

due. 1 Chit. Pl. 662; Steph. Pl. 143, and cases cited; 1 Wms. Saund. 337 b, note 3; Arch. Pl. and Ev. 350; Gould Pl. 461, 477, § 43; *Holson* v. *McArthur*, 3 McLean, 241; *Hall* v. *Bartlett*, 9 Barb. 297; *Greene* v. *Hearne*, 3 T. R. 301; *Moody* v. *Pheasant*, 2 B. & P. 446; *Tripp* v. *Thomas*, 10 E. C. L. 139.

Where the damages are certain on the record, there will be no writ of inquiry. 1 Sellon's Pr. 355.

On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleading, and found in favor of the same party. Gould Pl., part I, c. ix, §§ 42, 477.

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

The replication should be more particular and definite, and more distinctly inform the defendants what is claimed of them. An allegation that Peck received "divers sums of money" is no assignment of breaches, which is a specification of claims.

The English decisions supporting such a replication were made under the provisions of the statute, 8 & 9 Wm. 3, c. 11; which statute was never adopted here. *Bailey* v. *Rogers*, 1 Greenl. 186.

At common law, the plaintiff in such an action as this can assign only one breach. We assign breaches under R. S. of 1857, c. 82, § 17, which requires a particular assignment and specification of the breaches relied upon.

Counsel cited 1 Chit. Pl. 585; *Bailey* v. *Rogers*, 1 Greenl. 186.

If the replication be good or the plea bad, judgment will be only interlocutory,—that the defendants answer over.

Barrows, J. The defendants craved and had oyer of the bond declared on, and of the condition thereof which recites the election of Peck as treasurer of State, and provides in substance that if he shall duly and faithfully discharge the duty of this trust according to law, and render an account, when required by the legislature, of such sums of money as he shall receive, and shall well and truly pay to his successor in office, or to any other person that may be

appointed by the legislature to receive the same, "all such sums of money, books, property, and appurtenances, as upon such settlement of his accounts, or otherwise, shall be found due and payable from him, or his agents or servants, to this State as treasurer;" "and that during his continuance in office, he will not engage in any business of trade or commerce, or as a broker, nor as agent or factor for any merchant or trader," "and that he will render a true and just account . . . to the legislature . . . on the first Wednesday of January, 1859, . . . and faithfully and without delay deliver over to the treasurer, then to be chosen, . . . the moneys, books, property, and appurtenances of said office, . . . and truly and without delay pay over all such balances that shall appear to be due upon the adjustment of the accounts of said office, then the foregoing obligation to be void and of no effect, but in default thereof to remain in full force and effect." Hereupon the defendants plead a general performance by Peck of "all the covenants and conditions therein on his part to be kept and performed." To this the plaintiffs reply, alleging that Peck "continued to hold and exercise the said office of treasurer of State to which he was chosen, as in said condition of said writing obligatory mentioned for a long space of time, to wit, from, etc., to, etc.," "and that during the said time, . . . to wit, on, etc., at, etc., he, the said Benjamin D. Peck, as such treasurer of State, as aforesaid, had and received divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of thirty-nine thousand two hundred and thirty-one dollars and nineteen cents, belonging to the said State of Maine, and hath not accounted for or paid to the plaintiff the same, or any part thereof, although often requested so to do, but hath therein wholly failed and made default," "and the same is still wholly unpaid and unsatisfied contrary to the form and effect of the said condition of the said writing obligatory, and this, etc.," "wherefore said State prays judgment and its debt aforesaid, together with damages by it sustained on occasion of the detention thereof to be adjudged to it and costs."

The defendants demur to the replication, assigning for cause of

demurrer that the pleader "does not in and by the replication set forth and state with particularity and precision the breach of condition, . . . and the particular items thereof, and that the replication is in other respects uncertain, informal, and insufficient." The language of the bond as rehearsed in the plea is not remarkable for grammatical precision; but we think the instrument is to be deemed and treated as a "contract in a penal sum for performance of covenants and agreements," and therefore subject, so far as the pleadings are concerned, to the rules prescribed in R. S., c. 82, § 17.

The counsel for defendants reiterate in their argument what they had stated as the cause of demurrer, that the replication is wanting in particularity and precision, and that it does not set forth the breach of condition with sufficient detail and specification of items. They do not suggest what further in the way of detail is required, or what allegation is omitted, which is necessary to constitute a good assignment of a breach. It will be seen that the replication sets forth the reception by Peck during his official term, in his official capacity, of "divers sums of money amounting to" a certain sum specified to a cent, which he has not accounted for or paid over, but hath therein wholly failed and made default, and the same still remains wholly unpaid and unsatisfied, contrary to the form and effect of the condition of the bond, with a verification, wherefore plaintiff prays judgment for this particular sum, and damages for its detention, and costs.

The defendants cite from Chit. Pl. the familiar general rule that where there is a plea of general performance of the condition, the replication must state the breach with particularity, and should conclude with a verification, etc.

But it is equally true that useless prolixity in pleading is to be avoided, and where the subject comprehends multiplicity of matter, general pleading is allowed, and the breach is well assigned if the sum and description of the items are given, and enough stated to show all the acts and defaults necessary to constitute a breach. 2 Wms. Saund. 410, note 4, and the cases there cited.

One of these, *Shum* v. *Farrington*, 1 B. & P. 640, was debt

on a bond conditioned for the good behavior of one R. S., jr., and for his duly rendering and paying to the plaintiff a true, just, and fair account of all moneys, bills, etc., received by him as their agent and factor. The plea was, as here, general performance, to which there was a replication substantially identical, *mutatis mutandis*, with the one now under consideration. A special demurrer was filed, "for that it does not appear in and by the said replication of the plaintiffs, from whom, or in what manner, or in what proportions, the said sums of money in the said replication mentioned were received by the said R. S., jr." The demurrer was joined, and *Jones* v. *Williams*, Doug. 215, cited in support of it. That case and the demurrer presented were overruled upon full argument and consideration, Eyre, C. J., remarking that "any departure from the general way of stating the breach used in this replication, would lead to an inconvenient length of pleading, which the court will not determine to be necessary, unless compelled by a series of authorities." After remarking upon the solitary case cited in support of the demurrer, he proceeds to say that "whether a breach be sufficiently assigned or not, is to be decided by the rules of law and the forms of pleading. By the former, the party must show some fact which is a breach in the words of the condition. Where many sums have been received, it is not each sum, but all taken together, that constitute the breach, which must therefore be so stated."

Instead of being compelled by a series of decisions to sustain the demurrer, it appears that even then the weight of authority was the other way, and that when matter tends to great prolixity, conciseness in pleading is allowed and approved. *Mints* v. *Bethel*, Cro. Eliz. 749; *Braham* v. *Bacon*, *idem*, 916; *J'Ansen* v. *Stewart*, 1 Term Rep. 753; *Cornwallis* v. *Savory*, 2 Burr. 772. See also, *Calvert* v. *Gordon*, 7 Barn. & Cres. 809; E. C. L. R., vol. 14, p. 135; *Barton v. Webb*, 8 Term Rep. 459. Defendants' counsel objects that the English decisions were under the statute 8 and 9 Wm. 3, c. 11, which never became part of the common law in New England, as was held in *Bailey* v. *Rogers*, 1 Maine, 186. A part

of these English decisions were certainly prior to the statute referred to, as was also the case of *Arlington* v. *Merricke*, reported by Saunders from the Hilary Term, 23 and 24, Car. 2 (2 Wms. Saund. 403). The breach was there similarly assigned (*i. e.* generally), and Sir Edward Saunders, whose skill and accuracy as a pleader grows more and more wonderful in these degenerate days, though as counsel for defendants he demurred for other causes, made no such point.

We fail to perceive how the statute referred to has any bearing upon the point here raised. If it does, it need only be observed that since the decision in *Bailey* v. *Rogers*, *ubi supra*, similar provisions have been incorporated into our own statutes. Laws of 1830, c. 463; R. S. of 1841, c. 115, § 15; R. S. of 1857, c. 82, § 17.

It should be noticed, also, that in *Bailey* v. *Rogers*, the replication was adjudged bad, because by the terms of the guardian's bond there in suit, he was not bound to render an account "until he shall be thereunto required," and thereupon the court held that a citation from the judge of probate, requiring him to render an account, was a necessary preliminary, in order to charge the guardian on his bond for refusing to account, and no special request to account or citation to the guardian was alleged.

If such had been the only condition here, the general allegation of "though often requested" would be plainly insufficient, but these pleadings show a day fixed when Peck's accounts should have been rendered, and that that day was long past when the suit was commenced.

We do not see how the claims of the State could well have been made more definite, specific, and certain, by the pleadings. What the precise sums were which Peck received as treasurer, and appropriated to his own use, and from whom he received them, he may know, but it would be certainly difficult, if not impossible, for the plaintiff to ascertain; and this brings the case within the rule that general pleading is allowable also where the facts lie more in the knowledge of the opposite party than of the party pleading. *Gale* v. *Reed*, 8 East, 80.

Lord Ellenborough said, in the case just cited, that it was a sufficient answer in point of law (to a similar objection urged in that case on demurrer), that "as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiffs, there was no occasion to state them with more particularity."

The replication sufficiently assigns a breach of the bond, and specifies minutely the amount of the damages which have accrued, by reason of it. The demurrer admits all that is well pleaded in the replication.

As a consequence, judgment must eventually be rendered for the plaintiff for the sum thus claimed, unless the plaintiff consents to a withdrawal of the demurrer, and the court thereupon order it under R. S., c. 82, § 19. At present the entry must be

Exceptions sustained.

Replication adjudged good.

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

ELIPHALET CLARK, in equity, *vs.* DAVID ROBINSON.

Bill in equity—fraud.

A bill alleged, substantially, that the respondent, with intent to defraud the complainant, willfully and knowingly made to him a series of false and fraudulent representations, specifically set out, as to matters of fact relating to the "McKay Sole Sewing Machine," and the "Foreign Sole Sewing Machine Company;" and, that by means of such representations, he induced the complainant to purchase of him a large number of worthless shares in a mock company, and to give him in exchange therefor, a conveyance of several lots of land situate in this State, praying that the conveyance be decreed void and the respondent ordered to reconvey to the complainant. On demurrer, *Held*, that the bill be sustained.

BILL IN EQUITY, heard on demurrer.

The bill alleged, substantially, that the respondent, of Boston, Mass., in 1864, at Portland, contriving and intending to defraud the complainant, declared to him, that the "McKay Sole Sewing Machine" was patented and owned by an organized company (of which the respondent was a stockholder), in Boston; that the company was then successfully operating the machine in the United States for the manufacture of boots and shoes; that the stock had rapidly advanced in value, and the dividends large; that a company had obtained letters-patent on the machines in England, and introduced them there where they promised, at an early day, to be successful; that the stock of the company was not in the market, could be procured only of private holders at a high figure, and that the price was constantly advancing, and the dividends increasing each month.

That a "Foreign Sole Sewing Machine Company," of which the respondent was a member, had been organized in Boston, with a capital of $400,000, were owners of the patent-right, with the sole right to secure patents of the same in all the Canadas and all the countries of Europe, excepting England; that measures had been taken to secure letters-patent in the countries of Europe; that the respondent had then a limited number of shares, the par value of which was ten dollars, some of which he had sold for five dollars; that they were then worth seven dollars and fifty cents, and would advance to ten dollars in the ensuing January; that the well-known business talent and energy of the managers of the company, with its large capital, would insure its success in a short time; that the stockholders could not be assessed for any purpose; that the capital of $25,000, then held by the company, was ample to preclude assessments.

That relying upon such declarations, the complainant purchased, as he then supposed, of the respondent, two hundred and eighty shares in the "Foreign Sole Sewing Machine Company," and took from him what purported to be a certificate of such shares, at the rate of seven dollars and fifty cents per share, and paid him there-

for by a conveyance of seven lots of land, situate in Westbrook, at three hundred dollars each, to the respondent, Gordon McKay, and Lyman R. Blake, of Boston.

That, afterwards, in 1865, relying upon the same representations, the complainant purchased, as he supposed, of the respondent, three hundred and fifty-four shares in said company, at same rate, receiving what purported to be a certificate thereof, paying therefor the complainant's interest in a certain lot of land in Portland, conveyed to the respondent by S. C. Chase.

That all such declarations were and are false, by means whereof he has been defrauded of said lots of land, etc.

Prayer, for a discovery; that the supposed sale of said shares be decreed fraudulent and void; that the conveyance of said lots of land be decreed void; and that the respondent be ordered to restore all the property thus corruptly taken from the complainant.

To the bill, the respondent demurred.

P. Barnes, for the respondent, cited *Woodman* v. *Freeman*, 25 Maine, 531.

Howard & Cleaves, for the complainant.

Barrows, J. The bill alleges substantially that the defendant, in the summer of 1864, with intent to defraud the complainant willfully and knowingly, made to him a series of false and fraudulent representations as to matters of fact relating to the "McKay Sole Sewing Machine," and the "Foreign Sole Sewing Machine Company," and by means of these false and fraudulent statements, which are particularly set forth in the bill, induced the complainant to purchase of him a large number of worthless shares in a pretended company, which the bill charges never had a legal existence, nor any such capital, nor working cash capital, nor patent-rights, as Robinson had represented, but was altogether "false and fabricated for false and fraudulent purposes, as the said Robinson then and there well knew," and to give in exchange for these worthless shares a conveyance of seven lots of land in Westbrook, at $300 a

lot, to said Robinson and Gordon McKay and Lyman R. Blake, all of Boston, and also a conveyance of complainant's interest in a lot of land on Chestnut street, in Portland, of the value of $2,655, which was deeded to said Robinson by Sewall C. Chase, at complainant's request, in payment for some of these shares; and thereupon he offers to return the certificates of shares, and prays that Robinson may be held to answer and make discovery, and that the sale of the shares may be decreed fraudulent and void, and that the conveyances of the lots of land, etc., may be decreed and held void and of no effect, and the defendant required to restore the property.

The defendant alleges as cause for the demurrer to the bill that these matters do not make a case, which entitles the complainant to any such discovery, or relief in equity, as is here sought. In support of this position, he relies upon the doctrine of *Woodman* v. *Freeman*, 25 Maine, 531.

It was there held, that while a court of equity may rescind a conveyance or contract, which has been procured by fraud, when a proper case for it is presented, yet one who is induced to purchase lands of another, and to pay him for them by the fraudulent representations of a third person interested to effect such sale, cannot recover in equity the amount thus paid of such third person, and require him to receive a conveyance of the lands; nor can the court entertain a case in equity to give relief by way of damages against one who makes such fraudulent representations, when that relief is sought not as incidental or auxiliary to other relief granted to make it complete, but in a case where no other relief can be given, and when the party complaining has a plain and adequate remedy at law. And the court incidentally refer to and approve a series of decisions in which it is held, that if fraudulent representations have been made respecting personal property or personal rights, relief for injuries thereby occasioned can only be obtained by an action at law, and a court of equity will not entertain jurisdiction. But these are all cases where the fraud affected the rights of the complainants in and to personal property only. The case of *Wood-*

man v. *Freeman* arose, and was decided when the equity jurisdiction of this court was defined by c. 96, § 10, R. S. of 1841, which contained an express limitation of such jurisdiction to cases "where the parties have not a plain and adequate remedy at law." But we do not think it necessary to determine whether the omission of this phrase in the corresponding section of the Revised Statutes of 1857 does away with a condition which has been so far recognized as essential to the existence of jurisdiction in equity, that an allegation respecting it has become a formal part of almost every bill, and is found in the one here presented.

We think the case may be distinguished from *Woodman* v. *Freeman* on another ground. The bill in effect sets forth the procurement by the defendant of conveyances of real estate to himself, from the complainant, by means of falsehood and fraud, and the relief asked is, that these conveyances may be decreed void and of no effect, and the defendant required to reconvey, so that the complainant may be reinstated in possession, with a full and clear title to the property, of which he alleges he has been deprived by the fraud of the defendant. We may readily suppose circumstances which make such a restoration a more full and adequate remedy, than any assessment of damages which could be had in an action at law. Numerous cases are to be found in the books, where this relief has been afforded, and in some of them where there was but comparatively slight evidence of misbehavior; on the part of the grantee, in procuring the conveyance.

Thus, where an aged and illiterate man, in feeble health, a day or two before his death made a deed for an insufficient consideration, without independent professional advice, it was set aside at the instance of his heir, and the deed ordered to be delivered up and cancelled. *Clark* v. *Malpas*, 31 Beav. 80.

And where an unmarried lady, without professional advice, executed a deed in favor of her brother, with whom she was residing at the time, it was subsequently set aside on the prayer of the lady and her husband. *Sharp* v. *Leach*, 31 Beav. 491.

Doubtless where the parties are on an equal footing, as to intelli-

gence and capacity, and sustain no peculiar relation of trust and confidence to each other, relief of this description will not be given, unless a case of palpable fraud is distinctly alleged and satisfactorily proved; but it is none the less certain that one of the prominent heads of equity jurisdiction, founded upon the peculiar remedy, is where the rescission, cancellation, and delivery up of agreements, securities, or deeds is sought on the ground of fraud and foul practice in the procurement of them. Story's Eq. Juris. vol. 1, § 692. "If there is actual fraud, there seems the strongest ground for the interference of a court of equity, to rescind a contract, security, or other instrument." See *Rumph* v. *Abercrombie*, 12 Ala. 64; *Sheppard* v. *Ireson*, *idem*, 97. It was one of the difficulties mentioned by the court, as insuperable, in *Woodman* v. *Freeman*, that "no written or other legal contract or bargain, for the conveyance of any part of the tract of land by the defendants, or either of them, to the plaintiff, is proved to have existed at any time."

Having due regard to all the limitations of the general principle laid down by Judge Story (Equity Juris. vol. 1, § 184) as follows: "With the exception of wills . . . courts of equity may be said to possess a general, and perhaps a universal concurrent jurisdiction with courts of law, in cases of fraud, cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law," we are unable to perceive that any of these limitations preclude us from affording the relief here sought, if, upon final hearing, the case presented by the bill is found to be supported by the proof. Nor do we think this conclusion is at all in conflict with the doctrine of *Woodman* v. *Freeman*, *ubi supra*.

It is not merely an assessment of damages, accruing from fraudulent representations with regard to personal property or rights, which is sought, but a species of redress which the common law is unable to compass, by declaring void conveyances of real estate made by the complainant to defendant, under the influence of the fraud and falsehood perpetrated by the latter, in order to procure them.

There is nothing before us to indicate that the defendant does

not still hold the title to the greater part of the property thus wrongfully obtained. To secure the restoration of the undivided interest conveyed to McKay and Blake, it would be necessary that they should be made parties to the bill. But the question is not, now, to what extent relief can be granted, but whether any is attainable upon the facts presented in the bill. We think it would be a reproach to our system of equity jurisprudence, to say that there was none. See *Pratt* v. *Philbrook*, 41 Maine, 132.

Demurrer overruled.
Defendant to answer.

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

MIRANDA J. WEBSTER *vs.* JAMES WEBSTER.

Promissory note—action on by divorced wife against former husband.

A woman, after a divorce *a vinculo*, may maintain an action against her former husband, on a promissory note given by him to her in 1861, during coverture, for money borrowed of and belonging to her.

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

ASSUMPSIT on a promissory note, dated Jan. 22, 1861, "signed in the presence of an attesting witness," and given by the defendant to the plaintiff, for fifty dollars and interest.

The action was tried by the justice without the intervention of a jury, subject to exceptions.

The justice found, as fact, that at the time of making the note, the defendant was the husband of the plaintiff, cohabiting as husband and wife; that he borrowed and received the sum for which the note was given from his wife at its date; that the money was

hers, being the proceeds of property belonging to her at the time of their intermarriage; that they continued to live together until March 27, 1869; that at the October term, 1869, of this court, and before the commencement of this suit, the plaintiff was divorced from the bonds of matrimony between her and the defendant, on a libel filed by her at that term, and that nothing has been paid on the note.

The presiding justice ruled as matter of law:

"That a woman after divorce may commence and maintain a suit against her former husband, on a note given by him to her during coverture, for money borrowed of her and unpaid."

To this ruling the defendant alleged exceptions.

Deane & Verrill, for the defendant.

1. At common law, husband and wife are not competent parties to a contract; and the promise of either to the other for payment of money is a nullity. *Lewis* v. *Lee*, 3 B. & C. 291; 2 Kent, 107, 109; *Jackson* v. *Parks*, 10 Cush. 550; *Sweat* v. *Hull*, 8 Verm. 187; *Davis* v. *Millet*, 34 Maine, 429; *Patterson* v. *Patterson*, 45 N. H. 164.

2. The contract, or note, in this suit is void, and cannot be enforced in law. *Lord* v. *Parker*, 3 Allen, 127; *Ingham* v. *White*, 4 Allen, 412; *Smith* v. *Gorman*, 41 Maine, 405; *Crowther* v. *Crowther*, 55 Maine, 358; *Edwards* v. *Stevens*, 3 Allen, 315; *Turner* v. *Nye*, 7 Allen, 176; *Phillips* v. *Frye*, 14 Allen, 36.

W. H. Vinton, for the plaintiff.

Appleton, C. J. The parties to this suit were husband and wife. While the marital relation subsisted between them, the defendant borrowed of the plaintiff money, which she owned in her own right, and gave his promissory note therefor.

The defense rests upon the ground that the note is absolutely void, because given during the existence of the marital relation between the parties.

By the common law, marriage is an absolute gift to the husband

of all the goods, personal chattels, and other personal estate, of which the wife is actually or beneficially seized at the time in her own right, and of such other goods and personal estate as come to her during the marriage. The husband, however, was not absolutely entitled to the choses in action of his wife, unless reduced into possession during her life. The money of the wife, received from her by the husband, at common law, became his.

But the statutes of this State have made great and important innovations upon the rules of the common law. By R. S., 1857, c. 61, "a married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase, and may manage, sell, convey, and devise the same by will, as if sole, and without the joinder or assent of her husband." Since March 22, 1844, "a husband by marriage . . . acquires no right to any property of his wife. . . . A married woman may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may in writing revoke the same."

The rights of the wife thus conferred are utterly at variance with those she possesses at common law. Her property is secured to her "in her own right." The right to "manage, sell, convey, and devise" her property of every description "as if sole," includes all the rights of ownership. The words used are most general. If sole, she might loan, sell, or convey, as in her judgment should seem most advisable. The husband acquires no right to any of her property, but she may intrust its control to him, and if dissatisfied with his management, may revoke his authority. She has entire and exclusive authority over her own estate, and he has none. As to her property she is as if sole.

Before the passage of the statutes conferring rights on married women, their rights were protected and enforced by means of marriage settlement, and through the intervention of trustees. By these statutes the necessity of a settlement and of a trustee is avoided. The wife is clothed not merely with all the incidents of uncontrolled ownership, but the rights of the husband over her property are

specially limited to such as she may confer, subject to the power of instant revocation when she may see fit to exercise that power. The distinct personality of each in the management of property is recognized, instead of the uncontrolled powers of the husband over the estate of the wife.

By the common law, the wife could not convey to the husband, nor the husband to the wife. To accomplish it (for the thing was done), the devious intervention of trustees was required. Under our statutes, it has been held that a husband might deed directly to his wife. *Johnson* v. *Stillings*, 35 Maine, 427. So the wife may deed directly to the husband. *Allen* v. *Hooper*, 50 Maine, 371. Whether the husband deeded to the wife, or the wife to husband, here was, in each case, a contract between them. In *Randall* v. *Lunt*, 51 Maine, 247, it was held that a husband might convey real estate to his wife in payment of his note given her for money loaned by her to him. So in New Hampshire, it was held that a married woman holding real estate to her sole and separate use, under statutes similar to those of this State, might rent or lease the same to her husband, or any other person, and that she was entitled to the same remedies in respect to such property as if she were unmarried. *Albin* v. *Lord*, 39 N. H. 196. As the wife may release to the husband the control of her property, so she may revoke the right thus conferred. Revoking those rights, it would seem a necessary inference that she might call him in some way to account for what he may have received during his agency. If not so, then he is an agent without responsibility. If the husband without the consent of his wife receives her private property or money, is not his estate liable? If with consent, is it any the less liable?

In *Steadman* v. *Wilbur*, 7 R. I. 481, it was held, when the wife loans money to her husband out of her separate estate, that she has the same right to expect and receive security and repayment, and preference in payment out of his estate, as any other creditor has. It was held in *Logan* v. *Hill*, 19 Iowa, 491, that a promissory note executed by the husband to the wife, for money borrowed of her, was valid and binding, and may be enforced against his representa-

tives after his decease. In *Huber* v. *Huber*, 10 Ohio, 37, a promissory note, given by the husband to the wife, was held enforcible in equity. In *Wood* v. *Warden*, 20 Ohio, 518, the same doctrine was again affirmed. In *Hinney* v. *Phillips*, 50 Penn. 382, it was decided that a married woman might give or loan from her separate estate to her husband.

A husband may be the trustee of the separate property of the wife. *Riley* v. *Riley*, 25 Conn. 154. In *Murray* v. *Glasse*, 21 Eng. L. & Eq. 51, the husband gave his wife a promissory note for moneys received from her separate estate. "I think, however," observes Wood, V. C., "in the present case I may hold this to be a good declaration of trust by the husband for the benefit of the wife, though in the form of a promissory note." When there is a trust estate, the husband is responsible to the trustee for funds of the wife's separate estate, appropriated by him to his own use. When the wife is clothed with the full rights of ownership, when she is her own trustee, and the intervention of a trustee has ceased to be necessary, it would be strange if she were not to be protected in the enjoyment of what the law allows her to hold "in her own right," and with which her husband is interdicted from interfering.

The property of the wife is declared hers,—is protected by the law for her sole use. Whether the husband takes the money of the wife without right, or under an agreement to return it, when the common law fails to give an adequate remedy, equity supplements its deficiencies, and protects the wife in what the statute declares she may hold for her sole use. The result is that the note of the husband to the wife is not void. To declare it so, or the loan, of which it is evidence, would be to fail in giving the wife the protection which the statutes were intended to afford.

Our attention has been called to decisions adverse to these results; but on an examination of the cases relied upon, they will be found to rest on a different state of facts from those here presented for our determination. In *Turner* v. *Nye*, 7 Allen, 176, the money for which the note was given was the avails of property which the wife held by inheritance from her father, before the existence of the

statutes enlarging the rights of the wife as to any estate coming to her by descent, devise, or gift. "As to this property," observes Dewey, J., "the husband had the common law rights. He thus held the right to receive the annual rents and profits accruing therefrom." In *Phillips* v. *Nye*, 14 Allen, 36, Hoar, J., in delivering the opinion of the court, says, "The agreed facts do not show that the money which the wife received from her relations was her sole and separate property under the statute relating to married women. Whether it would alter the case, if such had been the fact, we need not consider. Nor does it appear that the husband, when his debts were paid with this money at his request, made any agreement to repay it. It was money which he had a right to reduce to possession and to use." In *Patterson* v. *Patterson*, 45 N. H. 164, it did not appear that the wife held the property for which the note was given to her sole and separate use. "Nor do we perceive," observes Bellows, J., "that the case is brought within any of the provisions of our statutes, which give a married woman power to contract as sole. It does not appear that the property for which the original note was given was held by the wife to her sole and separate use, or that the case comes within any of the provisions which authorize her to act as sole. Besides, the property was received by the husband, and the note given in 1844, before the passage of the law of 1846, on which the plaintiff relies." In the case before us, the money was the proceeds of property belonging to the plaintiff at the time of the intermarriage. By the statute, she held it in her own right as her separate estate, and the husband by the marriage acquired no rights therein. The fact that the husband gave his note, negatives the idea that the money loaned was a gift, or that the husband received it as such. Giving the note could not diminish the original liability of the husband for money belonging to his wife's estate, which he had received, and which at the time he promised to return.

The objection to the maintenance of the suit arising from the marital relation, is obviated by the divorce which the plaintiff obtained at her own instance, and through the fault of the defendant.

It is, therefore, a valid note, unpaid, and for which the defendant has received a full and adequate consideration. The defense, so far as it arises from the relation of the parties, is purely technical. It continues only while that relation continues, and it ceases with its termination. In *Albee* v. *Cole*, 39 Verm. 319, the husband had converted to his own use the notes belonging to his wife without her consent. "It is true," observes Peck, J., "that the testator in her life-time could not have maintained at law an action of trover against the defendant. But this was not from any want of right or title to the property, nor because the act of the defendant was not a wrongful and unlawful conversion of her property, nor because she was without remedy to redress the grievance. It was by reason of a personal liability a wife is under, incapacitating her to sue her husband at law. Her remedy would have been ample in a court of equity in her life-time. Her administrator succeeds to all her rights, but we are not prepared to hold that, in enforcing those rights, he is necessarily restricted in his remedy, to the very remedy to which the intestate was limited by reason of the personal liability of coverture, whereby she is legally incapacitated to sue her husband at law. It is true, the administrator represents the intestate, and succeeds to her rights, but he is not under her disability." The court held the action was maintainable. So in *Logan* v. *Hill*, 19 Iowa, 491. But when the disability is at an end, it is immaterial how it came to an end,—whether by the death of the wife, or by her divorce. *Exceptions overruled.*

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

Hope Iron Works *vs.* Oliver Holden & another.

Receipt—construction of. Certificate—construction of. Practice.

A writing acknowledging that the subscriber had received the promissory note of another "for five shares of stock in the M. T. Co., and certificates of stock are to issue to" the maker of the note for the same, when ready for issue,—is not a contract for the future sale of the shares, but a recognition that the shares themselves were the consideration of the note.

A certificate that a certain person named "is the owner of five fortieth parts of the letters-patent and property of the M. T. Co.," . . . and stipulating "that whenever an incorporated company shall be organized . . . the holder hereof shall be entitled to receive its equivalent value in the certificate of shares in the capital stock of such company," does not operate as an assignment to the holder of any interest in the letters-patent.

The fact that the jury were unable to agree upon one of four questions submitted to them, cannot be presented to the full court upon a motion to set aside the verdict as being against the evidence.

On exceptions to the ruling of *Goddard*, J., of the superior court, and motion to set aside a verdict for the defendants, as being against the weight of evidence.

It appeared that one Manton, being the inventor of a lathe-tool, obtained letters-patent therefor; that in the latter part of 1867, after some correspondence and several personal interviews between Manton and the defendants, in which Manton said he had applied for a patent, and was about to organize a company for the manufacture of the tool, the defendants, on Jan. 14, 1868, were induced to give their note for $\$1283\frac{33}{100}$, on four months, for five shares of the capital stock in said company, taking from Manton a paper signed by him, acknowledging that he "received of Oliver Holden & Co., their note, at four months from date, for twelve hundred eighty-three $\frac{33}{100}$ dollars, for five shares of stock in the Manton Tool Company, and certificates of stock are to be issued to said O. H. & Co., for five shares of said stock when ready for issue, when this receipt is to be given up;" that the defendants were anxious to receive the issue of stock, and so frequently expressed themselves in letters to Manton; that the note was made payable to the order of the plaintiffs, of which Manton was a member and agent.

That at the January session of general assembly of the State of R. I. (in which Manton resided), Manton petitioned for a charter to incorporate the Machinists' Tool Company; that Manton sent the defendants a certificate of the following tenor:

"MACHINIST TOOL COMPANY. No. 2.

U. S. I. R. Stamp. 25 cts.

Know all men by these presents, that Oliver Holden & Co. is the owner of five fortieth parts of the letters-patent and property of the Machinist Tool Company, the same being divided into forty shares, of the par value of five hundred dollars each, and it is hereby agreed that whenever an incorporated company shall be organized for carrying on the business of the above mentioned company, the holders hereof shall be entitled, upon the surrender of this instrument, to receive its equivalent value in certificate of shares in the capital stock of such company. J. R. FIELD, *Secretary*."

PROVIDENCE, R. I., March 2, 1868.

That the note matured, when, by way of renewal, two notes were given as before, making the same sum in the aggregate; that in the meantime, a charter had been obtained, in which Manton & Holden were mentioned as the original corporators; that it was never organized; that the plaintiffs discounted the notes and took them up at maturity as indorsers; that the defendants repeatedly agreed to pay them after they were given, but never did; that they never offered to return the latter certificate; that Holden never authorized his name used as corporator.

The presiding judge requested the jury to answer four questions, which he proposed to them in writing, as follows:

1. *Interrogatory.* Have the defendants, or either of them, received any consideration for the notes in suit?

Answer. They have not.

2. *Int.* If the jury find that defendants, or either of them, have not received any consideration for the notes in suit, have defendants, or either of them, waived or relinquished their right to receive the consideration of said note?

Ans. They have not.

3. *Int.* If the jury find that defendants, or either of them, have received a consideration for the notes in suit, but different from that originally agreed upon, have defendants consented to accept such different consideration instead of the one originally agreed upon?

Ans. They have not.

4. *Int.* If the jury finds that there was no consideration for the notes in suit, did the Hope Iron Works Company, plaintiffs in this suit, take the original note of January, A. D. 1868, of Manton, in the regular course of business, without knowledge of any want of consideration?

The jury did not answer this last question, but the foreman undertook to state they were unable to agree on this point, and how the jury stood upon it; but the court stated to the foreman that he did not consider it important for him to make any explanation, as the jury were not required to answer either of the questions.

The jury returned a verdict for the defendants, whereupon the plaintiffs alleged exceptions, and filed a motion that the verdict be set aside as being against the weight of evidence.

The remaining facts, so far as they are necessary to understand the law of the case, may be found in the opinion.

J. D. & F. Fessenden, for the plaintiffs.

1. Were the plaintiffs *bona fide* holders, for a valuable consideration, without notice? Unless the contrary is shown, to the satisfaction of the jury, defendants are not entitled to a verdict. See special finding, No. 4.

2. As to the consideration.

This is not a question strictly of fact, but of the legal result of facts proved. Jury having drawn an erroneous conclusion from the facts, a new trial should be granted. Hilliard on New Trials, c. 8, 14.

Stock in a corporation in process of, but not having completed its organization, is a good consideration for a promissory note. *Vermont Central Railroad Co.* v. *Clayes*, 21 Verm. 30; *Goshen Turnpike Co.* v. *Hustin*, 9 Johns. 217.

Nor does the insolvency of the corporation constitute a defense.

Angell on Corporations, §§ 520, 523. *Sagory* v. *Dubois*, 3 Sandf. Chancery, 465.

Nor informality in the organization. Angell on Corporations, § 520.

The provisional certificate of March 2d, transferred property of value, a sufficient consideration for defendant's promise. It was what they bargained for. They accepted it as such with full knowledge of the circumstances, and subsequently renewed their promise to the plaintiffs to pay for it.

A. A. Strout, for the plaintiffs, contended,

1. That the promise of Manton, as evidenced by the receipt and letters, was a valid consideration for the original notes. *Saco Manufacturing Co.* v. *Whitney*, 7 Maine, 256; *Read* v. *Cummings*, 2 Maine, 82.

2. Promises in letters and renewals of notes clearly proved an acceptance of the certificate of March 2d, in lieu of the original arrangement about stock.

3. If the original note was without consideration, it would be sufficient consideration for a new promise, if made expressly and without condition. *Warren Academy* v. *Starrett*, 15 Maine, 445; *Amherst Academy* v. *Cowls*, 6 Pick. 427.

4. The conveyance of the patent-right, by Manton to the company, and the issuing of the certificate of March 2d, was a good consideration for the new promise.

5. The jury were unable to agree on the last point, which was essential to the verdict.

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

DANFORTH, J. The jury have decided that there was a failure of consideration for the notes in suit. Upon this point we see no reason to disturb the verdict. The defendants supposed they were purchasing shares in the capital stock of an incorporated company. Manton was selling shares in a company to be incorporated. Suppose the contract had been as Manton understood it, and suppose

shares in a company in process of organization to be a sufficient consideration for a promissory note, still the defendants never received such shares. At the date of the original notes, even the charter had not been granted, and after it was granted no organization was ever completed or even begun. The defendants never received the conveyance of any shares, nor were they put in any position to enjoy the rights of a preliminary subscriber. They, as a consideration for their notes, obtained no shares in an incorporated company, nor any rights in one not incorporated. The original agreement with Manton was not consummated by him, or by any one under him.

It is, however, said that the receipt of Jan. 14, 1868, is, of itself, a sufficient consideration for the notes. But this is not a contract for the future sale of shares. It is rather a recognition of one already made. The fair construction of the paper is, that the shares themselves were the consideration of the notes, and not an agreement to sell or convey in the future. This paper does not, in any degree, change the testimony or modify its effect as to the original agreement under which the notes were given, nor does it furnish any new consideration for them.

It may be conceded that an agreement or promise to do anything in the future is a sufficient consideration for a promissory note. But, as already seen, this is not such an agreement or promise. It looks to a past transaction and not to a future, except as to the issuing of the certificate. It contemplates the stock as already in existence and sold, the certificate, only, to be prepared.

But perhaps a more conclusive answer to this point is, that the jury have found that the defendants never accepted the receipt as a substitute for the stock, or made any promise in the notes, or otherwise, upon the strength of it. And if the testimony does not place this beyond all doubt, it tends so strongly in that direction, that we cannot say the verdict was wrong.

It is further said that the paper of March 2, 1868, called a "provisional certificate," is a sufficient consideration for the promise of the defendants. Whether this paper is of any value, may perhaps

be doubted. There is nothing in the case to show the authority of Mr. Field to issue such a certificate. It is quite evident that, if issued with the proper authority, it does not comply with the requirements of law for the assignment of the letters-patent, and would give the defendants no interest whatever in such patent.

But there is the same difficulty with this paper as with the other. The jury have said, and we think were justified in saying, that the defendants never accepted it as in any respect fulfilling the original agreement, or as claiming any right or interest under it. There is nothing in the case showing that the renewals of the original note were other than simple renewals under the original agreement, founded upon the original consideration, and not induced by any subsequent transactions. The same may be said of the subsequent promises to pay. They appear to have been made with the expectation of, and relying upon, the fulfillment of the original agreement, and not because of the receipt or "provisional certificate." They were, in fact, accompanied by a repudiation of these papers, a denial that they did fulfill the original undertaking, and constantly claiming a certificate of the stock.

The suggestion that the jury were unable to agree upon one point submitted to them, as vital to the verdict rendered, might, perhaps, be entitled to serious consideration, were that question properly before us. But the motion for a new trial is founded not upon any misconduct of the jury, or that they were unmindful of their duty in neglecting to settle one of the issues presented to them, but upon the ground that the verdict rendered is against the evidence. The verdict as it stands necessarily disposes of that point. It is a denial that the plaintiffs are holders for a valuable consideration and without notice. And the question presented by the motion is whether that denial is unsupported by the testimony. We think it is not only not unsupported, but that it is fully justified, and that if the jury had understood the fourth question as presented to them, they would have had no difficulty in coming to a conclusion. It may, perhaps, be somewhat doubtful from the testimony, whether the plaintiffs are holders for value. But if they are,

there can scarcely be a doubt as to their having had notice of the origin and subsequent history of the notes. Manton testifies that he was the agent and treasurer of the plaintiffs; that they "acted as bankers for the Machinist Tool Company, advancing the money and collecting the assessments." It further appears, from Manton's testimony, that the original note was made payable to plaintiffs, discounted upon their indorsement, and the money raised on the discount was used, not for their own benefit, but for that of the Machinist Tool Company. This, with other testimony showing the intimate connection of Manton and the two companies, and the knowledge of the plaintiffs of these notes, and the transaction out of which they grew, would seem to remove all difficulty as to notice.

The whole charge of the presiding judge is excepted to, but no particular ruling or instruction is pointed out as being erroneous, nor have we discovered anything in it objectionable.

Motion and exceptions overruled.

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

PATRICK MCGLINCHY *vs.* STEPHEN D. HALL.

Execution—set-off of. Assault—assignment of.

The creditor in an execution issued on a judgment in which the debt or damage recovered is for rent, "became entitled to the sum due thereon," within the meaning of R. S., c. 84, § 27, when his cause of action accrued.

He is not so entitled to costs until he has obtained a judgment therefor.

"The first execution" in the same section is the one issued upon the judgment in the action which was first commenced.

No effectual assignment of a sum that may be recovered in an action of trespass for a personal assault can be made before final judgment.

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

TRESPASS.

The action was tried by the justice without the intervention of the jury, subject to exceptions.

The plaintiff's attorney, on July 10, 1869, at Portland, delivered to the defendant (a constable of Portland, authorized to serve civil precepts), an execution issued upon a judgment recovered in the superior court on June 8, 1869, in favor of the plaintiff, against John Stone for rent, for $60.14 debt, and $16.94 costs.

The attorney of Stone, on July 9, 1869, put into the defendant's hands an execution, issued on a judgment recovered June 8, 1869, in the superior court, in favor of Stone against McGlinchy, for twenty dollars damages, and five dollars costs. The action in which the latter judgment was recovered was trespass for a personal assault, commenced Oct. 24, 1868. The defendant was directed by the attorney of Stone to collect the latter execution.

McGlinchy was arrested on the execution July 9, 1869, and notified by the officer at that time, of the assignment of the latter judgment to Stone's attorney.

The defendant having the two executions, wherein the creditor in one was debtor in the other, in the same capacity and trust, the plaintiff's attorney thereupon offered to pay the defendant the costs taxed in the execution (*Stone* v. *McGlinchy*), viz., $5.15 for the execution, and the defendant's fees, and requested the defendant to set off the damages in said execution, viz., twenty dollars against the execution (*McGlinchy* v. *Stone*), so far as they would go, thereby satisfying the execution (*Stone* v. *McGlinchy*).

The defendant refused so to do, but compelled the plaintiff to pay the entire execution (*Stone* v. *McGlinchy*), with defendant's fees.

The justice found as matter of fact, that Stone being indebted to his attorney, J. O'Donnell, Esq., for fees and disbursements in the suit (*Stone* v. *McGlinchy*), for an amount equal to the amount of said execution, assigned the cause of action to his attorney in writ-

ing, while the same was pending in court, and before judgment, viz., June 2, 1869, and verbally assigned the execution at the time judgment was rendered, to his attorney, both assignments being made in good faith.

The justice ruled as matter of law:

1. That the defendant was not justified by the assignments, because neither of them was made before McGlinchy "became entitled to the sum due" him on his execution against Stone.

2. That the defendant was not justified in demanding and forcibly collecting of the plaintiff payment of any more of the execution (*Stone* v. *McGlinchy*), on account of "the attorney of Stone in the suit for his fees and disbursements therein," than the amount of costs taxed in said execution.

3. That the defendant is liable in this action for the amount of damages and dollarage therein collected of the plaintiff, and interest from the date of the plaintiff's writ.

To the foregoing rulings the defendant alleged exceptions.

J. O'Donnell, for the defendant.

The set-off could not be made for two reasons: 1. Because the execution (*Stone* v. *McGlinchy*) was satisfied by the latter the day previous, viz., July 9, 1869, by the arrest and giving security for release; and the execution (*McGlinchy* v. *Stone*) was not delivered to the officer until July 10th. 2. Because, if the execution (*Stone* v. *McGlinchy*) had not been secured or paid, the cause of action had been legally assigned long before (June 2, 1869), and at the time judgment was rendered, to Stone's attorney. Such assignments are sufficient to transfer an equitable interest. *Porter* v. *Ballard*, 26 Maine, 451; R. S., c. 84, § 27.

McGlinchy did not "become entitled to the sum due" until judgment was actually rendered. Until then, it was uncertain whether he would recover anything. A contract, upon which a judgment at law has been recovered, is merged in and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of its recovery. *Holbrook* v. *Foss*, 27 Maine, 442; *Farnsworth* v. *Jackson*, 32 Maine, 419.

W. L. Putnam, for the plaintiff, cited *Rice* v. *Stone*, 1 Allen, 566; *Newbert* v. *Cunningham*, 50 Maine, 231; *Ocean Ins. Co.* v. *Rider*, 22 Pick. 210.

BARROWS, J. The claim of a *bona fide* assignee to the sum due upon a judgment, is protected from being offset by an execution in favor of the judgment debtor against his assignor, if his assignment had been lawfully made before the creditor in such execution became entitled to the sum due thereon. This protection is granted in connection with the provisions requiring an officer who has in his hands executions, wherein the creditor in one is debtor in the other, in the same capacity and trust, to cause one execution to satisfy the other so far as it will extend, and to make this set-off when holding one of such executions, if the creditor in the other tenders it to him with a request to that effect; and it is coupled with the exemption from this liability to be thus offset, of so much of the first execution as is due to the attorney in the suit, for his fees and disbursements therein. R. S., c. 84, §§ 26, 27.

These provisions are designed to bring about an equitable adjustment of counter-claims between the same parties, in cases where this fails of being accomplished under the statutes regulating the filing of accounts in set-off.

But it is obvious that they will be much less effective if the construction contended for by this defendant's counsel is sustained,—that no creditor can be considered as entitled to any part of the sum for which he obtains judgment, until that judgment is finally entered up. It would almost always be in the power of a party who is desirous of avoiding this equitable result, to ensure to himself the benefit of his own claim by making sale of it during the pendency of cross actions, if his assignee could be thereby empowered to collect his execution, without regard to any indebtedness which the assignor may have previously contracted to the other party.

We think that, as to the debt or damages, "the creditor in the other execution became entitled" to it when his cause of action

accrued, although as to the costs, assuredly he is not so entitled until he obtains a judgment for them. This construction seems absolutely essential to the beneficial operation of the statute, and a liberal construction should be given in furtherance of the object. So with regard to the provision relating to the attorney's lien, "the first execution" is not necessarily the first in date, or the first in the hands of the officer, but it is the execution issued upon the judgment in the action which was first commenced.

The plaintiff here tendered to the defendant enough to discharge the attorney's lien upon Stone's execution, and the defendant's fees for collecting it, and then having an execution of thrice the amount against Stone for rent, which accrued before Stone had any demand against him which was legally capable of assignment, he tendered it to the defendant, and called upon him to offset so much of the debt therein as would pay the debt in the execution of *Stone* v. *McGlinchy*. The defendant refused to do this on the ground that Stone's execution had been assigned to his own attorney before plaintiff "became entitled to the sum due" in his execution against Stone. But Stone's action was trespass for a personal assault. No effectual assignment of the sum that might be recovered in it could be made even after verdict, before final judgment. *Price* v. *Stone*, 1 Allen, 566.

The plaintiff became entitled to the rent months before the entry of the judgment in Stone's suit against him. The merger of the claim for rent in the judgment cannot affect the right of set-off.

There is nothing in the exceptions upon which to base the assertion made in argument that Stone's execution was satisfied before the plaintiff tendered his execution, and claimed the set-off. The defendant should have made this set-off as requested, instead of compelling plaintiff to pay the whole of Stone's execution.

Exceptions overruled.

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

JAMES SLADE, libelant, *vs.* ABIGAIL W. SLADE.

Judgment—conclusiveness of. Divorce. Exceptions.

Upon a libel therefor, in behalf of the wife, alleging constant faithfulness on her part, but extreme cruelty on a day certain, and on divers other days and times since that day, on the part of her husband, to which the respondent pleaded traversing all the allegations therein, the unreversed judgment of a court having jurisdiction of process and parties, adjudicating that "the allegations of said libel being satisfactorily proved," a divorce, *a mensa*, is decreed, is conclusive between the parties, as to their conduct towards each other during the continuance of their matrimonial relation to the date of the judgment.

The parties to a libel for divorce, *a vinculo*, tried by the presiding justice, at *nisi prius*, are entitled to the right of alleging exceptions to rulings admitting testimony.

And a party is not deprived of such right by waiving a previous request for a jury trial.

ON EXCEPTIONS.

LIBEL for divorce *a vinculo*, dated Feb. 20, 1868.

At the May term, 1869, the libelee requested a trial by jury, and at the January term, 1870, waived it, when the case proceeded before the presiding judge.

At the trial, after the reading of the libel, the counsel for the libelee read the answer, and introduced in evidence, without objection, a transcript of the judgment therein referred to. The identity of the parties was admitted.

The libelee objected to the introduction of any evidence in relation to the conduct of the parties to each other, prior to the date of the libel preferred in Massachusetts, and objected specifically to the evidence offered by the libelant, on the ground that the parties are concluded by the judgment rendered in Massachusetts.

The presiding judge ruled, that the record conclusively established the fact that the respondent, therein named, treated the petitioner, therein named, on Jan. 1, 1850, with extreme cruelty, as alleged in the libel, and that she had, at the date of the libel, been refused a proper and sufficient support and maintenance.

He further ruled that it was competent for the libelant to introduce evidence to prove the marriage, their cohabitation, his separation, the continuance of the separation, the birth of their children, his conduct toward his wife, and her conduct toward him; except so far as was found in the proceedings in Massachusetts, and not inconsistent with it, the effect of her conduct upon him, the impossibility of living in domestic peace and harmony, and that it would be conducive to domestic harmony and consistent with the peace and morality of society, to decree a divorce from the bonds of matrimony.

He then admitted evidence, in accordance with his rulings, embracing facts which occurred since the commencement of the proceedings in Massachusetts to the commencement of this libel; and upon the evidence, the presiding judge decreed a divorce.

To the introduction of such evidence the libelee alleged exceptions.

The remaining facts appear in the opinion.

Davis & Drummond, for the libelee.

Luques, for the libelant.

1. To the decisions of a judge, in matters at his discretion, exceptions do not lie. Virgin's Digest, 253, § 24; *Cummings* v. *Smith*, 50 Maine, 568.

R. S., c. 60, § 2, expressly refers the whole matter of libels to the discretion of "any justice of the supreme judicial court."

2. By withdrawing the case from the jury and referring to the court, parties are concluded as to exceptions. *Treat* v. *Gilmore*, 49 Maine, 34; *Sturtevant* v. *Randall*, 49 Maine, 446; Virgin's Digest, 215, § 38.

Counsel also cited *Sheafe* v. *Sheafe*, 24 N. H. 536.

Barrows, J. The parties to this libel were married Sept. 2, 1835, at Harrington, in this State, and there lived and cohabited as husband and wife for a few months, and then removed to Boston, where they lived together, in the marriage relation, until August,

1863, rearing, meanwhile, a family of children. This libel alleges that they then separated, and that on the 6th day of Dec. 1866, the libelee in the present suit, brought against this libelant her libel for a divorce from bed and board, returnable before the supreme judicial court, in Suffolk county, Massachusetts, upon which she had a decree granted, as prayed for, April 13, 1868.

At the next succeeding January term of this court, in the county of York, the husband, who appears, in the meantime, to have established his residence at Biddeford (the wife remaining in Boston), prefers this libel, alleging the foregoing facts, and also that he "has always conducted himself toward said Abigail as a faithful and affectionate husband; but that said Abigail, at Boston aforesaid, on the first day of August, A. D. 1858, and on divers other days and times since that time, and at all times, has been improvident and extravagant, that her temper, disposition, and deportment toward him, have, for a series of years, been irritating and destructive of all marital happiness; that her course and conduct for the past ten years have been such as to occasion dissension and discord in his family, and made his home uncomfortable and unhappy, and that, by the aforesaid libel and decree of divorce, his family has been broken up and permanent disunion produced. Wherefore, and because it would be consistent with the peace and morality of society, and because it is reasonable and proper, and conducive to domestic harmony," he prays for a divorce from the bonds of matrimony, etc. To all which the wife replies, by denying all the charges of misconduct on her part, and his allegation that he has always conducted himself as a faithful and affectionate husband, and reiterating the allegations of his cruelty toward her, which are found in her own libel, the judgment upon which (as shown by the record of the proceedings in Massachusetts) she claims as conclusive in her favor, upon the charges here made.

At the hearing before the judge, at the January term, 1870, the respondent produced, in evidence, a copy of the record of the judgment rendered in her favor, in Massachusetts, by which it appears that she alleged in her libel, among other things, that she "has

always behaved herself toward her said husband, as a faithful wife," but that he, "on the first day of January, eighteen hundred and fifty, and on divers days, and at various times, and frequently since that day, has treated her with extreme cruelty, by beating, striking, and otherwise assaulting her, and during said times and at other times been guilty of cruel and abusive treatment, both in words and by acts; that she has been refused proper and sufficient support and maintenance, although her said husband has ample means to provide for her, and that his whole conduct toward her for a great many years has been so cruel, abusive, and intolerable as to make a continuance of her marriage relations intolerable." The record further shows that there was personal service upon the husband; that he filed an answer saying "that all the allegations, matters and things, in said libel contained, are false and groundless, and that there is not any cause of divorce as prayed for;" that at the April term, 1868, "the parties appear and a full hearing is had, and the allegations of said libel being satisfactorily proved," a divorce from bed and board is decreed. It was further decreed, in pursuance of an agreement of the parties on file, regarding the alimony to be awarded, that the husband should pay the wife alimony, at the rate of $600 per annum.

The exceptions show that the respondent objected to the evidence offered by the libelant, generally and specifically, on the ground that the parties are concluded by the judgment rendered in Massachusetts upon the wife's libel.

The presiding judge recognized, to a certain extent, the well-established principle, that when a fact has been once judicially tried and determined by a court of competent jurisdiction, upon process regularly served, the judgment thereon, so long as it remains unreversed, is conclusive upon the parties, by ruling that the record conclusively establishes the fact that the respondent therein named, on the first day of January, A. D. 1850, treated the libelant with extreme cruelty, as alleged in the complaint, and that she had at the date of that libel been refused a proper and sufficient support and maintenance. Looking back, now, to the allegations in that

libel, and to the respondent's plea therein, we cannot help thinking that this was altogether too restricted a view of what was established forever, as between these parties, by that litigation.

The issue there joined and decided, covered more time and more of the conduct of these parties toward each other, than this ruling indicates, and the failure of the presiding judge to recognize this, resulted in the admission, against this respondent's objection, of more evidence touching the libelant's conduct toward his wife and her conduct toward him, than was consistent with a proper regard for the effect of the proceedings in Massachusetts.

That conduct had all been canvassed and passed upon, not merely what occurred upon the particular days specified in the ruling, but during the continuance of their matrimonial relation, up to the time that a separation was decreed by the Massachusetts court. Nothing specific is charged in this libel, as having been done by this respondent in the few months that elapsed between the entry of the judgment in Massachusetts, and the commencement of the present suit.

But all that is alleged, in relation to her conduct toward him, refers to the time when the parties were living together as husband and wife, and that all should have been (and we must presume was) duly heard, and considered by the Massachusetts court. Yet under the erroneous idea that the proceedings in Massachusetts were conclusive only as to what occurred on the 1st of Jan. 1850, and as to the refusal of support at the date of the wife's libel, evidence of "his conduct toward his wife, and her conduct toward him," seems to have been gone into here, which she, relying upon the estoppel recognized by the law, might well have supposed would be excluded, but which doubtless had its effect upon the mind of the judge, in bringing him to the conclusion that it was reasonable and proper that a divorce should be decreed. To the admission of that testimony, not to the decision of the judge upon a matter which was submitted to his discretion, she took exceptions.

The judge seems to have thought that exceptions were not allowable, but he certifies, in substance, that they were duly taken, and

are in conformity to the truth and a correct report of the case, in order "that the law-court may take such action thereon as they deem to be in accordance with the rights of the parties, and consider them as exceptions if allowable." We think this equivalent to an allowance in the ordinary form, if the matters excepted to are found to be properly the subject of exceptions.

It was, in fact, an allowance upon a condition subsequent, and the statute prescribes no particular form of certificate. But the libelant's counsel insists that exceptions do not lie to the rulings here, because by c. 60, § 2 of the Revised Statutes, the power of granting divorces from the bonds of matrimony, under certain circumstances, is given to any justice of the supreme judicial court "when, in the exercise of a sound discretion, he deems it reasonable and proper, etc.," and he argues that the whole conduct, as well as the result of the trial, is thus committed to the discretion of the judge who hears the case, and, therefore, none of his doings in a case of this description, can be the subject of exceptions.

But we do not understand that the legislature, when they authorized a judge at *nisi prius*, upon a libel properly signed and served, containing suitable allegations, to determine, in view of the testimony adduced in the exercise of a sound discretion, whether it was reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society that a divorce should be granted, designed that that discretion should be exercised, regardless of the rules of evidence, or of any of the requirements of law, in the conduct of the trial.

Some years afterward, by special enactment, they provided that the parties to such a process might be witnesses (Laws of 1863, c. 211, § 4); is it within the discretion of the court to exclude either of them? The same discretion which, under § 2, c. 60, of the Revised Statutes, is to be exercised by the judge, under § 4, at the election of either of the parties, or by order of the court, may be confided to the jury.

Is the jury, then, to determine what testimony they will hear, as well as what conclusions they will draw from it? We hold that,

whether the case is tried by the judge or the jury, the parties to a libel for divorce are entitled to the same right of exception to rulings admitting, or excluding testimony, or respecting any point of law arising in the case, which the parties have in any civil suit or proceeding at law. Such has been the practice in this court since the passage of the statute relied on. *Dwelly* v. *Dwelly*, 46 Maine, 377; *Chase* v. *Chase*, 55 Maine, 21.

Nor is the respondent deprived of her exceptions in this case, because she waived a previous claim of a jury-trial and proceeded to the court.

There is little analogy between a case of this sort and those cited from vols. 39 and 43 Maine Reports, where it was held that if a party to a cause, which, in the regular and ordinary course of proceeding, would be tried by a jury, waived the jury-trial, and by an entry on the docket agreed to submit the case to the presiding judge, he was not entitled to exceptions, unless the right was specially reserved. Here the case proceeds to the judge, unless one of the parties insists upon a jury-trial; there is no waiver upon the docket, and no particular statutory provision like that of 1852, that the presiding judge shall, in all causes thus heard, "direct what judgment shall be entered up." Under such provisions it might well be held that an agreement, to submit the cause to the judge, thus made, should be considered tantamount to a waiver of all exceptions not specially stipulated for.

We do not perceive that the case of *Sheafe* v. *Sheafe*, 24 N. H. 536 (which, so far as it has any bearing upon this, simply affirms that where the same court, which has once heard a case of divorce, is proceeding under statute authority to that effect to revise its own decree therein, the evidence also may be reconsidered, and evidence heard tending to exculpate the party against whom the decree passed), can be deemed an authority which would justify another court, having no power conferred by statute to revise decrees of this sort passed by the courts of other states, in admitting evidence upon the very points which had been previously litigated and determined between the parties before another tribunal, whose doings

are entitled to full faith and credit in this. It was the statute power to revise the decree which authorized the rëexamination of the testimony. If this libelant desires such a revision as this, he should apply to the court which heard the original case.

The judge at *nisi prius* erred, not as to the principle which should govern, but in not applying it to all the matters that were covered by the proceedings in Massachusetts. For a statement of the rule by which we abide, as to the conclusiveness and effect of judgments rendered by courts having jurisdiction of the parties and the subject-matter, whose judgments are entitled to full faith and credit with us, see *Walker* v. *Chase*, 53 Maine, 258; *Sturtevant* v. *Randall*, 53 Maine, 149.

The respondent had a right to expect that those matters which had been the subject of controversy, and had been once decided in her favor, would not in this process be agitated anew.

Exceptions sustained.

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

RICHARD S. CASWELL *vs.* PHINEAS F. JOHNSON.

Bond—construction of. Penalty.

The defendant, by a sealed obligation in the ordinary form of a bond, "acknowledged himself bound and obliged unto" the plaintiff "in the sum of five hundred dollars," ... conditioned that, "in part consideration of" the sale by the defendant of his fish-market and fixtures and stock to the plaintiff, he will not engage in the retail sale of fish, within the city of Biddeford, so long as "the plaintiff shall remain in thebusiness;" *Held*, (1) That by engaging in the retail sale of oysters within the time and place mentioned, was a breach of the condition; and, (2) That the sum of five hundred dollars constituted a penalty, and not liquidated damages.

Caswell *v.* Johnson.

ON REPORT.

DEBT on an instrument, signed and sealed by the defendant, of the following tenor:

"Know all men by these presents, that I, Phineas F. Johnson, of Biddeford, in the county of York, and State of Maine, am holden, and stand firmly bound and obliged unto Richard S. Caswell, of said Biddeford, in the sum of five hundred dollars, to be paid to said Richard S. Caswell, his executors, administrators, or assigns. To the which payment, well and truly to be made, I bind myself, heirs, executors, and administrators, firmly by these presents, sealed with my seal, dated the nineteenth day of December, anno domini, one thousand eight hundred and sixty-seven.

"The condition of the above obligation is such, that, whereas said Johnson has this day sold to said Caswell the stock and fixtures in the store occupied by him on Main street, in said Biddeford, and in part consideration of said sale, has agreed with said Caswell not to engage in the retail sale of fish, within said Biddeford, so long as said Caswell shall remain in the business. Now, therefore, if the said Johnson shall not, directly or indirectly, engage in such retail trade while said Caswell shall be engaged therein, then this obligation shall be void,—otherwise shall be and remain in full force."

There was evidence on the part of the plaintiff tending to prove that the defendant sold oysters at retail, in Biddeford, after the execution and delivery of the foregoing instrument.

George A. Emery, for the plaintiff.

J. M. Goodwin, for the defendant.

TAPLEY, J. This is an action upon a bond, with a penal sum, conditioned, among other things, "not to engage in the retail sale of fish within the city of Biddeford, so long as said Caswell shall remain in the business." The evidence shows that since the execution of the bond, the defendant has engaged in the retail sale of oysters. The plaintiff contends that this constitutes a breach of the bond, and the defendant contends that the sale of oysters is not within the engagement.

Is the oyster included in the term fish? Chapter 179, of the acts of 1821, is entitled, "an act for the preservation of certain fish." The second section of the act relates to oysters. The third section provides a penalty for taking "any other shell-fish." "Other shell-fish" are referred to in section 4.

Chapter 61, of the Revised Statutes, 1841, is entitled, "of fisheries," and makes provision in it concerning the willful destruction of any "oysters or other shell-fish."

This chapter is a revision and condensation of the acts of 1821, 1823, 1828, and 1840, concerning fisheries.

Chapter 40, of the present revision, is entitled, "fish and fisheries." In this chapter they are treated as "shell-fish."

In *Moulton* v. *Libbey*, 37 Maine, 472, it was contended "that the common right of fishery does not include the fishery of clams." The court say, "in all treatises respecting that common right, the general term, '*piscaria*,' or its equivalent, is used as including all fisheries, without regard to their distinctive character, or to the method of taking the fish."

It is quite evident that in all legislative and judicial proceedings concerning them in this State, they have been regarded as a species of fish, and that the right to take them in the sea and its arms and creeks, is given under the right of "fishing therein," and is embraced under the same general terms that the right of taking other fish is given.

The classification which scientific men have made, founded upon the physical structure of the animal, is not of such common notoriety among the dealers in this class of animals, as to lead to the conclusion that a legal instrument was drawn and executed upon their theories, rather than the well-known accepted theory of the legislative and judicial departments of the State, even if such classifications should differ. The term "shell" prefixed to the word "fish," thus making a compound word of it, does not exclude them from this class of animals, but is put there to indicate the particular kind of fish, as cod-fish, sword-fish, dog-fish, and the like. It is a shell-fish, that is, a fish covered with a shell.

As remarked by the counsel for the defense, "the language and terms of the bond are plain and clear; there is, therefore, no need for resort to facts or evidence outside of the bond itself to ascertain its meaning." The bond being unlimited, and embracing within its terms one kind of fish as well as another, the court cannot limit it, and select from the many varieties the kind, or kinds, to which it shall apply. If the maker designed it should be limited, he should have fixed the limitation in the instrument. We think the evidence does show a breach of the bond, and that brings us to the more difficult question of damages.

This action is upon a bond in the ordinary form, in which the party binds himself in the penal sum of five hundred dollars. The plaintiff claims that this is a damage fixed by the parties, and that he is entitled to judgment and execution for that amount. The defendant claims that it is not a liquidated sum, but is inserted as a penal sum, and that if the plaintiff recovers, he can recover only such damage as he proves he has sustained.

Upon a careful examination of the case in the light of the adjudicated cases bearing upon this question, a majority of the court are of opinion that the sum inserted cannot be regarded as liquidated damages; therefore there must be

Judgment for the plaintiff, for the penal sum of the bond, and the amount for which execution shall issue, to be determined by a judge at nisi prius.

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

BENJAMIN WEBSTER *vs.* JOSHUA HOLLAND.

Parol demise. Flowage—what title essential to complainant. Grant of right of flowage—construction of.

Where one of three joint grantees paid no part of the purchase-money, and claimed neither possession nor title under the deed, nor exercised any control over the premises, he may be considered as having made a parol demise of his interest to the other grantees; and such a transfer, followed by more than forty years exclusive possession on the part of his co-grantees and their assigns, would bar any claim which he might thereafter assert.

The fact that a fee, of which a complainant is sole seized, is liable to be defeated by the non-performance of some condition subsequent by some former owner, will not preclude the complainant from recovering of a stranger to the title the damages sustained by flowage while he is in possession, no one having entered to claim a forfeiture for condition broken.

The grant by deed of "a full and perfect right to flow all land belonging to" the grantors, "situated in" a certain town, "and adjoining the Brown brook, so-called, meaning, nevertheless, to grant no right of flowage which would injure *of effect* the privilege of the Philpot mill, so-called,"—conveyed the right to flow such only of the grantors' lands there as would be flowed by a dam, so constructed as not to interfere with the Philpot mill-privilege as it existed at the date of the grant.

ON FACTS AGREED.

COMPLAINT for flowage, founded on R. S., c. 92.

The facts as they existed on the face of the earth can be readily understood from the opinion.

H. H. Burbank, for the complainant.

C. R. Ayer, for the respondent.

BARROWS, J. This complaint for flowage of land lying in Limerick, by means of a dam situated on Brown's brook, comes before us for adjudication upon an agreed statement of facts, in which the parties have stipulated that if the plaintiff has a full and complete title to the land flowed, the case is to be remanded, to have the damages ascertained as the statute provides. But if the defendant

has the right which he claims to flow the land, then plaintiff is to become nonsuit. The complainant must show that he is the sole owner of the land, or he fails to maintain his suit. *Davis* v. *Stevens*, 57 Maine, 593; *Tucker* v. *Campbell*, 36 Maine, 346. He presents a warranty deed of the premises to himself from Moses Philpot, dated May 9th, and recorded May 11, 1861.

In the absence of any further evidence respecting the title, this would suffice under the foregoing stipulation to entitle the plaintiff to have his damages ascertained, unless the defendant proves that he has the right to flow the land. But the plaintiff's title is traced back to John Watson, who, it seems to be conceded, was the owner of the land at some time prior to June 2, 1824.

On that day his administratrix, under license from the probate court, granted Oct. 26, 1823, appears to have conveyed a parcel of land, which included this, to Richard, Andrew, and John Philpot, by a deed regularly and seasonably executed, and delivered within the year after the granting of the license, though not acknowledged by the grantor till Oct. 1, 1841, nor recorded until Sept. 7, 1854.

One of the grantees in this deed, John Philpot, does not appear ever to have made a written conveyance of the undivided third which he acquired by this deed, and this would defeat the present suit if it did not affirmatively appear in the agreed statement that John paid no part of the purchase-money, and never claimed possession or title under the deed, nor exercised any control over the premises. He may be considered as having made a parol demise of his interest to the other two grantees, Richard and Andrew Philpot. Such a transfer, followed by more than forty years' exclusive possession by Richard and Andrew and their grantees, would effectually bar any claim that could now be asserted by John. So it was held in *Hamor* v. *Wasgatt*, a Hancock county case, decided in 1864 (not reported). See also, *Sumner* v. *Stevens*, 6 Met. 337.

Andrew Philpot quitclaimed his undivided half of the whole parcel, Aug. 26, 1854, to Richard, who thus became sole seized, and by his will, duly probated in 1858, devised his real estate to his son Moses (the complainant's grantor), charged, however, with the

maintenance of his wife, Huldah Philpot, and subject to a life-estate in her in certain portions of the same. But we find nothing in the provisions of the will which can prevent Moses from conveying to the complainant such an estate as will enable him while in possession, under a warranty deed from Moses, to maintain this process against any one wrongfully flowing the land. That the fee, of which a complainant is sole seized, is liable to be defeated by the non-performance of some condition subsequent by some former owner, will not preclude him from recovering of a stranger to the title the damage sustained by flowage while he is in possession, no one having entered to claim a forfeiture for condition broken.

It remains for us to determine whether the respondent is entitled to flow the land according to his claim, as the assign, through certain mesne conveyances, of the Limerick Woolen Manufacturing Co., to whose trustees Richard Philpot and als. in 1846, while they owned the premises, granted by deed "a full and perfect right to flow all lands belonging to us, situated in said Limerick, and adjoining the Brown brook, so-called, meaning, nevertheless, to grant no right of flowage which would injure *of effect*" (*or affect* probably intended), "the privilege of the Philpot mill, so-called." In the days when the technical rules of construction, laid down in the Touchstone and other ancient books of the law, were more rigidly adhered to than they are now, it might perhaps be questionable whether these grantors, having first conveyed "a full and perfect right to flow all the lands" there situate, belonging to them, could take back the right to flow a part of them by adding, in the same conveyance, "meaning, nevertheless, to convey no right of flowage which shall injure," etc. See 4 Greenl. Cruise, 300, Title, Deed, c. 20, § 8; Sheppard's Touch. 88; Hobart, 173.

But later decisions have effectually subordinated the more technical rules of construction to the more equitable general one, which requires us to give effect to the apparent intention of the parties if possible, provided that intention contravenes no positive rule of law.

And we think it manifestly the intention of the parties to this

grant that the grantees should acquire thereby only the right to flow such of the grantors' lands there as would be flowed by a dam so constructed as not to interfere with the Philpot mill-privilege as it then existed. The agreed statement of facts informs us that the dam actually constructed by the Limerick Manufacturing Co., when there was a full head of water, did interfere with and obstruct the use of the Philpot mill-privilege, but did not flow the premises now owned by the complainant.

It further appears that after the complainant bought of Moses Philpot, the respondent acquired a title to the Philpot mill-privilege, took away the old mill there, and by means of a dam, five feet higher than that erected by his predecessors, the Limerick Manufacturing Co., overflows the old Philpot dam and the complainant's land, claiming the right to flow all the lands that were owned by Richard Philpot and others at the time of the grant aforesaid, untrammeled by the restrictive clause in the grant.

This proceeding cannot relieve him from the payment of damages for flowing such of the Philpot lands as would not be flowed by a dam which would not interfere with the old Philpot mill-privilege. Accordingly, *The complainant's damages are to be ascertained in the mode prescribed by the statute.*

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

MARY A. KNOWLES *vs.* GEORGE TOOTHAKER.

Deed—construction of.

When a line described in a deed as running from a given point, is soon afterwards located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed.

Thus, Henry Smith conveyed to the defendant so much of his land as lay north of a line extending from a given point easterly, and "parallel with the north line of lot No. 9, to the county road," and thereupon, after causing the line to be surveyed, and marked on the face of the earth by stakes and stones and spotted trees, they built thereon a fence, intending it as the division fence, and respectively occupied thereto for six years, when Smith conveyed his remaining land to the plaintiff's grantor, running "to land supposed to be owned by" the defendant, "thence easterly on said" defendant's "south line to the county road;" *Held*, that the clause, "thence easterly on the said defendant's south line," limited the plaintiff's land to the fence, although the real line, as given in the deed, lay some rods north of the fence.

ON REPORT.

WRIT OF ENTRY.

CASE is fully stated in the opinion.

S. Belcher, for the plaintiff, cited *Wiswell* v. *Marston*, 54 Maine, 270.

P. M. & P. H. Stubbs, for the defendant.

DICKERSON, J. WRIT OF ENTRY. Both parties claim title through the same grantor, Henry Smith, who, in the first instance, conveyed "parts of lots numbered 9 and 10, on the east side of Sandy river," to the defendant. After reciting the other boundaries, the description in the deed continues as follows, "thence easterly by a line parallel with the north line of lot No. 9 to the county road," the grantee taking the land north of the line now in dispute, and the grantor retaining the land south of it. The line

was run and marked by a surveyor immediately after the conveyance, and the parties then built a fence on it, intending it for a division fence, Smith occupying to the fence on the south, and the defendant on the north side of the fence, for some six years, when Smith conveyed his remaining parcel to the plaintiff's grantor, describing the line in controversy as follows, "to land supposed to be owned by George Toothaker, thence easterly on said Toothaker's south line to the county road." About eight months afterwards, the grantee conveyed the last named premises to the plaintiff, describing it as "the same she purchased of Henry Smith." The plaintiff claims to hold to the line described as running "easterly by a line parallel with the north line of said lot No. 9 to the county road," in Smith's deed to the defendant, which is several rods northerly of the fence, and the defendant claims to hold to the divisional line made by the fence; and the question is, which is the true line between the parties?

The presiding judge ruled that the words, "on said Toothaker's south line," would limit the plaintiff's land to the line established by Toothaker and Smith, on which the division fence was built, and that she could not hold beyond this line, even if she could satisfy the jury that it did not conform to the original lot line; thereupon the parties agreed to submit the question to the law court, judgment to be rendered for the defendant if the ruling is correct; if not, the action is to stand for trial.

But for the acts of the parties in interest, in running, marking, and locating the line, building a fence upon it immediately after the conveyance, and occupying up to it down to the commencement of this suit, the line on the course described in the deed, if it could be ascertained, would be the line between the two parcels. Did these acts fix and establish the divisional line as the true line?

It was early held that where a deed refers to a monument, not actually existing at the time, but which is subsequently placed there by the parties for the purpose of conforming to the deed, the monument so placed will govern the extent of the land, though it does not entirely coincide with the line described in the deed. *Make-*

peace v. *Bancroft*, 12 Mass. 469 (1815); *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 211 (1821); *Lerned* v. *Morrill*, 2 N. H. 197 (1820).

Again it was held in *Moody* v. *Nichols*, 16 Maine, 23 (1839), that when parties agree upon a boundary line, and hold possession in accordance with it, so as to give title by disseisin, such boundary will not be disturbed, although found to have been erroneously established. In that case the call in the deed was "a line extended west, so as to include" a certain number of acres, the boundaries upon the other three sides having been accurately described. The parties to the deed agreed upon and marked that line, erected a fence upon it, and held possession according to it for thirty years.

The same doctrine was held by the supreme court of the United States, in giving construction to a line described in the deed as "running a due east course" from a given point. *Missouri* v. *Iowa*, 6 How. 660.

So the court in Massachusetts, in giving effect to a deed, describing a line as "running a due west course" from a given point, held that the line located, laid out, assented to, and adopted by the parties, was the true line, though it varied several degrees from "a due west course." *Kellog* v. *Smith*, 7 Cush. 382 (1851).

In *Emery* v. *Fowler*, 38 Maine, 102 (1854), the call in the deed was a line from a given point, "on such a course . . . as shall contain exactly one and a half acres." The lots to be conveyed were located upon the face of the earth by fixed monuments, erected by referees mutually agreed upon; and the parties to the several conveyances assented to and adopted the location before the deeds were given. Deeds intended to conform to the location thus made were then executed by the parties. The respective grantees entered under the deeds, built fences, and occupied in conformity with the location for fifteen years, when, it being found that more land was contained within the limits of the actual location upon the face of the earth than was embraced within the calls of the deed, a dispute arose. The court held that the monuments thus erected before the deed was given, must control, thus extending the rule adopted in

Moody v. *Nichols* to cases where the possession had not been long enough to give title by disseisin. That decision also makes the rule of construction the same, whether the location is first marked and established, and the deed is subsequently executed, intended to conform to such location, or whether monuments, not existing at the time, but referred to in the deed, are subsequently erected by the parties with like intention.

In construing a deed, the first inquiry is, what was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern; but when, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the earth, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles. The ordinary variation of the compass, local attraction, imperfection of the instruments used in surveying, or unskillfulness in their use, inequalities of surface, and various other causes, oftentimes render it impracticable to trace the course in a deed with entire accuracy. If to these considerations we add, what is too often apparent, the ignorance or carelessness of the scrivener in expressing the meaning of the parties, we shall find that the acts of the parties in running, marking, and locating a line, building a fence upon it, and occupying up to it, are more likely to disclose their intention as to where the line was intended to be, when the deed was given, than the course put down on paper, if there is a conflict between the two.

Hence the rule of law now is, that when, in a deed or grant, a line is described as running from a given point, and this line is

afterwards run out and located, and marked upon the face of the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive, and must be adhered to, though it may be subsequently ascertained that it varies from the course given in the deed or grant.

The acts of the defendant and Smith, through whom the plaintiff claims, in surveying and marking the line in dispute upon the face of the earth by stakes and stones and spotted trees, building a fence thereon, intending it to be the line between them, and occupying up to it, make and establish such line as the divisional line between the two lots.

The ruling of the presiding judge was in accordance with this construction of the deeds, and there must be

Judgment for defendant.

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

STATE *vs.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

Evidence. Practice. Common carrier. Passenger.

In the trial of a railroad corporation on an indictment under R. S. of 1857, c. 51 § 42, the same rules of evidence and the same principles of law should be applied as in analogous civil actions for damages.

When a passenger enters a railway train, and pays the regular fare to be transported from one particular station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station.

And when such train turns out upon a side-track, at an intermediate station, and there stops to await the crossing of another train out of time, and the passenger, not destined to that station, without objection made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence.

When such passenger thus leaves the car, and is on the platform, or near the track when his train is about to start, or the coming train has signalled its approach, the corporation, through its officer or servant, should give reasonable and seasonable notice for such passenger to return to the car, by using proper diligence, caution, and care; and if there be an established signal by the blowing of the whistle for passengers to resume their places in the cars, that should also be given.

But if the passenger go out of sight, and out of the reach of the voice which gives the usual loud and distinct notice for all passengers to repair on board, the corporation is not required to go after him.

On exceptions to the rulings of *Goddard*, J., of the superior court for the county of Cumberland.

Indictment founded on R. S., c. 51, § 36, alleging, substantially, that the defendants, at Yarmouth, on Aug. 2, 1869, negligently and carelessly run their locomotive against one David P. Pullen, then and there in the exercise of due care and diligence, by means whereof he was killed.

It appeared that the deceased purchased a ticket at Auburn, for Portland; that the train turned out on the side-track at Yarmouth station, to await the express train from Portland, which was then late; that he left the car, crossed the main-track, and went behind the water-tank to urinate; that the express train signalled its approach when a mile away, whereupon the conductor of the waiting train gave the usual notice for passengers to resume their seats, which was repeated when the approaching train was one-third of a mile away; that the down train gave the usual double-whistle signal and started about the time the express train arrived opposite the station; that the deceased did not hear the order of the conductor, but did hear the double-whistle, and thereupon rushed out from behind the water-tank, and not seeing the express train, because of intervening water-tank, undertook to cross the main-track, when he was struck by the engine of the express train, and so injured that he survived about two hours.

The express train did not stop at the Yarmouth station. And in relation to its rate of speed while passing the station, there was much conflict of testimony; some of the witnesses fixing it at six and others at twenty-five miles an hour.

After the judge had completed his charge, Mr. Bradbury, counsel for the defendants, said: "If your honor please, I ask your honor to instruct the jury that the contract between Pullen and the Grand Trunk Railway Company, being for transportation on their cars from Auburn to Portland, that they were not bound at any station, between these two points, to furnish ingress and egress to and from the cars for him.

Court. I give you that instruction, but I do not think it has anything to do with this case. The government is not proceeding in a civil suit for damages.

Bradbury. Do I understand your honor to give it unqualifiedly, or to explain it away?

Court. I give it unqualifiedly, but I also say that this party, having lost his life there, the question seems to me to be, was it by their negligence, while he was in the exercise of due care and diligence? This is not a suit for damages.

Bradbury. If your honor please, if the company is not bound to furnish safe ingress and egress at any intermediate point between the two points, then the passenger leaves the cars at his own risk.

Court. That may be true so far as a civil suit for damages is concerned, but I am not prepared to instruct the jury that it necessarily follows that the company can, therefore, escape liability in this prosecution, whereby the government seeks to obtain a conviction under the statute which imposes a fine for the benefit of his wife and children.

Bradbury. I understand your honor to give the instruction, and then to say that it has no bearing upon this case. I hold the position, if the contract between Pullen and the company was for his transportation between Auburn and Portland, that they are not bound to furnish ingress and egress to or from the cars, at any point between these two stations, that if he left the cars at any intermediate point, he left them at his own risk, and the company would not be responsible, under this indictment, for any accident that happened.

Court. I give you the instruction so far as a civil suit is con-

cerned between the parties. In my judgment it has nothing to do with the case. I do instruct you, distinctly, that if you are satisfied that there was negligence or carelessness on the part of the railway, or any of its agents, while employed in its business, and due care and diligence on the part of Pullen, the fact that he had left the train for a necessary purpose, without caution or notice by the railway company not to do so, does not constitute a defense to this action.

Mr. Bradbury then asked that the requested instructions and rulings be read by the stenographer.

The judge then said that he would reduce his instructions on this point to writing, which he did, and then read them to the jury, as follows:

"If the jury are satisfied that the life of Pullen was lost at the time and place laid in the indictment, by the negligence or carelessness of the Grand Trunk Railway Company, or its servants or agents, while employed in its business, and that Pullen was in the exercise of due care and diligence, then they are authorized to find respondent company guilty, and that the fact that Pullen, who is conceded to have been a passenger, entitled to be carried on the noon passenger train of that day, by respondents, from Danville Junction to Portland, over their road, had left the car, for a necessary purpose, while that train was waiting at Yarmouth station, without any caution or notice from respondents, and without being forbidden or requested to forbear from so doing, or any public notice or rule or regulation of the company forbidding it, and was returning thither at the time of the accident, does not excuse respondents from liability in this prosecution."

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

Bradbury & Bradbury, for the defendants.

T. B. Reed, attorney-general, for the State.

KENT, J. Exceptions to ruling of the judge.

It is provided by § 42, c. 51, R. S., that "any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment, found within one year, wholly to the use of his widow, if no children; and to the children if no widow; if both, to her and them equally; if neither, to his heirs."

The indictment charges facts which it is alleged, if true, bring the case within this provision of the statute.

This provision, for the payment of a sum of money for the loss of life, was undoubtedly made for the purpose of obviating the objection to such recovery, arising from the long-established doctrine of the common law, that no action for damages could be sustained for such loss of life.

It was declared in *Nickerson* v. *Harriman*, 28 Maine, 279, that "by the common law no value is ever put upon human life, to be recovered by way of damages in an action." And the court in Massachusetts held to the same doctrine in *Carey* v. *Berk. R. R. Co.*, 1 Cush. 475. The subject was discussed, with great ability, by Sprague, J., in *Cutting* v. *Seabury*, 1 Sprague's Decisions, 522, in which case the learned judge expresses doubts of the justice or wisdom of the rule, and whether it is fully "settled that no action can be maintained for the death of a human being," yet he does not decide the case upon that point, and leaves the question undetermined in his mind.

It was, no doubt, the belief that the common law afforded no remedy where life had been lost, even in the case where the injury, if it had been less than fatal, would have been good ground to sustain an action for damages, that led our legislature, at an early day, to provide a remedy for such cases.

In the law respecting highways, it has been provided, ever since the statute of 1821, that if any person suffers injury to his person or property, by reason of any defect in a highway, he may recover

his damages of the town liable to keep it in a safe condition. And in the same section it is provided, that, if the life of any person is lost through any such deficiency, the town bound to keep it in repair, having notice, shall forfeit not exceeding one thousand dollars, to be paid to the executor or administrator of the deceased for the use of his heirs, to be recovered by indictment.

The same mode of procedure, and for the same reason, has been provided in the statute now in question, and also made applicable to steamboats, stage-coaches, and common carriers. R. S., c. 52, § 7.

A question arises as to the rules and principles that are to govern in the trial of an indictment, found under these provisions. Are there any different rules to be enforced, because the claim is in this form, than are applied to the trial of civil suits, for like injuries? If, for instance, an indictment is found against a town for the loss of life by reason of a defect in the highway, must not the trial proceed, and the verdict be rendered upon the proof of the same facts, as in a civil suit for a less injury? The prosecution must prove a defective road,—the death caused solely by that defect, and reasonable care on the part of the deceased. On such proof, the verdict must be guilty, without any proof of a criminal intent or malice, or any of the distinguishing characteristics of a criminal prosecution, except the form of an indictment. But the State inflicts no punishment, as against a criminal offender, and no sentence of fine and imprisonment follows. The statute simply declares that the town "shall forfeit not exceeding one thousand dollars, to be paid to the executor or administrator of the deceased for the use of his heirs, to be recovered by indictment."

Nearly the same language is used in this section in relation to railroads, before quoted.

It is manifest that the whole object of these provisions, in regard to indictments, was to obviate the common-law doctrine in reference to human life, before stated, and to enable the heirs or family of the deceased to recover, for their own use, damages, to a certain extent, for the loss of life. But it was not the intention of the

legislature to do more than to do away, to this extent, with the rule that all claim for damages must stop at the grave. If, in this case, the man had lost a leg, but not his life, he could and must have brought a civil action to recover his damages. For reasons above stated, the law makers have carried the right beyond the life that was lost, and have adopted this mode of enabling the widow or children to recover for the loss of the father and husband.

It was thought just and expedient to hold these corporations and carriers thus liable, when death results from their wrong or neglect.

In England the same result was obtained by allowing a civil action, to recover damages by the representatives or family of the person killed by accident. Stat. 9 and 10 Vict. c. 93.

It will be observed that this is not an indictment for manslaughter, for causing the death of a human being unlawfully. The counts in this indictment are but little more than those which a pleader would have inserted in a writ, if the injury had been severe but not fatal. It would be anomalous, to say the least, to apply different rules of law to the two cases.

We are satisfied that in all this class of cases, where the statute has attempted to supply the supposed defect of the common law, as before explained, the same rules of evidence, and the same principles of law should be applied, as in like cases, when redress is sought by a civil action for damages.

In the case at bar, the presiding judge took a different view of the law.

The counsel for the defendants requested a distinct instruction, to the effect, that the contract between the deceased and the defendant company, being for transportation on that train, from Auburn to Portland, the company was not bound, at any station between these two points, to furnish ingress and egress to and from the cars; that if he left the cars at any intermediate point, he left them at his own risk, and the company would not be responsible, under this indictment, for any accident that happened.

The court said, "I give you that instruction so far as a civil suit is concerned between the parties. In my judgment it has nothing to do with the case."

The same counsel had before asked for an instruction covering only, but distinctly, the first part of the above request, viz., that, under the facts stated, the company were not bound to furnish ingress and egress at any intermediate station. The court on this request said, "I give you that instruction, but I do not think it has anything to do with this case. The government is not proceeding in a civil suit for damages."

The counsel then asked, "if the court intended to give it unqualifiedly, or to explain it away." The court replied, "I give it unqualifiedly, but I also say, that this party, having lost his life there, the question seems to me to be, was it by their negligence, while he was in the exercise of due care and diligence? This is not a suit for damages."

The persistent counsel then urged, that if his first proposition was correct, "then the passenger leaves the cars at his own risk." The court replied, "That may be true so far as a civil suit for damages is concerned, but I am not prepared to instruct the jury that it necessarily follows, that the company can, therefore, escape liability in this prosecution, whereby the government seeks to obtain conviction under the statute which imposes a fine for the benefit of his wife and children." The counsel then remarked, "I understand your honor to give the instruction, and then say that it has no bearing upon this case." He then more fully stated his proposition, as above set forth at the commencement of this recapitulation, and the judge made the reply there quoted. From this recapitulation, it is evident that the court declined to adopt the rule, which we have before stated, as in our view the correct one. The jury must have understood that the rules and principles, which would have governed in a civil case, were not applicable to the case before them. The court repeatedly admitted that the rule of law, contended for by the defendants, was correct and true, but decided that it could not apply to the case on trial, because that was by indictment. We think if it was correct, it should have been given. The counsel asked for a specific instruction on a single point. The defendants had a right to a distinct ruling on this point, and it should have been given or refused or modified.

It may admit of a doubt whether, in any view of the case, and under the most stringent rules of law applicable to criminal prosecution, the request was not one which should have been answered by the court, and proper instructions and explanations given on the point raised. It bore, more or less directly, upon the actual relations of the parties at the time of the accident. The essential point of the request was, what was the nature of the contract between the parties, and how far did that contract authorize the passenger to leave the cars, with intent to return, at an intermediate station, and how far did it require the company to provide means of ingress and egress for him at such stations, or to give notice to such absent passenger to return? Was such leaving entirely at the risk of the passenger? This might depend upon the ruling of the court as to the nature and extent of the contract between the parties.

It appears by the report, that after the above-stated colloquium between the judge and the counsel, the judge reduced his instructions on the point to writing. In those instructions, however, he does not answer the request, as to the nature of the contract, or explain to the jury the rights and liabilities of the parties under it. He does say that the single fact that he left the car for a necessary purpose, without any caution or notice, and without being forbidden or requested to forbear from so doing, or any public notice or rule or regulation of the company forbidding it, and was returning thither at the time of the accident, does not excuse respondents from liability in this prosecution.

It may be true to this extent, viz., that these facts would not be, alone, a perfect defense, but it failed in not more fully stating and defining the various points before alluded to. This instruction does not meet the request. It does not state a general rule, as to rights of a passenger, in respect to leaving the cars at an intermediate station, and the duty of the company to provide ingress and egress.

We think the judge should have instructed the jury, that the proposition of the defendant's counsel, in his first request, was correct, as the judge admitted it was, if applied in a civil suit. But we do not see that it follows that, therefore, the company could not

be liable under any state of circumstances, as asserted in the conclusion of the last request. When a train stops at one of its stations to discharge and receive passengers, belonging to that particular station, the company is bound to see that proper modes of egress and ingress are provided for such passengers. But the other passengers may leave the cars, unless notified not to do so, but it must, to a certain extent, be at their own risk, so far as the usual modes of egress or ingress are in question. And the same rule applies more strongly, when a train stops on a side-track, awaiting the passing of another train out of time. In such a case the duty and the safety of the passengers both concur in saying to those who are not destined for that station, that they should remain in the car. That is the place of safety. The uncertainty as to the time when the other train may pass, and as to its rate of speed, and the danger in standing on or near the track, or in passing across it, are all suggestive of risk, and of the necessity of great care and caution to avoid injury.

If, however, no objection being made, or notice given, a passenger, who properly ought not, does leave the car, when thus stopping, does no illegal act, but he, for the time, surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. He may return to his seat and resume his place and rights as a passenger on that train before it starts.

But whilst thus "his own man," he may be injured or killed, as other persons, not passengers, may be, "by the negligence or carelessness of the railroad or its agents," and the corporation may be liable for such negligence or carelessness.

A question may arise as to the duties of the servants or agents of the road, when such passengers have left the cars without objection, and are on the platform, or near the track, when the train is about to start, or the coming train has signalled its approach. We think it but reasonable, in such cases, to require that the proper officer or servant of the corporation should give reasonable notice in time for such passengers to return to the cars, which they left,

safely, by using due and proper diligence, caution, and care. But they are not bound or required to go after those who have gone away and out of sight and out of reach of the voice, which gives the usual loud and distinct notice for all to repair on board. If there be an established signal, by blowing the whistle, for passengers to take their places in the cars, that should also be sounded.

But if a passenger goes beyond this limit, and does not, in fact, hear the summons, it is his fault or misfortune. The road has done its duty in this particular. We do not mean to say that even in such a case, he may not be killed or injured by the negligence or carelessness of the corporation, within the meaning of the statute.

If it is proved that there were such acts of negligence and carelessness, the corporation may be liable, if those acts caused the death of the party named in the indictment, without any negligence or carelessness on his part, contributing to the injury.

The question must be determined upon the whole evidence, under the rules of law. The first point to be established is the negligence or carelessness of the corporation.

After a careful examination of the whole case and of the exceptions, we think there should be a new trial, for the reasons before stated. *Exceptions sustained.*

New trial granted.

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

Alexander Dunn *vs.* Grand Trunk Railway Company of Canada.

Common carrier.

If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger,—the corporation incurs the same liability for his safety as if he were in their regular passenger train.

On exceptions to the rulings of *Goddard*, J., of the superior court for the county of Cumberland.

Case for an injury alleged to have been received in July, 1868, while being transported from South Paris to Danville Junction, through the alleged insufficiency of the track and cars of the defendants, and the careless and negligent manner in managing them.

There was evidence tending to show that the plaintiff entered the saloon-car attached to the defendants' freight train, at South Paris station, for the purpose of going to Danville Junction; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare of eighty-five cents; that the saloon-car was thrown from the track and dumped; that the plaintiff was thereby injured; that the car was thrown off by a broken rail, and that the fare was thereupon paid back.

There was evidence on the part of the defense, tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers on the freight train, which was denied by the plaintiff.

It also appeared that the defendants issued a notice on May 23, 1866, that after that date "passengers would not be allowed to travel by freight trains on that part of the line between Portland and South Paris." On Sept. 8, 1868, they issued notice that "no passengers will be carried in the brake vans attached to freight

trains without written authority from the superintendent. . . . Any conductor allowing a passenger to travel in the brake van, or on any part of the freight train, will be dismissed."

The defendants requested the presiding judge to instruct the jury:

1. That the plaintiff was not entitled by law to be carried in the freight train of defendant company, as a passenger, unless by permission obtained before he entered the train from some authorized agent of defendants; and that if the jury find that plaintiff entered the freight train at South Paris without such permission, then that plaintiff is not entitled to recover for the alleged injury, and their verdict should be for defendants.

2. That if the jury find that the defendant company, before the time of the injury received as alleged by the plaintiff, had established and published a regulation by which passengers were not allowed to travel by freight trains on that part of the line between Portland and South Paris, and that such regulation was in force at that time, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

The judge did instruct the jury, *inter alia*, as follows: "I understand that the defense is substantially this, that inasmuch as notices had been issued and published by the directors of the company, prohibiting passengers from riding on freight trains, therefore, this passenger being upon a freight train, the company was not liable for the injury that he received, though the company would have been liable if he had been in a passenger train. If there is any other defense, you have noticed it, and of course you will give them the benefit of it.

"I have been requested to give you a number of instructions touching this particular point, all of which I decline to give except this:

"I do instruct you for the purposes of this case, that the plaintiff was not entitled by law to be carried on the freight train of defendant company, as a passenger, unless by permission obtained before he entered the train from some authorized agent of defend-

ants. I give you that one, and no more. But I also instruct you, that if you find that the plaintiff was allowed by the conductor, upon his entering that car, and upon the starting of the train, to remain as a passenger on that train, in a saloon-car; that on a full knowledge of the facts, the conductor on that train allowed and authorized that man to remain there without directing him to get off, or any attempt to put him off, and that afterwards he received from him pay as a first-class passenger, not only to the next station where the freight train was to stop, but beyond that station to Danville Junction, a further point on the road where the plaintiff desired to go (for I understand the evidence is that he was going to Lewiston, and Danville Junction was the furthest possible point in that direction on this road), then I instruct you that the defendant company cannot plead their regulation in release of their ordinary legal liabilities, but they are just as liable as if it had been a passenger train, and as if there had been no notices, provided that the plaintiff was not guilty of any fault or want of ordinary care himself."

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

P. Barnes, for the defendants.

I. The law of the case is with the defendants.

Lygo v. *Newbold*, 9 Excheq. 302. Plaintiff, without defendant's authority, but by permission of defendant's servant, rode in a cart, with her goods, which defendant had contracted to carry for her. Upon suit for personal injury occasioned by the cart's breaking down, *Held*, that the defendant was not liable for that injury, the plaintiff not being rightfully in the cart.

This case is cited as authority, in the case of *Lucas* v. *Taunton & N. B. Railroad Company*, 6 Gray, 70.

2 Redfield, 114, 3d ed. "Where an agent of a railway company assumed to make a contract, in relation to the business of the company beyond the line of his ordinary employment, and especially when it is in contravention of the common course of the business

of the company, or of their published rules and regulations, it will not bind the company."

Cites *Elkins* v. *Boston & Maine Railroad Co.*, 3 Foster, N. H. 275, which was a case of goods promised by agent, to be sent by passenger train, and lost.

The present case is the converse,—passenger going by goods train.

And stronger, in the circumstance that plaintiff entered the freight train without previous permission from any one, the conductor not knowing it until after the train had started. The conductor was not under obligation to stop the train to put him off, and had a justification, in a qualified sense, for taking plaintiff's money for the distance he was to go,—it not appearing that this freight train had any nearer, regular stopping-place. Under such circumstances, the plaintiff must be held, notwithstanding the payment, as taking upon himself the consequences of his unlawful act.

Robertson v. *N. Y. & E. R. R. Co.*, 22 Barb. 91, was a case of a person riding on an engine, with consent of the driver, but against regulations; *Held*, that the consent of the driver gave no legal right; *Held*, also (as might have been insisted on, in the case at bar), that the *onus* of showing the driver's authority was on the plaintiff,—"the presumption being, that plaintiff had no right to ride on the engine, whether he paid fare or not."

C. C. & C. R. v. *Bertram*, 11 Ohio, 457, cited in 2 Redfield, 219, was a case where regulations existed permitting passengers to go upon certain freight trains, under prescribed conditions; *Held*, that payment of fare to the office agent, or procuring a ticket before entering the train, was not an unreasonable condition.

Held, also, "that an offer to pay fare to an employee on the train not authorized to receive it, is not an offer to the company, and does not entitle the party to a place on such train as a passenger."

II. That part of the requested instruction, which was given by the court below, fully concedes the legal right of the defendant to exclude passengers from its freight trains, and to adopt regulations for that purpose.

The proof clearly establishes that the defendant had adopted and published such a regulation.

The inconsistency between the instruction as first given, and those which follow, is obvious.

The whole amounts to this,—that a railway company may lawfully establish a regulation excluding passengers from its freight trains, but that conductors of such trains may break these regulations at their pleasure.

The payment of money makes no difference, for this is one of the principal mischiefs to be guarded against,—and testimony, drawn out on the plaintiff's side, shows the necessity of such a guard. Other reasons are obvious,—such as the exposure of merchandise, if passengers are allowed to go on freight trains, at their own choice, even with consent of conductors.

The case finds that this company, having in view both its own protection and the accommodation of the public, had adopted, as a part of this very regulation, on this portion of its line, an arrangement for an increased number of passenger trains, and an important reduction of fares.

General disregard of the regulation would tend to an abrogation of these facilities. The plaintiff was, therefore, doing a wrong, not only against the company, but against the public.

It is immaterial whether the plaintiff knew of the regulation or not. It was lawful and reasonable, and he was bound by it.

T. H. Haskell, for the plaintiff.

Appleton, C. J. The defendants are common carriers of passengers and freight. They may carry freight in their passenger train, or passengers on their freight train. They have a right to make all reasonable rules and regulations in the management of their business, with which those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 23, 1866, passengers were not "allowed to travel by freight

trains on that part of the line between Portland and South Paris." The regulation was a reasonable one, and the defendants were authorized to make it. It is, however, fairly inferable from the regulation itself that previously passengers had been permitted to travel by the freight train. By the notice of Sept. 8, 1868, dated at Montreal, no passengers were to be carried in the brake vans attached to freight trains "without written authority from the superintendent." And "any conductor allowing a passenger to travel on the brake van, or any part of the freight train, will be dismissed."

The plaintiff went aboard the freight train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *prima facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on, to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser. *Penn. R. R. Co.* v. *Books*, 57 Penn. 346. If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object. *Fulton* v. *G. T. Railway*, 17 Up. Can. 428; *Hilliard* v. *Goold*, 34 N. H. 230; *State* v. *Goold*, 53 Maine, 279.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight train, enters the saloon-car, and remains there when the train starts, against the rules of the company, but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation. Is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action, and recover damages as a recompense for such injury. Is the traveler entitled to the protection of the law, when the negligence of the carrier destroys his goods, and without its protection, when the same negligence injures his health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care. *Baker* v. *Portland.*

In *Zump* v. *W. & M. R. R. Co.*, 9 Rich. (S. C.), 84, there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the inward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them injured. The defense was that the injury arose from the plaintiff's own fault in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were guilty of negligence, were for the jury. The plaintiff's seat, "it will be recollected," observes O'Neale, J., "was in the

forward car; the notice proved was in the rear car, on the platform, on which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger, is, I think, clear from Story on Bailment, § 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad company by a passenger, while traveling in one of its gravel trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel train, and not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrenceburgh & Up. Miss. R. R. Co.* v. *Montgomery*, 7 Porter (Ind.), 475, the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the company to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson* v. *Northern Railway Co.*, 24 Up. Can. (Queen's Bench), 98, the plaintiff traveling in the defendants' train on a passenger ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. No person in the passenger cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage car was usually posted upon the inside of the door of the passenger cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes Draper, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the

right to recover. Giving the fullest weight to the considerations urged in the defense,—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved,—I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by collision resulting entirely and directly from the gross negligence of the defendants' servants." In *O'Donnel* v. *Alleghany Valley R. R. Co.*, 59 Penn. 239, in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage car is an improper place for a passenger to ride,—whether the rule against it was communicated to him or not, if he left his seat in a passenger car and went into the baggage car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse,—and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor without his objection; *Held*, to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free themselves from responsibility, for their negligence, was held in the *Lackawanna & Bloomsburgh R. R. Co.* v. *Chesewith*, 52 Penn. 383, when the agents of a railroad company, contrary to the instructions and rules of the company, at the request of the owner of a freight car, attached it to a passenger car, the plaintiff agreeing to run all risks, the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defense was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes Thompson, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. . . . When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger train, even at his urgent solicitation, and we have not a particle of evidence that other inducements to do the act were held out, excepting freedom from responsibility as a consequence of the attachment, we must presume it was done with a view to the compensation to be paid on the one hand, and the usual

care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not willfully done. We think this is not the law, unless in a case when the will of an agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight trains with passenger cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care, and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury. *Edgerton* v. *N. Y. & H. R. R. Co.*, 39 N. Y. (12 Tiffany), 227. In *Carrol* v. *N. Y. & N. H. R. R. Co.*, 1 Duer, 578, the plaintiff, remarks Bosworth, J., "took a seat in the post-office apartment of the baggage car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger car. He took it with the assent of the conductor. He was not there as a trespasser, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordi-

nary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defense was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed none is raised at the argument. The counsel for defendants rest their defense on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand. The *Chicago B. & Q. R. R. Co.* v. *Hazzard*, 26 Ill. 373. "We have said in the *Chicago & Galena R. R. Co.* v. *Fay*, 16 Ill. 568," observes Breeze, J., "that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means, for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger." *Ohio & Miss. R. R. Co.* v. *Mahling*, 30 Ill. 9. "The evidence," says Walker,

J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train, as with their regular passenger coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo* v. *Newbold*, 9 Excheq. 302, the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way the cart broke, and the plaintiff was thrown out and injured. *Held*, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case, it does not appear that the defendant was a common carrier,—that he undertook to carry or received, or was to receive any compensation for the carriage of the plaintiff. In *Lucas* v. *New Bedford & Taunton R. R. Co.*, 6 Gray, 65, it was held that a person who enters the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such action, if his attempt causes or contributes to the injury, even if the corporation give him no special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to

the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The servants of the corporation could not know, and were not obliged to know the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on that of the corporation, the action was maintainable, and is adverse to the defendants. *Exceptions overruled.*

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

HENRY BAKER & wife *vs.* CITY OF PORTLAND.
HENRY BAKER *vs.* SAME.

Case—defective way—contemporaneous violation of city ordinance. Verdict—motion to set aside.

The fact that, when a resident of a city was injured by reason of a defective way, which the city was bound to keep in repair, he was driving at a "faster rate than six miles an hour," in violation of a city ordinance, is no bar to his right to recover damages for such injury, if such driving did not in any degree contribute to produce it.

The fact that the jury failed to agree upon the answer to the question whether the plaintiff was driving at a faster rate than six miles an hour, does not render it reasonably certain that a general verdict for the plaintiff, in an action for an injury sustained by reason of a defective way, is erroneous.

ON EXCEPTIONS.

CASE, for an injury occasioned by a defective highway.

There are two actions,—one for injury to Henry Baker's wife, and the other to himself.

The defendants put into the case the following city ordinance:

"No person having for the time being the care or use of any horse or other beast of burden, carriage, or draught, shall ride or drive, or cause the same to be driven through any part of the city at a faster rate than six miles an hour, under a penalty of not less than five dollars, nor more than twenty dollars for each offense."

The presiding judge instructed the jury, that, "if the plaintiff was driving at a faster rate than six miles an hour, at the time he and his wife were thrown from the carriage, yet if such driving did not in any degree contribute to produce the injuries complained of, it would be no bar to their right to recover."

The defendants filed a motion to set aside the verdict as being against law and evidence.

The case is stated in the opinion.

J. W. Symonds, city solicitor, for the defendants.

Within the limits of the city, the ordinance is law, having all the force of a statute, and binding citizens and strangers alike. *Pierce* v. *Bartrum*, Cowp. 269; *Gilmore* v. *Holt*, 4 Pick. 257; *Commonwealth* v. *Worcester*, 3 Pick. 462; Vandine's Case, 6 Pick. 187; *State* v. *Merrill*, 37 Maine, 329; Nightingale's Case, 11 Pick. 168; *Lowell* v. *Hadley*, 8 Met. 180; *Pedrick* v. *Bailey*, 12 Gray, 161; *Commonwealth* v. *Bean*, 14 Gray, 52; *State* v. *Freeman*, 38 N. H. 626; *Commonwealth* v. *Curtis*, 9 Allen, 266; Angell & Ames on Corp., §§ 325, 336; Comyn's Dig., By-laws A. & B.

The plaintiff was a citizen of Portland, and had constructive notice of this ordinance. Every person subject to the action of a by-law is presumed to know its import as is his duty. Angell & Ames on Corp., § 366; *Heland* v. *Lowell*, 3 Allen, 407.

A person driving on Sunday, in violation of law, cannot recover, though exercising the highest degree of care, and the injury result solely from the defect in the way. The simple fact that he is in the act of violating the law at the time of the injury, is a bar to the right of recovery. *Hinckley* v. *Penobscot*, 42 Maine, 89; *Bosworth* v. *Swansey*, 10 Met. 363. Same principle involved in case at bar.

The courts are not inclined to extend the obligation imposed by statute upon towns to keep their roads safe and convenient, to cases in which travellers are violating the law at the time of the injury. The city of Portland finds it unsafe for vehicles to be driven

through the streets at a faster rate than six miles an hour, unsafe for persons driving, and unsafe for foot passengers, and, acting within the authority conferred by the legislature, they forbid it. Upon what principle can they be held liable in damages for an injury sustained by the plaintiff, while in the act of violating that law?

The question whether the plaintiff in this case was or was not driving at a faster rate than six miles an hour was submitted to the jury, and they could not agree upon an answer. At the time of making up the exceptions, it was thought unnecessary that it should appear, the presiding justice stating that, upon suggestion of it in argument, the defendants should have full benefit of the fact.

Suppose the testimony in regard to the day on which an injury was received should be so conflicting that the jury could not determine whether it was on Sunday or another day of the week, could they render a verdict for the plaintiff?

That he was not driving in violation of law was a fact which the plaintiff was bound to prove. As in *Hinckley* v. *Penobscot*, it was held that the burden of proof was upon the plaintiff, who was traveling on Sunday, to prove that it was a work of charity or necessity. In repeated instances it has been held that the burden of proof is on the plaintiff in these cases to prove that he was not at fault at the time of the injury; that there was no negligence on his part; that he was driving according to law, and that no other cause combined with the defect to produce the injury. It was, therefore, not for the city to prove that he was driving faster than six miles an hour, but for the plaintiff to prove that he was not. This he did not do to the satisfaction of the jury.

The fact of the violation of the law by the plaintiff is a bar to such action as the one at bar. *Heland* v. *Lowell*, 3 Allen, 407, and cases cited; *Worcester* v. *Essex Bridge Corp.*, 7 Gray, 459.

The jury must find that the plaintiff was not violating the law before they can find a verdict in his favor; and the question whether or not such a violation of law contributed to the injury is immaterial.

How are the jury to determine that the illegal driving did not contribute to produce the injury? The testimony as to speed was so conflicting, that the jury could not agree. Every reduction of speed would evidently diminish the probability of the plaintiff's being thrown out; and if he had not been thrown out, and had been able to hold the reins, there would have been no injury.

A change in the rate of speed must by natural law increase or diminish the danger, while the verdict practically holds that the danger would be the same at a rate of less than six miles as it would be at a rate of more than six miles.

Defendants therefore insist that the finding of the jury, that the illegal driving did not contribute to the injury, was unwarranted by the testimony, and as the burden of proof on this point was on the plaintiff, that the verdict, even under the instructions of the court, was against evidence and the weight of evidence. It was not competent for the jury to find without evidence a fact which the plaintiff was bound to prove.

Or if the jury found their verdict, without finding that the rate of speed in no degree contributed to the injury, then the verdict is directly against the charge of the presiding judge.

Davis & Drummond, for the plaintiffs.

BARROWS, J. The plaintiffs suffered serious damage in person and property on the evening of Oct. 13, 1868, by reason of the upsetting of the carriage in which they were riding, in consequence of running over certain piles of stones which had been dumped in the roadway on Cumberland street, by persons in the employ of the street commissioner, and left there over night without guards or lights to protect or warn the traveler. The buggy and harness were well made and in good order, the horse well broken and kind, though spirited, the street much frequented, and the evening too dark for a man in a carriage to see obstacles of that description on the ground.

H. Baker testifies that he was driving not over five miles an

hour when the accident occurred. The defendants offered evidence tending to show that he was driving at a rate exceeding six miles an hour. There is a city ordinance prohibiting driving at a faster rate than six miles an hour, under a penalty of not less than five, nor more than twenty dollars. The jury were instructed that if plaintiffs were driving at a faster rate than six miles an hour when thrown from the carriage, yet if such driving did not in any degree contribute to produce the injuries complained of, it would be no bar to their right to recover. To this instruction the defendants except, and also present in each case a motion to set aside the verdict (which was for the plaintiffs), as against law and evidence.

Counsel for the defendants cite a strong line of cases, in which our own and other courts have held city ordinances of this and like character as binding on all who have actual or constructive notice of their existence, and as having the force of statute law within the limits to which they apply, and also cases in which it appears to have been held, with more or less distinctness, that a party seeking a remedy in damages against a town or city, or other corporation charged with the maintenance of a way or bridge, is not entitled to recover, if at the time of the accident the party plaintiff was violating a law of which he was bound to take notice.

But in all this latter class of cases it will be seen, upon examination, that the wrongful act of the plaintiffs either was, or was assumed to be, in some manner or degree contributory to the production of the injury complained of, so that the precise question here presented was not under consideration in any of them. They cannot be deemed authorities adverse to the instruction here given if the point was not raised or considered. Thus, in *Heland* v. *Lowell*, 3 Allen, 407, it seems to have been taken for granted on all hands that the plaintiff's want of care, evinced in the violation of the city ordinance, was one of the efficient causes of the accident. There may have been something in the evidence which made it certain that it was so, in which case it would be useless to raise or discuss the question which we are to pass upon. At all events the point was not taken, and the questions presented to the

court were, whether the plaintiff was bound by the ordinance, if it was not made to appear that he knew of its existence, and whether evidence of his general good character for sobriety was admissible to rebut the evidence offered in defense that he was intoxicated when the accident occurred. The rulings complained of were the rejection of the evidence of general good character for sobriety, and the instruction "that if the plaintiff, at the time of receiving the injury, was driving at a rate faster than a walk, in violation of the city ordinance, he could not recover, although he was using due care in *other* respects." It seems, from the very tenor of the instruction, to have been conceded on the part of the plaintiff, that, under the circumstances of that case, driving faster than a walk was not the "due care" which the plaintiff was bound to show he was using in *all* respects. The court recite a *dictum* from *Worcester* v. *Essex Merrimac Bridge Corp.*, 7 Gray, 459, to the effect that if the plaintiff was at the time of the accident violating a public statute or a by-law, of which he had actual or constructive notice, he could not recover damages for the accident; but they immediately refer to the true principle, adding, "and it is the established law that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage."

It is very clear that the court could not have meant that a concurrence merely in point of time between a breach of law by the plaintiff and the accident, would bar the right of the plaintiff to recover, because they had just said in *Alger* v. *Lowell*, 3 Allen, 406, that "intoxicated persons are not removed from all protection of law; the plaintiff was bound to show that he was in the exercise of due care, and the jury were so instructed: if he used such care by himself or others, his intoxication had nothing to do with the accident; the city may be liable under some circumstances for an injury sustained by . . . an intoxicated person, if the condition of the injured person does not contribute in any degree to occasion the injury." Now intoxication in the streets is a misdemeanor upon which a penalty is imposed by law as distinctly as it is by the

city ordinance, upon driving over a bridge faster than a walk (Mass. R. S., c. 130, § 18); and it appears as likely to contribute to the occurrence of an accident, to say the least of it; yet no one would be likely to contend that a city or town would be relieved from the consequences of its negligence in the care of its ways, merely because the sufferer was intoxicated at the time of the accident, if it were made to appear that his breach of the law in that respect had nothing to do with its occurrence. It has been settled that intoxication is not conclusive evidence of a want of ordinary care. *Stuart* v. *Machiasport*, 48 Maine, 477. In fine, recrimination is not a good plea in bar in actions of this kind, unless the plaintiff's claim originates in his offense, and he is obliged to prove the offense in order to establish his claim, or unless the commission of the offense has in some degree contributed to produce the injury, or necessarily negatives some point which the plaintiff is bound to establish in proof, in order to entitle him to a verdict.

The defendants' counsel contends that the simple fact that the plaintiff is in the act of violating the law at the time of the injury is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery; but to lay down such a rule as the counsel claims, and to disregard the distinction implied in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was traveling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the streets in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains.

The soundness of the distinction recognized by the presiding

judge in the instruction now under consideration, has been affirmed by this court in *Bigelow* v. *Reed*, 51 Maine, 325; *Hamilton* v. *Goding*, 55 Maine, 428, 429. See also, *Morton* v. *Gloster*, 46 Maine, 520; *Davis* v. *Mann*, 10 Mees. & Wels. 548. But the defendants' counsel insists that "the finding by the jury that the illegal driving did not contribute to the injury, was unwarranted by the testimony," and argues that a change in the rate of speed must necessarily increase or diminish the danger, while the "verdict practically holds that the danger would be the same at a rate of less than six miles, as it would be at a rate of more than six miles in an hour," inasmuch as the jury declared themselves unable to agree whether the plaintiff was driving at the rate of more than six miles. Is it reasonably certain, then, that the verdict must have been erroneous, because the jury failed to agree upon the answer to the question whether the plaintiff was driving at a rate exceeding six miles an hour? Suppose half the jury thought the plaintiff was driving at the rate of six miles and an eighth per hour, and the other half thought his speed did not exceed six miles. They would not agree upon the special finding, but would that prevent them from finding that the rate of speed, whichever of the two rates it was, did not contribute to produce the injury? Might they not well have found, upon the testimony here presented, that if the plaintiff was driving at a rate not exceeding five miles an hour, as he testified, the same results, to wit, the frightening of the horse, his starting to run, and the upsetting of the carriage, would have followed? If so, did it really make any difference as to the issue then on trial if he was going more than six miles an hour?

We think the answers to these questions must demonstrate the injustice of making such a test decisive of the plaintiff's right to recover.

The true question was (on this part of the case), whether he was using due and reasonable care under all the circumstances, or whether a want of such care on his part contributed to produce the injury. We have no reason to doubt that this question was submitted to the jury in a manner calculated to give to the testimony

offered by the defendants as to the plaintiff's rate of speed all its legitimate effect, or that it was passed upon by them in a manner which must preclude our interference with the conclusion to which they arrived.

In each case the entry must be,

Motion and exceptions overruled.

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

NORTH YARMOUTH *vs.* WEST GARDINER.

Pauper. Residence—acquiring and abandoning.

When a person leaves his place of residence with everything he has, without any intention as to returning, he has, under the pauper statute, abandoned it, whether he has established another or not.

And the interruption of a residence does not depend, in any degree, upon the fact whether he did or did not return.

A residence once established may be abandoned without having acquired another.

ON EXCEPTIONS.

An action for pauper supplies.

The only question in dispute was whether the pauper, John Johnson, had resided in West Gardiner for five successive years.

There was evidence tending to show that the pauper was born in Monmouth (where his father had a settlement and died about 1808), he being then about sixteen years of age; that he never acquired a new settlement in any other town, unless in West Gardiner; that his place of residence in West Gardiner was at one Davis's, where he was "off and on" from 1832 to 1853, not stopping at any one time more than four years; that he could neither read or write or reckon money; that he never brought any clothing

to Davis's or carried any away; that Davis never paid him anything for his labor except victuals, clothing, and lodging; that he would leave without notice, and return without invitation.

The defendants contended that if the pauper had once established his home in West Gardiner, and had commenced residing there, and then left the town, without any intention to return, his residence would be thereby interrupted; and further, that if the pauper had not sufficient intelligence, when he left, to form and retain the intention of returning, and making Davis's his future residence, his residence would be thereby interrupted. Upon this point the presiding justice instructed the jury, that if the pauper left with an intention not to return, it would be a clear case of interruption; that if he left with a formed intention to return, and did, in fact, return in pursuance of such intention, his absence would not be an interruption; that if he left without any intention as to whether he would or would not return, or with only an indefinite and half-formed purpose not to return, but did, in fact, return without having established a residence elsewhere, his absence would not constitute an interruption of his residence in West Gardiner.

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

L. Clay, for the defendants.

Davis & Drummond, for the plaintiffs.

An abandonment of a residence, with an intention not to return, will interrupt a settlement. *Exeter* v. *Brighton*, 15 Maine, 58.

A residence or home once fixed is deemed to continue until actually changed. *Brewer* v. *Linneus*, 36 Maine, 428.

To break up a residence there must be a departure with an absolute affirmative intention to abandon; and not a departure without any intention whatever. *Warren* v. *Thomaston*, 43 Maine, 406; *Bangor* v. *Brewer*, 47 Maine, 97, 101.

The instruction, proving the subject of exceptions in this case, is almost in the language of the opinion in *Worcester* v. *Wilbraham*, 13 Gray, 586, 589, which case with *Warren* v. *Thomaston*, are approvingly cited in *Lee* v. *Lenox*, 15 Gray, 496.

Wilbraham v. *Ludlow*, 99 Mass. 587, is not in conflict with the last cases cited, the opinion being based upon the fact found, that the pauper wandered from town to town with no purpose in view, and with no desires or intentions in relation to residence, except to have a home wherever he worked. In such case the pauper had a home wherever he worked, so long as he remained there.

All of the cases concur in holding that there must be a concurrence of fact and intention to establish a residence or break up one once formed. *Mead* v. *Boxborough*, 11 Cush. 362; *Holmes* v. *Greene*, 7 Gray, 229; *Carnoe* v. *Freetown*, 9 Gray, 357; *Whitney* v. *Sherborne*, 12 Allen, 111.

If there is no proof of intention to abandon, either in fact or by inference from the circumstances, one of the essential elements of abandonment is wanting.

It amounts to this; the pauper leaves, is absent awhile, and returns. Nothing is known of his intention. There is clearly no change.

All the cases can be reconciled by keeping in view the distinction between knowing the actual intention and inferring it from the circumstances.

The instruction requires the jury to find that the pauper never formed an intention to abandon his residence or to establish one elsewhere; all the authorities concur in holding that under such circumstances the residence is not abandoned, the actual intention being gathered from the whole evidence.

DANFORTH, J. The instruction excepted to and relied upon is as follows: "If he left without any intention as to whether he would or would not return, or with only an indefinite and half-formed purpose not to return, but did, in fact, return without having established a residence elsewhere, his absence would not constitute an interruption of his residence in West Gardiner."

This instruction assumes the fact that the pauper had established a residence in West Gardiner, and that he had left there without an intention to return. The proposition, then, is, that if under this

state of facts he does return without having established a residence elsewhere, his home in West Gardiner will not be interrupted by his absence. Here is no question as to the proper inference to be drawn from the testimony, or from the proved acts of the pauper, but the statement of a naked principle of law as applicable to the case. It makes the interruption of a person's residence depend upon his intention to abandon, or of his not returning, or both.

Two propositions are involved. First, if a person leaves his place of residence, taking with him all he has, leaving behind nothing to indicate that he has any home or residence there, at the same time has no intention as to whether he will or will not return; is this, of itself, such an abandonment as under the pauper laws to interrupt his residence in that place? Second, does the question of interruption depend, in any degree, upon the fact whether he did or did not return without having established a residence elsewhere?

In answering the first question, we are led to ask another, what is necessary to continue a residence once established? and this, to some extent, involves the nature or definition of a residence. In our pauper law, "residence," "home," and "dwelling-place," have been used as synonymous terms. In the statutes of 1821 and 1841, the word residence is used; in the revision of 1857 home is substituted. In the decisions the several words are used indifferently and are held to mean the same thing. *Warren* v. *Thomaston*, 43 Maine, 418.

In the same case, as in numerous others, it is held that to establish a "residence" within the meaning of the statute, there must be "personal presence without any present intention to depart." In *Turner* v. *Buckfield*, 3 Maine, 229, it is said that the expression, "dwells and has his home," means a residence with an intention to remain, or at least "without an intention of removal." In *Augusta* v. *Turner*, 24 Maine, 112; *Gardiner* v. *Farmingdale*, 45 Maine, 537; and *Corinth* v. *Bradley*, 51 Maine, 540, it is held that persons *non compos mentis* may reside in a town, within the meaning of the statute, so as to acquire a legal settlement therein. From these cases it would seem to be well settled that a "residence" may be

established with the absence of any intention of removal, or that, so far as intention is a necessary element of a "residence," it will be conclusively inferred from an actual presence accompanied with such circumstances as usually surround a home.

Another principle, which may be considered as well settled in this State, is that a residence once established may be abandoned or lost, without having acquired another. *Exeter* v. *Brighton*, 15 Maine, 58; *Jefferson* v. *Washington*, 19 Maine, 293.

In regard to "domicile," a word not used in the pauper law, it is different. This cannnot be lost without gaining another. Every person owes some duties to society, has some obligations to perform to the government under which he lives, and from which he receives protection. These duties and obligations are not to be laid aside at will, but rest upon and attach to the person from the earliest to the latest moment of his life. His domicile is the place where those duties are defined and are to be performed. It is imposed upon him, by the law, at his birth; and though, when arriving at legal age, he may choose the place where it shall be, it is not at his option whether he will be without any. With regard to a "residence" or "home" it is entirely different. This is a matter of privilege exclusively. It imposes no public burdens, but is private in its nature, relates to personal matters alone, and is the place about which, to a greater or less extent, cluster those things which supply personal needs, or gratify his affections. Hence it is purely and wholly a matter of choice, not only as to the place where it shall be, but also whether there shall be any. If, then, a residence once established may cease to continue, under what circumstances are we to consider it at an end, or when is it abandoned? Not what amount or kind of testimony may be required to furnish satisfaction of its abandonment, but when, as a matter of law, does it cease to exist. It seems plain that when all the elements which constitute a home have ceased, that the home itself would cease also. If "residence" is made up of actual presence and intention, or presence without intention, where these are wanting, we shall look in vain for the residence. If the parts are all gone, it would seem, necessarily,

to follow that the whole would be missing too. If, as in the case of a *non compos mentis*, it is made up of a presence with such surrounding circumstances as to compel the inference of intention so far as that may be necessary, then the absence of that presence and all those circumstances would leave nothing upon which a home could be predicated. What can be a more complete annihilation of home, in the case of an intelligent person, than his departure, leaving nothing behind indicative of a home, without any intention of returning thereto. So of an imbecile, when his departure is under such circumstances that nothing is left behind to indicate a return, and the purpose of his going leaves no opportunity for inference as to any intention on his part or that of others as to his return. A "residence" or "home" is usually patent to all observers, and a matter in regard to which those acquainted with the facts are not easily deceived. But when not a vestige of that home is left, who can say that it exists, and how shall it be known whether a pauper has or has not acquired a settlement in any particular place. The fact that a man once had a home in a town, is not of itself proof, under the pauper laws, of its continuance when all indications of it are gone. Upon the party alleging a five years' residence is the burden of proof, and he must show it to have continued all the five years. But if the abandonment of a home, "with bag and baggage," with no intention of returning, is not an end of that home, then, in many cases, the jury would be obliged to find a five years' "residence" upon the proof of one month, or a day even. If a person, leaving a place, has no intention as to a return to it, then he certainly has no intention to return, and it would seem difficult to maintain that home without an intention to do so, when there is nothing else left of it.

It is believed, too, that the authorities, when correctly understood, are in harmony with these views. There is, in some of them, an apparent conflict with the principles here laid down. Nor do they all seem to be consistent with each other. As in *Warren* v. *Thomaston*, before cited, it is said, "And to break up such residence, when once established, there must be a departure with intention to

abandon," and so in many other cases, which it is unnecessary to refer to, a similar expression is used. But this conflict is more apparent than real, and on examination will disappear. It will be found that in these cases this precise question was not before the court, and the expressions used were all the cases required. There was in those cases, or supposed to be, an actual existing intention one way or the other, and usually the books have taken it for granted that every person, who has the capacity when making any movement or doing any act in relation to his home, will have some intention by which that act shall be qualified, and this assumption is ordinarily well founded. It is difficult to conceive of a man, leaving his home, the place which more nearly concerns his welfare than any other, without any intention as to whether he will or not return. And in the absence of an intention to return, it is quite as difficult to conceive of its being a home to him. If, then, we keep in view the fact that most of the decided cases are those in which an intention did, or was supposed to exist, we shall find them consistent, and so far as they bear upon this question support the views heretofore expressed. It is proper to remark here, that so far as this question is concerned, domicile and residence mean the same thing, and are so treated by the authorities; so far as place is concerned, both are matters of choice, and the one fixes the other, and each depend upon the same conditions of presence and intention.

In *Warren* v. *Thomaston*, relied upon by plaintiffs, on page 419, it is said, "The fact of abandonment, or not, depended upon the intention of the pauper when he departed." Thus assuming that the intention did exist, making no suggestion, even, as to the effect of a want of intention. The same may be said of *Mead* v. *Boxborough*, 11 Cush. 362, and *Carnoe* v. *Freetown*, 9 Gray, 357. *Worcester* v. *Wilbraham*, 13 Gray, 586, is decided upon the ground that the pauper could not lose one residence till he had established another, and so is not applicable. *Bangor* v. *Brewer*, 47 Maine, 97, so far as it has any bearing, is against the plaintiffs. On page 101, the opinion reads thus, "No question is now better settled, than

that, in order to break up an existing residence, such as the statute requires, there must be an act of removal from the place where it exists, accompanied by an intention, on the part of the pauper, to remain permanently at the place of removal, or at some other place; or, at least, the pauper must be without any present intention of returning to the place from which he removed." If the last part of this remark is true, it is decisive of this case. *Holmes* v. *Greene*, 7 Gray, 299, goes still further. It is there held that a person, removing with his family to another State, though retaining his place of business, and intending to retain his domicile at his former residence, and to return to it, did not retain his residence. A simple naked intent to retain his former home was not sufficient. There must be some outward *indicia* of that intent, something by which others interested might have some proof of his residence. So in *Whitney* v. *Ashland*, 12 Allen, 111, it is held sufficient to break up his residence or acquire a new domicile, if he resides in the new place with the intention of remaining there an indefinite period and without any fixed purpose to return to his former place of abode. In the opinion on page 114, it is said, "The plaintiff must have a domicile somewhere. It could not be in Ashland if he had gone to reside elsewhere, having no intention to return to his old home, or if his purpose was unformed or indeterminate, either as to the length of his residence in Sherborne, or as to his eventual return to Ashland." This case seems to be somewhat in point, when we remember that in Massachusetts a person "must have a domicile somewhere." The case shows how he may lose one domicile that he may gain another. In the same way he may lose his residence in this State, when it does not appear whether he has gained another or not. The case of *Jefferson* v. *Washington*, 19 Maine, 293, is very much like this in its facts, and seems to be decisive of it. On page 302 it is said, "If a man becomes a worthless, dissolute vagabond, a wanderer from place to place, and from town to town, often depending upon the hand of charity, wherever it may be found, for relief from present suffering, could it be said that such a man had a dwelling-place and home? To the court it

would seem an abuse of terms." The case of *Corinth* v. *Bradley*, 51 Maine, 540, presents, substantially, the same question we have been considering. There the instructions required that the jury should find, in order to retain the residence left, that the pauper should "form and retain the intention of leaving for such temporary purpose and of returning." The case turned upon this point. *Wilbraham* v. *Ludlow*, 99 Mass. 587, is so much like this case that it would be difficult to distinguish it. Worcester defines domicile as "The place in which a person has a fixed residence, and to which, when he is absent from it, he has the intention of returning," and gives Burrill as his authority. The inference seems to be inevitable, both from principle and authority, that when a person leaves his place of residence with everything he has, without any intention as to returning, he has, under the pauper laws, abandoned that whether he has established another or not.

This brings us to the second proposition involved, Does the question of interruption depend, in any degree, upon the fact whether he did or did not return? The instruction is, that if under the facts stated, "he did, in fact, return without having established a residence elsewhere, his absence would not constitute an interruption of his residence in West Gardiner." The inference is, that if he did not return, his residence would be interrupted, or, that in order to break up his residence he must have established one elsewhere. If he had established a home elsewhere it would have been an interruption to his residence in West Gardiner, for under our law he could not have two at the same time. But, as we have already seen, the continuance of his home in West Gardiner could in no way depend upon his having established another, for he may have been without any. It is evident, also, that the continuance of the pauper's home depended, in no degree, upon his return. When he left, his residence ended, or it did not. If it ended, his return would not relate back so as to renew it from the time he left; in other words, restore that which had already ceased to exist. It might, indeed, establish a new home, but could not revive the old one. If such were the case, it might very pertinently be asked,

how long shall we wait for his return? Suppose the pauper had resided in town four years and was then absent two. What would be his condition at the end of five years? Shall we say he had no settlement then, but when he returns his old residence is revived, and now he has a settlement and has had one from the end of the five years?

It is true the question may be settled by other circumstances proved, but we are considering the state of facts contemplated by the instruction, and trying it by that test. The difficulty seems to be that the instruction lays down, as a conclusion of law, that which should have been left to the jury as a question of fact. This distinction has been overlooked in several of the reported cases, as in *Corinth* v. *Bradley*, 51 Maine, 540. The return of the pauper is made a necessary element in the continuance of his residence, when, in fact, it is only a matter of evidence for the jury to weigh, more or less cogent, as the absence may be of longer or shorter duration, or according to the circumstances attending it. Intention must always be proved by acts or the declaration of the party or both. If a person leaves his place of residence, with all he has, the jury are to draw the inference as to his object or purpose in doing so. If from weakness, or other cause, he has no intention or purpose in view, still it is for the jury to say, from the circumstances, whether he still retains a residence in the place left, and if a return or want of one is proved, this is to be considered as a question of fact, having such weight as it may be entitled to.

Exceptions sustained.
New trial granted.

APPLETON, C. J.; KENT, DICKERSON, and TAPLEY, JJ., concurred.

CUTTING, WALTON, and BARROWS, JJ., did not concur.

VATILIN DEROCHER, *pro. ami*, *vs.* CONTINENTAL MILLS.

Infant's contract—avoidance of.

When an infant has legally avoided his contract for labor, the rights of the parties thereto are precisely the same as if it had never been made.

Thus, where a minor, who agrees to work for a manufacturing corporation six months, at least, and give no less than two weeks' notice before leaving, but does leave before the expiration of the time, and without giving such notice, he is not liable to have the damages occasioned thereby deducted from what he would otherwise be entitled to recover for his labor.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed for 25½ days' work, at $1.25 = $31.87, ending June 29, 1869.

The case was referred to the presiding judge, with the right of alleging exceptions.

The judge found, as matter of fact,

That the defendants are a corporation and operators of a large cotton mill in Lewiston; that the plaintiff is a minor, and that she was emancipated by her father before the services for which this suit is brought were rendered; that when she commenced work for the defendants, she entered into a contract to work for them six months, at least, and give no less than two weeks' notice before leaving, failing in which she was to forfeit the wages due; that after working a portion of the time agreed upon, she left without giving any notice; that the loss resulting to the defendants, in consequence of the plaintiff's leaving without notice, exceeded the amount of her wages then due.

Upon these facts the presiding judge ordered judgment for the defendants; whereupon the plaintiff alleged exceptions.

Pulsifer & Frost, for the plaintiff.

Wm. P. Frye & J. B. Cotton, for the defendants, cited 1 Am. Lead. Cas., 259; *Moses* v. *Stevens*, 2 Pick. 332; *Vent* v. *Osgood*, 19 Pick. 572; *Judkins* v. *Walker*, 17 Maine, 38; *Thomas* v. *Dyke*, 11 Verm. 273; Schouler's Dom. Rel., 561 and note.

WALTON, J. The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor.

We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done when judges undertake to generalize too much, and to decide more than is presented by the cases then before them.

In a case before the house of lords on appeal, one of the questions was, whether an infant could, by contract, bar her dower. Lord Mansfield, in delivering his opinion, is reported to have said, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." *Buckingham* v. *Drury*, 2 Eden, 60.

Relying upon this *dictum*, it was afterwards held in England that money advanced by an infant for a lease of real estate, which he afterwards avoided, could not be recovered back. *Holmes* v. *Blagg*, 8 Taunt. 508.

Relying upon the same *dictum*, and the above decision, it was afterwards held in New York, that where an infant does work in part performance of a contract, which he fails to complete, he cannot recover for it. *McCoy* v. *Huffman*, 8 Cowen, 84.

Similar decisions were made in Indiana and New Hampshire. *Harney* v. *Owen*, 4 Blackf. 337; *Weeks* v. *Leighton*, 5 New Hamp. 343.

But these decisions, and the *dictum* of Lord Mansfield (so clearly erroneous, that one is almost led to doubt whether he could ever have made it), have all been overruled.

In England, the *dictum* of Lord Mansfield, and the use made of it in *Holmes* v. *Blagg*, 8 Taunt. 508, were repudiated in *Corpe* v. *Overton*, 10 Bing. 252. In the latter case, the court held that money paid by an infant toward the purchase of a share in the defendants' business, could be recovered back.

In New York, the decision in the 8th of Cowen was overruled in the 7th of Hill, 110 (*Medbury* v. *Watrous*). In the latter case, it was held that where an infant enters into a contract for the purchase of property, and performs work in part-payment of the price, but avoids the contract on arriving at full age, he may recover for the work.

In Indiana, the decision in the 4th of Blackford, 337, was overruled in *Dallas* v. *Hollingsworth*, 3 Ind. 537.

In New Hampshire, the decision in the 5th of New Hampshire, 343, was overruled in *Lufkin* v. *Mayall*, 25 New Hamp. (5 Foster), 82. In the latter case, it was held that an infant, who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it.

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the court inserted one of those unfortunate *dicta*, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury

would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." "It seems," therefore, says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The court just lay down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it. *Moses* v. *Stevens*, 2 Pick. 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated *ab initio*, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted. *Vent* v. *Osgood*, 19 Pick. 572.

And in New York the qualification attempted (inadvertently we have no doubt) to be engrafted upon the rule applicable to such cases, was expressly overruled. The court said they could not yield their assent to the soundness of such a qualification; and the court held, that an infant plaintiff in such an action is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. *Whitmarsh* v. *Hall*, 3 Denio, 375.

The *dictum* of Lord Mansfield, in *Buckingham* v. *Drury*, 2 Eden, 60, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again;" and the remark in the opinion of the court in *Moses* v. *Stevens*, 2 Pick. 332, that "the jury would make an allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract," are undoubtedly the cause of most, if not all, of the confusion to be found in the books on this branch of the law.

We think the rule of law, applicable to this class of cases, is correctly stated in *Vent* v. *Osgood*, 19 Pick. 572; and in the opinion

of this court in *Robinson* v. *Weeks*, 56 Maine, 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and determined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly no such result could have been reached.

Exceptions sustained.

New trial granted.

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

CUTTING, J., did not concur. TAPLEY, J., concurred in sustaining the exceptions.

Ann H. Ham *vs.* Inhabitants of Wales.

Defect in highway—notice of.

The law imposes no duty upon any inhabitant of a town, other than a town-officer, who perceives an obstruction on a highway, to remove it as soon as by due diligence he can do it.

Hence, in the trial of an action against a town for an injury occasioned by reason of an obstruction suffered to remain on a highway, it is erroneous to instruct the jury that "notice of a defect to any inhabitant of the town, of sufficient intelligence to know and appreciate the danger, and for a sufficient length of time to enable such person, by the use of due diligence to remove it, or to give notice to other inhabitants of the town of its existence, so as to enable them to remove it, if the person, to whom the defect was first known, was not a competent or suitable person to do it, was all the law required."

On exceptions.

Case to recover damages for an injury claimed to have been sustained by reason of alleged defects in the highway.

It appeared that on the evening of Sept. 6, 1867, while the plaintiff was riding with her horse and wagon upon the highway which crosses the Maine Central Railroad, near the Leeds station in Wales, her horse, driven by one Labree, who with his wife were in the wagon with the plaintiff, took fright at a hand-car belonging to said railroad company, then standing within the limits and near the traveled path of said highway, at a point where the highway is intersected by the railroad; became unmanageable, ran back and across the traveled path of the highway, and, for want of a sufficient railing along the embankment of the traveled path, forced the plaintiff's wagon over and down the embankment, whereby her wagon was overturned, and the plaintiff thrown out upon the ground and her left leg broken.

It also appeared that the track-repairers had used the hand-car in the afternoon of that day; that they left it where it was at the time of the accident but a short time before; that that was the usual place for it,—about two feet from the east side of the traveled

path; that the car had been used up and down the line by trackmen, every week-day for several months.

It also appeared that several of the inhabitants had seen the car there from ten to twenty minutes before the accident; and that the person who left the car at the place of accident, at the time in question, was a trackman, named Donally, an unnaturalized Irishman, but an inhabitant of Wales.

The presiding judge instructed the jury,

That the law did not fix any definite length of time that it should remain there, to make the town chargeable with notice; that the town would be entitled to a reasonable time; that is, to so much time, as by the use of ordinary diligence would enable them to remove it; that five minutes would be sufficient, if by the use of reasonable diligence, the car might have been removed within that time; that notice of a defect to any inhabitant of the town, of sufficient intelligence to know and appreciate the danger, and for a sufficient length of time to enable such person by the use of due diligence to remove it, or to give notice to other inhabitants of the town of its existence, so as to enable them to remove it, if the person to whom the defect was first known was not a competent or suitable person to do it, was all that the law required.

The verdict was for the plaintiff for $3250, and the defendants alleged exceptions.

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

A. A. Strout, for the plaintiff.

Appleton, C. J. This is an action of the case against the defendants for an injury occasioned by reason of an obstruction suffered to remain upon the highway.

The instruction, as to notice, was as follows: "That notice of a defect to any inhabitant of the town, of sufficient intelligence to know and appreciate the danger, and for a sufficient length of time to enable such person, by the use of due diligence, to remove it, or to give notice to other inhabitants of the town of its existence, so

as to enable them to remove it, if the person, to whom the defect was first known, was not a competent or suitable person to do it, was all that the law required."

A town is not instantly liable when an obstruction is placed upon, or a defect arises in an highway. Towns are only liable after reasonable notice. By the decisions, notice to an inhabitant is notice to the town. But after notice, the obstructions are to be removed or the repairs to be made by the appropriate officers of the town in a reasonable time. There is no duty upon an inhabitant, not a town officer, perceiving a defect or want of repair, at once to remedy it. The repairing of defects or the removal of obstructions is, or may be, a work of more or less labor, and deserving more or less compensation, which an inhabitant is not bound to do gratuitously. The statute provides by whom the removal of obstructions and the repairs of defects are to be made.

The instruction given imposes the obligation upon the person, perceiving an obstruction or defect at once—as soon as by due diligence it can be done—to remove the obstruction or repair the defect, or, if he is not competent to do it, to require the aid of other inhabitants, who will be bound to do it. It places the duty upon the inhabitant perceiving the obstruction or defect, or those notified by him. But the law places the obligation upon the officers of the town, after reasonable notice, which is a very different thing. The neglect of duty must be the neglect of the town, or its officers, after notice to one of its inhabitants, and after a reasonable time has elapsed in which repairs might have been made or obstructions removed.

The obligation is upon the town to repair. The neglect is of the town in not repairing. The obligation to repair is not upon the inhabitant perceiving the defect, nor is the town guilty of neglect for his not personally making the needed repairs.

Exceptions sustained.

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

WALTON, J., did not concur.

CALVIN RECORD, administrator, appellant, *vs.* EDWARD HOWARD, administrator *de bonis non.*

Probate Court—jurisdiction of.

The jurisdiction assumed by a judge of probate, so far as it depends upon the residence of any person, cannot be contested except on appeal in the original case, unless there is fraud, or want of jurisdiction apparent upon the face of the record.

Administration commenced upon the assumption that the deceased was a citizen of Maine, must be closed upon the same assumption, and it will not be competent for parties adversely interested to show that the deceased was a citizen of another State to affect the distribution of the estate.

Thus, where administration was granted upon a representation that the deceased at the time of her death was a citizen of Maine, and the record states that this fact was made fully to appear, and there was no suggestion of fraud, and no appeal from the decree of the probate court granting the administration, and the settlement of the estate was proceeded with till the administrator had settled his fourth, and final account, and had applied for an order of final distribution; *Held*, that the domicile of the deceased, at the time of her death, must be regarded as conclusively settled, not only for the purpose of giving jurisdiction to the probate court, but also for the purpose of distributing the estate; and that it was not competent to show that the domicile of the deceased, at the time of her death, was in Ohio, and not in Maine, either to show want of jurisdiction in the probate court, or to affect the distribution of the estate.

APPEAL from a decree of the judge of probate for this county.

In July, 1857, Vesta A. Perley, the plaintiff's intestate, died a widow and without issue in the State of Ohio.

At the January term, 1858, of the probate court for this county, upon the petition of "John Harris, of Turner, in this county," representing "That said Vesta A. Perley, of said Turner, daughter of said John Harris, widow, died . . . in the State of Ohio, seized and possessed of real estate, goods, and chattels, rights and credits, in said town of Turner, which ought to be administered according to law," and praying "that administration be granted to" the plaintiff; "the facts therein stated being made fully to appear," the judge of probate granted the prayer, and appointed the plaintiff, who was duly qualified.

In March, 1860, John Harris died, and at the following April term Job Prince was duly appointed administrator of his estate, with the will annexed.

The plaintiff settled his first account of administration, March term, 1859; second account, February term, 1860; third account, March term, 1861; and fourth, and final account, April term, 1864.

At the August term, 1864, of the probate court, on petition of the plaintiff praying that the balance left in his hands on settlement of his final account be decreed to be paid over to Job Prince, administrator, etc., of the estate of John Harris, father of Vesta A. Perley, she having died without issue, the judge of probate decreed "that the prayer of the petitioner be denied, it satisfactorily appearing that Vesta A. Perley, deceased, was not an inhabitant of this State at the time of her decease, but was an inhabitant of the State of Ohio. And it is also decreed that said Calvin Record transmit to the administrator of the estate of said Vesta A. Perley, in the State of Ohio, if such there be, the said balance named in his petition now remaining in his hands for distribution (deducting therefrom the legal costs arising on the aforesaid petition), to be distributed by said administrator according to the laws of said State." From this decree the plaintiff appealed. The jury returned a verdict finding that the domicile of Vesta A. Perley, at the time of her decease, was in the State of Ohio.

The appellant claimed that the proceedings in the probate court are conclusive upon the appellee; and all the questions, except that of domicile, was to be submitted to the full court, who were to enter such decrees as to said estate and the distribution thereof, as the law requires.

C. Record, pro se.

Wm. P. Frye & J. B. Cotton, for the defendant.

The proceedings of the probate court for this county are conclusive only so far as it had jurisdiction. Even when it has jurisdiction over the general subject, its decrees when exceeding its powers are void. *Peters* v. *Peters*, 8 Cush. 543; *Jochurnsen* v. *Suffolk Sav. Bank*, 3 Allen, 87.

The jurisdiction of a court of limited and special jurisdiction cannot be aided by any waiver of exceptions, or even by express consent. *Sigourney* v. *Sibley*, 21 Pick. 106.

The jury have found the domicile in Ohio.

Personal estate is to be administered according to the *lex domicilii*. *Fay* v. *Haven*, 3 Met. 109, 114; *Jennison* v. *Hapgood*, 10 Pick. 77, 108; R. S., c. 65, § 26.

The administrator in this county was merely ancillary. *Fay* v. *Haven*, *supra*; *Davis* v. *Boylston*, 9 Mass. 337, 355; *Stevens* v. *Gaylord*, 11 Mass. 263.

After payment of debts, the court can only order distribution of the balance according to the laws of Ohio, or that the same should be transmitted to the foreign administrator.

WALTON, J. This is a probate appeal case presenting a question of jurisdiction. It is contended that the probate court of the county of Androscoggin did not have jurisdiction, because, as the contestants say, the deceased did not at the time of her death reside in that county. But is this objection now open to them? We think not. The jurisdiction assumed by a judge of probate, so far as it depends upon the residence of any person, cannot be contested except on appeal in the original case, unless there is fraud, or want of jurisdiction apparent upon the face of the record. R. S. of 1857, c. 63, § 6.

Administration was granted upon this estate in 1858, upon a representation that the deceased was of Turner, in the county of Androscoggin; which fact, the record says, was "made fully to appear." Any one aggrieved by this action of the probate court had a right to appeal therefrom at any time within thirty days; and if prevented from so doing by accident or mistake, or defect of notice, or other cause, without fault on his part, the supreme court had power to allow such appeal to be entered any time within a year. (R. S., 1857, c. 63, §§ 19, 21.) No such appeal was taken or claimed. The settlement of the estate was allowed to proceed for over six years, and until the administrator's fourth and final

account had been settled, and an order for final distribution applied for, when, for the first time (so far as appears), objection is made that the deceased, at the time of her death, did not reside in Androscoggin county. No appeal having been taken from the decree of the judge of probate granting administration, and no fraud being shown, and no want of jurisdiction being apparent upon the face of the record, we think this objection comes too late.

We are aware that the law was at one time held otherwise in Massachusetts, as the cases cited by the learned counsel for the contestants show. But the law is now changed in that State as well as this. In fact, the statute, of which ours is a transcript, was first enacted in Massachusetts, and upon recommendation of the commissioners appointed to make the revision of their statutes, which went into effect in 1836. We have the printed report of the commissioners now before us. Referring to the law as it then stood, they say that if an administrator or a guardian is appointed by a judge of probate, who has not jurisdiction of the case, the whole proceedings are considered void, and titles to real estate, as well as all other titles, acquired under such proceeding, are entirely defeated; that if the jurisdiction depends on any question of fact which is provable by parol evidence, such as the place of residence of any deceased person, the evidence to prove that fact would not appear of record in the probate court, and years afterwards it might be impossible to produce the same evidence, or any other, to establish the same fact; that however strong the evidence of the party who denies the jurisdiction may be, it cannot be known that the evidence on the other side was not originally stronger; that as creditors, heirs, legatees, and others interested in the estate, have a right to appear at the inception of the proceedings, and contest the jurisdiction, if they omit to do so, they cannot justly complain of the decision. Mass. R. S. of 1836, c. 83, § 12; Rep. of Com., part 3, pp. 24, 30; Maine R. S. of 1841, c. 105, § 22; R. S. of 1857, c. 63, § 6.

We cannot doubt the wisdom of this change; for questions of domicile are among the most vexatious and difficult that courts of

justice have to deal with; and a rule of law that would never allow such a question to be definitely settled, but would allow every fresh litigant to open it anew, and if he should happen to succeed, thereby overturn a long course of administration, and defeat titles to real estate of more than twenty years' standing (as was done in *Holyoke* v. *Haskins*, 5 Pick. 20, and *Holyoke* v. *Haskins*, 9 Pick. 259), is better calculated to defeat than promote the ends of justice.

But there is another question to be considered. The contestants claim that if the residence of the deceased is to be regarded as conclusively settled so far as to give the probate court jurisdiction of the case, it may nevertheless be controverted for the purpose of controlling the distribution of the estate.

Our conclusion is, that this cannot be done. The jurisdiction assumed by the probate court was original and not ancillary. It was assumed upon a representation (then satisfactorily proved), that the deceased at the time of her death was a citizen of this State. The record so states. No appeal having been taken, and no suggestion of fraud being made, we think the question of domicile must be regarded as conclusively settled for all purposes connected with the administration of the estate. To hold otherwise would subject the settlement of the estate to all the inconveniences which it was plainly the object of the statute to avoid. The record as now made up states in substance that deceased, at the time of her death, was a citizen of Maine. If the record should now be made to say that she was at that time a citizen of Ohio, it would not only be self-contradictory, but self-destructive; for the want of jurisdiction would then be apparent upon the face of the record, and the protective power of the statute would cease to operate. The statute does not apply to cases where the want of jurisdiction is apparent upon the face of the record. The moment, therefore, that the record should be made to say that the deceased, at the time of her death, was a citizen of Ohio, and not a citizen of Maine, that moment the jurisdiction assumed in this case would be shown to be erroneous, and all the proceedings under it would become void, *ab initio*, and the settlement of the estate subjected to all the inconveniences which it was the object of the statute to obviate.

Administration having been commenced upon the assumption that the deceased at the time of her death was a citizen of Maine, and not a citizen of Ohio, and no appeal having been taken or claimed from the decree of the probate court granting the administration, and there being no suggestion of fraud, we think the settlement of the estate must be closed upon the same assumption, and that final distribution must be made according to the laws of Maine, and not according to the laws of Ohio.

Decree of the judge of probate reversed; a decree to be entered that distribution be made according to the laws of Maine, and the case remanded to the probate court for further proceedings.

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

JOHN H. WEBSTER *vs.* PARTHENA B. FOLSOM.

Creditor of husband seeking to hold land conveyed to wife. Practice.

If the creditor of a husband would hold land conveyed to the wife by a *bona fide* grantee of the husband, and paid for out of the property of the husband, he must do it by a bill in equity and not by a levy.

And it makes no difference that the husband's conveyance was made with a design, on his part, to defraud his creditors, and that the wife participated in such design, and joined in the deed for the purpose of releasing her right in dower.

The question of the admissibility in evidence, of certain answers in a deposition, cannot be presented to the full court unless the bill of exceptions contains a copy of such answers.

A provision, in the bill of exceptions, that the depositions "may be referred to, but not copied," is not sufficient.

BARROWS, J. The demandant claims title by virtue of a levy made on the premises to satisfy a judgment obtained by him against Rufus H. Folsom, the husband of the tenant, upon a debt contracted in May, 1866. In January, 1866, before the demandant's claim originated, and when, so far as appears, the husband was free from debt, he conveyed the land to one Eaton, who gave his promissory note for the agreed price thereof ($800); and the tenant joined in the conveyance to release her dower. In February, 1867, after the commencement of the plaintiff's action against the husband, and the attachment of his real estate on *mesne process*, Eaton conveyed the land to the tenant, and received from her his note upon which nothing had been paid. There was evidence tending to show that the conveyance was made by the husband with a design to defraud creditors, and that the wife participated in the design, and evidence to the contrary. There was evidence tending to prove that Eaton, while he held the title, stated that he did not know whether he should pay for the place or not; that if defendant and her husband wanted it back, he should let them have it, if they wanted him to keep it and pay the note he should do so. The tenant and her husband and Eaton testified that the conveyance was made in good faith.

Hereupon the plaintiff claimed that the conveyance was in fraud of creditors; or, if not so, that inasmuch as the consideration of Eaton's conveyance to the wife in February, 1867, after the debt to plaintiff was contracted, was the surrender of Eaton's note given to the husband for the land, that the land was paid for by the husband, and so was liable for his debt, and that the plaintiff could hold it by virtue of his levy: and he requested the court to instruct the jury, that if Folsom's conveyance was made with a design to defraud creditors, and the wife participated in such design, the conveyance can be impeached for the fraud, though Eaton, who received the conveyance, should not be found to have participated in the fraudulent design. The presiding judge refused so to instruct, and held that the plaintiff could not recover if Eaton purchased in good faith, though the conveyance was made by Folsom and wife with fraudulent design.

Unless the purchaser, as well as the seller, of property alleged to be conveyed in fraud of creditors, is a partaker in such fraud, the sale cannot be avoided for that cause. If one purchases property in good faith, paying a reasonable consideration therefor, he acquires a good title to it whatever may have been the motives of the former owner in making the sale. We cannot make the case at bar an exception to this familiar rule, because the property has now gone back into the possession of the wife. *Non constat*, but she may have the warranty of an innocent purchaser to rely upon in support of her present title.

Moreover the jury found specially, that Folsom's conveyance was made in good faith and without any design to defraud creditors; which seems to be fatal to the plaintiff's case in any view of it. The correctness of that finding is not here in question. There is no motion to set aside the verdict. The case is before us on exceptions only.

If we assume, as claimed by the plaintiff in argument, that there was no evidence that the husband had given this Eaton note to the wife before the debt, on which the levy was made, was contracted, and that, therefore, payment for the conveyance to the wife must be deemed to have been made with the husband's funds, still the plaintiff could not acquire title by his levy so as to enable him to maintain this action, because neither the legal estate, nor any remains of it (such as would sustain a levy and suit under § 13, c. 76, R. S.), were in his debtor when the debt was contracted or when the attachment and levy were made. The case finds that it had passed from him by a *bona fide* conveyance before the debt to the plaintiff was contracted. He then had no more interest or estate in it than as if he had never owned it. If now the plaintiff seeks to hold it in the hands of the wife, as having been paid for out of the husband's property, he must pursue his remedy in equity. *Low* v. *Marco*, 53 Maine, 45.

It is only when the legal title has once been in the husband, and has been conveyed by him in fraud of creditors, that a levy will avail to give a creditor such a seisin as will enable him to maintain

a writ of entry against the wife. The creditor can acquire no legal seisin by the levy, if before the attachment the title which the husband once had has passed from him by a *bona fide* conveyance, any more than he could in a case where the husband never has had a legal title. With such a finding as to the validity of the Eaton deed, the rulings with regard to the gift of the Eaton note by the husband to the wife, and the presence or absence of testimony to show such a gift, and to predicate the ruling upon, became purely immaterial so far as the maintenance of this suit is concerned.

The exceptions state that the questions and answers from No. 4 to No. 10 inclusive, in the deposition of Rufus H. Folsom, were admitted, subject to plaintiff's objection. In another part of the exceptions it is said that that deposition (among others) "may be referred to, but not copied." Whatever a party expects to have considered as part of the case, must be copied. We have nothing before us to show what the testimony deemed objectionable was. The presumption is that the rulings were correct. It is for the excepting party to show it if they were not so. Counsel cannot present in this court an objection to the admissibility of testimony by a naked reference to papers remaining on file in the court below. *Exceptions overruled.*

APPLETON, C. J.; KENT, DICKERSON, and TAPLEY, JJ., concurred.

Webster, pro se.

E. Kempton, for the defendants.

JOSEPH G. JEWETT & another, *scire-facias*, *vs.* ALBERT H. JEWETT.

Plea of puis darrein continuance—demurrer—judgment.

In a plea of *puis darrein continuance*, the day of the continuance must be set forth.

If on demurrer to such plea, the judgment be against the defendant, it will be peremptory.

ON EXCEPTIONS.

Scire-facias to revive a judgment satisfied by a defective levy. The writ was dated Feb. 12, 1869, returnable at the March term, 1869, in this county.

At the August term, 1869, the defendant filed the following plea, which was duly sworn to:

And now the said defendant comes at this next term of the court after the first continuance of said action, and for plea says that the said plaintiffs ought not further to have or maintain their aforesaid action against him, or have judgment thereon for an alias execution, as in their writ of *scire-facias* prayed for, because he says that after the last continuance of this cause, and before the present term of the court, to wit, on the 7th day of May last past, the said Joseph S. Jewett, one of the plaintiffs, by his certain writing of release of that date, by him signed, and here in court to be produced, for a valuable consideration to him paid by the defendants, did release and discharge the judgments referred to in said writ, together with all interest and costs of every name and nature which had then accrued thereon, or any execution issued thereon, or any writ of *scire-facias* brought thereon, and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiffs ought further to have or maintain their aforesaid action against him.

To this plea the plaintiffs replied substantially, that Joseph S. Jewett had no interest in the judgment and execution mentioned

in the writ, when the judgment was rendered, but had long before that time released by deed under seal all his right, title, and interest, in and to the land which was the subject-matter of the suit on which said judgment for costs was rendered; that he had no right or authority to discharge said judgment and execution, as claimed by his writing of May 7, 1869; that Joseph G. Jewett was the only party in interest in said judgment and execution, and he alone could discharge the same,—all of which facts the defendant well knew before May 7, 1866; that said discharge was fraudulently and collusively obtained, with a design to defraud J. G. Jewett; and that J. S. Jewett, after the levy and before it was declared void, by his deed duly executed, acknowledged, and recorded, conveyed his interest in the land levied upon to one H. D. Jewett. This plea concluded to the country.

To this replication the defendant demurred, alleging that it was bad in substance and bad in form, specifically setting out the defects, and the demurrer was joined.

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

N. M. Whitmore, 2d, for the plaintiffs.

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

TAPLEY, J. To the plaintiff's writ in this case, the defendant pleads *puis darrein continuance*, a release and discharge of the plaintiff's claim. To this plea the plaintiff has replied, and to the replication of the plaintiff the defendant demurs.

This raises not only the question of the sufficiency of the replication, but also that of the plea; "for it is an established rule that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance." 1 Chit. Pl. 668 and notes.

"Great certainty is required in pleas of this description; and it is not sufficient to say, generally, that 'after the last continuance'

such a thing happened, but the day of the continuance must be alleged." 1 Chit. Pl. 660; 3 Chit. Pl. 1238 to 1246; Steph. Pl. 80.

"A plea of this kind must be certain, for it is not sufficient to say that since the last continuance such a thing happened, but the day of the continuance must be shown, and also the time and place must be alleged when the matter of defense arose." 3 Bouvier's Inst., § 3022.

A plea *puis darrein continuance* requires extreme certainty, and the day of continuance should be specified. *Vicary* v. *Moore*, 2 Watts, 451; *Dunn* v. *Hill*, 11 Mees. & Wels. 470.

Such a plea must show facts happening after the last continuance, and the time and place when the defense arose. *Ross* v. *Nesbit*, 2 Gil. 252; *Cummings* v. *Smith*, 50 Maine, 568.

The plea of the defendant makes no averment of the day of continuance, and is fatally defective.

A plea of *puis darrein continuance* is a waiver of all former pleas, and if, on general demurrer, the decision be against the defendant, the judgment must be peremptory in favor of the plaintiff. *McKeen* v. *Parker*, 51 Maine, 389.

Judgment peremptory against the defendant.

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

SETH W. BOYNTON, *pro. ami*, *vs.* HENRY W. CLAY.

A minor may sue for his own services.

A minor may maintain an action by his mother and next friend, with her consent, on an express contract for his services, made on his own account, after the death of his father.

On exceptions.

Assumpsit by the plaintiff, who is under the age of twenty-one years, by his mother and next friend, to recover for four months' and seventeen days' labor.

There was evidence on the part of the plaintiff tending to show that he contracted with the defendant to labor for him six months for fifty dollars and board; that he labored from May 7th to Sept. 24, 1866, and then left because the defendant required him to work on the Sabbath; that the plaintiff's father was deceased at the time he made the contract, and his mother resided in Massachusetts; that he was sixteen years of age; that the plaintiff had paid him twelve dollars and thirty cents; and that he called for his pay when he quit, but the defendant refused to pay. It also appeared that the plaintiff was never emancipated.

On the part of the defendant there was evidence tending to show that the contract was that the plaintiff was to stay with the defendant one year for fifty dollars, with the privilege of going to school four months; that the defendant did not require the plaintiff to work on the Sabbath, and that the plaintiff's mother had a husband living.

The case was taken from the jury and referred to the presiding judge, with right to allege exceptions in matters of law.

After the evidence was all in, the defendant moved for, and the presiding judge ordered a nonsuit, for the reason that the action could not be maintained in the name of the plaintiff. Whereupon the plaintiff alleged exceptions.

A. G. Stinchfield, for the plaintiff.

A. Libby, for the defendant.

Appleton, C. J. A minor, by the consent of his father, may go out to service and receive his earnings. He may maintain an action, for the value of his labor, against the person employing him, either upon the express contract when there is one, or upon an implied contract. *Corey* v. *Corey*, 19 Pick. 29; *Bubier* v. *Bubier*, 39 Maine,

406; *Burlingame* v. *Burlingame*, 7 Cow. 92. "We go so far as to say," observes Parker, C. J., in *Whitney* v. *Earle*, 3 Pick. 201, "that when a minor son makes a contract for his services, on his own account, and the father knows it and makes no objection, there is an implied assent that the son shall have his earnings."

Here the defendant contracted with the minor. The father having deceased, the mother can have no greater rights than he had, whatever hers may be. The mother has in no way interfered adversely to her son; but, on the contrary, she appears in court as his next friend to aid in the prosecution of his claim, and, therefore, her assent, if it was necessary to have it, may well be inferred.

Exceptions sustained.

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

STATE OF MAINE *vs.* WILLIAM G. KINGSBURY.

Evidence to contradict—corroborative—collateral. Burning a meeting-house. Opinion—disqualification of juror.

Statements made by a person out of court, which are inconsistent with his material testimony in the trial of a cause, are competent by way of contradiction.

Thus where, in the trial of a person for procuring another to maliciously burn a certain meeting-house, the wife of the defendant had testified that no inducements, as testified to by the accomplice, were held forth, on a certain occasion, nor means furnished him by her husband for firing the meeting-house,—it is competent for the purpose of contradicting her, to prove that when her husband was first arrested, and she was informed that the accomplice had turned State's evidence, and charged her husband with inciting him to fire the building, she replied, "Well, he never would have done it if it had not been for others,—others were more to blame than he was."

The admission of irrelevant testimony will not be deemed sufficient ground for a new trial, when the jury were expressly instructed to disregard it.

State *v.* Kingsbury.

Where, in the trial of a person charged with maliciously burning a meeting-house, it was in evidence that the accomplice fired the building by means of a can of kerosene oil furnished for the purpose by the defendant, testimony that the shirt of the accomplice, when he fired the building, had kerosene stains upon it, is admissible.

Answers to collateral questions in cross-examination are conclusive.

Such as asking one, who fired a building at the alleged instigation of the defendant, if he had a mania or strong desire to see burning buildings, or whether or not under the influence of such a feeling he had fired other buildings.

R. S. of 1857, c. 119, § 3, recognize meeting-houses as erected for public uses; and proof that such a house was occupied for public worship is sufficient.

To be a sufficient ground for disqualifying a juror from sitting in the trial of a criminal prosecution, the opinion formed by him must be fixed and unconditional.

On exceptions, and motion for new trial because of disqualification of two of the jurors.

Indictment under R. S., c. 119, § 3.

The facts sufficiently appear in the opinion.

L. Clay & E. F. Pillsbury, for the defendant,

In support of the motion, cited *McAllister* v. *Sibley*, 25 Maine, 474; *Studley* v. *Hall*, 22 Maine, 198; *State* v. *Webster*, 13 N. H. 491; *Com.* v. *Roby*, 12 Pick. 519; *People* v. *Mather*, 4 Wend. 229; *Troxdale* v. *State*, 9 Humph. 411; *Wiggin* v. *Plummer*, 11 Foster, 251; *Willis* v. *People*, 32 N. Y. 715; *People* v. *Plummer*, 9 Cal. 298; *Nesmith* v. *Clinton F. Ins. Co.*, 8 Abbott, 141; *Foster* v. *Brooks*, 6 Geo. 287; *Riley* v. *State*, 9 Humph. 646; *Madder* v. *State*, 1 Kansas, 340.

In support of the exceptions, counsel cited upon the point that "statements out of court must be contrary to what was testified at the trial." 1 Greenl. on Ev., § 462; *Hathaway* v. *Crocker*, 7 Met. 265; *Hubbell* v. *Bissell*, 2 Allen, 196.

Upon the kerosene stains,—that they did not "tend to fix the guilt on the particular person charged, and the rights of the accused should not be prejudiced by confirmation of immaterial points," counsel cited *People* v. *Haynes*, Albany L. Journal, March, 1870, 215; *Com.* v. *Bosworth*, 22 Pick. 400.

That the building should be proved to have been erected for pub-

lic uses. R. S., c. 119, § 3; Russ. on Crimes, 786; 1 Greenl. on Ev., § 816.

T. B. Reed, attorney-general.

Upon the admissibility of Mrs. Kingsbury's declarations for the purpose of impeachment, cited *Com.* v. *Hunt*, 4 Gray, 423; *State* v. *Blake*, 25 Maine, 350, 353. On the cross-examination of Kitchen, *Harrington* v. *Lincoln*, 2 Gray, 133; *Com.* v. *Goddard*, 2 Allen, 148; *Ware* v. *Ware*, 8 Greenl. 52; *Com.* v. *Buzzell*, 16 Pick. 157, 158.

On disqualification of jurors, *Smith* v. *Eames*, 3 Scam. 76; *Baxter* v. *People*, 3 Gil. 368; *People* v. *Honeyman*, 3 Den. 121; *People* v. *Fuller*, 2 Parker's Cr. Cas. 16; *People* v. *Stout*, 4 Parker's Cr. Cas. 71, 132; *Sanchez* v. *People*, 4 Parker's Cr. Cas. 535; *State* v. *Spencer*, 1 N. J. 196; *Mann* v. *Glover*, 2 Green, 195; *Moses* v. *State*, 11 Humph. 232; Epp's Case, 5 Grattan, 676; *Smith* v. *Com.*, 7 Grattan, 593; *Ramage* v. *Ryan*, 9 Bing. 333; *Taylor* v. *Greeley*, 3 Greenl. 204.

Appleton, C. J. The defendant was indicted for inciting, procuring, hiring, etc., one James Kitchen to set fire to a certain meeting-house,—the property of the Second Baptist Church in China, and erected for public use, whereby said meeting-house was burnt and consumed.

The testimony of Kitchen is not reported, but as there was a conviction, he must, probably, have testified to the facts set forth in the indictment.

To contradict his statements, the defendant offered the testimony of his wife, from which it appeared that Kitchen, on the evening of the fire, returned from Augusta with the defendant, who had on that day been tried and fined for a violation of the Maine liquor law; that he took supper at defendant's; that she was present with them while Kitchen remained, not having been absent from their sight more than a minute at a time; that Kitchen left,—her husband remaining with her,—and that he did not take the lamp-filler from the kitchen that evening.

Her evidence tends to prove that nothing could have been said or done by her husband in her presence to induce Kitchen to set fire to the church, and that he did not furnish the lamp-filler with kerosene for that purpose.

As her testimony was to contradict Kitchen, it is fairly inferable that he testified to the reverse, in whole or part,—that the wife was not thus continually present while he was in the defendant's house, and that inducements were there held forth, and means furnished by the defendant for accomplishing the purpose the latter had in view.

To contradict the testimony of the wife, one Sawyer was called, who swore that he called on Mrs. Kingsbury in the course of half an hour after Kingsbury was taken away, after the confession of James Kitchen; that he asked Mrs. Kingsbury if she knew why her husband was taken away; that she said she did not; that he told her he understood that Kitchen had made a confession, and in his confession had stated that her husband hired him to burn the house; that she replied, "Well, he would never have done it, if it had not been for others,—others are more to blame than he was."

The witness was sworn to testify the truth, the whole truth, and nothing but the truth. She might misrepresent or conceal the facts, or she might utter falsehoods. She would be impeached by proof of misrepresentations, concealment, or the statement of falsehoods. She is impeached by the utterance of statements inconsistent with or contradictory to facts stated by her.

Whenever a witness has testified to any material facts, any acts or declarations of his which appear to be inconsistent with such testimony, are competent by way of contradiction. *Brigham* v. *Clark*, 100 Mass. 430. It is not necessary that the contradictions should be in terms; statements by the witness, inconsistent with his testimony upon material matters, may be proved against him. *Hall* v. *Young*, 37 N. H. 134.

"He would never have done it, if it had not been for others,—others are more to blame than he was." He would not have done it, *i. e.* he did it, but there is an excuse for his doing it. The

blame rests more on others than on him. The statement may imply knowledge not merely of the husband's having done that wherewith he was charged, but that he did it at the instigation of others. It may tend to show that the witness either concealed or falsified the facts within her knowledge, and, in either event, this testimony was admissible for the purpose of contradiction.

If it be said that the witness referred to Kitchen, that was not to be determined by the court. The meaning of the language used was for the jury, not the court. It was for the jury to determine whether or not it impeached, in any degree, the testimony of Mrs. Kingsbury. It was received only for that purpose. If the language was capable of different constructions, the jury were to give it the right one. The evidence was not to be excluded, if in any aspect it tended to contradict, and by contradicting to impeach the testimony of the defendant's wife.

It was either contradictory of the testimony of the witness, or it was not. If contradictory, as we think it was, then the evidence was properly received. If not contradictory, it was immaterial, and a new trial is not necessarily to be granted, because inadmissible testimony has been received, particularly when, as in this case, the jury were instructed that it was not to be weighed as proof of the prisoner's guilt at all, nor was it the proper subject of argument in that direction. It frequently happens, during the progress of a trial, that witnesses, ignorant of the rules of evidence, utter what, upon legal principles, is inadmissible. The government may propose to contradict a witness in defense, and may call testimony for that purpose. The evidence fails to contradict the witness. The jury are instructed not to regard such testimony. When proper instructions are given, such admission is not deemed a ground for a new trial. It is to be presumed the jury will follow the directions of the court. If it were not so, a witness might stop a cause in mid trial, or it must proceed at the hazard of a new trial, and the court would be powerless to avert the evil by any instructions, however pertinent and stringent. In the present case, if the jury gave heed to the court, and we must presume they did, no harm was

done, even if the evidence was not contradictory; for they were told it was not to be weighed as proof of the prisoner's guilt at all.

It is usual in cases of felony to require other evidence in corroboration of an accomplice; but, nevertheless, it is competent for a jury to convict on the testimony of an accomplice alone. The testimony of Charles Kitchen, that there were stains of kerosene oil on the calico shirt his father had on when he set the fire, was legally admissible as a fact in the case. It does not appear that it was offered as a fact in corroboration of the testimony of the father. And if it was, it is to be presumed that proper instructions were given as to whether it was to be deemed a corroborative fact or not, inasmuch as there are no exceptions to those given, nor to any requested and withheld on this subject.

James Kitchen, a witness called by the government, was asked a series of irrelevant questions on cross-examination, to all of which he made answers. The prisoner's counsel proposed to disprove the truth of those answers, but the presiding judge rejected the testimony as inadmissible, and rightly. The answers given were all collateral to the issue. Having received answers to his collateral inquiries, the prisoner must abide by the result, otherwise there might be collateral issues raised, limited in number only by the fertile ingenuity of counsel.

Meeting-houses, court-houses, etc., are buildings erected for public uses. The statute, c. 119, § 3, recognizes them as so erected. Other buildings, erected for public use, include all such as are not included in the preceding enumeration. The ruling of the presiding judge was not erroneous in this matter.

The defendant has further moved for a new trial, because Wm. M. Robinson had formed and expressed the opinion that the defendant was guilty of the crime charged before the trial, and was, therefore, disqualified to act as a juror on his trial.

Alfred M. Nelson testifies that some six months before the trial, he told Robinson that if Kingsbury hired Kitchen to burn that meeting-house, he thought he ought to go to State prison, and, according to the report, there was no doubt but that he did. To

this Robinson replied, "Yes, he ought to go for life." The witness further added that he had made different statements in regard to this conversation.

Two other witnesses testify that in the October before the trial, Robinson, in conversation with them, said that he believed Kingsbury was guilty of hiring Kitchen to fire that building as much as he believed he was alive, and he ought to be hung or sent to State prison.

It appeared that Robinson was questioned by defendant's counsel, under direction of the court, prior to his being sworn on said jury, as to his having formed or expressed any opinion in relation to the guilt or innocence of the accused, to which he answered that he had not.

The juryman being sworn, testified that he lived seven or eight miles from the defendant; that he had no interest in the church that was burned; that at the times referred to by defendant's witness, he had not seen Kitchen's confession, nor read any of the testimony, and had formed no opinion as to the guilt or innocence of the defendant; that he had said if he was guilty, he ought to go to State prison.

Most of the witnesses, called by the defendant, were impeached as unworthy of credit,—so much so, that we think reliance cannot fairly be placed on the verbal accuracy of their statements. There is a material difference between a positive and an hypothetical opinion of guilt or innocence. If the story is true, the defendant is guilty, is what any one would say when some one relates a series of facts evidencing guilt. No one reads a newspaper containing a detailed account of the commission of some crime, who might not say, if the account is true, the person charged is guilty,—yet such remark should not disqualify the person making it as a juryman. This is the most that Robinson, upon a fair review of the evidence, has done.

In *Taylor* v. *Greeley*, 3 Greenl. 204, it was proved that the juror, a short time before trial, had said that he knew all about the cause, and that the plaintiffs would and ought to recover, and that it would be a hard case for the plaintiffs if they should fail in the

action. The juryman swore he had no recollection of having used the language imputed to him, though he might have done so, and that he went upon the panel unbiased, unprejudiced, and impartial. The court refused to sustain the motion, the juror having sworn that he was impartial, and not under the influence of any impure motives. In *Ramage* v. *Ryan*, 9 Bing. 333, the court refused to grant a new trial, the juryman having denied the using of the words charged, "the whole sting of the charge" having, as Alderson, J., remarked, been "answered."

To sustain a challenge to a juryman for favor, there must be a formed and expressed opinion. "This," remarks Smith, J., in *People* v. *Stout*, 4 Parker's Cr. Cas. 117, "it is well settled in numerous cases, must be a fixed, absolute, positive, definite, settled, decided, unconditional opinion. The rule is uniformly laid down by the use of one of these words, or words of equivalent force (4 Den. 9–34; 3 Id. 133–9; 4 Wend. 229, 243; 8 Johns. 347; 1 Den. 281; 2 Virginia Cases, 378). A conditional, contingent, hypothetical, indeterminate, floating, indefinite, uncertain opinion will not do, nor an impression (*Mann* v. *Glover*, 2 Green, 195; *ex-parte Vermilyea*, 6 Cow. 565; *Durell* v. *Mosher*, 8 Johns. 445). In *State* v. *Potter*, 18 Conn. 167, the juror being challenged, said he had read certain newspaper accounts in relation to the supposed murder, and among them the confession of the prisoner, and that if these accounts were true, he was of opinion that a horrid murder had been committed. The challenge was overruled, and the supreme court sustained the decision. "It is perfectly evident," remarks Williams, C. J., "that he had no opinion upon the case itself, but he did think, if the facts were as stated in the prisoner's confession, a horrid murder had been committed. This is a mere hypothetical opinion." Indeed, the entire current of authorities is in accordance with these views. *Sanchez* v. *People*, 4 Parker's Cr. Cas. 535.

Objection was likewise taken that E. C. Banks, the foreman of the jury, before whom the defendant was tried, had a conversation, while the cause was on trial, in which he said "there had been a

trial last fall, and the jury did not agree; that there were eight for condemning him, and four for acquitting him. He said he had no doubt he hired this Kitchen to set the building afire." The juryman, upon being examined, denied having such conversation during the trial; he testified that he had no conversation with any one on the subject until after the verdict was rendered; that he had made up his mind not to talk with any one on the subject, while the cause was on trial, and that he did not; and that the conversation above referred to was after the rendition of the verdict.

It is not necessary to consider the effect of the conversation in question, as the defendant fails to satisfy us that it occurred while the cause was on trial. A witness may easily mistake as to the day when an alleged conversation took place. The statements of the juryman are not overcome by adverse testimony, and we have no doubt of their truth. *Motion and exceptions overruled.*

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

KENT and TAPLEY, JJ., did not concur.

CHARLES A. SEVERY *vs.* JOSEPH F. NYE.

Pleading. Abatement.

A plea in abatement must be direct and positive, and not argumentative.

Thus, in an action against a sheriff for the wrongful official acts of his deputy, a plea in abatement alleging substantially that the alleged trespass accrued to the plaintiff by reason of the official acts of the defendant's deputy, for which the defendant was legally responsible; that the plaintiff had his election to bring his action therefor directly against the deputy or the defendant; that he elected to and did bring it against the deputy, and the same is still pending and undetermined; and "that by bringing his said suit directly against said deputy, the plaintiff elected to release and did thereby release this defendant from all further liability for the supposed trespasses," etc., is bad.

The pendency of an action of trespass against a deputy-sheriff for his wrongful acts done under color of his office, cannot be pleaded in abatement in an action against the sheriff for the same cause.

The pendency of such a suit against a deputy when an action against the sheriff for the same cause is entered, is not a release of the latter action.

On exceptions.

Trespass *de bonis asportatis.*

This action is against the sheriff of the county of Somerset for the acts of his deputy, Josiah D. Bartlett, done under color of his office. It was entered at the December term, 1868. The defendant seasonably filed the following plea, which was duly signed and sworn to:

And now the said defendant comes and defends the force and injury when, etc., and prays judgment of the plaintiff's writ and declaration, and that the same may be quashed, because he says that the said plaintiff heretofore, to wit, at a term of the supreme judicial court held at Norridgewock, within and for said county of Somerset, on the third Tuesday of September, A. D. 1867, duly brought and entered his action against one Josiah D. Bartlett, the deputy of said defendant, and therein impleaded the said Bartlett in a plea of trespass, and for the same causes of action in the declaration aforesaid above set forth; that the said writ against said Bartlett was duly served and entered in said court at said term, and said Bartlett duly appeared and answered thereto, and the same was continued from term to term, and, at the time of the commencement of the present suit against this defendant, the same was pending in this court, and still is pending and undetermined, as by the record thereof in said court remaining appears; that this defendant was sheriff of said county at the time said alleged causes of action accrued to the plaintiff, duly elected, commissioned and qualified as such, and ever since has been, and still is such sheriff; that said Josiah D. Bartlett then was and still is a deputy under him, duly appointed, commissioned and qualified to act as such, and for whose acts and doings, as such deputy, this defendant then was and still is responsible; that said alleged trespasses and causes of action, if any, accrued to said plaintiff by reason of, and through the acts and doings of said Bartlett, in his official capacity as a deputy of said defendant, and not otherwise, viz., in the service of a writ against the said plaintiff in favor of creditors of his, duly sued out, and upon which said Bartlett attached certain property; which

said attachment constitutes the alleged causes of action and trespasses of which the said plaintiff in both of his said writs and declarations complains; that said defendant never, in any way or manner, or at any time, personally interfered with the plaintiff or his property, and that said plaintiff has no cause or causes of action against him other than such, if any, as may have accrued to him from the acts and doings of said Josiah D. Bartlett, his said deputy, in his official capacity aforesaid, or under color of his said official capacity; that said plaintiff had, by law, his election to bring his said action for said supposed trespasses directly against said Bartlett, who, as said defendant's deputy, committed them, if any; or, against this defendant, who, as said Bartlett's superior, was by law responsible therefor; but not against both, either jointly or severally; that said plaintiff, with full knowledge of all the facts, elected to bring his action, for said supposed trespasses, directly against said Bartlett, said defendant's deputy, and did so bring it, and attached said Bartlett's property therein; which said action is the same above mentioned as brought and entered in this court, at the term thereof holden the third Tuesday of September, A. D. 1867, and was pending in said court, when the present suit for the same supposed trespasses against this defendant was commenced, and is still pending in said court and undetermined, as by the record thereof appears; and the said defendant avers that by bringing his said suit, which is still pending as aforesaid, directly against said Bartlett, the said plaintiff elected to release, and did thereby release, this defendant from all further liability for the supposed trespasses, acts, and doings, and cause of action in his writ and declaration aforesaid, above mentioned and set forth; all which he is ready to verify. Wherefore he prays judgment of said writ and declaration, and that the same may be quashed, and for his costs.

To this plea the plaintiff replied, that the action against Bartlett was determined at the December term, 1868, prior to the commencement of this suit, by plaintiff's becoming nonsuit, and that said action remains on the docket simply for the purpose of having the question of the plaintiff's liability therein, for costs, determined.

To this replication the defendant filed a general demurrer which was joined.

The presiding judge sustained the demurrer and held the plea good, and abated the writ, *pro forma;* and the plaintiff alleged exceptions.

D. D. Stewart, for the defendant.

Final judgment had not been entered in the suit against Bartlett. The court had power to take off the nonsuit. No party can recover costs in a suit which is not pending; and a suit is always pending until final judgment is entered. *Woodcock* v. *Parker*, 35 Maine, 138; *Woodcock* v. *Parker*, 34 Maine, 593; *Lothrop* v. *Page*, 26 Maine, 119.

The effect of the pendency of that suit upon this, depends upon the legal relations and rights existing between the plaintiff, defendant, and Bartlett. If the defendant and his deputy were co-trespassers, the pendency of that suit would be immaterial, because remedies against co-trespassers are concurrent; and a suit against one, without satisfaction, would not affect a suit against the other. The sheriff and his deputy are not co-trespassers. *Campbell* v. *Phelps*, 1 Pick. 62. Nor are their relations those of master and servant, *Ibid.*; but they are *sui generis*,—growing out of the effect of the statute and of the peculiar common law of Massachusetts and Maine upon the subject. By English common law, all actions for breach of official duty must be brought against the sheriff only. *Cameron* v. *Reynolds*, 1 Cowp. 403; Sewell on Sheriffs, 34; *Tuttle* v. *Love*, 7 Johns. 472; *Paddock* v. *Cameron*, 8 Cow. 212; *Abbott* v. *Kimball*, 19 Verm. 551; *Draper* v. *Arnold*, 12 Mass. 449.

The peculiar relations subsisting between a sheriff and his deputy is fully stated in *Campbell* v. *Phelps*, *supra;* same parties, 17 Mass. 246. The deputy is, so far as third persons are concerned, an independent officer. For any wrongful act he may be treated directly as a trespasser; or the injured party may, "at his election," regard the sheriff as having personally done the wrongful act, and treat him as the trespasser; and if he does so elect, the law con-

siders the sheriff as the guilty party and not the deputy. The remedies are not concurrent, but elective. They are not liable jointly or severally, but electively. Hence a pending suit against one may be pleaded in abatement of a suit against the other.

That the remedy is elective, the following cases declare. *Draper* v. *Arnold*, 12 Mass. 450, declares the "practice uniform for a long course of years, to sue either the sheriff or his deputy for the default of the latter, at the election of the injured party." . . . "A breach or neglect of duty, by a deputy-sheriff, furnishes a good ground of action against him personally, whenever the party injured chooses to forego the advantage of bringing his action against the sheriff." The sheriff is a "substitute for the deputy." *Campbell* v. *Phelps*, 1 Pick. 67. The statute of limitations runs four years against a sheriff and six against the deputy. So in *Taft* v. *Metcalf*, 11 Pick. 458, "A party aggrieved by the act of a deputy-sheriff, has his election to sue the sheriff or deputy." Same language in *Walker* v. *Foxcroft*, 2 Greenl. 272. When remedies are not concurrent but elective, the party must abide by the election when once made. *Bohanan* v. *Pope*, 42 Maine, 93.

From the nature of the right to be exercised, the election is made when the party determines which to sue, and brings his suit accordingly. *Campbell* v. *Phelps*, 1 Pick. 67.

It is immaterial whether the suit is pending or has been prosecuted to final judgment and execution. A worthless judgment and execution against an insolvent deputy, can be of no more value than a suit pending. All the evils likely to result from allowing a party to bring a suit against a sheriff, after he had elected to sue the deputy, will occur the same, whether the one against the deputy finally terminates in a judgment against him, or in a nonsuit. When the right of election has been exercised it becomes *functus officio*. A nonsuit will not bar an action against same party, but the right of election is gone forever. *Butler* v. *Hildreth*, 5 Met. 49, is decisive of this branch of the case.

H. L. Whitcomb, for the plaintiff.

APPLETON, C. J. This is an action of trespass *de bonis asportatis* against the sheriff of the county of Somerset. To this he has pleaded in abatement, the pendency of a former suit by this plaintiff, against one Bartlett, a deputy of the defendant, for the same cause of action, whereby he has released the defendant.

The greatest precision and accuracy are required in pleas in abatement. They must be certain to every intent, and they must not be argumentative.

1. Pleading is a statement of facts, not a statement of argument. A plea should be direct and positive, and not by way of rehearsal, reasoning, or argument. "Thus if *scire-facias* be brought against a parson for the arrears of an annuity recovered against him, and he plead, that before the writ brought, he had resigned into the hands of the ordinary who accepted thereof, this plea is argumentative, for he should have pleaded directly that he was not parson on the day of the writ brought, instead of pleading facts from which that conclusion was to be drawn," etc. 1 Chit. Pl. 518. "Every plea must be direct and not by the way of argument or rehearsal." Co. Lit. 303 a. A plea that the "supposed debt, if any there be," is bad on special demurrer, for not confessing the debt. *Margetts* v. *Bays*, 31 E. C. L. 223.

The pleader, besides setting forth the facts on which he relies to abate the plaintiff's writ, inserts, by way of argumentation, a syllogism therein to this effect: that an election to sue a deputy-sheriff by a party plaintiff, and a suit by him is a release of the sheriff, whose deputy he is, that this plaintiff had commenced a suit against the defendant's deputy, Bartlett, which is now pending, and that thereby he released the defendant.

It is true, that argumentativeness in a plea must, as a general rule, be taken advantage of by special demurrer. But this applies only to pleas in bar, not to pleas in abatement, as to which every exception may be taken on general demurrer.

2. The sheriff and his deputy are liable for the wrongful acts of the latter done *colore officii*. The party aggrieved may sue the sheriff or his deputy. The cases cited show that either may be

sued, but they do not show that a suit brought and pending against the deputy-sheriff is a release of the sheriff as the plea alleges; "and the said defendant avers, by bringing his said suit, which is still pending as aforesaid, directly against said Bartlett; the said plaintiff elected to release, and did thereby release this defendant from all further liability for the supposed trespasses, acts, and doings, and causes of action in his writ and declaration aforesaid above mentioned and set forth," etc.

In the leading case of *Campbell* v. *Phelps*, 1 Pick. 62, the court were divided. "The point upon which the majority are agreed," observes Parker, C. J., "is, that the sheriff and his deputy are not to be considered as joint trespassers in a tort done by the latter so as to subject them either to a joint action, or to give the party injured a right to bring his action against one after having recovered judgment and sued out execution against the other." According to the opinion of the minority, it was held that "whenever a trespass is committed by a deputy, by color of his office, the party injured may have a separate action against the sheriff and another against his deputy, and may proceed to judgment against either,"—and that a recovery against one, without satisfaction, is no bar to an action against the other. Both assume a judgment necessary to constitute a bar. The majority say that is sufficient; the minority require that it should be satisfied. In accordance with the views of the minority is the opinion of the supreme court of Connecticut in *Morgan* v. *Chester*, 4 Conn. 387, where it was held that notwithstanding the judgment against the deputy, and his imprisonment on execution, the cause of action against the sheriff remained unimpaired. It is nowhere intimated that the institution of a suit against the deputy is a discharge of the sheriff. Indeed, by recurring to the cases cited by the learned counsel for the defendant, while they recognize the right to sue either the sheriff or his deputy, they do not assert the proposition that a suit without judgment is a bar, nor can any such case be found, as applicable to parties sustaining the relation of sheriff and deputy.

In *White* v. *Philbrick*, 5 Greenl. 147, it was held that a judgment

in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff against another person for taking the same goods. "Chief Justice Parker, in the case *Campbell* v. *Phelps*, appears to admit," observes Weston, J., "that both in trover and in trespass, *de bonis asportatis*, the property vests in the defendant. This, Wilde, J., in the same action, denies, unless upon satisfaction of the judgment." The right of action is merged in the judgment. "It is the judgment," observes Jervis, C. J., in *Buckland* v. *Johnson*, 80 E. C. L. 145, "that disposes of the matter and not the payment." In same case, Maule, J., says, "Having his election to sue in trover, for the value of the goods at the time of sale, or for the proceeds of the sale, as money had and received, the plaintiff elected the former, and he has obtained a verdict and judgment. He has, therefore, got what the law considers equivalent to payment, viz., a judgment for the full value of the goods. . . . Having once recovered judgment his remedy was altogether gone; his claim was satisfied as against all the world." The recovery of the judgment, not the institution of the suit, was the bar. In *Hunt* v. *Bates*, 7 R. I. 217, it was held that judgment in trover, for the full value of the goods converted, against the deputy making the attachment, was a bar to an action of trespass by the same plaintiff, against the creditor at whose suit the attachment was made. This was upon the principle that the plaintiff's right was merged in his judgment.

In *Emery* v. *Fowler*, 39 Maine, 327, it was decided that a judgment against the principal, for the act of the servant, rendered upon a trial on the merits of the case, was a bar to a suit against the servant for the same act, and that when such judgment was rendered, after the pleading of the general issue in an action against the servant, it was admissible under that plea. "This case," observes Shepley, C. J., "requires that a single point only should be considered; whether one who acts as the servant of another, in doing an act alleged to have been a trespass, is to be so connected with the principal, who commanded the act to be done, that what

will operate as a bar to the further prosecution of the principal, will operate as such for the servant," and the court held in the affirmative. "A familiar example is presented," he adds, "in suits against a sheriff or his deputy, which being determined upon the merits, against or in favor of the one, will be conclusive upon the other." Nowhere is the doctrine stated that the institution of a suit against the deputy is a release of his principal.

The defendant and his principal were each, severally, liable to the plaintiff. The obtaining of judgment and the suing out of execution are an election which may constitute a bar, but not the commencement of a suit which may be abandoned at any moment. *Hopkinson* v. *Hersey*, 20 Maine, 452; *Livingston* v. *Bishop*, 1 Johns. 290.

Exceptions sustained.
The defendant's plea bad.
Defendant to answer over.

CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.
KENT, J., concurred in the result.

SAMUEL SHAW, administrator, *vs.* FRANKLIN COFFIN.

Infant—liability of.

An infant is liable in assumpsit for money stolen, and for the proceeds of property stolen by him, and converted into money.

ON REPORT.

ASSUMPSIT to recover the amount of a note for $450, and an order for $50, given by the defendant to the plaintiff's intestate on Dec. 30, 1847.

The writ was dated March 28, 1864, and contained counts on the note and order, and one for money had and received.

The defendant pleaded the general issue, which was joined, and by brief statement alleged that the defendant was an infant when the note and order were given; and that they were given under duress, and without consideration.

It appeared that the defendant, and a minor son of Elijah Wood, jr., the plaintiff's intestate, on the night of the 8th of Sept., 1847, took from the barn and stable of the plaintiff's intestate, in Palermo, a valuable horse, carriage, and harness, property of the intestate, and three hundred dollars of money from the intestate's desk, and went to Canada, where the carriage and harness were sold for one hundred dollars, which was paid to the defendant; that the horse was returned; that the thieves went thence to Waukesha, Wisconsin, where they kept a small grocery store, under the names of Smith and Brown; that the plaintiff's intestate sought for and found them at Waukesha, when the defendant admitted the larceny, and gave the note and order in suit; and that the defendant was born June 2, 1829.

It also appeared that the defendant returned to this county, and remained here some six months, during the latter part of 1853, and the fore part of 1854, when and where his wife died; that he then returned to his residence in Coles county, Illinois, where he has resided most of the time ever since, and where he resided at the time of the trial of this action; that he has been in this county several times since he first went away.

There was some evidence tending to show that the note and order were given under duress, and other testimony that they were not.

There was evidence of a demand when the note and order were given.

D. D. Stewart, for the plaintiff, cited *Bristow* v. *Eastman*, 1 Esp. 172; 1 Am. Lead. Cas. 262; *Young* v. *Marshall*, 8 Bing. 43; Story on Cont. (1st ed.), § 45; Chit. on Cont. 34; 2 Kent's Com. 241; Reeve's Dom. Relations, 246; *Elwell* v. *Martin*, 32 Verm. 217; *Towne* v. *Willey*, 23 Verm. 359; *Walker* v. *Davis*, 1 Gray, 508; 2 Greenl. on Ev., § 368; *Homer* v. *Thwing*, 3 Pick. 494; *Howe* v. *Clancey*, 53 Maine, 130; *Boston & W. R. R. Co.* v. *Dana*, 1 Gray, 83.

William Folsom, for the defendant, cited 2 Kent's Com. 240, 241,

and cases cited in note b; Oliver's Prec. 117, and cases there cited, viz., *Moses* v. *McFarland*, 2 Bur. 1005; *De Hireland* v. *Bauerback*, 1 Camp. 52.

APPLETON, C. J. The defendant, while a minor, having stolen money and other property of the intestate, which he converted into money, settled with him for the sums thus tortiously obtained, by giving his promissory note therefor.

This action is for the moneys stolen, and for the note given on settlement of the same.

The note given by the defendant, when a minor, has not been ratified. The note of an infant, given on the adjustment of an account against him, is voidable. It is equally voidable, though given on a settlement for damages arising from his torts. The defendant, having avoided his note by the plea of infancy, the plaintiff is remitted to his original cause of action, as existing before the settlement by the defendant.

It is well settled that an infant is liable in the appropriate form of action for his torts. He would, therefore, be held in an action of trover for money stolen.

Is an infant liable on assumpsit for money stolen, or for the proceeds of stolen property when converted into money? The thief of full age is so liable. The owner of property stolen, and converted into money by the thief, may maintain assumpsit against him for money had and received. *Howe* v. *Clancey*, 53 Maine, 130; *B. & W. R. R. Co.* v. *Dana*, 1 Gray, 83. The reasons upon which these decisions rest apply equally to the minor as to the adult. If the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of the adult, and assumpsit maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor. It would be a reproach to the law, if a minor, when arrived to years of manhood, were to be allowed to escape from the payment of what is due, by the plea that he had stolen the money demanded of him when under age. In *Walker*

v. *Davis*, 1 Gray, 506, Thomas, J., says, "The defendant obtained the possession of her (the cow), by fraud, a fraud to which infancy would constitute no defense. Supposing no contract to have been made, the plaintiff then had the election to bring his action for the tort, or, as the cow had been sold before the note became due, to waive the tort and bring assumpsit." In *Towne* v. *Willey*, 23 Verm. 359, referring to the liability of infants for torts, Redfield, J., in delivering the opinion of the court, says: "In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive, substantial torts, but not for violations of contracts merely, although by construction the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract at his election." The precise question here presented arose in *Elwell* v. *Martin*, 32 Verm. 217, and the court there held that the defendant was liable in assumpsit for money tortiously taken by him during his infancy.

The plaintiff proves a demand on 30th Dec., 1847, from which time the defendant is liable to pay interest.

Judgment for the plaintiff for $400, and interest from Dec. 30, 1847.

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

ELISHA O. FLAGG, petitioner, *vs.* MARY S. O. BADGER & others.

Life-estate. Lease—construction of.

If a lease of land be made to a person, "to hold for the term of the life of the said" lessee, "and the life of her husband" named, "and the life of" another person named, the estate is not terminated with the death of the lessee.

ON REPORT.

PETITION FOR PARTITION, dated Feb. 4, 1867, wherein the petitioner claims two-thirds of the premises described in the petition, and introduced sufficient evidence of his title thereto.

The defendant then introduced a lease covering the same premises, dated Sept. 1, 1847, executed by Elisha Odlin as lessor, and by Sarah Flagg as lessee, the material part of which is as follows:

"This indenture, made the first day of September, in the year of our Lord eighteen hundred and forty-seven, witnesseth, That Elisha Odlin, of Salem, in the county of Essex, and Commonwealth of Massachusetts, does hereby lease, demise, and let unto Sarah Flagg, of Hartland, in the county of Somerset, and State of Maine, a married woman, a certain tract of land in said Hartland, and for reference to boundaries and description, see the record of the deed in the Somerset Registry of Deeds, vol. 60, p. 247. To hold for the term of the life of the said Sarah Flagg, and the life of her husband, Levi Flagg, and the life of Mary S. O. Grace, yielding and paying therefor the rent of one wheat corn annually."

It appeared that Sarah Flagg and Levi Flagg, mentioned in the lease, died before the commencement of this petition; that the present defendant, Mary S. O. Badger and Mary S. O. Grace, are the same person; and that the petitioner and defendant are brother and sister.

The presiding judge ruled that the lease gave an interest to Sarah Flagg only, which estate, or term, terminated with her death.

Whereupon it was agreed to report the case, and if the ruling is erroneous, the case to stand for trial.

D. D. Stewart, for the defendants.

The lease was not only for the life of Sarah Flagg, but technically *pur autre vie*. 1 Coke on Litt. 41 (*b*); Rosse's Case, 5 Coke's Rep. 13 (*a*); 4 Dane's Ab. 646, c. 130, art. 1; 1 Greenl. Cr. 98, 99; 4 Kent's Com. 26; 2 Bouvier's Inst. 227; 1 Washb. on Real Prop. 90; Mass. Stat. of 1805, c. 90, § 1; Pub. Laws of 1821, c. 38, § 17; R. S. of 1841, c. 93, § 1; R. S. of 1857, c. 75, § 1; Pub. Laws of 1852, c. 295; *Winslow* v. *Goodwin*, 7 Met. 383; *Dalton* v. *Savage*, 9 Met. 28; *Sheffield* v. *Lovering*, 12 Mass. 493; 1 Greenl. Cr. 111, note 1.

J. H. Webster & T. B. Barrett, for the petitioner,

Contended that there being no words of inheritance in the lease, the estate terminated at the death of Sarah Flagg. *Jackson* v. *Myers*, 3 Johns. 388, 396; *King* v. *Barnes*, 13 Pick. 24; *Jackson* v. *Davenport*, 18 Johns. 295, and 20 Johns. 537; *Williams* v. *Woodward*, 2 Wend. 487.

Tapley, J. On the first day of September, 1847, one Elisha Odlin, by indenture, duly executed, leased, demised, and let unto Sarah Flagg, a certain tract of land in this State, "to hold for the term of the life of the said Sarah Flagg, and the life of her husband, Levi Flagg, and the life of Mary S. O. Grace," who is now Mary S. O. Badger. Sarah Flagg and Levi Flagg died before the commencement of these proceedings.

The presiding judge ruled "that the lease gave an interest only to Sarah Flagg, which estate or term terminated with her death;" if this ruling is erroneous, the case is to stand for trial.

By the lease there was an estate and interest in the land, granted to Sarah Flagg for the term of the longest of the lives of the three persons named therein.

By the statute of 1821, c. 38, § 17, "when any person shall die seized of any lands, tenements, or hereditaments, or any right

thereto, or entitled to any interest therein in fee-simple, or for the life of another not having lawfully devised the same, the same shall descend," etc.

This provision was reënacted substantially in the several revisions of the statutes made since. R. S., 1841, c. 93, § 1; R. S., 1857, c. 75, § 1.

Being an interest in lands held for a term extending beyond the life of Sarah Flagg, it was under the laws of this State, not "terminated with her death."

Under the agreement of the parties the case must stand for trial.

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

SUSAN NORRIS & another, in equity, *vs.* BETSEY A. LABEREE & another.

Conveyance of land in consideration of service to be rendered by grantee. Reforming deed—mistake of law—effect of deed.

M. L. conveyed land, by deed of warranty, to his father, S. L., conditioned that, if the grantor "maintained and supported" S. L. and wife, and paid his sister S. three hundred dollars, the deed should be void. Subsequently, M. L. having died without issue, the land descended to S. L., who thereupon conveyed it to his other son, M., by deed of quitclaim, "in consideration of the conditions to be performed for me and mine by" M., "agreeably to the deed of the late M. L. to me;" the acceptance of the latter deed rendered M. personally liable to perform the conditions mentioned, but created no lien upon the land.

In such case, the deed having been made as the parties intended, without any wrongful insertions or negligent omissions, a court of equity will not after twenty years, interfere to reform it, so that it will have the legal effect expected.

Nor to cancel a deed, alleged to be fraudulent, on the prayer of one having no interest in the land thus conveyed.

Norris *v.* Laberee.

BILL IN EQUITY.

The bill substantially alleged that Seth Laberee, one of the complainants, on Feb. 14, 1842, caused one Goud to convey to one Miles Laberee, son of said Seth, a farm worth $4000, and in consideration of which conveyance, Miles conveyed the same to Seth, upon the condition that the said deed should be void "if the said Miles should well and truly find, provide for, and maintain and support my father, the said Seth Laberee, and his mother, Susan Laberee, or such other who may ever be his lawful wife, during each of their natural lives in such a relation, to the end thereof, with all things reasonable, necessary, and comfortable for such their several support, at his own charges, in both sickness and health; and should grant to them or either of them, as the case may be, such accommodation for their own respective use and occupancy in the dwelling-house upon the premises aforesaid, as shall be equal to one-half of the same in all the privileges and appurtenances thereto belonging, for their own personal domestic use; and should always keep and provide for his or their use, at their reasonable command, or either of them, a good and suitable horse, with a carriage or carriages, as may be convenient and practicable, for their personal use at all times; and should also find and provide a home and maintenance for his sister, Susan Laberee, the other complainant, as usual, with her parents, while she may live in single life or become an orphan, until the time of her possible marriage, and, upon the event of such marriage, should well and truly pay to her, the said Susan, as her out-fit in discharge of all legal claim upon my father, or his estate, as an heir-at-law, the full sum of three hundred dollars in cash, or in articles of that value;" that said conveyance created an equitable lien on the premises in behalf of the said Seth and wife for a life-estate, and for the oratrix Susan, to the amount of $300, which had never been paid or discharged; that in September, 1847, Miles deceased without heirs of his body, and the property descended to his father, Seth, subject to the equitable lien of the complainant Susan; that upon the death of Miles, Seth undertook to enter into similar arrangements, and of the same legal effect as

the foregoing, with his only surviving son, Myrick, and in pursuance thereof, in April, 1849, he executed and recorded a deed of the premises to Myrick, in which it was recited to be "in consideration of the conditions to be performed for me and mine by Myrick Laberee, agreeably to the deed of the late Miles Laberee, deceased, to me, the said Seth Laberee, bearing date Feb. 14, 1842;" that he was advised by the scrivener, well versed in the law, that said latter deed was of the same nature and legal effect as the former, and as it was intended to be; that he intended said deed to be, and fully believed it was of the same legal effect, when he executed it, as the deed of said Miles, and that it secured to him, wife, and daughter Susan, all the rights and benefits secured to them by the conditions of the deed from Miles, and that the same was a deed of maintenance, and subject to forfeiture, and that he should not otherwise have executed it without consideration; that neither said Myrick nor Miles ever paid $300, and said Myrick in his lifetime never claimed or believed that he had other than a conditional title to said premises, holding the same in trust subject to the conditions mentioned in the deed from said Miles; that the complainants so believed until the court so adjudged.

The bill further alleged, that the deed to Myrick was never actually delivered to him in his lifetime; that said Myrick abandoned any title to said premises, and surrendered the premises to said Seth, whereupon the said Seth assisted said Myrick in purchasing other premises, upon which Myrick moved, and ceased to claim any rights under said conveyance, and never afterward offered to fulfill any of the conditions or trusts imposed on said Miles, after which abandonment, the said Seth went into full possession, and so continued until the death of his wife, when he leased the premises to said Myrick, under which arrangement said Myrick was in possession until his decease in May, 1862, whereupon Betsey A. Laberee was appointed administratrix on his estate; that said Betsey, and one J. M. Carleton, her attorney, contriving to injure and defraud the complainants, instituted criminal proceedings against the said Seth for willful trespass, for cultivating the premises as he had been

accustomed to for forty years, and thereon imprisoned the said Seth for a long time, for offenses of which they knew he was innocent; that from want of means to defend, said Seth was obliged to surrender possession of said premises to the defendants; that further contriving to injure and defraud the complainants, the defendants procured a license from the probate court for said county to said Betsey, administratrix as aforesaid, under pretense that there was not other property belonging to the estate of said Myrick sufficient to pay his debts, and by said license, while the title thereto was in litigation, sold the same to said Carleton for $500, although there was other property sufficient and available for the payment of said debts; that said Betsey and Carleton shared the benefits derived from said sale, they well knowing all the premises herein set forth. That the profits of said premises have yearly netted $500, which the defendants have converted to their own use, and have refused to pay or secure anything to the complainants; that they have sold from the premises $2500 worth of property.

Prayer for a decree that the defendants pay over all the moneys, and secure to the complainants and each of them, all the rights and benefits reserved and secured to them in and by virtue of the deed from Miles; that the deed from said Seth to said Myrick be cancelled and declared void, and also the deed from said Betsey to said Carleton; or to reform the deed from said Seth to said Myrick, in accordance with the intentions of the parties.

The bill was duly signed and sworn to, March 22, 1869; served, returned, and filed April term, 1869.

October term, 1869, defendants filed general demurrer, which was duly joined.

A. G. Stinchfield, for the complainants.

No adequate remedy at law. *Laberee* v. *Carleton*, 53 Maine, 211; *Jameson* v. *Hapgood*, 7 Pick. 8. But when defendant is bound to account, jurisdiction will be taken, though the plaintiff have a remedy at law. *Hobart* v. *Andrews*, 21 Pick. 526; *First Cong. Soc.* v. *Trustees, &c.*, 23 Pick. 148.

Deed of April, 1849, created a trust, and the failure to furnish support and pay the money as by conditions in deed of Feb. 14, 1842, by Myrick, the repudiation of the trusts by him and his administratrix, and sale of the estate to Carleton, worked a forfeiture, and the estate reverted to the one creating the trust.

No particular mode of expression is requisite for the purpose of raising a trust. 4 Kent's Com. 304.

The complainants have an equitable interest by virtue of the conveyances, which constitute a trust. *Bugbee* v. *Sargent*, 23 Maine, 270; *Pratt* v. *Thornton*, 28 Maine, 360; *Pike* v. *Collins*, 33 Maine, 38, 47; *Rawson* v. *Uxbridge*, 7 Allen, 130.

The deed of February, 1842, is incorporated into the deed of April, 1849, and all the rights secured by it to the complainants, go with it into the latter.

Trusts embrace all obligations which, *ex æquo et bono*, a party ought to perform, and when there is no legal remedy. 2 Story on Eq. 230; 4 Kent's Com. 312. See, also, *Bryant* v. *Russell*, 23 Pick. 521; 4 Kent's Com. 308; 2 Washb. on Real Prop. 134 (*n*).

The intent and design of the grantor, and not words, are the principal things in a deed. *Linscott* v. *Buck*, 33 Maine, 534; *Bryant* v. *Russell*, *supra*.

The trust having been repudiated, the trust estate reverts, and the court may decree a reconveyance. *Hanley* v. *Sprague*, 20 Maine, 431; 2 Story's Eq. Jur., §§ 979, 1196, n., 1197, 1198, 1200.

In taking the deed, Myrick assumed the trust. *Nugent* v. *Riley*, 1 Met. 117, 120; *Newell* v. *Hill*, 2 Met. 180; *Carter* v. *Carter*, 14 Pick. 428.

The record of a trust deed is notice to all subsequent purchasers. R. S., c. 73, § 12.

A conveyance may be decreed directly from Carleton to Seth Laberee, with proper covenants. *Buck* v. *Swazey*, 31 Maine, 41; *Dwinal* v. *Vesey*, 32 Maine, 509.

2. Or the deed of April, 1849, may be reformed by the insertion of the conditions imposed on Miles in the deed to Myrick, after the

covenants, which was clearly the intention of the parties. *Simpson* v. *Vaughan*, 2 Atk. 31; *Langley* v. *Brown*, 2 Atk. 203; *Ball* v. *Storer*, 1 Sim. & S. 210; *Keisselback* v. *Livingstone*, 4 J. C. R. 144.

To the same effect are *Sanford* v. *Washburn*, 2 Root, 499; *Peterson* v. *Grover*, 20 Maine, 363; *Davis* v. *Rogers*, 33 Maine, 222; *Wiser* v. *Blackly*, 1 J. C. R. 607; *Gillespie* v. *Moon*, 2 J. C. R. 585; 1 Story's Eq. Jur., §§ 97, 112, 115, 143, 155, 160, 162, 166, 168; 1 Pet. 12.

A. P. Gould, for the defendants.

APPLETON, C. J. On 14th Feb., 1842, Miles Laberee conveyed the farm, which constitutes the subject-matter in controversy, to his father, Seth Laberee, in mortgage, conditioned to support him and his wife during their natural lives, and to pay three hundred dollars to their daughter, Susan Laberee.

Miles Laberee died childless, 22d Sept., 1847, and the estate descended to his father.

On the 10th April, 1849, Seth Laberee, "in consideration of the conditions to be performed for me and mine by Myrick Laberee, . . . agreeably to the deed of the late Miles Laberee, deceased, to me, the said Seth Laberee, bearing date the 14th Feb., 1842," etc., conveyed the premises, described in the last-mentioned deed, to Myrick Laberee. This placed the title in him of the estate discharged of all conditions. *Laberee* v. *Carleton*, 53 Maine, 211.

If there was a contract made by Myrick with his father to perform what is specified as the consideration of the deed to the former, the remedy for its non-performance would be by suit upon such contract, precisely as it would have been on a note of hand, if one had been given for the premises conveyed. If there was no written contract, yet the grantee would be held liable. When land is conveyed by deed-poll, with a reservation or provision that the grantee shall perform a certain service for the benefit of the grantor, and the grantee accepts the deed, he is bound to perform the service. *Newell* v. *Hill*, 2 Met. 180. An action in assumpsit may,

in such case, be maintained upon the implied promise arising from the acceptance of the deed. *Goodwin* v. *Gilbert*, 9 Mass. 510; *Nugent* v. *Riley*, 1 Met. 121; *Maine* v. *Cumston*, 98 Mass. 317. But the contract, whether express or implied, whether to render a service or to pay a sum of money, is a mere personal contract of the party thereby liable. No lien is imposed upon the estate by way of security for the performance of whatever may constitute the consideration of the estate conveyed.

It was, undoubtedly, the expectation of all parties, when this deed was given, that Myrick would on his part perform what in his deed is stated as the consideration thereof. So a mortgage back should have been given as security for the performance of what was impliedly or expressly promised to be performed. This was neglected from a mistake of law in the construction of the deed to Myrick. This bill is now brought to correct this mistake, by altering the terms of the deed, or enforcing a reconveyance of the estate. But there was no fraud nor deceit practiced upon Seth Laberee when he made his deed to his son Myrick. There was no wrongful insertion or negligent omission of words. It was made as the parties intended it should be, but its legal effect was different from what they expected. The general rule in equity is that ignorance of the law shall not affect agreements nor excuse parties from the legal consequence of their acts.

The deed sought to be reformed on the ground of mistake was made and delivered 10th April, 1849. This bill was filed April term, 1869, so that twenty years had elapsed before the grantee sought the correction of the alleged mistake. In the mean time the grantee had deceased, and the very estate in controversy had been sold, by order of the judge of probate, to pay the debts of its owner. After so great laches, it is too late to expect the aid of a court of equity to cure the neglects and correct the mistakes of a party asking its intervention, if this were a case where it could be had.

By R. S., 1857, c. 73, § 11, "There can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney." But here was no writing signed by the party to be

charged, and consequently no trust in writing contemplated by this section.

The bill alleges the deed to Myrick was never delivered, if so, no reason is perceived why the grantee might not enforce his rights at law.

As the complainants have no interest in the estate of Myrick, they cannot ask for the cancellation of the deed from the administratrix of his estate to Carleton. If there has been fraud in the settlement of that estate, its correction must be sought in the probate court. The complainants fail to show in their bill any ground for the interference of a court of equity.

Demurrer sustained.

Bill dismissed—without costs.

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

STATE OF MAINE *vs.* ALDEN LITCHFIELD.

Privileged communications—telegrams not. Operator bound to disclose as witness. Notice to produce—when seasonable. Credibility of an accomplice.

Telegraphic communications are not privileged.

A telegraphic operator is bound, as a witness, to disclose them.

Notice to a person receiving a telegram to produce it is seasonable, if given before the trial commences.

The degree of credit to be given to any witness, including an accomplice, is to be determined by the jury.

ON EXCEPTIONS.

INDICTMENT for being an accessory before the fact in a compound larceny, committed May 4, 1870, in the Lime Rock Bank, in Rockland, Langdon W. Moore, and others, being principals.

In the trial, the government offered to prove the delivery and contents of a telegram, material in the case, by the telegraph operator, received at the office April 29, 1870, addressed to the defendant, having given written notice to produce the original to the defendant's counsel, on the morning after the arraignment of the prisoner, upon their entering their names on the docket.

The defendant's counsel objected that the notice was not seasonable; that the telegram was a privileged communication; and that the operator was not bound to disclose, she objecting to testify; which objections of counsel and operator, after suspending the inquiry till the second day to give opportunity for the defendant to search for the original, the presiding judge overruled, and ordered the operator to testify, whereupon she testified,

That she recollected receiving such a telegram for him, but was not sure about the delivery of it. She had a faint recollection of delivering it herself to the defendant.

On cross-examination, she testified that she had carefully examined her receipt-book and could not find defendant's name upon it; that the contents of the telegram, as near as she could recollect, were, "To Alden Litchfield,—The children will come to-night, Uncle."

The defendant's counsel requested the court to instruct the jury,

That the testimony of the operator, "that she had a faint recollection that she delivered the telegram" to the prisoner, was not competent evidence for the jury to act upon; which he declined to do, but did instruct them,

That they would give such weight to the operator's testimony as they thought it entitled to, taking it in connection with testimony previously given, by two of the accomplices, tending to show that a telegram, containing those words, had been received by the defendant, and the positive denial of the defendant that he ever received it or knew of its existence.

The defendant's counsel further requested the presiding judge to instruct the jury,

That the government was not entitled to a conviction of the prisoner, upon the testimony of a *particeps criminis*, or accomplice, in the crime committed, nor upon the testimony of more than one such *particeps* or accomplice, unsupported by credible and material testimony; which he declined to do, but did instruct them,

That there was no rule of law precluding the conviction of the prisoner on the testimony of an accomplice, provided the jury feel sure that they could rely upon it as true. And the presiding judge

cautioned the jury to examine it with care, and to give no more weight to it than in their opinion it was entitled, and that the testimony of accomplices was to be received with caution and carefully scrutinized.

Testimony corroborative of the accomplices as to material facts and circumstances, other than the foregoing, was introduced by the government, without objection by the defendant.

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

Thereupon, upon motion of the county attorney, in behalf of the State, the presiding judge certified, pursuant to R. S., c. 77, § 21, that he deemed the exceptions frivolous and intended for delay. Whereupon, upon motion of the defendant's counsel, the time for furnishing arguments was extended to sixty days from Oct. 1, 1870.

A. G. Jewett, in support of the exceptions.

Albert S. Rice, county attorney, *contra.*

APPLETON, C. J. The main question, presented for our determination, is whether a telegraphic operator is bound to testify to the contents of a telegraphic message.

The case finds the message material to the issue. A verbal message, communicated to the prisoner, would be admissible, and the party communicating it would be compelled to state it. So a written message, or its contents, after due notice to produce the original, and a failure of its production by the party notified, would be received in evidence. The mode of transmission to the person delivering the message, whether by telegraph or otherwise, has nothing to do with the matter. The important inquiry relates to its materiality.

Nor can telegraphic communications be deemed any more confidential than any other communications. Telegraphic communications are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. No communication should be excluded, no individual should be exempt from inquiry, when the communication, or the answer to the inquiry would be of importance in the conviction of crime or the acquittal of innocence, except when such

exclusion is required by some grave principle of public policy. The honest man asks for no confidential communications, for the withholding the same cannot benefit him. The criminal has no right to demand exclusion of evidence because it would establish his guilt. The telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld, whenever the cause of justice renders their production necessary. They cannot wish their servants should, however innocently, coöperate in the commission of crime, and decline to coöperate in its detection and punishment, and thus become its accomplices. The interests of the public demand that resort should be had to all available testimony, which may lead to the detection and punishment of crime, and to the protection of innocence. The telegraphic operator, as such, can claim no exemption from interrogation. Like other witnesses, he is bound to answer all inquiries material to the issue.

The notice to produce was seasonably given, in accordance with the 27th rule of this court, 37 Maine, 576. It was before the trial commenced. The rule does not require the notice to be given before the commencement of the term.

The degree of credit, to be given to an accomplice, was submitted to the jury with proper instructions. There is no rule of law that they may not convict upon such testimony. There should be none such. The degree of credit to be given to a witness, whatever may be his character or position in a cause, should not be arbitrarily determined in advance of his testimony and in ignorance of the circumstances affecting its credibility.

The telegraphic operator testified to receiving the telegram in question, and that she had a faint recollection of delivering it to the defendant. She had some recollection on the subject. The evidence, therefore, was proper for the jury, and it was for them to consider how far and to what extent it would be safe, under all the circumstances of the case, to rely on her memory.

Exceptions overruled.

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

BETSEY D. HATCH *vs.* HENRY E. PALMER & another.

Conveyance subject to mortgage—payment of mortgage debt—dower.

Where a mortgager of real estate, in his lifetime, assigned his property for the benefit of his creditors, and his assignees sold the equity of redemption to the tenants, making the conveyance "subject to a mortgage . . . to be provided for by the purchasers," a payment of the amount due on the mortgage, by the tenants, and an assignment thereof to themselves, operate as an extinguishment of the mortgage; and the mortgager's widow, if she did not join in the deed, may recover dower in the premises, notwithstanding she joined in the mortgage for the purpose of releasing her dower.

ON FACTS AGREED.

WRIT OF DOWER.

The plaintiff is the widow of Davis Hatch, deceased, who, during coverture, being seized in fee of the premises described in the writ, mortgaged the same to one William Donnell, to secure the sum of $2500 and interest, and the plaintiff joined with her husband in the mortgage, for the purpose of releasing her dower in the premises.

Subsequently, Davis Hatch assigned his property for the benefit of his creditors, and his assignees conveyed to the defendants, for $1167, all the interest conveyed to them by said Hatch, "subject to a mortgage to the late William Donnell, of mortgage and interest this day due, of $3183, to be provided for by the purchasers."

Dower was duly and seasonably demanded, but no assignment thereof made.

The mortgage, for the consideration named, was legally assigned, together with the note secured thereby, by the executor of the last will and testament of said Donnell, to the defendants, and the assignment recorded.

Upon these facts the court to render such judgment as the law required.

W. L. Putnam, for the plaintiff.

Tallman & Larrabee, for the defendants.

APPLETON, C. J. This is a writ of dower. Demand is admitted to have been duly made.

Davis Hatch, the husband of the demandant, mortgaged the premises, in which dower is claimed, to one Donnell. Hatch subsequently assigned all his property for the benefit of his creditors. His assignees sold the equity of redemption to the tenants for $1167, and in their deed made the conveyance "subject to a mortgage to the late William Donnell, of mortgage and interest this day due, of $3183, to be provided for by the purchasers."

The tenants, by accepting the deed with this clause, were to pay the Donnell mortgage. *Braman* v. *Dowse*, 12 Cush. 227. In pursuance of their agreement they paid the mortgage, took an assignment of the same, and now claim to hold it as against the widow's right of dower in the estate.

A widow is entitled to dower in a right in equity against all but the mortgagees, and those claiming under them, but if the administrator redeem, with the assets of the estate, she is let in to dower without contribution. *Rossiter* v. *Cossit*, 15 N. H. 38. One possessed of an equity of redemption conveyed the premises in fee, the grantee agreeing to pay to the mortgagee the amount due on the mortgage and the balance to the grantor, which was done. The wife of the grantor was held entitled to dower. *Bolton* v. *Ballard*, 13 Mass. 226. In *McCabe* v. *Swap*, 14 Allen, 188, it was held that if a deed of land contained an express stipulation that the grantee shall pay off an existing mortgage upon the land, as a part of the consideration of the deed, and save the grantor harmless therefrom, a payment of that amount and an assignment of the mortgage to him will operate as extinguishment of it, and the widow of the mortgager, though she may have released her right of dower in the premises to the mortgagee, will, upon such extinguishment of the mortgage, be entitled to dower in the estate. In this case, the mortgage debt was left in the tenant's hands with which to pay the mortgage, which they were to do. Having done it in pursuance of this agreement, they are not to hold the mortgage as a subsisting incumbrance, for the payment was made with the funds of the

mortgager. Where a mortgage debt is paid by one who is bound by contract to pay it, and he pays it and takes an assignment, the assignment will be held to be a discharge, though an assignment in form.

The tenants paid $4350 for the estate conveyed to them. The amount of $3183 was reserved in their hands to pay the mortgage. Had this been made by Hatch in his lifetime, there would have been no question as to the discharge of the mortgage. But it makes no difference whether paid by him or his administrator or assignee, with the assets of the estate, the defendants having accepted a deed of the interest of Hatch, upon the condition or implied promise that they would provide for the mortgage.

Judgment for demandant.

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

FREDERICK W. DEARBOURN *vs.* UNION NATIONAL BANK.

Trover—bailee. Evidence of inconsistent propositions. Demand—conversion.

Trover cannot be maintained against a bank for United States bonds deposited therein, but which have been either lost or stolen therefrom.

When the evidence equally sustains each of the propositions, that bonds deposited in a bank were either lost, stolen, or misdelivered, neither of them can be regarded as established.

Demand and refusal will not be sufficient evidence of conversion, when it also appears that the property demanded was not at the time in the possession or control of the person on whom the demand was made, but that it had been previously lost, or stolen, or misdelivered.

ON REPORT.

H. Orr, for the plaintiff.

Davis & Drummond, for the defendants.

APPLETON, C. J. This is an action of trover against the defendants for the alleged conversion of certain bonds of the United States, together with the coupons attached. The bonds were left with the bank either as security for notes of the plaintiff discounted there, or on deposit. In either event, the bank would be liable in trover for a conversion to its own use of the plaintiff's bonds, but not for a loss through negligence or by larceny.

In trover, a demand and refusal make out a *prima facie* case. But this is rebutted by proof that the property demanded was not at the time of the demand in the defendants' possession, nor under his control. *Boobier* v. *Boobier*, 39 Maine, 407. Trover will not lie against a bailee when the goods have been lost or stolen. *Hawkins* v. *Hoffman*, 6 Hill, 586. There must be some wrongful act on the part of the defendant. A loss by mere nonfeasance will not sustain this form of action. *Bowlin* v. *Nye*, 10 Cush. 416. Trover cannot be maintained against a common carrier for not delivering goods intrusted to him for transportation, if the goods are not in his possession at the time of the demand, and have been either lost or stolen. *Packard* v. *Gilman*, 4 Wend. 613. Indeed there seems an entire concurrence of authorities that in case of a loss of goods by a bailee, or of a larceny from him, that he is not liable in trover.

The evidence fails to show how the loss of the bonds in question occurred. They may have been lost, stolen, or misdelivered. The evidence tends equally to sustain any one of these propositions. In such case no one of them can be regarded as established. Here, the action can only be maintained on proof of misdelivery, if at all, and that fact is not shown. *Smith* v. *First National Bank in Westfield*, 99 Mass. 605.

The demand for these bonds was made by the plaintiff in August, 1868, and by his attorney in the following October. The proof is satisfactory that before either of these dates the bonds in question had ceased to be in the custody or under the control of the defendants.

If they were stolen or lost through negligence, whatever remedy

the plaintiff has is in assumpsit, when a contract is proved to exist, or in case, for negligence. The writ contains only a count in trover, and the evidence fails to establish any conversion by the defendants. *Plaintiff nonsuit.*

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

SELDEN F. JENKINS *vs.* NATIONAL VILLAGE BANK OF BOWDOINHAM.

Pledgee's liability. Construction of receipt.

A bank is bound to take ordinary care only of United States bonds pledged to it as collateral security for the payment of a note discounted by the bank.

A writing, executed by the cashier, acknowledging the receipt by the bank of certain United States bonds from the maker of a note discounted by the bank, "to be returned to him on the payment of his note in four months, dated May 9, 1866," is not a contract which increases the common-law liability of the bank, even if the cashier had the authority to do so.

ON REPORT.

ASSUMPSIT on a receipt, a copy of which may be seen in the opinion.

The time of payment of the note was extended by the defendant to Jan. 12, 1867, upon payment of $11.16 interest for the extension; and on the latter day the note was paid, and a return of the bonds demanded and refused.

The remaining facts appear in the opinion.

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

On the point of the authority of the cashier to execute the receipt, contended that he had such authority, unless the by-laws of the bank restricted him, which was not pretended, and cited *Burnham* v. *Webster*, 19 Maine, 232; *Farrar* v. *Gilman*, 19 Maine, 440; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Warren* v. *Gilman*, 17 Maine, 360; *Badger* v. *Bank of Cumberland*, 26 Maine, 435.

2. That the discounting of the note upon the collaterals offered and the giving the receipt were one transaction; that it was advantageous to the bank,—a part of its legitimate business. Having received the benefits, the bank cannot repudiate the burdens, even if the cashier exceeded his authority. Counsel contended that *Medomak Bank* v. *Curtis*, *supra*, was conclusive that the bank ratified the giving of the receipt by extending time of payment of note.

When a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good against accidents, because he might have provided against it in his contract. 2 Saunders, 422, a, note 2; *Mill-dam Foundry* v. *Hovey*, 21 Pick. 441; *Hadley* v. *Clark*, 8 T. R. 267; *Atkinson* v. *Ritchie*, 10 East, 533.

A loss by robbery or larceny raises a presumption of negligence, and the exercise of due and ordinary care must be affirmatively shown to repel the presumption of negligence. *Brown* v. *Waterman*, 110 Cush. 17.

Bank has remedy on cashier's bond if he violated his official duties.

A. Libby, for the defendant.

KENT, J. This case is referred to the court, on report of the evidence, with jury powers. We find the material facts to be these: The bank discounted a note of the plaintiff for $588 on four months, on the 9th of May, 1866, and at the same time, and as part of the transaction, received from the plaintiff as a pledge or collateral security two United States 10-40 bonds, amounting to six hundred dollars on their face. This transaction was assented to by the directors. The cashier on the same day gave to the plaintiff a receipt, in his official capacity, of the following tenor:

"NATIONAL BANK OF BOWDOINHAM, May 9, 1866.

Received of Selden F. Jenkins, United States 10-40 bonds, one of $500, and one of $100, amounting to six hundred dollars, to be

returned to him on the payment of his note for $558 in four months, dated May 9, 1866."

(Signed) "R. BUTTERFIELD, *Cashier.*"

These bonds were kept by the bank, with the other bonds and papers and valuables of the bank and of depositors, in the safe, and with the same care as their own, and with reasonable care and oversight. The bank was entered by burglars on the night of the 21st of June, 1866, and the contents of the vault, including these bonds, removed and carried off. The bank used reasonable diligence in attempts to recover the property thus removed, but without success. The note has since been paid to the bank. This action is brought against the bank to recover the value of the bonds. The declaration does not allege any want of care on the part of the bank, but is based upon an alleged promise, in consideration of the delivery of the bonds, to return the bonds upon payment of the note. It does not set up a liability of a general nature, arising from the relation of bailor and bailee, but declares on a special promise to redeliver, at all events, upon payment of the note.

The counsel invokes the receipt of the cashier to sustain this action, and claims that it is a special contract, distinct and different from the one made by the directors, and shown by their signature on the book of the bank, wherein this note is entered in the list of "bills offered and discounted," and under the head of "first surety" is this entry, "10-40 bonds collateral." The receipt of the cashier, it is contended, is an absolute agreement to keep, at all events, and to return on payment of the note. In other words, that thereby the bank became insurers, and bound to keep and return the bonds, whatever might happen. The counsel also contends that the cashier had a right thus to bind the bank by virtue of the powers conferred upon him by his office.

The last question is immaterial if the first proposition is not maintained. And we think it is not. The receipt amounts to no more than would be implied by law, on the facts which appear on the discount book. It is the simple case of a pledge of collateral securities, to secure the payment of a particular note, and that is all that

the receipt imports. The collaterals are to be given back when the debt is paid. That is all.

The case of *Field* v. *Brackett*, 56 Maine, 121, is in point. In that case, the plaintiff alleged that the defendant received his (plaintiff's) wagon, the same to be kept and used by defendant for one month, and the defendant promised to return the wagon to him at the expiration of the month, in good order, but did not. The defendant admitted the truth of these allegations, but replied that the wagon, during the month, was stolen, without any fault or want of due care on his part. It was held by the court that there was nothing more intended by the promise than the law implies in such a case of bailment, viz., "to return at the time appointed in as good order as when received, ordinary wear and tear and casualties for which no blame could attach to the hirer excepted." In these and like contracts, by which property is delivered under a contract of bailment, without the legal title passing, the law fixes the liability to keep with proper care, but does not make the bailee an insurer against robbery or casualties, when no fault attaches to him. And it does not fix such liability of an insurer, if in the contract, written or verbal, there are no words assuming such undertaking.

The bank was held to the common-law liability by the action of the directors. The receipt of the cashier merely expresses in more words, what the discount book sets out in a condensed form.

If it had undertaken to do more, and to charge the bank as insurers, we are by no means ready to say that such a contract would have come within the powers of a cashier.

The liability of a pledgee is well settled. Mr. Justice Story (Bailments, 197) defines a pledge as "a bailment of personal property as security for some debt or engagement." Kent says, "In general, the law requires nothing extraordinary of the pawnee, but only that he shall take ordinary care of the goods; and if they should happen to be lost, he may, notwithstanding, resort to the pawnee for his debt." 2 Kent's Com. 579.

This has been the law ever since the celebrated case of *Coggs* v. *Bernard*, 2 Lord Raymond. Indeed, it is not denied by the learned

counsel for the plaintiff, who places his claim upon the receipt of the cashier, as a contract to deliver absolutely on payment. And as before stated, the declaration does the same, and is silent as to any want of care. If it had alleged, as the case is presented by the proof, we see but little difficulty in sustaining the proposition that all due and reasonable care was used by the bank under the circumstances.

According to the agreement of the parties, we must order

Judgment for the defendant.

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

WALTON, J., did not sit.

TIMOTHY MOOERS, in equity, *vs.* KENNEBEC & PORTLAND RAILROAD COMPANY & others.

The court of county commissioners is not a court of record within the meaning of R. S. of 1857, c. 81, § 92 (R. S., c. 81, § 79).

To a judgment of county commissioners, fixing the damages for real estate taken for the location of a railroad, the statute of limitations is a bar after six years.

To a bill in equity brought under R. S., c. 51, § 10, "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, the objection that the damages were fixed by the county commissioners, more than six years before the filing of the bill, may be taken as a defense by demurrer.

A bill "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, must allege a specific demand, on a day certain, more than thirty days before the filing of the bill, or it will be bad on demurrer.

BILL IN EQUITY, heard on demurrer.

The bill alleged, substantially, that the Kennebec & Portland Railroad Company was duly incorporated and authorized to construct a railroad from Augusta to Portland, in 1849; that they took a parcel of the complainant's real estate described; that for the land taken, the county commissioners, upon due proceedings, awarded

him his damages; that being dissatisfied with the award and determination of the county commissioners, a jury, upon proper proceedings, rendered a verdict, on Sept. 3, 1849, for him for $168 for said damages, which was duly returned, accepted, and recorded at the December term, 1852, and judgment was rendered thereon; that the said sum of $168, with interest from Sept. 3, 1852, amounting to $329.28, is actually due him for his said damages, with costs; that the Portland & Kennebec Railroad Company are in occupation of said railroad, claiming title thereto, and in receipt of the rent, income, and profits; that they took their title, with notice of the trusts and liabilities imposed upon the Kennebec & Portland Railroad Company, and subject to all their liabilities for damages for land taken and now used by the Portland & Kennebec Railroad Company, and with notice of the complainant's claim for damages; that they became liable to pay him the amount so found due, for his damages, with interest; "that though often requested, and demanded more than thirty days prior to the filing of this bill, the Kennebec & Portland, and Portland & Kennebec Railroad Companies have neglected and still neglect to pay;" and because the damages so found have not been paid or secured to him, as by law required, the complainant prayed for an injunction, etc., until such damages, interests, and costs shall be paid.

The bill was signed, sworn to, served, returned, and filed Sept. 21, 1868, and continued without prejudice till Sept. 21, 1869, when the respondents filed a demurrer, showing for cause that the complainant's claim, as set out in the bill, was barred by the statute of limitations; and the demurrer was joined.

A. G. Stinchfield, for the complainant, contended that nothing less than twenty years' adverse possession can give the right to use and occupation of the land taken, without paying the damages, the suit not being an action on a judgment, but a bill to enjoin.

The defense of statute of limitations cannot be taken by demurrer, without answer denying all the facts and circumstances which might avoid the statute. *Goodrich* v. *Pendleton*, 3 J. C. R. 384.

Bradbury & Bradbury, for the respondents.

KENT, J. The plaintiff, in his bill, prays for an injunction against the defendant corporation and its servants and agents, under and by virtue of the provisions in § 9 of c. 51, R. S. He states, in substance, that he obtained a judgment in the court of county commissioners, of this county, in December, 1852, for his damages for land taken by the railroad, and that it has never been paid. The defendants demur and for cause allege, that the claim, as it is set forth in the bill, is barred by the statute of limitations. This bill was filed in 1868.

By § 92, c. 81, R. S., "all actions upon judgments of any court, not a court of record, except municipal and police courts, and justices of the peace in this State, shall be commenced within six years after the cause of action accrues, and not afterwards."

The court of county commissioners is not a court of record, within this statute. *Woodman* v. *Inhabitants of Somerset*, 37 Maine, 29.

The claim, therefore, was not one that could be enforced by law, when this bill was filed. The 9th section on which the complaint is founded, provides that "when the damages remain unpaid for more than thirty days after they are due and demanded, a bill in equity may be filed, by the person entitled to them, praying for an injunction against the use or occupation of his land taken."

The first point to be established is, that damages are due and unpaid. There must be an existing right to demand payment, and, if not complied with, a right to enforce the claim. A claim, whether in judgment or otherwise, cannot be said to be existing, within the meaning of this statute, when it is barred by the statute of limitations. If the plaintiff could not recover, on a suit on his claim, he cannot have this summary remedy by injunction. His legal right to the payment of damages, and to enforce that right at law, must be shown before this extraordinary power will be interposed to prevent the railroad from passing over, on their track, the land that has been so used for more than twenty years.

When the bill states a case within the statute of limitations at law, the objection may be taken, as a defense, by demurrer. If

the plaintiff be within any exception of the statute, he should state it in his bill. Story Eq. Pl., §§ 484, 751.

There is another objection as the bill stands, as amended in the copy before us. The statute requires, § 9, that the damages must remain unpaid for more than thirty days after they are due and demanded. A regular and formal demand on the company must be shown. It is not enough to make the usual and general allegation, as in a writ, that, though often requested, etc. A specific demand, on a day certain, more than thirty days before filing the bill, must be stated, or the bill will be bad on demurrer.

Demurrer sustained.

Bill dismissed with costs.

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

NOAH WOODS, *scire-facias*, *vs.* LORENZO D. COOKE.

Scire-facias against trustee. Demand.

Where the respondent, as mortgagee, in possession of mortgaged chattels, at the March term, 1869, was charged as trustee "conditionally, namely, if the plaintiff pay him $2000 and interest from" a specified date, "within sixty days after the final judgment," an averment that the plaintiff tendered to the respondent "said $2000 and interest within said sixty days, to wit, on the seventeenth of May, 1869," is, on demurrer, a sufficient allegation of a compliance with the condition.

And it will be presumed that the court, in fixing the time within which the money should be paid, complied with R. S., c. 86, § 50; and an averment of tender within the time thus fixed, is equivalent to an averment of a tender "while the equity of redemption existed."

When a person is adjudged a trustee for "specific property in his hands, which he is bound to deliver at a future day," a demand need not be made upon him "within thirty days next after final judgment," to prevent a dissolution of the attachment.

But when the court, under R. S., c. 86, § 50, fixes a time, during the life of the equity of redemption of personal property, within which the plaintiff may tender the amount due on the mortgage, a demand, within thirty days next after the tender by the attaching creditor, is necessary, under § 73, to fix the liability of the trustee.

On exceptions.

Scire-facias, for that whereas Noah Woods, of Bangor, in the county of Penobscot, before our justice of our supreme judicial court, holden within and for our said county of Kennebec, at Augusta, on the first Tuesday of March, A. D. 1869, by the consideration of our said justice, recovered judgment against Barker A. Neal, of Gardiner, in our said county of Kennebec, and also against the goods, effects, and credits of said Barker A. Neal, in the hands and possession of Lorenzo D. Cooke, of said Gardiner, as his trustee, "charged conditionally, namely, if the plaintiff pay the trustee $2000 and interest from April 19, 1865, within sixty days after final judgment, then the trustee is to deliver to the officer one-half the cigars and the interest in the vessel;" and the said plaintiff, Woods, avers that he did offer and tender to said Cooke said $2000 and interest within said sixty days, to wit, on the 17th day of May, A. D. 1869, for the sum of nineteen hundred thirty-four dollars and ninety-four cents, debt or damage, and also twenty-five dollars and seventy-two cents for costs and charges by him about his suit in that behalf expended, as to us appears of record.

And whereas, on the twenty-seventh day of March, 1869, an execution was issued on said judgment in due form of law by said court; and put into the hands of George Wheeler, a deputy-sheriff fully authorized to serve the same; and on the twenty-ninth day of May, 1869, said officer demanded of said Lorenzo D. Cooke, the goods, effects, and credits in his hands and possession, belonging to said Neal, and he refused to deliver the same; and said officer thereupon returned said execution in no part satisfied. Yet, though judgment be rendered as aforesaid, the execution of the same remains to be made, and the said Woods hath made application to us to provide remedy for him in that behalf.

The defendant demurred at the first term, and the plaintiff joined the demurrer.

The presiding judge overruled the demurrer and adjudged the declaration good, whereupon the defendant alleged exceptions.

A. Libby, in support of the exceptions.

1. There was no demand on the trustee within thirty days from rendition of judgment. R. S., c. 86, § 73.

The only date of judgment averred in the writ is first Tuesday of March, 1869. The execution was issued March 27, 1869. The demand on trustee is averred on the 29th of May, 1869, sixty-three days after execution was issued.

2. The two sections, 50 and 73, should be construed together. It is not competent for the court to extend the duration of the attachment after judgment, at discretion. The statute limits the duration of the attachment. By § 50 the property is to be delivered to the officer and held and disposed of by him, as if it had been attached on *mesne process*. He could not take and hold it as if attached on *mesne process*, after the expiration of thirty days from rendition of judgment.

3. It does not appear, by any averment in the writ, that the tender was made and the property demanded while the right of redemption existed.

4. It does not appear, by comparison of dates, that a tender was made within sixty days from rendition of judgment.

The demurrer was filed the first term, and if the declaration should be held good, the case should stand for leave to plead over.

J. Baker & W. Benjamin, for the plaintiff.

BARROWS, J. The writ sets forth a recovery of a judgment by the plaintiff, at the March term, 1869, against one Neal, as principal, and against Neal's goods, effects, and credits in the hands and possession of this respondent, as Neal's trustee, "charged conditionally, namely, if the plaintiff pay the trustee $2000, and interest from April 19, 1865, within sixty days after the final judgment, then the trustee is to deliver to the officer one-half of the cigars and the interest in the vessel."

Then follow averments of a tender by the plaintiff of "said $2000, and interest within said sixty days, to wit, on the 17th day of May, A. D. 1869;" that execution issued on this judgment, in due

form of law, March 27, 1869, and was placed in the hands of an officer duly authorized to serve it; and that on the 29th day of May, 1869, the officer demanded of the respondent the goods, effects, and credits of said Neal, in his hands and possession, and he refused to deliver them; and thereupon the officer returned the execution in no part satisfied, and that execution upon that judgment still remains to be done. The respondent demurred generally at the first term, and excepts to the overruling of his demurrer, which was duly joined.

He presents, as the grounds of his demurrer, the want of any averment of a demand by an officer on the trustee within thirty days from the rendition of judgment, the want of any averment that the tender was made or the property demanded while the right of redemption existed, and the failure to make it appear, upon a comparison of dates, that the tender was made within sixty days after the rendition of judgment.

Reversing the order in which they have just been stated, we remark,

1. The averment is distinct, that the tender was made "within said sixty days," and there is nothing, in the dates given, absolutely inconsistent with this averment. Though the judgment was rendered at the term begun and holden on the first Tuesday of March, 1869, it does not follow nor seem probable that it was rendered on that day, and the date of the execution, March 27, 1869, is within sixty days next preceding the 17th of May, when it is alleged the tender was made. Inasmuch as the dates given do not contradict the express averment admitted by the demurrer, that the tender was made within said sixty days, we deem this ground untenable.

2. There is no direct averment that the tender was made while the right of redemption of the mortgaged chattels existed, but the writ sets forth *in totidem verbis* the order of the court, charging the trustee, upon condition that plaintiff paid the requisite sum within sixty days after final judgment, and avers a tender within said sixty days. To sustain this cause of demurrer it would be necessary to presume that the judge made an order in direct con-

travention of the statute which provides (c. 86, § 50) that, upon a certain state of facts being disclosed by the trustee, "the court . . . shall order that on payment or tender of such money by the plaintiff to said trustee, within such time as the court orders, and while the right of redemption exists, he shall deliver over the property," etc.

We are not to presume, upon a demurrer, that the court made the order in this case, in disregard of the requirements of the statute. An averment of a tender, within the time limited by the court in the order, is equivalent to an averment of a tender while the equity of redemption existed.

If the fact was otherwise, the defendant should have excepted to the ruling by which he was charged, and must now plead and establish the existence of the error in the order. But he might as well object to the writ for want of an averment that the trustee disclosed property, not exempt by law from attachment, mortgaged to him and in his possession, upon which the principal defendant had an existing right of redemption, for this, under the same § 50, is all prerequisite to the passage of the conditional order for delivery. The passage of the order necessarily implies it all.

3. If a demand for the property to be made upon the respondent, by an officer, within thirty days after final judgment, is essential, it is fatal to the plaintiff's case, for no such demand is averred. The respondent relies upon § 73, c. 86, and the first clause of that section supports his position strongly.

But the provision which dissolves the attachment by the original process, if the goods, effects, or credits are not duly demanded of the trustee, within thirty days next after final judgment, is qualified by the final clause as follows: "but when the debt due from the trustee to the principal defendant is payable at a future day, or specific property is in his hands which he is bound to deliver at a future day, the attachment shall continue until thirty days next after such debt is payable in money, or the property aforesaid is demanded of the trustee."

Applying this now to cases arising under § 50, and construing the

whole together so as to give due effect, if possible, to all the provisions, it is plain that the mortgagee, or pledgee, is not bound to deliver the property until the amount of his debt is tendered to him; that the judge may fix such reasonable time, during the life of the equity of redemption, as he thinks proper, within which the plaintiff may tender, and the attachment will hold good for thirty days after the tender is made, and the trustee becomes bound to deliver. When the process of foreign attachment is served, the law lays its hand upon the principal debtor's interest and he is thereby precluded from making an effectual tender, and his right to redeem is in the hands of the court, to be made available to his creditor under the provisions of § 50. It will always be in the power of the mortgagee to save all his own rights, by seasonably taking the proper steps to foreclose his mortgage. We think a demand by the officer having the execution, within the thirty days next after the tender by the attaching creditor, is necessary to fix the liability of the trustee, who might otherwise well suppose that the debt had been discharged by the principal defendant, and that without such demand *scire-facias* could not be maintained.

Such a demand is averred here, and a refusal by the respondent to deliver thereupon. *Exceptions overruled.*

Repleader awarded upon payment of costs.

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

True W. Townsend *vs.* Henry Meader.

Equity of redemption—return of sale of. Judgment—entering up.

It is not necessary that an officer's return of a sale of an equity of redeeming land from a mortgage should specify the day or hour or particular place of the sale.

It is sufficient in this respect if it appear by the return that the time required by the statute intervened between the time of giving the notice and that of making the sale.

Thus, a return of a sale of an equity of redeeming land situated in Gardiner, is sufficient as to notice which recites that "on the first day of September, 1858, I gave notice in writing of the time and place of sale to the within named" debtor, "in person, and I gave public notice of the time and place by posting up notifications thereof in two public places in ... two adjoining towns, and also in a public place in" Gardiner, "thirty days before the time of sale; and I also caused an advertisement of the time and place of sale to be published three weeks successively before the day of sale in the *Northern Home Journal*, a public newspaper printed in" Gardiner, "in said county; and afterwards, on the sixth day of October, at a public auction held at the Gardiner hotel, in the city of Gardiner, I sold," etc.

By virtue of the 35th Rule of Court, unless the prevailing party, within three months after judgment is ordered, files all papers and documents necessary to enable the clerk to make and enter the judgment and complete the record, judgment cannot be afterwards recorded unless, upon petition and notice to the adverse party, the court, at a subsequent term, order it.

Hence, if the defendant be defaulted in an action upon a mortgage, and the plaintiff refuse to file the papers necessary to enable the judgment to be made up, an entry upon the docket of "judgment as on a mortgage," made at the instigation of the defendant, after default and adjournment of the court, is not binding upon the plaintiff.

On report.

Writ of entry, whereby the plaintiff claims to recover possession of premises described in the writ by virtue of a sale of the defendant's right in equity to redeem them from a mortgage held by the plaintiff as assignee.

W. M. Stratton, clerk of the courts for this county, called by the plaintiff, testifies that he made up the judgment, in *Townsend* v. *Meader*, by assessing the amount due on the mortgage, at the request of Mr. Clay, the defendant's counsel in that case, after the court adjourned, and after giving plaintiff's counsel notice; that

witness understood plaintiff's counsel declined to furnish vouchers and have the amount assessed. No notes or mortgage were produced or filed.

On cross-examination he further testified, that the judgment on the mortgage was made at the time fixed in the notice to plaintiff's counsel; that some papers were furnished by the defendant's counsel, among which was Mr. Thompson's statement of the amount due; and that neither the plaintiff nor his counsel was present.

L. Clay, called by the defendant, testified that he made a tender to plaintiff's counsel, on May 16, 1868, of $109, being the amount due and assessed on the mortgage now in suit; that he declined to accept it; that witness understood the plaintiff declined to file the note and mortgage, and to have the amount assessed.

The remaining facts are stated in the opinion.

N. M. Whitmore, 2d, for the plaintiff.

A. Libby, for the defendant.

Tapley, J. This is a real action. The premises in question were formerly owned by the tenant. On the 17th day of January, 1848, he mortgaged the same to one John Plaisted, and on the 22d day July, 1851, he again mortgaged them to one Robert Thompson, subject to the Plaisted mortgage. On the 12th day of March, 1855, Plaisted assigned his mortgage to said Thompson. On the first day of September, 1858, both mortgages apparently outstanding, the plaintiff duly seized the right in equity which the defendant had of redeeming the premises from the existing mortgages, and subsequently sold the same at public auction to the plaintiff. On the eighth day of March, 1864, Thompson duly assigned to this plaintiff the mortgage given him by defendant, and on the 22d day of November, 1864, in consideration of the payment of the mortgage originally given to Plaisted, Thompson, the assignee, discharged it. By whom this latter mortgage was paid does not appear. This being discharged left the legal estate in the premises in the present plaintiff, and entitles him to recover.

By the terms of the report "the court is to enter such judgment as the law requires."

It is suggested that the officer's return upon the execution does not show a compliance with the requirement of the statute in making sale of the equity, in that it does not state the time and place of sale.

The officer in his return states that he gave the defendant, Meader, notice of the time and place of sale, and the manner of giving the notice. It is not necessary that the return should show the day or hour or particular place which was mentioned in the notice, if it appear that the time required by law to intervene between the notice and sale did intervene. This sufficiently appears in the return,—that the notice was posted thirty days before the time of sale. It appears that afterwards, and on the sixth of October, he did make a sale at the Gardiner hotel, in the city of Gardiner. The time of day when sold does not appear, but whatever that time of day was, it appears in a former part of the return the defendant, Meader, had been notified of. It was the time and the place of sale he was notified of. The officer does not say in his return that the notification was of a time and place of a proposed sale, but that he did in fact notify him of the time and the place of sale, that is, he notified him of the time and the place when and where the sale actually was made. It was not a time and place when and where the sale did not take place, but it was the time and place of sale. The return in this particular states a fact; it does not undertake to recite the notice or attempt to give its contents. It states as matter of fact that he gave notice of the time and place of the sale. If he had recited the notice, and then concluded the return as it now appears, it might have been suggested as now, that it does not necessarily appear that the sale took place at the time named in the notice. That objection does not now appear, for all we know of the time and place actually fixed in the notice is the time and place when and where the sale was made, and these being necessarily identical, the objection is without foundation in fact, whatever might have been its legal force if well taken.

By a copy of a docket entry furnished us, it appears that at the March term, 1868, an action was entered in the name of *True W. Townsend* v. *Henry Meader*, which was defaulted, and that at the instance of the debtor, the clerk entered up judgment as on mortgage, the plaintiff having declined and refused to furnish vouchers. What this action was founded upon, does not appear except as gleaned from the arguments of counsel. It, however, appears that whatever it was, the proceedings after default were had at the instance of the defendant and after court adjourned.

By the 35th rule of court, it is "the duty of the prevailing party in every suit forthwith to file with the clerk all papers and documents necessary to enable him to make and enter judgment and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term, and after notice to the adverse party, the court shall order it to be recorded, . . . and the judgment when so recorded shall be, and be considered in all respects, as a judgment of the term in which it was originally awarded."

It appears by the report in this case, that no papers were filed in this case by the plaintiff, and that instead of following the rule provided for such cases, after the adjournment of the court such judgment was entered up as appeared to be proper upon the evidence adduced by the defendant after he had been defaulted. That such proceedings were unauthorized is quite clear. The course pointed out by the rule should have been pursued. No such *ex parte* proceedings can bind the plaintiff. If the action was upon a mortgage, and the plaintiff refused to file the necessary papers to complete and make up the record, no record would be made up, and the mortgager could at any time, if the right of redemption existed, tender the amount due and save his rights. It is rather a novel proceeding for a defendant after default to fix the kind and amount of judgment which is to be rendered against him, and that, too, upon other matters than the legitimate evidences of the plaintiff's claim.

The deed of mortgage, if introduced alone, would entitle the defendant upon motion to have judgment entered as on mortgage. If with the mortgage, the sheriff's deed, and his proceedings upon the execution had been introduced, the defendant would not have been entitled to such judgment. All these matters were within his own knowledge, and matters of record. In undertaking to represent the plaintiff's title, he did not do it truly, but untruly, and knowingly did so, to obtain a judgment he was not by law entitled to. Not only was the proceeding irregular, but a fraud upon the plaintiff and upon the court so far as it could be affected by it. The haste made to make a tender of the amount the defendant furnished the clerk is only another evidence of a design to accomplish an end which could not have been attained in open court.

The defendant has had no legal or equitable title in the premises since Oct. 6, 1859, one year after the purchase by the plaintiff of the equity. This was four years and a half before the proceedings referred to. We are not prepared to hold that these proceedings revested the mortgager with an estate he had been so long devested of.

No controversy is made as to the *mesne profits*, the only testimony being that of the deputy-sheriff Berry. The annual value, after deducting all lawful taxes and necessary and ordinary repairs, he testifies was about $80 per year from Oct. 6, 1862, to Oct. 6, 1868, the date of plaintiff's writ. There must be

Judgment for the plaintiff for possession, and for the sum of $480 for mesne profits, with interest upon that sum from the date of plaintiff's writ.

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

ROBERT GORDON *vs.* INHABITANTS OF READFIELD.

Soldier's bounty—recovery of.

Where, under an article in the warrant for a town-meeting held in May, 1861, "to see what action the town will take relative to aiding the State in complying with the late requisition of the president of the United States, on the State of Maine, for men and means to suppress the rebellion," the town "voted that the soldiers from this town have five dollars per month added to the government pay,"—proof that the plaintiff entered the army Dec. 21, 1861, without evidence that he entered under the first call, will not entitle him to recover.

REPORT.

ASSUMPSIT on account annexed, and special counts for forty-four months' service in United States army, at $5 per month, from Dec. 21, 1861, to June 17, 1865, $220; and interest 2 years and 6 months, $33; and balance of $300 bounty, $100 = $353.

The remaining facts appear in the opinion.

E. Kempton, for the plaintiff.

A. Libby, for the defendants.

KENT, J. This is an action to recover five dollars a month for forty-four months' service as a soldier in the army. There is also on the account annexed a claim for "$200 balance of $300 bounty." There is no count in the declaration, except the one on account annexed, for the last item.

To sustain his action, the plaintiff must prove a contract or promise on the part of defendants. He relies upon a vote of the town on the 11th of May, 1861, under an article in the warrant, "to see what action the town would take relative to aiding the State in complying with the late requisition of the president of the United States on the State of Maine for men and means to suppress the rebellion."

The vote relied upon and recited in the declaration was in these

words: "Voted, that the soldiers from this town have five dollars per month added to the government pay."

We think it perfectly clear that the article in the warrant and the vote under it, had sole reference to the men who had or should enlist under the then late call of the president, which was for 75,000 men. The plaintiff did not, on his own showing, enter the army until the 21st of December, 1861. The burden of proof is on him to show that he did enter under the first call. It is not enough to show that he was a soldier at some time during the war. The town did not pass a vote to cover all future time, and if they had passed such a vote, it would have exceeded its power, under the limited and restricted article in the warrant.

It is a part of public history, and well known to all, that a second call by the president of the United States for 400,000 men was made in July, 1861, before the enlistment of plaintiff.

But we place our decision of the case on the ground that the plaintiff has failed to show, as he was bound to do, that he entered the army under the first call, to which alone the action of the town could be applied. *Plaintiff nonsuit.*

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

SAMUEL SWANTON, 2d, *vs.* JOHN LYNCH.

Pleading. Variance.

A declaration setting out an unconditional promise to pay a specified sum in money, is not supported by proof of a promise to pay partly in certain notes of a third person at fifty cents on the dollar, and the balance in money.

ON REPORT.

ASSUMPSIT, for that the said defendant, at said Portland, to wit, at said Augusta, on the twenty-eighth day of October, A. D. 1857, by a certain instrument in writing by him signed, in consideration

that the plaintiff and one Wm. D. Crooker, had formerly assigned to him, the said Lynch, by deed of warrantee, township number five, in the fourth range of townships in the county of Oxford, on his part agreed and promised the said Swanton and Crooker to pay them therefor the sum of twenty thousand dollars, as follows, viz., to assume the payments of all outstanding notes which had previously been given by them for said township, and secured by mortgage thereof, not exceeding the said sum of twenty thousand dollars.

And the said defendant further agreed and promised the said Swanton and Crooker, that for any amount the said outstanding mortgage notes should fall short of said sum of twenty thousand dollars as aforesaid, that he, the said defendant, would make up and pay to the said Swanton and Crooker, by giving them therefor his promissory notes, payable, one-half in two years, and one-half in three years, with interest; said notes last named to be given when the parties holding said first-named notes should renew and extend the same, one-half two years, and one-half three years, and when said township was free of all incumbrances, except said mortgage.

And the plaintiff avers, that said mortgage notes, given by said Swanton and Crooker for said township, and which the said defendant agreed and promised to pay, and has paid, amounted to the sum of fourteen thousand dollars and no more; and that the said notes fell short of the said sum of twenty thousand dollars, in the sum of six thousand dollars, and that said township has long since been cleared of all incumbrances.

The plaintiff further avers, that afterwards, on the twenty-first day of January, A. D. 1858, the said Wm. D. Crooker consenting thereto, the said defendant, by his writing on the back of said instrument, for a valuable consideration, agreed and promised the plaintiff to pay him the amount due by virtue of said instrument, which the plaintiff avers to be the said sum of six thousand dollars, with interest from the said twenty-eighth day of October, A. D. 1857. Yet though requested, the said defendant did not give to the said

Swanton and Crooker his said promissory notes as aforesaid, but wholly refused so to do.

There was also a second count for money had and received.

To support his case, the plaintiff introduced a contract in writing of the following tenor:

"I have this day received of Samuel Swanton, 2d, and W. D. Crooker a warrantee deed of township number five, in the fourth range of townships in Oxford county, dated Oct. 23d, 1857. And as a consideration for the same, I agree to pay them the sum of twenty thousand dollars, as follows, viz., to assume the payment of all the notes given by said Swanton and Crooker in payment for said township now outstanding, and secured by mortgage on the same, not exceeding twenty thousand dollars. For any amount said outstanding notes may fall short of twenty thousand dollars, I agree to make up to said Swanton and Crooker in my promissory notes, one-half in two years, and one-half in three years, with interest. It is understood and agreed that the above conditions shall be fulfilled when the parties holding said notes against Swanton and Crooker shall renew and extend the same, one-half two years, and one-half three years, and the township cleared by said Swanton and Crooker of all incumbrances, except the above-mentioned mortgages. JOHN LYNCH.

PORTLAND, Oct. 28, 1857."

And the memorandum on the back of the written contract of the following tenor:

"I hereby agree to pay the amount due on the within to Samuel Swanton, 2d, said Swanton to allow as a part-payment the notes held by me against A. Jackson, and indorsed by W. D. Crooker, discounting fifty per cent from said notes. JOHN LYNCH.

PORTLAND, Jan. 21, 1858."

The plaintiff testified, that he called on the defendant for performance, when the agreement was indorsed on the written contract; that the defendant rendered to the plaintiff an account of

what the defendant had paid under the contract, and what was then due from him, making the balance of about four thousand dollars.

Here the plaintiff stopped.

The defendant moved for a nonsuit, but the presiding judge overruled the motion. The defendant offered two notes signed by A. Jackson & Co., one dated May 23, 1857, for $450, payable in four months, at bank in Portland, indorsed by Wm. D. Crooker; the other dated March 27, 1857, signed by A. Jackson & Co., for $226.81, on four months, payable at Casco bank, Portland, indorsed by said Crooker. The plaintiff objected to them on the ground that it did not appear that they were the notes referred to in defendant's agreement with plaintiff, and they were excluded.

The defendant then called plaintiff and showed him the notes, and he testified as follows:

These notes were not present when the agreement was made; no notes were (when) then exhibited. I can't say whether these notes are the ones referred to in the agreement; my impression is, that the amount of the notes was not stated definitely at the time, but think some $400 or $500. Don't know of any other notes signed by A. Jackson & Co. and indorsed by Crooker. The defendant again offered the notes, but they were excluded on the ground that they were not sufficiently identified.

The defendant then submitted to a default, with the agreement that the case should be reported, the default to be taken off, and the action to stand for trial, if in the opinion of the full court the plaintiff had not made out his case, or said notes should have been admitted.

No paper in the case indicates the name of the plaintiff's attorney.

A. Libby, for the defendant.

WALTON, J. At the trial of this action the plaintiff introduced such evidence as he thought proper, and then stopped. Thereupon the defendant moved for a nonsuit upon the ground that the evidence did not support the declaration. The motion was overruled.

The defendant then consented to be defaulted upon this condition, that the case should be reported to the full court, and the default be taken off, and the action stand for trial, if in the opinion of the full court the plaintiff had not made out his case. The question, therefore, is whether the plaintiff's evidence corresponds with and supports his declaration.

We think it does not. On reading the plaintiff's declaration, it will be observed that he sets out an unconditional promise on the part of the defendant to pay him the sum of six thousand dollars, with interest, while the written agreement of the defendant, read in evidence in support of this alleged promise, is not unconditional, but contains this important qualification, namely, that the plaintiff should allow as part-payment the notes held by the defendant against A. Jackson, and indorsed by W. D. Crooker, discounting fifty per cent from said notes. In other words, the plaintiff was to accept in part-payment of the sum named the Jackson notes at fifty cents on a dollar.

We thus see that there was an important and fatal variance between the averments and the proof. The plaintiff avers an unconditional promise to pay six thousand dollars in money; the proof is a promise to pay partly in money and partly in notes, the notes to be accepted at fifty cents on a dollar.

It is clear, therefore, that the plaintiff's evidence did not correspond with nor support his declaration; and, as agreed by the parties, the default must be taken off, and the action stand for trial.

Default taken off,

Action to stand for trial.

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

MARCELLUS STEWARD *vs.* JOSEPH W. WALKER & trustee.

Motion in abatement—when to be filed.

R. S., c. 86, § 16, providing that the principal defendant in a trustee process, on whom no personal service of the writ has been made, "may assume the defense of the suit," does not permit him, after the time allowed therefor by the rule of court, to file a motion in abatement for the want of service upon him.

Thus, a resident of the county summoned as trustee disclosed at the March term, 1867, that he was executor of a certain will, and that it was then uncertain whether anything, or if anything, how much would ever be due to the principal defendant. There having been no service upon the principal defendant, except a nominal attachment, notice to him by publication in a newspaper was ordered, but never given, and the action stood continued for the further disclosure of the trustee until September term, 1869, when, on the second day of that term, the principal defendant volunteered a special appearance by attorney, and filed a motion in abatement on the ground that the supposed trustee was never trustee of the principal defendant; that none of his property had been attached, nor any personal service made on him. The next day the trustee was discharged. *Held*, That the principal defendant cannot voluntarily assume the defense by pleading in abatement after the time fixed by the rule; and that the action be dismissed without costs.

ON EXCEPTIONS.

DEBT on a judgment commenced by trustee process.

The facts all appear in the opinion.

D. D. Stewart, for the plaintiff.

A. H. Ware, for the principal defendant.

The motion was seasonably filed. It would not be in accordance with a fair construction of the rule of court to require a person, against whom an action is pending, to file a plea or motion in abatement prior to the term at which he is obliged to appear. *Rathbone* v. *Rathbone*, 4 Pick. 89; *Cooley* v. *Patterson*, 49 Maine, 570; *Smith* v. *Davis*, 38 Maine, 459; *Robbins* v. *Hill*, 12 Pick. 568.

A party may voluntarily appear and defend. And he may file his motion in abatement within the first two days of his appearance. *Maine Bank* v. *Hervey*, 21 Maine, 38; *Blake* v. *Jones*, 7 Mass. 28.

The record discloses such a want of service as will abate the writ on plea or motion. *Chamberlain* v. *Lake*, 36 Maine, 388; *Gardner* v. *Barker*, 12 Mass. 36; *Jacobs* v. *Mellen*, 14 Mass. 132; *Nye* v. *Liscomb*, 21 Pick. 263; *Morrill* v. *Rogers*, 1 Greenl. 328; *Guild* v. *Richardson*, 6 Pick. 364.

The action should be dismissed. R. S., c. 86, § 16; *Mace* v. *Woodward*, 38 Maine, 426; *Lawrence* v. *Smith*, 5 Mass. 362; *Cassity* v. *Cota*, 54 Maine, 380.

The prevailing party is entitled to costs. R. S., c. 82, § 94; c. 86, § 21; *Thomas* v. *White*, 12 Mass. 367; *Guild* v. *Richardson*, 6 Pick. 371; *Reynolds* v. *Plummer*, 19 Maine, 22; *Hurd* v. *Hanover*, 8 Met. 347; *Call* v. *Mitchell*, 39 Maine, 467.

BARROWS, J. At the March term, 1867, the plaintiff entered an action of debt on a judgment, in which a resident of Somerset county was duly summoned as trustee of the principal defendant, who is described in the writ as of Embden, in the same county. No service, except a nominal attachment, was made upon the principal defendant, the officer making return that he was not within the precinct. The alleged trustee appeared at the return term and filed a disclosure, by which it appeared that he was the executor of Sophia Walker's will; that the estate was in process of settlement, and that it was uncertain whether anything, or if anything how much would ever be due to the principal defendant under the provisions of the will. Notice to the principal defendant, by publication in a newspaper, was ordered, but never given, and the case stood continued, apparently to await the settlement of the estate and the further disclosure of the trustee until the September term, 1869, when, on the 2d day of the term, the principal defendant volunteered a special appearance by attorney, and filed a motion to quash on the ground that the supposed trustee is not, and never was, the trustee of the principal defendant, and that no goods or estate of the principal defendant had been attached, nor any service made upon him in any way. The next day the trustee was discharged, and had execution for his costs, and the case stood contin-

ued until the March term, 1870, when the presiding judge sustained the motion of the principal defendant, and abated the writ allowing costs to the principal defendant, to all which the plaintiff excepts.

The right of the defendant thus to intervene, and the effect of such intervention at that (or any) stage of the proceedings before he has been summoned or notified to appear and answer, must depend upon a reasonable construction of the various statutes and rules of court, which are found applicable to the case, and these statutes and rules are to be construed together to promote justice and preserve the rights of all parties.

R. S., c. 86, § 16, provides that if all the persons summoned as trustees are discharged, or the suit against them is discontinued, the plaintiff shall not proceed against the principal defendant, unless there was sufficient personal service of the writ on him; but he may assume the defense of the suit.

R. S., c. 81, § 18, provides that when goods or estate of a person, not an inhabitant of the State, and having no tenant, agent, or attorney therein are attached, notice to the defendant may be ordered by a judge in vacation, "or the court after entry may order such notice to the defendant as justice requires; and if such order is complied with and proved to the satisfaction of the court, the defendant shall be held to answer to the suit as in other cases."

Section 25 of the same chapter provides that when the service of a writ is defective or insufficient by reason of some mistake of the officer or of the plaintiff as to the place where, the time when, or the person with whom the summons or copy should have been left, the court may order a new summons to be issued and served in such manner as they may direct, and such service shall be as effectual as if made and returned on the original writ.

Section 5 of the same chapter provides that in all actions commenced in any court proper to try the same, jurisdiction shall be sustained if goods, estate, effects, or credits of any defendant are found within this State, and attached on the original writ; and service shall be made as provided in the 18th section before referred to.

"Pleas or motions in abatement, or to the jurisdiction, . . . must be filed within two days after the entry of the action, the day of the entry to be reckoned as one. . . ." Rule 6, *Regulæ Generales.*

This rule has received a liberal construction in furtherance of justice, and for the preservation of all the substantial rights of defendants. Thus, where no judge was in attendance on the first day of the term, such a motion was held to be seasonably filed on the third day. *First Nat. Bank of Brunswick* v. *Lime Rock F. & M. Ins. Co.*, 56 Maine, 424.

And it has repeatedly been held, that where a case has been continued in order to give notice to the defendant, a plea in abatement was seasonably filed, if filed within the specified number of days at the first term at which the defendant was required by law to appear, *i. e.* at the first term at which his notice calls upon him to appear. *Rathbone* v. *Rathbone*, 4 Pick. 89; *Robbins* v. *Hill*, 12 Pick. 569; *Smith* v. *Davis*, 38 Maine, 460.

But it by no means follows that a party, who volunteers an appearance, not having been called into court by any form of service, defective or otherwise, is entitled to like indulgence, or that he can, by presenting himself at any stage of the proceedings, recover against the other party a bill of costs, which, so far as he himself is concerned, is entirely of his own making. What is it competent for the defendant to do in the way of pleading, when he "assumes the defense of the suit," as he has an undoubted right to do? Can he come in, not being called, merely for the purpose of turning the plaintiff out of court, by showing that he himself is not obliged to answer because there has been no service upon him, when the statutes authorize the court to supply the defect in a manner which will preserve the rights of all parties? How shall these provisions of the statutes, to which we have referred, be construed so that they will not prove a delusion and a snare? Manifestly, the legislature designed to provide in them for the entry in court of actions in which, at the time of entry, there had been no service upon all the parties upon whom the process must be legally served before judgment could be finally entered up. It is not to be supposed that

they designed to authorize such an entry, and at the same time to give a right to the defendant to defeat it totally, and procure the dismissal of the action, with costs, by volunteering an appearance before he has received any notice to appear. If the construction contended for by the defendant could be admitted, the maintenance of the suit might always be defeated by a seasonable intervention in every case where the defendant did not see fit, *ex gratia*, to waive the objection to the service and plead to the merits. It cannot be, that while this course of proceeding on the part of the plaintiff is authorized by the statute, the defendant shall have his option to intervene, before notice to him is given or attempted, to take advantage of the defect in the service. That is not a coming in to assume the defense. It was expressly held not to be a taking upon himself the defense of the action in *Gardner* v. *Barker*, 12 Mass. 36, where the principal defendant, not being an inhabitant of the State, service was made on his agent, and he seasonably pleaded in abatement the want of any goods, effects, or credits in the hands of the supposed trustee, and of any attachment of his own goods or estate upon the writ. The court say that "his appearing to take this exception is not a taking upon him the defense of the suit within the proviso of the statute; it is to show cause why he should not take upon him the defense." In that case the defendant, having been called into court by the service upon his agent, and having filed this plea seasonably, it was rightly sustained, and the writ abated; but the case is not an authority which can sustain the position of this defendant whose special appearance was entirely voluntary, and his motion filed long after the expiration of the time allowed by the rules.

We hold that if the defendant designs to come in and assume the defense under the statute, or upon any previously existing common-law right so to do, he must necessarily be held to waive objections arising out of the want or insufficiency of notice, and to plead to the merits of the case.

The rule that a party, not summoned to answer to a suit, cannot sustain a claim for cost, even upon an entire surceasing of the suit

after partial service was recognized by our court in *Hodge* v. *Swazey*, 30 Maine, 162, where the complainant's property was attached and taken from him upon a writ on which no further service was made, and the action was not entered. Complainant procured from the officer a copy of the writ, and entered a complaint for costs. The court say: "The officer was bound to give the copy which the petitioner procured. It was no act of the respondents. There was no service nor any attempt to make one. The question, then, is, whether, where there has been no service, a defendant's complaint for costs can be sustained." This question the court answered in the negative, and awarded costs to the respondents.

Undoubtedly, if the defendant had any defense that would be good in bar of the claim asserted against him, he might, finding an action pending against him in court, come in and waive any objection for the want of notice, and assume the defense of the suit, and this, if his defense was maintained, would entitle him to judgment for his costs.

If called in by a defective notice, he might maintain such dilatory plea as the facts would authorize; but if he intervenes upon his own motion, it must be by a plea to the merits. This alone would be assuming the defense of the action. The aim and tendency of our legislation has long been to facilitate the decision of causes between party and party upon their intrinsic merits, avoiding mere quibbles and cavils, and the unexpected and unjust results that arise from too rigid an adherence to mere technicalities (which are rapidly becoming obsolete), and looking more to substance than form in the administration of justice. From this disposition, wisely or unwisely, came the abolition of special pleading and the liberal provisions respecting amendments, which are fast consigning all merely dilatory pleas to oblivion, except in those cases where the court can see that there is good cause for interposing them. The firm of Quirk, Gammon & Snap, if they thrive at all now-a-days, must do so by the skill of Gammon. Quirk has been pretty much silenced by the statutes of *jeo fails* and amendments, and Snap by those granting reviews. If this defendant had a substantial defense

to this action of debt on a judgment, he has had an opportunity to present it. But he declines to do this, and takes care to make his appearance a special one only. He is not here by any call of the plaintiff or of the court to answer; he does not assume the defense.

It remains for us to determine what must be the disposition of this action upon the facts disclosed by the record. The trustee being discharged, and no attachment having been made upon the writ, the case is not one where notice to the defendant can be legally ordered, nor can any legal judgment be rendered without one. The defendant's appearance is only *sub modo*, and cannot enable the action to proceed. It must be dismissed without costs, which is, we presume, the disposition which the plaintiff would have been ready to make of it when the trustee was discharged, but for the interposition of a claim of costs for the principal defendant, which neither law nor justice can sustain.

Exceptions sustained.

Action dismissed without costs.

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

IRA S. ROGERS *vs.* JAMES HOGAN & trustees.

Contract—construction of. Assignment—effect of.

A railroad sub-contractor, by his written agreement with the contractor, agreed "to construct and complete all the grading, earth, rock, and masonry for the road-bed of the Somerset railroad, from the third station north of Otis Hill road-crossing, to the Kennebec river;" "that if any work shall be done by said sub-contractor which is not included in this contract, the price and value of said work shall be determined by the chief engineer;" "that the said work, during its progress, shall be subject to the supervision and inspection of said engineer, and shall be made to conform, in every respect, to his satisfaction;" "that with a view of preventing all disputes and misunderstandings, and for the speedy adjustment of such as may occur, the chief engineer shall determine the amount or quantity of the several kinds of work herein contracted

to be done, and shall decide every question which can or may arise relating to the execution of work under this contract, on the part of the sub-contractor, and his decision shall be final." The sub-contractor did work on the foundation of the bridge across the Kennebec river, which was accepted and its value estimated by the chief engineer. *Held*, that the work on the bridge foundation was done under the contract.

And an assignment of such a contract by the sub-contractor, and "all the rights and privileges therein mentioned," except the ten per cent due "on all earth, excavations of earth, and masonry and stone delivered on the road to the first of March," carries the value of the work on the foundation of the bridge as estimated by the chief engineer.

ON EXCEPTIONS.

Trustee process against James Hogan, as principal defendant, and S. S. Thompson and J. G. Larry, alleged trustees of Hogan.

Thompson disclosed, substantially,

That on the 23d of September, 1868, he entered into a written contract with the Somerset Railroad Company, to build their road from West Waterville to Carratunk Falls, and took J. G. Larry in as a partner in the contract between Norridgewock bridge and West Waterville; that on the 25th of the following November, the principal defendant entered into a written contract with Thompson and Larry, "to construct and complete all the grading, including earth, rock, and masonry, for the road-bed of the Somerset railroad from the third station north of Otis Hill road-crossing to the Kennebec river, or if the line is changed, as far north as the present river crossing," at the prices specified in the contract; that Hogan continued to work under the contract until April, 1869, when he assigned the contract, and "all the rights and privileges therein mentioned, except the ten per cent due him on all earth, excavations of earth, and masonry and stone delivered on the road to the first of March," to Thomas Hogan and Stephen Mills, who continued the work under the contract until the time of the service of the writ upon the trustees; that at the time of the service of the writ on them, the trustees had paid the principal defendant all he had earned under the contract, except the ten per cent reserved by the contract, and about two hundred dollars balance due for extra work done by him upon the bridge foundation, and accepted and

estimated by the chief engineer; that Hogan and Mills claim the unpaid balance by reason of the assignment to them; that the work contracted to be done by the principal defendant is not completed; that the work done on the bridge foundation was allowed by the railroad company as extra work.

No paper in the case indicates the date of writ or service, but it was served after the assignment.

The presiding judge charge the trustees, and they alleged exceptions.

J. H. Webster, for the trustees.

S. D. Lindsey, for the plaintiff.

APPLETON, C. J. On the 25th November, 1868, S. S. Thompson and J. G. Larry, the alleged trustees, entered into a contract with James Hogan, the principal defendant, to do certain specified work upon the Somerset railroad. After describing the work to be done, as it was obvious that there might be extra work not embraced in the specifications, but which would be indispensable in the construction of the railroad, the following provisions were inserted in the contract:

"Eighthly. It is also agreed that if any work shall be done by said sub-contractor (Hogan) which is not included in this contract, the price and value of said work shall be determined by the chief engineer. And it is likewise agreed that the work, during its progress, shall be subject to the supervision and inspection of said engineer, and shall be made to conform, in every respect, to his direction; and all bad or imperfect work to be immediately remedied, and the same rendered good and substantial to the satisfaction of said engineer. All measurements herein and in the specifications mentioned or referred to, are understood to mean English measure.

"Ninthly. And it is further mutually agreed, with a view to the preventing all disputes and misunderstandings, and for the speedy adjustment of such as may occur, that the chief engineer shall

determine the amount and quantity of the several kinds of work herein contracted to be done, and shall decide every question which can or may arise relating to the execution of the work under this contract, on the part of said sub-contractor, and his decision shall be final and conclusive."

It is admitted that the defendant did work on the bridge foundation for the Norridgewock bridge, which was accepted and the value of which was estimated by the chief engineer.

The question presented is whether this work is to be deemed work done under the contract, and we think it is.

The contract embraces, and was intended to embrace, work done under the specification therein set forth, and any and all work on the road not specially described in the contract. All work done under the eighth article of the contract is equally under the contract, as that more particularly described. This article assumes that the specifications do not embrace all the work that will be required for the completion of the road. It provides that the "price and value" of "any work which is not included in the contract," that is, in that portion of it which precedes this article, shall be determined by the chief engineer. It gives him the power of supervision, inspection, and direction. If the work is badly or imperfectly done, its badness and imperfection are to be immediately remedied, and it is to be rendered good and substantial to his satisfaction. His decision is to be final and conclusive. All these provisions refer to "any work" which had not been previously described, and it brings such work within the contract, and subject to the decision of the chief engineer. If, then, the work or the bridge foundation had been so "bad and imperfect" as to be valueless, and the engineer had so decided, his decision would, by the very terms of the agreement, have been conclusive, and the contractor would have had no right to recover. This is the necessary result of the contract. It follows, therefore, that this work would be work under the contract. That the contracting parties so understood it is shown by the acts of the chief engineer in accepting and estimating the value of the work, which it was no business of his to do unless by virtue of article eighth.

On the 21st April, 1869, the defendant, James Hogan, assigned his contract and all "the rights and privileges therein mentioned," except the ten per cent due "on all earth, excavations of earth, and masonry and stone delivered on the road, to the first of March, to Thomas Hogan and Stephen Mills." This assignment was before the service of the trustee writ. The alleged trustees had notice of the same. The validity of this assignment is not questioned. It embraced all save what was specially excepted. But the exception does not refer to the work on the bridge foundation, nor is it contended that it does. For that work, according to the estimate of the chief engineer, the trustees are liable to the assignees of the defendant.

Exceptions sustained.

Trustees discharged.

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

INHABITANTS OF CONCORD *vs.* GEORGE M. DELANEY & others.

Illegal contract—recovering back money paid under.

If the parties to an illegal contract are not in *pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in an action for money had and received.

The plaintiff town, at a legal meeting called for the purpose, "voted to raise six hundred and twenty-five dollars to each man who enlists to fill Concord's quota on the last call," and that "the selectmen hire money and pay the volunteers after they are mustered into the Unites States service." Thereupon the selectmen hired the money and paid fifty-four hundred dollars to the defendants, who fraudulently assured them that pursuant to their contract with the selectmen, the defendants had caused to be enlisted, accepted, and placed to the quota of the plaintiff town nine men for three years each, when in fact eight of the men were enlisted and credited for one year only. In an action for money had and received to recover back the money paid, *Held*, that the action is maintainable, without first placing the defendants in *statu quo*.

ON REPORT.

The writ was dated Dec. 20, 1866, and was served on Frank Davis only, who alone appeared.

The declaration was as follows:

In a plea of the case, for that the defendants at said Augusta, to wit, at said Norridgewock, on the 30th September, A. D. 1864, then being copartners, as aforesaid, in consideration that the plaintiffs would pay them within a reasonable time the sum of five thousand and four hundred dollars, agreed with and promised the plaintiffs that they would furnish them with nine men, to be accepted, placed upon, and allowed on the quota of said town of Concord, under the call of the then president of the United States of America, for five hundred thousand men, of July 18, 1864, and that each of said nine men should be procured, enlisted, accepted, and placed to the credit of said town of Concord for a term of service of three years, and so that the town of Concord should thereafterwards derive and enjoy all the advantages, privileges, and exemptions resulting from having nine men each for a term of service of three years placed upon the quota, and passed to the credit of said town of Concord. And the plaintiffs did then and there agree with and promise the defendants, in consideration of the aforesaid agreement and promise of the defendants, that they would pay them the said sum of five thousand and four hundred dollars, to wit, in a reasonable time, and before or as soon as the said nine men should be put in and allowed upon the quota of Concord, and placed to the credit of said town in manner aforesaid.

And the plaintiffs aver, that the defendants, on said 30th of September, and on the fifth day of October, A. D. 1864, and on the days between said 30th of September and 5th of October, did cause to be enlisted and accepted and placed to the credit of and allowed on the quota of said town of Concord nine men, and they promised that each of said nine should be so enlisted, put in, and placed for the term of three years, as aforesaid; and that they then and there informed and assured the plaintiffs that each of said nine men had in fact been so enlisted and put on the quota of and placed to the

credit of said town of Concord, as aforesaid, for the term of three years.

And the plaintiffs aver, that, relying on said promises of the defendants, and upon the said statements and assurances of the defendants, they then and there, to wit, on said 30th of September and said 5th of October, paid to the defendants fifty-four hundred dollars, the property of said town aforesaid. And the plaintiffs further aver, that on the 19th of December, 1864, a call was only made by the president of the United States of America for three hundred thousand men for the army of the said United States, and that such orders were duly made, and such proceedings were had that a call was made upon said town of Concord, and said town of Concord was duly and legally required to furnish twelve men under the said call of the president of the 19th of December, 1864, to wit, on the

day of February, A. D. 1865, excepting and less one man that the plaintiffs had furnished and caused to be placed to the credit of their said town subsequently to said 5th of October, 1864. And the plaintiffs aver, that until said call last mentioned was made on them, they verily believed, being deceived by the aforesaid information and assurances of the defendants, and particularly by said Delaney, which information and assurances were false and fraudulently made for the purpose of deceiving them, that each of said nine had been put in and placed to the credit of said town of Concord for the term of three years, whereas in fact only one of said nine men had been so put in and placed for the term of three years, and each of the other eight men had been so put in and placed for the term of but one year, all of which was well known to the defendants on the said several days of September and October, 1864.

And the plaintiffs further aver, that in consequence of the non-performance by the defendants of their said promise and agreement, their said town of Concord was obliged to furnish, and that they did actually furnish, under said last call of the president, eleven men more than they would have been obliged or required to furnish, in case the defendants had performed their said promises, and that they procured in April, 1865, to wit, on the 1st day of said

April said eleven men, for whom they were obliged to pay fifty-five hundred dollars, to take the place of men that had been drafted on said call upon the plaintiff town, and were also subjected to the expenditure of much time and money in obtaining, finding, and procuring said men, to the amount and value of two hundred dollars, making fifty-seven hundred dollars and interest from said first of April, 1865, as the amount of damages and loss sustained by the plaintiffs by reason of the non-performance by the defendants of their said promises.

Also, for that the defendants, at said Augusta, to wit, at said Norridgewock, on the 5th of October, 1864, being indebted to the plaintiffs in the sum of fifty-four hundred dollars, for so much money at and before that time had and received by the defendants to the plaintiffs' use, in consideration thereof then and there promised the plaintiffs to pay them said sum and interest thereon from that date on demand. (Under this count the plaintiff will claim the same sum of $5400 and interest thereon described in the first count as having been by them paid to the defendants upon the facts stated in said first count, and upon the facts that the money was obtained from them by defendants upon the false and fraudulent assurance, statements, and representations and promises of defendants, and particularly of the defendants, Delaney and Davis.)

The defendant, Davis, pleaded the general issue, together with a brief statement that he, Davis and Yates, faithfully and fully performed all contracts made between them and the plaintiffs; that all of such contracts were contrary to the statutes of the State and of the United States, and were expressly prohibited by such statutes, and were also against the spirit and policy of such statutes, and against public policy, all of which the plaintiffs well knew, and were therefore wholly illegal and void, and no action can be maintained by these plaintiffs thereon, or upon any matter growing out of the same or connected therewith, or to recover back anything paid to the defendants and to said Delaney and Yates under such contracts.

The plaintiffs proposed to prove the allegations in the first count in the declaration except as modified by the following statement:

That soon after Oct. 5, 1864, Corydon Felker, one of the selectmen of plaintiff town, ascertained that some of said nine men had been placed on the quota of Concord for one year and not for three years; that he thereupon called upon Delaney and Davis to perform said agreement or settle on account of the non-performance, and to pay back so much of the money as they ought to; that Delaney promised in presence of and with no objections by Davis, repeatedly at different times during said October, that he would ascertain how many had been put in for one year, and would make everything right; that after being called on several times, and at each time giving similar assurances, he finally, in said October, told Felker that he would do nothing about it; that Felker, during 1864, was one of the selectmen of Concord; that the selectmen agreed together to procure only three years men, and not to procure any one year men, and to obtain them if possible for $600 each, and that it was agreed by and between them, that said Felker should go to Augusta to effect said object; that said Felker, in all his aforesaid doings, acted in behalf of said town and with the concurrence of the other selectmen.

That said Delaney, Davis, and Yates were, during said September and October, partners, engaged in filling the quotas of towns under said call; that they did and had been accustomed to fill the quotas for many towns in Maine, and had within a few days previously filled the quotas for other towns at six hundred dollars for three years men, and at five hundred dollars for one year men, and at other rates.

It appeared that at a meeting of the town of Concord, legally notified and held Oct. 1, 1864, under the following articles in the warrant:

"Art. 2. To see how much money the town will vote to raise, to fill Concord's quota the present call."

"Art. 3. To act on any other business that may properly come before said meeting."

The town took the following action:

"Art. 2. Voted, to raise $625 to each man who enlists to fill Concord's quota on the last call."

"Art. 3. Voted, the selectmen shall hire money and pay the volunteers after they are mustered into the United States service."

The case was reported to the full court with the stipulation that if upon so much of the proposed evidence as is legally admissible the action is maintainable, it is to stand for trial.

J. S. Abbott, for the plaintiffs.

D. D. Stewart, for the defendants.

The alleged contract under which the plaintiffs claim is illegal. *Concord* v. *Delaney*, 56 Maine, 204.

Whether the plaintiffs proceed under their general or special count, the facts upon which they claim to recover are the same, and no action can be maintained upon them.

When the contract between the parties is in violation of a statute provision, or against its spirit and policy, and one pays money to the other under such contract, no action lies to recover damages for its non-execution by the other, nor to recover back any part of the money paid. *Perkins* v. *Savage*, 15 Wend. 413; *Burt* v. *Place*, 6 Cow. 431; *Bank of the United States* v. *Owen*, 2 Pet. 539; *Buckman* v. *Bryan*, 3 Denio, 340; *Canaan* v. *Bryce*, 3 B. & Ald. 179, 185; *Nellis* v. *Clark*, 20 Wend. 24, 32; *Smith* v. *Hubbs*, 1 Fairf. 76–78; *Nellis* v. *Clark*, 4 Hill, 424; *Wheeler* v. *Russell*, 17 Mass. 258, 281; *Pattee* v. *Greeley*, 13 Met. 286; *Gregg* v. *Wyman*, 4 Cush. 322, 325, 331; *Morton* v. *Gloucester*, 46 Maine, 521, 523; *Pope* v. *Linn*, 50 Maine, 85; *Benson* v. *Drake*, 55 Maine, 558, 559.

The truth or falsity of the statements, alleged to have been made by the defendants, could have been instantly ascertained by the plaintiffs by the exercise of the least diligence at the provost-marshal's and adjutant-general's offices. *Pratt* v. *Philbrook*, 33 Maine, 17; *India Rubber Co.* v. *Adams*, 23 Pick. 256.

The plaintiffs never having restored, or offered to restore, the consideration received from the defendants, but having retained it,

cannot maintain assumpsit. 1 Chit. Pl., 355, 356; Chit. on Cont. (5th ed.), 741, 743; Story on Cont. (3d ed.), § 848 (a); *Hunt* v. *Silk*, 5 East, 448; *Hudson* v. *Robinson*, 4 M. & S. 475; *Watson* v. *Earl of Charlemont*, 12 Ad. & El. N. S. 860; *Clark* v. *Auchmaty*, 1 El. Bl. & El. 148 (96 Eng. Com. Law), 148; *Minor* v. *Bradley*, 22 Pick. 457; *Tisdale* v. *Buckmore*, 33 Maine, 463; *Connor* v. *Henderson*, 15 Mass. 319; *Norton* v. *Young*, 3 Greenl. 30; *Junkins* v. *Simpson*, 14 Maine, 364; *Coolidge* v. *Brigham*, 1 Met. 547; *Croft* v. *Wilbur*, 7 Allen, 249; *Cook* v. *Gilman*, 34 N. H. 557; *Garland* v. *Spencer*, 46 Maine, 530.

The only remedy upon the facts as alleged is by an action on the case. *Garland* v. *Spencer*, 46 Maine, 530; *Hogan* v. *Weyer*, 5 Hill, 389; *Clark* v. *Auchmaty*, 96 E. C. L. 148; *Percival* v. *Hitchborn*, 56 Maine, 580.

A mere promise is never a ground of fraud. *Boyd* v. *Stone*, 11 Mass. 349; *Greer* v. *Greer*, 18 Maine, 18.

DICKERSON, J. There was no statute authorizing the selectmen of the plaintiff town to make the contract declared on in the plaintiffs' writ, nor has any statute been since passed ratifying or confirming that contract. The powers of towns and town officers being derived exclusively from the statutes, the contract made by the selectmen was illegal and void. While no action can be maintained on the special counts in the plaintiffs' declaration, an action may be maintained on the count for money had and received, if the plaintiffs are able to prove the necessary facts upon a trial of the case. *Inhabitants of Concord* v. *Delaney*, 56 Maine, 204.

The rule of law is, that where the cause of action arises, *ex turpi causa*, from the violation of a positive law, or of public policy, and the parties are *in pari delicto*, the court will not enforce the agreement of the parties by compelling its execution, or the payment of damages for not executing it, or the recovery back of what has passed under it, but will leave the parties where it finds them. The object of the law is to prevent the contemplated wrong if the contract be executory, and to punish the wrong-doer by leaving him

to the consequences of his own misconduct, if the contract be executed. *Smith* v. *Hubbs*, 10 Maine, 76; *Nellis* v. *Clark*, 20 Wend. 32; *Burt* v. *Place*, 6 Cow. 491; *Best* v. *Strong*, 2 Wend. 319; *Denny* v. *Lincoln*, 5 Mass. 385.

But if the parties to an illegal contract are not *in pari delicto*, the party who has been oppressed, or taken advantage of by the party receiving the money, may recover it back in an action for money had and received. *Worcester* v. *Eaton*, 11 Mass. 376; *Bliss* v. *Thompson*, 4 Mass. 491.

And no privity of contract between the parties is necessary to support this action, except what results from the defendants having the plaintiffs' money, which he has no right conscientiously to retain. *Mason* v. *Waite*, 17 Mass. 553; *Hall* v. *Marston*, 17 Mass. 401.

The action for money had and received is an equitable action, and lies where the defendant has received or obtained the possession of the money of the plaintiff, which in equity and good conscience he ought to pay over to him. (But the equitable nature of this form of action is available for the defendant as well as the plaintiff; and he may go into any equitable defense and claim every equitable allowance with respect to the whole or a part of the plaintiff's claim). 2 Greenl. Ev. § 127; *Lockwood* v. *Kelsea*, 41 N. H. 188.

In the case at bar no contract was made by, nor were any representations made to the plaintiffs, or any person authorized to act for them in the premises. There was no illegality or misconduct on their part. They are not *in pari delicto* with the defendants, and are not on that account estopped from maintaining this action. Nor are they required, as a prerequisite to maintaining this suit, to place the defendants in the position they were before the contract was entered into, as they made no contract with the defendants. The selectmen, it is true, were intrusted with the money of the plaintiffs, but it was for other purposes than that contemplated in their contract with the defendants. They improvidently and without authority paid over the plaintiffs' money to the defendants, on account of their false and fraudulent assertions and representations.

The defendants withheld from the plaintiffs the money thus wrongfully obtained. The law will not sanction their wrong by denying to the plaintiffs the equitable remedy which they seek. In equity and good conscience, as well as in law, the money sued for belongs to the plaintiffs as fully and completely as it did before it was delivered to the defendants, unless they have equitably appropriated it in whole or in part to the benefit of the plaintiffs. Upon a trial of the cause the rights of the parties may be equitably adjusted; for, in resorting to this equitable form of action, the plaintiffs concede the equitable right of the defendants to go into every equitable defense and show on trial that, *ex æquo et bono*, they are not liable for the whole or any part of the plaintiffs' demand. *Eddy* v. *Smith*, 13 Wend. 490. *Case to stand for trial.*

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

JOHN H. WEBSTER *vs.* BENJAMIN K. ADAMS & trustees.

Judgment—conclusiveness of.

When an action by trustee process is commenced prior to one by the principal defendant against the trustee, a judgment in the latter action in favor of the trustee is not conclusive upon the plaintiff in the former upon the question of the trustee's discharge.

ON EXCEPTIONS.

DEBT on a judgment, commenced by trustee process against the principal defendant and Joseph Spaulding and Charles B. Foster, and one Titcomb. The trustee, Foster, before a commissioner appointed for that purpose, disclosed, substantially, that he and Spaulding had been partners for many years, under the style of Foster & Spaulding; that on Nov. 30, 1858, the firm made a written contract with the principal defendant, wherein Adams agreed

to put one good six-ox team, and one good four-horse, the next logging season, upon the certain specified township of Foster & Spaulding, and cut and haul, mark and land on the Churchill stream all the pine and spruce said teams could haul that season; that Foster & Spaulding agreed to pay Adams three dollars per thousand, to be surveyed as therein stipulated; that the amount due for the lumber hauled, pursuant to the contract, was $1957.12; that they had paid him, as by the exhibit annexed to their disclosure, $1968.92, together with an additional sum of $700 as by his receipt; and that Adams was further indebted to Foster & Spaulding for a balance due on an operation of 1859–60, of $198.45, and for a horse of the value of $75.

Upon the filing of the disclosure at the March term, 1868, the plaintiff, under R. S., c. 86, § 29, filed certain allegations, and among them, that Adams cut and hauled under the contract a larger quantity of lumber than that disclosed; that the horse was delivered in 1866, in part-payment of the sum due on this operation, but was worth much less than the sum stated; that the sum said to be due on the operation for 1859–60 had been settled; and that the amount named in the receipt is covered by the exhibit. Thereupon the trustees had leave to disclose further.

On March 1, 1867, the principal defendant, Adams, sued Foster & Spaulding on the written contract mentioned in their disclosure, claiming to recover $3000 for the logging operation of 1858–9, after deducting therefrom certain items of credit amounting to $1900. This latter action was duly entered, tried, and a judgment therein entered in favor of the defendants therein, in May, 1869.

The alleged trustees, Foster & Spaulding, thereupon claimed in this action that the judgment in the action, *Adams* v. *Foster*, constituted a bar to any further proceedings by this plaintiff against them in this action, and that they were under no obligation to disclose further, and moved their discharge upon that ground.

The presiding judge held the judgment conclusive upon the plaintiff and, *pro forma*, ordered the trustees, Foster & Spaulding, to be discharged; and the plaintiff alleged exceptions.

J. H. Webster, *pro se.*

D. D. Stewart, for Foster & Spaulding.

APPLETON, C. J. This action was commenced Dec. 19, 1866, and served on the trustees before any suit was brought by the defendant against the trustees. The plaintiff, by virtue thereof, acquired a lien upon the indebtedness of the trustees to the principal defendant, if any there was.

By R. S. 1857, c. 86, § 29, as amended by c. 120 of the acts of 1862, "the answers and statements sworn to by a trustee shall be deemed true in deciding how far he is chargeable, until the contrary is proved; but the plaintiff, defendant, or trustee may allege and prove any facts material in deciding that question."

By § 30, "any question of fact, arising upon such additional allegations, may, by consent, be decided by the court, or submitted to a jury in such manner as the court directs."

The plaintiff, in this case, filed additional allegations.

It has been held in *Benner* v. *Dennison*, 36 Maine, 227, that a trustee is to be regarded as a party with rights adverse to the plaintiff. Having commenced his action and acquired a lien on any indebtedness from the trustee to the defendant, the plaintiff had a right to offer proofs and to be heard by himself or counsel before the court or jury, as to the indebtedness of the trustee and as to its amount. This right is given by statute, c. 86, § 30.

Where the trustee suit is subsequent in time to that of the defendant therein against the trustee, the judgment obtained in the suit first, in order of time, would seem to be conclusive, upon the plaintiff in the trustee suit, §§ 56, 57, 58. By the last section, the first suit is to "proceed so far as to ascertain by a verdict, or otherwise, what sum, if any, is due from the defendant." The plaintiff in the trustee suit holds only what is found by a jury or the court to be due. But in the present case, the suit, *Adams* v. *Foster*, was commenced on March 1, 1867, and long after the bringing of the trustee process. In such case, by § 66, "if any alleged trustee is dis-

charged, the judgment shall be no bar to an action brought by the principal defendant against him for the same demand."

Is, then, the judgment, when in favor of the trustee in a suit subsequently brought by the principal defendant against him, conclusive upon the question of his discharge. We think not. The trustee suit was first in time and first in right. The plaintiff in the trustee suit had no right to be a party to the suit subsequently brought, to employ counsel therein, to summon witnesses, or to be heard in its disposition. He had a right to do this in the suit commenced by himself, and the defendant, in the action first commenced, cannot divest him of such existing right by bringing a suit against the trustee.

Further, the action, *Adams* v. *Foster*, related only to the lumbering operations of the winter of 1858–9. These parties were engaged in similar operations in other winters. The judgment had no relation to those operations. It could not, in any event, be a bar to the plaintiff's right to hold the trustees for any indebtedness, the existence of which was not involved in that action, and could not be determined therein. *Exceptions sustained, and the trustees to answer further.*

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

REBECCA S. LUCE, administratrix, *vs.* WILLIAM McLOON.

Statute of limitations.

On April 28, 1855, J. & Co., for their own benefit, gave their negotiable promissory note to F., the plaintiff's intestate and the defendant, each of whom indorsed it and duly received notice of its having been protested for non-payment. On April 30, 1855, J. & Co. mortgaged an ample stock of goods to the defendant and another to secure the payment of this and another note, but, in the following October, the defendant discharged the mortgage without receiving payment of the former note. On Dec. 29, 1858, F. took up the note, and, on Dec. 24, 1864, demanded one-third of the amount paid therefor of the plaintiff as administratrix, who paid it and thereupon brought this suit for the amount thus paid. *Held*, that whatever cause of action the plaintiff may have had against the defendant by reason of the note was barred by the statute of limitations.

ON REPORT.

ASSUMPSIT, for that said defendant, at said Rockland, in said Knox county, on the day of the purchase of this writ, being indebted to the plaintiff, as such administratrix, in the sum of five hundred dollars, for so much money before that time paid, laid out, and expended, by the plaintiff, as such administratrix, for the use of the said defendant, at his request, in consideration thereof, then and there promised the plaintiff to pay him the same sum on demand; and the plaintiff avers, that she demands of the defendant the sum so paid to his use, on, to wit, the day of the purchase of this writ.

Also for that said defendant, at said Rockland, in said Knox county, on the day of the purchase of this writ, being indebted to the plaintiff, as such administratrix, in another sum of two hundred dollars, for interest upon, and for the forbearance of divers sums of money, before then due, and owing from the defendant to the plaintiff, as such administratrix, and by the plaintiff forborne to the defendant, for divers long spaces of time, before then elapsed, at the special instance and request of the defendant, in consideration thereof, then and there promised the plaintiff, to pay her said sum on demand.

Also for that, at said Rockland, in said Knox county, on the 28th day of April, 1845, R. L. Jackson & Co. made and signed their promissory note, in the sum of seven hundred dollars, payable in sixty days after its date, to William McLoon, N. A. Farwell, and said A. G. Luce, or their order, at either bank in said Rockland; which note was on the same day indorsed by said McLoon, Farwell, and Luce, which note was discounted on the day of its date at the Rockland Bank, in said Rockland, by said R. L. Jackson & Co.,—said note having been made, and thus indorsed, by said indorsers, for the benefit of said R. L. Jackson & Co. to enable them to raise money upon it, said indorsers being mere accommodation indorsers, and afterwards, after said note had matured, and after the same had been duly protested by said Bank, for non-payment thereof, to wit, on the 31st day of December, 1855, said Farwell paid said note, and interest, and cost of protest, to said Rockland Bank, amounting in all to eight hundred forty-eight dollars and fifty cents; he, together with the other said indorsers, having been duly notified by said bank, of the due presentment of said note, to the makers thereof, for payment, and the non-payment of the same by them; and he having been duly called upon by said bank, as one of the indorsers, to pay it.

And thereafterwards, to wit, on the 31st day of December, 1858, said Farwell demanded of said McLoon, to pay him said amount, that he had on that day paid said bank, on account of said note, which said McLoon then and there neglected and refused, and ever since has neglected and refused to do; of all which said defendant had notice.

The plaintiff avers, that after the said note was given, to wit, on the 30th day of April, 1855, said R. L. Jackson & Co. mortgaged to I. K. Kimball, of said Rockland, and said defendant, a large amount of personal property, to wit, their stock of goods, merchandise and tools, then in their store, occupied as a boot and shoe store, on Main street, in said Rockland, consisting of boots, shoes, leather, calf-skins, hats, caps, tools, and fixtures; which mortgage was given to secure a two thousand dollar note, dated April 28th,

1855, payable in sixty days from its date, to said mortgagees, and by them indorsed to the George's Bank, for the benefit of said mortgagers, and also to secure the payment of the seven hundred dollar note aforesaid.

And afterwards, to wit, on the 1st day of October, 1855, said defendant and said I. K. Kimball, the aforesaid mortgagees, without the knowledge or consent of said Andrew G. Luce, or the plaintiff, or said Farwell, discharged and cancelled said mortgage, and gave up to the mortgagers their claim to, and control over said mortgaged property, there being at the date of said mortgage, and all the time, up to the time of said discharge, more than enough of said mortgaged property in value to pay said notes secured, in the hands of the said mortgagers, subject to be taken by said mortgagees, at their option, by virtue of said mortgage, which mortgage was duly recorded, in the city clerk's office of said Rockland, on the 7th day of May, 1855, and which mortgaged property said defendant was legally bound to take, hold, and keep, for the benefit of said indorsers, of the said seven hundred dollar note, and as security against their liability upon said note. And the plaintiff avers, that when said note became payable, it belonged to said bank, and was then at said bank's office and place of business, in said Rockland, and was then and there, to wit, on the 30th day of June, 1855, presented for payment, and payment of the said note, according to its tenor, was then and there duly required of the makers thereof; but payment thereof was then and there refused, and no funds being then and there at said bank, belonging to said makers of said note; of all which the defendant, and said Farwell, and said A. G. Luce, who was then living, thereafterward, to wit, on the same day, had due notice; and that said Bank looked to them for payment, interest, cost, and damages.

And the plaintiff avers, that she, as the administratrix of the goods and estate of the said Andrew G. Luce, was called upon, on, to wit, the 24th day of December, 1864, by said Farwell, and required by him to contribute, and pay to him, three hundred eighty-four dollars and eight cents, as the share which she, as the

administratrix of said A. G. Luce's estate, was then legally bound to contribute, and pay to said Farwell, on account of his having paid said note as aforesaid—said three hundred eighty-four dollars and eight cents being one-third part of the sum so paid by said Farwell, and interest thereon, from the time he paid it, up to the time the plaintiff paid him said three hundred eighty-four dollars and eight cents, as aforesaid; and which said three hundred eighty-four dollars and eight cents, the plaintiff, as the administratrix of the said Andrew G. Luce's estate, then paid to said Farwell, being then legally bound and obliged to do so.

Wherefore, and in consideration whereof, the defendant then and there became liable, and promised the plaintiff, to pay her the said sum so paid by her, to said Farwell, to wit, three hundred eighty-four dollars and eight cents on demand.

And the plaintiff avers, that afterwards, on the same day of the payment of said sum by her to said Farwell, she demanded of the defendant the same sum, and then and there notified him that she had paid said amount to said Farwell, on account of his having paid said note, as aforesaid; but the defendant then and there, after having been so notified, and payment of said sum demanded of him as aforesaid, refused to pay the same.

The writ was dated Dec. 24, 1864.

Plea, general issue, and brief statement of the statute of limitations.

It was agreed that Luce died Feb. 20, 1860, and that the plaintiff was duly appointed and qualified as administratrix on his estate.

There was evidence tending to prove the facts alleged in the declaration.

Peter Thacher, for the plaintiff.

A. P. Gould, for the defendant.

DICKERSON, J. On the 28th day of April, 1855, R. L. Jackson & Co. gave their promissory note for $700, payable at either bank in Rockland, in sixty days, to N. A. Farwell, William McLoon, and A. G. Luce, who indorsed the note on the same day. The note was given for the benefit of the makers who obtained the money on it at the Rockland Bank.

The makers gave said McLoon and I. K. Kimball a mortgage to secure this note and other notes, April 28, 1855, which was seasonably recorded, and discharged, by order of the mortgagees, Oct 1, 1855.

Payment of the note was duly demanded, and notice given to each of the indorsers; and it was taken up by N. A. Farwell, Dec. 29, 1858, who demanded one-third of the amount paid by him, of the plaintiff, as administratrix of A. G. Luce, Dec. 24, 1864, which she then paid by giving him her note. This action was brought Dec. 24, 1864, to recover of the defendant the amount thus paid by the plaintiff.

The money counts are not relied upon in the argument, and if they were, this action cannot be maintained upon these counts, as the note was barred by the statute of limitations, when the plaintiff made the payment to Farwell, and no action could then have been maintained on the note against the defendant.

It will be found, upon an examination of the case, that a like fatality attends the special count in the writ. This count sets forth the facts upon which the plaintiff relies to fix the defendant's liability, upon the ground that he took the mortgage of April 28, 1855, to secure the note in question, and discharged it without paying that note. Without determining whether the allegations in the special count, if proved, would be followed by the result claimed, it will be observed that the defendant's liability, if any existed, growing out of the mortgage and his discharge of the same, accrued Oct. 1, 1855, when the mortgage was discharged. The statute of limitations would commence to run from that time. The plaintiff could not maintain an action against the defendant until she had paid the note, or a part thereof, if the defendant incurred any lia-

bility on account of the mortgage. Her cause of action, if any she had against the defendant on that account, would accrue when she made such payment. But the defendant discharged the mortgage Oct. 1, 1855, and she made the payment to Farwell Dec. 24, 1864. The plaintiff's claim, therefore, if any she had against the defendant, was barred by the statute of limitations, when she made the settlement with Farwell, and that statute having been pleaded, this action cannot be maintained.

As this objection is decisive of the case, it becomes unnecessary to consider the other points raised in defense.

Plaintiff nonsuit.

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

FRANCIS COBB & others *vs.* LIME ROCK FIRE AND MARINE INSURANCE COMPANY.

Warranty—words constituting a—when affected by usage.

In a policy of insurance on a vessel, the words, "prohibited from the River and Gulf of St. Lawrence between September first and May first," constitute a warranty that the vessel shall not enter those waters within the time mentioned.

The words are to be construed in their ordinary and popular sense, unless by some known usage of trade they have a different meaning.

The usage or the construction given to particular words in Boston, Mass., will not affect a policy of insurance upon a vessel made at Rockland, Maine, containing the same words, unless a similar usage or the same construction is shown to exist in the latter place.

ON REPORT.

ASSUMPSIT by merchants residing in Rockland, upon a policy of insurance upon the schooner Republic, issued April 4, 1861, by the defendant company established in Rockland. The policy contained the following clause: "Prohibited from the River and Gulf of St. Lawrence between September first and May first."

The schooner sailed from St. Johns, Newfoundland, to Pictou, N. S., in December, 1861, where she took on a cargo of coal and then sailed for Boston. Between Pictou and the Gut of Canso she encountered a gale. At Port Mulgrave a survey was had and a portion of her cargo taken out, whereupon she proceeded on her homeward voyage and was lost.

It was agreed that either party might use at the hearing Colton's and Johnson's Atlases and the maps and charts used at the trial, and may read any articles from Blunt's Coast Pilot, Encyclopedia Britannica, Lippincott's Gazetteer, Barclay's Dictionary, and furnish the court with extracts therefrom, the court to make such use thereof as may be admissible.

The case was withdrawn from the jury and reported to the full court, who were to enter the judgment required by the law and evidence.

O. G. Hall and *Davis & Drummond*, for the plaintiffs.

A. P. Gould, for the defendants.

Appleton, C. J. This is an action upon a policy of insurance upon the schooner Republic, containing this clause, "prohibited from the River and Gulf of St. Lawrence between September first and May first." These words constitute a warranty that the vessel shall not enter those waters within the time specified. *Odiorne* v. *N. E. Mutual Marine Ins. Co.*, 101 Mass. 551.

The schooner sailed from St. Johns, Newfoundland, to Pictou, N. S., in December, where she loaded with coal. After leaving Pictou the vessel encountered a heavy gale, and was lost on her homeward voyage.

The vessel was in the Gulf of St. Lawrence within the prohibited time, if the Strait of Northumberland is within the gulf, and upon consulting the authorities to which counsel have referred, we are satisfied that it is. Bowditch, in his Navigator, the work most likely to be used by ship-masters or consulted by them, places Pictou in the gulf, and designates the Gut of Canso as the north-

ern entrance to the same. If so, according to the plain language of the policy, the plaintiff must fail.

But, it is said, though the Strait of Northumberland and Pictou may geographically be deemed as within the gulf, yet that in mercantile acceptation they are not so regarded, and that evidence to show such to be the case is properly receivable. *Robertson* v. *Clarke*, 8 E. C. L. 373; *Robertson* v. *Maury*, 21 E. C. L. 383.

The construction of a policy is to be governed by the law of the place where it is made. The words used are to be understood in their ordinary and popular sense, unless by some known usage of trade they have a different meaning. An usage may be local or general. But if local, the contracting parties are not bound by the usages of other places, unless they are referred to or made part of the contract. It is immaterial what may be the usage or the construction given to particular words in Boston, they will not affect a contract at Rockland, unless a similar usage or the same construction to the same words is shown to exist there, if the contract is there made. The usage must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume the parties had knowledge of it, or that they were bound to be informed of it.

Now the evidence entirely fails to show that in this State or at Rockland, there was any such meaning attached to the prohibitory clause as the plaintiffs claim. The evidence on the subject is contradictory. When the evidence is thus contradictory, and the defendants utterly deny any knowledge of such a construction as the plaintiffs contend for, the contract must be taken in the ordinary acceptation of the language used. *Plaintiffs nonsuit.*

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

DICKERSON, J., concurred in the result.

TAPLEY, J., did not concur.

SIDNEY B. MORSE *vs.* JEREMIAH SLEEPER.

Levy. Judgment. Real action—pleading in.

A levy upon real estate, made by virtue of an execution issued upon a judgment, wherein the debt or damage recovered exceeds the amount of the *ad damnum*, dates from the time of the levy, and does not relate back to the time of the attachment.

Such a levy is effectual to pass the debtor's title to the creditor and his assigns.

By reason of R. S. of 1857, c. 82, § 10, such an error cannot be made available for the purpose of reversing the judgment, "when the person and case can be rightly understood."

A levy made upon an undivided fifth of the execution debtor's estate held in common, is valid under R. S. of 1857, c. 76, § 7, provided the return states the debtor's ownership of the part taken, although it should appear that the debtor actually owned more.

It is essential to the validity of a levy made upon an undivided portion of the land, of which the execution debtor is seized in fee and in severalty, that it appear by the return that the premises levied on could not be "divided by metes and bounds without damage to the whole."

A levy upon the land of one of the several execution debtors will be invalid unless the return show with certainty that the debtor, whose estate has been taken, chose one of the appraisers, or neglected to do so upon being duly notified.

Under the general issue in a real action, the defendant may disprove the seisin of the plaintiff, as alleged in the writ, by showing that the plaintiff's grantor had previously conveyed the title to a third person, although the defendant does not claim under him.

The simple evidence that land has been fraudulently conveyed by a debtor, and that the fraudulent grantee has quitclaimed all his right, title, and interest to a third person, will not prevent a prior creditor, subsequently levying his execution thereon under R. S. of 1857, c. 76, § 13, from acquiring the "momentary seisin" necessary to enable him to try the title with the party in possession not claiming under such conveyances.

ON REPORT.

WRIT OF ENTRY, in which the plaintiff sought to recover one undivided fifth part of certain premises situated on Owl's Head Harbor, and described in the writ, dated Aug. 12, 1865.

Plea, *nul disseisin*, with brief statements of denial of the plaintiff's title and allegation of seisin in the defendant; also alleging

that if the title be not in the defendant, it is in one Joseph Jackson, alleged to be seized.

The case is sufficiently stated in the opinion.

Thacher, for the plaintiff.

Gould, for the defendant.

BARROWS, J. Both parties claim the premises here demanded, under conveyances from different levying creditors of Elisha Brown.

The demandant insists that his title originates with and dates from an attachment of Brown's real estate which Samuel F. Morse & Co. caused to be made Dec. 15, 1855, upon a writ on which final judgment in their favor was rendered at the October term, 1862, and followed by a seasonable levy.

As the tenant claims under levies made subsequent to this attachment, though prior to the levy under it, its validity becomes a matter of importance in considering the plaintiff's title. Of the various objections alleged against it,—some of them plainly hypercritical and untenable,—one only need be considered.

The officer is commanded in the writ to attach Brown's goods or estate to the value of $500, and the *ad damnum* is fixed at that sum; but the case stood continued for judgment for five or six years, and when judgment was finally rendered, it was for a sum exceeding $530, debt or damage, besides costs of suit.

Now the lien created by the attachment upon the debtor's property could not exceed the sum which the officer was commanded in his precept to attach; the officer's return does not profess to go beyond it, and would have been void for the excess if it had. The Morse levy was made for the whole sum for which judgment was rendered, with costs of levy, thus exceeding the amount of Brown's property which the officer was directed to attach, and did attach, by $77.

As the judgment-creditor confounded, in his judgment and levy, a claim for which he had no lien by attachment with one for which

he might have had such lien, the lien fails altogether, and the plaintiff's title must be deemed to have originated with the levy only, and cannot relate back to the date of the attachment. The difficulty was curable only by a remission, on the part of Morse & Co., of so much of their claim as exceeded $500, and by their taking judgment and levying their execution for no more than the officer had attached.

For obvious reasons, an amendment increasing the *ad damnum* would have dissolved the attachment. The creditor is placed in no better position by persisting in taking judgment and levying his execution for the excess.

Was the levy, under which the plaintiff claims, properly made? The only objection specially alleged against it by the tenant's watchful counsel is, that it describes Brown's interest as an undivided fifth part of the estate, when, if the demandant's view of the title be correct, the debtor's interest was in fact about nineteen-twentieths. R. S., c. 76, § 7, providing that "the whole or a part of an estate held in joint tenancy or in common, may be taken and held in common, but the whole estate must be described, and the share of it owned by the debtor must be stated," is cited, and it is contended that a misstatement of the amount of the debtor's interest is fatal to the levy. But the same requirement as to stating the debtor's share or interest is found in c. 94, § 11, of the Revised Statutes of 1841, and this identical objection was made and considered in *Rawson* v. *Clark*, 38 Maine, 223, and held insufficient to invalidate the levy for reasons which are so well set forth there, that it is unnecessary to reiterate them here. The case is not like that of the levy in *Rawson* v. *Lowell*, 34 Maine, 201, a levy upon four-fifths of the debtor's interest in common, omitting any statement of what the share owned by the debtor was. That left the amount of the debtor's property taken to satisfy the execution altogether uncertain. It might be more, it might be less, according to the share in the whole which he was found to own. But here the levy is upon one-fifth of the whole, and of that fifth the debtor is stated to be the owner. It is a sufficient compliance with the statute re-

quirement, even if it should appear that the debtor in fact owned more than a fifth. There is no uncertainty here as to what the levy covered. The amount of the debtor's interest which is taken is definitely stated; it is not a fraction of an uncertain fraction; all that is designed to be compassed by requiring the share owned by the debtor to be stated is accomplished, and, as remarked by the court in *Howe* v. *Wildes*, 34 Maine, 574, "the construction contended for by the tenant would subject creditors to unreasonable hazard and liability to loss."

Nor do we think that the levy is liable to be defeated by the fact that Morse & Co. took a judgment for debt or damage exceeding the *ad damnum* in their writ.

Admitting that it is incumbent upon the demandant claiming under a levy to show a valid judgment, and that the tenant is in such a position as to entitle him to question and impeach the judgment (as to which, however, see *Woodman* v. *Smith*, 37 Maine, 21), still we find here a judgment rendered, by a court having jurisdiction of the parties and the subject-matter, upon process duly served on the defendant, Elisha Brown, and the error is not of such a description as could, at any time, under our statutes (R. S., c. 82, § 10), have been made available to reverse the judgment; for the persons and case can be rightly understood, and the defect might have been amended, though, as we have before seen, an amendment would have been fatal to the plaintiff's attachment. Moreover, the time within which a writ of error might have been brought to reverse it, had there been good cause, has elapsed, and the judgment of Morse & Co. must be deemed valid and binding, and the levy effectual to give the levying creditor (and through him, the demandant) such title as Elisha Brown had at the date of it.

We come, then, to the consideration of the matters set up in defense.

Of the seven levies, under which the tenant claims title in himself, five were made Nov. 21, 1856, as upon land held by the debtor, Brown, in fee-simple and in severalty, and no reason is assigned in either of them for levying upon an undivided share instead of

making the levy upon a portion of the property by metes and bounds. It is essential to the validity of such a levy, under c. 94, § 13, R. S. of 1841, that it should appear therein that the premises to be levied on could not be divided without damage to the whole. *Merrill* v. *Burbank*, 23 Maine, 538; *Mansfield* v. *Jack*, 24 Maine, 98.

The omission must be held fatal to these five levies; and as they cover $\frac{9}{2}\frac{2}{2}\frac{8}{6}\frac{}{5}$ of the whole estate, it is plain that the one-fifth levied on by the demandant's grantor was left open to his subsequent levy. But the levy upon Hammond's execution against Brown and others, though not defective in this particular, seems to be identical in phraseology, so far as the statement of notification to the particular debtor, whose land was seized, and choice of an appraiser by him is concerned, with the levy in *Harriman* v. *Cummings*, 45 Maine, 351, where it was held that it must appear with certainty that the debtor, whose estate was taken, selected one of the appraisers, or was notified to choose one and neglected, or the levy will be void. That decision was followed in *Boynton* v. *Grant*, 52 Maine, 220, and must be deemed conclusive against the validity of Hammond's levy.

Apparently, the only valid levy presented by the tenant is that of Sidelinger upon $\frac{1}{2}\frac{2}{2}\frac{}{6}\frac{}{5}$ of the property, and that is offered in evidence by the demandant to justify the course taken by Morse & Co., under whom he claims, in levying as upon an estate held by Brown in common with others.

Indeed, the able counsel for the tenant does not undertake in argument to sustain those levies, but confines himself to attacking the attachment and levy under which the demandant makes his title, and to claiming that the title, if not in the tenants, is in one Jackson, and not in the demandant, and that Jackson's title is fatal to the maintenance of the suit.

As, of the two parties here contending, the demandant has shown the better title, this last position remains to be considered.

The tenant offers in evidence a quitclaim deed of the Owl's Head Stand, including the demanded premises, dated October 12,

and recorded Oct. 16, 1855, from Elisha Brown, the debtor, to Isaac Tolman, 3d, purporting to convey in consideration of $10,000, "all my (Brown's) right, title, and interest in and to" the same, "containing eleven acres," etc.; also a quitclaim deed from Isaac Tolman, 3d, to Joseph Jackson, dated Dec. 10, 1858, and recorded March 12, 1859, purporting to convey in consideration of $600, "all my (Tolman's) right, title, and interest in and to a certain lot" of land in South Thomaston, which embraced the Owl's Head Stand, and another parcel adjoining it, which appears to have been conveyed by Brown to Tolman, Oct. 12, 1855, in consideration of $1300, by another deed, and thereafterwards mortgaged June 11, 1858, by Tolman to Jackson, for about $550. The mortgage, however, was upon the Daniel Emery lot adjoining the Owl's Head Stand, and does not extend to any part of the premises here in controversy.

Hereupon the tenant contends, that if he was not the owner of the premises by virtue of his levies at the time of the levy under which the demandant claims, Jackson was the owner of all Brown's estate in them by virtue of these conveyances. If it is competent for the tenant to set up this title in Jackson, under whom he does not claim, and to introduce these deeds, which the demandant denies, the demandant presents, to rebut it, the uncontradicted testimony of Brown, the debtor, by which it appears that he made the quitclaim deed of the Owl's Head Stand to Tolman, who was in his employ at the time, for the purpose of having Tolman hold it in trust for him, so as to enable him to control it and prevent any one of his creditors from attaching it, to the exclusion of the rest; that he told Tolman the object when he proposed to make the conveyance to him, and that Tolman did not then or ever pay him anything for the property, or ever to his knowledge assert any right, title, or interest in it, and that he (Brown) continued to occupy and use the property until March, 1857.

The tenant does not claim under these deeds to Tolman and Jackson, but he proposes to make use of them to defeat the plaintiff's suit, and thus retain the present possession of the premises

and the power to litigate the title with any one who may assert a claim under these deeds which he sets up against this demandant. One is led to inquire how far and to what just or legitimate end can this line of defense be pursued. With us the form of the pleadings and the character of the issue to be tried, and the burden imposed upon each of the litigating parties, respectively, to entitle him to prevail, are all regulated by statute.

The first ten sections of c. 104, R. S. of 1857, furnish the formula by which most of these questions are to be solved. Selecting those provisions which seem applicable to the questions we are now considering, we find: that by § 2, the demandant is required to declare on his own seisin within twenty years prior to the date of his writ, and allege disseisin by the tenant; by § 4, that "he need not prove an actual entry under his title, but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seisin;" by § 6, that every person alleged to be in possession of the premises demanded, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; that the defendant may plead in abatement (or by brief statement filed within the time allowed for pleas in abatement, unless the time is extended by leave of court), but not in bar, that he is not tenant of the freehold, and disclaim such portion of the premises as he does not assert a title to in himself; and by § 8, that in a trial upon the general issue, 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 present case, the brief statement of title in Joseph Jackson, filed by the tenant, with the general issue, was not filed within the time allowed for pleas in abatement, or within any extension of the time. It was not designed to have the effect of a special non-tenure, and put the demandant to proof of an ouster by the tenant. The tenant asserts his own title in the premises, and Jackson's is presented only in the alternative, if his own fails. The only pur-

pose for which the evidence of it can be received is to rebut the demandant's proof of seisin by showing that at the date of the levy, under which demandant claims, the execution debtor had no title. For, as we have seen, if the demandant establishes his seisin within twenty years, as alleged, and his right of entry, "he shall recover the premises unless the tenant proves a better title in himself."

In *Shapleigh* v. *Pillsbury*, 1 Maine, 290, the court speak of it as a common principle, well known and familiar, that when the demandant has established his title and seisin within the time alleged, the tenant shall not be permitted to show title in a third person unless he can derive title from such person to himself by legal conveyance or operation of law.

We are not now to inquire whether, if this controversy were between the demandant and some party in possession claiming title under Joseph Jackson, the title of Jackson's grantee would prove to be a better title than that of the demandant, but whether the existence of Jackson's deed of itself disproves the plaintiff's allegation of seisin.

In *Stanley* v. *Perley*, 5 Maine, 369, it was settled that it is competent for the tenant, under the general issue, to disprove the seisin of the demandant, as alleged in the writ, by showing that the demandant's grantor had previously conveyed the title to a third person, even though the tenant does not claim under such grantee. This decision rests upon sound principles and has never been impugned. It was followed in *Chaplin* v. *Barker*, 53 Maine, 275.

But the case at bar differs from these two in one very important particular. In neither of those cases was it even attempted to be shown that the prior conveyance by the execution debtor was tainted with fraud, while here the proof is plenary and uncontradicted that the conveyance from Brown to Tolman, whose title Jackson holds, was made for the express purpose of delaying and defrauding creditors, of whom this demandant's grantor was one.

By virtue of R. S., c. 76, § 13, a levy may be made upon land fraudulently conveyed by a debtor, and the officer shall deliver to the creditor a momentary seisin, which shall be sufficient to enable him to maintain an action for its recovery in his own name.

If, then, the title had stood in Tolman's name at the date of the demandant's levy, it is perfectly clear that Brown's deed to Tolman could not have availed to disprove the seisin of the demandant; for, by the express provision of the statute, the momentary seisin given by the officer will suffice to enable the creditor to put the party in possession upon proof of a better title in himself.

Does the quitclaim deed from Tolman to Jackson, bearing date prior to the demandant's levy, make any difference?

Under the statute provision just referred to, we must hold that where land has been fraudulently conveyed by a debtor, a further conveyance by the fraudulent grantee will not so completely purge the fraud as to prevent the levying creditor from acquiring the momentary seisin necessary to enable him to try the title with the party in possession; otherwise two successive conveyances, both of which may be fraudulent and designed to secure the property for the debtor's benefit, would effectually place it beyond the creditor's reach, in contravention of the spirit and intent of the statute. We do not say that a conveyance by the fraudulent grantee to a *bona fide* purchaser for value without notice of the fraud would not give the latter a better title than the creditor would derive from a subsequent levy, but only that the momentary seisin which the officer gives the creditor will enable him to maintain his action, unless the party in possession shows a better title in himself; in fine, that proof of such conveyances does not rebut the evidence of the levying creditor's seisin. In the present case, as the tenant does not claim under these conveyances, but under his own levies, it is not, perhaps, necessary to take any further notice of them.

But it may, perhaps, be worthy of remark, that the deed from Tolman to Jackson is a mere quitclaim of his (Tolman's) right, title, and interest, made upon a nominal consideration which contrasts strangely with those named in the two deeds from Brown to Tolman, and that there is no evidence that either Tolman or Jackson ever had any possession under these conveyances of the Owl's Head Stand, which would seem to have passed from the possession of Brown into that of the levying creditors. Tolman's deed to

Jackson does not purport to convey the land, but only the right, title, and interest of the grantor in it, and that (upon the testimony here presented) was the right, title, and interest of a fraudulent grantee. If the tenant held Jackson's title as well as his own, it would certainly be incumbent on him at least to show a purchase by Jackson in good faith, for value without notice, when the first link in the chain is invalidated by fraud. In *Oliver* v. *Pratt*, 3 Howard, 333, Judge Story says, "it is difficult to conceive how a grantee, under a quitclaim deed, can claim protection as a *bona fide* purchaser without notice for a valuable consideration, against any title paramount to that of the grantor, which attaches itself, as an unextinguished trust, to the land."

It will be time enough, however, to discuss the validity of Jackson's title when it is presented by a party claiming under it. For reasons before adverted to, it cannot in any view of it be considered as rebutting the demandant's evidence of seisin; and that being established, the demandant would be entitled to recover unless the tenant can show a better title in himself.

The demandant's seisin as alleged, and his right of entry being made to appear, the question then is, which of the two litigating parties has the better title,—not whether some third person, who presents no claim, might prevail against either or both of them.

According to the stipulations in the report,

Case to stand for trial.

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

WILLIAM D. CROOKER & another, in equity, *vs.* WILLIAM M. ROGERS & others.

Equity—pleading and practice in.

A suit in equity cannot be maintained by one who has assigned all his interest in the subject-matter of the suit.

The plaintiff's want of equitable interest need not be taken advantage of by demurrer, but the objection may be taken at the hearing on the merits.

When the sole surviving defendant in a bill in equity has no interest in the subject-matter of the suit, the bill will be dismissed.

A bill in equity cannot be maintained when its only object is to recover a sum of money alleged to be in the hands of the defendant, inasmuch as the plaintiff has a plain, adequate, and complete remedy at law therefor, in an action for money had and received.

BILL IN EQUITY, heard on bill, answer, and proof.

The original bill, filed Nov. 25, 1864, brought in the name of William D. Crooker, alone, against William M. Rogers and William Rogers jointly, alleged, substantially,

That on June 12, 1855, W. M. Rogers loaned to W. D. Crooker $12,000, and, on same day, Crooker secured him by bill of sale of one-half of the ship Revenue; that the bill, though absolute in form, was intended solely to secure W. M. Rogers for the money loaned; that Rogers agreed to reconvey on payment of the loan and interest, and for further protection, and not to waive, abrogate, or amend the former agreement, on March 26, 1856, Rogers gave the plaintiff, W. D. Crooker, a written memorandum therein promising to reconvey in case the plaintiff caused to be paid the debt incurred by W. M. Rogers for the money loaned, by the aid of the earnings of said one-half of said ship.

That W. M. Rogers mortgaged said one-half of the ship to Lombard & Co., of Boston, to secure them against their liability by reason of their acceptance of the drafts Rogers drew upon them, whereupon they accepted his drafts for $15,000, and he thereby procured the money so loaned.

That the drafts were renewed once, and a portion of them twice; that the plaintiff furnished W. M. Rogers $8000 to be used in part-payment of the drafts; that after the conveyance of said one-half of the ship, it earned large sums for freights, Rogers receiving one-half thereof, which ought to have been applied to the extinguishment of the loan; that Rogers, with the money furnished by the plaintiff and the earnings, procured a discharge of the mortgage to Lombard & Co., and thereafterwards Rogers sold and conveyed one-half of the ship to strangers.

That long before the sale by Rogers, he had received more than enough from the plaintiffs and earnings of one-half of the ship to pay the debt, and after reimbursement and before sale, the plaintiff requested Rogers to reconvey, but he refused.

That Rogers received, from freights and sale, a large sum of money above that required to pay so much of said debt as was not paid by and with the $8000 furnished by the plaintiff, and that he ought to account for said one-half of the ship.

Prayer, for answer and for auditor to state account, and for a decree of payment of the sum found due.

William M. Rogers deceased Dec. 3, 1864.

After the answer of William Rogers, and of William Rogers, administrator of the estate of W. M. Rogers, viz., on Oct. 24, 1866, the original plaintiff, W. D. Crooker, obtained leave to join William W. Crooker, as a co-plaintiff, and the two plaintiffs joined in an amended bill, substantially alleging, upon the knowledge of W. D. Crooker, and upon the information and belief of W. W. Crooker,

That about June 12, 1855, by virtue of an agreement made with W. D. Crooker, William M. Rogers & Son procured of Lombard & Co. about $12,000 for the use of W. D. Crooker, upon the credit of the firm of the defendants, further secured by a mortgage of one-half of ship Revenue; that W. D. Crooker, by his bill of sale of June 12, 1855, absolute in form, but intended only as security to W. M. Rogers, conveyed one-half of said ship to him; that he agreed that when the money and interest were repaid he would

reconvey the one-half of the ship, and on March 26, 1856, he gave W. D. Crooker a written memorandum to the effect that he would reconvey the one-half of the ship, provided W. D. Crooker should cause the liabilities of W. M. Rogers & Son to Lombard & Co. to be paid and released, and that the earnings of said one-half said ship should be applied toward the liquidation of the debt.

That W. M. Rogers conveyed said one-half said ship to Lombard & Co., to secure them for their liability of the proposed acceptance of the defendants' drafts upon Lombard & Co., whereupon Lombard & Co. did accept drafts for $15,000, thereby procuring the money for the use of W. D. Crooker.

That on Nov. 24, 1867, W. D. Crooker sold and assigned to John Crooker and Henry W. Owen said written agreement, and all his rights, titles, and interests by virtue of the same, and particularly all right, title, and interest in the ship Revenue, and all freight earned and thereafter to become due and payable, and all claim and demand against W. M. Rogers, to the use of them and their assigns; that on Nov. 13, 1865, by virtue of a contract entered into between John Crooker and Henry W. Owen on the one part; William W. Crooker, with the concurrence and assent of W. D. Crooker, and by his procurement made before the original bill of complaint of W. D. Crooker, of the other part, John Crooker and Owen having no further interest in the same, transferred and assigned all their right, title, and interest in the premises, and W. W. Crooker received said assignment to his own certain uses, a more particular statement whereof is unnecessary.

That they believe that William Rogers was a party in interest to the same, and that William D. Crooker, either upon his knowledge or information and belief, and W. W. Crooker, upon information and belief, repeat all the residue of the several allegations contained in the original bill, and the same prayers; and that, so far as the changed state of the title may require, they prayed for a decree in favor of W. W. Crooker.

Adams, for the plaintiffs.

Tallman & Larrabee, for the defendants.

WALTON, J. There are several objections to the maintenance of this bill. In the first place the suit was brought in the name of a party who had ceased to have any interest in it. The suit was commenced in the name of William D. Crooker, alone. The proofs show that long before the suit was commenced, he had sold and assigned all his interest in the subject-matter of it to John Crooker and Henry W. Owen. The assignment to them was Nov. 24, 1857, and the original bill is dated Nov. 25, 1864. William D. Crooker had, therefore, ceased to have any interest in the subject-matter of the litigation, for more than seven years before this suit was commenced. Within the rule established in *Haskell* v. *Hilton*, 30 Maine, 419, the bill should have been dismissed for that reason. The principle established in the above case is, that after the assignment of all interest in a chose in action, upon which a claim in equity is founded, the bill must be brought in the name of the assignee; and that it is not necessary that the assignor be a party; and that a total want of interest in the plaintiff, in a suit in equity, is fatal to the bill; and that the objection may be taken by demurrer or at the hearing.

Another objection, to the maintenance of the bill, is that William Rogers, the only surviving defendant, was improperly joined in the suit. The proofs fail to show that he had any such connection with the transaction which forms the subject-matter of this suit, as would justify making him a party defendant.

Another objection to the maintenance of the bill is, that if the plaintiffs have any remedy,—that is, any right to the money in the hands of William M. Rogers,—they have a plain, adequate, and complete remedy at law, in an action for money had and received.

The case in principle is not unlike that of *Russ* v. *Wilson*, 22 Maine, 207. The object in that case, as in this, was to recover a sum of money, which it was averred was in the hands of the defendant, and which the plaintiff claimed, in equity and good conscience, belonged to him, and for an account. The plaintiff claimed that his remedy was in equity, because the case was one of trust. But the court answered that it is not every case of trust that is

cognizable in equity; that trusts embrace a wide field, and that in most cases, a remedy may be sought by a suit at law, and much more appropriately than in equity; that proceedings at law are precise and direct to the object in view, and are simple and expeditious; while the proceedings in equity are latitudinary, multifarious, dilatory, and often vexatious; that various pretenses are often resorted to in order to uphold jurisdiction in equity, but that such pretenses should not be listened to with too much facility; that to yield too inconsiderately to such pretenses, would, in the end, pervert justice, and render legal proceedings deservedly odious. We think these remarks apply with stronger force to the case now under consideration, than to the one then before the court. This is a case where the plaintiff's rights were secured by a written contract. If the defendant violated the contract, the plaintiff's remedy was by a suit at law to recover his damages; or, if the defendants, or either of them, had in their hands money, which in equity and good conscience belonged to the plaintiff, an action for money had and received would have furnished him with an ample, complete, and expeditious remedy. The proofs show no such case of trust, no such case requiring an account or discovery, as to justify the bringing of a bill in equity. *Law* v. *Thorndike*, 20 Pick, 317.

Bill dismissed with costs.

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

Alphonso Patten *vs.* City of Bangor.

Bounty—construction of resolve to pay. Mustering officers—authority of.

Where a resolve of a city government provided, "That for the purpose of promoting enlistments to fill the city's quota, under" a specified call of the president, a certain bounty should "be paid to each man who has volunteered, or shall volunteer,"... "the mayor to draw his order on the city treasurer" therefor, "on receiving satisfactory evidence that such man has volunteered, and been accepted and mustered into the military service as a part of said quota," proof that the person claiming the bounty was duly accepted and credited upon that quota by the proper authority is essential to a recovery.

The memorandum, "credited 4th district, Penobscot county, 3d ward, Bangor city, Me.," made upon the "muster and descriptive roll of the detachment," to which he belonged, by the mustering officer in Florida, where the volunteer reënlisted, did not fix the volunteer upon that quota.

On report.

Action to recover a bounty provided in the following resolve, passed by the municipal government of the city of Bangor, Feb. 7, 1865:

That for the purpose of promoting enlistments to fill this city's quota under the call of the president of the United States, of Dec. 19, 1864, for three hundred thousand men for the military and naval service of the United States, the following sums be paid to each man who has volunteered, or who shall volunteer, or to each enrolled man who has procured, or shall procure a substitute for himself, namely: To each person (except such as have enlisted in, or been assigned to the "Coast Guard"), who volunteers or procures a substitute for the period of one year, three hundred dollars; for the period of two years three hundred and fifty dollars; for the period of three years four hundred dollars.

The mayor to draw his order on the city treasurer for said sums respectively, on receiving satisfactory evidence that such man has volunteered, or such enrolled man has procured a substitute as aforesaid, and that such volunteer or substitute has been accepted

and mustered into the military or naval service of the United States, as a part of said quota.

The plaintiff put in his original "muster and descriptive roll," purporting to be a "muster and descriptive roll of a detachment of United States recruits mustered into service Jan. 17, 1865, forwarded by Lieutenant John Hamilton, for the 82d Regiment of United States Colored Infantry, stationed at Barrancas, Florida, pursuant to orders from the war department, dated," etc. Under the head of "Remarks" on this roll, was the following entry: "Credited 4th district, Penobscot county, 3d ward Bangor city, Me. Discharged from 2d Maine Cavalry, by special order No. 424, extr., 41, from the war department, dated Nov. 30, 1864, to enlist in the 82d United States Colored Infantry, with the view of being appointed hospital steward of the latter regiment." The muster roll was duly certified and signed by the mustering officer at New Orleans, Louisiana.

It appeared from testimony in behalf of the plaintiff, that his father, at his request, called upon the mayor of Bangor in February, 1865, informed him of the plaintiff's enlistment and assignment to the quota of Bangor, and requested the mayor to pay over the bounty on plaintiff's order, which the mayor declined to do until he should receive official notice of the enlistment and crediting of the plaintiff to the quota of the city; that the plaintiff reënlisted in consequence of the bounty promised by the defendant.

It appeared, on the part of the defendant, by documentary evidence from the adjutant-general's office, showing that the plaintiff was not credited on the defendant's quota.

The mayor testified, substantially, that he declined to draw order for plaintiff's bounty, because of want of evidence of enlistment and credit to defendant's quota; that he received from the offices of adjutant-general and provost-marshal, of Maine, official notice from day to day of the credits to defendant's quota; that no man could be credited on a quota without their order,—one of them having charge of one kind of enlistment, and the other of another.

Elijah Low, called by the defendant, testified, substantially, that

he was provost-marshal for the 4th district during the rebellion; that he received a letter from the plaintiff, but never felt authorized to credit a name to a town or sub-district until he received orders from the provost-marshal of the State, but had nothing to do with the adjutant-general of the State; that witness had no authority to put plaintiff's name upon the quota of Bangor, according to the usages of the office, having had no evidence other than that contained in his letter. On cross-examination, he testified that reënlisted men, who had served out their time, could enlist on whatever quota they pleased; that witness had no authority to place a man on a quota or change one; that the enlisted man might indicate where he would like to go, witness would return him to provost-marshal general of Maine; that when the latter approved it he would notify witness, and the credit would be given accordingly.

The presiding judge directed a verdict, *pro forma*, for the plaintiff. If the direction was not right, the verdict to be set aside and a nonsuit entered.

Plaisted & Clark, for the plaintiff, cited *Hart* v. *Holden*, 55 Maine, 575; *Johnson* v. *Newton*, 40 Verm. 9; *Gale* v. *Jamaica*, 39 Verm. 615; *Hill* v. *Eden*, 41 Verm. 202; *Steinway* v. *Eden*, 41 Verm. 187.

A. L. Simpson, city solicitor, and *J. A. Peters*, for the defendant.

Dickerson, J. The resolve of the city council of Bangor, under which the plaintiff claims bounty, provided for the payment of bounty to each man who had volunteered, or should volunteer, or to each enrolled man who had procured or should procure a substitute on the city's quota, under the call of the president, of Dec. 19, 1864. The declared purpose of that resolve was "to fill the city's quota under that call." No man could be available for this purpose until he had been duly accepted, and credited upon that quota. This was a condition precedent to a valid claim for bounty.

The burden is upon the plaintiff to show that he was thus accepted and credited. He was discharged from the 2d Maine Cavalry, serving in the department of the Gulf, reënlisted, and was mus-

tered into the military service of the United States Jan. 17, 1865, as appears by the muster and descriptive roll of the detachment to which he belonged.

Under the head of "Remarks" upon that roll was the following memorandum in writing, "credited 4th district, Penobscot county, 3d ward Bangor city, Me." This memorandum, made by the mustering-in officer more than two thousand miles distant from Bangor, did not, *ipso facto*, put the plaintiff upon Bangor's quota. It was not competent for that officer to fix the plaintiff upon that quota. Nor could the plaintiff place himself there without the approval of the proper authority. This memorandum was evidence of the plaintiff's election to go upon the quota of Bangor, nothing more. In order to make this election effectual, it must have been officially approved by the proper officer. No such official sanction was ever given. The quota of Bangor was filled without the plaintiff, and he cannot be upon a quota thus filled.

The construction of the resolve contended for by the counsel for the plaintiff would place men upon the quota of Bangor who had never been accepted as such by the proper authority, and render the city liable to pay an indefinite number of bounties under a vote to pay a limited number. Nor, under such construction, would the city authorities know when its quota was full. The plaintiff was never accepted upon the quota of Bangor, designated in the resolve in question, and is not entitled to the bounty claimed.

The plaintiff never having been upon the defendant's quota, could not have given the mayor "satisfactory evidence" that he was so credited. It, therefore, becomes unnecessary to consider the question of notice to the mayor.

The cases cited by the counsel for the plaintiff are so widely variant in their facts, from the case at bar, that they furnish no rule for construing the resolve under consideration.

Verdict set aside.
Plaintiff nonsuit.

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

JAMES MCCANN and wife *vs.* CITY OF BANGOR.

User—sidewalk may be proved by. Way established by dedication and acceptance.

The principles of R. S. of 1857, c. 18, § 62, providing that the repair of a way within six years before the cause of action accrued, estops the town to deny the location, apply to a sidewalk.

When there is a long-continued user of a highway which the town or city has repaired, or there is a dedication made and accepted, the town or city is liable for injuries received solely from the defects of the way.

ON EXCEPTIONS.

CASE to recover damages for an alleged injury received by the wife, by reason of a defect in Front street, in Bangor, in November, 1868.

It was admitted that Front street was legally laid out and established, and the city was bound to keep it in repair.

James McCann (plaintiff) testified,

That he had occupied his store on the west side of Front street seventeen years; that there had been a common thoroughfare, for travelers on foot, all the time, leading from Union street down toward May street, on the west side of Front street, by his store and other stores in that vicinity; that the European & North American Railway Company, in 1868, dug down the west side of Front street, near the stores, for the purpose of laying their track, leaving a bank about five feet high, and made a convenient pathway across the bank in the line of the thoroughfare, where it had been cut off by the digging; that after the track was laid, and before the injury, the city lowered the bank and left the pathway in a bad condition. It was on the pathway his wife fell and broke her arm. The thoroughfare was within the limits of Front street.

There was no evidence that the city had laid out and established the thoroughfare, but there was testimony, on the part of the defendant, that the city had leveled and widened the pathway

after the accident, on account of the ice that might make in the winter.

The street commissioner testified that he passed over this walk before the accident, but could not say how often.

The presiding judge instructed the jury,

That a public road is made for travelers, whether on foot, in a carriage, or on horseback. Outside of the public road, a traveler travels at his own risk and responsibility. Now the city is not bound, while it is bound to make roads safe and convenient for travelers passing to and fro in the street, to make a sidewalk for travelers. Making sidewalks is a matter of discretion with the city authorities. It may make them or not. But making the sidewalk, it is bound just so much to keep it in good repair, and safe for travelers, as any other portion of the street. The question is here, whether there was an established sidewalk created and made by the city, and used by citizens. If so, it was the duty of the city to keep it in repair. If there was not, then it was under no obligation, for it is a matter for the city authorities, as I said before, to determine whether there shall be a sidewalk or not. But if there be one, it is bound to keep it in repair. If it is bound to keep it in repair, it is responsible for its want of repair. If there is not one by authority, it is not bound so to do.

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

A. Sanborn, for the plaintiffs.

C. P. Stetson, for the defendant.

APPLETON, C. J. A highway may be proved by long-continued user. A sidewalk may be shown to exist in the same way. The repairing of a way or bridge within six years before the cause of action accrued, estops the town to deny the location of the way or bridge on which the injury occurred. R. S. 1857, c. 18, § 62. The same principle applies to a sidewalk as to the way.

The instruction was too restricted. It limits the liability of the

town, for defects in the sidewalk, to the special case, when it is created and made by the city. But when there is a long-continued user of a highway which the town or city has repaired, or there is a dedication made and accepted, the town or city is liable for injuries arising from its defects, when the person injured is without fault.

Exceptions sustained.

KENT, WALTON, DANFORTH, and TAPLEY, JJ., concurred. CUTTING, J., did not concur.

FREDERICK A. BARTLETT *vs.* ALBERT K. LEWIS.

Practice—motions for new trials—when to be filed—what should be made to appear.

By the 17th rule of court, a motion for a new trial "must be filed within two days after verdict, unless the court for good cause, by special order, enlarge the time."

By R. S., c. 82, § 33, when a motion is made to have a verdict set aside as being against law or evidence, a report of the whole evidence shall be signed by the presiding judge. A report, certified by the counsel to be a correct report of all the material evidence in the case, is not sufficient.

A motion founded on any alleged cause not shown by the evidence reported, accompanied by depositions annexed, and not by testimony "heard and reported by the judge," is not in compliance with the second clause of § 33.

The verdict and the nature and grounds of the action and of the defense should appear in a motion to have a verdict set aside as being against law or evidence.

ON REPORT.

An action to recover damages done to a horse hired by the defendant of the plaintiff.

The following motion, signed by the "defendant's attorney," appears to have been made at the April term, 1870: "And now said defendant, within three days after verdict, prays the court that the verdict in the above case be set aside, and a new trial granted, because the verdict is against the evidence, the weight of evidence, and the law."

Then follows twelve printed pages of testimony, to which is appended a certificate of the following tenor, signed by counsel for both parties:

"The foregoing is agreed to as a correct report of all the material evidence in the case."

Following the foregoing is this motion made by the defendant's attorney:

"And now said defendant comes into court on the 19th day of the term, after verdict and before judgment, and moves further for a new trial, on the ground of newly discovered evidence which is material, and said evidence is as follows: Here follow several depositions. The case as printed contains no certificate, except the attestation of the clerk."

A. Sanborn, for the plaintiff.

J. F. Robinson, for the defendant.

WALTON, J. In matters of practice, there is a growing disregard of the rules of court, and also of express statutory provisions, which needs correction.

The 17th rule of this court requires motions for new trials to be filed within two days after the verdict, unless the court for good cause, by special order, enlarges the time. Whether the motion in this case was thus filed does not appear. It is stated in the motion that it was made within three days after verdict, but it is nowhere stated that it was either made or filed within two days, as the rules of court require.

Again, the R. S. of 1857, c. 82, § 33, provide that when a motion is made in the supreme judicial court to have a verdict set aside as being against law or evidence, a report of the whole evidence, drawn up, shall be signed by the presiding judge. In this case the counsel have signed what they call a correct report of all the material evidence in the case; but there is no report of either the whole evidence, or of the material portions of it, signed by the presiding judge.

Again, the same section provides that when the motion is founded on any alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion shall be heard and reported by the judge. Such a motion is made in this case, but no such report of the judge accompanies it. There are several depositions annexed to the motion, but no testimony appears to have been heard or reported by the judge, as the statute requires.

Again, when a motion is made to have a verdict set aside as being against law or evidence, the court ought in some way to be informed what the verdict is, and also the nature and grounds of the action, and the nature and grounds of the defense; otherwise, how can the court tell whether the evidence supports the action or not, or whether the verdict is against law or evidence or not? We infer that the verdict in this case is against the defendant, for the reason that he is trying to have it set aside. But the record does not state, and we have no means of knowing what amount, if anything, the plaintiff recovered, nor the form of the action, whether contract or tort, nor the grounds of defense.

Again, this case was entered upon the law docket at the June term, 1870. A written brief was then furnished the court by the plaintiff's counsel, and the defendant's counsel agreed to furnish one in ten days. It is now December 28th, and no argument has been furnished.

Under these circumstances, we think the defendant will have no just grounds of complaint if his motions are overruled.

Both motions overruled.

Judgment on the verdict.

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

Inhabitants of Oldtown *vs.* Inhabitants of Bangor.

Citizens of U. S.—children of citizens born out of U. S. Child of naturalized citizen, born out of U. S., takes derivative settlement of father upon coming into the State.

By virtue of the act of congress, approved Feb. 10, 1855, c. 71, a person born out of the jurisdiction of the United States is a citizen thereof, if, at the time of his birth, his father was a citizen of the United States.

If a naturalized citizen, after obtaining a legal settlement in a town in this State, removes to the province of New Brunswick, his child born there, upon coming into the State takes the settlement of his father, although the father does not return.

On facts agreed.

Action for supplies furnished by the plaintiff town to James Walker, as a pauper, who fell into distress in that town, June 22, 1868.

Seasonable notice and denial were given.

George Walker, father of the pauper, was born a British subject, in Ireland; came to Bangor in October, 1827, where he was naturalized in January, 1834; resided in Bangor, exercising the rights of a citizen, until July, 1841, when he moved with his family into the province of New Brunswick, where he went into business, and has ever since resided, exercising the rights of a citizen of that Province; on April 14, 1842, while George Walker was residing in and exercising the rights of a citizen of that Province, the pauper, the legitimate son of George Walker, was born; he resided with his father in the Province until the spring of 1858, when, being sixteen years of age, with the consent of his father, he went to Houlton, in this State, to learn a trade; in August, 1861, the pauper enlisted into the army of the United States as of Woodstock, N. B.; remained in the army until 1865; was married in Houlton in July, 1865; went into business in Woodstock, N. B.; thence he went with his wife and lived with his father, where he remained in

business a short time and then moved with his wife to Houlton and resided there till June 22, 1868, when, on his way to Lewiston for labor, he received an injury in the plaintiff town, fell into distress there, and received the aid sued for.

James Walker never resided in Bangor, and never gained a legal settlement in any town in this State in his own right, and he has never been naturalized under our naturalization laws.

If, upon these facts, James Walker had a legal settlement in Bangor, the defendants to be defaulted.

Sewall & Blanchard, for the plaintiffs.

A citizen of the United States, by becoming a citizen of another country, does not thereby cease to be a citizen of the United States. 3 Dall. 133; 7 Wheat. 548; 3 Pet. 161; Case of Martin Coszta.

The pauper, though born in a foreign government, is a citizen. 10 U. S. Stat. 604.

No person can by any act of his own, without the consent of his government, put off his allegiance and become an alien. *Shanks* v. *Dupont*, 3 Pet. 246.

Allegiance attaches at the time of birth, under circumstances in which the family owes allegiance, and is entitled to protection, and no act of the citizen can relieve him from it. *Calais* v. *Marshfield*, 30 Maine, 511.

Expatriation, and domicil under a foreign government, *animo manendi*, furnish no evidence of an intention to renounce allegiance, however long the residence is continued. *Ludlam* v. *Ludlam*, 26 N. Y. 356.

Counsel also elaborately argued, that even if James Walker was born an alien in a foreign jurisdiction, it would constitute no defense to this action, inasmuch as the pauper statute of this State makes no distinction between a citizen and an alien, citing *Landaff* v. *Atkinson*, 8 N. H. 535; *Townsend* v. *Billerica*, 10 Mass. 411; *Canton* v. *Bentley*, 11 Mass. 441; *Wilbraham* v. *Sturbridge*, 6 Cush. 61; *Payne* v. *Dunham*, 29 Ill. 125; *Knox* v. *Waldoboro*, 3 Greenl. 455; *Calais* v. *Marshfield*, 30 Maine, 520.

A. L. Simpson, city solicitor, for the defendants, cited *Lyndon* v. *Danville*, 28 Verm. 809; *Albany* v. *Derby*, 30 Verm. 718; *Westford* v. *Essex*, 31 Verm. 459; *Elmer* v. *Calais*, 33 Verm. 468; *Calais* v. *Marshfield*, 30 Maine, 511.

APPLETON, C. J. The father of the pauper was an alien, who had been naturalized in this State, and after his naturalization had acquired a settlement in Bangor. Subsequently to this the father removed to the Province of New Brunswick, where he has since resided and where the pauper was born.

The rights and privileges of citizenship, whether arising from birth or acquired by naturalization are the same. The father, when he removed, was a citizen of the United States, and remained so notwithstanding his absence from its jurisdiction. Though the pauper was born in New Brunswick, he is to be regarded as a citizen of this government by virtue of the act of congress, approved 10th February, 1855, c. 71, which provides "that persons heretofore born, or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be, at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be citizens of the United States." By the express provisions of this act the pauper is declared to be a citizen, and cannot be regarded as an alien.

By R. S., c. 24, § 2, "Settlements acquired under existing laws remain until new ones are acquired." The settlement of the father remained in the defendant city, notwithstanding his absence. Its liability for his support, in case of his falling into distress, would revive on his return.

By § 1, "legitimate children have the settlement of their father if he has any in the State." The pauper, being legitimate, has the settlement of his father. The fact that he was born without the jurisdiction of the State does not change the result. In *Townsend* v. *Billerica*, 10 Mass. 411, it was held, where A., having a settlement derived from his father, removed to New Hampshire and there had a son born, who afterwards came into this State and had

children, that these children had a derivative settlement from their grandfather. The court there held that even though the grandfather might have gained a settlement in New Hampshire, it would not operate to deprive him of his settlement gained in Massachusetts. In *Canton* v. *Bentley*, 11 Mass. 441, the pauper, whose settlement was in dispute, was born in Connecticut, but the father, before his removal, had acquired one in Massachusetts. It was decided that upon the son's coming into the latter State, he had a derivative settlement from his father. A person, who has acquired a settlement, retains it until another is gained, and transmits it to his children though born in another State. *West Cambridge* v. *Lexington*, 1 Pick. 505; *Landaff* v. *Atkinson*, 8 N. H. 532. If one, having a legal settlement in Vermont, remove to another of the United States and never returns, his children born there take the settlement of their father upon coming to Vermont. *Westford* v. *Essex*, 31 Verm. 459. It is immaterial whether the father returns or not, the children take his settlement derivatively. Nor can it be important in what jurisdiction they are born,—whether in that of one of the United States or of some foreign government. The same consequences must follow in either case, when the children are citizens and not aliens at the time of their birth.

Defendants defaulted.

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

PATRICK BRADLEY *vs.* ABBIE M. WILSON.

Deed—construction of. Boundary. Parol evidence.

If a deed of real estate describes one of the lines as ending at a point on one side of a street "opposite" a point on the other side, a straight line between the two points must cross the street at a right angle; and parol evidence is not admissible to show that a line ending at a different point was intended.

ON REPORT.

WRIT OF ENTRY for a triangular lot of land in Bangor, on the west side of Essex street, as delineated on the chalk.

The only question in the case was the true line of division between the parties arising under the construction of the deeds. The defendant's deed bounds his land on the south by the plaintiff's land, as conveyed to him by Fellows & Laughton.

The plaintiff claimed under a deed from Fellows & Laughton, dated March 13, 1868.

The defendant claimed under a deed from the same grantors to one Merrill, dated April 28, 1862, and a deed from Merrill to her, dated April 1, 1864.

The plaintiff's deed describes his northerly line (the line in question) as running from the acknowledged corner bound of another lot "S. 69° 10′ E., about 59½ rods to a point in the westerly line of said street, opposite the north-west corner of said Bradley's land, being lot C., lying on the easterly side of said street."

The course of Essex street is N. 12° 12′ W.

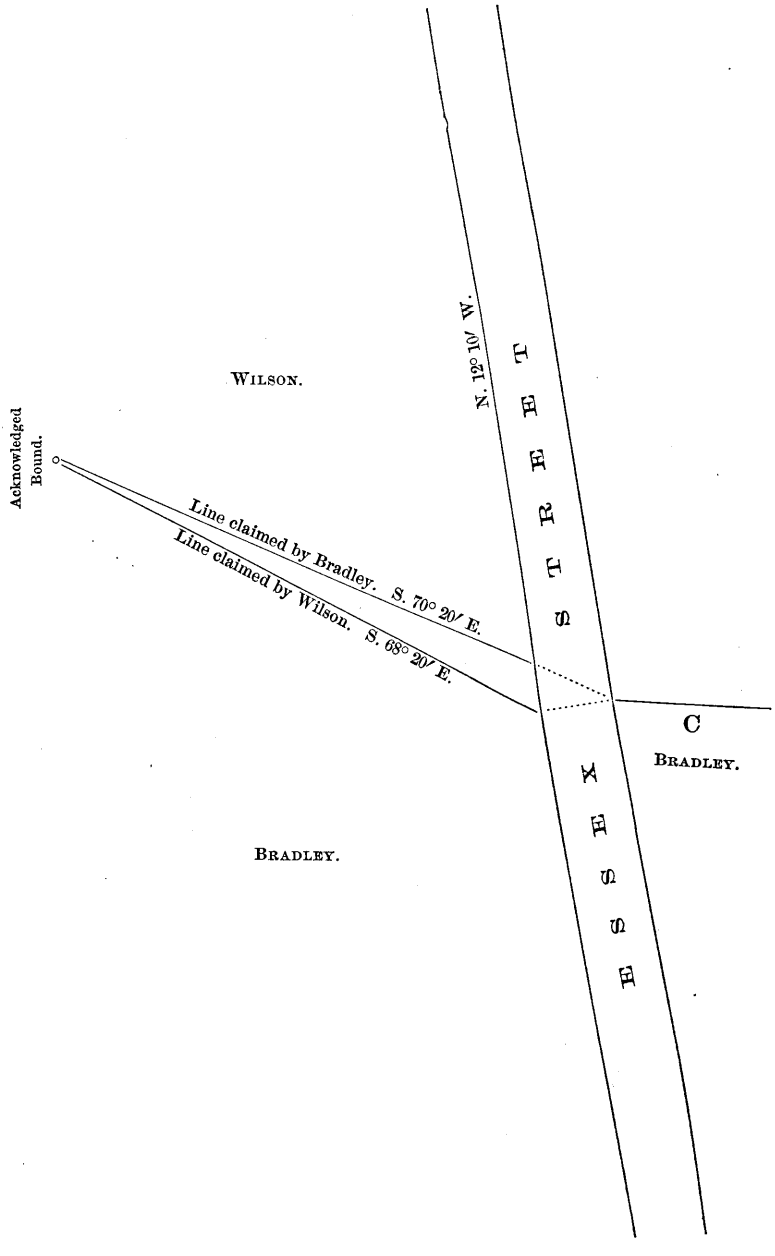
The plaintiff's line as claimed is S. 70° 20′ E.

The defendant's line as claimed is S. 67° 35′ E.

A straight line drawn from the acknowledged corner to the east side of the street to the north-west corner of said Bradley's lot C., will give the demanded premises to the plaintiff.

A straight line drawn from the acknowledged corner to a point in the westerly line of said street, directly across the street at a

Bradley *v.* Wilson.



right angle with the line of the street from the north-west corner of Bradley's lot C., will give the demanded premises to the defendant.

The court to render judgment on nonsuit or default, according to the legal rights of the parties, except as follows:

The plaintiff offered to prove by parol evidence that just prior to his deed to the plaintiff, the parties to his deed had the line in question run by a surveyor, and the deed was afterward written from his minutes of description, the line run being that claimed by the plaintiff, and the deed being written with the intention of describing that line. The defendant objected to the testimony. If the offered testimony was legally admissible, and in the opinion of the court affected the merits of the case as otherwise existing, then the case to stand for trial.

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

The points respectively claimed are both opposite the corner of C.,—the one at a right angle with the street, and the other at an angle slightly varying from a right angle.

The course accords with the plaintiff's claim more nearly than with the defendant's.

The objective point was the corner of C. The plaintiff owned lot C., on the east side of the street. There being no monument on the line short of the corner of C., the language "to a point opposite C." was merely descriptive of that corner. The parties designed to run in the most direct line from the monument left to the corner of C.; but going for it in a "bee-line," they found themselves opposed by the street, and supposing they could not put their monument on the other side, stopped at the point where the direct line would leave them on the opposite side.

By operation of the deeds, the plaintiff owned the street subject to the public easement. If there had been no street, the bound in the deed would have been made to strike the plaintiff's land at corner C., otherwise, as now, it would require two courses.

The plaintiff's land, taking it on both sides with the right to the street, has an angle or jog in it, if the defendant's theory be sound.

The words, "point . . . opposite," are not so much to control the direction of the line as to indicate that the line between the point of departure and corner will terminate on that side of the way.

The intention of the parties may be clearly deduced from their previous and contemporaneous conduct. They surveyed the line between the two points, wrote it out, and inserted it in the deed. *Stone* v. *Clark*, 1 Met. 378.

A. W. Paine, for the defendant.

WALTON, J. The word opposite, as defined in the dictionaries, means over against, standing in front, or facing. If an object on one side of a street is opposite an object on the other, a straight line running from one of the objects to the other will cross the street at a right angle. If a straight line, extending from one of the objects to the other, does not cross the street at a right angle, then the two objects, with reference to the street, could not be said to be opposite each other. Of two houses standing on opposite sides of a street, could it be said that they were opposite, if one was further up or further down the street than the other? If a laborer should be told to plant a tree on one side of a road opposite to a tree on the other side, would there be any ambiguity in the direction? Could there be any doubt as to where he would place it? Would not a line between the two cross the road at a right angle? Undoubtedly.

So in a conveyance of real estate. If one of the lines is described as ending at a point on one side of a street opposite a point on the other side, we think there can be no doubt that a straight line between the two points must cross the street at a right angle. And such a description is too plain and too free from doubt to be controlled or affected by parol evidence.

This conclusion is decisive of the case now before us. The line in dispute is described as running from an acknowledged corner to a point in the westerly line of a street opposite the north-east corner of a lot on the easterly side of the street. And it is agreed, that if

a straight line between the two points named is to cross the street at right angles, then the tenant is entitled to judgment, unless parol evidence is admissible to control the description in the deed, in which case the action is to stand for trial. Our conclusion is, that the line referred to must cross the street at right angles, and that the description in the deed cannot be controlled by parol evidence.

Judgment for the defendant.

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

JOHN D. W. SMITH & others, in equity, *vs.* SAMUEL LARRABEE.

Bill to redeem. Venue. Foreclosure. Notice. Record. Intelligible description. Waiver of foreclosure.

A bill to redeem land mortgaged may be maintained in the county where the defendant resides, although all the land lies in two other counties.

When a mortgage describes two parcels of land in different counties, and the notice for foreclosure, describing both parcels, is published according to law in a newspaper printed in each county, a copy of the notice published in each county, with the name and date of the paper in each county in which it was last published, duly recorded in the respective registries, is a sufficient recording under R. S. of 1841, c. 125, § 5 (R. S., c. 90, § 5).

A notice, describing land as "one undivided sixth part of township numbered four in the fifteenth range in the county of Piscataquis, and of township numbered four in the sixteenth range in the county of Somerset, subject to the reservation of public lots," and referring to the mortgage described by naming the parties, and date, and the book and page of registration, contains an intelligible description.

Where a published notice is signed with the name of the mortgagee "by" A. W. P., "his attorney," and the mortgager subsequently recognizes and adopts the proceeding as effectual, he may rely on these facts as, *prima facie*, sufficient evidence of the authority of the attorney.

The giving of permits to cut timber on mortgaged land by the mortgagee, and the receiving of stumpage after publishing notice for the purpose of foreclosure, are not a waiver of such attempted foreclosure.

BILL IN EQUITY, to redeem mortgaged land situated in the counties of Piscataquis and Somerset, and made returnable in this county of Penobscot, in which the respondent resides.

The bill is brought in the names of John De Wolf Smith, William C. Crosby, and Amasa Barrett, and alleges, substantially,

That, on July 28, 1853, Carlton S. Bragg, owning an undivided one-sixth part of township numbered four, range fifteen, in the county of Piscataquis (21,465 acres), and of township numbered four, range sixteen, in the county of Somerset (18,219 acres), each township subject to a reservation of 1000 acres for public lots, sold the same to Asa W. Babcock for $9421; that Babcock gave his two notes for $3557.50, payable to Bragg or order in one and two years, with interest annually, secured by a mortgage of the premises.

That by subsequent conveyances the title of Babcock passed to the complainants,—to Smith one-half, and to Crosby and Barrett one-quarter each.

That on Feb. 26, 1856, Bragg assigned the notes and mortgage to the respondent, who still owns them.

That on Oct. 29, 1863, the complainants, being desirous of redeeming the mortgaged premises, and having a legal and equitable right to do so, made a written demand upon the respondent for a true account of the sum due on the mortgage, and of rents and profits and expenditures for improvements; but that the respondent, up to the filing of the bill, has neglected and refused to render any account, and thereby prevented the complainants from performing or tendering performance of the conditions of the mortgage.

That Bragg, while holding the mortgage, and the respondent, after its assignment to him, from time to time in different years, gave permits to cut timber on said mortgaged premises, and cut and sold off and converted to their own use large quantities, for which the respondent should account as rents and profits.

The complainants offer to pay all sums equitably due.

Prayer for account, release of premises on payment of amount due, and for further relief.

The answer admitted execution of mortgage, complainants' title, assignment to the respondent and his present ownership, and the demand; but denied that the complainants had or have any legal or equitable right to redeem the premises, because of foreclosure.

The parties agreed upon the following facts:

That the respondent, after the assignment of the mortgage, as set out in the bill, at different times joined with other proprietors of the mortgaged premises, consisting wholly of timber lands, in giving written permits to Babb & Strickland to cut and carry away pine and other lumber from the mortgaged premises, the respondent being described in the permits as the owner of an undivided one-sixth part, and Babb & Strickland entered and cut under each of the permits; that the respondent received his proportion of all sums of money paid for stumpage of lumber cut under the permits, which were severally signed and executed by the respondent on Aug. 31, 1857; Aug. 26, 1858; Aug. 10, 1859; Sept. 3, 1860; Oct. 27, 1862; Sept. 22, 1863.

That during the whole period, from July 28, 1853 (date of mortgage), to Feb. 26, 1856 (time of assignment), one John Winn was one of the proprietors of the premises, and was duly authorized by Bragg to grant permits to cut timber on the premises in respect of and for the undivided one-sixth part then held by Bragg, as mortgagee, and that Winn did grant permits to cut lumber on the premises, and that lumber was cut under each of the same, and that Bragg received his proportion of all stumpage cut under the permits granted by Winn, and indorsed same on the mortgage notes, and that the permits executed by Winn were dated Aug. 10, 1853, and Oct. 9, 1854.

That the "Piscataquis Observer" is a newspaper printed in the county of Piscataquis, and that the "People's Press" is a newspaper printed in the county of Somerset; that the copies of the newspapers containing the notices of foreclosure hereinafter described, are dated and numbered as follows: the "People's Press," nos. 6, 7, and 8, of vol. 33, dated Sept. 21, 28, and Oct. 5, 1854, respectively; the "Piscataquis Observer," nos. 26, 27, and 28, of vol. 7, dated Sept. 21, 28, and Oct. 5, 1854, respectively.

That the respondent has never claimed ownership of the public lots in the towns, under the mortgage, nor received stumpage therefor.

The notice of foreclosure, printed and recorded in Somerset county, and the certificate of the register, are as follows:

NOTICE OF FORECLOSURE.

The undersigned, Carlton S. Bragg, of Bangor, in the county of Penobscot, hereby gives notice that Asa W. Babcock, of said Bangor, by his deed, dated the twenty-eighth day of July, A. D. 1853, recorded in Somerset Registry of Deeds, book 75, page 72, conveyed in mortgage to the undersigned one undivided sixth part of township numbered four, in the fifteenth range in the county of Piscataquis, and of township numbered four, in the sixteenth range in the county of Somerset, subject to the reservation of public lots, reference to said deed to be had. The conditions of said mortgage having been broken, the undersigned, by reason thereof, claims a foreclosure of the same. CARLTON S. BRAGG.

By ALBERT W. PAINE, *his Attorney.*

September 12, 1854.

SOMERSET, ss.

The foregoing notice was copied from the "People's Press," a public newspaper printed in Skowhegan, in the county of Somerset, bearing date Oct. 5, 1854, vol. 33, no. 6, the same having been published three weeks successively in said paper.

Entered and compared by

DENNIS MOORE, *Register.*

Received October 19, 1854.

The other notice was the same as the foregoing, except that, instead of the words, "in Somerset Registry of Deeds, book 75, page 72," were "Piscataquis Registry of Deeds, book 29, page 59." And the certificate of the register, duly signed, was as follows:

PISCATAQUIS, ss.

I hereby certify that the above notice has been published three weeks successively in the "Piscataquis Observer," the last publica-

tion bearing date Oct. 5, 1854, and was entered for record Oct. 28, 1854, and compared.

W. C. Crosby, for the complainants.

1. The mortgagee being in actual and exclusive possession, granting permits to cut, could not foreclose under R. S. of 1841, c. 125, § 5, that provision being for him only who "is not desirous of taking and holding possession of the premises." He should have adopted one of the modes allowed under § 3.

2. The notice was not given by the mortgagee, but by one purporting to act as the mortgagee's attorney without evidence of authority. The authority should affirmatively appear. *Treat* v. *Pierce*, 53 Maine, 71. In the absence of proof, the legal presumption is against the act. Same as when executing a deed. Foreclosure is a statute conveyance. Subsequent acts of mortgagee are at most a ratification which is not sufficient. *Treat* v. *Pierce*, *supra*.

3. The description is not "intelligible." The notice distinctly indicates the extent of the claim. The notice does not disclose whether public lots are reserved in one or both townships, or what number of acres is reserved. There may have been a reservation intended in one, while the public lots may have been set out in the other; and to state the claim too largely misleads same as an under statement. In *Chase* v. *McLellan*, 49 Maine, 375, the general description, with reference to the record, was held sufficient against the original mortgager in possession who made the mortgage.

4. The record of the notices was not in accordance with the positive requirements of the statute. Each notice is recorded in one county only, instead of in "each." It is sufficient to publish the notice "in the county where the premises are situated," but the record must be made in each county containing premises covered by the mortgage. The original provision, Public Laws of 1838, c. 333, being different, the term "each" was introduced into the revision of 1841.

If the two notices, simultaneously published in both counties,

constitute one foreclosure, then "the name and date of" each newspaper in which it was last published should have been recorded in each county. R. S., 1841, c. 125, § 5. Otherwise no one could ascertain from the record that the provision requiring publication in the county where the premises are situate, has been complied with. *Morris* v. *Day*, 37 Maine, 386.

The statute requires the record of every county within which premises covered by a mortgage lie, to show each and every foreclosure made under the mortgage wherever made, because a foreclosure completed in another county constitutes a payment *pro tanto*, and thus removes an incumbrance upon the property within the county where records are examined. *Spring* v. *Haines*, 21 Maine, 126.

A complainant, searching the Piscataquis registry to learn whether no. 4, range 15, is or not incumbered by this mortgage, has a right to find there a complete history of every act of the mortgagee affecting that title, which is required to be recorded anywhere. He finds only a notice published in Piscataquis county, which he may believe unauthorized, defective, or waived. So far, the mortgage is wholly unpaid. But if the notice and record, etc., had in Somerset county, makes a good foreclosure upon no. 4, range 16, the value of that part of the mortgaged premises may be sufficient to pay the whole debt, and no. 4, range 15, be wholly freed from incumbrance. What other language could the legislature use to convey the idea contended for?

5. Subsequent possession and receipt of the rents and profits by the mortgagee was a waiver of the proceedings in foreclosure. The permits were granted both before and after the three years.

Can he be out of possession for the purpose of foreclosure, and in possession for the purpose of taking rents and profits? Counsel cited *Smith* v. *Kelley*, 27 Maine, 237; *Fay* v. *Valentine*, 5 Pick. 418; *Potter* v. *Small*, 47 Maine, 293; *Chase* v. *McLellan*, 49 Maine, 375; *Cutts* v. *York Manuf. Co.*, 18 Maine, 190; 2 Hilliard on Mort., 19.

Geo. M. Weston, submitted a brief on the same points.

F. A. Wilson, for the respondent,

Contended that the bill could not be maintained in this county, but should be brought in the county where the land lies, citing *Clark* v. *Scudder*, 6 Gray, 122; *Lienow* v. *Ellis*, 6 Mass. 331; 1 Washb. on Real Prop., 339; 1 Greenl. on Ev., § 189; 2 Bouv. Law Dict., "Privity" and "Privities;" Jacob's Law Dict., "Privies;" 2 Washb. on Real Prop., 15 and 16; *Hurd* v. *Curtis*, 19 Pick. 459.

KENT, J. The question in this case, on the merits, is whether the mortgage, assigned to the defendant, has been legally foreclosed. If it has not been, the prayer for redemption should be granted. If it has been, the prayer must be denied.

The defendant claims that a foreclosure was perfected by advertisement, in the mode pointed out in R. S. of 1841 (then in force), c. 125, § 5. The complainants deny that it has been thus legally foreclosed, for various reasons, which are set forth and urged in argument.

It is objected, in the first place, that the defendant, or Bragg, his assignor, was not in a situation in which he could avail himself of this mode of foreclosure, because, it is alleged, he was at the time of publication in possession of the premises, and therefore could not pursue this mode.

The premises named in the mortgage are timber and woodland, and it appears by the agreed statement of facts, that both Bragg, the mortgagee, and the defendant, his assignee, have at different times, before and since the publication, given permits to others to cut timber on the land, and have received payment therefor. Assuming that these facts sufficiently establish a possession, the question is whether such possession debars the foreclosure in this mode, and compels the party to resort to some other mode.

The law allows a mortgagee to have or to obtain possession for other purposes than foreclosure. The statute of 1841, c. 125, § 2, authorizes a mortgagee to enter on the premises or recover possession by suit and judgment before any breach of the condition of

the mortgage, when there is no agreement to the contrary. But this entry and possession has no relation to foreclosure, and is of no effect for that purpose, although continued for more than three years. The mortgagee, if he would foreclose, must proceed independently of such entry, before condition broken. Now he being in possession, how can he foreclose his mortgage, under the provisions of the statute? He is not in a condition to commence an action at law for possession, for he is already in possession. He may, we think, when thus in possession, commence a proceeding for foreclosure, after condition broken, by the written consent of the mortgager, or person holding under him. Or by a peaceable and formal entry for that purpose, in presence of witnesses, as provided in §§ 3, 4. We do not think that the law requires him to abandon his former possession absolutely, before he can resort to these methods. But by either of these modes he may change his former entry and possession into one for foreclosure, although the statute in terms gives the right thus to foreclose to those only who, after a breach of the condition, "are desirous of obtaining possession for the purposes of foreclosure." A fair construction of the statute will authorize a party, in possession for one purpose, to obtain a new possession of a different character from the former, *i. e.* one for the purpose of foreclosure. But in all these cases it is provided that this new possession, thus obtained, must be continued for the three following years.

The statute then goes on (§ 4) to provide for the case where the mortgagee is not desirous of taking and holding possession of the premises. It allows such person to foreclose by advertisement in a newspaper, or by serving a notice of his intention to foreclose on the mortgager or his assignee.

The question is, in this case, whether a mortgagee in possession, not for the purpose of foreclosure, can avail himself of this mode of foreclosing by publishing or serving a copy. It would be difficult to assign any valid reason why the law should not allow him to adopt this mode. It is certainly very plain and satisfactory. It is generally a better mode than any other, short of a suit, to give no-

tice in fact to all parties interested. If the notice is personally served, it is equal to notice by suit. There is nothing in the nature of the possession, before breach of the condition, which renders this mode more inapplicable than the one by written consent or by entry in presence of witnesses.

But it is urged that the statute, in its terms, restricts the use of this provision to one "not desirous of taking or holding possession." We, however, are of opinion that the intention of the legislature in this provision was simply to provide for the case, where the mortgagee did not wish to avail himself of any of the provisions of the law, to obtain by that proceeding possession of the premises. By the other modes, possession in fact was obtained. By this mode the party obtains no possession, nor any new rights relating to the possession. He simply obtains a right to have the three years allowed for redemption commence running. If he is in a condition not to desire or to need the aid of any process or proceeding, under the law, to obtain possession, he may adopt the manner in question by advertisement or personal notice. Any other construction of these several provisions would seem to debar the mortgagee in possession before condition broken, from the use of any of the modes of foreclosure.

2. It is also objected that there has been a failure to comply with the subsequent provision of the section, which requires that "a copy of such printed notice, and the name and date of the newspaper in which it was last published, be recorded in each registry of deeds in which the mortgage is, or by law ought to be recorded."

The facts in this case bearing on this point are, that one parcel of the land included in the mortgage is in the county of Piscataquis, and one in the county of Somerset. A notice was published by the mortgagee in a newspaper printed in each county, the first and subsequent publications in both counties being on the same days. The notices were alike, except that one referred to the mortgage deed as recorded in Piscataquis, and the other as recorded in Somerset Registry of Deeds. In both, the mortgagee claimed to foreclose the whole mortgage, on the ground of a breach of the conditions of the mortgage.

The notice published in Piscataquis was duly recorded in the registry of that county, and the one published in Somerset was duly recorded in that county. The register of each county duly certifies to the fact of such record. But there is no certificate or evidence that the notice published in Somerset was copied and recorded in Piscataquis, or *vice versa*. The objection rests on this last fact; and the question is, whether this omission to record the two notices, as published in the registry of each county, is fatal to the attempted foreclosure.

Each notice, as published, describes, as before stated, both tracts, and informs the reader that by that notice the mortgagee claims to foreclose the whole mortgage.

The general rule is, that the registry of deeds in a county is intended for the record of matters pertaining to the title to real estate lying within the limits of that county only. It is not the place where any record touching the title to land in any other county is usually found, or where any person is required to look for such record. If a person desired to ascertain the state of the title to a particular tract of land, he would examine the records of the county in which the land was situated, and no other. In this case the inquirer would find, in looking at the registry in Piscataquis, that the notice there recorded declared an intention to foreclose the whole mortgage, and that one of the tracts was in Somerset county. Now if both the notices had been there recorded, and also a certificate made in that registry of the names and dates of both newspapers in which the notice had been printed, it would not have shown that the same record had been made in Somerset county. It would still be necessary to examine the records in that county. The register of one county cannot properly certify that the records in another county contain certain matters. If he does, then his registry would contain a record touching land in another county, which would seem to be out of place there, giving no information, so far as the land in the other county was concerned, which could be relied on as legal evidence of the fact, or be of any value or importance in itself.

But it is insisted that the statute is imperative, and can bear no other reasonable construction than that which requires a registry of both notices in each county, together with the names and dates of both newspapers in which it was published.

The original act of 1838, c. 33, which first provided for this mode of foreclosure, did not seem to contemplate the case of a mortgage of land in two or more counties, but simply provided that the newspaper notice should be recorded in the registry of deeds where the mortgage is recorded. But in the revision in 1841, it is evident that this section was amended to meet the case above stated. It may, perhaps, be doubtful whether the legislature intended that more than one notice should be required to be published in a newspaper, even when the lands were in different counties. The statute names only a notice "in the (a) newspaper printed in the county where the premises are situated," and then provides that "a copy of such printed notice, and the name and date of the newspaper in which it was last published, be recorded in each registry of deeds, in which the mortgage deed is or by law ought to be recorded."

The object of this provision is manifest. It is that each registry shall contain a record of the notice to foreclose the mortgage, so that the inquirer may find there all the proceedings affecting the title in that county, where he would naturally look for them. To effect this object, it is not necessary to multiply the number of newspapers in which the notice is to be published. Such publication is to give notice to the mortgager or his grantee. It is not required to be in the county in which he lives. The words, "in the county where the premises are situated," may be complied with, if the notice is printed in the county in which any part of the premises are situated. If, having the question directly before them, the legislature had intended to require a newspaper publication in each county, it would seem probable that in the revision they would have used language which would clearly indicate the intent.

The construction that a single newspaper notice, recorded in each registry where the mortgage deed is or should be recorded, is

all that is required, is strengthened by the limitation of thirty days after the last publication, in which the record is to be made. In this case, it singularly happens, that both notices were published in the two counties on the same day, and the last publication in each was on the same day. But this could happen but seldom, particularly if the land was located in three or four different counties. If there were several notices, ending on different days, from which would the thirty days be reckoned? And so as to the three years for redemption given to the mortgager after the publication.

But it is unnecessary for us to determine this point absolutely, because in this case the notice was published in both counties. But the same general course of reasoning would lead us to the conclusion, that the object of the law is complied with, if the registry in each county contains a record of the notice of foreclosure published in that county, with the name and date, etc., of the newspaper, although it does not contain a record of a copy (almost in duplicate) of the same notice published in a newspaper in another county, with a certificate of publication in such newspaper outside of the county. We have seen that such certificate would be in no sense a compliance with the law, requiring a registry of the copy in each county, and could not be proof of any fact touching the registry in the other county. We think the foreclosure not fatally defective for this cause.

It is next objected, that there is no sufficient evidence that the published notices were given by the mortgagee, as required by the statute. It appears that they were signed "Carlton S. Bragg, by Albert W. Paine, his attorney."

It was decided in *Treat* v. *Pierce*, 53 Maine, 71, that the unauthorized signing and publishing of a notice of a foreclosure cannot, by a subsequent ratification by the mortgagee of the act, be rendered operative from the date of its publication. But in that case the defendant introduced affirmative evidence to prove, that the notice was signed and published by the person signing as attorney, when he was not such attorney, and had no authority or request from the mortgagee to publish the notice. These facts were proved.

On these facts, the court held, for reasons given in the opinion, that a subsequent ratification and adoption of the act could not make the notice operative from the date of publication. But the question was not raised, whether, in the absence of all proof by the plaintiff, it was necessary for the defendant to prove the authority of the agent, by evidence beyond the *prima facie* presumption.

In the case at bar, it appears that Bragg—the mortgagee in whose name the notice was published—recognized and adopted the act of Mr. Paine and his signature as his agent, by assigning, with the mortgage, to the defendant all the rights and benefits of a foreclosure commenced by him. This must refer to the notice in question, as there is no pretense that any other has ever been attempted. And the defendant—the assignee—claims and insists upon the foreclosure thus commenced by notice, signed by attorney.

There is no evidence that this recognition by the mortgagee was made after the act. We think, that, in the absence of any such evidence, we may fairly and properly presume that it relates to the time of publication. We think, that where a notice is published and signed with the name of the mortgagee or person holding the mortgage, "by A. B., his attorney," and the party afterwards recognizes and adopts the proceeding, and claims rights under it, and claims that it is effectual to foreclose, that it is not necessary for him to produce further evidence of attorneyship; but he may rely on these facts as *prima facie* sufficient, until impeached or qualified by other testimony.

The objection that the premises are not "intelligibly" described, as required by the statute, is not tenable. The description in the notice is clearly sufficient to inform those entitled to redeem, with reasonable certainty, what premises are intended. *Chase* v. *McLellan*, 49 Maine, 375.

The complainants finally insist, if the court should be of the opinion that the notice, as published and recorded, was a sufficient commencement of the process of foreclosure, yet that the facts agreed in relation to the after possession and receipt of stumpage, by the mortgagee and the defendant, his assignee, show a waiver of the foreclosure begun.

It has been decided, that the commencement and prosecution of an action at law on the mortgage is a waiver of an entry to foreclose made previously. *Smith* v. *Kelley*, 27 Maine, 237.

There are other cases, some of which are cited by the complainants' counsel, which go far to establish the general principle he contends for, that after the mortgagee has commenced a foreclosure in any of the modes permitted by the statute, he may change his intention and waive the foreclosure by acts which show such change of intention, being in themselves inconsistent with the further prosecution of the foreclosure in the manner first commenced.

Admitting the correctness of this general doctrine, the question arises, what act here shown is inconsistent with a purpose to avail himself of the foreclosure by notice in the newspapers? We have seen that the object and the effect of such mode is not to obtain possession, and that it does not in fact have any bearing on the actual possession. It neither gives nor takes away in the matter of such possession. If, therefore, he could cause the notice to be published when in such possession, as has been before explained, *i. e.* giving permits and receiving stumpage, without any surrender of such possession, we can see no waiver of such attempted foreclosure, or any fact that is inconsistent with such continuing purpose and intent, by the subsequent receipt of income by the same means from the premises. There has been no attempt to obtain possession by any of the other proceedings named in the statute, and no indication of any purpose to abandon the mode now relied upon.

A preliminary question was raised, whether this bill can be sustained in Penobscot county, as the land lies in other counties, although the defendant and some of the complainants live in the county in which the bill is brought. On consideration, we are satisfied that a bill for redemption may be sustained in this county. It is in the nature of a personal action. It seeks only for a final decree requiring the defendant to do a specific personal act, viz., release the premises. The deed he gives must be recorded in the registry of the county where the land lies. This keeps the record title perfect. The obligation to do this, where there has been a

legal redemption, is one that attaches to the person wherever he is. The rule is, "*equitas agit in personam*," and this doctrine has been applied where the bill was brought to foreclose a mortgage where that mode was allowed by law.

If a mortgage can be foreclosed by a bill brought in the county, *a fortiori*, it can be redeemed by such a bill. This case illustrates the practical difficulty of a rule which should absolutely require, in all cases, that the bill be brought in the county in which the land lies. In which of the counties should it be commenced? Or must there be two distinct bills, or, in case of land in four or five or more counties, in one mortgage, must there be a bill in each?

Without entering into a more extended discussion of this point, we will simply refer to a few authorities in which the question is considered. Story Eq. Jur., §§ 743, 744, 899, 900; *Great Falls M. Co.* v. *Worster*, 3 Foster (N. H.), 463, and cases there cited; *Toller* v. *Carteret*, 2 Vern. 494.

The conclusion is, that the foreclosure was perfected, and the bill cannot be sustained.

Bill dismissed with costs for defendant, but under the circumstances of this case, no costs to be taxed in the nisi prius court after the entry of the case in the law court.

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

The following dissenting opinion was drawn by

CUTTING, J. Bill in equity brought in Penobscot county to redeem lands situated in Somerset and Piscataquis counties. The first question presented is, as to the jurisdiction of this court, sitting in the former, to adjudicate in matters touching real estate being in the latter counties. Or, in other words, whether equity will overrule the distinction at law between local and transitory actions.

"The court has cognizance of civil actions, legally brought before it, between party and party. R. S., c. 77, § 2.

I am aware of no statute or rule of the common law which

confers a greater jurisdiction on a court of chancery than that of law, as it respects local or transitory actions. In both instances the question arises, whether the process is *in rem* or *in personam;* the former when touching the realty, and the latter the person.

No legislation from the most remote period has compelled a party to defend his castle beyond the vicinage of his own peers; for, in a court of equity, it is notorious, that questions of fact frequently arise which are presented to a jury.

At law, so particular have courts been in maintaining this principle, they have invariably held that an assignee of covenants running with the land, cannot sustain an action for a breach except in the county where the estate is situated. *Lienow* v. *Ellis*, 6 Mass. 331; *Clark* v. *Scudder*, 6 Gray, 122; *White* v. *Sanborn*, 6 N. H. 220. It is said, that "chancery is ordained to supply the law, not to subvert the law." Lord Bacon proclaimed it, and Judge Story has cited it as a motto in the title-page of his Equity Jurisprudence.

The only authority cited, tending to sustain our jurisdiction, is from the same author (2 Story's Eq. Jurisprudence, § 744), wherein it is held, that in order to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is sufficient, that the parties, to be affected and bound by the decree, are resident within the State or county where the suit is brought, for the primary decree is *in personam* and not *in rem.* The incapacity to enforce the decree *in rem* constitutes no objection to the right to entertain such a suit.

Here, it may be remarked, that the learned author was speaking of a bill for a specific performance of a contract, which is only a chose in action, on which a suit at law may be brought in any county where either party resides.

But in a later edition, that section is enlarged by adding, that in the State of Pennsylvania it had been held, that a court of equity sitting in and for one county, had no jurisdiction over a bill praying for an injunction against the erection of a nuisance in another county; and this after a full review of all the authorities.

In conclusion, it may be remarked, that we know of no law giv-

ing a larger venue to a court of equity than to that of law, as to which the true rule is laid down in Bouvier, where he says, "In local actions, in which the subject or thing to be recovered is local, the action must be brought in that county where the cause of action arose; among these are all real actions, and actions which arise out of some local subject, or the violation of some local rights or interest, as the common law action of waste, trespass *quare clausum fregit*, trespass for nuisances to houses or lands, disturbance of right of way, obstruction or diversion of ancient water-courses, etc.," sustained by numerous authorities.

A bill in equity for the redemption of mortgaged real estate puts in issue the title, and is in its nature a real action, and as such has the common-law venue, unless that venue has been enlarged by statute. But the equity powers of this court are limited, confined to a certain specified jurisdiction, and not that enlarged power, such as is conferred upon the chancery court of England, and of some of the American States, as cited by Story. This principle has been so frequently enunciated by this court, that it becomes needless to cite authorities to sustain it.

Now what statute has ever been enacted in this State enlarging the common-law venue, so far as it respects local and transitory actions? We know of none except, perhaps, in cases of charters of certain railways extending into contiguous counties.

The question here raised might have been presented on demurrer and decided on inspection, but error in pleading, or even consent of parties, will not confer jurisdiction.

Thomas W. Vose *vs.* Webster Treat.

Ratification. Special promise to assignee—action on.

Where, after judgment on a marine policy recovered in the name of the owner of one-eighth interest, alone, the owner of the remaining seven-eighths settled with the attorney recovering judgment, by agreeing with him as to the amount of fees he should receive, and receiving from him the balance of a partial collection on the execution, after the deduction of the amount of his fees, together with the execution, the balance of which the defendant subsequently collected, and thereupon agreed to pay to the assignee of the one-eighth interest, his share thereof; it was held, that the acts of the defendant constituted a ratification of the original suit, and that assumpsit would lie upon the special promise by the assignee.

On exceptions.

Assumpsit for two hundred and fifty dollars for so much money had and received.

Writ dated Sept. 27, 1869.

At the April term, 1870, the action was referred, by rule of court, to Judge Dickerson, of this court, "either party to have the right to except."

At a subsequent term, the case having been heard, Judge Dickerson returned the following report:

I find, as matter of fact, that,

One Edwin P. Treat commenced an action on a policy issued by the Union Insurance Company, returnable at the January term, 1867, the plaintiff owning only one-eighth of the vessel insured; that he did not inform his counsel that he was not sole owner until after the entry of the action; that soon after the entry of the action and before the trial, he informed him that he owned only one-eighth part of the vessel, and that the other part-owners declined to take any part or assume any responsibility in the prosecution of the suit. After entry, and before trial, E. P. Treat delivered to his counsel the policy, protest, and register of the vessel as a pledge to secure the payment of his fees and disbursements, without making any

definite arrangement as to their amount, it being understood that the amount would depend upon the result of the suit.

The action was tried and verdict rendered for the plaintiff. Exceptions and a motion for a new trial were filed, allowed, and subsequently argued at the law term of the court at Bangor; but the court overruled them both, and judgment was rendered for the plaintiff on the 10th day of May, A. D. 1869, for the sum of two thousand three hundred and two dollars and twelve cents debt or damage, one hundred and fifty-five dollars costs of suit, upon which execution was issued June 17, 1869.

The counsel who recovered the judgment, collected the sum of six hundred and fifty dollars on this execution, June 25, 1869, being the amount due him as counsel in the case, and for which he claimed to have a lien on the execution.

Webster Treat did not employ said counselor in the case, nor did said counselor know that he had any interest in the same, until after judgment was rendered and he had collected his fees on the execution.

Webster Treat became owner of the remaining seven-eighths interest in said suit, on the 13th day of January, 1868. On the 9th day of July, 1869, Webster Treat called upon said counsel, and told him he was willing to allow him Boston prices for such services, but he thought his claim exceeded that rate, whereupon it was agreed between them that said counsel should make a deduction of one hundred dollars from his bill, and he paid said Webster Treat the sum of eighty-seven dollars and fifty cents, being seven-eighths of the sum of one hundred dollars thus deducted, and delivered the execution to him with all said counsel's rights thereon.

On the 10th day of July, A. D. 1869, the said Webster Treat collected the balance of the execution of the said company, being the sum of sixteen hundred and thirty-nine dollars, for which he gave his receipt on the execution, the premium note having been first deducted from the amount due on said execution.

I further find, as matter of fact, that said Edwin P. Treat filed his petition, to be declared a bankrupt, in the district court of the

United States, for the district of Maine, on the 14th day of January, A. D. 1868, together with a schedule of his property, including his claim on one-eighth of the policy sued as aforesaid, which schedule was subsequently amended by declaring that said policy had been delivered and assigned to A. G. Jewett, as security for the payment of services rendered and disbursements made by him on a suit upon said policy.

A. H. Hubbard, Esq., of Winterport, was appointed assignee of the estate and effects of the said Edwin P. Treat, bankrupt as aforesaid, on the 7th day of April, A. D. 1868, and on the same day all the estate, real and personal, of the said bankrupt, including all the property, of whatever kind, of which he was possessed, or was interested in or entitled to on the 14th day of January, 1868, was assigned and conveyed to the said A. H. Hubbard, in accordance with the provisions of the act of congress, entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867. Said assignee signified his acceptance of said trust on the 7th day of April, 1868. On the 17th day of February, 1869, said assignee filed his petition in the district court of the United States for the district of Maine, praying for leave to sell certain property subject to him, including the bankrupt's interest in one-eighth of the policy of insurance on schooner "R. H. Perkins," in the Union Insurance Company of Bangor.

On the 19th day of February, 1869, said court granted said assignee leave to sell said property as prayed for, who advertised the same, according to law, and sold the bankrupt's interest in one-eighth of the policy of insurance, aforesaid, to Thomas W. Vose, Esq., the plaintiff in this action, at public auction, he being the highest bidder therefor, on the 10th day of April, A. D. 1869.

Subsequently to this purchase by the plaintiff, and after the defendant had obtained the money on the execution, as aforesaid, they had an interview upon the subject of the plaintiff's claim against the defendant, now in suit, in which the defendant said to the plaintiff, that he need not sue it and that he would pay it.

I also find, as a matter of law,

1. That the defendant's settlement with Mr. Jewett was a ratification of his original employment as counsel, and a recognition of his claim on the defendant for seven-eighths of the amount due him as counsel.

2. That by his purchase of the interest of Edwin P. Treat, in one-eighth of the policy of insurance on the schooner "R. H. Perkins," issued by the Union Insurance Company of Bangor, he acquired a valid claim to one-eighth part of sixteen hundred and thirty-nine dollars amounting to two hundred and four dollars and eighty-seven cents.

3. That the defendant's promise to pay the plaintiff the amount of this claim, gave the plaintiff the legal right to maintain this action against the defendant, the latter having previously collected the money now sued for, on the execution against the Union Insurance Company.

4. That without such special promise the plaintiff would not be entitled to maintain this action.

The defendant objected to the acceptance of the report on the ground that, upon the facts found, the rulings of the law were erroneous, and that judgment should have been rendered for the defendant. The presiding judge ruled otherwise, and affirmed the rulings of the referee, whereupon the defendant alleged exceptions.

John Varney and *Jewett*, for the defendant, contended, *inter alia*, that the defendant, having been a stranger to the original suit, he fully disavowed the suit and E. P. Treat's whole conduct in relation to it. E. P. Treat had not assumed to be defendant's agent, but acted for himself alone.

To constitute an agency, with consequent rights and liabilities, by ratification, there must have been previous original assumption of agency expressed or concealed by the person whose acts are to be ratified. Such original assumptions, if unauthorized, may be ratified; but the absence of such assumption precludes ratification.

Story on Agency, § 242, note 2 and cases there cited; 1 Pars. on Cont. (3d ed.), 45; 2 Bouv. Inst., 21, 25.

But if E. P. Treat had unauthorizedly assumed to act as agent, the transaction between the defendant, E. P. Treat's counsel, could not amount to a ratification. The counsel had defendant's property, and he deemed it prudent to compromise and take a part rather than litigate for the whole.

The rule enunciated by the report would compel a party to lose all his property, or ratify indefinite exaction.

To constitute a ratification, it must be made with a full knowledge of all the facts and circumstances in the case.

N. H. Hubbard & T. W. Vose, for the plaintiff, cited 2 Bouv. Law Dict. (11th ed.), 421, and cases there cited; 1 Pars. on Cont. (4th ed.), § 3, and notes; *Bryant* v. *Moore*, 26 Maine, 84; *Cushman* v. *Loker*, 2 Mass. 106; *Clement* v. *Jones*, 12 Mass. 60; *Pratt* v. *Putnam*, 13 Mass. 361; *Fisher* v. *Willard*, 13 Mass. 379; *Emerson* v. *Newbury*, 13 Pick. 379.

Appleton, C. J. Edwin P. Treat having one-eighth interest in a policy of insurance issued by the Union Insurance Company, commenced a suit thereon, the owners of the remaining seven-eighths declining to assume any responsibility in the matter. He employed A. G. Jewett, Esq., as counsel. The suit was conducted to a successful result, and execution thereon was issued June 9, 1869.

On Jan. 13, 1868, the defendant became the owner of seven-eighths of the policy.

Mr. Jewett, after the execution was obtained, collected thereon $650, which he claimed as a just compensation for his services. The defendant was dissatisfied, but ultimately settled with Jewett upon his deducting $100, and paying him seven-eighths of that sum, and delivering him the execution.

On June 10, 1869, the defendant collected the balance of the execution.

On Jan. 14, 1868, Edwin P. Treat filed his petition to be declared a bankrupt, including in his schedule his interest in the policy in suit. An assignee was appointed. Leave was granted the assignee to sell the assets of the estate, and on April 10, 1869, the plaintiff became the purchaser, at an auction sale, of the interest of said E. P. Treat in this policy.

The defendant having collected the execution, the plaintiff called upon him for his one-eighth. The defendant said he need not sue his claim, he would pay it.

This brief statement of uncontroverted facts shows, that the plaintiff was the owner of one-eighth of a policy, the whole amount of which had been collected by the defendant, except what had been previously paid to Mr. Jewett, and that the defendant had promised the plaintiff to pay him his share.

No reason is perceived why this promise should not be performed.

The defendant, by his settlement with Mr. Jewett, after his collection of the execution, ratified the bringing of the suit and his employment. He has received the fruits of successful litigation, and has settled with the counsel managing the cause. It is not easy to see how there could be a more complete and effectual ratification.

The defendant has neither a legal nor an equitable title to the share of Edwin P. Treat. The plaintiff has both. The promise to pay the assignee entitles him to bring the suit in his own name. *Lang* v. *Fiske*, 11 Maine, 335. *Exceptions overruled.*

Report of referee accepted.

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

WALTER I. BROWN, *prochein ami*, *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Child—care and prudence of. Railroad—liability of. Nonsuit—when proper.

A child of nine years, who, in the daytime, jumps from a sidewalk, lawfully constructed by a railroad company on the side of its railway-bridge, upon the properly constructed draw, while the same is being lawfully closed, is so wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom.

When the facts are not controverted, a nonsuit may properly be granted, if a verdict in favor of the plaintiff upon the proofs offered by him would be set aside as being against evidence.

ON REPORT.

CASE for an injury received June, 1868, by jumping upon the defendants' draw while the same was being closed.

It was admitted that the defendants had legally located their railroad across the Kenduskeag stream, in Bangor, in this county; that the bridge was constructed in accordance with Special Laws of 1864, c. 321, § 7, and that the sidewalk, over and upon which the plaintiff was passing, erected by the defendants on the side of its railway bridge, "within the limits of the land taken by said company for its railway," was properly constructed and maintained in accordance with Special Laws of 1868, c. 502; that vessels are accustomed to pass through the defendants' bridge; and that at the time of the injury complained of, the draw in the bridge having been just before opened for the passage of a vessel, was being closed.

Walter I. Brown (plaintiff), testified, that he was ten years old October, 1869; that on the 24th of June, 1868, he and two other boys went down to draw-bridge for the purpose of crossing the Kenduskeag; that the "draw was open when he got down, it was going around when he got on, it was around to shut;" that Forest L. Pooler, to whose house they were going, was with witness. The witness further testified as follows: "The boy that got me down

there went on to draw first, the other boy got on, then I got most on, it was going so fast I could not get on, and I kind of slipped and got caught in the draw; leg staid there half a minute, when boy got me out;" that no one warned him not to get on, and that he could then read printing; there was no notice, flag, or barrier.

On cross-examination, he also testified, substantially, that he did not see any vessel passing through; that the draw was moving around when he got there, and he waited until the draw got around so that he could jump on; that he saw no flag; asked no one whether he could go upon the draw; that he had to jump to get on; a man and two boys turning the draw, about twenty feet from witness; he did not ask any one to stop draw before he got on; did not get his leg out until the draw was turned back; that there was a railing on each side of the walk.

Forest L. Pooler, called by the plaintiff, testified substantially to the same, and that Charley Saddler jumped upon the draw first, witness next, and plaintiff then tried, but slipped, and his leg was caught in the draw; that there were no notices, no barrier, or flag, and that no one told them it was dangerous to attempt to cross; and that witness and plaintiff had crossed there once or twice before.

George I. Brown, father of the plaintiff, testified, that the leg of his son was crushed and amputated; that notices were put up after the injury in 1868, one against going upon the draw while in motion, and flag is put up on draw just before it starts.

If, upon so much of the testimony as was admissible, the action could not be maintained, a nonsuit was to be entered.

F. A. Wilson and *H. L. Mitchell*, for the plaintiff.

The degree of care to be exercised by a child depends upon its age. *Munn* v. *Reed*, 4 Allen, 431; *Birge* v. *Gardiner*, 19 Conn. 507; *Lynch* v. *Nurdin*, 41 E. C. L. 422; *Hunt* v. *Pownal*, 9 Verm. 411.

This is a question of fact. *Wright* v. *Goff*, 6 Ind. 416; *Biers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Smith* v. *Lowell*, 6 Allen,

39; *Patterson* v. *Wallace*, 28 Eng. Law & Eq. 48; *Collinson* v. *Larkin*, 3 Taunt. 1; *Martin* v. *Great Northern R. R. Co.*, 16 Conn. 179.

If plaintiff's conduct was the result of childish instinct and thoughtlessness, and not of heedlessness in regard to danger, it is not such an absence of due and ordinary care as will prevent a recovery. *Munn* v. *Reed*, *supra*; *Birge* v. *Gardiner*, *supra*; *Oldfield* v. *New York R. R.*, 3 E. D. Smith, 103; *Kelley* v. *Penn. R. R. Co.*, late case, opinion in note, 1 Hilliard on Torts, 149.

The defendants not bound to construct the sidewalk. By accepting the act of legislature, they took with the advantages the obligations. Whether the walk was in a condition safe and convenient for foot-passengers, guarded against accidents likely to occur, is a question of fact. *Shaw* v. *Boston & Worcester R. R. Co.*, 8 Gray, 45; *Knight* v. *P. S. & P. R. R. Co.* 56 Maine, 244.

The neglect of the defendants is evidenced by an absence of flag-man, sign, winging gate, or other signal.

C. P. Stetson, for the defendants, contended,

That there being no evidence of negligence on the part of the defendants, and of no defect in the sidewalk such as to render it unsafe, the court can so determine as a matter of law upon the undisputed facts. *Raymond* v. *Lowell*, 6 Cush. 524; *Morton* v. *Frankfort*, 55 Maine, 46; *Beisiegel* v. *New York Cent. R. R. Co.*, 40 N. Y. 9; *Ernst* v. *Hudson R. R. Co.*, 39 N. Y. 61; *Deyo* v. *New York Cent. R. R. Co.*, 34 N. Y. 13.

Something more must be shown than that an injury has happened. *Welfare* v. *Lond. & B. R. Co.*, 4 Q. B. 693; *Sinei* v. *Great Western R. R. Co.*, 4 Ex. 117; *Adams* v. *Lan. & Yorkshire R. Co.*, 4 C. P. 739; *Crafter* v. *Met. R. Co.*, 1 C. P. 300, 302.

There must be ordinary care on part of plaintiff, and negligence on part of defendants. *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 252. If the whole evidence shows plaintiff careless, the court may instruct the jury, as a matter of law, that the action cannot be maintained. *Wright* v. *Malden & Melrose R. R. Co.*, 4 Allen,

289; *Gahagan* v. *Boston & Lowell R. R. Co.*, 1 Allen, 189; *Bancroft* v. *Boston & Worcester R. R. Co.*, 97 Mass. 278; *Todd* v. *Old Colony & Fall River R. R. Co.*, 3 Allen, 18; *Todd* v. *Old Colony & Fall River R. R. Co.*, 7 Allen, 207; *Trow* v. *Vt. Cent. R. R. Co.*, 24 Verm. 497; *Gavett* v. *Man. & Law. R. R. Co.*, 15 Gray, 501; *Lucas* v. *New Bedford & Taunt. R. R. Co.*, 6 Gray, 64; *Hickey* v. *Boston & Low. R. R. Co.*, 14 Allen, 429.

Plaintiff was using the bridge for sport,—the fun of jumping upon the draw when in motion. *Stinson* v. *Gardiner*, 42 Maine, 248.

The recklessness of jumping upon a moving draw is analogous to a traveler's going out of the traveled part of the road, driving over rock or logs. *Gleason* v. *Bremen*, 50 Maine, 226.

Lynch v. *Nurdin*, and *Birge* v. *Gardiner*, cited by plaintiff, are opposed to the current of later decisions. *Lygs* v. *Newbold*, 24 L. & Eq. 509; *Phil. R. R. Co.* v. *Spearen*, 47 Penn. S. R. 300; *Skelton* v. *Lond. & No. Western R. Co.*, 2 Law Rep. Com. Pleas, 631.

Appleton, C. J. It is admitted that the defendant corporation had legally located its railroad across the Kenduskeag stream, and that the bridge over which the plaintiff was passing was constructed over said stream in accordance with the requirements of the statutes of this State.

To entitle the plaintiff to recover, he must show that the injury was occasioned by the omissions of duty, or the commission of wrongful acts on the part of the defendant, and not through his own neglect and want of ordinary and common care. The negligence of the defendant is the gist of the action, but the absence of negligence contributing to the injury, on the part of the plaintiff, is equally important.

While the plaintiff is bound to be in the exercise of ordinary care and prudence, less care and prudence will be required of a child than of a person of mature age. The care and prudence to be expected from a child will obviously have relation to his age and intellectual capacity. The plaintiff, though held to show the injury

to have been occasioned by the negligence of the defendant, and without fault on his part, is not required to show greater care on his part than could be reasonably required, regard being had to his age.

If a child is of too tender an age to be permitted to go in the streets without the attendance and supervision of those having him in charge, their negligence and want of due care will have the same effect in preventing the maintenance of an action for an injury occasioned by the neglect of another as would the plaintiff's want of care, if he were an adult. *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123; *Wright* v. *Malden & Melrose R. R. Co.*, 4 Allen, 283; *Callahan* v. *Bean*, 9 Allen, 401. In these cases the parties injured were much younger than this plaintiff.

The plaintiff was nine years old. If of age to be permitted to go in the streets without parental or other supervision, he must be held responsible for a degree of care and prudence proportionate to his age. He was passing the railroad bridge. The draw had been opened. When he reached there, it was closing. The defendants were in the exercise of their indisputable right to open and close. The plaintiff saw that every second rendered his passage less dangerous, and that if he would but wait, it would be accomplished without risk, or even the possibility of danger. The defendants were in no respect negligent. They were making as rapidly as they could the passage each moment the safer, and were not bound to anticipate the folly or the rashness of others. If they had stopped the motion of the draw, the danger of the plaintiff, if he attempted to leap, would have been increased. The defendants were not required by the statute to have a flag or a flag-man stationed at the draw to give notice. If they had done so, neither the flag nor the flag-man could have given him greater information or clearer warning than his own vision gave him. It was in the daytime. And notice was unnecessary when all was known without notice. His companions leaped upon the approaching draw. He followed, and, failing in his attempt, was caught in the draw and injured. While the grave injury the plaintiff received may be regretted, no reason

is perceived why the defendants should be called upon to afford compensation therefor, when they were without fault, and in the due exercise of their chartered rights.

The facts in this case are undisputed. There has been no evidence offered on the part of the defense. The negligence or rashness of the plaintiff is shown by his own evidence to be the cause of his injury. No neglect of the defendants is proved. When the facts are not controverted, a nonsuit may properly be granted, if a verdict in favor of the plaintiff, upon the proofs offered by him, would be set aside as against evidence. It would be absurd to send a cause to a jury when the verdict, if rendered in favor of the plaintiff, would not be permitted to stand. It is no interference with the province of the jury to give judgment upon the legal effect of admitted facts. When the plaintiff's evidence fails to show any cause of action, a nonsuit should be ordered. *Wright* v. *Malden & Melrose R. R. Co.*, 4 Allen, 283; *Todd* v. *Old Colony & Fall River R. R.*, 7 Allen, 207; *Steves* v. *Oswego & Syracuse R. R. Co.*, 18 N. Y. 422; *Morton* v. *Frankfort*, 55 Maine, 46; *Cooper* v. *Waldron*, 50 Maine, 80. *Plaintiff nonsuit.*

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

JACOB O. ROGERS *vs.* INHABITANTS OF GREENBUSH.

Taxes assessed for legal purpose—money paid for under protest not recoverable by resident owner.

Assumpsit will not lie by a resident owner to recover from his town money paid under protest to redeem land sold for taxes raised for a legal purpose, but assessed in an irregular or defective manner.

It seems, that the form of protestation, under which a tax is paid with a view of recovering it back, is immaterial; but it must be a distinct and definite protest against paying the particular tax on the ground of its illegality.

ON REPORT.

ASSUMPSIT for money had and received, whereby the plaintiff, a resident of the defendant town, claims to recover back money paid to redeem land, situated in said town, sold for taxes. The plaintiff paid the money to the collector, "at the time protesting against said taxes." He was not arrested, nor were his goods seized, but a portion of said lands were sold, and he redeemed them to save forfeiture.

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The plaintiff claimed to recover the money back upon the ground that the assessments were not legally made.

The action was commenced within one year after payment; and if maintainable, it was to stand for trial.

W. T. Hilliard, for the plaintiff.

J. A. Peters & F. A. Wilson, for the defendants.

KENT, J. The question presented for our determination is, whether an action of assumpsit can be maintained to recover back money paid for taxes on real estate, belonging to and assessed as the property of an inhabitant of the town, who paid to the collector such taxes, "at the time protesting against said taxes;" although he was not arrested, nor were his goods seized, but a portion of the land was sold, which he redeemed to save forfeiture. He claims that the assessments were not legally made.

This, then, is not a case of a person denying the right of the town to tax him or his property, real or personal, or both, on the ground that he was not an inhabitant, and therefore not liable to be entered at all on the tax-list. Nor is it the case of taxing real and personal estate in the same assessment, and an attempt to collect under the warrant to distrain or arrest the body. Nor is it a question of overvaluation.

There is no allegation that the taxes were raised for an illegal purpose. It is not denied that the land was liable to be taxed to the plaintiff. The only objection is, that "the assessments were not legally made." We understand this to mean, that there were irregularities or deficiencies in some particulars in making the assessments.

We do not think it necessary to determine, whether the fact that the plaintiff, at the time he paid, "protested against said taxes," is sufficient to answer the requirement of the law, that the taxes were paid under protest. We think that the law requires something more definite and distinct than general fault-finding, grumbling, complaint of injustice or inequality, even if in language it takes the form of protestation. It must be a distinct and definite protest against paying the particular tax, on the ground of its illegality. The form may not be material.

In the present case, as the parties desire a decision on the main question, we waive a decision on this question.

Can this action on these facts be sustained? We can find no statute of this State which authorizes it. On the contrary, the statute provisions, by inference at least, seem to negative the right. In relation to the real estate of non-residents, this right of action is expressly given by § 146, c. 6, R. S. of 1857. It follows the section which makes the new provision, refusing a right "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 shall have been paid or tendered." The provision, allowing an action to recover back such payment, was inserted with the manifest design of allowing a party who dis-

puted the legality of the tax or of the proceedings, to test those questions by an action to recover the amount paid, without risking the loss of his title to the real estate.

But whilst the same provision is made, in substance, in case of a tax on the land of a resident, as to the nature and amount of evidence to be produced by the party claiming under a tax sale, the other provisions as to payment, before trial, and as to recovering back the tax paid, are entirely omitted. R. S. of 1857, c. 6, § 157. The only provision we can find in this statute relating to this right of action is found in § 98, which provides that "if any money, not raised for a legal object, is assessed with other moneys, legally raised, the assessment shall not be void; nor shall any error, mistake, or omission by the assessors, collector, or treasurer, render it void; but any person paying such tax may bring his action against the town, and shall recover the sum not raised for a legal object, with twenty-five per cent interest and costs, and any damages he has sustained by reason of the mistakes, errors, or omissions of such officers."

Whatever construction may be given to this section, it is manifest that it does not authorize this suit, which is to recover back money paid for taxes, confessedly not raised for an illegal purpose. The apparent intent of the section is to limit the right to recover for money paid to the single matter of mixing a tax for an illegal object, with a tax for legal objects, and to leave the party, as to errors, mistakes, and omissions by the town officers, to his action on the case for his special damages. But we give no opinion as to the true construction of this statute provision.

Independently of the statute, we think the action cannot be sustained.

It is undoubtedly true, that many cases may be found in our court and in that of Massachusetts, where actions to recover back money paid for taxes, under protest, have been sustained. But on examination, they will be found to be cases where the party suing was not an inhabitant, and therefore not liable to be assessed at all, or where the assessment was for both real and personal estate, or for

personal estate only, and the collector's warrant authorized and directed the enforcement by seizure of property or the arrest of the body.

The reason why in these cases the party was allowed his action to recover back money thus paid, is that the party had no other mode by which he could assert his rights, or have any hearing, or test in any way, the legality of the tax and of the proceedings under it. It was deemed unjust, if not unconstitutional, to allow any officers to issue a final execution, peremptory and absolute and severe in its terms, beyond even an execution from a court, without allowing the party charged some opportunity, in some form, to have a judicial investigation and determination of the questions raised.

But this is exceptional, and allowed in those cases only, when otherwise the party would be remediless.

This view is stated very distinctly and decidedly by C. J. Shaw, in *Wright* v. *Boston*, 9 Cush. 241, and it is a view which goes far to reconcile all the cases, which at first reading might seem contradictory. The court say, in that case, "The only ground upon which a party is allowed to pay a tax or assessment under protest, and afterwards maintain an action to recover it back, is when the tax was wholly void, a mere nullity; when a party can have no action and take no appeal, and when the collector appears with his warrant, he must pay, or have his person arrested or property taken, then he pays under a species of duress; and as the tax was wholly void, as when the party was not an inhabitant and not liable to pay any tax, the city or town, into whose treasury it has been paid, cannot equitably retain it. For any defect or irregularity in the course of the proceeding in making the assessment any ground of objection, which does not go to show the whole proceeding a nullity, he must take his appeal, if he has one."

The same view is taken in *Preston* v. *City of Boston*, 12 Pick. 7; and more distinctly restated in *Boston & S. B. Glass Co.* v. *Boston*, 4 Met. 189. The reason for the rule, allowing a person to maintain an action to recover back taxes paid to a collector, is there

stated to be, because the warrant to the collector is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. In the case before us, the taxes in question were on the real estate only. By the existing law, such estate is liable to be sold by the collector. He had pursued that mode, and part of the estate had been sold and was redeemed by the plaintiff. It does not appear that the collector had attempted or intended to attempt any other mode of collecting the tax, than by sale under the statute lien for these taxes. Indeed, the case finds that he was not arrested, nor were his goods seized.

The plaintiff then had an opportunity to test the validity of the tax and of the proceedings, by commencing or defending any real action depending upon the validity of the sale. He was not remediless. He was not under duress or threats. He paid voluntarily, so far as any actual danger of loss of personal property or of liberty was concerned. He had a door opened for him into court, where he could defend his title to the land, if the tax or proceedings were illegal and insufficient to pass the title.

Plaintiff nonsuit.

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

ELIZABETH ROGERS & another *vs.* INHABITANTS OF GREENBUSH.

Recovering back money paid for taxes by non-resident.

Chapter 199 of the Public Laws of 1868 (R. S., c. 6, § 163), limiting the right of recovery to "money raised for an unlawful purpose," does not apply to a case pending when the act took effect.

ON FACTS AGREED.

ASSUMPSIT. Writ dated March 2, 1868.

The action is brought under R. S. of 1857, § 146, to recover back money paid for taxes assessed upon lands in Greenbush and owned by Josiah Rogers, now deceased, father of the plaintiff, he and they being then residents in Massachusetts. The taxes were assessed for different years prior to 1868. Some of the lands were sold by the town, and the taxes paid under protest, before expiration of the time of redemption, to save the lands, and within one year prior to the date of the writ.

The plaintiffs contended that the taxes were not legally assessed, but that the proceedings were irregular. If they can sustain an action upon such proof the case to stand for trial.

W. T. Hilliard, for the plaintiffs.

J. A. Peters & F. A. Wilson, for the defendants, cited Public Laws of 1868, c. 199, § 1; R. S. of 1857, c. 6, §§ 146, 98.

KENT, J. The plaintiffs are the owners of certain real estate in Greenbush, as heirs of their father, Josiah Rogers. This estate had been assessed to the said Josiah, as a non-resident proprietor, and the plaintiffs had paid the taxes, charges, and interest to the collector. They bring this suit to recover the amount paid, under the provisions of c. 6, § 146, R. S. We see no ground to prevent their maintaining an action in court, unless it arises under the amendment of this section, by c. 199, Laws of 1868.

The manifest intent of the law in 1857, was to allow a party, who was taxed as a non-resident, to test the legality of the tax by paying it, and then suing the town to recover it back. This intent was carried further in the preceding section, § 145, by which it is provided, that such payment must precede any defense where the validity of the sale for such taxes is in question.

It said to the party, you must pay your tax, but you may test its legality by a suit against the town to recover it back, and in that suit you may investigate all the proceedings, as fully as in a real action, and have all your rights protected, without jeopardizing the whole of your title. This was but reasonable and just, if he must first pay the tax, before he can be heard in defense of his title to his land sold for non-payment. The law intends that every man shall, in some form, have an opportunity to be heard on the questions involving his liability to be taxed for his person and property, both real and personal. *Rogers* v. *Greenbush*, *ante*.

The legislature, in 1868, c. 199, amended the above-named § 146, by limiting the right to bring the action to the case of raising money "for an unlawful purpose." By the original section the action could be maintained, when, on trial, it appeared that "any requirement of the law had not been complied with, in raising the money, assessing the tax, or in the subsequent proceedings for the collection thereof." We are not called upon to express any opinion of the wisdom or justice of this change in the law, by which a party is now obliged to pay the tax in full, before he can defend in a real action based on the title, and yet is deprived of his action to recover the money back, except in the single case of an assessment for "an unlawful purpose," however grossly defective the proceedings in raising, assessing, or collecting the tax may have been.

According to the view of those who construe these provisions strictly, if he pays an assumed illegal tax, he may save his land, but lose his money with no opportunity to be heard, except on one point,—the unlawful purpose. If he does not pay it he must lose his land, hopelessly, but saves his money. The recent case of *Orono* v. *Veazie*, 57 Maine, 517, has somewhat meliorated the severity of such construction.

But the question in this case is, whether the amendment of 1868 affects this case. It does not repeal the section, or take away all remedy under it, although it limits this kind of action to a single illegality.

This payment was made, and this action was commenced before the amendment of the statute was made. There is no language in the new statute which indicates any intention in the legislature to make it retrospective, or to apply it to past transactions, or to interfere with actions pending. We never hold an act to be retrospective, unless it is plain that no other construction can be fairly given.

When the plaintiffs paid their money the law said to them, "if you will pay, you shall have a right of action against the town." They did pay, the right attached, and the action was commenced. It would require very strong evidence to satisfy us that the legislature intended to take away the right created by the legislature, and in reliance upon which the money had been paid. We waive the question of the constitutional power of the legislature to abolish entirely a right thus acquired, because we are satisfied that they have not attempted or intended to do it.

The case of *Gerry* v. *Stoneham*, 1 Allen, 319, is very nearly the same as this, on this point, and sustains the views we have taken fully.

Case to stand for trial.

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

WILLIAM D. MCLAUGHLIN & another *vs.* CITY OF BANGOR.

Damages—for injury to personal property through defective way. Loss of use not an element.

In an action against a town for an injury to a stage-coach caused solely by a defect in a highway, the loss of the use of the coach for a reasonable time, while it is being repaired, is not an element of damage.

ON EXCEPTIONS.

CASE, to recover damages for an injury to the plaintiffs' stage-coach, caused March 20, 1868, by being upset on account of an alleged defect in Harlow street, in Bangor, in front of the plaintiffs' public house.

It was in evidence, on the part of the plaintiffs, that, on the day alleged, their coach upon wheels was driven by their servant up to the door of their house, and then stopped to take in passengers from their house.

That some two or three days prior thereto, the servants of the city, directed by the street commissioner, cut a trench in the ice along the gutter of said street, near the curb-stone, in front of the house, from three to six inches deep, and about eight inches wide, for the purpose of carrying off the surface-water that accumulated from the melting snow and ice; that in consequence of the accumulation of snow and ice the shoulder of the street was higher than it otherwise would be, and correspondingly steeper from the shoulder to the gutter; that the coach stopped, with its wheels within three or four feet from said trench; that after the passengers entered the coach, the driver started the horses into the street, when the wheels commenced slewing, and finally slewed into the trench, and the coach was thereby upset and injured.

There was evidence on the part of the defendant tending to show that the defect, if any, was caused by the plaintiffs scraping the snow from their sidewalk and leaving it in the street, thereby

causing the steeper declivity from the shoulder of the street to the trench; and there was evidence to the contrary.

The other testimony in the case it is not necessary to report.

The presiding judge instructed the jury, *inter alia*, that it was the duty of the city to keep their roads safe and convenient for travelers with their horses, teams, and carriages; that in large and crowded cities and crowded thoroughfares more care was required to keep the roads in good repair, than where the travel is little and the inhabitants sparse.

That for the purpose of keeping their roads in repair, cities and towns have the legal right to raise or lower them to the inconvenience of those living upon them; they may cut them down or may raise them up so as to render access to premises bordering upon them almost impassable. If in raising or lowering a street it incommodes those living upon it, it is their misfortune.

That if plaintiffs are entitled to recover, the jury have their bill and have heard the testimony with regard to the injury to the coach. That the jury can see in that bill what were necessary items for the repair of the coach, and if they see fit they can give plaintiffs damage for the loss of the use of the coach a reasonable time the coach was being repaired.

McCrillis & Flagg, for the plaintiffs.

A. L. Simpson, city solicitor, for the defendant.

WALTON, J. In actions for injuries to personal property, the rule of damages, where no circumstances of aggravation are shown, is the difference in the value of the article before and after the injury. If the article is wholly destroyed, its fair market value at the time of its destruction, and a sum equal to lawful interest from that time to the time of the assessment of the damages, make up the amount which the plaintiff is entitled to recover. If the article is only partially destroyed, and the plaintiff retains it, the amount which he is entitled to recover is the difference between the value of the article before it was injured, and its value in its

injured condition. To this amount may be added a sum equal to interest from the time of the injury to the time of rendering the verdict. But to these sums nothing can properly be added for loss of the use of the article. And especially is this true, where, as in this case, there is no claim in the writ for such damages. Such damages are very uncertain. They are not necessarily a direct result of the injury, for the plaintiff may have had no occasion to use the article, or may have been able to supply himself with another equally convenient at little or no expense. They are at most, not direct, but uncertain and consequential, and to entitle a party to recover such damages in any case, he ought to be required to declare for them, that the other party may have notice of the claim and be prepared to meet it.

But whatever may be the rule in other cases, we are clear that in actions against towns for injuries claimed to have been received through defects in highways, no such new element of damage ought to be introduced. For some unaccountable reason verdicts against towns in such cases are now enormously large, and seem to be constantly growing larger; and to allow the introduction of a new element of damage, of so uncertain a character as the loss of the use of a mere chattel, would be a step in the wrong direction.

If the article was wholly destroyed, we presume no one would think of claiming damages for loss of the use of it, in addition to its full value. And we see no reason why a different rule should prevail where the loss is only temporary. It will take no longer to supply the loss in the one case than the other. And again, an article that is being used is being constantly worn out. The loss in wear and tear is, in the end, equivalent to its full value. To allow a party to recover for the use of an article, which in fact is not used, and also its full value, would be to allow him double damages for the same injury.

Our conclusion is, that the ruling of the presiding judge in this case, that the plaintiff was entitled to recover for loss of the use of the coach while it was being repaired, was erroneous. The amount allowed by the jury on this account may have been small, but we

think the ruling introduces a new and dangerous element into this class of cases, which it will not do to sanction.

Exceptions sustained.
New trial granted.

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

The following concurring opinion was submitted by

APPLETON, C. J. I concur in this opinion. The language of the statute is, "if any person . . . suffers any damage in his property, through any defect or want of repair or sufficient railing in any highway, townway, causeway, or bridge, he may recover for the same," etc. The injury to the property must be direct and specific, and not consequential. Such has been the uniform construction in Massachusetts as well as in this State. *Harwood* v. *Lowell*, 4 Cush. 310. The damage must be to the property whereby its value is destroyed or diminished. *State* v. *Hewitt*, 31 Maine, 400; *Weeks* v. *Shirley*, 31 Maine, 270. The right of a father to the future earnings of his minor children does not constitute present property, and is not embraced in the words "property" in the statute. *Reed* v. *Belfast*, 20 Maine, 247. The same principle applies here. The plaintiff cannot recover what might have been the possible earnings of his coach if it had not been injured.

PENOBSCOT TRIBE OF INDIANS *vs.* JONES P. VEAZIE & another.

Exception in a deed—construction of. Government title superior to that of aborigines. In real action plaintiff must recover on strength of his own title.

In a deed from the Penobscot Indians, to the Commonwealth of Massachusetts, releasing all right, title, and interest to the lands lying on each side of the Penobscot river, commencing at Nichols Rock and extending up the river thirty miles, was the following clause: "Excepting and reserving to the said tribe all the islands in said river above Oldtown, including said Oldtown Island, within the limits of the said thirty miles," *Held*, that five islands lying along side of Oldtown Island, were not embraced within the exception.

The title of the government is superior to that of the aborigines.

Where the State conveyed land to the grantor of the defendants' ancestor, more than thirty years ago, and the defendants, and those under whom they claim, have held the possession and claimed to be the owners of the land during all that time, it is not competent for a tribe of Indians, who do not appear to have any title to the premises, to question the regularity of the sale by the State.

ON REPORT.

WRIT OF ENTRY, brought in pursuance of a special resolve of the legislature of Maine, approved Feb. 5, 1868, to recover five small islands in Penobscot river, known as "Grassy Islands," lying above the Indian village, on the lower end of Oldtown Island, called Oldtown, and not above but alongside the island called Oldtown Island.

Plea, general issue and statute of limitations.

The plaintiffs put into the case a treaty dated Aug. 8, 1796, between "William Shepard, Nathan Dane, and Daniel Davis, commissioners, duly appointed and fully authorized and empowered by the Commonwealth of Massachusetts, to treat and stipulate with the Penobscot tribe of Indians, respecting lands they claim on Penobsot river, on the one part, and Orono, Opsang, Nicketumbarvit, Joseph Peace, Wyarsomeeggasett, and Sebattis Neptune, chief of the said tribe, for themselves and for their said tribe," wherein

it is stipulated that, "in consideration of the immediate and annual payment" of the articles therein named, the said chiefs for themselves and tribe "do grant, release, relinquish, and quitclaim to the said Commonwealth, the said tribe's right, interest, and claim to all the lands on both sides of the River Penobscot, beginning near Colonel Jonathan Eddy's dwelling-house, at Nichols Rock, so called, and extending up the said river thirty miles in a direct line, according to the general course of said river, on each side thereof, excepting, however, and reserving to the said tribe all the islands in said river, above Oldtown, including said Oldtown Island, within the limits of the said thirty miles."

Also deed from the same tribe by their said chiefs to the Commonwealth of Massachusetts, of the same date and tenor.

Plaintiff put in the following resolves:

Resolved, That the governor of the Penobscot tribe of Indians, the principal chiefs and a majority of said tribe, under the advice of their agent, be and hereby are authorized to sell a certain island in Penobscot river, called Smith's Island, situated above and near Oldtown Falls, so called, and containing about one acre and a half of land, to Nathan Winslow; and the deed of the governor and principal chiefs of said tribe of Indians, conveying said island to said Winslow, when approved and countersigned by the land-agent of this State, shall be considered and held as evidence of a good title to the fee of said island in all judicial courts within and for this State; and the consideration-money for the purchase of said island shall be paid to the Indian agent, to be appropriated to the use of said Indians as the governor and council shall direct.

Approved Feb. 27, 1829.

Resolved, That the land-agent of this State, jointly with the land-agent of Massachusetts, be, and he is hereby authorized and empowered to sell and convey by deeds of quitclaim, all such small tracts or gores of land in this State, as may remain the undivided property of said States, from time to time, as they shall come to his knowledge, for the benefit of said States.

Approved March 3, 1829.

Also, the following resolution, passed by the legislature of Massachusetts:

Resolved, That the land-agent of this Commonwealth, conjointly with the land-agent of the State of Maine, be, and he is hereby authorized and empowered to sell and convey by deeds of quitclaim all such small tracts or gores of land in the State of Maine, from time to time as they shall come to his knowledge, for the benefit of the two States of Massachusetts and Maine. Provided it appears evident the same are owned by said States.

Approved Feb. 18, 1829.

A deed of the premises in controversy from the land-agents of Maine and Massachusetts, to Nathaniel Lord, dated June 20, 1837, duly recorded.

A deed, dated Jan. 15, 1839, and duly recorded, from Lord to Samuel Veazie of the same premises.

It appeared that Samuel Veazie died March 12, 1868, and that the defendants are his heirs at law; that when the treaty and deed were executed, that the present town of Oldtown and Orono were unincorporated, the whole territory comprising them being then known as Stillwater Plantation.

It also appeared that the defendants, and those under whom they claimed, had continued to occupy the premises under their deed, as their own, openly, adversely, and peaceably from the date of the deed to Lord.

It appeared, on the part of the plaintiffs, that the land-agent, by virtue of Public Laws of 1835, c. 158, surveyed these islands, and on his plan, recorded in the land-office, marked these islands as the property of the plaintiffs.

The case was referred to the full court to render such judgment as the rights of the parties required.

T. B. Reed, attorney-general, for the plaintiffs.

That the resolves of February 18, and March 3, 1829, did not contemplate the islands in controversy, is evident from the resolve of February 27th. Hence if the States owned the islands in com-

mon, the resolves conferred no authority on the land-agents to sell, and their deed is void. Story on Agency, § 126; 2 Kent's Com. 620 *et seq.*

There is no evidence that the islands were owned in common by the States; and if they were not, the sale was not within the authority conferred.

The islands were reserved in the deed and treaty. They lie above Oldtown, but not above Oldtown Island. The word "said" qualifies Oldtown and not Oldtown Island. Having named Oldtown, and wishing to clear up any doubt to the island on which Oldtown is situated, the exception included "said Oldtown Island." The construction is recognized in the Public Laws of 1835, c. 158, and in the plan made under it.

The plan, whether considered as the work of a public officer or as a public record, makes out a *prima facie* case, and, being uncontradicted, it must prevail. *Bruce* v. *Holden*, 21 Pick. 189; *Kendall* v. *White*, 13 Maine, 245; 1 Greenl. on Ev., § 491.

No title, having been conveyed by the State, it is either in the State or tribe. The resolve under which this action is brought admits it to be in the tribe.

Independent of rights conferred by the State, the plaintiffs have always had the title, and never parted with it.

The title of the Indians to the soil is subject to the limitation only, that no one except the State can buy of them. *Worcester* v. *Georgia*, 6 Pet. 214; *Mitchell* v. *U. S.*, 9 Pet. 745, 746; *Jackson* v. *Wood*, 7 Johns. 295; *Goodell* v. *Jackson*, 20 Johns. 693.

This right has been recognized in Maine and Massachusetts not only by the treaties, but by statute 13 William III. (1701), cited in *Brown* v. *Wareham*, 10 Met. 49; Colony Laws (1623), § 1; An. Chart. and Laws, c. 58, p. 132; Acts and Resolves of Prov. of Mass. Bay, 471, 472, 301.

Prescription applies only to incorporal hereditaments. *Cortelyon* v. *Van Brunt*, 2 Johns. 362.

The plaintiffs never, hitherto, having had any right to appear, cannot be concluded by adverse possession. *Nelson* v. *Butterfield*,

21 Maine, 220, 235, 237, and cases cited; *Barker* v. *Richardson*, 2 B. & A. 579.

The statute of limitations is purely a question of remedy, and is within the control of the legislature, which can enlarge the time within which a suit may be brought. *Carnegie* v. *Morrison*, 2 Met. 381; *Bulger* v. *Roche*, 11 Pick. 36; *Bridgham* v. *Bigelow*, 12 Met. 273.

A. W. Paine, for the defendants.

WALTON, J. This is a real action in which the Penobscot tribe of Indians claim to recover possession of five small islands lying in the Penobscot river, near Oldtown. The action is authorized by a resolve of the legislature, and is prosecuted by the attorney-general for the benefit of the plaintiffs.

It appears that in 1796 the Penobscot Indians released to the Commonwealth of Massachusetts all their right, title, and interest to the lands lying on each side of the Penobscot river, commencing at Nichols Rock, so called, near Colonel Jonathan Eddy's dwelling-house, and extending up the river thirty miles. The deed contains the following reservation:

"Excepting, however, and reserving to the said tribe all the islands in said river, above Oldtown, including said Oldtown Island, within the limits of the said thirty miles."

The plaintiffs claim that the islands sued for are included in the foregoing reservation. If this were true, it would by no means follow that they are entitled to recover. The statute of limitations would still have to be overcome; for the defendants, and those under whom they claim, have been in the actual possession of the premises, under a grant from the State, for more than thirty years. They would also have to overcome the objection that the courts have always held, that a title derived from the government is superior to one derived from the aborigines; and that if it should now be held otherwise, and it should also be held that the statute of limitations is no bar to a recovery under an Indian title, a door

would be opened to endless litigation, and thousands of titles, now considered perfectly secure, would be instantly destroyed.

The fact must not be overlooked, that the reservation referred to did not create in the Indians any new title,—did not operate as a grant to them of the islands therein described. Its effect was simply to leave in them the title which they before had, and no more. It is clear, therefore, that if the plaintiffs prevail, it must be upon the ground that the title of the aborigines of this country to the wild lands over which they roamed is superior to that of the government. The executive and legislative departments of the government have generally treated with the Indians as if they were the owners of those vast territories. But when the title to any particular tract of land has been called in question, in the courts of justice, no such doctrine has been admitted. The courts have uniformly held that the title of the government is superior to that of the aborigines. 3 Kent's Com. Lect, 51, and authorities there cited.

But the defendants do not rely wholly upon these grounds of defense. They deny that the islands sued for are included in the reservation referred to. They do not deny that "all the islands in said river, above Oldtown, including Oldtown Island," were reserved; for such is the very language of the deed. But they deny that the five small islands sued for, which lie alongside of Oldtown Island, were reserved; and we think they are right. Certainly they are not a part of Oldtown Island, nor are they above it. How, then, can it be claimed that they are included in the above reservation? We think it cannot. We think that whatever title the Penobscot Indians had to those islands was conveyed to the Commonwealth of Massachusetts in 1796, and that these plaintiffs now have no shadow of title. The defendants, on the contrary, are in possession under a conveyance from the land-agents of Maine and Massachusetts. The land-agents conveyed to Nathaniel Lord in 1837; Lord conveyed to Samuel Veazie in 1839; Veazie died in 1868, and the defendants are his heirs.

It is suggested, however, that the land-agents, in making the conveyance to Lord in 1837, may have exceeded their authority.

We have not deemed it necessary to scrutinize very carefully the resolves under which they acted in making the sale, to see whether they exceeded their authority or not; for it is a familiar rule of law, that, in real actions, the plaintiff must recover, if he recover at all, upon the strength of his own title and not the weakness of his adversary's. It is clear that the plaintiffs have no title to stand upon. It is not necessary, therefore, to scrutinize very closely the regularity of the sale under which the defendants claim. The State received two hundred and fifty dollars for less than four acres of land, and, so far as appears, there has never been any attempt to rescind the sale. The State has kept the money for upwards of thirty years, without offering to restore it; and the defendants, and those under whom they claim, have held the possession and claimed to be the owners of the land during all that time. We think it is not competent for these plaintiffs, who do not appear to possess a scintilla of title, to question the regularity of the sale.

Judgment for defendants.

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

CHARLES H. LEIGHTON *vs.* THOMAS J. HAYNES.

Trespass quare clausum—cost of survey taxable in.

The prevailing plaintiff, in an action of trespass *quare clausum*, is entitled to have the reasonable costs of a survey made by order of court included in the taxation of his costs.

ON REPORT.

TRESPASS *quare clausum* on lot No. 10, R. 2, in Corinth.

The docket entry showed the appointment of a surveyor, and the issuing of a commission to him, but it did not appear upon whose motion the appointment was made.

The surveyor was sworn July 2, 1869, and finished his survey on or before Nov. 1, 1869, both parties having been present at the survey.

The question in controversy was one of lines. The action was referred, and the referees made their award in favor of the plaintiff. Upon the acceptance of the report of the referees by the court, the plaintiff claimed that the cost of the survey should be included in the taxation of his costs of court; but the defendant objected that the action at bar was a personal action, and that the cost of survey could not be taxed except in actions "where lands are demanded."

The case was reported to the full court for its adjudication upon the question of taxation.

W. T. Hilliard & McCrillis, for the plaintiff.

L. Barker, for the defendant.

BARROWS, J. We think the plaintiff is entitled to have the cost of the survey included in the taxation of his costs of court. It has always been the practice in the courts of this State and Massachusetts to appoint a surveyor to run lines and make plans of lands when such a measure was deemed useful in the trial of a cause pending before them, or necessary in order to ascertain the rights of the parties as to the matter in controversy. We deem the power to do so an incident to the general authority to hear and try the case, even without a special statute provision for it. It is in this respect like the power to order a view by the jury, or to compel the attendance of witnesses. Such a survey is frequently imperatively necessary to the intelligent determination of the rights of the parties in an action of trespass *quare clausum*. And when such a survey appears to have been important for the ready and proper elucidation of the case, we see no reason why the reasonable costs of making it should not be allowed to the party on whose motion it is made if he prevails, as well as the proper costs of procuring any other competent testimony.

The first statute recognition of this power in the court that we find in this State is in the R. S. of 1841, c. 115, § 112, and it seems to have been designed to authorize the sheriff to call out the *posse comitatus* to protect surveyors thus appointed in certain cases, not merely to confer upon the court the power of appointment, which existed, and was exercised, long before. We believe it has been the practice to allow the costs of surveys thus made by the direction of the court ever since the separation of this State from Massachusetts, and the propriety of this practice was directly and distinctly affirmed in *Wesley* v. *Sargent*, 38 Maine, 315. The position taken in argument, that there was an agreement of the parties upon which that decision was based, is not correct. On the contrary, it appears that the allowance of the costs of the survey in that case was resisted, because "the survey was made upon the motion of the prevailing party, and at their pleasure and against the wishes of the plaintiffs;" and the usual docket entry, where the appointment of a surveyor is resisted, was made, by which the court reserves the determination of the question of the allowance of the expense until the necessity for the survey has been demonstrated by the trial of the cause. *Costs of the survey to be taxed.*

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

The following opinion was submitted by

DICKERSON, J. This is a question of costs. The action was trespass *quare clausum*. The defendant claimed title in himself, it being a question of lines. A surveyor was appointed and commissioned by the court, and made a survey of the premises in the presence of both parties. The action was referred, and an award rendered in favor of the plaintiff. The plaintiff claims that the costs of the survey, as taxed by the surveyor, should be included in his costs of court. The defendant objects that this is a personal action, and that the costs of survey cannot be legally taxed.

Section 46, c. 104, R. S., provides that "the court may appoint a surveyor to run lines and make plans of lands demanded in a real or mixed action on motion of either party."

The defendant having pleaded title in himself, the rights of the parties to the suit depend upon the title to the land described in the writ. There is the same necessity for "running lines and making plans," as there is in a writ of entry, when a question of lines arises. Accordingly, it has been the practice of the court in this State to appoint a surveyor in actions of trespass *quare clausum*, and trespass *de bonis asportatis*, when the rights of the parties depend upon the establishment of certain boundaries or lines, if such a measure is deemed useful in the trial of the cause, as well as in writs of entry.

In *Inhabitants of Wesley* v. *Sargent*, 38 Maine, 324, the action was trespass to recover the value of a lot of mill-logs, alleged to have been cut within the corporate limits of the town of Wesley, and the defendants admitted their liability, if the logs were cut in Wesley. The question involved the true northerly line of a certain township. A surveyor was appointed, and a nonsuit was ordered by the court. A question having arisen as to the taxation of the costs of the survey, at *nisi prius*, Cutting, J., ordered that the whole expense of the survey should be borne by the plaintiffs, and the law court sustained this ruling.

For certain purposes, other actions than actions of ejectment, or writs of entry, are regarded as real actions when the title to real estate is in issue. An action of trespass *de bonis asportatis* has been held "a real action" within the meaning of the Massachusetts statute, allowing appeals in real actions from the court of common pleas to the supreme court. *Blood* v. *Kemp*, 4 Pick. 169. So, also, is the action *quare clausum fregit* a real action for such purpose. *Davis* v. *Mason*, 4 Pick. 158.

To restrict the authority of the court, in the appointment of a surveyor, to actions where land only, or land and something else are demanded, would be to give the statute a different construction from that which it has heretofore received, and to deprive the court, in a large class of cases, of an important instrumentality indicating the truth, and determining the rights of the parties. We think that the legislature intended by the terms "a real or mixed ac-

tion," to comprehend the action of trespass *quare clausum*, so far as regards the authority to the court to appoint a surveyor, at least where the title to the land is in issue.

Though the docket does not show upon whose motion the surveyor was appointed, the appointment will be presumed to have been made according to the statute. The conclusion is, that the plaintiff is entitled to have the cost of the survey included in the taxation of his costs of court.

APPLETON, C. J., concurred.

SAMUEL LARRABEE *vs.* JOSEPH M. HODGKINS & another.

Deed—void for vagueness of description of premises.

A deed of land given by the treasurer of State for the non-payment of a State tax, describing the premises as "one-fourth, No. 5, R. 8, W. E. L. S.," is void on account of the vagueness of the description of the premises.

ON REPORT.

ASSUMPSIT for money had and received.

The money sued for is one-fourth of a sum collected by the defendants for stumpage of logs cut on township No. 5, range 8, west from the east line of the State in Penobscot county, and in the winter of 1868 and 1869. The defendants admitted that they have the money, and are ready to pay it to the rightful owner.

The money sued for was claimed by one Lane, who is the owner of the one-fourth township, unless the plaintiff owns it by virtue of a tax-title. Both Lane and the plaintiff claim the fund, and both have demanded it of the defendants.

The title set up by the plaintiff is under proceedings for the collection of the State tax upon said township for the year 1864, for the non-payment of which sale was made Sept. 19, 1866. The defendants claimed that without any evidence on their part the

plaintiff could not maintain this suit, because of the insufficiency of the description in the deed of the treasurer of State, even if all the preliminary proceedings were regular.

The description of the premises in the deed of the treasurer of State was simply, "one-fourth, No. 5, R. 8, W. E. L. S."

If the action could not be maintained, the plaintiff was to become nonsuit.

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

Same description used for years—well understood—common language of conveyances. Common in the tax acts. Held good in *Adams* v. *Larrabee*, 46 Maine, 519.

Tax-title was sustained in *Hodgdon* v. *Wright*, 36 Maine, 326. The assessment (as see tax act in the laws of that year), was "B. R. V. W. of E. line of State."

One-quarter means undivided quarter; such is the natural and ordinary meaning of the term.

The description in the deed in *Hodgdon* v. *Wright*, *supra*, was "14,593 acres in township B."

The law has been changed since the decision in *Clarke* v. *Strickland*, 2 Curtis, 439.

A. W. Paine, for the defendants, on the vagueness of the description in the deed, cited *Harvey* v. *Mitchell*, 31 N. H. 575; *Smith* v. *Bodfish*, 27 Maine, 289–94; *Raymond* v. *Longworth*, 14 How. 76; *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. 362.

Appleton, C. J. The plaintiff claims a title to a quarter of a township of land by reason of the non-payment of a tax of eight dollars.

The land sold was described thus, "one-fourth No. 5, R. 8, W. E. L. S. In *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. U. S., 349, the advertisement purported to sell for the non-payment of taxes "half of lot No. 491," and the sale was held void for the vagueness of the description of the estate sold. "What," observes Mr. Justice McLean, in delivering the opinion of the court, "would be under-

stood by such a description? Suppose half a square had been advertised, it not having been divided into lots; would it convey that certainty to the public, as to the precise property about to be sold, that would enable one to form an opinion of its value? No one could suppose that an undivided half of the square was to be sold under the notice; and which half was offered, could not be determined from the advertisement. Would this be a notice under the requisites of the law?

"The value of a lot or half lot depends upon its situation. If one of the half lots fronts two streets in a populous part of a city, it is of much higher value than the other half. And this difference in value may be still greater, if the lot be situated near the middle of a square, fronting the street, and it be divided so as to cut off one-half of it from the street."

"It will thus be seen, that it is not a matter of small importance to the person who wishes to purchase, to know which half of a lot is offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner that the description should be definite. That an undivided moiety may be sold for taxes, has already been stated. But would any one understand that one-half of lot No. 4 means an undivided moiety?"

This reasoning is equally applicable to a township of land, in which the different quarters may be of very unequal value. So, too, there may be a very great difference between a divided and an undivided quarter. The price will vary accordingly as one or the other may be sold. Titles like the plaintiff's, "by which proprietors are deprived of their property, usually for a mere fraction of its value, and without their knowledge, are not favored by the law." *Clarke* v. *Strickland*, 2 Curtis, 439.

There are other grave objections to the plaintiff's title, but it is not necessary to discuss their validity, as we think the deed of the plaintiff is void for the reasons already stated.

Plaintiff nonsuit.

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

LIME ROCK FIRE & MARINE INSURANCE COMPANY *vs.* EDWIN P. TREAT & another.

Copartnership—not bound by one partner's signing firm name to premium note for insurance upon his individual property.

One partner cannot bind his firm by signing their name to a renewal note of a premium note given by such partner in the name of the firm for a policy of insurance upon his individual property.

ON REPORT.

ASSUMPSIT on a promissory note signed E. P. Treat & Co., and on the original account for which the note was given, which bore date more than six years earlier than the date of the writ.

D. N. Mortland, for the plaintiffs.

N. H. Hubbard, for Henry Treat.

DICKERSON, J. Assumpsit on a promissory note signed "E. P. Treat & Co." E. P. Treat has been defaulted, and the plaintiffs claim to hold Henry Treat liable on the note, as a copartner in the firm of E. P. Treat & Co.

The note in suit was given in payment of a note dated in 1862, and signed E. P. Treat & Co., and in settlement of certain other matters of account. The signature to both notes is in the handwriting of E. P. Treat.

Henry Treat testifies that he was a copartner of E. P. Treat from the fall of 1857 to the summer of 1864, but not when the note in suit was given. The consideration of the first note was the premium for insuring the brig, "E. P. Treat," which was owned in part by the defendants in equal proportions, and in their individual capacity. As the brig constituted no part of the copartnership property, neither of the copartners had a right, as such, to sign the copartnership name to the premium note, and thereby bind the firm; nor could either of the copartners bind the firm by giving a renewal note in the copartnership name.

The plaintiffs cannot recover on their account annexed, because it is barred by the statute of limitations. According to the agreement of the parties the entry must be, *Plaintiffs nonsuit.*

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

BENJAMIN J. COLSON *vs.* JOHN H. WILSON.

Attachment—debtor's election of property to be exempted. Mortgage—lien of personal property attached—how waived.

When a debtor owns a horse and colt and a pair of oxen, he may elect which shall be exempted from attachment if he avail himself of the privilege when the attachment is about to be made.

If, having the opportunity to make the election, he fails to do so, he will be deemed to have waived his right to hold them exempt from attachment.

Where the owner of a pair of oxen, having the opportunity, omitted to elect to have them exempted from attachment, and the mortgager of the oxen omitted for the space of ten days, after due notice of their having been attached, to "deliver to the officer a true account of the amount due on" his mortgage, as required by Public Laws of 1859, c. 114, § 2 (R. S., c. 81, § 43), the mortgagee "thereby waived the right to hold the property" on his mortgage.

ON REPORT.

Trespass *de bonis asportatis*, for taking and carrying away a yoke of oxen on the second day of November, 1867. Writ dated Nov. 2, 1867.

Plea, general issue, with a brief statement justifying the taking, by his deputy, one Phipps, on a writ dated Nov. 1, 1867, in favor of one Mayo and against one Abner D. Colson, and alleging that the oxen were at the time Abner D. Colson's property.

Phipps' return upon the writ, *Mayo* v. *Abner D. Colson*, bore date "Nov. 12, 1867, at ten and a half o'clock A. M.," and was of the following tenor: "By virtue of the within writ, I have attached one yoke of oxen, the property of the within-named Abner D.

Colson, said to be subject to a mortgage to one Benjamin J. Colson; whereupon I notified said Benjamin J. Colson of said attachment, and demanded an account in writing of the amount due upon the debt secured by said mortgage; and such account not being given within ten days of said attachment, I retain said oxen under attachment." The writ was duly entered, and the action is still pending.

The plaintiff claimed to hold the oxen by virtue of a mortgage of the same, dated April 26, 1866, and duly recorded, from Abner D. Colson, to secure a note of same date for fifty dollars. Mortgage and note were put into the case.

It appeared from the evidence in the case that Abner D. Colson had a mare, and colt three or four months old, at the time the oxen were attached; that when the attachment was made, he did not claim to hold them exempted from attachment, but first declared they were not his, and then said they belonged to his brother Benjamin.

The court were to render judgment by nonsuit or default, according to the legal rights of the parties.

N. H. Hubbard, for the plaintiff.

C. P. Brown, for the defendant.

DICKERSON, J. The plaintiff claims title to the oxen, which are the subject of the trespass, under a mortgage from one Abner D. Colson; and the defendant justifies the taking by his deputy, Phipps, as attaching officer of a creditor of the mortgager.

The counsel for the plaintiff contends, that the case shows that the taking was several days prior to the attachment, and that, therefore, the defense set up by the defendant is not open to him. The writ upon which the oxen were attached was dated November first, 1867, and appears to have been served November 12th. The writ in the case at bar bears date Nov. 2, 1867.

This apparent anachronism, however, is readily explained by reference to the officer's return upon the writ in the original suit,

which, though dated November 12th, after reciting that the officer had attached the oxen as the property of Abner D. Colson, said to be subject to a mortgage to Benjamin J. Colson, contains the following clause, "whereupon I notified said Benjamin J. Colson of said attachment, and demanded an account in writing of the amount due upon the debt secured by the mortgage, and such account not being given within ten days of said attachment, I retain said oxen under attachment."

The writ in the case at bar is dated November 2d, and the plaintiff testifies that he sued it out immediately after he had notice of the attachment. It is fairly inferable from these facts that the attachment was made and notice was given to the mortgagee November 2d, and that the officer, after waiting ten days, the time allowed by the statute for the mortgagee to render a statement of his claim, made his return, dating it ten days after the attachment, instead of the day of the attachment. The objection based upon the discrepancy of dates is thus obviated.

It is further argued, on the part of the plaintiff, that the oxen were exempt from attachment at the time of the taking. It appears from the evidence, that the debtor in the former suit, who is the plaintiff's mortgager, owned a mare and a colt at the time the oxen were attached. By the R. S. of 1857, as amended by c. 102, § 1, of the laws of 1867, a debtor is allowed to hold, exempt from attachment and execution, "one pair of working cattle, or instead thereof, one pair of mules, or one or two horses, not exceeding in value three hundred dollars." The debtor cannot hold the cattle and the horse or horses, but he may hold either of them exempt from attachment if he own both. The one may be more valuable or desirable to the debtor than the other, and it would be contrary to the policy of the law to allow the creditor to deprive him of the right of choice. The exemption is for the benefit of the debtor, and the right of election is in him. But if he would avail himself of this right, he must signify his wishes to the officer, when the attachment is made, if he has the opportunity to do so; otherwise he will be deemed to have waived his right thereafterwards to hold

the property as exempt from attachment and execution. No such election was made by the debtor at the time of the taking, and it is now too late to make it. The law has made it for him. *Smith* v. *Chadwick*, 51 Maine, 515; *Clapp* v. *Thomas*, 5 Allen, 158; *Nash* v. *Farrington*, 4 Allen, 157.

The oxen, not being exempt from attachment, were subject to the provisions of c. 81, § 64, of the R. S. of 1857, in the same manner as any other mortgaged personal property. The plaintiff "omitted, for the space of ten days after notice of the attachment given to him by the officer, to deliver to him a statement of the amount due on the mortgage," as required by § 2, c. 114, of the laws of 1859, and must "be deemed to have waived his right to hold the property by virtue of his mortgage."

Plaintiff nonsuit.

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

VIRAM B. PAUL *vs.* DANIEL MESERVEY.

Contract—rescission of.

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former.

Thus, where, pursuant to the sale by the plaintiff to the defendant of a mare with foal, the defendant paid the plaintiff twenty-five dollars, and agreed to let him have the colt when four months old, unless he should conclude to keep the colt and pay the plaintiff fifty dollars therefor; but in accordance with a subsequent contract, the plaintiff took back the mare before foaling time, sold her to a third person, and let the defendant have a two years old colt upon the defendant's paying him thirty-seven and one-half dollars boot money; *Held*, that when the plaintiff took back the mare and sold her, the consideration for the promise of the fifty dollars failed.

ON MOTION to set aside the verdict as being against law and against the weight of evidence.

ASSUMPSIT upon a written instrument, dated Nov. 19, 1866, signed by the parties, and of the following tenor:

It is hereby agreed between Daniel Meservey, of the first, and

V. B. Paul, of the second part, as follows: said Daniel Meservey hereby agrees to let said Paul have the colt that comes of the mare; that the said Paul lets the said Meservey have next spring the said mare, to be well used and kept in good condition, and the colt at the said Meservey's risk until it is four months old. If said Meservey wants to take the colt at fifty dollars, he has the privilege, said colt to be delivered in a good and sound condition, if not, Meservey is to pay said Paul fifty dollars.

It appeared that the original trade was made and the mare delivered to the defendant about the 17th day of September, but the contract was not put in writing until the day of its date, November 19th, following; that neither when the trade was made, nor when the written contract was executed, was anything said between the parties in relation to trading back.

That shortly after the contract in suit was executed, the defendant let the plaintiff have the mare back for a two years old colt, and gave him thirty-seven and one-half dollars to boot; that the written agreement was not given up or mentioned by either party at the time of the making and executing of the second trade.

That about two months after the execution of the second trade, the plaintiff sold the mare to one Ordway, and was to have the colt when four months old, or sixty dollars; that the mare foaled the spring following, but the colt died when ten days old.

The jury found a verdict for the plaintiff.

N. Abbott, for the plaintiff.

E. K. Boyle, for the defendant.

WALTON, J. The plaintiff obtained a verdict in this case, and the defendant moves to have it set aside on the ground that it is against law and against evidence. The case is this:

The plaintiff sold the defendant a mare supposed to be with foal. The defendant paid the plaintiff twenty-five dollars, and agreed to let him have the colt when it should be four months old; or, if the defendant wanted to take the colt at fifty dollars, he was to have

the privilege. The plaintiff afterwards proposed to take back the mare, and let the defendant have a two years old colt, if the defendant would pay him thirty-seven dollars and fifty cents to boot. This the defendant agreed to, and the contract was executed. The defendant paid the boot, and the plaintiff took back his mare, and soon after sold her to another person.

The plaintiff now claims, that inasmuch as the defendant thus disabled himself from delivering to him the colt when it should be four months old, he is entitled to the fifty dollars. The defendant, on the contrary, contends, that inasmuch as the new contract was inconsistent with the former one, and rendered its further performance impossible, he was discharged from its further performance; that the effect of the new contract was to rescind the old one; or, at least, waive its further performance.

We think the defendant is right. We think that when a new contract is inconsistent with, and renders the performance of a former one between the same parties impossible, the former is rescinded, upon the same principle that a subsequent act of the legislature repeals a former act, when the two are inconsistent.

True, the defendant agreed to deliver the colt to the plaintiff when it should be four months old, or pay fifty dollars. But this promise was in consideration of (in fact part of) the stipulation, that the defendant might take the colt at fifty dollars, if he wanted to. The plaintiff was not to have the colt and the fifty dollars too. The fifty dollars was to be the price of the colt if the defendant elected to buy it. And when the plaintiff took back the colt and sold it to a third person,—or, what is the same thing, took the mother and sold her before the colt was foaled,—the whole consideration for the promise failed. *Motion sustained.*

Verdict set aside.

New trial granted.

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

PHEBE C. BERRY, administratrix in review, *vs.* BENJAMIN B. WHITAKER.

Review of real action—conveyance after action brought. Administrator cannot prosecute review of.

If the demandant in a real action, after verdict in his favor, but before judgment, convey the real estate in controversy to a third person, such conveyance will not prevent a judgment in his favor in a review of the action, if he is otherwise entitled to it.

An administrator cannot commence or prosecute a writ of review in a real action not brought to foreclose a mortgage.

ON REPORT.

WRIT OF REVIEW of a real action not on a mortgage.

The original action was a writ of entry, in which Benjamin B. Whitaker (present defendant) was plaintiff, and Benjamin Brown (plaintiff's intestate) defendant; and was tried at the October term, 1863, when a verdict was rendered for Whitaker, but judgment was not rendered thereon until the October term, 1866, prior to which time, to wit, on the 28th June, 1864, Whitaker conveyed the premises in controversy to his mother.

The petition for review was entered by the original defendant (Brown), at the January term, 1867, and the writ of review granted to the administratrix on his estate, at the January term, 1869.

The court to enter proper judgment.

N. Abbott, for the plaintiff, cited *Derby* v. *Jones*, 27 Maine, 357; *Pres., etc., Williams' Coll.* v. *Mallett*, 16 Maine, 84.

W. H. McLellan, for the defendant.

WALTON, J. This is a writ of review in a real action. In the original suit the plaintiff was the prevailing party; but pending the suit, after a verdict in his favor and before judgment rendered, he conveyed the demanded premises to his mother; and the question

is whether this conveyance defeats his right to a judgment in his favor in this action of review, provided he is otherwise entitled to it.

We think it does not. We know of no authority for such a position. Certainly none of the cases cited support such a doctrine. On the contrary, the one relied on as decisive, in favor of such a doctrine, is, in our judgment, decisive against it. We refer to *Williams' College* v. *Mallett*, 16 Maine 84.

In that case the presiding judge was requested to instruct the jury, that, it being proved that the demandants had assigned their interest in the mortgage, declared on by a regular deed of assignment, the action could not be maintained in the name of the demandants, although the deed might have been made after the commencement of the action. This instruction the judge declined to give, and the full court held that the refusal was correct. The court say, that, in a real action, tried upon the general issue, the demandant is bound to prove his seisin within the time upon which he has counted in his writ; and that this may be repelled by the tenant, by showing that another was seized at the same time; but that proof that the demandant had conveyed his title, after the commencement of the suit, has no such tendency, and is not admissible in evidence.

It is a well-settled rule of law that he who takes a conveyance of land in litigation (*pendente lite*), takes it subject to such judgment as may eventually be rendered in the case. But the existence of this rule shows that such a conveyance may be made without affecting the rights of the parties to the suit.

It is also true, that, in a real action, the demandant must recover upon the strength of his own title, and not upon the weakness of his adversary's title; but this does not refer to the state of the title at the time of the trial, but at the time of the commencement of the suit. And in an action of review, by the commencement of the suit, is meant the time of the commencement of the original suit, and not the time of the commencement of the action of review.

But there is another difficulty in this case. The report states that the review is prosecuted by the administratrix of the original defendant. What authority has an administratrix to prosecute a writ of review in a real action? She may, undoubtedly, commence, prosecute, defend, or review such personal actions as by the rules of the common law or by statute survive. And she may commence a suit to foreclose a mortgage; and to recover damages for waste and trespass, when the estate is insolvent. But we know of no authority by which an administratrix may commence or prosecute a writ of review in a real action not brought to foreclose a mortgage. The difficulty is, that the title to real estate descends to the heir, and does not vest in the administratrix, as such.

At common law, the death of a party to a real action abated the suit. But our statutes provide that the death of a party to a real action shall not abate it; but that the court may proceed with it, after due notice to all interested in the estate. But an administratrix, as such, is not interested in the real estate of the deceased; it is the heir. Hence notice, in such cases, is always given to the heir. And in a case where the administrator inadvertently appeared and took upon himself the defense of a real action, and submitted the cause to arbitration, the court held the award void. *Bridgham* v. *Prince*, 33 Maine, 174.

And in another case it was held that an administrator cannot, in that capacity, maintain a real action, because the title to the testator's real estate does not vest in him. *Brown* v. *Strickland*, 32 Maine, 174.

We think it is clear that inasmuch as the administratrix was not a competent party to appear and take upon herself the defense of the original action, she cannot do the same thing by means of a writ of review. *Plaintiff in review nonsuit.*

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

OAKES ANGIER *vs.* BENJAMIN L. SMALLEY and others.

Stamp act—construction of.

The act of congress of June 30, 1864, c. 173, § 17, does not require the certificate of discharge of a poor debtor, on his disclosure, to be stamped.

ON EXCEPTIONS.

DEBT on a poor debtor's bond, dated March 5, 1864.

The defendants offered parol evidence of a certificate of discharge of the principal, alleged to have been given by two disinterested justices of the peace and of the quorum, within and for this county, the original of which was alleged to have been lost. It was in evidence that the certificate, if any issued, was dated Sept. 3, 1864.

The defendant, Smalley, testified, that the original certificate was not stamped.

The plaintiff contended that even if the original certificate had been produced, it was not competent evidence, without proof that the proper United States internal revenue stamp had been duly affixed thereto, and that no secondary evidence of the contents of the instrument was admissible, until the legality of the original had been established.

But the presiding judge ruled otherwise, and the plaintiff alleged exceptions.

Joseph Williamson, for the plaintiff.

E. K. Boyle, for the defendant.

APPLETON, C. J. The certificate of the magistrate's discharge of a poor debtor on his disclosure is a "legal document." All the "legal documents" upon which stamps are required to be affixed by the act of congress of June 30, 1864, c. 173, § 17, are specifically enumerated, and do not embrace the certificate in question. The specific enumeration of legal documents to be stamped, excludes all not thus enumerated.

It becomes unnecessary to consider whether the provisions of the U. S. statute, requiring instruments or documents to be stamped, and prohibiting their admission as evidence until the requisite stamps have been affixed, apply exclusively to the courts of the United States or not. That they apply only to the courts of the United States was held to be the law in *Carpenter* v. *Snelling*, 97 Mass. 452. *Exceptions overruled.*

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

RISING SUN LODGE OF MASONS *vs.* JOHN A. BUCK.

Conditional deed—liability of the grantee incurred by acceptance of.

By accepting a deed of real estate "subject to all the" grantor's "liabilities" to the assignee of the grantor's lessee, the grantee assumes the performance of the condition, from which the law will imply a promise on which an action of assumpsit will lie.

Thus, in December, 1850, the owner of a two-story building, by a lease under seal demised to the treasurer of a lodge of Odd Fellows the upper room, with the right to assign the same, for the term of ninety-nine years, covenanting in the lease that the lessor's "administrators and assigns shall, at their own cost, at all times during said term, well and sufficiently repair, maintain, and keep the outside of said building with diligence and in good and proper order and condition, ... and all the grants, covenants, and conditions herein contained, shall extend to and be binding on the parties and their legal representatives respectively." In April, 1861, the said treasurer assigned the lease to the plaintiffs. In January, 1866, the owner of the building conveyed it to the defendant, "subject to all" the grantor's "liabilities to the" plaintiffs "for the hall." Subsequently, upon being notified by the plaintiffs that the roof was out of repair, the defendant neglected to make the necessary repairs, whereupon the plaintiffs made them and brought *indebitatus assumpsit* to recover compensation for the same; *Held*, that the action was maintainable.

ON REPORT.

ASSUMPSIT on an account annexed, for labor and materials in repairing roof of the building occupied by the plaintiffs. There was also a count for money had and received.

It appeared that the defendant owned and occupied all of the building referred to in the lease and deed, except the upper story, which was occupied by the plaintiffs, and that the repairs, to a certain extent, were needed and furnished by the plaintiffs without any direction or order for the same on the part of the defendant.

The remaining facts appear in the opinion.

Arno Wiswell, for the plaintiffs.

Eugene Hale, for the defendant.

APPLETON, C. J. On the 25th December, 1850, Samuel P. Brown leased to Stillman Colton, treasurer of Narramsic Lodge, the hall, or upper room in his store, with the right to assign the same for the term of ninety-nine years, and covenanted that he, his executors and assigns would, at their own cost and charge, at all times during said term, "well and sufficiently repair, maintain, and keep the outside of said building and stairs leading to the hall or demised premises, with diligence and in good and perfect order and condition, fire and unavoidable casualties excepted, and all the grants, covenants, and conditions herein contained, shall extend to and be binding on the legal representatives of the parties, respectively, as well as themselves."

The lease was duly assigned by Stillman Colton, treasurer to the plaintiffs.

On the 12th January, 1866, and after the above assignment, Samuel P. Brown conveyed his store to the defendant, "subject to all my (his) liabilities to the Rising Sun Lodge of Masons, for the hall in the upper part of said building," etc.

The roof of the store becoming leaky and out of repair, the plaintiffs notified defendant of that fact and requested him to make the necessary repairs, and, upon his neglect so to do, they made the

repairs and have brought this action to recover compensation for the expenses thus incurred.

No question is made as to the necessity of the repairs made, nor that they were not properly done and at a reasonable price.

The defendant took his deed subject to the liabilities of his grantor, Brown, to the plaintiff. Brown, by the terms of his lease, was to keep the outside of the building, etc., "in good and perfect order." Taking the deed subject to those liabilities, the defendant impliedly assumed the performance of those liabilities, and agreed to save his grantor harmless from the obligation he had assumed. In such case the law is well settled that assumpsit may be maintained against the grantee. "The doctrine is perfectly well settled," observes Bigelow, C. J., in *Maine* v. *Cumston*, 98 Mass. 319, "that, when a party accepts a deed-poll, or instrument in the nature of a deed-poll, by which he obtains a right or interest in property on condition or with a stipulation that he shall pay a sum of money or perform a certain duty, he becomes thereby bound to pay the money or perform the duty. Not having signed and sealed the deed, he is not liable for breach of covenant; but, by accepting the deed, he assumes the performance of the condition or stipulation, from which the law will imply a promise on which the action may be maintained." In *Huff* v. *Nickerson*, 27 Maine, 107, a conveyance of land by quitclaim was made containing this stipulation, "provided said grantee shall pay said grantor or his assigns twenty-two dollars annually from this date, on demand," until the happening of a certain event. It was held that the grantor might maintain assumpsit to recover the money, if the grantee held under the deed and neglected to make the annual payments on demand. So this promise will be implied, when the payment is to be made to a person other than the grantor, and assumpsit may be maintained on the part of the person to whom such payment is to be made. *Felch* v. *Taylor*, 13 Pick. 133.

But the promise of the defendant is to keep the outside of the building, etc., "in good and perfect order." The remedy of the plaintiff is upon the implied promise of the defendant, arising from

his acceptance of the deed from Brown to him, and his undertaking to save him harmless from his liabilities to the plaintiff. If from his neglect to make repairs, after due notice of their necessity, and after a reasonable time in which to make them, the plaintiffs, for the preservation of their estate, were compelled to make repairs, they are entitled to recover the reasonable expenses necessarily incurred in so doing.

The writ contains an account annexed and the money counts.

Action to stand for trial.

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

MARY E. SAWYER *vs.* SARAH LUFKIN.

Limitations—statute of—mutual account.

In order that an item of credit in an open and mutual account current may take the account out of the operation of the statute of limitations, it must appear that the credit was authorized by the defendant himself, or some one legally competent to act for him.

ON REPORT.

ASSUMPSIT on an account annexed for "labor in taking care" of the defendant "144 weeks, to March, 1859, at $1.50 per week."

The credit side of the account consisted of items of cash, from $4 to $20 each, commencing July, 1856, and purporting to have been received from Valentine Lufkin and Mark Lufkin. The last item was a credit of $40 cash, dated January, 1860, and was paid by Mark Lufkin.

The writ was dated Dec. 18, 1865. Plea, general issue, and statute of limitations, by Thomas S. Fuller as guardian.

On the part of the plaintiff, it appeared that the defendant, being hopelessly insane and incapable of taking care of herself, the plaintiff, in May, 1856, at the request of Mark Lufkin (then about eighteen years of age, and son of the defendant), went to the de-

fendant's house, and nursed and took care of her during the time mentioned in the account; that the family consisted of the defendant and her two minor sons, who were absent most of the time; that the plaintiff found defendant in a filthy condition as to clothing; that the defendant required constant care, being violent at times; that the guardian came to the defendant's house but two or three times during the time the plaintiff was there, and exercised no control and furnished nothing.

On the part of the defendant, it appeared that Thomas S. Fuller was duly appointed and qualified as guardian of the defendant in July, 1855; that soon afterwards he took her to the insane hospital at Augusta, where she remained about one year; that her children desiring to take care of her at home, she was removed home, where then the defendant had a daughter and two sons; that the guardian agreed with the sons that if they would maintain their mother, and keep an account of all payments, when they had paid what the place was worth, they should have it; that the guardian never employed the plaintiff, and that she never mentioned the subject of wages to the guardian.

The whole property was valued at $900.

The full court to enter judgment by nonsuit or default.

Wiswell, for the plaintiff.

C. J. Abbott, for the defendant.

WALTON, J. Part-payment, in order to take a debt out of the operation of the statute of limitations, must be made by the debtor himself, or some one legally authorized to act for him. Payment by a stranger will have no such effect.

The same is true of an item of credit in an open and mutual account current. If the only item in the account, within six years of the date of the writ, is a credit of cash, and this item is relied upon to take the account out of the operation of the statute of limitations, it must be made to appear that the credit was authorized by the defendant himself, or some one legally competent to act for him; otherwise, the account will be barred.

In this case, the plaintiff seeks to recover a balance which she says is due her for labor in taking care of the defendant, who is, and for many years has been, hopelessly insane. The grounds of defense are, first, that the labor was not performed on the credit of the defendant, but on the credit of her two sons, who, by an arrangement with her guardian, had agreed to maintain her; secondly, that the plaintiff has been paid all that her services were reasonably worth; thirdly, the statute of limitations.

It is unnecessary to consider the first two grounds of defense; for very clearly the plaintiff's cause of action, if she ever had one against the defendant, is barred by the statute of limitations.

The labor sued for was all performed more than six years prior to the commencement of the suit; and the cash payment of forty dollars, credited within the six years, which is relied upon to avoid the statute bar, was not made by the defendant nor her guardian, nor with their knowledge or consent, nor by any one legally competent to bind her. It was made by one of her sons, probably in pursuance of the arrangement made by him and his brother with the guardian, and on his own account, and out of his own money. Such a payment is not sufficient to remove the statute bar. To have that effect, the payment should have been made by the defendant herself, or by some one legally authorized to act for her. Not having been so made, it can have no effect upon her rights.

This is the second time this case has been before the law court; but nothing was decided when it was first before the law court, except that an insane person, under guardianship, although thereby rendered incompetent to make an express contract, might, nevertheless, be liable for necessaries upon an implied promise. Whether or not the claim sued was barred by the statute of limitations (if the question was then properly before the court), was not considered, and nothing was decided respecting it. See 56 Maine, 308. *Judgment for defendant.*

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

JENNIE B. LEE *vs.* ANDREW J. CHASE.

Money on life policy—by whom recoverable—not by widow of deceased. Executor de son tort.

The legal representative of an intestate estate is the only party who can recover money due on a policy of insurance upon the life of the intestate.

The widow of the intestate cannot maintain assumpsit against a third person, to whom the insurance company had paid the money due on the policy, to recover the proportion which descends to her by virtue of R. S., c. 75, § 10.

To recover against a defendant, as an executor *de son tort*, under R. S., c. 64, § 37, the defendant should be declared against as an executor.

ON REPORT.

ASSUMPSIT to recover one-third of twenty-five hundred dollars paid, after the death of A. J. Lee (plaintiff's husband), by the Connecticut Life Insurance Company to the defendant, on a policy of insurance issued by the company on the life of Lee, in his lifetime.

The writ was dated Jan. 25, 1869. Plea, general issue, with a brief statement alleging, substantially, that the policy was assigned to the defendant by A. J. Lee in his lifetime, in trust for Lee's two children, and the money collected on the policy is held in pursuance of the assignment, and that the defendant is now executing the trust, which is in full force, and not terminated.

The marriage of the plaintiff and Lee was admitted, as also the death of Lee, which took place Jan. 25, 1867.

It was also admitted that one Seth Lee was duly appointed and qualified as administrator of the estate of A. J. Lee; that the estate was rendered insolvent; that neither the policy nor the money due thereon was ever included in the inventory of the estate, nor was the money collected by the defendant from the company ever claimed or controlled by the administrator; and that the final account of the administrator had been settled.

It appeared, by documentary evidence from the probate court, that the defendant had been appointed and qualified as guardian of

the minor children of A. J. Lee, and charged himself with the money collected of the insurance company in his inventory.

It appeared, on the part of the plaintiff, that she had the policy in her possession for some time before the death of her husband; that in the month of April, 1867, after the death of her husband, the defendant told her that he had collected the twenty-five hundred dollars, and that it was his, the defendant's, property; that no part of it was plaintiff's, and that the policy had been assigned to the defendant by her husband. That, subsequently, the defendant told the plaintiff that the money belonged to the two boys when they became of age; that none of it belonged to her or the little girl, the youngest child, born December, 1866. That she being in want, demanded her share of the money from the defendant before the commencement of the suit, but he refused to pay; and that the little girl died in June, 1867.

The plaintiff offered to prove that there was no assignment to the defendant by the deceased for any purpose whatever, but that the policy was the property of the deceased at the time of his death; that if there was any assignment, it was obtained by fraud and without consideration; that if there was any assignment by the deceased, it was made when he was insane; that it was obtained through undue influence; all of which testimony the presiding judge excluded, and ruled that the action was not maintainable.

Thereupon the case was withdrawn from the jury and by consent reported; and if the action could not be maintained upon so much of the evidence introduced and offered as was admissible, the plaintiff to become nonsuit.

Henry Hudson, for the plaintiff.

A. M. Robinson, for the defendant.

Appleton, C. J. Andrew J. Lee, the husband of the plaintiff, effected a policy on his life for the sum of twenty-five hundred dollars, which after his death the defendant collected, and claims to hold by virtue of an alleged assignment to him in trust for two of

the children of said Lee. The defendant has been duly appointed guardian of the children referred to, has inventoried the money received as their estate, and given bonds therefor.

Seth Lee was appointed administrator upon the estate of Andrew J. Lee, by whom the estate was represented insolvent. He has settled his final account as administrator, but has not at any time charged himself with any money received upon the policy of the intestate.

By R. S., 1857, c. 75, § 10, "a sum of money received for insurance on his (the intestate's) life, deducting the premium paid therefor within three years with interest, does not constitute a part of his estate for the payment of debts or purposes specified in the first section of chapter sixty-six, when the intestate leaves a widow or issue, but descends, one-third to his widow, and the remainder to his issue; if no issue, the whole to the widow, and if no widow, the whole to the issue."

The plaintiff, as the widow of Andrew J. Lee, claims to recover the third of the sum received by the defendant upon the policy of her husband.

The estates of deceased persons are to be settled in the probate court. The debts due to the estate belong to the administrator or executor, whose duty it is to enforce their collection. The claim against the insurance company upon their policy was a claim due the estate, if not previously assigned. The administrator was bound to collect it. When collected, the administrator was to deduct the premiums according to the statute, and the residue was to be distributed in accordance with the statutory provisions on the subject. The plaintiff's claim would be through the probate office and after distribution.

Now the policy in question belonged to the estate, or it did not.

If it did not belong to the estate, but had been previously assigned in good faith, then neither the administrator nor the plaintiff had any claim upon the money collected by the assignee.

If the money belonged to the estate, and the defendant collected the money without authority, then the claim may still be enforced

against the insurance company. Payments made to an executor *de son tort*, constitute no defense to an action by the rightful administrator or executor. *Hunter* v. *Wallace*, 13 Up. Can. Q. B. 385. But in such case the suit can only be maintained by the representative of the estate. The plaintiff could not recover in any suit upon the policy in her own right.

So the administrator may affirm the collection made by the defendant, if without right, and recover the amount received to the use of the estate, and to be distributed according to law. But the plaintiff could in no way affirm the wrongful acts of the defendant. Her interest is but a third, and the administrator might choose to proceed against the insurance company. If the defendant has money belonging to the estate, however received, his indebtedness is to the estate, and it is for the administrator to call it out of his hands, not for those whose right to it or any portion of it accrues after it becomes a part of the estate, and by the order of the judge of probate for its distribution.

If the policy belonged to the estate, and the defendant collected the money without authority, he would be an executor *de son tort*. An executor *de son tort* is one who assumes the office by intrusion, or interferes with the assets of the estate without authority, as by suing for, receiving, or releasing the debts due the estate. Toller on Executors, 38. One who, without rightful authority, assumes the administration and disposition of the estate of a deceased person, and receives and pays out money belonging to it, is liable to a creditor as executor *de son tort*. *White* v. *Mason*, 26 Maine, 301. The right of action is given by R. S., 1857, c. 64, § 32, "to creditors and other persons aggrieved" against the person interfering as executor *de son tort*. But in such case "the declaration against an alleged executor is in the same form, whether the defendant be rightful executor or executor *de son tort*." *Myrick* v. *Anderson*, 68 E. C. L. 719. But in this case the action is not against the defendant as executor, and, therefore, even if the plaintiff is one of the persons referred to in § 32, it cannot be maintained. The defendant should have been declared against as executor.

If the defendant claims to hold the funds received by him under an assignment, whether in trust or otherwise, the validity of which is to be contested on the ground of fraud or want of consideration, it is for the administrator to contest the matter. If he does it successfully, he holds the funds as a part of the estate. If he omits or neglects his duty, he is liable for such omission or neglect as for any other omission or neglect of duty. But the plaintiff is not the proper party to contest the assignment, whether fraudulent or not. The whole estate, and those having a right to the funds, are interested. The plaintiff at most represents but a third. The legal representative of the estate is the proper party to any litigation, when the assets of the estate are to be recovered for its benefit. The premiums and interest for three years thereon belong to the general assets, and are a part of the fund for the payment of debts. The residue is to be distributed between the widow and the children of the intestate. The administrator represents all those rights and unites in himself all those interests. Upon him alone the law devolves the duty of their protection and enforcement. He only can give a valid discharge. His bond to the judge of probate is the security afforded by law to all interested in the estate, and if he fails in his duty, those aggrieved must seek their remedy upon it.

Plaintiff nonsuit.

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

Isaac Blethen *vs.* John Lovering.

Indorsement "without recourse"—warranty—limitations.

If the payee of a negotiable promissory note, by his indorsement thereof "without recourse," impliedly warrants that it was given for a valuable consideration, such liability accrues when the indorsement is made; and the statute of limitations then begin to run.

The "fraudulent concealment of the cause of action" must be proved in order to avoid the statute of limitations upon that ground.

On report.

Assumpsit to recover the amount paid by the plaintiff to the defendant for a negotiable promissory note, dated June 11, 1855, for $35, payable in one year, given by one Durnin to the defendant and by the latter indorsed, "without recourse," to the plaintiff; and for costs and expenses paid on a judgment recovered in February, 1865, against the plaintiff, by Durnin, in an action against him on the note by the plaintiff.

The writ was dated Sept. 14, 1866.

It appeared, on the part of the plaintiff, that the note mentioned was indorsed, "without recourse," to the plaintiff, by the defendant, about the time it became due, for a valuable consideration, and that it was void for want of consideration at its inception.

That the plaintiff brought a suit on the note against Durnin, who recovered judgment against the plaintiff upon the ground that the note was void for want of consideration, and that that suit cost him one hundred dollars.

The action was withdrawn from the jury and reported to the full court, and if the action was not maintainable, the plaintiff was to become nonsuit.

Henry Hudson, for the plaintiff.

The suit was commenced within six years from the time of the verdict in the suit on the note, when this cause of action accrued

and the statute began to run. *Gilmore* v. *Bussey*, 12 Maine, 418; *Butler* v. *Horne*, 13 Maine, 397; *Cole* v. *McGlathry*, 9 Maine, 131; *McKnown* v. *Whitmore*, 31 Maine, 448.

The fraud was concealed, and the suit was commenced within six years after the cause of action was known. R. S. of 1857, c. 81, § 107; *Bishop* v. *Little*, 3 Greenl. 405; *Rouse* v. *Southard*, 39 Maine, 404.

A. M. Robinson, for the defendant.

APPLETON, C. J. The defendant, on or about its maturity, indorsed to the plaintiff, "without recourse," a note signed by one Charles Durnin, for $35, dated June 11, 1855, and payable in one year. On the note the plaintiff brought a suit, which was referred, and the referee made a report in favor of said Durnin, which was accepted at the February term, 1865, of this court, for Aroostook county, and judgment rendered thereon.

On the 14th September, 1866, the plaintiffs brought this action on the ground of an implied promise or warranty, on the part of the defendant, at the time of the transfer, that the amount purporting to be due was due, when, in truth, nothing was due, the note having been given without consideration.

If the note was without consideration, the plaintiff claims that the defendant, notwithstanding his special indorsement, would be liable within the principle of the *Ticonic Bank* v. *Smiley*, 27 Maine, 225. If it be so, his liability, whatever it was, accrued at the time of his indorsement and not since. If there was a promise or a warranty it was according to the statement of facts, broken as soon as made. So an indorsement of a negotiable paper is a warranty, by him who makes it, to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to such indorsement are genuine; and where the signatures are forgeries, the indorser is at once liable upon his warranty to such subsequent holder, without any presentment for payment or notice of non-payment. *Turnbull* v. *Boyer*, 40 N. Y. 456. The liability of the

defendant accruing, then, at the time of his indorsement, the statute of limitation constitutes a bar.

The plaintiff seeks to avoid this by R. S., c. 81, § 107, which extends the limitation in cases of fraudulent concealment of the cause of action. But neither the writ nor the report of the evidence sets forth any such fact or any offer to prove such fact.

Plaintiff nonsuit.

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

ARTHUR L. STEWART *vs.* ALEXANDER CAMPBELL & another.

Statute of frauds—what is within.

A verbal promise to pay the debt of another, in consideration of funds in the hands of the party promising, is not within the statute of frauds, and may be enforced.

But a verbal promise to pay the debt of another, in consideration of forbearance of the creditor to sue the debtor, is within the statute of frauds, and cannot be enforced.

Thus, the plaintiff's debtor, having a debt against one D., and a lien therefor upon a vessel which D. was building for the defendants, told the plaintiff that inasmuch as D. had refused to pay the plaintiff's demand, according to a previous promise, the plaintiff should have the benefit of his lien-claim. Whereupon, the defendants told the plaintiff that they did not want the vessel detained for so small a bill, and promised him that if D., upon his return, did not pay him the sum owed by his debtor, they would see it paid. The plaintiff did not discharge his debtor, nor did his debtor release D. or his lien on the vessel, though he did not enforce it as he would have done, had he not believed the debt would be paid by D. or the defendants. In an action to recover of the defendants the plaintiff's debt against his debtor; *Held*, that the promise is within the statute of frauds.

ON REPORT.

ASSUMPSIT on an account annexed, of the following tenor:

1861, Oct. 20. To amount which you agreed to pay me for Alfred Sprowl, if he would not sue his account and lien-claim on schooner "Campbell," $21.50. 1867, Oct. 1. Interest to date, $7.70. Making a total of $29.20.

There was also a special count for the same sum.

It appeared from the deposition of Alfred Sprowl,

That he worked on the schooner "Campbell" for Amos Dyer, in the spring of 1861; that when the schooner was launched, Dyer owed him about $40; that in May deponent purchased a cook-stove of the plaintiff for $21.50, promising to pay him when the "Campbell" should be launched; that Dyer agreed to pay the plaintiff for the stove, but about the time the vessel was launched Dyer left for New York.

That within four days after the schooner was launched, the deponent notified the defendants that he had a lien-claim against the vessel; that Dyer had agreed to pay a bill at the plaintiff's, and had not done it, and that if it was not paid, the deponent would take advantage of the lien-claim on the vessel; that defendants said they did not want the vessel stopped for that amount, and that they would fix the bill at plaintiff's; that the Campbells said they had not settled with Dyer, but supposed they owed him $300; that they then went to plaintiff's store, and Stewart took Campbell for pay for the stove.

That in consequence of the foregoing arrangement of Campbell to satisfy plaintiff for his claim against the deponent, the deponent forbore to sue his lien-claim upon the vessel; and that he never received the balance from Dyer or any other person.

It appeared from the plaintiff's deposition,

That he sold Sprowl a cook-stove to do cooking for the men whom he employed on the "Campbell;" that when the time for payment had expired, Sprowl desired the plaintiff to give up the security on the stove and take his lien-claim on the vessel.

That when the vessel was launched, Dyer came with Sprowl and agreed to pay the amount Sprowl owed the plaintiff, and the same night Dyer returned and said he could not pay as agreed, because he could not get the money; that plaintiff told Sprowl of Dyer's retraction, and Sprowl said plaintiff should have to use the lien-claim to make the money out of it; that Sprowl, after going to see the Campbells, wanted to know if plaintiff would give up the lien-

claim if they would become responsible; that the plaintiff responded he would; that D. W. Campbell and Sprowl came, and the plaintiff thinks the first words Mr. Campbell said were, that Sprowl had told him that the plaintiff was going to stop the vessel; that Campbell said they had built a large interest in the vessel, and did not want her stopped for so small a bill, for they had paid too much in to have the vessel detained; that Dyer was away, and that if he, Dyer, did not pay the money, as he had told Sprowl and Campbell he would, they would see it paid; that plaintiff asked Campbell if they wanted it charged to the company, and he said he did not, for he knew Mr. Dyer would pay the money.

The defendant's evidence sufficiently appears in the opinion.

The court to give judgment as the law and facts required.

J. A. Milliken, for the plaintiff, cited *Cabot* v. *Haskins*, 3 Pick. 93; *Sumner* v. *Williams*, 8 Mass. 200; *Lent* v. *Padelford*, 10 Mass. 230; *Leonard* v. *Verdenburg*, 8 Johns. 29; *Farly* v. *Cleaveland*, 4 Cow. 432; 1 Pars. on Con. 357; *Babcock* v. *Wilson*, 17 Maine, 376; *Russell* v. *Babcock*, 14 Maine, 138; *Davenport* v. *Mason*, 15 Mass. 15; *Goodspeed* v. *Fuller*, 46 Maine, 144; *Rowe* v. *Whittier*, 21 Maine, 545; *Sanborn* v. *Morrill*, 41 Maine, 467; *Nelson* v. *Boynton*, 3 Met. 396.

George Walker, for the defendant.

APPLETON, C. J. The plaintiff had a debt against one Sprowl. Sprowl had a debt against one Dyer, and a lien therefor upon a vessel he, Dyer, was building for these defendants and others.

According to the plaintiff's testimony, Dyer came to his place of business and agreed to pay the amount which Sprowl owed him. Subsequently, on the same day, he informed him that he was unable to do it. The plaintiff advised Sprowl of this, who told him that he should have the benefit of his lien-claim upon the vessel, but never assigned the same. Sprowl went to see David W. Campbell, one of the defendants, who returned with him, when, according to the plaintiff's testimony, the following conversation,

which was all they had together, took place. "I think," testifies the plaintiff, "the first words Mr. Campbell said were, that Sprowl had told him I was going to stop the vessel. He said they had built a large interest in the vessel, and did not want her stopped for so small a bill, for they had paid too much money in to have the vessel detained; that Dyer was away, and that if he, Dyer, did not pay the money, as he had told Sprowl and me, that they would see it paid. I asked Mr. Campbell if he wanted it charged to the company, and he said he did not, for he knew Dyer would pay the money."

The plaintiff did not discharge Sprowl, nor does he say he did, nor did Sprowl release Dyer or his lien on the vessel, or agree to so do, though he did not enforce it as he would have done had it not been for the expectation that the debt in suit would have been paid. Dyer did not pay the plaintiff, but collected of the defendants the amount due from them, so that they have no funds of his in their hands.

By R. S., c. 41, § 1, it is provided that "no action shall be maintained . . . to charge any person upon any special promise to answer for the debt, default, or misdoings of another, . . . unless the promise, contract, or agreement, on which such action is brought, or some memorandum thereof, is in writing and signed by the party sought to be charged therewith, or by some person thereto lawfully authorized."

It is difficult to perceive why the promise of the defendants, if made as the plaintiff claims, is not within the clear and explicit language, and the true intent and meaning of the statute. The debt of Sprowl to the plaintiff, and that of Dyer to Sprowl, remained due and outstanding, and could be enforced at any moment. The defendants still remained indebted to Dyer, and the lien of Sprowl was undischarged. If the promise was to pay the debt of Sprowl to the plaintiff, that debt and the lien of Sprowl having never been discharged, it is the verbal promise to pay the debt of another, and is the very case for which the statute makes special provision.

That such is the true construction of the statute is established by the almost entire concurrence of judicial authorities. "But if C. had requested A. to forbear to sue B. for the debt, and A. had forborne accordingly, that was a good consideration at common law to support the promise, and is good since the statute if the promise be in writing." *Forth* v. *Stanton*, 1 Wms. Saund. 211. In *Watson* v. *Randall*, 20 Wend. 201, it was decided that an agreement to forbear to sue a debtor is a good consideration of the promise of a third person to pay the debt; but to render the promise obligatory, it must be in writing. "While the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing. The authorities are all uniform," remarks Nelson, C. J., in delivering the opinion of the court, "that the promise to pay, in consideration of forbearance, is within the statute. When there is a verbal promise to pay the amount of the debt of another, in consideration that the creditor will forbear to sue for a limited time, the forbearance is a new consideration upon which the promise is founded. But such cases are held to be within the statute." In *Nelson* v. *Boynton*, 3 Met. 396, it was held, that a promise to pay the debt of a third person, which was in suit, and secured by an attachment of personal property, in consideration of the holders discontinuing the suit, is within the statute, and so not binding unless in writing. "To bind one, therefore," remarks Shaw, C. J., "for the debt or default of another, two things must concur; first, a promise on good consideration; and, secondly, by evidence thereof in writing." The same principles are fully established in *Stone* v. *Symmes*, 18 Pick. 467, and *Curtis* v. *Brown*, 5 Cush. 488. This view of the statute was adopted in *Harrington* v. *Rich*, 6 Verm. 666. In *Jones* v. *Walker*, 13 B. Mon. 357, the supreme court of Kentucky held, that if the debtor be discharged, and the defendant promise to pay the creditor the debt thus discharged, that it is not within the statute; but when the original debt is not extinguished, nor the original debtor discharged till payment is made by the party promising to pay, it is within the statute. In *Waggoner* v. *Gray*, 2 Hen. & Mumf. 603, the facts were

these: one Gray, the defendant's intestate, being indebted to Slaughter, and Slaughter to Waggoner, the plaintiff, Gray, in consideration of his debt to Slaughter, promised the plaintiff to pay the debt of Slaughter to him; but the plaintiff did not thereupon discharge Slaughter, and the promise of the defendant was held to be collateral and void by the statute of frauds. "The distinction," says Roane, J., "seems to be, that when the person, in whose behalf the promise is made, is not discharged, but the person promising agrees to see the debt paid, so that the promise has a double remedy, the promise is collateral, and must be in writing." This view of the law was subsequently affirmed in *Ware* v. *Stephenson*, 10 Leigh, 155, and in *Noyes* v. *Humphries*, 11 Grattan, 643. The general rule is, that as long as the debt of the person, for whom the promise is made, remains, the promise is collateral. "The statute," remarks Parke, B., in *Hargreaves* v. *Parsons*, 13 Mees. & Welsb. 560, "applies only to promises made to the persons to whom another is already or is to become answerable. It must be a promise to be answerable for a debt or default in some duty by that other person towards the promisee."

There is a species of novation, called delegation, in the civil law, which "is effected by the intervention of another person, whom the debtor, in order to be liberated from his creditor, gives to such creditor, or to him whom the creditor appoints, and such person so given becomes obliged to the creditor in place of the original debtor." Burge on Suretyship, 173. But it is necessary that there should be the concurrence of the person delegating, that is, of the original debtor and of the person delegated, or the person whom he appoints. The intention of the creditor to discharge the first debtor and accept the second in his place, must, in order to give effect to the delegation, be perfectly evident." Ib. 174. There are authorities which show that the circumstances constituting, under the Roman law, a delegation, sustain the promise of a third person to pay a debt of another to his creditor, when that debt has been extinguished, and the debt of the person promising has been substituted upon sufficient consideration therefor. But there must be the mu-

tual assent of all parties to make the substitution effectual at common law. *Butterfield* v. *Hartshorn*, 8 N. H. 348. In *Tatlock* v. *Harris*, 3 D. & E. 180, Buller, J., says, "suppose A. owes B. £100, and B. owes C. £100, and they meet, and it is agreed between them that A. shall pay C. £100, B.'s debt is extinguished, and C. may recover the same against A." "If," says Cloudman, J., in *Bird* v. *Gammon*, 3 Bing. N. C. 883, "debtor, creditor, and a third party agree that the third party shall be substituted for the debtor, the debtor is exonerated. *Fairlee* v. *Denton*, 8 B. & C. 395, has decided that, establishing to that extent an exception to the rule that debts cannot be assigned." 1 Parsons on Contracts, 187. Such promises are not within the statute; but in the present case no such promise is proved on the part of the defendants, for no debts have been discharged, nor was the promise of the defendant unconditional, according to the statement of the plaintiff to whom it was made.

In accordance with these views are the decisions of this court. It was held, in *Plummer* v. *Lyman*, 49 Maine, 229, that a parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there had been no privity, was within the statute of frauds as a promise to pay the debt of another. Thus, where A. had a claim on a vessel for materials used in building it, and B. held the vessel to secure him for advances made to the builder, a promise by B. to accept the order of the builder in favor of A., for the amount of his claim, cannot be enforced, unless it appears to have been for some consideration, such as a discharge of A.'s lien on the vessel, or his promise to discharge it, or release his claim upon the builder. In the case at bar there was no discharge of lien or promise to discharge or release of the defendant of the amount in controversy. In *Richardson* v. *Williams*, 49 Maine, 558, A. being indebted to B., C. verbally promised B. to pay him the amount, and charged it to A. without the consent of the latter. It was held that B., not having released or assigned his debt, the promise was without consideration, and that such promise was within the statute of frauds, and not binding. In *Furbish* v. *Goodenow*,

98 Mass. 297, it was decided, that an oral promise to pay the debt of another is within the statute of frauds, if the original promisor remains liable, and no consideration moves from the creditor to the new promisor, although there is a valuable consideration moving from the original debtor to the new promisor. But here there is no consideration moving from anybody to the defendant.

But it is urged that these views are at variance with the current of judicial decisions in this State, and reliance is placed upon numerous decisions by our courts. In *Russell* v. *Babcock*, 14 Maine, 139, it was held, that an agreement to delay the collection of an execution was a sufficient promise by a third person to pay the same, and that such promise need not be in writing. But this decision would repeal the statute, and it has since been overruled. Referring to this decision in *Hilton* v. *Dinsmoor*, 21 Maine, 410, Shepley, J., uses the following language: "If this was in reality the ground of the decision in that case, and the abstract of the reporter is to that effect, we are constrained to say it is unsupported by the authorities." To the same effect was the case of *Doyle* v. *White*, 26 Maine, 341.

In *Dearborn* v. *Parks*, 5 Greenl. 81, the debtor of the plaintiff left funds in the hands of the defendant, with which he was to pay his (the debtor's) debt to the plaintiff. The defendant receiving these funds, or being allowed for them in settlement, as if paid to the plaintiff, promised to pay them to the plaintiff. The plaintiff, therefore, had funds in the defendant's hands, placed there for his benefit, for which he might well maintain a suit. In *Hilton* v. *Dinsmoor*, 21 Maine, 210, the consideration of the defendant's promise was forbearance to sue, and funds placed by the debtor in the defendant's hands with which he was to pay the debt. The court held the promise in consideration of forbearance was within the statute, but the funds having been placed in the defendant's hands by the plaintiff's debtor, the promise of the defendant in consideration thereof was not within the statute. In *Rowe* v. *Whittier*, 21 Maine, 545, notice was taken of the fact that the plaintiff had not discharged his debt against his debtor, which he sought to

enforce against the defendant. "If," says Whitman, C. J., "the claim was a legal one against Patten & Co. (the debtors of the plaintiff), it does not appear that they were discharged from it in consideration of the promise made by the defendant, and if it had so appeared, the defendant not being otherwise liable, his promise would not have been obligatory under the statute of frauds without a memorandum in writing." In *Brown* v. *Atwood*, 7 Greenl. 356, where S. sold a vessel to A., who promised in consideration thereof to pay B. a debt due from S., upon which promise B. brought his action against A., it was held that such promise was good, though not in writing, for it was a promise to pay his own debt, though enuring to the benefit of B. The plaintiff had funds in the defendant's hands, left by his debtor, and might well call them out. In *Maxwell* v. *Haynes*, 41 Maine, 559, the plaintiff's debtor sold out to defendant, leaving funds in his hands to pay his debt to the plaintiff. In all these the defendant held funds of the debtor in his hands designated and set apart for the payment of his debt, and held by the defendant for that purpose. In *Fullam* v. *Adams*, 37 Verm. 391, Poland, C. J., referring to this class of cases, says, "And we believe it will be found that in all the cases now regarded as sound, when it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hands funds, securities, and property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty, growing out of the receipt of the fund."

Now this action cannot be sustained upon the doctrines of the cases last referred to upon which reliance is placed for that purpose. The debt of the defendant to Dyer was not discharged, and he has since paid it. The same is the case with the claim of Sprowl against Dyer, and of the plaintiff against Sprowl. No action or right of action is discharged, and there never has been a time when each creditor might not have successfully maintained an action against his debtor.

Nor can the plaintiff recover on the ground that funds have been placed in the defendants' hands to meet this specific debt. Dyer

placed none there, nor did Sprowl, nor in fact have the defendants the funds of anybody with which to meet this debt.

If Sprowl neglected to enforce his lien, it was not in consequence of any agreement not to do it, or any release of it. The case shows nothing that would have been a bar to its enforcement at any time.

There is a class of cases, as in *Alger* v. *Scoville*, 1 Gray, 391, in which it was held, that the promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another within the statute. So in *Pike* v. *Brown*, 7 Cush. 136. In *Eastwood* v. *Kenyon*, 11 A. & E. 446, it was held, that a promise by the defendant to the plaintiff to pay A. B. was not within the statute. "The facts were," says Lord Denman, "that the plaintiff was liable to a Mr. Blackburn on a promissory note; the defendant for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Mr. Blackburn. If the promise had been made to Mr. Blackburn, doubtless the statute would have been applied, and it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor and not to the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration we are of opinion that the statute only applies to promises made to the person to whom another is answerable." But the promise here is not made to Dyer nor to Sprowl, and when made, as in the present case, is within the statute.

According to the facts, as stated by the plaintiff in his testimony, and the law as applicable to these facts, he cannot on his own showing maintain this suit. Still less can he do it, if the testimony of the defendant is deserving credit.

The defendant's testimony is as follows: "Sprowl wanted me to go into Mr. Stewart's, and he spoke about this lien-claim; as near as I can recollect, I told him that I did not know whether he had

a claim on the vessel. I had only his word for it, but rather than have any trouble about the claim, I would pay Stewart, provided he would first satisfy me that it was due from Dyer. I required him to settle with Dyer so that we could charge Dyer. Whatever promise I made was upon this condition. I so understood it and so intended to be understood. We paid no bill, that I recollect of, without their being first audited by Dyer or on his order." No order from Dyer was obtained, nor did Sprowl settle with him. After some time elapsed, Dyer presented his bill, which the defendants paid.

Upon the defendant's version of the transaction he is exempt from liability. His promise was to Sprowl, if to any one, and it was upon condition. The condition was never performed, so that no liability ever attached, and the suit is not in the name of Sprowl. The statement of the defendant has the greater marks of probability, and is more in accordance with the natural course of business. The burden is on the plaintiff to prove the facts necessary to establish his case, and we think he has failed to do it, and upon this ground, if on no other, the plaintiff must fail.

KENT, J., concurred.

WALTON, J. It is perfectly well settled in this State that when a promise to pay the debt of another is founded on a new consideration beneficial to him who makes the promise, such a promise is not within the statute of frauds. "A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well be to pay another's debt as to do any other act." This promise may be absolute or conditional; to pay money or perform labor; and having a valuable consideration of its own to rest upon, it is a new, original, and independent undertaking, and may, like any other lawful contract, be enforced in law, or damages recovered for the breach of it.

Thus, where the defendant took a conveyance of land, and in part consideration thereof promised to pay a note from the grantor

to a third person, it was held that the promise was not within the statute of frauds. *Dearborn* v. *Parks*, 5 Greenl. 81.

So, where the debtor sold a vessel to the defendant, who, in consideration thereof, promised to pay the plaintiff's debt, it was held that the promise was obligatory, though not in writing. *Brown* v. *Atwood*, 7 Greenl. 356.

And it was held in one case, that an agreement to delay the collection of an execution against one was a sufficient consideration for a promise by another to pay the amount thereof, and that such a promise was not within the statute of frauds. But the correctness of this decision may well be doubted, unless it can be sustained upon the ground that the defendant had security for his undertaking. There was evidence that he said the debtor had secured him. *Russell* v. *Babcock*, 14 Maine, 138.

In a later case, where the defendant promised to pay the debt of a third person in consideration of property put into his hands, as well as forbearance to sue, the promise was held not to be within the statute of frauds; but it was denied that forbearance alone would take the case out of the operation of the statute. *Hilton* v. *Dinsmore*, 21 Maine, 410.

And in a still later case, where the debtor had been logging for the defendants, and in the spring sold out all his "fixings" to them, and they promised to pay all his bills, it was held that their promise was obligatory, and one of the creditors recovered his debt in a suit against them. *Maxwell* v. *Haynes*, 41 Maine, 559.

In a recent case in Massachusetts, it was held that an oral promise to pay the debt of another is within the statute of frauds, if the original debtor remains liable and no consideration moves from the creditor to the new promisor, although there is a valuable consideration moving from the original debtor to the new promisor. *Furbish* v. *Goodnow*, 98 Mass. 296. But it is conceded in the opinion of the court in that case that the law is otherwise in New York, Vermont, and Maine.

In a recent case in New York, the court of appeals reviewed the authorities in a full, clear, and able manner, and the court held

that "a person who receives a consideration may be bound by any lawful promise founded upon it, and that that promise may as well be to pay another's debt as to do any other act." Three members of the court were in favor of adhering to an earlier decision in which it had been held that injury to the creditor alone was a sufficient consideration to uphold such a promise, as where he relinquished security; but a majority of the court held that it must be a beneficial consideration moving to the party promising. *Mallory* v. *Gillett*, 21 N. Y. 412.

The difficulty in this case is, that the evidence fails to establish any consideration whatever for the defendants' promise. At least, such is the opinion of a majority of the court. It is true, that the plaintiff's debtor pretended to have a lien on the defendants' vessel, but the evidence fails to establish such lien; or, if he had one, that he discharged it. So far as appears, therefore, there was no consideration whatever for the defendants' promise, if one was in fact made, which they emphatically deny. It is clear, therefore, that the plaintiff cannot recover. *Plaintiff nonsuit.*

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

JOSEPH A. CONANT *vs.* RICHARD NORRIS.

Fence-viewers—disqualification of.

An assignment of a partition fence by fence-viewers, one of whom is a brother-in-law of one of the owners of the adjacent land, is void.

ON REPORT.

CASE under R. S. of 1857, c. 22, §§ 4, 5, 6, to recover double the value of a fence built by the plaintiff after an alleged assignment by fence-viewers.

It appeared that one of the fence-viewers who acted in making the alleged assignment, was the brother-in-law of the plaintiff, who offered no evidence of consent and waiver of this objection on the part of the defendant.

The case was withdrawn from the jury and reported to the full court, who were to order a nonsuit if the objection of relationship is fatal to the maintenance of the action.

C. M. Herrin, for the plaintiff.

The statute provides that certain officers shall be disinterested,—naming appraisers of real estate, appraisers to take inventories, commissioners to assess damages for flowage, commissioners to make partition; but the statute omits this requirement, in the same sense, as to certain other officers, among which are fence-viewers. The intention to make the distinction is apparent from the fact.

When the statute provides that a certain officer shall be "disinterested," it means disinterested as defined in R. S., c. 1, rule XXII; but as to others, they need only be free from personal interest.

Counsel cited *Lovering* v. *Lamson*, 50 Maine, 334; *Cummings* v. *York*, 54 Maine, 386; *State* v. *Intoxicating Liquors*, 54 Maine, 564; *Com.* v. *Emery*, 11 Cush. 411, as to the effect and construction of the omission to require certain officers to be disinterested.

The action is remedial and not penal. *Palmer* v. *York Bank*, 18 Maine, 166; *Reed* v. *Northfield*, 13 Pick. 96; *Suffolk Bank* v. *Worcester Bank*, 5 Pick. 106.

Madigan & Donworth, for the defendant.

WALTON, J. The plaintiff claims to recover double the value of a partition fence built by him after an alleged assignment by fence-viewers and neglect by the defendant to build his part. The fact came out in the course of the trial, that one of the fence-viewers who made the assignment was a brother-in-law of the plaintiff, and the question is, whether this was such a disqualification as renders the proceedings void, and defeats the plaintiff's right to recover.

We think it was. This precise question came before the supreme court in New Hampshire, and the court held that one of the fence-viewers being disqualified to act, by his relationship to the plaintiff, the proceedings were void, and furnished no foundation for the plaintiff's claim. *Sanborn* v. *Fellows*, 22 N. H. 473.

In that State, as in this, there is no express statutory disqualification; but the court held, after a careful examination of the question, and an elaborate review of the authorities, that by the rules of the common law, a fence-viewer, who is related to one of the parties within the fourth degree, by consanguinity or affinity, is disqualified to act.

We cannot doubt that the decision was right. The duties of a fence-viewer require a careful exercise of the judgment, and are essentially judicial in their character; and we see no reason why he should not stand as indifferent between the parties, and be as free from prejudice and bias as a judge, or a juror, or a justice of the peace.

Our conclusion is, that the relationship of the fence-viewer to the plaintiff was such a disqualification as renders the proceedings void, and defeats the plaintiff's right to recover. *Plaintiff nonsuit.*

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

BENJAMIN L. STAPLES, administrator, *vs.* GEORGE B. WELLINGTON.

Instructions. Exceptions. Temporary hallucination—continuance of, not presumed. Admissibility of evidence—when objections to be stated.

A party cannot sustain exceptions to an instruction which is more favorable to him than the one which he requested to be given.

Thus, where a requested instruction contained the two propositions, (1) that the assignee of a debt need not notify the debtor of the assignment, and (2) that if notice were given by the assignor or any third person, it would be sufficient to put the debtor upon inquiry to ascertain the fact; and the instruction given

negatived the necessity of notice by the assignee, and affirmed the sufficiency of notice from any reliable source, as withdrawing the right of the debtor to pay the assignor; *Held*, that as a notice, coming from an unreliable source, would not be sufficient to induce inquiry, the instruction given was more favorable to the debtor than the one requested by him, and that he cannot sustain exceptions thereto.

There is no presumption of law as to the continuance of a temporary hallucination or delusion resulting from disease; and a party claiming to avoid a contract by reason thereof, must show its existence at the time of the making of the contract, and that the hallucination was of a character affecting his capacity to make the contract sought to be avoided.

To be available, the grounds of objection to the admissibility of testimony must be stated when it is offered.

A party is not injured by the exclusion of an admissible statement contained in an answer in a deposition, when the same statement in other portions of the deposition is received.

A verdict, founded upon conflicting testimony, will not be set aside as being against the weight of evidence, unless it be flagrantly erroneous.

ON EXCEPTIONS.

ASSUMPSIT on a special contract for the payment of an alleged bounty as a volunteer in the United States army.

At the February term, 1867, the action was tried, and the jury returned a verdict for the plaintiff; whereupon the defendant filed a motion to set aside the verdict, and the action was continued.

On the 6th of May, 1867, the plaintiff's intestate, by his deed, assigned all his right, title, and interest in the verdict, and the claim on which it was founded, to Edmund Madigan, his attorney in the action.

On the 7th of September, 1867, the defendant obtained from the plaintiff's intestate a deed of release of the action, and all claims upon which the same is founded, the consideration of which being, as expressed in the lease, sixty-seven dollars.

At the September term, 1867, the release was presented to the defendant, accompanied by a motion to dismiss the action, the motion to set aside the verdict having been withdrawn. The motion was resisted by Edmund Madigan, the assignee, on the ground of the assignment of May 6th, and also on the ground of the invalidity of the release by reason of the alleged incapacity and unsoundness of mind of Francis G. Brown, the assignor and plaintiff's intestate, on Sept. 7, 1867, the day of its date.

The defendant pleaded the release to the further maintenance of the action; and the plaintiff replied that he ought not to be precluded from having judgment on the verdict in his favor; because, (1) the alleged writing of release was not the deed of said Francis G. Brown; (2) it was obtained by the fraud and circumvention of the defendant, and for a grossly inadequate consideration, by deceit and undue influence; (3) said Brown, at the time of the pretended execution of said alleged writing of release, was not of sound mind, nor legally competent to execute the same; (4) before the time of the pretended execution of said release, the action and all rights accruing therefrom, had, for a valuable consideration, been duly assigned to E. Madigan, of all which the defendant had notice; and (5) heretofore and before the middle of vacation, the said Brown deceased, and afterwards, to wit, on, etc., Benjamin L. Staples was duly appointed and took upon himself the trust of administrator of the estate of said Brown.

The defendant rejoined, substantially, that the release ought to be allowed against the further maintenance of the action, because it was not obtained for an inadequate consideration, nor by any deception or circumvention; that it was not obtained from said Brown when he was of unsound mind and legally incapacitated for the transaction of business; that the defendant had no notice of the assignment, and concluded to the country. The plaintiff joined the issue thus tendered.

At the February term, 1869, the presiding judge presented two issues for the jury to determine:

1. Did the defendant have notice of the assignment before receiving the release? and

2. Was the release valid or void?

There was evidence tending to show that the defendant had notice of the assignment to E. Madigan before the execution of the release. There was evidence tending to show the unsoundness of mind or alleged incapacity of Brown, the intestate, to make a binding contract, on Sept. 7, 1867, the date of the release; and there was evidence to the contrary.

The plaintiff introduced the depositions of Robert Brown, Phebe Brown, and William Brown, certain portions of which being objected to were ruled out. These, as well as the remaining facts, sufficiently appear in the opinion.

The jury found that the defendant did not have notice of the assignment before executing the release; and that the release was valid; and the plaintiff alleged exceptions, and also filed a motion to set aside the verdict upon the issues as being against the weight of evidence.

J. Granger & E. Madigan, for the plaintiff.

Upon the point of excluding the statement, in the depositions, that the plaintiff's intestate's talk the next day, and for a week or more after the pretended execution of the release, had "no sense or reason in it," cited *Commonwealth* v. *Timothy*, 8 Gray, 480.

The requested instruction concerning notice should have been given. *Bridgham* v. *Wentworth*, 11 Cush. 123; *Drake* v. *Curtis*, 1 Cush. 414.

Upon the question of notice counsel cited 3 Washb. on Real Prop. 284; Best on Presump. 140; *Farnsworth* v. *Child*, 4 Mass. 639; *Young* v. *Dearborn*, 7 Foster (N. H.), 324; *Cameron* v. *Little*, 13 N. H. 26; *Davenport* v. *Woodbridge*, 8 Greenl. 18; *Anderson* v. *Van Allen*, 12 Johns. 343; *Warren* v. *Swett*, 11 Foster (N. H.), 341; *Nute* v. *Nute*, 41 N. H. 69; *Jordan* v. *Gillen*, 44 N. H. 428; *Cooper* v. *Newman*, 45 N. H. 331, 342; *Davis* v. *Keyes*, 38 N. Y. 94.

The instruction did not define "reliable source." It is not a term of art, nor does it have a fixed meaning like "reasonable" or "gross," and misled the jury. If the defendant obtained information or notice from an inmate of a State prison, it should have been left to the jury to say whether he was reasonably put upon inquiry, and ought or ought not to have pursued the inquiry until he ascertained the fact. "Constructive notice exists where the party, by any circumstances whatever, is put upon inquiry." Bouv. L. Dict., Tit. Notice.

Upon the question of Brown's insanity or delusion, the counsel contended that the burden of proof attaches to the party alleging a lucid interval, who must show competence at the period when the act was done and to which the lucid interval refers. *Attorney-general* v. *Paruther*, 3 Bro. Ch. Cas. 441; *Sutton* v. *Sadler*, 3 C. B. (N. S.) 94. If derangement or imbecility be proved at any particular period, it is presumed to continue until disproved, unless caused by the violence of a disease. 1 Greenl. on Ev., § 42; Swinburne on Wills, 65.

Counsel also cited, on the point of presumption of continuance of insanity, Williams' Exrs. 19; *Jackson* v. *Van Dusen*, 5 Johns. 159; 1 Redf. on Wills, 47–92; 2 Greenl. on Ev., § 689; *Haviland* v. *Haynes*, 37 N. Y. 28; *Woodbury* v. *Obear*, 7 Gray, 467.

The court should have clearly discriminated between the presumption attending general insanity and that of temporary. The instruction given makes a distinction between insanity and unsoundness of mind, when the term includes all derangements of mind. Taylor's Med. Jur. 625. The distinction should have been made by the instruction, and left to the jury to find whether it came within one or the other. Otherwise the tendency was to mislead.

The instruction given, though correct as an abstract principle of law, yet for want of a qualification which would have made the present case an exception, was incorrect in its application. *Pond* v. *Williams*, 1 Gray, 635; *Mansfield* v. *Corbin*, 2 Cush. 152; *Farnum* v. *Davidson*, 3 Cush. 234. "Hallucination" has not received a technical meaning in law like "lunacy." See Worcester's Dict. Delirium, one form of insanity, may be temporary or permanent. When proved, he who would show it has ceased, must show it was temporary, accidental, or arose from causes which no longer exist. See *Hix* v. *Whittemore*, 4 Met. 545. Counsel also cited *Halley* v. *Webster*, 21 Maine, 461.

J. C. Madigan & Donworth, for the defendant.

APPLETON, C. J. This suit is prosecuted for the benefit of Edward Madigan, to whom the original plaintiff assigned, on 6th May,

1867, the demand in suit. The defense rests upon a release executed on 7th Sept., 1867, by plaintiff's intestate.

The validity of the release was contested on the ground, 1st, that the defendant had notice when he received it, that the demand released had previously been assigned; and, 2d, that the releasor was not of sound mind when it was given.

1. The presiding judge was requested to instruct the jury "that it was not necessary that the notice of the assignment should be given by the assignee; if the defendant had notice from the assignor, or from any third person, of the existence of such assignment, it would be sufficient to put the defendant upon inquiry to ascertain the particulars of the fact, and if the defendant neglected to do so, he had no right to deal with the assignor for a release of the claim, and the release would be invalid." This instruction was not given any further than is contained in the following words:

"It is the duty of the assignee, taking an assignment of a debt or claim, to notify the debtor, and if he does this, the right of the debtor to deal with the assignor is withdrawn, and he has no longer any authority to pay the assignor or take any discharge from him. The notice, to have this effect, need not come from the assignee, if the debtor had notice from any other reliable source, he is equally bound by it."

The request contains two propositions,—1st, that it was not necessary that notice should be given by the assignee; 2d, that if notice was given by the assignor or any third person, it would be sufficient to put the defendant upon inquiry to ascertain the fact, and if he neglected, he dealt with the assignor at his peril.

But the instruction given was more favorable to the assignee than the one requested. It negatived the necessity of notice by him. It affirmed the sufficiency of notice from any reliable source, as withdrawing the right of the debtor any longer to deal with the assignor or take a release from him. It was not that the notice was sufficient to induce inquiry on the part of the debtor, as was assumed by the request, but that it was sufficient in and of itself to render a release after such notice of any avail.

It is true, the notice referred to must come from a reliable source. But if it came from an unreliable, it would not be sufficient to induce inquiry. If the information comes from a source unreliable, it will not suffice to induce action; for it will hardly be pretended that the sufficient credit should be given to what is unreliable, to require the same course of conduct which would be the legitimate result of information upon which reliance could be placed.

It is obvious that the instruction, whether right or not, is more favorable to the assignee than the one requested.

2. The presiding judge was also requested to instruct the jury, "that when a party, executing a contract, has been shown to be of unsound mind before its execution, the burden of proof is on the party claiming under the contract to show soundness of mind at the time of its execution."

The instruction given was as follows: "that it was only in a case of insanity, which changed the burden of proof, and that temporary hallucination of mind would not so change the burden."

The request given assumes and affirms the correctness of the request as made. The only inquiry is whether the additional remark was erroneous and prejudicial to the plaintiff in interest.

The qualification as to hallucination, whether correct or not, depends on the meaning of the term. Now hallucination is not *per se* insanity. It does not necessarily avoid a contract. It may exist as to matters in no way affecting the capacity to contract. The medical definition of hallucination adopted by Worcester is, a "morbid error in one or more of the senses; a perception of objects which do not, in fact, make any impression upon the external senses; delirium, delusion." The state of mind indicated by hallucination is strikingly illustrated by the remarkable story of Nicolai, the Berlin bookseller, who, for a length of time, was visited at his bedside by individual forms that were visible to his sight and addressed him. During all this period he was conscious that it was a delusion. Still he transacted his ordinary business with his usual ability, and his contracts were as valid as if the delusion had not existed.

If the delusion or the delirium is that caused by disease, it is

obviously temporary in its character. It will continue only during the continuance of the fever in which it originated. If a fever is shown to exist at a given date, the law does not presume its continuance as in the case of fixed insanity. So there is no presumption of law as to the continuance of the temporary hallucination or delusion resulting from disease. The party claiming to avoid a contract, by reason of temporary hallucination or delusion, must show its existence at the time of the contract sought to be avoided for such cause, and that it was of a character affecting his capacity to make the contract sought to be avoided.

It is undoubtedly true, that when an hallucination has become permanent, it is to be deemed insanity, general or particular according to the nature of the delusion under which the patient labors. But the instruction excluded, from the consideration of the jury, a case of permanent and fixed hallucination, and referred only to an hallucination temporary in its nature, and which would terminate, or might be expected to terminate, with the termination of its exciting cause.

3. The only objections specifically taken to the testimony of Burns, Fitzherbert, and Hayden was that of irrelevancy. But that objection is not sustainable. The counsel now rely on particular sentences in their testimony, to which specific objections do not appear to have been taken at the time. The general objection fails, because the testimony was relevant. The particular objection was not taken when, had it been, the testimony to which it applies might have been excluded. The grounds of objection should be stated at the time. If well taken, they will avail the party. After the trial, it is too late to take the objection.

4. In the deposition of Robert Brown, the remark, "there was no sense or reason in anything he said that day," was stricken out of the deposition. But the preceding part of the sentence, "he kept talking all Sunday, talking foolish talk all the time," was read to the jury as well as the next sentence, "the reason why I cannot recollect any thing Francis said that Sunday is because there was no sense or reason in what he said."

In another part of the deposition this sentence was stricken out: "the general way that he was in from the time he came to my place until he died was flighty, and no sense or reason in him." But these statements appear in the deposition, "I could get no sense or reason in what he said, and that is the reason why I cannot remember. I meant to say I could find no sense or reason in what he said," etc.

It is apparent that the exclusion could not have injured the plaintiff, if the portions excluded were admissible, inasmuch as the same statements from this witness were received and permitted to be read to the jury.

5. This case, according to the report before us, had been tried once before, and with the result of disagreement. There was evidence on both sides, and in the conflict of proof, the law devolves on the jury the duty and responsibility of determining where the truth may be. The jury, with better means of judging than we can have, for they saw and heard the witnesses, have arrived at a result which they deemed in accordance with the preponderance of testimony, and there is no such flagrant error in their verdict as will justify us in setting it aside.

Motion and exceptions overruled.

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

ANDREW J. TUCK *vs.* OLIVER MOSES & others.

Replevin bond—construction of. Judgment for return final and conclusive—not changed by amended return. Damages—evidence in mitigation of.

If a replevin bond be not "in double the value of the goods to be replevied," but good at common law and "conditioned as in the prescribed form of the writ," the condition will receive the same construction as if the bond were a statute bond.

The judgment for a return is the final judgment in replevin, and is conclusive upon the parties as to the matters embraced within it.

An action of replevin is not disposed of until the question of return of the property is acted upon, notwithstanding the writ may have been abated upon the ground that the penal sum of the bond was too small; and until then, both parties are in court with a legal right to be heard.

The officer's return upon a replevin writ is a part of the record; and when a judgment for return has once been rendered, an amendment of the officer's return cannot change or control it.

In an action upon a replevin bond, it is competent for the defendants to show in mitigation of damages that since the taking by the replevin writ, the plaintiff's interest in whole or in part has ceased to exist, the actual damages to the plaintiff or those he represents being the simple question involved.

A defendant in replevin is entitled to the value of the property replevied at the time of rendition of judgment for a return.

A large quantity of wood having been replevied from an attaching officer, the actions in which the attachments were made proceeded to judgment and execution, and the full value of the word was insufficient to satisfy the executions. The repleven writ was abated because the replevin bond was not "in double the value of the goods to be replevied;" but it was good at common law, and "conditioned as in the prescribed form of the writ." Judgment was thereupon rendered for a return, but not complied with. In an action upon the bond, *Held*, That the market value of the wood having increased since it was replevied, the defendants were liable, (1) for the value of the wood at the date of the judgment for return, with interest at six per cent from the date of that judgment to the date of the judgment on the bond; (2) the cost in the replevin suit with interest for the same time; and (3) for a sum equal to twelve per cent on the value of the wood when replevied from the date of the judgment in the suit in which it was attached, to the date of the judgment for return.

ON REPORT.

DEBT on a replevin bond, dated Dec. 16, 1862, given by the city of Bath as principal, and Oliver Moses and others as sureties, and conditioned as follows:

"Whereas, the said city of Bath has this day sued out of the clerk's office of the supreme judicial court for the county of Franklin, a writ of replevin against A. T. Tuck, for nine hundred and fifty-two cords of wood, attached on sundry writs against the Androscoggin Railroad Company, of the value of twenty-eight hundred and fifty-six dollars, now taken by the said Tuck, in said county. . . Now if the said city of Bath shall prosecute the said replevin to final judgment, and pay such damages and costs as the said A. T. Tuck shall recover against them, and shall also return

and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment in said suit, then this obligation shall be void, otherwise to remain in full force."

The replevin writ commanded the coroner "to replevy . . . four hundred cords of wood in the wood-shed of the Androscoggin Railroad Company at Farmington, . . . valued at twelve hundred dollars; also, forty cords of wood in Wilton, near the depot, . . . of the value of one hundred and twenty dollars; also, fifty cords of wood near the "Great Fill" in Jay, of the value of one hundred and fifty dollars; also, four hundred and fifty cords of wood along both sides of the railroad, a little west of the North Jay depot, . . . of the value of thirteen hundred and fifty dollars; also, twelve cords of wood in the town of Jay, of the value of thirty-six dollars,—all of the value of twenty-eight hundred and fifty-six dollars, and the same attached by the said defendant and detained by him at the places described," etc., . . . "provided they, the said city of Bath, shall give bond to the said A. T. Tuck, with sufficient sureties, in the sum of fifty-six hundred and twelve dollars, being twice the value of the said goods and chattels," etc.

The return upon the replevin writ, dated Dec. 19, 1862, was of the following tenor:

"By virtue of this writ, having first taken the bond required by law, I have this day replevied the wood within mentioned, and have delivered the same to the said city of Bath, the plaintiffs; and afterwards, on the same day, I summoned the said Andrew T. Tuck, within named, to appear at the within-named court, as within commanded, by reading this writ to him, aloud in his presence and hearing, and I return the bond which I have taken, herewith, as within directed."

On motion of the defendant in replevin (present plaintiff), the writ of replevin was abated because the penal sum of the bond was one hundred dollars less than double the alleged value of the wood replevied. Thereupon, on Nov. 18, 1865, a judgment for return

was rendered. The judgment, omitting the formal parts, was as follows:

"In a plea of replevin, for that the said A. T. Tuck, on the twelfth day of December, at said Farmington, unlawfully and without any justifiable cause, took the goods and chattels of the said city of Bath, as aforesaid (to wit, 'four hundred cords of wood in the wood-shed of the Androscoggin Railroad Company at Farmington, and between that and the engine-house and near the railroad depot, valued at twelve hundred dollars; also, forty cords of wood, being along the south line of said railroad track in Wilton, near the depot, and also on the north side of said railroad track, of the value of one hundred and twenty dollars; also, fifty cords of wood near the "Great Fill," in Jay, of the value of one hundred and fifty dollars; also, four hundred and fifty cords of wood along both sides of the railroad, a little west of the North Jay depot, being all the wood in possession of said company, Sept. 9, 1862, and all purchased by them since, of the value of thirteen hundred and fifty dollars; also, twelve cords of wood in the town of Jay, of the value of thirty-six dollars,—all of the value of twenty-eight hundred and fifty-six dollars,—(and the same attached by said defendant and detained by the said Tuck, at the places above described, and all being the property of the city of Bath, county of Sagadahoc),' and them unlawfully detained to this day, to the damage of the said city of Bath (as they say), the sum of three thousand dollars.

"This action was commenced for and entered at the April term of this court, A. D. 1863, when the said defendant appeared and filed his motion in writing, that said writ might be abated, and prayed that the court would order and adjudge, that all of said wood, except the last-named parcel of wood containing twelve cords, to wit, the nine hundred and forty cords of wood first named in said writ, should be returned and restored to said defendant, and that said defendant should be awarded his damages for the taking and detention of said wood and his costs. And thence this action was continued from term to term until the April term of said court, A. D. 1865, when the court ordered and adjudged that said writ should

be abated. And thence this action was further continued to the present term. And now at this term all the premises being seen and fully understood, it is considered, ordered, and adjudged by the court, that the property replevied, except twelve cords not claimed, to wit, that said four parcels of wood first named in said writ, amounting to nine hundred and forty cords of wood, and being all the wood described in said writ, except said twelve cords last named in said writ not claimed by said defendant, be returned and restored to the said Andrew T. Tuck, to be held by him irrepleviable by the plaintiffs. And, further, that the said Andrew T. Tuck recover judgment against the said city of Bath, in this action, for his costs of suit taxed at fifteen dollars and sixty-eight cents."

On September 9th, the present plaintiff, as deputy-sheriff, had attached the wood as the property of the Androscoggin Railroad Company, on a writ in favor of one Dyar, and between that time and December 2d, following, he attached the same wood subject to the former attachment on four other writs. All of these actions were entered and judgments recovered thereon. Dyar's judgment was recovered April 21, 1863, and the others on October 21st, following. Execution issued on Dyar's judgment April 23, 1863, and was placed in the hands of the plaintiff in this action, who thereupon made return thereon that all the wood attached on the original writ had been replevied out of his hands by virtue of a replevin writ in favor of the city of Bath, on Dec. 19, 1862, etc. And a similar return was made on each of the other executions Oct. 24, 1863.

At the September term, 1867, the defendants were defaulted, and Oliver L. Currier, Esq., was appointed master in chancery, to hear the evidence and report the facts bearing on the question of damages; and at the March term, 1868, made his report, wherein he found, as matter of fact, that at the time of the attachment of the wood replevied on the several writs against the Androscoggin Railroad Company, the wood was the property of said company, and liable to attachment for the debts of the company; that the value of the nine hundred and forty cords of wood, at the time of

replevying the same, was twenty-eight hundred and twenty dollars; that the value of the same at the time of rendition of judgment of return (Nov. 18, 1865), if the same had been actually returned in like good order and condition as when taken, would have been forty-six hundred and ninety-five dollars.

"That acting upon parol evidence, the quantity of wood actually replevied and delivered by the coroner to the agent of the city of Bath, was less than was attached, a portion of it having been consumed or removed by the Androscoggin Railroad Company after it had been attached and before it was replevied; and that the value of the wood per cord was the same when replevied as when attached.

"By the same kind of evidence, it is shown that Joseph A. Linscott was the agent of the city of Bath, to take delivery of the wood from the officer who replevied the wood, and that he wrote the coroner's original return on the replevin writ at his request; that said Linscott went with the coroner, on the 19th December, 1862, and pointed out to him the several parcels of wood at the places described in the replevin writ to be replevied, and took delivery of the wood actually replevied, as the agent of the city of Bath. That said Linscott, at the same time, directed the coroner to return, as replevied by him, all the wood at the several places where situated, which had been attached as described in the replevin writ, whether it had been before consumed or removed or not, so as to have the whole matter settled in one suit, and the coroner's return was accordingly so made. The number of cords of wood attached is not found to be less than the number described in the replevin writ, nor less than the number described in the record of the judgment for a return, except twelve cords not claimed. No wood was replevied that had not been previously attached by Tuck.

The quantity and value of the wood actually replevied and delivered by the coroner to the agent of the city of Bath, on Dec. 19, 1862, as shown by parol evidence, was six hundred (600) cords,—at that time of the value of $1560. If this wood had been

returned when judgment was rendered, for a return on Nov. 18, 1865, in like good order and condition as when taken, the value of it then would have been $3040."

At the April term, 1867, the coroner, who served the replevin writ, obtained leave to amend his return according to the facts, and thereupon changed it, so that the part pertaining to the quantity of wood replevied, as amended, read as follows: "I have this day replevied so much of the wood within mentioned as I can find in the various places named in said writ and no more, and have delivered the same," etc.

The case was reported to the full court, who were to consider the facts found by the master upon legal testimony, and such documents as were admissible, and render judgment for such damages as the law requires, the law court to have all the powers of a judge at *nisi prius*.

J. C. Woodman, for the plaintiff.

1. The bond, by referring to the writ as a "writ of replevin against the said A. T. Tuck for 952 cords of wood, attached on sundry writs against the Androscoggin Railroad Company," estops the defendants to deny the quantity of wood replevied. *Bean* v. *Parker*, 17 Mass. 600, 601; *Cordis* v. *Sager*, 14 Maine, 477; *Cady* v. *Eggleston*, 11 Mass. 285; *Milliken* v. *Coombs*, 1 Maine, 346; *Cutler* v. *Dickinson*, 8 Pick. 387; *Heard* v. *Lodge*, 20 Pick. 58; 1 Greenl. Ev., § 23; 2 Starkie Ev., 30, 31; *Huggeford* v. *Ford*, 11 Pick. 223; *Middleston* v. *Bryan*, 3 M. & S. 155; *Swift* v. *Barnes*, 16 Pick. 194; *Howe* v. *Handley*, 28 Maine, 248; *Parker* v. *Simonds*, 8 Met. 212.

The finding of the master also concludes the defendants upon this point.

2. The parol evidence before the master as to quantity of wood actually replevied was not admissible. The quantity was before the court on motion for a judgment of return. The plaintiff's right to recover on his bond depends upon the judgment in replevin. *Thomas* v. *Spofford*, 46 Maine, 411. "The sureties are bound to

perform what the principal was adjudged to perform, or must pay damages as an equivalent for performance." *Pettigrove* v. *Hoyt*, 11 Maine, 69. After abatement, then comes the question what judgment shall be rendered. R. S., c. 96, § 11. A return will not be ordered when in equity it ought not to be returned, though the defendant in replevin has judgment in his favor in the suit. *Bath* v. *Miller*, 53 Maine, 316; *Wheeler* v. *Train*, 4 Pick. 168; *Simpson* v. *McFarland*, 18 Pick. 429, 433; *Whitwell* v. *Wells*, 24 Pick. 33; *Bartlett* v. *Kidder*, 14 Gray, 452; *Ingraham* v. *Martin*, 15 Maine, 375. The officer's return is proper evidence upon this question. *Slayton* v. *Chester*, 4 Mass. 479; *Stinson* v. *Snow*, 10 Maine, 264.

All the facts passed upon by the judgment of return are settled, and by that judgment Bath and sureties are estopped. *Bath* v. *Miller*, 53 Maine, 316, 317, 318. No defense can be permitted on this question which existed prior to that judgment. *Thatcher* v. *Gammon*, 12 Mass. 269; *Flint* v. *Sheldon*, 13 Mass. 453; *Guinard* v. *Heysinger*, 15 Ill. 288; *Bird* v. *Smith*, 34 Maine, 68; *Noble* v. *Merrill*, 48 Maine, 140. The wood was constructively replevied, and the defendants ought not to be allowed to deny it. *Cady* v. *Eggleston*, 11 Mass. 285; *Milliken* v. *Coombs*, *supra*.

3. The mutilated return comes too late. It cannot affect the judgment. *Davis* v. *Putnam*, 5 Gray, 321.

4. It does not contradict the original one.

5. The object of amending returns is to uphold and not to destroy. The court cannot change the record under color of an amendment. *Limerick*, petitioners, 18 Maine, 186; *Collins* v. *Douglass*, 1 Gray, 167; *Wolcott* v. *Ely*, 2 Allen, 340; *Stanley* v. *Stanley*, 26 Maine, 198; *Haynes* v. *Small*, 22 Maine, 16.

On the question of amendment, counsel also cited *Sherman* v. *Smith*, 4 Cush. 410; *Cunningham* v. *Hobart*, 7 Gray, 424; *Whiting* v. *Cook*, 8 Allen, 63; *Davis* v. *Maynard*, 9 Mass. 242; *Thatcher* v. *Miller*, 13 Mass. 270; *Williams* v. *Brackett*, 8 Mass. 240; *Freeman* v. *Paul*, 3 Maine, 260; *Emerson* v. *Upton*, 9 Pick. 167; *Perry* v. *Dover*, 12 Pick. 211; *Hovey* v. *Wait*, 17 Pick. 196; *Haven* v.

Snow, 14 Pick. 28; *Varnum* v. *Bissell*, 14 Pick. 191; *Means* v. *Osgood*, 7 Maine, 146; *Berry* v. *Spears*, 13 Maine, 187; *Bannister* v. *Higginson*, 15 Maine, 77; *Russ* v. *Gilman*, 16 Maine, 211; *Hobbs* v. *Staples*, 19 Maine, 219; *Miller* v. *Miller*, 25 Maine, 110.

6. The defendants were adjudged to return on Nov. 18, 1865, nine hundred and forty cords of wood, but they have not done it. What will be an equivalent?

The plaintiff in replevin is bound by his valuation of the property in the writ; but the defendant in replevin is not. *Gordon* v. *Jenney*, 16 Mass. 465; *Parker* v. *Simonds*, 8 Met. 212; *Swift* v. *Barnes*, 16 Pick. 195; *Howe* v. *Handley*, 28 Maine, 251; *Thomas* v. *Spofford*, 46 Maine, 410. He is entitled to the rise. *Cook* v. *Lothrop*, 18 Maine, 201. The plaintiff has lost the value of the wood at the time of judgment for return. The bond entitles the plaintiff to that amount. See *Swift* v. *Barnes*, *supra*; and *Parker* v. *Simonds*, 8 Met. 211.

7. The plaintiff is entitled to incidental damages. "Damages for taking and costs." R. S. c. 96, § 11. "And twelve per cent on the value of the goods while the service of the execution is delayed" by replevin. R. S. c. 96, § 12. And these "do not go in the discharge of the judgment." § 14. When no damages have been awarded for delay in the service of the creditor's execution in the replevin suit, the defendant in replevin may recover in his suit on the bond damages for such delay, both before and after judgment in the replevin suit, and down to the day when judgment is rendered on the bond. *Huggeford* v. *Ford*, 11 Pick. 223; *Dillingham* v. *Smith*, 30 Maine, 383; *Same* v. *Same*, 32 Maine, 183; *Smith* v. *Dillingham*, 33 Maine, 384, 387; *Thomas* v. *Spofford*, 46 Maine, 408. The ordinary damages for detention before the creditor is delayed in his execution by the replevin and the penal damages given afterwards, have been given in the same action. *Huggeford* v. *Ford*, *supra*.

8. It makes no difference that the bond was not in accordance with the statute. The penal damages do not depend upon the

legality of the writ or bond, but upon the express language of R. S. c. 96, § 12. How shall these damages be recovered if no bond is taken? The statute provides no remedy; but *ubi jus ibi remedium.* And this maxim gave occasion to the first invention of "action on the case," the Stat. of Westminster, 2 (13 Edw. I. c. 24), being only in affirmance of the common law. Broom's Maxims, 149. Every statute made against an injury, mischief, or grievance, impliedly gives a remedy; for if no remedy is expressly given, the injured party may have one on the special circumstances of the case. 1 Chit. Pl. 134; *Bristow* v. *Wright*, Doug. 665; *Arnitt* v. *Garrett*, 3 B. & A. 440; *Andrews* v. *Dixon*, 3 B. & A. 645; *Thornhill* v. *Huddersfield*, 11 East, 349; *Pinckney* v. *East Hundred*, 2 Saund. 374; Com. Dig., Action upon the case upon Stat. (a), (a 1).

The penal damages may be recovered in an action on the bond. c. 96, § 18.

The amount to be recovered depends not upon the penalty of the bond, but upon § 12. The bond was taken to furnish security for costs, and return; or in lieu of the wood, its value, with all damages incidentally springing out of the replevin and accruing to the plaintiff in accordance with the statute.

There is no analogy between the statute provisions in replevin and those in regard to poor debtors. There is no provision in the statute on replevin analogous to § 38, giving the penal damages on failure of the poor debtor to "fulfill the condition of such bond."

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

The defendants are not liable for any more wood than was actually replevied. Master has proved that to be six hundred cords.

The writ having been abated, the court could not render judgment for a return at the next term. The writ had become a nullity. *Greeley* v. *Currier*, 39 Maine, 518.

The plaintiff being out of court, by reason of abatement, could not be heard. Not being able to be heard, he is not estopped by the judgment. *Greeley* v. *Currier*, *supra.*

The court had no purpose or authority to render judgment for a return of more wood than was actually replevied.

The judgment was not intended to go beyond the amount of wood actually replevied, and the court should change the record made by the clerk if it means otherwise.

The plaintiff who attached the wood cannot be held responsible to the attaching creditors for any more wood than he actually attached, and in this suit can recover for no more than was replevied. For any wood attached and not replevied he must have some other remedy.

For some purposes, the judgment for return may be conclusive upon the party, but the question of damages is still left open. *Davis* v. *Harding*, 3 Allen, 302; *Flagg* v. *Tyler*, 6 Mass. 33; *Mattoon* v. *Pearce*, 12 Mass. 406; *Parker* v. *Simonds*, 8 Met. 205; *Bartlett* v. *Kidder*, 14 Gray, 449.

The judgment fixed upon no specific quantity of wood as having been replevied.

A judgment, determined upon defects in the writ and proceedings, and not upon a trial of its merits, presents no estoppel to further proceedings to determine the rights of the parties. *Walbridge* v. *Shaw*, 7 Cush. 560; *Wilber* v. *Gilmore*, 21 Pick. 253.

The quantity stated in the writ is 952 cords. Now, less is claimed. The judgment for less must have been founded upon testimony *aliunde*, which is unlawful. *Greeley* v. *Currier*, *supra*.

The bond not being a statute bond, the measure of damages must be the same as if an action of trespass had been brought against the coroner. *O' Grady* v. *Keyes*, 1 Allen, 284.

The amendment of the coroner's return upon the replevin writ having been made by leave of court, must be regarded as the original return. It was made prior to the hearing before the master. *Fairfield* v. *Paine*, 23 Maine, 498.

There are no third parties' rights to be affected by the return. The parties whom the plaintiff represents are his *cestuis que trust*. *Howe* v. *Handley*, 28 Maine, 241. Their rights depend upon his, and their claim for damages, by reason of the replevin, is limited to

the amount which he is actually entitled to recover. *Farnham* v. *Moore*, 21 Maine, 510; *Bartlett* v. *Kidder*, 14 Gray, 449.

The bond being a common-law bond, entitles the obligee to common-law damages only. *Howe* v. *Handley*, 28 Maine, 251.

R. S., c. 96, §§ 11, 12, do not apply to a common-law bond. Upon the question of damages, counsel cited *Pettygrove* v. *Hoyt*, 11 Maine, 66; *Smith* v. *Dillingham*, 33 Maine, 387; *Davis* v. *Harding*, 3 Allen, 303; *Howe* v. *Handley*, *supra*; *Melvin* v. *Winslow*, 10 Maine, 397; *Swift* v. *Barnes*, 16 Pick. 194; *Parker* v. *Simonds*, 8 Met. 205.

The damages must be based upon the value of the wood when taken and not when ordered to be returned, because the bond was not a statute bond. *Gordon* v. *Jenney*, 16 Mass. 469; *Smith* v. *Dillingham*, *supra*; *Parker* v. *Simonds*, *supra*.

Where there is no judgment for damages and no statute bond, the measure of damages can be assessed only at six per cent. No twelve per cent damages are to be allowed during the delay occasioned by the replevin, when the proceedings are quashed by reason of the insufficiency of the bond.

DANFORTH, J. This is an action upon a replevin bond in which the defendants have been defaulted. The question presented is the amount of damages which the plaintiff is entitled to recover. This, however, involves several preliminary matters which must first be settled.

1. The extent of the defendants' liability under their contract. The bond is not a statute bond, and on that ground the writ, by which the action was commenced in which it was given, was abated. It has, however, before this been decided to be valid at common law. *Tuck* v. *Moses*, 54 Maine, 115.

As a common-law contract it must receive such a construction as will, within legal principles, most effectually accomplish the intention of the parties. The bond was given for the purpose of authorizing an action of replevin. It refers to and describes the writ, and the language of the condition is, that the plaintiffs "shall prosecute

said replevin to final judgment, and pay such damages and costs as the said A. T. Tuck shall recover against them, and shall also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment in said suit."

This condition is in the usual form of replevin bonds, and such as is prescribed by the statute. Further than this there is no provision in the statute in relation to the bond, except as to the amount of the penalty, and none whatever regulating the liabilities of the obligors under it. The replevin suit and the liabilities of the plaintiff in case he fails to sustain his action are, in a great measure, regulated by statute.

The suit is tried without regard to the bond, and it is only when the plaintiff fails and final judgment is rendered against him, and on neglect to comply with that judgment, that the defendant has any occasion to resort to his bond. The statute has attached certain incidents to that judgment, such as damages for the taking of the property, which may or may not be incorporated into it. That the language of this bond is sufficient to require a compliance with the judgment, there can be no doubt. As the judgment and its incidents cannot be well separated, it would seem to be sufficient to require a compliance with all those liabilities which necessarily follow that judgment. Such has been the judicial construction of language similar to this, independent of any statute provision. *Smith* v. *Dillingham*, 33 Maine, 384.

Both from principle and authority we must hold the language of this bond as sufficiently broad to hold the obligors liable to fulfill the judgment in the replevin suit, and all the obligations legally resulting therefrom. In other words, the language of the condition being the same as that in a statute bond, it must receive the same construction, for both are construed by the principles of the common law and not by statute.

2. Of the final judgment in the replevin suit. What is its force and effect?

The writ in the replevin suit was abated, and the defendant had

judgment for a return of the property and for his costs. It is, however, contended that this judgment, so far as it relates to the return, is not conclusive between the parties. But if it is a judgment, as between the parties, it must be conclusive upon all questions settled by it, as long as it stands. This is the universal rule to which it is believed there is no exception. *Granger* v. *Clark*, 22 Maine, 128; *Walker* v. *Chase*, 53 Maine, 258.

That this was a judgment of the court, regularly rendered, there can be no doubt. It is by statute the final judgment in a replevin suit. It involves all the characteristics of a judgment. It is made up as the result of a hearing of the parties upon the production of legal and competent testimony. It involves an inquiry into and an adjudication upon the merits of the question at issue, and will be rendered only as law and equity shall require. It does not, as a matter of course, follow the previous result of the suit. *City of Bath* v. *Miller*, 53 Maine, 315, 316; *Wheeler* v. *Train*, 4 Pick. 168; *Simpson* v. *McFarland*, 18 Pick. 427; *Whitwell* v. *Wells*, 24 Pick. 33; *Ingraham* v. *Martin*, 15 Maine, 373.

In *Bath* v. *Miller*, above cited, such a judgment was held and treated as conclusive between the parties. The quantity of the wood replevied was a question in controversy. The writ and return of the officer thereon are a part of the record. The writ states distinctly the property to be replevied; the return, unlike that in *Miller* v. *Moses*, 56 Maine, 128, states just as distinctly the property replevied; and the judgment, differing in the same respect from that in *Miller* v. *Moses*, sets out with similar precision the exact property to be returned.

But it is said the court had no jurisdiction, because the writ was abated at one term and the judgment was rendered at another, when there was no writ or bond in court.

The record shows the facts to be as stated, but the consequence claimed does not follow.

The action is not disposed of until the question of return is acted upon. That is the final judgment in the case, and until that is rendered both parties are in court with a right to be heard, and in this

case it appears from the record that the action was continued for a hearing upon the motion for a return.

It is further said, that the present defendants had no legal right to offer any testimony on that hearing, the writ having been previously abated; and the case of *Greeley* v. *Currier*, 39 Maine, 516, is relied upon. Whether this case is or is not good law we have no occasion at this time to decide; for, if it was not competent for the defendants to introduce other testimony on the hearing as to what judgment should be rendered, it certainly follows that such testimony cannot now be introduced to vary or control that judgment after it is rendered.

As to the amended return of the officer, if that is to be received as testimony, it would not follow that the judgment is wrong. It does not show that the whole amount of wood claimed in the writ was not replevied. Whether one return is true or the other, the judgment still remains the same. But the amendment comes too late to affect the judgment. The return at most is but evidence, upon which the judgment is founded, and after it has once been rendered, an amendment of the return can no more be received to change or control it, than can other evidence. Whether it may or may not be received as testimony in the proper process for reversing the judgment, is a question not now before us.

But independent of any legal principles involved in this judgment, the defendants in their bond have virtually agreed that it shall be binding upon them. They have agreed to pay such damages and costs as shall be recovered against them, and shall return the property if "such shall be the final judgment in said suit." Such has been the "final judgment in said suit," and the plaintiff now asks, that they shall simply abide by what is written in the bond. Of that they cannot complain if they are held. In the replevin suit, the then plaintiffs, now defendants, ordered certain specific wood to be replevied; by their officer they say that such wood was replevied and they received it. They have failed to make good their title, and after an opportunity for a full hearing, final judgment has been rendered that the same wood be returned; and this, by their bond, they have agreed to do.

We know of no principle of law or equity that will now permit them to contradict, vary, or control the effect of these acts, this judgment, and this contract.

This brings us to the question of damages. What shall the amount be? This question, so far as it is not settled by the judgment, is undoubtedly open to the defendants. That has settled the quantity of wood to be returned, but not its value, nor the extent of the plaintiff's interest in it. These questions are open and have been heard by the master appointed by the court, upon such testimony as the parties chose to offer. The judgment for the return fixes the extent of the plaintiff's interest in the wood at the date of the replevin writ.

If the defendants could have shown by parol testimony or otherwise, that the interest of the plaintiff, in whole or in part, had, since that time, ceased to exist; or if for any reason the property, or any part of the proceeds, on being returned to him would at once have reverted to the defendants, it would have been competent for them to have done so, notwithstanding the order to return, in mitigation of damages. Such is the reasonable doctrine, for it is simply a question of actual damage to the plaintiff or those he represented. It could be no damage to him to withhold that which he had no right to receive, or having received he would be under legal obligation to return. So far the authorities go in permitting a modification of the language of the judgment, but no further. *Davis* v. *Harding*, 3 Allen, 302; *Bartlett* v. *Kidder*, 14 Gray, 449, and cases cited.

But the defendants have failed to produce any such testimony. On the other hand the report of the master shows that the plaintiff's interest is that of an attaching officer; that judgments have been obtained in the suits in which the wood was attached, and executions issued thereon which are still unsatisfied; that the full value of the wood will not be sufficient to satisfy them, and that the proper steps were taken to keep the attachment good.

The plaintiff, then, is entitled to receive, as one item of damages, the full value of the wood. But at what time is that value to be

fixed? The master finds the value at the time it should be returned under the judgment, as much larger than the value as fixed in the writ at the time it was replevied. That the plaintiff in replevin is bound by the value which he puts upon the property in his writ, may now be considered as well-settled law. So that in case of depreciation in value by use, decay, fall in the market price, or otherwise, the loss is his and he cannot avail himself of it in mitigation of damages. *Howe* v. *Handley*, 28 Maine, 251; *Gordon* v. *Jenney*, 16 Mass. 469; *Huggeford* v. *Ford*, 11 Pick. 223; *Parker* v. *Simonds*, 8 Met. 211.

But with the defendant in replevin it is otherwise. As he has no hand in fixing the value in the writ, he is not estopped from showing it to be greater than is there stated. *Thomas* v. *Spofford*, 46 Maine, 408.

In the case at bar the increase in the value of the property must have arisen from an increase in its market price. As the property was wrongfully taken by the then plaintiffs, there would seem to be no reason why they should be permitted to have the advantage of that which would justly have accrued to the then defendant if the property had remained in his possession as the law required. Besides, the defendants' contract requires them to return the property "if such shall be the final judgment" of the court. That contract was broken when, and only when, the judgment was rendered. If they do not return the property, the damage to the plaintiff would evidently be its fair value at that time. This would be analogous to the law of damages growing out of a breach of ordinary contracts for the delivery of property. This principle was adopted in the case of *Swift* v. *Barnes*, 16 Pick. 194, and was also recognized as sound law in similar cases, in *Parker* v. *Simonds*, 8 Met. 211, though this latter case was excepted from its operation on the ground that the property there had fallen in value and not risen. Therefore, the other principle was applied, viz., that the plaintiff in replevin was bound by his own valuation. In *Thomas* v. *Spofford*, before cited, Kent, Justice, in giving the opinion of the court, on page 410, says, "It seems clear on the authorities

and from reason, that the defendant in replevin is not concluded or estopped by the sum named in the bond as the actual value. And the insertion of the same in the execution, by the inadvertence of the clerk, cannot, in our judgment, estop the party from proving the actual value at the time of the taking, or the time of the demand."

It follows that the defendants in this case are liable for the value of the property at the time of the breach of their contract, Nov. 18, 1865, found by the master to be ($4,695) four thousand six hundred and ninety-five dollars. To this is to be added a sum equal to legal interest from that time to such time as judgment shall be entered up in this case. Also, the amount of the costs in the replevin suit, viz., $15.68, with interest for the same time. As the plaintiff holds the wood as an attaching officer, and the service of the execution was delayed by the replevin, the statute provides a penalty of not less than twelve per cent on the value of the goods attached while the execution is so delayed.

This is one of the legal incidents of the judgment in the replevin suit, and, as it was not recovered in that suit, it may be recovered in this action upon the bond. As there is no proof that the wood was of any greater value than that alleged in the writ, until the judgment in the replevin, and as in the contemplation of the statute the service of the execution is not delayed by the replevin beyond the date of the judgment for a return in that suit, this sum is to be ascertained by reckoning the twelve per cent upon the value of the wood as stated in the replevin writ from the time of the judgment in the suit in which it was attached to the date of the judgment for a return in the replevin suit. In brief, the damages are to be made up thus,—1st, the value of the wood at the date of the judgment in the replevin suit, viz., $4,695, with interest at six per cent on that sum, from the date of that judgment, Nov. 18, 1865, to the date of the judgment in this action; 2d, the costs in the replevin suit, $15.68, with interest for the same time; and 3d, a sum equal to twelve per cent on the value of the wood at the time it was replevied, $2,820, from the date of the judgment in the suit

in which it was attached, viz., April 22, 1863, to the date of the judgment in the replevin suit, viz., Nov. 18, 1865.

These several sums added together make an aggregate of seven thousand one hundred and forty-seven dollars and forty-two cents ($7,147.42), and judgment must be rendered for that sum.

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

JOSEPH S. CRAIG, treasurer of Proprietors of the Center Meeting-house in Farmington, *vs.* INHABITANTS OF FRANKLIN COUNTY.

Deed—construction of. Pew-owners—rights of, how vindicated.

In 1802, John Church, by his deed of warranty, in consideration of $100, conveyed certain land, covering the demanded premises, to "David Moors, treasurer of the First Meeting-house Society in the center of Farmington," a voluntary, unincorporated association, "and his successors in said office, for the use of said society so long as it shall be improved for public use," *habendum* "to the said Moors and his successors in said office, to the use of said society to their use and benefit forever." A meeting-house was soon afterwards erected upon a portion of the land, pews sold, and the house occupied for public worship by several denominations for a series of years. In 1822, pursuant to action of the association, several of the original associates, "their associates and assigns," were incorporated into a body politic by the name of "The Proprietors of the Center Meeting-house in Farmington," and the act of incorporation provided "that the land heretofore conveyed to D. Moors, treasurer of said proprietors, and now deceased, . . . be and hereby is confirmed to such treasurer as said proprietors shall hereafter choose for the use and benefit of said proprietors, . . . and the treasurer, so hereafter to be chosen, shall be, to all intents and purposes, the successor of said Moors." The proprietors organized under their charter, chose John Church, jr., treasurer, confirmed all votes passed prior to incorporation, and, in 1824, erected forty-five pews in the gallery, and sold them, and their treasurer executed deeds thereof to the purchasers. In the same year, by an additional act of the legislature, the proprietors were authorized to make alterations, additions, and improvements of the house and such

improvement of the land "as is designated and intended in the grant thereof." In June, 1839, pursuant to a vote duly recited in the deed, "The Proprietors of the Center Meeting-house in Farmington, by John Church, jr., their treasurer, in consideration of one dollar," executed and delivered unto the inhabitants of the county of Franklin and their successors forever, a deed of quitclaim of the demanded premises, with a covenant of warranty against the "lawful claims and demands of all persons claiming by, through, or under them," "for the purpose of a site for a court-house, for the use of said county, provided the same shall be accepted by the county commissioners as a full equivalent of all claims of said county on any individuals thereof for furnishing a court-house for ten years, reserving the use of said meeting-house for town meetings and meetings of worship in the lower story so long as the same shall remain standing, but with liberty to the county to rebuild, alter, repair, or fit up the same in a proper manner for holding the courts, and also conditioned that said deed shall be void whenever a court-house is erected on any other site." In February, 1838, John Church quitclaimed to The Proprietors of the Center Meeting-house the land originally granted to Moors, including the site of the old meeting-house, to be "always used for some public building, court-house, town-house, or meeting-house." In 1839, the county took possession, removed most of the pews in the second story, fitted it up for a court-room, and have retained possession thereof and held courts therein ever since. In 1852, the remaining gallery-pews were removed against the objections of the owners, and further repairs made. In 1867, at an annual meeting of the proprietors, the plaintiff was duly chosen treasurer, and certain others trustees, who were instructed by a vote of the proprietors "to take such measures for the defense of" the proprietors' "rights in the Center Meeting-house as they think proper," under which vote the plaintiff, as treasurer, brought this real action to recover possession of the premises claiming the legal title to be in the treasurer as trustee of the proprietors; *Held*, (1) That Moors took a fee-simple conditional in trust for the use and benefit of the original associates and those who might afterwards become members of the association by the purchase or inheritance of pews; (2) That at the decease of Moors, the estate descended to his heirs at law charged with the trust; (3) That the plaintiff, as the successor of John Church, jr., is estopped by the deed of the proprietors, executed by the latter; (4) That the plaintiff, as treasurer, cannot assert a title against the grantee of the proprietors; (5) Whether the legislature could and did by the additional act transfer the legal title from Moors' heirs to the treasurer of the corporation to be chosen, *quære*; (6) That if such act did operate as such a transfer, it vested both the legal and equitable estate as a use executed in the corporation; (7) That the effect of J. Church's quitclaim deed to the corporation in 1838 was to abrogate the conditions annexed to the original grant so far as they attached to the immediate site of the meeting-house; (8) That the pew-owners did not become tenants in common of the estate on which the house stood, but were entitled to a beneficial interest, and as against the grantees of the corporation could vindicate their rights only in equity; (9) That the county may avail itself of the limitation bar; and (10) That the case exhibits none of the elements of a public charity.

On report.

Writ of entry, dated Nov. 19, 1867. Plea, general issue, with brief statement and a disclaimer as to the lower story of the meeting-house.

The case is sufficiently stated in the opinion.

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

1. That under the original deed from John Church to David Moors, dated July 13, 1802, said Moors took the legal estate of the premises therein described, in trust for the use and purpose therein named, subject only to said Church's contingent right of reversion.

2. That the legal estate in the premises, subject to said contingent right of reversion, passed, by virtue of the act of incorporation, from David Moors through his successors down to the plaintiff as his last successor in the office of treasurer.

3. That the legal estate never reverted to the original grantor or his heirs by reason of any neglect of the proprietors to choose a treasurer during those years in which no records of the transactions of the proprietors are found; for it is a well-settled principle in equity that "a trust shall never fail for want of a trustee." 2 Story's Eq. Jur., § 976.

4. That by the act of incorporation of 1822, neither the proprietors nor their treasurer were authorized to take and hold any other rights, title, or interest in land, except such as were conveyed by the original deed from John Church to David Moors in 1802; hence the proprietors took nothing by the deed of quitclaim from said John Church to them, dated Feb. 7, 1838.

5. That neither the proprietors nor their treasurer were authorized by the act of incorporation, or by law, to convey the premises at all, or to divert them in any way from the purpose named in the original deed; nor could they do so except by authority from the legislature, which they never had. Hence the proprietors conveyed nothing to the county by their deed given by John Church, treasurer, dated June 24, 1839.

6. That if the deeds of 1838 and 1839 were operative to convey any title to or interest in land, the defendants, before they can

claim title by virtue of the deed to them, must show affirmatively that prior to the delivery of their deed, the $200 had been paid to Captain Henry Stewart for the use of John Church's wife, as it was only upon the condition of such payment that John Church authorized the delivery of his deed to the proprietors. The evidence in the case wholly fails to show that said payment was prior to the deed to the county.

7. That the deed from Church to the proprietors, dated Feb. 7, 1838, being only a deed of release and quitclaim, if its delivery was subsequent to the deed from the proprietors to the county, nothing would thereby enure to the county. *Pike* v. *Galvin*, 29 Maine, 183; *Miller* v. *Ewing*, 6 Cush. 40.

8. That if any rights whatever in the premises could have passed to the county by virtue of their deed from the proprietors, of June 24, 1839, the only rights which the county could by possibility have taken were such contingent reversionary rights as the proprietors had then acquired, if any, from John Church, sr., by virtue of his deed to them, dated Feb. 7, 1838; because the legal estate in the premises, which had previously vested in Moors and his successors in the office of treasurer, in trust for the use and purpose named in the original deed, could never be conveyed by a deed executed in the name of "The Proprietors of the Center Meeting-house in Farmington, by John Church, their treasurer;" nor does John Church, treasurer, undertake by said deed to convey the legal estate vested in him as treasurer, nor can said deed by legal construction have any such effect.

9. That no possession of lands under a claim of title based upon a conditional grant, like the deed of June 24, 1839, from the proprietors by John Church, treasurer, to the county, containing conditions and reservations, will work a disseisin, however long-continued. The deed contains reservations, and is conditioned that the grant "shall be void whenever a court-house for the use of said county be erected on any other site." *Parker* v. *Proprietors of Locks and Canals*, 3 Met. 101.

10. That if the defendants and the proprietors have had a joint

or common possession of that part of the demanded premises now claimed by the county, so that neither party has been dispossessed, the seisin still remains in the party who has the true or actual title. *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131. The evidence shows that the proprietors and defendants have both occupied the court-room, each party claiming to do so as matter of right.

Wm. Cothren, on same side.

Robert Goodenow & S. Belcher, for the defendants.

BARROWS, J. The piece of land demanded in the writ is part of a parcel which was conveyed July 13, 1802, by John Church, with warranty of title, and release of dower by Church's wife, to "David Moors, treasurer of the First Meeting-house Society in the center of Farmington, and his successors in said office, for the use of said society so long as it shall be improved for public use," *habendum*, "to the said David Moors and his successors in said office, to the use of said society to their use and benefit forever." The deed appears to have been made in consideration of $100, the receipt of which is acknowledged, and the property to have been thus conveyed to Moors, as treasurer of a voluntary, unincorporated association, composed of about fifty persons, who, on or about "ye 3d May, 1802," at Farmington, subscribed a paper declaring that they are "desirous to unite and add to the respectability of this town, and are sensible that this end can be attained in no way so well as by building a meeting-house, for public and social worship, near the center of said town," and, accordingly, "do agree to form ourselves into a body politic with a determined resolution to effect the building of said house, and we do severally pledge our honor to abide by the regulations hereunto subjoined to the completion of said meeting-house." The first of these regulations is as follows:

"1st. Said meeting-house is to be the exclusive property of said society." Their determined resolution seems to have been crowned with success; a large parcel of land was purchased and conveyed to their treasurer, as above recited, a meeting-house erected, the

pews sold, and the house occupied for public worship more or less by various denominations for quite a long series of years.

After the business connected with the erection of the meeting-house and the sale of the pews was adjusted, the meetings of the association seem to have been very infrequent. But we find a record dated March 1, 1813, of a meeting at which a new treasurer was chosen, and a committee to confer with the town respecting the compensation to be allowed by the town to the proprietors for the use of the house to hold town meetings in. This meeting was twice adjourned for the purpose of petitioning for an act of incorporation, but nothing appears to have been done about it at that time, and no record is found of any meeting of the association from that time until September, 1821. But in 1822 (prior to which time it is agreed that David Moors, who held the legal title to the land in trust for the proprietors, was deceased), an act of incorporation was procured apparently in pursuance of action taken at the meeting of the association in September, 1821, and certain gentlemen, including a considerable number of the original proprietors, "their associates and assigns," were "incorporated into a body politic by the name of The Proprietors of the Center Meeting-house in Farmington." By the second section of the act of incorporation, it was "further enacted that the land heretofore conveyed to David Moors, treasurer of said proprietors, and now deceased, and his successors in that office, on which the meeting-house aforesaid stands, be and hereby is confirmed to such treasurer as said proprietors shall hereafter choose, for the use and benefit of said proprietors, agreeably to the intention of the original grant; and the treasurer, so hereafter to be chosen, shall be to all intents and purposes the successor of said Moors." By the third section, the proprietors were empowered to raise money for the purpose of repairing the meeting-house and a proper improvement of the land, and for other incidental expenses to be assessed "on the several proprietors of pews in said meeting-house, according to the relative value of the respective pews they may own therein as established by said proprietors," and the private property of each proprietor

was charged with the payment of such assessments, "in the same manner as it would be holden to pay State, county, and other taxes."

The proprietors seem to have promptly organized under the act of incorporation, and to have held their first meeting April 24, 1822, when, among other officers, they chose John Church, the son of the original grantor of the lot, their treasurer, and appointed a committee to form a code of by-laws and regulations, and report at a future meeting, and a committee to see what repairs are necessary, and receive proposals for making them and report. At an adjournment, May 4, 1822, they voted to accept the code of by-laws reported by the committee, acted on the report of the committee on repairs, and voted that the assessors should "ascertain, as far as possible, the owners of pews," and sell the pews, then to be erected in the gallery, to the highest bidder. At a further adjournment, on June 15, 1822, they "voted that all votes of said proprietors, prior to their incorporation, be valid," accepted a plan of forty-five pews to be erected in the gallery, and postponed the sale of them at auction previously voted, but authorized the sale by the assessors of one pew on the ground floor held in common, and of the gallery pews at private or public sale, the treasurer to give quitclaim deeds of them. On the 28th of December, in the same year, among other things, they voted to dismiss the second article in the warrant, which was, "to see what method shall be taken to sell the pews in the gallery," but passed a vote to build them, agreeably to the plan before accepted, and have them completed in eighteen months.

This matter of the sale of the gallery pews seems to have been the subject of much discussion and frequent action, as also was the use of the lower floor by the town for town meetings in consideration of stipulated payments.

The forty-five gallery pews were completed at last, and, June 19, 1824, by vote of the corporation, they were offered for sale for a gross sum of two hundred and fifty dollars, and sold in ten shares for that price ($10 on each share in cash, and the balance the fol-

lowing winter with interest), "the several purchasers to receive deeds of said pews from the treasurer when securities are given for the payment." Feb. 10, 1827, they revised their by-laws, providing, among other things, that pews on the lower floor should be estimated at six shares each, and the pews in the gallery at one share each, and one share shall be entitled to one vote, and the proprietors of twenty pews shall constitute a quorum to do business (changed Aug. 11, 1827, "so as to have thirty pews on the lower floor constitute a quorum to do business, raise money, or to revise the by-laws);" and that "all officers shall be chosen by written ballot, except committees, and be continued in office until others shall be chosen in their room;" that "each pew shall be valued on the lower floor in assessing taxes according to their original purchase as they were bid off, and pews in the gallery according to the appraisal of the committee chosen for that purpose;" and that "upon change of owners of gallery pews, the new proprietor to give written notice and make proof of the fact to the clerk before he shall be allowed to vote in proprietors' meetings;" and the clerk was required to get and keep as complete a list of the proprietors as possible, and transmit a copy to the assessors when a tax was to be assessed.

By an additional act of incorporation, the provisions of the original act as to liability for assessments were "so far altered and amended as that the pews of the proprietors only shall be liable for the payment of moneys assessed," . . . "and shall be considered and taken to be personal property;" and the proprietors were authorized to raise moneys for defraying the expenses of such alterations, additions, or improvements to the house as they might think proper to make, and for such improvement of the land on which it stands, "as is designated and intended in the grant thereof," "provided the proprietors shall accept this additional act within one year, at a legal meeting to be by them called for the purpose." And the proprietors did so accept it at a meeting held for the purpose Jan. 10, 1829. In 1836, it is apparent from the records that the necessity of assessments for repairs had become urgent; a committee was raised to confer with the town or some denomination to see if

they would buy the house. Votes were passed at other meetings in that year to sell the house at auction, and apportion the money among the owners of the pews; to take the house down and sell in lots to suit purchasers, and distribute the proceeds among the proprietors, and to reconsider these votes.

The testimony is, that for some years, about this time, the house was not occupied for religious worship, and doubts were suggested whether the proprietors had not forfeited their rights under the Church deed. But no entry for a breach of the condition appears to have been made. In 1838, the project of making a conveyance to the county began to be agitated, and in June of that year, upon notice of a meeting to hear the report of the committee chosen to confer with the county commissioners, and determine whether such conveyance should be made, the proprietors met and voted "to instruct their treasurer to make and execute a deed of all the claims which they have to the Center Meeting-house and site, together with the common (reserving the ground now fenced out for a burying-ground), to the county of Franklin as a site for the court-house and other county buildings so long as it shall be occupied for that purpose, provided the said buildings shall be erected of brick, and within two years from the date of the deed." A vote somewhat significant of the condition of the property at that time was also passed, authorizing the treasurer "to prosecute any person that shall make depredations on said meeting-house."

The report of the committee chosen to confer with the county commissioners shows that the proposition of the county commissioners was "to locate the court-house on the spot where said meeting-house now stands, provided the proprietors of said house convey their claim to said house and land to said county for the purpose of building a court-house on said site, and to be held by said county so long as it shall be occupied for that purpose, and provided, also, that a site suitable for the erection of a jail should be given to said county." It seems that the county commissioners' proposition contemplated neither payment nor the performance of any act for the benefit of the proprietors, except taking the old meeting-house and

its site off their hands entirely, and the proprietors were disposed at that time to accede to the proposition, reserving only so much as had been fenced off for the burying-ground, and providing only that the erections to be made by the county should be of brick, and made within two years.

Prior to this, on the seventh of February, 1838, John Church, the original grantor, had made a deed of quitclaim to the proprietors of the lot originally granted to David Moors, "containing two acres by estimation, being the land called the common, and including the site of the old meeting-house, but excluding what is now fenced as a burying-ground, which is to remain as such; and the said common is always to be used as such; and the site of the meeting-house shall always be used for some public building, court-house, town-house, or meeting-house." This deed purports to be in consideration of $200, and a memorandum by the grantor upon the margin directs that it shall be placed in the hands of his son-in-law as an escrow, to be delivered when the consideration should be paid. It was not placed on record until July 18, 1839.

May 18, 1839, the vote which was passed the preceding year to convey to the county was reconsidered, and at an adjournment of the same meeting, the corporation voted, "that the treasurer of this society be authorized and directed to convey to the county of Franklin all the right, title, and interest which this society has to" (the premises demanded in the present suit), "for the purpose of a site for a court-house for the use of said county, provided the same shall be accepted by the county commissioners of said county as a full equivalent and discharge of all claims of said county on any individuals thereof for furnishing a court-house for ten years, the deed of conveyance to reserve to said society the use of said meeting-house for town meetings and meetings of worship in the lower story, so long as the same shall remain standing, but with liberty to the county to alter, repair, or fit up the same in a proper manner for holding the courts of said county, and also conditioned that said deed to be void whenever a court-house for the use of said county be erected on any other site."

Thereafterwards, June 24, 1839, a conveyance was made (in which the foregoing vote is recited by way of preamble), setting forth "that the Proprietors of the Center Meeting-house in Farmington, by John Church, their treasurer, in pursuance of the foregoing vote, and of one dollar paid by the said inhabitants of the county of Franklin, the receipt, etc., do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the inhabitants of the said county of Franklin and their successors forever, all their right, title, and interest in and to" (the demanded premises describing them), for the purpose of a site, etc. (here following the language of the vote, except that the word "rebuild" is prefixed to "alter, repair, or fit up" in the "liberty" granted to the county), *habendum* to the grantees "and their successors forever, in as full and ample a manner, and with the same limitations and restrictions as in and by said vote of said proprietors is set forth." "And said proprietors do covenant . . . that they will warrant and defend the premises to, etc., against the lawful claims and demands of all persons claiming by, through, or under them." "In witness whereof, the said Proprietors of the Center Meeting-house in Farmington, by John Church, their treasurer, have hereunto set," etc. The deed is subscribed "John Church, treasurer," and the acknowledgment purports to have been made by the proprietors, "by John Church, their treasurer." The testimony shows that claiming title to the demanded premises under this deed, the county, by their agents and officers, took possession of them in 1839, fitted up the second story of the meeting-house for a court-room, etc., expending a considerable sum of money in so doing, and removing most of the gallery pews, and that that portion of the house since that time has been used and controlled constantly by the county officers for purposes connected with the business of the county,—the religious, agricultural, and other meetings which were held there being held by permission of the county officers in charge, and exercising absolute authority as to the occupation of the premises.

The keys seem to have been in the possession of the successive clerks of the courts. The courts have been held there regularly

since March, 1840, and when occupied for other purposes, it has been by and with the permission of these officers, acting in this matter under the direction of the county commissioners. Thus the Unitarian Society obtained access by an arrangement with the county officers, under which rent was paid for a year or more, and there is no evidence from which we can infer that they have not at all times exercised exclusive and absolute authority as to the use of the demanded premises, claiming it as a right. In 1852, further alterations and repairs were made, and the remaining pews in the gallery were removed, notwithstanding the objection of one of the pew-holders, who forbade the mechanic engaged in the work; but he, under the direction of the county commissioners, proceeded and finished it. The county has expended some $2000 in alterations and repairs since their occupation of the premises commenced. The proprietors have had undisturbed possession of the lower floor,—have rented it to the town for town meetings, and it has been used under them for other purposes. Propositions have been mooted from time to time in the proprietors' meetings, looking to the remuneration of the pew-holders whose property in the gallery had been interfered with by the alteration and appropriation of the upper part of the building to the use of the county. But nothing was done, the corporation voting "that any individuals who have had their property in said house injured by the direction of the county commissioners, call on the county for damages." Finally, under a vote passed Sept. 9, 1867, at an annual meeting (where the plaintiff was chosen treasurer, and certain other gentlemen assessors and trustees of the corporation), authorizing the trustees "to take such measures for the defense of our rights in the Center Meeting-house as they think proper," this suit is commenced, wherein the plaintiff, as treasurer of the corporation, claims that the legal title to the premises conveyed by his predecessor, John Church, to the county in 1839, is still in him as trustee for the corporation, by virtue of the original conveyance of John Church, sr., to David Moors in 1802, the act of incorporation of 1822, and his election as treasurer. He denies the validity of the conveyance

to the county by his predecessor. He denies, also, that the county have acquired any rights by the long-continued possession which they have had under this conveyance, and claims that the foregoing facts establish his seisin within twenty years last past, and a right to recover them as against the defendants.

His positions briefly stated are, that David Moors took an estate in trust for those who might become pew-holders in the house; that by virtue of the act of incorporation, the same estate was transferred to such treasurer as the corporation might choose, and so came to John Church, jr.; that nothing passed to the county by virtue of John Church, jr.'s, deed, because it purports to be the conveyance of the proprietors who were merely the *cestuis que trust*, and not the holders of the legal title; that the legal title still remained in John Church, jr., as treasurer and trustee, and so came to this plaintiff upon his election as treasurer; that whatever had been the form of that conveyance, nothing could have passed by it, because neither the act of incorporation, nor any other statute, authorized the sale of the property, but only the holding of it in trust for the uses specified in the original conveyance from John Church, sr., to David Moors; that the vote of the corporation to sell, and the conveyance made in pursuance of it, could not deprive the individual pew-holders of their rights; that this is a public charity, or, at all events, a trust, and that, therefore, the county could acquire no title by adverse possession; that the county claim under their deed, which is but a conditional one, and that this is incompatible with the acquisition of a title by disseisin; that the county took their deed with notice of the trust, and therefore subject to it, and that thus the title of the defendants, both by deed and disseisin, fails altogether.

Having referred frequently to the records offered in evidence, it is proper to remark here, that though they are not in book form, and there is no evidence that the clerk was sworn during many of the years, yet it is clearly proved that they came from a trunk which has been handed down from one clerk to another, and in which these files were carefully labelled and preserved; many of

the papers are shown conclusively to be original documents, and none exhibit any suspicious appearance.

Both parties in turn resort to these files for evidence upon which they rely, while each objects to the use the other proposes to make of them for the same purpose, yet neither suggests so much as a doubt of their genuineness as minutes made contemporaneously, designed to serve as a record of actual transactions, or of their general accuracy. Under these circumstances, ancient as most of these records are, and inasmuch as the acts and doings of the unincorporated association were formally adopted and ratified as valid and binding by the corporation, we think neither party can complain of their admission as competent evidence of the acts and facts therein recited.

We think David Moors took a fee-simple conditional in trust for the use and benefit of the original associates, and those who might afterwards become members of the association by the purchase or inheritance of the pews.

"When property is conveyed to the use of a party not capable of taking the legal estate, it cannot vest in the *cestui que use* by the statute of uses; therefore, by a well-known rule of construction early engrafted on the statute of Hen. 8, it constitutes an estate in trust in the first takers." *Attorney-general* v. *Proprietors of Federal St. Meeting-house*, 3 Gray, 44.

Here was no body politic or corporate capable of holding the fee which was to be held for the use and benefit not only of the original proprietors and builders of the house, but of those who might in process of time become associated with them as pew-owners, who, by the acquisition of a title to their pews, would not become tenants in common of the estate on which the house stood, but would be entitled, nevertheless, to a beneficial interest and an exclusive right to occupy the particular portion of the house belonging to them under suitable restrictions,—an interest and right capable of protection under and by law, and entitled to such protection when redress for a wrong inflicted is seasonably sought in the proper form.

The deed was to David Moors, as treasurer, and his successors in said office, without words of limitation to heirs or assigns. Moors was not a corporation, and in strictness of law was not capable of having a successor; but the trust upon which he received the property was plainly of such a nature as to be likely to require a legal estate in the trustee for a time exceeding the duration of his natural life, in order to carry the trust properly into effect, and, consequently, under a well-established rule of law, the estate is to be construed as a fee. At his death, it descended to his heirs at law, who then held the legal estate upon the same trust as he had held it. In the absence of any conveyance from them, the demandant claims that the act of incorporation of the proprietors, passed in 1822, operates to vest the legal estate in the treasurer to be chosen by the new corporation and his successors in the office, the title being transferred upon every new election, *ipso facto*, thus making in effect the treasurer a sort of corporation sole, to hold the legal title for the benefit of the corporation aggregate by whom he is elected. It is essential to the maintenance of this action by the demandant to hold that it was competent for the legislature thus to transfer the title, and that the act was so framed as to have that effect. But with the view which we take of the case, it is unnecessary for us to consider whether such an act would be a legitimate exercise of legislative power. But assuming that the legislature could and did, by the act referred to, transfer the legal title from David Moors' heirs to the treasurer to be chosen by the corporation, it was done expressly that he might hold it "for the use and benefit of said proprietors." If we again assume that (notwithstanding there was now a being in existence, capable of holding the legal estate, for whose use the estate was confirmed to the treasurer and his successors), still it was not a use executed by virtue of statute of Henry 8, c. 10, but that the successive treasurers held it in trust for the corporation, the demandant advances just far enough towards the maintenance of his suit to fall within the rule laid down in *Sawyer* v. *Skowhegan*, 57 Maine, 500, which forbids a trustee, to whom the legal title has been conveyed to be held as a naked, pas-

sive trust, to maintain an action against the *cestui que trust*, or those claiming under him to oust them of their possession. In *Sawyer* v. *Skowhegan*, the party who had received a conveyance of the legal title in trust for a lodge of Odd Fellows, undertook to assert that title against the grantee of the lodge, for the benefit of the lodge under a reorganization, but failed for reasons which are equally fatal to the claim of the present plaintiff.

The proprietors of the Center Meeting-house in Farmington, with the utmost deliberation, the subject having been canvassed by them in various aspects more than a year, made a conveyance of all their interest in the property here demanded to the county of Franklin, and warranted the same to the county against all persons claiming by, through, or under them; and this deed was executed in the name of the corporation by the plaintiff's predecessor. We think the successor of John Church, jr., as treasurer, is estopped by that deed from asserting a title for the benefit of those who have warranted all their interest in the premises to the tenants.

Returning now to the act of incorporation under which the plaintiff claims: if it availed to vest the title in the treasurer for the use and benefit of the corporation, it is not easy to see why the estate did not vest in the corporation as a use immediately executed by virtue of the statute of uses (27 Hen. 8, c. 10), the legal estate following the equitable use and interest.

Except when the duties of the trustee are active, no good can result from severing the legal estate from the beneficial use, and it was to avoid the embarrassment of titles thence resulting that the statute of uses was enacted.

There is nothing to indicate that the treasurer was to have any active duties to perform in relation to the estate, or that he was to be anything more than a mere depositary of the title for the use and benefit of the corporation. He was liable to change with annual elections, while the corporation, which was the *cestui que use*, was a permanent organization, capable of holding the legal estate more conveniently for all concerned. If the act of incorporation then operated to transfer the estate from the heirs of the original

trustee, Moors, we think it vested both the legal and equitable estate as a use executed in the corporation which was to have the beneficial interest; and thus, however it may be, the demandants' title would fail.

What was the effect of the quitclaim deed of John Church, sr., to the corporation in 1838? Plainly, we think, for the reasons and upon the principles succinctly and clearly stated by Cutting, J., in *Hooper* v. *Cummings*, 45 Maine, 366, the only effect would be to abrogate the conditions annexed to the original grant so far as they attached to the immediate site of the meeting-house. The original grantor, without ever having entered for a breach of the condition, releases his claim to the estate by another deed to a stranger. What was his claim? A naked right to enter for a forfeiture whenever the condition should be broken,—a right that could be exercised only by him or his heirs,—not by a stranger. The original grantor having alienated this, the condition is gone.

What estate did the proprietors have, then, at the time they made their deed to the county?

That the deed of John Church, sr., made in 1838, and originally delivered to his son-in-law, Stewart, as an escrow, had been at that time perfected by delivery to the grantee on payment of the stipulated sum, we see no reason to doubt. The testimony of Mrs. Samuel Church, we think, is very far from showing that the payment by the proprietors was not made until some time between 1841–43. She says she does not know by whom the money was paid that Mrs. Church, sr., received at that time. If it had been paid by the proprietors and loaned by the widow, and again repaid at the time mentioned by Mrs. S. Church, it would still be likely to be spoken of in the family as the money she received for the deed to the proprietors. Mrs. S. Church's testimony cannot be considered as overcoming, or, indeed, as conflicting with the presumption that the holder of the escrow did his duty in the premises.

Still assuming that the act of 1822 availed to vest the estate in the treasurer for the use and benefit of the corporation as *cestui que use*, and holding that this use was executed in the corporation

immediately upon the vesting of the estate in its treasurer, and that the condition annexed to the original grant was gone by virtue of the deed of John Church, sr., in 1838, the corporation would stand precisely as though it had purchased the estate, and taken an unconditional conveyance of it from John Church as a site for their meeting-house. They would have in themselves the *jus habendi* and the *jus disponendi*, subject only to the requirements of law growing out of the character of the property and the use which had been made of it.

Thus situated, they make a deed of a certain portion of the property to the county, covenanting to warrant the premises conveyed to the grantee against all claims by, through, or under them.

How can the demandant, claiming simply as the depositary of the title for their use, seeking to recover the property only that he may hold it for their benefit, expect to prevail? Most certainly he is estopped by the deed executed by his predecessor, under the direction of the corporation. By means of this conveyance to the county the proprietors, while they curtailed the dimensions of their place of worship, secured a sound roof over their meeting-house for more than a quarter of a century without expense to themselves. Justice will not permit them as a corporation to repudiate the contract by which they accomplished it.

Who was injured by this arrangement? Who has lost anything by it who is not estopped to complain? The corporation had built and sold pews in the gallery; they had confirmed the titles to other pews there, originally granted by the proprietors before their incorporation. To their pew-holders the proprietors stood in the relation of trustees. The pew-holders had a beneficial interest in the property of the corporation and certain rights in their pews. Unless otherwise specially provided by statute, pews are real estate. The owners of them are to have appropriate remedies for any violation of their rights in relation to them. How shall those rights be vindicated? The pew-holders are not tenants in common of the property. It is but a qualified title and ownership that they have in their pews. We think that their remedy, when their rights are

invaded by permission of the corporation to which they belong, and to whom they look as their trustees, must be sought in equity in their own names, making that corporation and its grantees parties to the suit, and that this is the only mode in which the appropriate redress can be meted out. Certainly it cannot be done in a suit like this where their rights are confounded with those of the corporation under whose grant the tenants hold, and where judgment for the demandant, if it could be obtained, would enure directly to the benefit of the same corporation.

But in addition to the estoppel by deed which must prove fatal to the demandants' suit, there is other matter shown in defense, which would effectually bar his recovery.

The county took possession of the premises in 1839, claiming to be the owners thereof, subject only to the condition made in the deed of the proprietors to the county,—a condition which has not yet been broken.

The fact that they entered claiming title under the deed, and that they still contend that the deed is valid and operative to give them a good title to the premises, does not preclude them from availing themselves of the limitation bar. They took possession claiming to own the premises, subject only to a liability to forfeit them if ever a court-house for the use of the county should be erected on any other site. They claimed, in all other respects, the absolute ownership. They exercised the rights and did all the acts indicative of ownership. Their possession was open and notorious, exclusive and adverse. They ignored all claims, both of trustees and *cestuis que trust*, within the limits which they claimed. The case is not within the principle of those in which it has been held, that as between trustee and *cestui que trust* the limitation bar does not operate,—that no lapse of time is a bar to a direct trust. There was a clear repudiation of the trust. They were not tenants in common with the corporation, but each occupied in severalty according to the terms of the grant. They removed nearly all the gallery pews in 1839. In disregard of the prohibition of the pew-holders in 1852, they removed the remainder. Whenever the

premises have been occupied for any purpose except those connected with the holding of the courts, it has been by the permission of the officers and agents of the county, who have at all times controlled the keys.

The case exhibits none of the elements of a public charity. As in the case of *The Proprietors of the Meeting-house in Federal Street in Boston*, 3 Gray, 49, "it is entirely wanting in the quality of gift, donation, or gratuity from anybody to anybody."

Purchase, property, settlement of accounts, use by the members and proprietors who became pew-holders, have been the order of proceeding throughout until the conveyance to the county. The general public had no rights there except by courtesy of the proprietors. There was nothing either in the source or use of the proprietary property to indicate a design on the part of any one to establish a public charity. It is unnecessary to determine whether the acceptance by the corporation of the act of 1828, making the pews personal property, would limit to six years the right of the gallery pew-holders to redress. The county have had such a possession of the premises for a period of twenty-seven years prior to the commencement of this action as must be deemed an effectual bar to its maintenance. *Judgment for the tenants.*

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

EDWARD E. BOURNE, judge of probate, *vs.* WILLIAM STEVENSON & others.

Administrator's bond—breach of. Evidence. Practice.

An omission on the part of an administrator to include in his inventory, within the time prescribed by the statute, an amount of money deposited in a savings institution, known by him when he accepted his trust to belong to the estate of his intestate, is a breach of his official bond.

In the trial of an action on an administrator's bond for an alleged breach in knowingly omitting to include in his inventory an amount of money deposited in a savings bank, it is not competent for the administrator to show by a witness that about the time the administrator was appointed and before he returned his inventory, the witness consulted counsel in behalf of the administrator as to whether or not the deposit should be inventoried, and that the witness communicated to the administrator the advice given.

Nor, in such case, is it competent for the administrator to testify that in omitting to inventory the deposit he acted upon the belief, after being so advised by counsel, that it was not a part of the intestate's estate, and that he had no right to include it in his inventory.

In the trial of an action on an administrator's bond for an alleged breach in knowingly omitting to include in his inventory an amount of money deposited in a savings bank and belonging to the estate, the requested instruction that, "if the administrator, before he returned his inventory, proved that the deposit was claimed by" two other persons specified, and "if he consulted counsel as to his duty in inventorying the money, and was advised by counsel and believed that he had no right to inventory and administer upon it, then the omission to inventory would not be a breach of the bond," was properly withheld.

So with the requested instruction that "if the deposit was claimed" by the two persons named, "and none of it was ever received by the administrator, then the omission was no breach."

A citation to the administrator to inventory property belonging to the estate is not a necessary prerequisite to the maintenance of an action on the administrator's bond, for knowingly omitting to inventory such property.

Nor is the judgment of the probate court, upon such a citation, admissible evidence in such action, especially when an appeal therefrom is pending.

In the trial of an action on an administrator's bond, for an alleged breach in knowingly omitting to inventory a certain sum of money deposited in a savings bank and belonging to the estate, the presiding judge declined to instruct the jury, at the defendant's request, that if they believed the testimony of a certain witness as to what the intestate said and did when the bank-book was put into the witness' hand, that transaction amounted to a gift of the money to two certain persons; but he did accurately state to the jury the law concerning gifts; *Held*, that the defendant had no cause for exception.

When, in the trial of such an action, no instructions are asked in relation to the administrator's knowledge of the existence and of the intestate's ownership of the deposit, and no exception is taken to those given upon the subject, the instructions will be presumed to be correct.

ON EXCEPTIONS, AND MOTION to set aside the verdict for the plaintiff, as being against the weight of evidence.

DEBT on an administrator's bond, brought by special leave of the judge of probate for this county. Plea, *non est factum*, with brief statement alleging full performance on the part of the defendant, Stevenson. The plaintiff replied, by way of counter-brief statement, that the defendant had not fully performed the conditions of the bond, in that he had not returned any true or perfect inventory of the estate of the intestate, in that he had not included in the inventory of said estate the deposit made by said intestate in her life-time, in the Saco and Biddeford Savings Institution, and belonging to said estate at the time of the decease of the intestate.

The defendants' counsel asked the witness, Nehemiah Hill, "Whether about the time the defendant, Stevenson, took out administration, and before he returned his inventory, he consulted counsel for Stevenson as to whether the money in the savings bank should be inventoried, and whether he communicated to Stevenson the legal advice given." The presiding judge sustained the plaintiff's objection and excluded the evidence.

The defendants also offered the testimony of Stevenson, "that in omitting to inventory the deposit in the savings bank, he acted upon the belief, after being so advised by legal counsel, that it was not part of Alice Murch's (the intestate) estate, and that he had no legal right to include it in his inventory and account," but the presiding judge excluded it.

Three of the requested instructions appear in the opinion.

The defendant requested the presiding judge to instruct the jury, "That if they believed the testimony of Nehemiah Hill, as to what was said and done by Mrs. Murch at the time the bank-book was put into his hands, that transaction amounted to a gift of the money in the savings bank to the two daughters, Mrs. Hill and Mrs.

Stevenson." The judge declined to give the instruction; but did instruct them,

"That Mrs. Murch had a right to give the money deposited in the bank to Mrs. Hill and Mrs. Stevenson. This she might do without any instrument of conveyance in writing. She might do it by a verbal declaration and a delivery of the evidence of its deposit. It was not necessary that the book should be placed in the hands of either Mrs. Hill or Mrs. Stevenson. It might be placed in the hands of a third person for them. It is not necessary that they should have the right to the immediate possession of the money. It is necessary, however, that it should at once vest in them the property without the right of revocation by Mrs. Murch. Its immediate possession might be intrusted to another party for a time even, during the life of Mrs. Murch. Mrs. Murch must, however, have parted with all property in it, and have no power to recall the gift. The immediate possession of the book may be intrusted to another party, and the money intrusted to another party and held for them even for the life-time of Mrs. Murch. Mrs. Murch must, however, have no power to control the gift in any manner. That would constitute a gift to Mrs. Hill and Mrs. Stevenson.

"If, however, she intrusted the book to Mr. Hill, with instructions to draw from the bank, after her decease, such money as might remain there, and then give it in equal proportions to Mrs. Hill and Mrs. Stevenson, that would be an authority which she might revoke, and would not constitute a gift in the life-time of Mrs. Murch.

"That in relation to the matter of citation, the record which has been put into the case discloses sufficient evidence of a citation, and refusal to inventory, if any was needed, to authorize this plaintiff to maintain this action, if he is otherwise entitled under the evidence, and the rules which I have given."

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

Edwin B. Smith, for the plaintiff.

J. M. Goodwin, for the defendants.

APPLETON, C. J. This is an action of debt on the administration bond of William Stevenson, administrator on the estate of Alice Murch, and conditioned among other things that the said administrator, "do make, or cause to be made, a true and perfect inventory of all and singular the real estate, goods, and chattels, rights and credits of said deceased, which have or shall come to the hands, possession, or knowledge of him, the said administrator, or into the hands or possession of any other person or persons for him, and the same do exhibit, or cause to be exhibited, upon oath into the registry of the court of probate of the said county, within three months of the date hereof," etc. The action is brought by leave of the judge of probate.

The breach alleged consists in neglecting and refusing to include in the inventory returned a sum of money deposited by said Alice, with the Saco & Biddeford Savings Institution, and belonging to her estate at the time of her decease, which sum and deposit came to the knowledge of said Stevenson at the time of his acceptance of said trust and before the return of any inventory by him.

The defense was, that the deposit did not belong to the estate of Alice Murch, and that the administrator had no knowledge that it did belong to her estate. The verdict of the jury was for the plaintiff, and must be regarded as establishing both facts, *i. e.*, that the deposit belonged to the estate of Mrs. Murch, and that the administrator knew of such deposit, and that it did belong to said estate.

The omission to include the deposit belonging to the estate of Mrs. Murch, under the circumstances as we must assume they were found to exist, was a clear breach of the bond. In delivering the opinion of the court in *Potter* v. *Titcomb*, 2 Fairf. 167, Weston, J., says, "The law of Massachusetts, in force when the bond was given, clearly made it the duty of the administrator, within three months, to cause an inventory to be made of the estate of the deceased. And, by the condition of the bond, it was to be a true and perfect inventory of all and singular the goods, chattels, rights, and credits of the deceased, which have or shall come to the hands,

possession, or knowledge of the administrator. The judge of probate has no power to dispense with this duty. His authority was limited by law; and the bond was for the security of all persons interested in the estate. No citation in the probate court was necessary, as the court has holden in this case, to render the administrator liable upon his bond for not returning a true and perfect inventory." *Potter* v. *Titcomb*, 1 Fairf. 53.

The administrator having knowledge, as the jury must have found, of this claim belonging to the estate of his intestate, was bound to include it in his inventory within the time specified in his bond. The omission so to do was a breach of duty. It does not appear that all the instructions given were reported. No instructions were asked in relation to the fact of knowledge of the existence of this claim on the part of the administrator, and no exceptions are taken to those given, except as will be hereafter considered. The instructions given must, therefore, be presumed to be correct,—and it is to be assumed that the jury were directed to find for the plaintiff only in case the deposit belonged to the estate of the intestate, and that the administrator had knowledge that such was the fact.

The defendants have filed numerous exceptions to the rulings and refusals to rule of the presiding justice, which it becomes necessary to consider.

1. The question proposed to Nehemiah Hill, "whether about the time the defendant, Stevenson, took out administration, and before he returned his inventory, he consulted counsel for him (Stevenson) as to whether this money in the savings institution should be inventoried, and whether he communicated to Stevenson the advice given," was clearly inadmissible. It does not appear that the counsel was fully apprised of all the facts. If the advice was wrong, it would constitute no defense. If right, the defense would rest upon the facts proved and the law applicable to them, and not upon the opinion of counsel. The answer to the question, whatever it might have been, would have been immaterial.

2. So the proposed testimony of Stevenson, "that in omitting to inventory the deposit in the Saco & Biddeford Savings Bank, he

acted upon the belief, after being so advised by legal counsel, that it was not part of Alice Murch's estate, and that he had no right to include it in his inventory and account," was properly rejected. Erroneous advice of counsel would constitute no justification, even when the counsel were informed of all the facts. But it does not even appear that such was the case.

3. The request that "if the defendant, Stevenson, before he returned his inventory, found that the money was claimed by Mrs. Hill and Mrs. Stevenson, and if he consulted counsel as to his duty in inventorying this money, and was advised by counsel and believed that he had no right to inventory and administer upon it, then the omission to inventory would not be a breach of the bond," was properly refused. The mere claim of a third person would afford no sufficient reason for not inventorying property unless well founded. It does not appear that the counsel, whose advice was given, were made acquainted with all the facts, and if they were, the belief of the administrator, in the correctness of the opinion given, would constitute no defense. If the administrator knew the facts he must act upon such knowledge, and it will be no justification that his own views of the law were erroneous, or that he acted upon the mistaken views of others upon whose judgment he relied.

4. The request that "if the deposit in the savings institution was claimed by Mrs. Hill and Stevenson, and none of it was ever received by the administrator, then the omission to inventory is no breach of the bond," should not have been given. An unfounded claim and one known to be unfounded might be made, but that would be no justification for neglecting to inventory the property thus wrongfully claimed. It has been held to be the duty of the administrator to inventory property fraudulently conveyed by the deceased as against his creditors. *Booth* v. *Patrick*, 8 Conn. 283; *Andrew* v. *Doolittle*, 11 Conn. 283. The title in case of fraud would appear in the grantee, and the administrator must know of the existence of the fraud. In the case under consideration it was well known to the administrator that the apparent title to the deposit was in deceased, and, *prima facie*, it should have been

inventoried. The jury have found the deceased never parted with it.

5. It has been previously determined by this court that a citation to the administrator to inventory is not necessary as a prerequisite to the maintenance of an action on the administration bond for a neglect to inventory. *Potter* v. *Titcomb*, 1 Fairf. 53; S. C. 2 Fairf. 167. It was his duty to inventory without citation. The breach of the bond occurred when the time limited for inserting this claim in the inventory had elapsed without its being done.

6. It is conceded by the counsel for the defendant that the law, as applicable to the alleged gift from the deceased to Hill, in trust for the daughters of the deceased, was technically correct. A judge is not bound to give instructions in the words of a request. It is sufficient that the law is accurately stated, though in different language. That it is accurately stated is not denied.

7. The judgment of the probate court in the matter of the citation to the administrator to inventory the deposit was vacated by the appeal. The case is before the court upon that appeal. The evidence was inadmissible except to show that there was such a citation and there had been proceedings under it, but not to show the judgment of any court. Besides, the petition was long after a breach of the bond had occurred, and cannot in any view affect the right to institute and prosecute this action.

8. The motion for a new trial must be overruled. The jury is the tribunal appointed by law for the determination of facts, and the court will be slow in setting aside their conclusions. The degree of credit to be given to a witness is specially for their determination. They see the witnesses and can judge of the just degree of credence to be given to their testimony, better than we can upon a mere report of the evidence. *Exceptions and motion overruled.*

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

JOSEPH MITCHELL *vs.* HUGH S. MCNABB.

Debt—action of, when it will not lie.

An action of debt will not lie upon a sealed instrument wherein is contained no promise to pay any sum of money under any terms or conditions, but a bill of sale of certain tools used in and about the boot and shoe business, together with the vendor's good-will, and an agreement "not to carry on the boot and shoe business in the city of Portland for one year from the date hereof."

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

DEBT, "for that the said defendant, at said Portland, on the 30th day of May, A. D. 1870, by his writing obligatory of that date, sealed with his seal and here in court to be produced, therein sold to the plaintiff the good-will of his business, and therein agreed not to carry on the boot and shoe business in the city of Portland for one year from the date thereof. Yet the said defendant, not regarding his said agreement, did again commence the boot and shoe business in said city of Portland, on the first day of July thereafter, and hath continued to carry on the boot and shoe business in said city of Portland, from said first day of July to the day of the purchase of this writ. And the plaintiff avers that the said defendant, by not keeping his said agreement, has damaged him in his business the sum of two hundred dollars."

To this declaration the defendant filed a general demurrer which the plaintiff joined. The presiding judge sustained the demurrer and adjudged the declaration bad; whereupon the plaintiff alleged exceptions.

The instrument declared on was a formal bill of sale, under seal, with covenants in the usual form, of certain tools used in and about the manufacture of boots and shoes, "together with the good-will of" the vendor's "business." Then followed the agreement, "and I hereby agree not to carry on the boot and shoe business in said city for one year from the date hereof."

The case was not entered upon the district docket, but was certified directly to the chief justice, in accordance with the statute.

W. H. Vinton, for the plaintiff, cited 1 Chit. Pl. 108, 118; *Norris* v. *School District*, 12 Maine, 298; *McVicker* v. *Budy*, 31 Maine, 318; *Smith* v. *First Cong. Meeting-house*, 8 Pick. 178.

A. A. Strout & H. C. Peabody, for the defendant.

APPLETON, C. J. This is an action of debt. The writ is dated Oct. 14, 1870. The declaration sets forth an agreement, under seal, signed by the defendant, in and by which he "agreed not to carry on the boot and shoe business in the city of Portland for one year," from May 31, 1870, and an averment that from the first day of July he "continued to carry on the boot and shoe business in said city of Portland to the day of the purchase of this writ." To this the defendant demurred, the demurrer was sustained, and the plaintiff excepted. The question presented is whether debt is maintainable.

The declaration sets forth no promise to pay any money under any terms or conditions, but simply an agreement to abstain from selling boots and shoes at a particular place and for a stipulated time, and a violation of such agreement. The damages in such case must obviously be uncertain and unliquidated.

Debt lies when one is entitled to receive a certain and liquidated sum of money, or in case of a bond for the payment of money, or the performance of some act under a penalty, or for goods sold and delivered, etc. "Debt," remarks Richardson, C. J., in *Lowell* v. *Bellows*, 7 N. H. 391, "is the proper action, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty; but it is not the proper remedy when the demand is rather for unliquidated damages than for money, unless the performance of the contract is secured by a penalty. 1 Chit. Pl. 101." "The true test," remarks Story, J., in *Bullard* v. *Bell*, 1 Mason, 543, "is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty." Debt "lies only for the recovery of a

sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty." 1 Chit. Pl. 113. Debt will not lie on a contract of indemnity against unliquidated or unascertained damages. *Flannagan* v. *Com. Ins. Co.*, 1 Dutch. (N. J.) 506; *Rutan* v. *Hopper*, 5 Dutch. (N. J.) 112. As the action of debt is for the recovery of a sum of money, the breach or cause of action complained of must necessarily originate out of the non-payment of the money previously alleged to be payable. But here there was not and could not be the allegation of any sum of money which the defendant was bound to pay, and for the neglect to pay which he should be held responsible in damages. *Exceptions overruled.*

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

BETSEY STILPHEN, libelant, *vs.* FRANCIS STILPHEN.

Divorce—power of court to grant. Pleading. Practice—when pleadings end in demurrer. Puis darrein continuance—form of.

The fact that the husband has already obtained a divorce *a vinculo*, is no bar to the granting of a like divorce to the wife, when, in the exercise of a sound discretion, it is deemed reasonable and proper.

When the pleadings end in a demurrer, the court must decide against the party who committed the first error.

If a libelee would take advantage of the fact that during the pendency of the libel against him, he had obtained a divorce from the libelant, it must be done by a plea of *puis darrein continuance.*

Such a plea must not be pleaded in bar generally, but to the further maintenance of the suit.

ON EXCEPTIONS.

LIBEL FOR A DIVORCE *a vinculo.*

The libel was dated Sept. 22, 1864, and entered at the October term following. At the following January term personal notice was ordered upon the libelant, and on Feb. 25, 1865, complied with.

At the October term, 1867, the libelee filed a motion to dismiss upon the ground that the bonds of matrimony between him and the libelant had been dissolved upon his libel; but the presiding judge overruled the motion.

The libelee, by leave of court, then pleaded,

That the libelant ought not to have and maintain her said libel for a divorce, and to be granted alimony and allowance as aforesaid against him, because, he says, that at the term of our supreme judicial court, begun and holden at Wiscasset, within and for the county of Lincoln, on the second Tuesday of May, A. D. 1865, being the ninth day of said month, the said Francis Stilphen impleaded the said Betsey Stilphen, in a petition and libel for divorce from the bonds of matrimony, in his own favor and against the said Betsey; which libel was sued out of said court and served upon the said Betsey, on the 26th day of December, A. D. 1864; which bonds of matrimony are and were the same identical bonds, in the said Betsey Stilphen's libel, above mentioned; and thereupon such proceedings were had that afterwards, to wit, at the same term of said court, as is above set forth, the said Francis Stilphen, by the consideration of the same court, was divorced from the said Betsey; and it was by said court, then and there considered and decreed, that the bonds of matrimony theretofore entered into and existing by and between the said Francis Stilphen and Betsey Stilphen, for the causes set forth by the said Francis in his said libel, be and the same were thereby dissolved, as by the record and proceedings thereof now remaining in said court more fully appears; which judgment and decree still remains in full force and unreversed; and this he is ready to verify. Wherefore, the said Francis Stilphen prays judgment if the libelant ought to have and maintain her libel aforesaid against him, and to be granted alimony as aforesaid.

To which the libelant replied,

That by anything by the said Francis in his plea aforesaid pleaded, she ought not to be barred from having and maintaining her said libel for divorce to be granted to her, and for alimony and

allowance as aforesaid, because she says that prior to the making and suing out of his said libel, on which the said decree of divorce was by him obtained, to wit, on the 22d day of September, 1864, the said Betsey sued out her said libel against the said Francis, made returnable to the October term then next of this court, which was entered at said October term, and continued to the January term then next, and that the said Francis agreed with her attorney, in consideration that he would not have service made, that he would waive notice and would have his appearance entered in court.

Whereupon and for that cause, relying on said agreement, she did not have her said libel served. But said Francis, wrongfully disregarding his said promise, neglected and refused to have his appearance entered or to waive notice, but with covinous and unjust purpose and design of intercepting and defeating her just claim to a divorce with alimony, as prayed for in her said libel, on Dec. 22, 1864, sued out his said libel and caused immediate notice and service thereon; and said Betsey, by her attorney, at said January term, obtained an order of notice on her said prior libel, which was made returnable to the May term following, and was duly served. And at the said May term, the said Francis, in her absence, and in the absence of her counsel, and when she did not expect a trial on his said libel, caused her to be defaulted, and at an *ex parte* hearing before the court, testified to her desertion and going away from his house in September or October, 1863, as stated in his said libel, but wrongfully and fraudulently withheld and kept back from the court the fact he well knew and ought to have stated, that his gross unkindness and cruelty to her compelled her, when in very feeble health and unable to bear his cruel treatment, to go to her friends for succor and protection, and that her going away at that time was not wrongful and willful desertion, as he well knew. And she avers, that that proceeding and testimony was had upon the hearing of the same libel, and at the time of the making the same decree in respondent's plea mentioned. And this she is ready to verify. Wherefore she prays judgment and a decree of divorce to her, and alimony, as prayed for in her libel.

To this replication the libelee demurred, and the libelant joined the demurrer.

The presiding judge, *pro forma*, overruled the demurrer; and thereupon the libelee, having leave to plead double, filed a plea of not guilty, and offered in bar to the further prosecution of the libel and of the prayer for alimony and allowance a copy of a libel, *Francis Stilphen* v. *Betsey Stilphen*, which was filed Dec. 24, 1864, served Dec. 26, 1864, entered at the January term, 1865, when it was decreed, "that the bonds of matrimony, heretofore entered into by and between the said Francis Stilphen and Betsey Stilphen, for the causes set forth by the said Francis in his said libel, be and the same are hereby dissolved, and that the custody of the said two minor children be with the father." The presiding judge ruled, *pro forma*, that it constituted no bar to the present libel, and, after hearing the case, entered a decree of divorce; and instead of alimony, allowed the libelant certain articles of personal property, and the specific sum of five hundred dollars. Whereupon the libelee alleged exceptions.

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

The prayer of the libel is, "that the bonds of matrimony may be dissolved between" the libelant and the libelee, "and a divorce decreed." The libelee replies, that no bonds of matrimony exist, and proves it by a decree (founded upon a libel and due proceedings had thereon), "that the bonds of matrimony heretofore entered into by and between" the parties here, "be and the same are hereby dissolved."

The court cannot dissolve a second time a contract which it has once, by a solemn decree, dissolved and annulled.

Marriage is a civil contract which the court has the chancery power of dissolving on the petition of either party for the alleged breach of it by the other, and for other causes which concern society.

A divorce *a vinculo* annuls the marriage altogether, and restores the parties to all the rights of unmarried persons, and relieves them

from all the liabilities which grew out of the marriage, except as may be provided by statute or made a part of the decree. 1 Pars. on Cont., 566.

The statute did not, in 1865, impose any limitations upon the effect of the decree; but all former laws upon the subject were repealed by R. S. of 1857.

No limitation is found in R. S., 1857, c. 60, § 2; and to make sure that no limitation should exist, Public Laws of 1858, c. 45, provided, that "whenever a divorce from the bonds of matrimony has been decreed, either party may lawfully marry again; and all acts and parts of acts inconsistent with that were thereby repealed."

The same result was reached by the court before the passage of this last act. *State* v. *Weatherby*, 43 Maine, 258.

Parties may have purchased and paid full value of real estate of the libelee since his divorce for the fault of his wife, thus learning that she was not divorced for his fault, and hence that she could not recover dower under R. S., c. 60, § 6. A decree of divorce from the bond of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original libel, filed at a subsequent term. *Greene* v. *Greene*, 2 Gray, 361.

On this libel no decree respecting alimony or allowance could be made.

The decree of divorce is the foundation of all decrees in a libel for divorce.

The only power the court has in respect to the property of either party, is given in §§ 6, 7. Such decrees can only be made in favor of the party to whom the divorce is decreed.

A decree respecting the children may be modified, § 19; but the decree of divorce and that concerning property remain unchanged except on petition for new trial, which this libelant has unsuccessfully tried.

The libelee's libel was first served. No special plea was necessary under which to admit the facts.

If special plea was necessary, judgment should have been for the respondent.

The libelant did not deny the plea nor demur, but replied, setting up matters in avoidance. The judgment is valid until reversed.

The facts set forth in the replication were not evidence for her on the trial of the merits, and no answer therefore to the judgment when it was put in evidence. 1 Chit. Pl., 662.

Puis darrein continuance is proper only where matter of defense has arisen since issue in fact has been joined. 1 Chit. Pl., 657–8.

The plea is substantially to the further maintenance of the suit, "that she ought not to have and maintain her suit."

The omission of the word "further" is not fatal, especially as the libelant did not demur, but replied. If defective, it was cured by libelant's election to treat it as valid and reply new matter. 1 Chit. Pl., 671 *et seq.*

The respondent demurred to the libelant's new matter and not to the whole case.

The court will not go back to the first plea, except where there is a defect in substance. *Calais* v. *Bradford*, 51 Maine, 414, 416. See also, *State* v. *Sweetsir*, 53 Maine, 438.

The ruling excepted to was upon the effect and not admissibility of the evidence.

No fraud was proved or attempted to be, except so far as it comes from the pleading.

J. Baker & J. Ruggles, for the libelant.

Walton, J. In this case the wife petitioned for a divorce. While her libel was pending, the husband also petitioned for a divorce, and both suits were pending in the same court at the same time. The wife employed counsel from another county, not only to prosecute her own libel, but to defend against her husband's; but in the absence of her counsel, and in her absence, and at a time when, as she says, she did not expect the actions to be called for trial, the husband had his wife called and defaulted on his libel; and then, at an *ex parte* hearing, and as his wife avers and the pleadings confess, by his own false testimony, obtained a decree in his favor. The wife at once petitioned for a review, but the husband

soon after married another woman, and thus deprived the court of the power to grant it; for when either of the parties has married again, the court has no power to grant a review in a divorce suit. Thus foiled in her efforts for a review, the wife claimed the right to go on with her libel, which was first filed, and offered to prove not only the truth of the charges she had made against her husband, but also the falsity of the charges he had made against her, and the falsity of his testimony in support of them; and upon the question of alimony, or an allowance, that the property which she and her husband had accumulated during the twenty years or more that they had lived together, had been acquired mainly by her labor and good management in keeping a boarding-house; and that she had been cast off by her husband in such a feeble state of health, and so destitute of the necessaries of life, that she had been obliged to become a public charge. To this the husband interposed no other defense than the fact that he had already obtained a divorce, which he claimed was a complete bar to the further prosecution of his wife's libel. To this plea the wife replied, that he obtained his divorce in her absence by fraud and false swearing. To this the husband demurred. The court is thus called upon to decide whether the fact that the husband has already obtained a divorce, deprives the court of the power to grant a like divorce to the wife, and thus lay the foundation for an ancillary decree, securing to her such portions of the common property as justice and humanity may dictate.

We cannot doubt that this court is vested with such a power. It was at one time conferred in express terms. The Revised Statutes of 1841, c. 89, § 2, contained an enumeration of eight causes for which a divorce might be granted. The seventh was, that when one party had been divorced, the court might grant a like divorce to the other upon such terms and conditions as in the exercise of a sound discretion should be judged reasonable. This entire section was afterwards repealed,—not, however, for the purpose of depriving the court of the power to grant a divorce in any of the cases therein named, but because a new statute had in the mean time

been enacted, conferring upon the court such enlarged powers, in matters of divorce, that the former enumeration of causes was not only useless, but imperfect and deceptive. The very act which repealed the former enumeration, reaffirmed the power of the court to grant a divorce in any case and for any cause (except where both parties had been guilty of adultery, or were guilty of collusion), if the same should be deemed reasonable and proper, etc. Act of 1850, c. 171.

But, it is said, that when one party has been divorced, the other may lawfully marry again; therefore, there is no necessity for a second divorce. If the sole object of a divorce suit was to enable one or both of the parties to marry again, this argument would be entitled to great weight. But this is not the case. The ultimate object is, in many cases, to enable the court to decree concerning the care and custody of the children, and make provision for their support and education, and to secure to the wife such portions of the common estate as justice and humanity may dictate. The decree for a divorce may in such cases be regarded as a mere matter of form, necessary only to enable the court to make the ancillary decree; for in terms the law does not authorize the court to make the latter without first making the former. The assumption, therefore, that a second divorce can never be necessary because the first will enable the parties to marry again, is not correct. It is true that it is no longer necessary to enable the wife to marry again, but it is still necessary to enable the court to make a decree, securing to her such portions of the common property as may be deemed reasonable and proper.

In a case which occurred in New Hampshire, the supreme court of that State say that "the wife may be in the wrong; she may have an unhappy disposition; she may have ill-treated her husband, or deserted him, or have otherwise misconducted herself; and yet the property she may ask for may be only such as was hers before the marriage, or such as has been accumulated in whole or in part by her own industry; and her fault may be far from such as ought to be punished by the forfeiture of all her property, thus leaving

her to beg or starve. She may have so conducted that her husband may be well entitled to a divorce, and yet she may be a wronged and injured woman; and there seems, therefore, to be good reason why the court should be vested with the power of making to her a just and reasonable allowance in any such case." *Sheafe* v. *Sheafe*, 24 N. H. 564; *Sheafe* v. *Leighton*, 36 N. H. 240.

In the case above cited, the husband had obtained a divorce for the alleged adultery of his wife; and yet the court, on the wife's petition praying for alimony, permitted her to introduce evidence to show that her counsel had misapprehended the weight and sufficiency of the libelant's testimony, and had neglected to furnish evidence in defense of the charges set up in the libel, because he believed that a divorce could not be decreed upon the evidence produced by the libelant; and also to show gross impropriety of conduct on the part of the libelant toward the libelee, in endeavoring to ensnare her and procure causes of divorce; and also to show that she might be innocent of the charges preferred against her, while her husband himself might, perhaps, be guilty of the crime of adultery; and the court, upon mature consideration, held that the course pursued was proper, for the reasons given in the extract from the opinion of the court already quoted.

There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as *ex parte* divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and *a fortiori* is this true, when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that

the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done.

That the court once possessed the power, when one party had been divorced, to grant a like divorce to the other upon such terms and conditions as in the exercise of a sound discretion should be deemed reasonable and proper is clear, for it was conferred in express terms; and we think it is equally clear that the court has never been deprived of this power. The object of the second divorce is not to enable the delinquent party to marry again, but to enable the court to make such ancillary decrees as justice and humanity may require.

The fact must not be overlooked that a second divorce in no way impugns the first. In declaring the bonds of matrimony dissolved, the second decree is in harmony with and confirms the first. As before remarked, the second decree is important only as enabling the court to make such ancillary decrees concerning the property as justice may seem to require.

And in this case, it must be remembered, that the wife's libel was first filed, and that the defendant's demurrer to the wife's replication admits (at least for the purposes of this case), that the husband's divorce was obtained in her absence, and in the absence of her counsel, by his own false and fraudulent testimony.

And it may also be added, that the husband's plea in bar that the bonds of matrimony between him and his said wife had already been dissolved, was not pleaded in proper form; and that his demurrer to the wife's replication requires the court to decide against him, upon the well-settled rule of pleading, that when the pleadings end in a demurrer, the court must decide against the party who committed the first error. *Calais* v. *Bradford*, 51 Maine, 414; *Shelden* v. *Call*, 55 Maine, 159. The ground of defense set up in the defendant's plea in bar was a matter that occurred while the wife's suit was pending, and could, therefore, be taken advantage of only by plea *puis darrein continuance;* and by the well-settled rules of pleading, such a plea must not be pleaded in bar gen-

erally, as was done in this case, but to the further maintenance of the suit. *Rowell* v. *Hayden*, 40 Maine, 582, and cases there cited. The defendant's plea was, therefore, clearly bad in form, and would authorize the court to decide the case against him upon that point alone. But in a case of this importance the court felt reluctant to base their decision on a mere matter of form in the pleadings, and have, therefore, carefully considered the case on its merits.

Our conclusion is, that the mere fact that the husband has already obtained a divorce, is no bar to the court's granting a like divorce to the wife, the object being to enable the court to make an ancillary decree, securing to the wife such portions of the property as in the exercise of a sound discretion may be deemed reasonable and proper. Whether or not this power should be exercised in a given case, is for the judge to determine at *nisi prius*, upon the evidence then before him. *Exceptions overruled.*

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

JONAS GREENE *vs.* GEORGE W. LUNT.

Oath of town clerk—record of certificate of. Taxes—assessment and collection of. Land assessed—what is and is not a sufficient description of.

The record, "Oxford, ss., March 3, 1862, personally appeared William Woodsum, and took the oath necessary to qualify him to discharge the duties of clerk of the town of Peru for the ensuing year, according to law, before me, Samuel Holmes, moderator. A true copy of certificate, William Woodsum, town clerk," is sufficient evidence of a compliance with R. S., c. 3, § 17; and that the oath prescribed in § 14 was administered.

The certificate duly assigned by the assessors, "that the foregoing pages contain an inventory of polls and estate, real and personal, liable to be taxed in" a town named, sufficiently indicates that the real estate described above lay in such town.

In the assessment of taxes on land of resident owners, the parcels taxed must be definitely and distinctly described, or no lien will attach.

Thus, neither of the following descriptions is sufficient: "Part of the two river lots joining N. Walker's and Pettingill farm, lots 1 and 2, range 1, 100 acres;"

"A piece of land north-westerly of and adjoining S. G. Wait's land, lot 5, range 3, 6 acres;" "One-half of lot north-westerly of Luther Jackson's farm, lot 2, range 2, 50 acres;" "The lot joining B. Walton's farm, lot 1, range 2, 85 acres;' "A piece of land between A. J. Churchill and J. H. Weymouth, part of lot 7, range 3, 27 acres;" "One-half island opposite S. Holmes', 15 acres;" "A part of E. A. Pollard's farm, lot 6, range 5, 25 acres;" "Part of lot joining Josiah Hall's, lot 1, range 5, 40 acres;" "The lot being southerly and joining J. P. Hopkins' and S. R. Newell's wood-land, lot 3, range 4, 60 acres;" "Half of lot westerly of J. S. Holmes' farm and adjoining it, lot 4, range 2, 50 acres;" "A piece of land easterly of Worthly Pond, joining W. Harlen's farm, lot 7, range 5, 8 acres."

But each of the following is sufficient: "The island opposite N. Walker's, and above Alden's Ferry;" "Second lot from S. Holmes', lot 4, range 3, 100 acres;" "Second lot from D. L. Conant's land, lot 3, range 3, 85 acres;" "Larry Farm on the hill formerly owned by S. Roberts, being part of lot 1, in ranges 3 and 4, 75 acres;" and "Second lot from J. Lunt's, lot 6, range 3, 100 acres."

The sale of land for taxes will not be illegal, because the lists of assessments upon the polls and estates required by R. S., c. 6, § 56, contain no description of the lands assessed other than the number of acres and the numbers of the lots and ranges in which they are situated.

Nor because it does not affirmatively appear that "a record of the assessment and of the invoice and valuation from which it was made," "or a copy of it," was deposited in the assessors' or clerk's office, "before the taxes were committed to the proper officer for collection."

Nor because the warrant to the collector for the collection of State, county, and town taxes also contained a direction to collect a certain "sum voted by the inhabitants of school district, No. 9," when it did not appear that the provisions of R. S., c. 11, § 39, had been complied with.

Nor because it contained a direction to collect a deficient highway-tax when it did not appear that the highway surveyor gave the statute notice to the delinquent tax-payer, or returned to the assessors the lists required by R. S., c. 18, § 45.

Nor because it does not appear that prior to the notice of sale, the collector made a demand on the owner for the tax on the land advertised.

Nor because the collector's notice of sale did not designate the owner's "right," or contain any such description of the land "as is necessary to render it certain and plain," other than the number of acres and the number of lot and range.

Nor because the collector's certificate upon the notice filed with the town clerk did not specify what notice was given.

Nor because there was no evidence that the owner was notified of the sale as required by § 151, except so far as it appeared from the collector's return upon the back of the notice, and in his "return with a particular statement of his doings in making the sale," that he has "given the notice of said intended sale as required by law."

Nor because the collector's return to the town treasurer was not made within four days of the time notified for the sale, but was made within four days of the time to which the sale was adjourned and actually made.

ON REPORT.

WRIT OF ENTRY to recover possession of eighteen parcels of land, situated in Peru, in this county, and claimed under a sale for taxes.

The plaintiff introduced the records of the town showing an election of officers at a town meeting held March 3, 1862.

The plaintiff introduced the following transcripts of the record:

"OXFORD, ss:—March 3, 1862.—Personally appeared William Woodsum, jr., and took the oath necessary to qualify him to discharge the duties of clerk of the town of Peru for the ensuing year, according to law, before me.

SAMUEL HOLMES, *Moderator.*

A true copy of certificate,

Attest: WM. WOODSUM, JR., *Town Clerk.*"

Extract from the inventory so far as it relates to the estate of George W. Lunt, defendant, a resident in 1862:

(The figures on the left are inserted to denote the number of parcels mentioned in the opinion.)

			No. Lots.	*Range....*	*No. Acres....*	*Value....*
		LUNT'S LOWER TRACT.				
(1)	Lunt	Geo. W.				$350.00
(10)	do.	Second lot from D. L. Conant's land	3	3	85	150.00
(17)	do.	Half of lot westerly from S. Holmes' farm and adjoining it	4	2	50	36.00
(8)	do.	Second lot from S. Holmes'	4	3	100	50.00
(13)	do.	One-half island opposite S. Holmes'			15	100.00
(9)	do.	Second lot from J. Lunt's	6	3	100	70.00
(15)	do.	Part of lot joining Josiah Hall's	1	5	40	80.00
(12)	do.	Farm on the Hill, formerly owned by S. Roberts, being part of	1 1	3 4	75	250.00
(14)	do.	A part of E. A. Poland's farm	6	5	25	15.60
(18)	do.	A piece of land easterly of Worthley pond, joining W. Harlen's farm	7	5	8	25.00
(11)	do.	A piece of land between A. J. Churchill and J. H. Weymouth, part of	7	3	27	100.00
(16)	do.	The lot being southerly and joining J. P. Hopkins' and S. R. Newell's wood-land	3	4	60	125.00
		LUNT'S UPPER TRACT.				
(7)	do.	The lot joining W. B. Walton's farm	1	2	55	175.00
(3)	do.	Part of the two river lots joining N. Walker's and Petengill farm	1 2	1 1	100	300.00
(6)	do.	One-half of lot north-westerly of Luther Jackson's farm	2	2	50	300.00
(4)	do.	The Cyrus Keen farm	6	2	30	75.00
(5)	do.	A piece of land north-westerly of and adjoining S. G. Wait's land	5	3	6	25.00
(2)	do.	The island opposite N. Walker's and above Alden's ferry			6	50.00
*	*	*	*	*		

The foregoing pages contain an inventory and valuation of polls and estates, real and personal, liable to be taxed in the town of Peru for State, county, and town taxes for the year 1862, as it existed on the first day of April of said year.

JOHN KNIGHT, } *Assessors of*
JONAS GREENE, } *Peru.*

RECORD OF ASSESSMENT OF HIGHWAY TAX FOR 1862.

Names of Persons liable to be taxed in the town of Peru.	*No. Polls.*	*Poll Tax.*	*Taxes on Personal Estate.*	*Taxes on R. Estate.*	*Total amt of tax.*
Lunt George W.,	1	$1.00	$2.62	$7.00	$11.32
* * * * *					

Record of assessment of highway and money tax, and names of persons liable to be taxed in the town of Peru for 1862.

Lunt George W.	1	1.00	2.23	5.95	9.18
* * * * *					

LUNT'S LOWER TRACT.	*No. Lots.*	*Range...*	*No. Acres.*	*Value....*	*Highway Tax.....*	*Money Tax.....*
Lunt Geo. W.,	3	3	85	$1.50	$3.00	$2.55
do.	4	2	50	36	72	61
do.	4	3	100	50	1.00	85
do. One-half of island.			15	100	2.00	1.70
do.	6	3	100	70	1.40	1.19
do.	1	5	40	80	1.00	1.36
do.	1	3	75	250	5.00	4.25
	1	4				
do.	6	5	25	15	30	25
do.	7	5	8	25	50	42
do.	7	3	27	100	2.00	1.70
do.	3	4	60	125	2.50	2.12
LUNT'S UPPER TRACT.						
do.	1	2	55	175	3.50	2.98
do.	1	1	100	300	6.00	5.10
	2	1				
do.	2	2	50	300	6.00	5.10
do.	6	2	30	75	1.50	1.27
do.	5	3	6	25	50	42
do. Island,			6	50	1.00	85

REMARKS ON THE FOREGOING ASSESSMENTS FOR 1862.

We have assessed on the polls and estates of resident proprietors, and on the estate of non-resident proprietors in the town of Peru, the sum of three thousand dollars, voted by the town, with an overlay not exceeding five per cent, the aforesaid sums to be raised and expended in labor and materials on the highways in said town; the same we have committed to the several highway surveyors in due form of law. We have assessed the tax at two cents on the dollar. We have assessed on two hundred and twenty-one polls,

at one dollar each, with an inventory of ($138,323), one hundred and thirty-eight thousand three hundred and twenty-three dollars.

JOHN KNIGHT,
JONAS GREENE,
OTIS WYMAN,
Assessors of Peru.

PERU, April 28, A. D. 1862.

We have assessed the money tax on the polls and estates of resident inhabitants and on the estate of non-resident proprietors liable to be taxed in the town of Peru for the year 1862, at one cent seven mills on the dollar. Before making the money tax we deducted from the inventory one thousand five hundred forty-five dollars, it being the town-farm and stock, making the inventory stand $136,778. We assessed on one hundred and ninety-seven polls at one dollar on the poll. We have assessed five hundred and one dollars and fifty-seven cents State tax ($501.57); also a county tax of three hundred and five dollars and eighty-four cents (305.84) county tax, and one thousand dollars voted by the town last March to defray the town charges ($1000). Also six hundred and seventy-five dollars for the support of schools ($675), with an overlay of forty-one dollars and eighteen cents ($41.18), the same we have committed to the collector for collection, with a warrant, in due form of law, for collecting and paying over to the several treasurers.

JOHN KNIGHT,
JONAS GREENE,
OTIS WYMAN,
Assessors of Peru.

PERU, June 11, A. D. 1862.

The demandant introduced the warrant to the collector of the town of Peru for the year 1862, dated June 11, 1862, for collecting of State, county, and town taxes for said year, and the commitment of the tax bills on list of same date which were admitted by defendant to be in due form, properly executed and signed by the three assessors of Peru for the year 1862; from the tax-list the following extracts are made:

Greene *v.* Lunt.

COLLECTOR'S TAX LIST FOR 1862.

	Polls.	*Poll Tax.*	*R. Estate.*	*Personal.*	*Amt. Tax*
Lunt Geo. W.,	1	$1.00	$5.95	$2.23	$9.18

COLLECTOR'S TAX LIST FOR 1862.—*Resident Land Continued.*

	No. Lots.	*Range....*	*No. Acres*	*Value....*	*Amount of Tax....*
LUNT'S LOWER TRACT.					
Lunt Geo. W.,	3	3	85	$150	$2.55
do.	4	2	50	36	61
do.	4	3	100	50	85
do. One-half of island,			15	100	1.70
do.	6	3	100	70	1.19
do.	1	5	40	80	1.36
do.	1	3	75	250	4.25
	1	4			
do.	6	5	25	15	25
do.	7	5	8	25	42
do.	7	3	27	100	1.70
do.	3	4	60	125	2.12
LUNT'S UPPER TRACT.					
do.	1	2	55	175	2.98
do.	1	1	10	300	5.10
	2	1			
do.	2	2		300	5.10
do.	6	2	20	75	1.27
do.	5	3	6	25	42
do. Island,			6	50	85

NOTICE.—The resident proprietors of the following tracts of land or real estate in the town of Peru, in the county of Oxford, are notified that the same are taxed in the tax-list committed to the subscriber, the collector of taxes for the said town of Peru, for the year one thousand eight hundred and sixty-two; that the taxes assessed on the same remain unpaid; that nine months from the date of the assessment have expired.

Names of Owners.	ESTATE TAXED.	*No. Lots.*	*Range....*	*No. Acres*	*Amt. Tax unpaid....*
Lunt Geo. W.,	The stand where he resides,				$5.95
do.	Lunt's Lower Tract,	3	3	85	2.55
do.	" " "	4	2	50	61
do.	" " "	4	3	100	85
do.	One-half of island in front of S. Holmes,			15	1.70
do.	Lunt's Lower Tract,	6	3	100	1.15
do.	" " "	1	5	40	1.36
do.	" " "	1	3	75	4.25
		1	4		
do.	" " "	6	5	25	25
do.	" " " East of pond,	7	5	8	42
do.	" " "	7	3	27	1.70
do.	" " "	3	4	60	2.12
do.	Lunt's Upper Tract,	1	1	100	5.10
		2	1		
do.	" " "	2	2	50	5.10
do.	" " "	1	2	55	2.98
do.	" " "	6	2	30	1.27
do.	" " "	5	3	6	42
do.	Island above Alden's Ferry,			6	85

And if no person shall appear to discharge said tax on or before the twelfth day of May next, at one o'clock in the afternoon, I shall proceed to sell at Jonas Greene's store in said town of Peru, by public auction to the highest bidder, so much of said respective tracts or parcels of real estate or land as shall be sufficient to discharge said taxes and all necessary charges.

OTIS WYMAN, *Collector of taxes for said town of Peru.*

A true copy. Attest: OTIS WYMAN, *Collector.*

PERU, March 28, 1864.

I hereby certify that the foregoing is a true copy of the notice of the aforesaid intended sale, and that I have given notice of said intended sale as required by law.

OTIS WYMAN, *Collector of taxes for said town of Peru.*

PERU, March 28, 1864.

Five cent stamp.

Received and recorded, March 28, 1864.

WM. WOODSUM, JR., *Town Clerk.*

To the town treasurer of the town of Peru, in the county of Oxford, and State of Maine:

This is to certify that I, Otis Wyman, collector of taxes for the town of Peru, aforesaid, for the year 1862, pursuant to the law of said State, have sold this twelfth day of May, A. D. 1864, the real estate of George W. Lunt, a resident owner or proprietor, for payment of taxes at said time remaining due and unpaid, and in the schedule following is set forth the amount of land sold, being the same on which the taxes were unpaid, the name of the owner of said lots or parcels of land, the amount of taxes for which each was sold, and the legal cost and charges of said sale and the purchaser of each parcel, and I have executed deeds of the several parcels to the persons entitled thereto, and on this 16th day of May, A. D. 1864, I lodged this certificate and said deeds with you to be disposed of as the law requires:

Greene *v.* Lunt.

SCHEDULE.

Name of owner.	*Quantity of Land Sold.*	*Amt. Tax due and unpaid..*	*Cost and Charges.*	*Name of Purchaser.*
George W. Lunt.....	¾ of an acre.	$5.95	$0.66	Jonas Greene.
do.	85 acres	2.55	66	do.
do.	50 ,,	61	66	do.
do.	100 ,,	85	66	do.
do.	15 ,,	1.70	66	do.
do.	100 ,,	1.15	66	do.
do.	40 ,,	1.36	66	do.
do.	75 ,,	4.25	66	do.
do.	25 ,,	25	66	do.
do.	8 ,,	42	66	do.
do.	27 ,,	1.70	66	do.
do.	60 ,,	2.12	66	do.
do.	55 ,,	2.98	66	do.
do.	100 ,,	5.10	66	do.
do.	50 ,,	5.10	66	do.
do.	30 ,,	1.27	66	do.
do.	6 ,,	42	66	do.
do.	6 ,,	85	66	do.

In witness of all which I hereunto subscribe my name, this 16th day of May, A. D. 1864.

Five cent stamp.

OTIS WYMAN,
Collector of the town of Peru for 1862.

OXFORD, SS., May 16, 1864.

Personally appeared the above-named Otis Wyman, and made oath that the above certificate, by him subscribed, is true. Before me, SAMUEL HOLMES, *Justice of the Peace.*

Recorded and lodged with me,

WM. H. WALKER, *Town Treasurer of Peru.*

(EXTRACT FROM WARRANT TO COLLECTOR, 1863.)

"To Wm. R. Greene, collector of the town of Peru, within the county of Oxford, GREETING.

In the name of the State of Maine, you are required to levy and collect of the several persons named in the list herewith committed unto you, each one his respective proportion therein set down of the sum total of such list, it being this town's proportion of a tax or assessment of $495,366.99, by a law of the legislature of said State passed the 24th day of March, A. D. 1861, to apportion and assess the same on the inhabitants of this State, also said town's proportion of a tax or assessment of $12,000, granted by a resolve of the legislature of said State passed at the last session, upon an estimate made by the court of county commissioners of the county of Oxford, of sums necessary for defraying the charges of the county for

the year ensuing, together with the sums voted by the inhabitants of said town of Peru, in legal town meeting held on the 2d day of March last, for the service of the town, and the sum voted by the inhabitants of school district No. 9 in said town. . . .

Given under our hands and seals, by virtue of a warrant from the treasurer of the State of Maine, and also a warrant from the clerk of the court for said county commissioners of Oxford county, and the votes of said town of Peru, and the vote of the inhabitants of school district No. 9, on the 19th day of June, in the year of our Lord one thousand eight hundred and sixty-three."

(Official signatures of assessors.)

(EXTRACT FROM WARRANT TO COLLECTOR, 1864.)

"To Wm. K. Greene, collector of the town of Peru, within the county of Oxford, GREETING.

In the name of the State of Maine, you are required to levy and collect of the several persons named in the list herewith committed unto you, each one his respective proportion therein set down of the sum total of such list, it being this town's proportion of a tax or assessment of $1,321,571.41, by a law of the legislature of said State, passed the 25th day of March, A. D. 1864, to apportion and assess the same on the inhabitants of this State. Also said town's proportion of a tax or assessment of $9,000 granted by a resolve of the legislature of said State, passed at the last session, upon an estimate made by the court of county commissioners of the county of Oxford, of sums necessary for defraying the charges of the county for the year ensuing, together with the sums voted by the inhabitants of said town of Peru, in legal town meeting held on the 7th day of March last, for the service of the town and a deficient highway tax, for 1863, of $63.33."

The plaintiff also introduced record evidence of the collector's "return with a particular statement," etc., and of numerous other facts not necessary to be stated here.

Bolster & Wright, (and with them) *D. Hammons*, for the plaintiff.

A. Black, for the defendant.

1. In the discharge of all duties connected with the assessment or collection of taxes, or in the sale of lands for taxes, every town officer must be proved to be an officer *de jure*. *Payson* v. *Hall*, 30 Maine, 319; *Proprietors of Cardigan* v. *Page*, 6 N. H. 182; *Pike* v. *Hanson*, 9 N. H. 491.

2. The oath administered to the town clerk each year was not that required by law, and was insufficient.

The certificate of the moderator was insufficient. R. S., c. 3, §§ 14, 17.

3. A record must be made of the original and not of a copy. The same is true of the certificate of the oath administered to the town clerk.

4. It does not appear who administered the oath to the town officers in 1862. The word "attest" indicates a witnessing or an attestation of the record.

5. The inventories do not show that the lands taxed to defendant and sold for the taxes lie in the town of Peru. It does not appear that "Lunt's upper tract" or "lower tract" lie in the town of Peru. This should appear affirmatively. The assessors say that the lands are liable to be taxed in Peru. That is an opinion or conclusion of the assessors, and insufficient.

6. The inventory must contain a certain, plain, and accurate description of the land taxed. It is the foundation upon which all the subsequent proceedings rest. The assessment, the tax list, committed to the collector, the notice of sale, the returns and the deeds. An imperfect or erroneous description in the inventory runs through all the subsequent proceedings, and is fatal to them. An error or imperfection in the inventory is not cured by a correction or amendment in the after proceedings.

The description must be plain and accurate, so that the tax-payer may understand the premises taxed, and the purchaser at the sale may find them from the description. Blackwell on Tax Titles, 2d ed., 123 and following pages and cases cited; *Adams* v. *Larrabee*, 46 Maine, 516; *Lafferty's Lessee* v. *Byers*, 5 Hammond, 457.

7. To describe the land taxed as a part of a lot, without defining precisely what part, or as a piece of land or by other like description, without giving boundaries or other particular description, is insufficient. Blackwell on Tax Titles, 2d ed., 127–8–9 and cases cited; *Adams* v. *Larrabee*, 46 Maine, 516; *Stewart* v. *Ateer*, 5 Ohio, 257.

Taking the inventory of 1862, and the several parcels of real estate taxed to defendant, in the order in which they stand; of the first parcel there is no description whatever. The 3d, 5th, 7th, 8th, 9th, 10th, 11th, 14th, 15th, 17th, are described as parts or halves of lots or tracts and as pieces of land, without describing what half or part, or in any way describing the pieces so as to enable one to find them, while the description of the remaining parcels is exceedingly imperfect, uncertain, and defective. Same of the parcels including undefined parts of two lots. Were the ranges and lots taken from Lunt's place, or from a town plan? Precisely the same objections exist to the inventories of 1863. The description of some of the parcels may be somewhat changed or modified, but they are all equally imperfect, uncertain, and defective.

8. The assessment list, being a list of the taxes assessed upon the property described in the inventory, should and must perfectly and fully agree in its description of the parcels of real estate taxed with the inventory. Any material variation or disagreement is fatal. The R. S., c. 6, § 56, requires the assessors to make "perfect lists" of their assessment, and commit the same to the collector. To be a perfect list, the assessment should contain an accurate and plain description of each parcel of real estate taxed, and if it fail to do so, it is not such a list as is required by law. Blackwell on Tax Titles, 392 and following pages.

The assessment and tax list in each year, 1862–3–4, in the case at issue, are identical in form of description, and in each year they differ widely from the inventory of the same year, not merely in form but in substance. As to the first parcel of defendant's land, they agree with the inventory in not giving any description whatever. The remaining parcels are described in the assessment and

tax lists by range, lot, and acres alone, with the exception of the islands, and with the same exceptions they are described as whole lots, while the inventories describe them as parts and halves of lots and tracts, and as pieces of land. Can such lists be regarded as the "perfect lists" required by statute? The original assessment should have been offered in evidence, and not the record. R. S., c. 6, § 157.

9. A record of the assessment and inventory is required by statute to be deposited in the assessors' office, if any, otherwise with the town clerk, before the taxes are committed to the collector.

This requirement is peremptory, and a compliance with it essential. It is for the benefit and protection of the tax-payer, that he may have the opportunity to examine them and ascertain what property is taxed to him, the rate, etc. It should appear affirmatively that the records were so deposited; but in this case it does not so appear in either of the years in question. R. S., c. 6, § 59; *Brown* v. *Veazie*, 25 Maine, 359; Blackwell on Tax Titles, 2d ed., 117 and cases cited.

10. By the warrant to the collector in 1863, it appears that there is included in the taxes assessed upon the tax-payers of the whole town, a school tax not voted by the town, but by "school district No. 9 in said town," an assessment clearly unauthorized.

Supposing the tax to have been assessed upon the tax-payers of district No. 9 only,—a supposition we have no authority to make,—there is still an equally fatal objection to the warrant as presented. There is no evidence that defendant's lands taxed did not lie in said district, and probably some or all of them did lie there.

It should be in proof that the provisions of R. S., c. 11, § 39, were complied with, and the omission is fatal to the warrant. The doings of the school district in raising the money are not given. *Elwell* v. *Shaw*, 1 Maine, 339.

11. The warrant to the collector in 1864 shows that a deficient highway tax was included in the assessment, and assessed upon the tax-payers of the whole town instead of upon the delinquents.

There is no evidence that the highway surveyors gave the no-

tice to the delinquent tax-payers required by R. S., c. 18, § 42, or returned to the assessors the lists required by § 45 of the same chapter. *Patterson* v. *Creighton*, 42 Maine, 367; *Elwell* v. *Shaw*, 1 Maine, 339.

12. It should appear in proof, that prior to the notice of sale the collector made a demand on the defendant for the tax on the land advertised.

The tax should be collected from personal estate of the tax-payer, if he has any liable to be taken. The lien upon real estate of resident owners for the tax upon it is given as matter of security. The warrant don't mention it, and the real estate should be resorted to only when there is a want of personal estate.

Personal property cannot be taken without previous demand. Blackwell on Tax Titles, 172.

13. In giving notice of sale, the collector is required to give the "right lot and range, number of acres, and such other short description as is necessary to render it certain and plain." R. S., c. 6, § 150; *Ronkendorff* v. *Taylor*, 4 Pet. 349; Blackwell on Tax Titles, 223 and following pages; *Lafferty's Lessee* v. *Byers*, 5 Hammond, 458.

In the notice of sale each year, the first parcel of defendant's land is described as "the stand where he resides." No such description, or anything equivalent to it, is found in the inventory or subsequent proceedings. By what authority did the collector insert it?

As to the other parcels, there are the same errors, imperfections, and deficiencies in descriptions in the notices as in the assessments and tax lists. None of them are sufficiently described; there are no "such other short description" as is required, nor is the "right" stated in any instance.

14. The certificate on the notice filed with the town clerk should state what notice was given by the collector. Blackwell on Tax Titles, 213.

15. The same objections as those made to the assessments, tax lists, and notices, may be made with equal force to the returns

made to the town treasurer and town clerk. *Andrews* v. *Senter*, 32 Maine, 394.

16. There is no evidence that defendant was notified of the sale as required by c. 6, § 151, R. S. The certificate of the collector to the town clerk is not evidence. It is no part of the doings in making the sale, and should have been proved *aliunde*. R. S., c. 6, § 159.

17. The sales for the taxes of 1864 was adjourned. Was it lawful? The return by collector to the town treasurer was not made within four days of the time notified for the sale, but was made within four days of the time to which the sale was adjourned, and the sale actually made. R. S., c. 6, § 143; Blackwell on Tax Titles, 275.

18. In the deeds all sorts of vagaries of description seem to have been indulged in by the collectors. The deeds of the different years in nearly every case differ from each other in description of the same parcels of land, and all differ essentially from the inventory of the same year, and find no support, except in rare instances, from the notices of sale.

The first series describe the parcels as lots, parts of lots, and parcels of land, and in this respect approximates the inventory; but in other respects there is little simil arity to the inventory, and none to the notice of sale. The second series deals only in whole lots, and recognizes no parts or pieces. While the third series describes all the parcels as parts of lots save the islands.

In making the deeds, the collectors seem to have consulted each his own fancy without regard to any previous description. Tax deeds should be more certain and plain than in a conveyance.

It will be observed that "the stand where he resides" was deeded the first year only, and was not returned as sold the third year. The deeds should follow the notices and description. Blackwell on Tax Titles, 38–2–3 and 392; *Erwin* v. *Helm*, 13 Sargeant & Rawle, 151.

19. The writ does not follow either series of deeds in description of the premises demanded, but partakes something of all the de-

scription with some additions not found in either. The writ must follow the deed under which the demandant claims. He can only recover by virtue of his deed.

20. The deeds were not given by the collectors in their official capacity and convey nothing.

DANFORTH, J. This is an action to recover possession of eighteen different parcels of land, claimed by virtue of a sale for taxes for the years 1862, 1863, and 1864. The proceedings in assessing the taxes and making the sales, are substantially alike in each year, and, therefore, it will be unnecessary to consider only those of the first.

Many objections have been raised to the election, qualification, and proceedings of the officers who made the assessments, as well as to the proceedings of the collector in making the sales. It is true that in these respects, as the plaintiff's title is founded solely upon the provisions of the statute, such provisions must be strictly complied with. Without considering each objection, it is difficult to say, that after a careful comparison of the proceedings of the town and its officers, with the several provisions of the statute, we find that the officers were duly elected and qualified, and that the certificate of the oath taken by them is sufficient and in conformity with the provisions of the R. S., c. 1, § 6. Nor do we find any defect in the assessment or in the proceedings of the collector in making the sales, certainly none not remedied by R. S., c. 6, § 98, unless it be in the description of the land taxed and sold. The indefinite description of the several parcels assessed is the only serious objection to the plaintiff's title. He will, then, be entitled to a judgment for such lots as are sufficiently described, while as to the others he must fail.

The R. S., c. 6, § 150 provides that, "for all taxes legally assessed on real estate belonging to resident proprietors . . . a lien is hereby created which shall continue in full force until the payment thereof." By the same section it is further provided that the collector may give notice "of his intention to sell so much of such

real estate . . . as is necessary to pay said tax and all charges." By § 152 of the same chapter it is enacted that, "when no person appears to discharge the taxes duly assessed on any real estate of resident owners, with costs . . . the collector shall proceed to sell at public auction, to the highest bidder, so much of such real estate as is necessary to pay the tax then due." The collector has no authority whatever for selling land of resident proprietors for taxes except as given in these statutes. He can sell such and only such as the law gives a lien upon, and the lien attaches to such and only such as are legally assessed, and to the specific and definite parcel upon which the tax is laid. If there is no definite parcel taxed, there can be no lien, and if no lien there can be no legal sale. Hence the inference is irresistible, that, in the assessment which establishes the lien, and which is the foundation on which rest all the subsequent proceedings, the lots taxed must be definitely and distinctly described. This view is confirmed, if confirmation were necessary, by the provision in § 150 in relation to the notice to be given by the collector, which is as follows, "designating the name of the owner, if known, the right, lot and range, the number of acres as near as may be, . . . and such other short description as is necessary to render it certain and plain." The collector must obtain his information from the assessment. He has no authority to add to or take from it; nor can the assessors, after the completion of the tax, add to the description so as to make that certain which was before uncertain. The assessment must be complete in and of itself as much as a deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in the buts or bounds. These must be ascertained from what is written and from that alone. We may suppose, as contended in the argument, that the assessors intended to assess the lot or portions of the lot owned by the person taxed, or we may learn that fact from those officers themselves. But this is not a question of intention, but one of fact. What did they do? What is the specific lot upon which the tax is made? Until we can answer these

questions, and from the record, we are utterly unable to ascertain the lot to which the lien attaches and the one to be sold. Blackwell on Tax Titles, 392, 123–4.

Applying these principles to the case at bar, we find the description, in the assessment of many of the lots sold, defective and insufficient.

The first parcel claimed in the writ has no description whatever. The thirteenth, though sufficiently set out in the writ, in the assessment is described as one-half island; whether an undivided half does not appear, or if not undivided, no means are furnished by which we can ascertain which half is intended.

The third, fifth, sixth, seventh, eleventh, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth parcels declared for are described as parts of lots or parcels, or so many acres of a certain lot.

Such a description, however it may be in a deed, when the grantor makes his own bargain and can enter into such a contract as he pleases, is plainly insufficient in a tax title, where the lien is fixed by the assessment and nothing is left to the discretion or election of the collector or purchaser as to the location of the particular lot sold or the specific acres in the lot to which the sale shall attach. Under such a description the person assessed could not tell whether it was his property or that of a stranger which was taxed. Nor would the purchaser have sufficient knowledge of the identity of the land to enable him to bid intelligently. Blackwell on Tax Titles, 124 and cases cited; *Adams* v. *Larrabee*, 46 Maine, 516.

Therefore, as to these lots, the action must fail. But as to the remaining lots it is different. The second declared for is described somewhat differently in the writ and assessment, yet the description in each is definite, and the two have so much in common as to satisfactorily lead to the conclusion that both refer to the same tract.

The fourth piece is described as the Cyrus Keen place, in lot six, range two; the eighth as the whole of lot four, range three, Lunt's Lower Tract; the ninth as lot six, range three; the tenth as lot three, range three; and the twelfth as the Lang farm on the hill, being parts of lots one in the third and fourth ranges. These

lots are sufficiently described to enable any one to identify them by having the knowledge necessary to apply the description to the face of the earth.

The plaintiff must, therefore, have judgment for the second, fourth, eighth, ninth, tenth, and twelfth parcels demanded in his writ and described as above, and for the remainder,

Judgment for defendant.

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

ELIAS HASKELL *vs.* INHABITANTS OF WOOLWICH.

Local actions—wrong venue of, how taken advantage of.

When an action against a town for damages by reason of a defect in its highway is brought in a county other than that in which the town is situated, advantage of the fact may be taken under the general issue.

ON EXCEPTIONS.

CASE to recover damages for an injury caused on the 17th October, 1866, to the plaintiff's leg by an alleged defect in a highway in the defendant town.

The alleged defect consisted of a guide-board, painted white with black letters upon it, which had fallen from the post, and had been placed upon a hemlock bush, four feet high, near the traveled part of the road.

The plaintiff was and is a resident of Jefferson, in this county, and the town of Woolwich was and is a town in the adjoining county of Sagadahoc.

Plea, general issue.

When the plaintiff had put in his testimony and stopped, the defendants moved that the action be dismissed, upon the ground that it appeared from the plaintiff's evidence that the action is not

brought in the county where the defendant town is situated; but the presiding judge overruled the motion.

The defendants requested the presiding judge to instruct the jury,

That if the evidence satisfied the jury that the place of the alleged injury was at the time of it in the town of Woolwich, in the county of Sagadahoc, and at the time of the commencing of this action was and still is in said county, the action cannot be maintained; but the presiding judge declined to give it.

The verdict was for the plaintiff; whereupon the defendants alleged exceptions.

Wales Hubbard, for the defendants.

Ingalls & Smith, for the plaintiff.

APPLETON, C. J. This is an action on the case to recover compensation for an injury occasioned by a defect in an highway which the defendant town was bound to keep in repair. The suit is brought in the county of Lincoln. The town of Woolwich is within the county of Sagadahoc.

Actions of this description were transitory at common law. *Titus* v. *Frankfort*, 15 Maine, 89. They were made local by an act passed in 1849, c. 108. By R. S., 1857, c. 81, § 6, "all actions against towns for damages by reason of defects in highways, shall be brought and tried in the county in which the town is situated." The same provision is found in the revision of 1871, c. 81, § 13.

This action being made local by statute, must be brought in the county of which the town sued constitutes a portion. Being a local action, it was not necessary to plead in abatement. "When an action, local in its nature, is commenced in a wrong county, the defendant," observes Preble, J., in *Hathorne* v. *Haines*, 1 Greenl. 245, "is not obliged to plead the fact in abatement. If the objection appear on the record, he may avail himself of it on demurrer; or, if it do not appear in the record, as in the case at bar, he may avail himself of it on trial under the general issue." The defend-

ant may demur to the declaration when the fact appears of record. *Thrale* v. *Cornwall*, 1 Wils. 165; *White* v. *Sanborn*, 6 N. H. 220. So the plaintiff, after the general issue has been pleaded, may be nonsuited. 15 Peterson, 326 Venue. So judgment may be arrested. *Robinson* v. *Mead*, 7 Mass. 353. In accordance with these views are all the decisions of this court. *Blake* v. *Freeman*, 13 Maine, 130; *Webb* v. *Goddard*, 46 Maine, 505. Had this been a transitory action, the ruling of the presiding justice would have been correct. But as the law is, this action cannot be "brought and tried" in the county in which it was commenced without directly and clearly violating the statute, which prohibits this being done.

The decision in *Raymond* v. *Lowell*, 6 Cush. 524, rests upon the statutes of Massachusetts, and is not an authority adverse to the conclusions to which we have arrived. *Exceptions sustained.*

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

ALLEN MCGREARY *vs.* JOHN CHANDLER & others.

Voluntary association—non-joinder of all the members must be pleaded in abatement.

In an action on a promissory note, signed by the defendants as directors, wherein a voluntary association, called "the Machias Mining Company, promise to pay Ellis M. Smith or order" the sum named at the time specified; *Held*, (1) That all the members of the association, if any, being liable, the action should be against all; but (2) That the action against the defendants alone is maintainable, unless they plead in abatement the non-joinder of their associates.

ON EXCEPTIONS.

Facts appear in the opinion.

APPLETON, C. J. This is an action of assumpsit upon the following note indorsed in blank:

"$83.66. WINE HARBOR, Oct. 16, 1862.

For value received, the Machias Mining Co. promise to pay Ellis M. Smith, or order, eighty-three dollars and sixty-six cents in three months from date.

JOHN CHANDLER,
GEORGE THOMPSON, } Directors."
G. S. PARKER,

The Machias Mining Co. is a voluntary association of individuals, and not a corporation under the laws of the State. The defendants are members, and assume to act as its directors, and as such to bind the association. If they have bound the association, as they purport to have done, all its members are bound by and liable upon their contracts. The suit in such case would be against all the members. In the present case, it is against three of the associates only; but it is maintainable against them unless they plead in abatement the non-joinder of their associates, which they have not done.

It is unnecessary to consider whether the words "directors" are to be regarded as merely a description of the persons, as in *Chick* v. *Trevitt*, 20 Maine, 462, inasmuch as the defendants are liable as members of the association for which they have acted as directors, and may be sued as such. *Exceptions sustained.*

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

A. M. Nichols, for the plaintiffs.

Geo. Walker, for the defendants.

EMERY ANDREWS *vs.* JAMES S. MARRETT.

Surety—what will discharge.

A surety has a right to have his liability remain precisely as he himself has fixed it; and any change in the contract or duty, for the performance of which he is holden, made without his consent, will discharge him.

Thus, where the holder of an over-due, non-negotiable promissory note, knowing one of the signers to be a surety, accepted from the principal debtor four new negotiable notes, three of which were payable at a future day, and the other on demand after date, and agreed that the original note should remain in his hands as collateral security for the payment of the new ones, all without the knowledge or consent of the surety; *Held*, that the effect of this arrangement was to enlarge the time of payment for a part of the debt, and to change the character and terms of the contract with respect to the whole of it, and that the surety was thereby discharged.

ON REPORT from the superior court.

ASSUMPSIT on a promissory note of the following tenor:

"$3000. PORTLAND, Oct. 22, 1866.

Six months after date, for value received, I promise to pay Emery Andrews three thousand dollars.

[Stamp.] JAMES E. FERNALD.

(On the back.)

Otis Cutler,

Jas. J. Marrett."

The remaining facts are sufficiently stated in the opinion.

P. Barnes, for the plaintiff.

W. L. Putnam, for the defendant.

WALTON, J. A surety has a right to determine for himself on what terms, and for how long a time, he will be holden for the debt of another; and having himself fixed the terms of his suretyship, no one else has a right to change them without his consent. He has a right to have his contract remain precisely as he made it.

And if the debtor and the creditor change any of its terms, or prolong the time for its performance, without the consent of the surety, he is thereby discharged.

The defendant consented to become a surety on the note in suit by writing his name on the back of it. The note was not negotiable, and it was payable in six months from date. After the six months had expired, the plaintiff accepted from the principal debtor four new notes for the same debt, three of which were payable at a future day, and the fourth on demand after date, and all of them negotiable, the original note, as before stated, not being negotiable. And it was agreed between the plaintiff and the principal debtor, that the original note should remain in the plaintiff's hands as collateral security for the payment of the new ones. All this was done without the knowledge or consent of the defendant.

We cannot doubt that the legal effect of this arrangement was to enlarge the time of payment for a part of the debt, and to change the character and terms of the contract with respect to the whole of it; and that the defendant, being a mere surety, was thereby discharged.

The case is not distinguishable in principle from *Gould* v. *Robson*, 8 East, 576. In that case the holder of a bill of exchange, when due, took part-payment from the acceptor, and a new acceptance for the remainder, payable at a future day; and it was agreed (as in this case) that the original bill should remain as security for the payment of the new one. The court held, that the effect of this arrangement was to give time to the acceptor, and that the indorser, who was a mere surety, and no party to the agreement, was thereby discharged.

So in *Rees* v. *Berrington*, 2 Vesey, 540, the Lord Chancellor held, that where the obligee in a bond, with a surety, took notes from the principal, payable *in futuro*, without consulting the surety, the latter was thereby discharged.

So in *Fellows* v. *Prentiss*, 3 Denio, 512, the court held, that if the principal debtor give the creditor his note for the debt, payable one day after date, the surety is thereby discharged; and that it is

not competent for the creditor to prove that the note was intended as a mere memorandum, and was not to operate as an extension of the credit. To the same effect are *Bangs* v. *Mosher*, 23 Barb. 478; and *Myers* v. *Welles*, 5 Hill, 463.

So in *Okie* v. *Spencer*, 2 Wharton (Penn.), 253, where the holder of a promissory note, on the day it became due, accepted from the maker a check, dated six days afterwards, which was to be in full satisfaction of the note if paid at maturity, the court held, that this was a suspension of the remedy on the note for six days, and discharged the indorser as effectually as if it had been for six years.

In *Stedman* v. *Gooch*, 1 Espinasse, 3, Lord Kenyon said, that the law was clear that if a creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable.

So in *Walton* v. *Mascall*, 13 M. & W. 452, the court said it was established law that the acceptance of a negotiable instrument for and on account of an antecedent debt, operates as a suspension of payment of the debt till the note becomes due.

So in *Kendrick* v. *Lomax*, 2 C. & J. 405, where the plaintiff accepted a new bill for one that was then due, and before the second bill became due, sued the first, the court held the action could not be maintained; that when the plaintiff took the second bill he virtually agreed not to sue on the first till the second should become due. See, also, to the same effect, *Baker* v. *Walker*, 14 M. & W. 465; and *Withall* v. *Masterman*, 2 Camp. 179.

So in *Thomas* v. *Dow*, 33 Maine, 390, this court held, that the surety on a poor debtor's bond is discharged by a contract made for a valuable consideration, between the creditor and the debtor, without the knowledge of the surety, that the bond should be discharged if the debtor, at a time beyond the six months, paid part of the amount due. The ground of the decision is the same as in the cases already cited, namely, that the acceptance of the debtor's promise to pay at a future day, by necessary implication, operates as an extension of the time of payment till that day arrives. "If,"

said the court, "the obligees had instituted a suit upon the bond, the principal could have obtained relief in a court of equity by injunction; and the argument that the plaintiffs waived no right by the agreement, but retained the right to commence a suit at the expiration of the six months on the bond if forfeited, cannot be maintained. See, also, to the same effect, *Phillips* v. *Rounds*, 33 Maine, 357; and *Bank* v. *Mallett*, 42 Maine, 349; and same case, 34 Maine, 547.

That the defendant was a mere surety on the note in suit, and that the plaintiff knew such to be the fact when he took it, is satisfactorily proved. The defendant so testifies, and the plaintiff, though a witness at the trial, does not deny it. The manner of the defendant's signing, being upon the back of the note instead of upon the face, tends to the same conclusion. So, also, do the plaintiff's letters, which are in evidence in the case. In fact, his whole conduct, from the time when he accepted the note to the close of the trial, as shown by the evidence, plainly indicates that he knew that Fernald was the principal debtor, and that the defendant was only a surety. Such being the true relation of the parties, it was not competent for the plaintiff and the principal debtor to change the surety's liability without his consent. That such would be the effect of the new arrangement between them, if enforced, there can be no doubt. The effect of the new arrangement was, therefore, such as to discharge the surety.

Judgment for defendant.

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

JOHN A. POOR & another *vs.* SAMUEL LARRABEE.
Same *vs.* DANIEL B. HINKLEY & another.
Same *vs.* JOHN S. KIMBALL.

Real action—evidence by defendant. Attachment of real estate. Assignee of tenant in dower—possession of, not adverse to reversioner. Statute of limitations as applicable to reversioner. Administrator's deed—date and acknowledgement. Assignee of tenant in dower entitled to betterments.

In the trial of a real action, it is competent for the defendant in possession, under the general issue, to disprove the seisin of the demandants as alleged in the writ, by showing that the party, under whom they claim, had neither title nor possession at the time of the conveyance under which they claim.

Thus, where the demandants' title depended upon an alleged attachment, seasonably followed by a levy on real estate made in favor of the demandants' grantor against his debtor, the tenant may, for the purpose of disproving the demandants' seisin within twenty years, show that the alleged attachment was void, and that after the attachment, but prior to the levy, the debtor was decreed a bankrupt under the United States Bankrupt Act of 1841, and that the demandants' grantor's debtor did not have possession when the levy was made.

The Stat. of 1838, c. 344, § 4, which provided that it should be necessary to the validity of an attachment of real estate that the plaintiff should set out in his writ, specifically, the demand or claim on which his action is founded, applied to suits pending at the time the act took effect as well as to those subsequently commenced.

The administrator of the intestate estate, to which belonged the lots of land in controversy, under a license from the probate court, conveyed them to the defendants' grantors, and the widow, to whom the land had been assigned as dower against common right, joined in the deeds, to convey and release her dower. Thereupon the defendants' grantors entered and erected a brick block upon the premises. In a real action by the grantee of the levying creditors of the heirs of the intestate; *Held*, (1) That during the life of the widow, the defendants cannot be regarded as holding adversely to the reversioners; and (2) That it is incompetent for the defendants to question the regularity of the probate proceedings by which the dower was assigned.

An assignment of dower made by commissioners appointed without objection by the court of probate, and duly returned to and accepted by the judge of probate, is final and conclusive upon all parties thereto and their privies, when the decree of acceptance is not appealed from.

The statute of limitations does not begin to run against a reversioner during the continuance of the particular estate.

Poor *v.* Larrabee, Hinkley, and Kimball.

A reversioner, during the continuance of the life-estate, is under "legal disability" within the meaning of Public Laws of 1821, c. 52, § 12 (R. S. of 1857, c. 71, § 28), so that he may bring an action within five years after the termination of the life-estate to recover land sold under an administrator's license, more than five years before the commencement of the action.

If, under a license duly issued by the probate court, an administrator, after taking the oath and giving the bond prescribed by the statute, regularly sell the land described in his license, at public auction, and execute and deliver a deed thereof to the purchaser, within a year from the date of his license, then the title passes, although the deed was not acknowledged until after the expiration of the year.

Aliter, where the land was duly sold and struck off to the purchaser before, but the deed thereof was not executed and delivered until afterwards.

In the absence of other evidence a deed may be presumed to have been executed and delivered on the day of its date.

Where an administrator's deed was dated within a year from the date of his license, but was not acknowledged until after, the more prudent course, in the absence of other controlling facts, is to require such a turn to be given to all doubtful matters *ut res magis valeat quam pereat.*

Public Laws of 1843, c. 6, § 1, embodied in R. S. of 1857, c. 104, § 23, did not affect the rights of reversioners in any improvements made prior to the time when that statute took effect.

Aliter, as to improvements made since.

On report.

Writs of entry for four lots adjoining of land with stores and wharves thereon respectively, situate in Bangor, on the west side of Exchange, formerly Poplar street.

The land in controversy was formerly the property of Zadoc French (under whom both parties in each suit claim), who died intestate in the spring of 1831, leaving three sons, Ebenezer, Frederic F., and George S. French, his only heirs.

On Aug. 29, 1831, through proceedings in the probate court for this county, the lots in controversy with others were assigned to Bulah French, widow of Zadoc, as her dower "against common right." She died April 18, 1863.

April 3, 1833, Frederic conveyed all his interest in his father's estate to his brothers Eben and George; but the deed was not delivered until March 23, 1836, when it was recorded. It contained the clause "providing that said (grantees) are to save said Frederic free from all claims harmless, on any deeds or conveyances

which he may have signed, and acknowledged to convey any of said real estate mentioned in this deed."

On Aug. 14, 1837, one A. G. Brown, on a writ in his favor against Ebenezer French, caused the latter's real estate to be attached. The writ was entered at the October term, 1837, and continued till the June term, 1843, when it was defaulted and continued for judgment till June term, 1845, when judgment was rendered, and within thirty days thereafter the execution issued upon the judgment was levied upon Ebenezer French's undivided half of the demanded premises. The writ contained a count on a note and a general money count, without any specification of claim to be proved under it.

On Oct. 10, 1837, one Wiggins Hill sued out a writ in his own favor, upon a note against George S. French, which was duly entered and continued from term to term till June term, 1838, when it was defaulted and continued for judgment to October term, 1842, when judgment was rendered; and within thirty days thereafter the execution issued upon the judgment was levied upon George S. French's undivided half of the demanded premises.

On July 25, 1843, Brown conveyed the land levied upon by virtue of his execution to one of the plaintiffs (George Stetson), who, on July 18, 1843, conveyed one-half of his interest to the other plaintiff (Poor); and, on April 13, 1843, Hill conveyed his levy to said Poor, all of which deeds were seasonably recorded.

Ebenezer French was appointed administrator of his father's estate, and at the June term, 1831, of this court, he was duly licensed to sell real estate of his intestate at auction, sufficient to pay the sum of $25,000 of the just debts and incidental charges, his whole real estate being inventoried at about $60,000. The court at that term adjourned, finally, on June 18, 1831. Before acting under the license, the administrator gave the bond, took the oath and gave the notice prescribed by the statute, and sold the lots in controversy at public auction, on June 14, 1832.

The defendants, severally, offer the following described deeds, given by the administrator, viz.,

1. Deed "A." to Frederic F. French, of the "Kimball lot," dated June 29, 1832, and acknowledged next day.

2. Deeds "B." and "C.;" the former to the defendant Larrabee, and the latter to D. E. Wadleigh, of the lots claimed in the Larrabee suit, both dated June 14, 1832, and acknowledged July 16, 1832.

3. Deed "D." to D. E. Wadleigh, of the Hinckley & Egery lot, dated June 14, 1832, acknowledged Jan. 22, 1833.

F. F. French conveyed the "Kimball" lot (conveyed to him by deed "A.") to Pillsbury & Davis, by warranty deed, dated and recorded June 17, 1833, and it is admitted that this title is now held by Kimball's landlord, under whom Kimball holds the premises as tenant for years; also, that the premises in deed "C." have since been conveyed to Larrabee, and those in deed "D." to Hinckley & Egery, tenants in the suit at bar.

After receiving their respective deeds, the grantees, in 1832, severally entered upon the lots in question, and, during that or the next year, erected a block of brick stores on the lots, and made other improvements, and have continued to occupy the same until the present time, and for these improvements and erections a claim was filed for betterments. Some improvements were also claimed to have been made on the lots since the statute of March 4, 1843, went into force. The demandants also filed request for estimation of value of the land, without the improvements, agreeably to statute.

The tenants offered the following facts in evidence, all which are objected to as irrelevant, viz.,

Ebenezer and George S. French were both bankrupts under the United States Statute of 1841. Their petitions were both dated Feb. 21, 1842, filed Feb. 25, 1842, decreed bankrupts April 5, 1842, and both were discharged; Ebenezer by decree dated Jan. 30, 1844, and George by decree dated Aug. 6, 1842.

Defendants offer to prove further that the deeds were all made out by Wm. Abbot, Esq. The one to F. F. French was originally dated June 14, 1832, and the consideration was paid on that

day, but George B. Moody altered the date to the 29th to make it accord with the date of release of dower annexed to the deed. Plaintiffs object to the admission of the testimony as irrelevant.

The defendants also alleged that certain facts have a tendency to show frauds in the levies, as follows, viz., that George's interest in the Kimball store was set off for $450, Eben's interest in same for $300, George's interest in the Larrabee corner store was set off for $450, Eben's for $375.

That George's interest in the other Larrabee store was set off for $450. Eben's for $300.

And similar facts respecting the Hinckley & Egery store. That the Kimball store was worth at that time, in cash, $3,000. Larrabee corner store $3,500, and the other $3,000, and so of the Hinckley & Egery store, and that they have been worth those sums ever since.

That the appraisers were induced by the creditors, or their attorney, through misrepresentation, that they should not include in the valuation any buildings, or erections, in their estimate of the value of the land; that none of the defendants or persons under whom they claim were present at the levies, or had any knowledge of the same; that said appraisers were also induced to appraise said property lower than their value, by a representation that there was doubt whether the debtors had any interest in the property. Plaintiffs denied all said allegations, and on the contrary averred that at the time of said levies the property, and all property, was greatly depreciated in value, and that the valuation was made fairly, and without any improper influence from the creditors, or their attorney, and object to the admission of all the testimony.

If these facts are admissible, and have any tendency, such as could authorize a verdict, if proved, to show fraud so as to affect the levies or avoid them, then the cases to stand for trial.

The cases were submitted to the full court for decision, according to the legal rights of the parties, the court to draw conclusions of fact from the evidence or case reported as a jury might do. If the

actions cannot be sustained, a nonsuit to be entered, otherwise a default, except as above agreed, and in the case of a default to decide if the tenants are entitled to betterments, if so, the question of their value and of the value of the land without the improvements, is to be submitted to a jury, unless the parties agree on some other mode of adjustment.

The administrator's deeds were all in common form,—made on same kind of blank.

Annexed to deed "A.," after the certificate of acknowledgment of the grantor, Ebenezer French, was the following:

"And I, Bulah French, widow of the aforesaid Zadoc French, for the consideration aforesaid, do hereby remise, release, and relinquish to the said Frederick F. French, and his heirs and assigns forever, all my right and title to dower, in and to the aforegranted premises.

"In witness whereof, I, the said Bulah French, have also hereunto set my hand and seal, this twenty-ninth day of June, in the year of our Lord, one thousand eight hundred and thirty-two.

BULAH FRENCH. [Seal.]

In presence of
GEO. B. MOODY.

"I certify that this deed of release was annexed to the foregoing instrument of conveyance from said Ebenezer French to said Frederick F. French, before either of said instruments were signed.

(Signed) GEO. B. MOODY, *Justice Peace.*"

Recorded July 5, 1832.

The attestation clause of deed "B." was as follows:

"In witness whereof, I, the said Ebenezer French, administrator as aforesaid, have hereunto set my hand and seal, this fourteenth day of June, in the year of our Lord, one thousand eight hundred and thirty-two. And Bulah French, relict of the said Zadoc French, in consideration of one dollar paid by said Samuel Larrabee, doth hereby sell and release to him her dower and all the interest which she hath in the premises."

The attestation clauses of deeds "C." and "D." were the same *mutatis mutandis*.

A. W. Paine, for the plaintiffs, in addition to many propositions sustained by the court, contended,

That the administrator's deeds were not fully executed during the life of his license; that the license expired June 18, 1832; that the deeds of the Larrabee and Hinkley lots were not acknowledged until the year had expired. The acknowledgment is part of the deed, and is so regarded by the courts and legislature. An express provision requires it. Without it, the deed is only provisionally or partially good,—good only against parties and persons having notice. The deed conveys the title, absolutely, only when acknowledged. Without acknowledgment the deeds could not have been recorded, and the land would have then been exposed to attachments. *Dole* v. *Thurlow*, 12 Met. 157–162; *Call* v. *Buttrick*, 4 Cush. 345; *Gibbs* v. *Swift*, 12 Cush. 393.

If it be part of the deed, it can be performed by the administrator only while his license lasts.

It is the administrator under his license who acknowledged, and no other acknowledgment is good.

Being no legal acknowledgment there can be no legal record, for a deed not properly acknowledged cannot be properly recorded.

But if acknowledgment be not part of the deed, the deed must be signed, sealed, and delivered within the year. *Wellman* v. *Lawrence*, 15 Mass. 326; *Macy* v. *Raymond*, 9 Pick. 285; *Jewett* v. *Jewett*, 10 Gray, 32; *Marr* v. *Boothby*, 19 Maine, 573; *Marr* v. *Hobson*, 22 Maine, 321.

In Massachusetts, by the express provision of the statute, deeds made after the year has expired to perfect a sale made before are good. Stat. of Mass., 1840, c. 97; R. S. Mass., 1860, c. 102, § 47.

Maine has no such statute. A similar statute, covering some defects incident to administrator's deeds, was enacted, but does not embrace the defect in question. R. S. of 1841, c. 112, § 35; R. S. of 1857, c. 71, § 29.

Under these statutes *Marr* v. *Boothby*, *supra*, and *Mason* v. *Ham*,

36 Maine, 573, were decided. These statutes could not affect case at bar, inasmuch as the statute was not enacted until long after the deeds were made.

Where a deed is completed, bearing date even with its acknowledgment, there would seem to be no doubt that in the absence of all evidence, the deed was delivered on the day of its date or execution. The presumption fails when it is apparent from the face of the deed that it was not completed at the time of its date. Thus where it refers to one of a later date, the presumption could not prevail. *Sweetsir* v. *Lowell*, 33 Maine, 446. See also, *Smith* v. *Porter*, 10 Gray, 68; *Jackson* v. *Hill*, 5 Wend. 532–3; 2 Washb. on Real Prop. 578.

The presumption does not prevail in respect to deeds not acknowledged. *Elsy* v. *Metcalf*, 1 Den. 323; *Jackson* v. *Stevens*, 16 Johns. 110; *Doe* v. *Howland*, 8 Cow. 277; *Osterhart* v. *Shoemaker*, 3 Hill, 513; *Brown* v. *Burton*, 5 Dowl. & L. 289, 2 B. C. 220.

Where a deed is acknowledged by several grantors, on different days, all subsequent to the date, the presumption that it was delivered on the day of its date is destroyed. *Henderson* v. *Baltimore*, 8 Md. 352; *Loomis* v. *Pingree*, 43 Maine, 299. The date indicating the day of completion must represent the day of delivery; but when on its face it shows itself incomplete on the day of its date, the presumption of delivery then fails.

Acknowledgment is one of the essentials required by the statute. It is the means necessary for its preservation and protection of the title. It is so essential that the statute carefully provides a remedy for the defect. R. S., c. 73, §§ 17 to 23 inclusive.

The defendants have all the means of proof, and if the delivery did actually take place before acknowledgment, they can show it and overcome the presumption.

J. A. Peters, for the defendants, after elaborately discussing the point concerning the delivery of the deeds sustained by the court, contended,

That as to deed "A." the defendant must recover upon adverse possession; that Mrs. French did not convey any dower, but merely

relinquished her right which was a waiver only; that the defendant was not under any life-estate, because there was none, and he had purchased none.

Plaintiffs cannot recover because of disseisin in all the cases. It is no answer to say that any of the defendants held a life-estate, for they claimed under administrator's deeds; that the plaintiffs are estopped from denying such a seisin as would entitle them to an action, because in their levies they acknowledged a seisin in each case, instead of accepting the assignment of a remainder, as by statute. So they could have sued within the assumed life-estate, or else their levies were void.

Defendants hold by disseisin because they are not the direct grantees of the administrator and his mother; and because the tenants supposed and believed that they were absolute owners against all the world, and always acted as such. Will the court decide that we were in law conscious of having a life-estate, and that we were putting an immense value, by way of improvement, upon that estate, of a permanent character? We maintain that if a person holds land for twenty years, believing himself an absolute owner, and in all respects acting as such, that a disseisin is obtained, no matter how much or how little title he has, or how he got it. The very object of the law is to make even his mistakes a protection to him. The tenants would naturally have supposed that Mrs. French merely released a right of dower. Most professional men would have supposed the same thing. Mrs. French nowhere appears in the body of the deed. Her act was in fact merely a waiver. It so resulted. See 23 Maine, 276; 27 Maine, 381; 33 Maine, 396.

Plaintiffs' levies were void because attachments lost by the bankruptcy of the French's. *Bowley* v. *Bowley*, 41 Maine, 543; *Stone* v. *Everett*, 3 Story, 446.

If, notwithstanding the bankruptcy, the plaintiffs had a lien by attachment, it was only for what existed at the time of the bankruptcy, for the debt and not the subsequent costs; and the lien was drowned by levying for both debt and costs. The debts could have been proved in bankruptcy. *Haggerty* v. *Amory*, 7 Allen, 458.

The attachments were lost by a want of continuance of the action at the June term, 1842. There was a break which will make void the attachments, even though judgment was made up regularly. This is settled precisely in the case of *Leighton* v. *Reed*, 28 Maine, 87.

Though the judgment may be good, the attachment became void. The copy of the docket, which may be found herewith, will show, that while other actions, standing for judgment, were continued (a few put into a copy as a sample), these cases were not, unless included in the order. First, before final order, which is copied. These actions which had been defaulted, and were ready for judgment, could not be included in the general continuance.

Dower was not correctly set out to Mrs. French.

The attachment void, the writ containing money count without any specification.

Levies erroneous, being for too much by seventeen cents. *Brown* v. *Lunt*, 37 Maine, 423; *Oatman* v. *Walker*, 33 Maine, 71; *Glidden* v. *Chase*, 35 Maine, 90. His return of items when he makes them is conclusive. *Boyd* v. *Page*, 30 Maine, 460.

The remedial act, R. S., c. 76, §§ 20, 21, so far as these levies are concerned, would be retrospective and unconstitutional.

In neither of the levies was the dower of Mrs. French noticed so far as the *locus in quo* is concerned. A seisin instead of assignment was given.

One-third of lot in deed "A." was not reached by the plaintiffs' attachments, because F. F. French's deed of June 17, 1833, conveyed it to Pillsbury and Davis under whom defendant now claims.

Defendants entitled to betterments made since March 4, 1843. Act of that year.

Why does not the five years' limitation apply here? See that and other provisions in R. S., c. 71, §§ 28, 29. This would apply to all the cases. The retrospective part of this act is constitutional. *Beal* v. *Nason*, 14 Maine R. 344.

There was fraud in the levies; and if all else fails in respect to any portion of the estate sued for, then a jury must pass upon the question. *Hilton* v. *Hanson*, 18 Maine, 397.

The case shows deceit, and circumvention practiced upon the appraisers. If such conduct as is offered to be shown here does not amount to enough to submit a question of fraud to a jury, then there is no remedy for extraordinary cheating, when done by attorneys and officials.

BARROWS, J. The several parcels of land demanded in these suits formed a part of the estate of Zadoc French, who died intestate in the spring of 1831, leaving three sons, Ebenezer, George, and Frederic, his only heirs. The demandants claim title under levies made in 1843 upon the several lots in question as the property of Ebenezer and George, to whom Frederic had made a deed, dated April 3, 1833, of all his interest in his father's estate containing the following clause, "providing that said (grantees) are to save said Frederic free from all claims harmless on any deeds or conveyances which he may have signed and acknowledged to convey any of said real estate mentioned in this deed." This deed was not delivered until March, 1836, when it was recorded. But previous to that time, viz., on June 17, 1833, Frederic French had made a warranty deed of one of these lots to parties under whom the present tenant holds.

The tenants, and those under whom they claim, have been in actual possession of the demanded premises since some time in the year 1832, when they entered and forthwith made expensive and permanent improvements, erecting a brick block upon the premises, claiming title under deeds from the administrator of Zadoc French, in which deeds Bulah French, the widow of Zadoc (to whom these with other lots had been assigned in August, 1831, by proceedings in the probate court to set out her dower against common right), joined for the purpose of conveying or releasing her dower.

Bulah French lived until April 18, 1863. These suits were commenced July 20, 1863, the demandants denying the validity of the administrator's deeds, and claiming that the tenants cannot be considered as disseisors during the lifetime of Bulah French, whose

estate they held by virtue of valid conveyances from her as above stated.

The tenants, or those whose title, good or bad, the tenants hold, have been in possession of the demanded premises since 1832.

The demandants must recover, if at all, on the strength of their own title, and, until they show a title in themselves, they cannot rely upon any defects, real or supposed, in that of the tenants.

They claim under attachments made by their grantors in 1837 (long after the tenants or their grantors were in possession of these lots), of all the right, title, and interest which Ebenezer French and George French respectively had in and to any and all real estate in the county of Penobscot.

Their levies were not made until 1843. If their attachments were valid and duly preserved, levies regularly made in pursuance thereof would transmit to the demandants' grantors such title as Ebenezer French and George French respectively had at the dates of the attachments in 1837. But if their attachments were invalid, they would acquire only such seisin and title as the debtors, Ebenezer and George respectively, had at the dates of the levies. Before the levies were made, viz., on the 5th of April, 1842, Ebenezer French and George French had been severally decreed bankrupts upon petitions filed February 25, 1842, under the statute of the United States passed in 1841 to establish a uniform system of bankruptcy, and all their right, title, and interest in real estate had vested in their assignees, subject to such liens as had been created by valid subsisting attachments. It becomes necessary to examine into the validity of these attachments. The demandants' grantors acquired nothing by their levies unless they can be made to hold from the date of the original attachment in 1837; for, when the levies were made, the debtors had no seisin either in fact or in law. The tenants' grantors had the actual possession, and whatever legal estate Ebenezer and George may have had before their bankruptcy, it passed at that date to their assignees, unless prevented by the existence of a valid attachment.

It is argued for the demandants that the tenants cannot set up

an outstanding title in a third party under whom they do not claim, to defeat the action. But it is clearly competent for the tenants to disprove the seisin of the demandants, as alleged in their writ, by showing that the party under whom they claim had neither title nor possession at the time of the conveyance under which they claim. *Stanley* v. *Perley*, 5 Greenl. 369; *Chaplin* v. *Barker*, 53 Maine, 275.

Looking now at the writ against Ebenezer French, we find it contains, in addition to a count upon a promissory note, a general money count without any specification of claims to be proved under it. It has been decided that an attachment of real estate made upon such a writ is invalid and of no effect. *Saco* v. *Hopkinton*, 29 Maine, 268; *Osgood* v. *Holyoke*, 48 Maine, 410.

Nor can it avail the demandants that the attachment was made a few months before the passage of the statute of 1838, c. 344, under which, as revised but not changed, in 1841, R. S., c. 114, § 33, the decisions above referred to were made. The suit was still pending when the statute was passed and when it was embodied in the Revised Statutes of 1841. The attaching creditor could have no vested rights to be affected by the act declaring all attachments thus made to be void, until he had perfected his lien by levying his execution. Until that was done, the remedy by attachment on *mesne process* was entirely within the control of the legislature which created and might lawfully modify or abrogate it according to their own discretion.

The consequence is, that the demandants show no title to the undivided half of these lots which they claim under Ebenezer French, because the proof of seisin which they offer is rebutted by the proof that Ebenezer French had neither title nor possession when the demandants' grantors took their statute conveyance from him.

But we fail to see any valid objection to the proceedings under which the demandants claim to have acquired the title of George French in these lots. The attachment in the suit against him was properly made and preserved and perfected by a seasonable levy, so

that whatever interest he had in the property at the date of the attachment in 1837, finally vested, not in his assignee in bankruptcy, but in the levying creditor whose title the demandants hold.

The allegation that the attachment was lost by reason of a failure to continue the action for judgment at the June term, 1842, cannot be considered as sustained. It is true that the docket of that term does not now show a written entry of a continuance for judgment; but the cabalistic marks by which clerks are wont to signify those continuances are frequently hastily made in pencil, and are easily effaced; and the non-appearance of them cannot countervail the pregnant fact that the cases were regularly transferred to the docket of the next term, supported by the record of judgment, which recites a continuance from term to term and must, under these circumstances, be deemed conclusive evidence that the case was duly and regularly continued.

It becomes necessary, then, as the demandants have shown an apparently good title to George French's part of the land, to examine the title of the tenants, and ascertain whether or how far they have maintained their right to a judgment in their favor by proving a better title in themselves. They claim title by virtue of their long possession and improvement of the premises, and under and by virtue of the deeds, before referred to, from the administrator of Zadoc French and from Bulah French, to whom these lots had been assigned as part of her dower.

They cannot, under these circumstances, make good a title by possession.

They held the life-estate of Bulah French by legal conveyances from her, and these suits were commenced very shortly after her decease.

While Bulah French lived they were rightfully in possession under their deeds from her, and that possession must be regarded as held under the legal title thus derived, and consequently is not and cannot be adverse to those claiming reversionary rights. *Varney* v. *Stevens*, 22 Maine, 331; *Austin* v. *Stevens*, 24 Maine, 520; *Moulton* v. *Edgecomb*, 52 Maine, 31.

It is not competent for the tenants in this suit to set up any alleged irregularities in the probate proceedings by which these lots were set out as dower to Bulah French, whose life-estate in the premises they have enjoyed under conveyances from her. They seek now to do so in order to place themselves in the position of disseisors as regards the title of the heirs, and to obtain the benefit of the statutes of limitation which we shall presently notice.

But that assignment was duly accepted by the court of probate. Neither the widow nor the heirs interposed any objection to its acceptance, or claimed any appeal from the decree of the court of probate confirming it, as either party might have done if there were any irregularities in the proceedings by which injustice was done them. They must be conclusively deemed to have assented to and accepted the assignment. Even a parol assignment, if assented to and accepted, would be held binding upon the parties. An assignment by means of proceedings in the court of probate, when not appealed from, is no less so. Such an assignment is only one form of a setting out of dower by the heirs, the judge of probate having no jurisdiction to appoint commissioners where the right of dower is disputed. This very assignment has been adjudged by this court conclusive upon the widow in *French* v. *Pratt*, 27 Maine, 396. It is equally so upon her grantees, and would undoubtedly have been held to be so upon the heirs and those claiming in privity with them, had they sought to enforce their claims during the lifetime of Bulah French. It was a matter of which the probate court in Penobscot county indisputably had jurisdiction, and the judgment of that court not being appealed from is final and conclusive upon all parties to it and their privies. These tenants took from Bulah French conveyances, which they present here among their muniments of title. It is not for them to say that she had no legal estate when they have so long enjoyed it under her grant.

Nor does the general statute of limitations bar the demandants' right to recover. They are within the exception made by clause third of § 3, c. 105, R. S. of 1857, and R. S. of 1841, c. 147, § 3,

clause third. The statute of limitations does not begin to run against a remainder-man or a reversioner during the continuance of the particular estate. *Durham* v. *Angier*, 20 Maine, 242; *Mellus* v. *Snowman*, 21 Maine, 201.

Neither is the case within the purview and effect of the statutes which have all along limited actions brought to try the title to lands sold under a probate license to the term of five years. Statutes of 1821, c. 52, § 12; R. S. of 1841, c. 112, § 18; R. S. of 1857, c. 71, § 28.

The title of the tenants under the deeds of Zadoc French's administrator must prevail, unless it is made to appear that the sale was not made within the year during which the administrator's license to sell was in force. If the sale was made within the year, the resort to the statute is unnecessary; if not so made it is useless; because a sale, made after the license has expired, cannot be said to be made under such license, and it is only to sales made under such license that the provision applies. *Chadbourne* v. *Rackliff*, 30 Maine, 360.

We come, then, directly to the question of the validity of the tenants' title under the administrator's deeds.

The only flaw that is alleged to exist in these conveyances is, that they were not executed and delivered within the year after license to sell was granted to the administrator. He got his license at the June term of this court, which adjourned finally on the 18th of June, 1831. It seems to be conceded that that was the date of the license. The case finds that he regularly gave his bond, took the oath, and gave the notice of sale required by law, and sold the lots in controversy at public auction on the 14th of June, 1832.

The deeds of the lots demanded in the suits against Larrabee and against Hinkley bear date on that day. But it is claimed on the part of the demandants, that, inasmuch as these deeds, though dated June 14, 1832, the day when the auction sale took place, were not acknowledged by the administrator until July 16, 1832, and January 22, 1833, respectively, the sale was not completed within the year during which it might lawfully be made under the license, and so no title passed thereby.

In Massachusetts, under similar statute provisions, the supreme court decided, in *Macy* v. *Raymond*, 9 Pick. 284, that, although the estate had been regularly put up at public vendue and struck off to the purchaser within the year, no title passed by a deed reciting these facts, but bearing date after the expiration of the license.

If this doctrine had not been followed in a series of decisions in our own State, we might feel inclined to question the propriety of adhering to a rule so rigidly technical, and so liable to work positive injustice. But the decision was adopted and acted on by our own court in *Marr* v. *Boothby*, 19 Maine, 150; *Marr* v. *Hobson*, 22 Maine, 321, and *Mason* v. *Ham*, 36 Maine, 573. We deem it bad policy to overturn even a questionable decision upon which the title to real estate is made to depend, when it has been long acquiesced in, and many titles have probably been taken and transferred in pursuance of it.

But it still remains to be ascertained whether and how far the decision affects the titles of these tenants.

We start with the rule that it is incumbent on the tenants to show that the administrator's deeds were executed and delivered before the expiration of his license.

Is the acknowledgment of the administrator to be deemed an essential part of the execution of the deed, and necessary to pass the title?

Cases are abundant to the point that a deed, though not acknowledged nor recorded, will pass the title to the estate as against the grantor and his heirs. *Lawry* v. *Williams*, 13 Maine, 281; *Buck* v. *Babcock*, 36 Maine, 491. An acknowledgment by one of the grantors, or something equivalent to it, is required before the deed can be recorded; but ever since the first year of our existence as a State we have had statute provisions authorizing the reception of proof of the execution of the deed where the grantor had died or left the State without acknowledging it; or when, being requested, he refused to acknowledge it; and, in this latter case, if, upon a hearing the magistrate "is satisfied by the testimony of witnesses

that they saw the deed duly executed by the grantor, he shall certify the same thereon," etc. It seems, then, that a deed may be "duly executed" without an acknowledgment, and that the lack of the acknowledgment by the administrator merely, at the expiration of the license, would not defeat the sale if the transfer were in other respects complete. If the administrator had refused to acknowledge these deeds, the grantees might have proved their execution, and then their title would have been perfect against all the world without any further act on the part of the administrator. If the deed was in fact executed and delivered before the expiration of the license, the acknowledgment of these facts may be made by the administrator afterwards, for it was not essential to the making of a good conveyance between the parties. It was in fact made in season to admit the deeds to record long before George French's creditor attached his interest in the land; and even had they not been recorded, as the law stood then, the visible change of possession which took place in 1832, followed by the erection of brick stores upon the lots by the new occupants, would have been a sufficient notice to subsequent purchasers or attaching creditors. *Hanley* v. *Morse*, 32 Maine, 289; *Clark* v. *Bosworth*, 51 Maine, 528.

The question returns, were these deeds in fact executed and delivered before the expiration of the license? The case is singularly barren of evidence on this point. Setting aside the ingenious arguments of counsel, based principally upon matters which, if they are true, are not made to appear, and looking only at the report, we find ourselves left to the presumptions arising from the exhibition of deeds bearing date before, but not acknowledged until after the expiration of the license. These presumptions are not remarkably cogent in either direction. Nor do the decisions cited by counsel, somewhat conflicting in their character, lead to any very satisfactory conclusion. Where there is nothing on the face of the papers or in the evidence to indicate the contrary, the presumption undoubtedly is, that the execution and delivery took place on the day of the date. This presumption is strengthened by a fact agreed to in the case, that the grantees in 1832 entered and erected

a block of brick stores on the lots. But the deed to Hinkley was not acknowledged until 1833. It is hardly to be presumed that such an erection of an expensive block would have been made before the grantor had a deed, either actually or constructively delivered, so as to be operative.

The fact that the acknowledgment did not take place till a subsequent day has been variously construed by different courts.

With so little to make the matter certain, we think the more prudent course is that which was taken by our own court in *Loomis* v. *Pingree*, 43 Maine, 308, which was to read the transaction by the light of the maxim which requires such a turn to be given to all doubtful matters, *ut res magis valeat quam pereat;* and this curiously enough leads us logically to an opposite conclusion upon the question of fact from that which was reached in *Loomis* v. *Pingree*, *ubi supra*.

Assuredly, however, we do no violence to probabilities in presuming that there was at least a constructive delivery of these deeds by the administrator on the day of their date, and that they were left by him for the grantees with the scrivener until such time as the signature of Bulah French, with whom a separate negotiation was necessary, could be procured. While there is so little that is of a conclusive character, we hold that the presumption as to the delivery may well shift so as to conform to what we must suppose were the intentions of the parties.

The result is, that the tenants show the better title to the whole of the premises demanded in the suits against Larrabee and against Hinkley. But it is clear that the administrator's deed of the Kimball lot to Frederic French was not executed and delivered within the year; and so, although the tenant, Kimball, offers to prove that the deed was originally drawn and bore date on the day of the auction sale, and that the consideration-money was paid over to the administrator on that day, we feel constrained, by the decisions before adverted to, to hold that conveyance invalid. But Frederic French conveyed this lot by warranty deed to the tenant's grantors, and that conveyance was duly recorded and also followed

by a visible change of possession long before his deed to his brothers of his interest in his father's estate was delivered; so that the tenants acquired by Frederic French's warranty deed a good title to the one-third which he held as heir of Zadoc French; for Frederic's warranty deed of the lot must be held effectual to convey all the interest which he had in the premises at the time it was made. The result is, that the title to the Kimball lot stands thus: The demandants show no title to Ebenezer French's third, all his interest having passed to his assignee in bankruptcy before the levy under which they claim was made; the tenant shows the better title to Frederic French's third; the demandants show a good title to George French's third, and on amending their writ so as to claim one-third in common and undivided would be entitled to judgment therefor, unless the levy would be avoided by the testimony offered by the tenant for the purpose of showing fraud in the making of the levies.

The suggestion with regard to the value affixed by the appraisers to the debtors' interest would have no force in itself to show fraud; for considering that the debtors' estate was subject to a life-estate, which has only recently terminated, we see nothing very remarkable in the discrepancy between the appraised value and that which the tenant asserts to have been the actual value of the whole property.

But the tenant goes further and proposes to prove that the appraisers were induced by the misrepresentation of the creditor or his attorney to exclude all the buildings upon the land from the valuation, and to appraise it at less than its true value, on the ground that there was doubt whether the debtor had any interest in the property. We think such interference on the part of the creditor or his attorney, with fraudulent intent (of which it would be for the jury to judge), would avoid a levy in the hands of the creditor himself or of any party cognizant of the fraud when he took his title; and we cannot receive the indignant denial of the fact by the demandants' counsel as conclusive in their favor upon that point. Inasmuch as it appears that one of these demandants

was the creditor in interest when the levy was made, and also is the attorney referred to in the tenant's proffered evidence, the cause must stand for trial to give the tenant an opportunity to make good his assertions in this matter.

If fraud of this sort were practiced, one of the demandants at least was a party to it, and they cannot jointly claim the rights of *bona fide* purchasers.

The debtor, George French, had an interest in the buildings which had been erected on the land before the levy. The brick store, when it was erected, became and was a part of the realty, and George French had a vested reversionary right in it of which no subsequent legislation could deprive him. Prior to the statute of March 1, 1843, no grantee or assignee of a tenant for life or in dower could acquire a right to betterments as against the reversioner, nor could the passage of that act affect the rights of the reversioners in any improvements previously made.

No good reason is perceived why the tenant should not have the benefit of that act as subsequently reëmbodied in R. S. of 1857, c. 104, § 23, so far as any improvements made since its passage are concerned. According to the stipulations in the report, the value of these last is to be assessed by the jury unless the parties agree on some other mode of adjustment.

In conformity with the views herein expressed, the disposition of these actions is as follows: in the suits against Larrabee and against Hinkley there must be *Judgment for the tenants.*

In the suit against Kimball the demandants will be allowed upon such terms as to costs as the judge at *nisi prius* may deem proper to amend their writ so as to claim only an undivided third part of the premises, and, thereupon, *The case to stand for trial.*

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

APPENDIX.

STATE *vs.* HOWARD A. CLEVELAND.

The statutes of this State require that the "jury, finding a person guilty of murder, shall find whether he is guilty of murder in the first or second degree."

Upon an indictment which charges the defendant with the crime of murder generally, without specifying the degree of the crime, a general verdict that the defendant is "guilty of the murder whereof he stands indicted," is not a finding that he is guilty of murder of the first degree, according to the provisions of the statutes in such cases made and provided.

At the February term of the supreme judicial court holden at Bangor, in Penobscot county, on the first Tuesday of February, A. D. 1869, the grand jury found the following indictment against Howard A. Cleveland:

INDICTMENT.

"The jurors for the State aforesaid, upon their oath present, that Howard A. Cleveland, of Orrington, in the county of Penobscot, on the seventeenth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, at Orrington, in the county of Penobscot, aforesaid, one Warren George, feloniously, willfully and of his malice aforethought did kill and murder against the peace of said State and contrary to the form of the statutes in such case made and provided. And the jurors aforesaid, upon their oath do further present, that said Howard A. Cleveland, at Orrington, in said county of Penobscot, on the seventeenth day of November, A. D. 1868, with force and arms, in and upon one Warren George, feloniously, willfully, and of his malice aforethought did make an assault, and that said Cleveland, a certain pistol then and there charged with gunpowder and one leaden bullet, then and there feloniously, willfully, and of his malice aforethought did dis-

charge and shot off to and against the said Warren George, and that said Howard A. Cleveland with the leaden bullet aforesaid, out of the pistol aforesaid, then and by force of the gunpowder aforesaid, by the said Cleveland discharged and shot off as aforesaid, then and there feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound the said Warren George on and upon the right shoulder of said George, near the lower part of the shoulder-blade of him, said George, giving to the said Warren George, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Cleveland in and upon the shoulder of the said George, near the lower part of the shoulder-blade, one mortal wound of the depth of ten inches and of the breadth of three-fourths of an inch, of which said mortal wound the said Warren George then and there instantly died. And the jurors aforesaid, upon their oath aforesaid do say, that the said Howard A. Cleveland the said Warren George, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought did kill and murder against the peace of the State. And the jurors aforesaid, upon their oaths do further present, that said Howard A. Cleveland, at Orrington, in said county of Penobscot, on the eighteenth day of November, A. D. 1868, feloniously, willfully, and of his malice aforethought did kill and murder one Warren George, and that the said Warren George then and there died of the wounds inflicted then and there by said Cleveland against the peace of said State and contrary to the form of the statutes in such case made and provided."

The defendant was tried at the February term, 1869, Appleton, C. J., presiding. The record of the finding of the jury is as follows:

VERDICT OF THE JURY.

"Said jury was sworn, according to law, well and truly to try the issue, who, after hearing all matters concerning the same, on the twenty-second day of the term, being the twenty-sixth day of February, A. D. 1869, return their verdict thereon, and say on oath that the said Howard A. Cleveland is "guilty of the murder whereof he stands indicted."

At a subsequent term of the court, Cutting, J., presiding, the defendant was sentenced to be hung as for murder of the first degree. The statutes of the State provide that such a sentence shall not be executed till the expiration of a year from the time it is passed. Before the expiration of the year it was ordered by the executive council that the justices of the supreme judicial court be required to give their opinion upon the following question, to wit:

Did the jury by their verdict aforesaid find said Cleveland guilty of murder in the first degree, according to the provisions of the statutes in such cases made and provided?

To this question the justices responded as follows:

OPINION OF APPLETON, C. J., ANSWERING THE QUESTION IN THE AFFIRMATIVE.

BANGOR, Dec. 5, 1870.

To the question proposed by the honorable council, I have the honor to answer as follows:

The indictment against Cleveland contains two counts, and the material question arising is, whether they or either of them charge murder in the first degree.

The first count, according to the uniform course of authorities in Massachusetts, New York, and this State, is a good one for murder in the first degree. It can only be deemed good for that offense, because it charges it. If not so, then all convictions of murder in the first degree, under similar indictments, must be deemed erroneous; for if the first count does not aptly and sufficiently describe murder in the first degree, no finding of the jury can supplement the insufficiency of the indictment, for no finding can increase the offense, nor add to the indictment what is not therein contained. "If that crime (murder in the first degree) is not charged," observes Bigelow, C. J., in *Green* v. *Com.*, 12 Allen, 171, in reference to an indictment like the present, "in an indictment so framed, then it must follow that the offense is not described to the accused in a full, plain, and substantial manner, as required by the constitution, unless it can be said that an indictment, which does not include a description of an offense, is a compliance with the constitution, a proposition which is manifestly absurd."

Murder in the first degree and murder in the second degree, though embraced in the same general term, are different offenses, indicative of different degrees of guilt, and receiving different punishments. The degrees of murder indicate different degrees of criminality precisely as they are indicated in the different kinds of arson, larceny, or assault with varying intent and under different and changed circumstances. No indictment can be so worded as in one count to describe accurately different offenses. If the indictment undertakes to describe different offenses, it must use different language, for there must be different elements constituting each different offense, else the offenses would not be different. If the indictment describes only murder in the second degree, a prisoner cannot be convicted of murder in the first degree. It is an elementary principle of criminal law that a jury cannot convict a person of any crime, however clearly proved, unless it is duly and technically set forth in the indictment. But the instances are numerous of generic offenses, when in an indictment for a greater the jury may convict of a lesser offense, which is included in the greater. Thus, in an indictment for an assault with intent to kill, the accused may be convicted of an assault simply. So, under an indictment for murder in the first degree, one may be convicted of murder in the second degree or of manslaughter; but if the indictment does not set forth murder in the first degree, there can be no conviction of that offense by any possible finding of the jury. A verdict for the greater offense can only be sustained when the indictment in and of itself describes such offense.

If it be not conceded that the first count sets forth murder in the first degree, all convictions under similar counts are erroneous, unless we are prepared to hold that a man can be convicted of an offense other and greater than that with which he is charged.

By an act passed in 1865, c. 329, the legislature determined what should be a sufficient indictment in capital cases of murder,—that is, of murder in the first degree, the offense of murder in the second degree not being a capital offense. The second count is in the form prescribed by statute, and must be deemed for murder in the first degree.

Now the statute, c. 118, § 4, requires the jury finding a person

guilty of murder to find whether he is guilty of murder in the first or second degree. It prescribes no formula. It only requires a finding of the degree. If the indictment is for murder in the first degree, and the jury find the prisoner "guilty of the murder whereof he stands indicted," it requires optics sharp to perceive how it can be that they do not find him guilty of murder in the first degree. The prisoner stands indicted of murder in the first degree; the verdict is guilty of the murder whereof he stands indicted, not of what he is not indicted, nor of a lesser degree of criminality. If the jury find the prisoner guilty of a lesser offense, they say so. If not, he is guilty as he is indicted and not otherwise.

There is a large class of offenses in which two or more offenses are or may be embraced in a greater. Thus, under an indictment for an assault with intent to kill, the person may be convicted of an assault. Under an indictment for carnal ravishment, the prisoner may be convicted of an assault with intent to commit a rape or of an assault. But when the charge is of the highest offense, the verdict of guilty is regarded as of the offense as charged. So if the indictment sets forth the different degrees of the generic offense in different counts, the finding of guilty is of the highest offense described in the indictment. If there is to be a reduction, it must be by a special finding.

In accordance with the universal rule in criminal procedure, the verdict of guilty, as in the present case, is of the offense charged, and none other.

The division of murder into two degrees was first enacted in Pennsylvania in 1794, and their statute prescribes that "the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain by their verdict whether it be murder in the first or second degree." This provision is almost identical with our R. S., c. 118, § 4. It was held in Pennsylvania, in *White* v. *Com.*, 6 Binn. 179, that when the indictments show the offense to be of the first degree, that "all that a jury need do, would be to find the prisoner guilty in manner and form as he stands indicted." In *Com.* v. *Earle*, 1 Wharton, 531, the doctrine was reaffirmed, the court remarking, that "the provision for the

ascertainment of the degree by verdict was intended for cases in which the jury might be at liberty to find the prisoner guilty in the second degree; but when the indictment sets forth murder in the first degree, they hold a special finding unnecessary and nugatory. The jury, by finding the prisoner guilty as he stands indicted, have made the indictment a part of the verdict, and the case is to be regarded precisely as if they found a special verdict stating the facts as they are set forth in the indictment.

A similar provision is found in Indiana. It was there held, that when the indictment charged the prisoner with murder in the first degree, that a verdict finding him "guilty in manner and form as he stands charged in the indictment," is a finding of guilty of murder in the first degree. The court say, "the jury find him guilty in manner and form as he stands charged. This evidently refers to the specific charge contained in the indictment. Of what, then, does he stand charged? Why, of murder in the first degree. There is indeed no ground of objection to the verdict." *Kennedy* v. *The State*, 6 Porter, 485.

In New York, murder is divided into different degrees. After an elaborate examination of the authorities, it was there repeatedly and unanimously held in their highest courts that the common-law count for murder, like the first count in the indictment under consideration, was a good one for murder in the first degree. In accordance with the universal rule that where lesser crimes are included in a greater, the finding of guilty is a finding of the greater, it was held that a finding of guilty to an indictment, like the one under consideration, was a finding of guilty of murder in the first degree. "The result most clearly is," observes Woodruff, J., in *Fitzgerald* v. *The People*, 37 N. Y. 424, "that the crime of murder is sufficiently charged, when alleged as in the present indictment, 'with malice aforethought' . . . And a verdict of guilty, as charged in the indictment, is a finding of guilty of murder in the first degree; and judgment and condemnation to the punishment awarded to that crime necessarily follow." The same question subsequently arose in *Kennedy* v. *The People*, 39 N. Y. (12 Tiffany) 244, and it was again held that an indictment in the common-law form, charging the killing with malice aforethought is

good, notwithstanding the statute has divided the crime of murder into different degrees; and a verdict finding the accused "guilty as charged in the indictment," is a conviction of murder in the first degree.

The object of the provision found in § 4 was in reference to the degrees of crime and the consequent measure of its punishment. The jury may find the highest degree as they do where, on an indictment for murder in the first degree, they find the prisoner guilty of the crime as charged, or they may reduce the degree of guilt by a special finding. Unless the crime charged is reduced to a lesser crime by a special finding, the conviction is of the offense set forth in the indictment, and none other.

The jury found Cleveland guilty of the offense charged. It is not questioned that pertinent and proper instructions were given. If the offense charged is murder in the first degree, they have affirmed the guilt as charged. They might have found the lesser crime of murder in the second degree, but they did not. If the indictment does not describe the offense of murder in the first degree, no finding of the jury could enlarge the offense charged in the indictment.

I believe it is admitted that the indictment charges murder in the first degree, and the truth of this charge having been affirmed by the jury without qualification, I am of opinion that Cleveland was duly convicted of murder in the first degree, and is amenable to the penalties of the law for the offense thus charged and of which he was convicted as charged. I have the honor to be

Your obedient servant,

JOHN APPLETON.

To the Honorable the Council of Maine.

OPINION OF CUTTING, J., ANSWERING THE QUESTION IN THE AFFIRMATIVE.

In answer to the request of the honorable the council, I submit the following reply:

At the trial I did not preside, but at a subsequent term, after all objections as to the prior rulings and findings had been waived, on

motion of the attorney-general, as the judge presiding, I was required to pronounce the sentence of the law. Thereupon I examined the record of the former conviction, on the exhibition of which I found that the prisoner had been indicted for murder in the first degree, and that the verdict of the jury was that he was "guilty of the murder whereof he stands charged."

I was aware of the statute which requires "the jury, finding a person guilty of murder, to find whether he is guilty of murder in the first or second degree." I then and still entertain the opinion that the finding of the jury was a strict compliance with the statute, that it was a finding of murder in the first degree, of which the prisoner stood charged. A further finding would have been superfluous. To the judicial mind all arguments to the contrary must be considered as poor logic, and adverse to adjudications in the highest courts in this country. If there be any decisions to the contrary, the finding, "as stands charged," was no part of the record. But whether my conclusion was right or wrong, I pronounced the sentence, and the judgment and record of the court was made accordingly, and that judgment must stand as the guidance of the executive until removed on a writ of error, as prescribed by statute.

Neither the prisoner or his counsel has seen fit to claim such a process, upon which alone, if error was committed, could redress be had after a hearing of both parties.

Now I would respectfully suggest to the council asking my opinion, whether there is any statute or law constituting them a court for the hearing of errors in criminal matters. If they answer in the affirmative, then they assume judicial powers and usurp jurisdiction in the last resort, in all cases of misdemeanors and felonies, whenever there shall be a petition presented for a pardon.

JONAS CUTTING.

OPINION OF KENT, J., ANSWERING THE QUESTION IN THE NEGATIVE.

BANGOR, Dec. 5, 1870.

To the Honorable Council of the State of Maine:

I have the honor to acknowledge the receipt of a copy of the vote of the council, requiring the opinion of the justices of the supreme judicial court in relation to the effect of a verdict in case of one Howard A. Cleveland.

I deem it proper, before considering the question proposed, to say most respectfully, but frankly, that I have entertained a strong doubt whether it is one which comes within the scope and intent of the constitutional provision which requires the justices to give their opinions to other departments of the government. This hesitation did not arise from any doubt of the importance of the question of law propounded. It is, undoubtedly, a very important one to the prisoner. But it is not an abstract question of law, and does not ask for an opinion on such question, disconnected from an individual case. It asks for an opinion as to the effect of a certain verdict, in a certain case, against one Howard A. Cleveland.

If I can properly look only at the part of the record furnished with the question, and the basis of it, I find a copy of an indictment and of a verdict of the jury. There is nothing to indicate whether there have been any subsequent proceedings in the case, and nothing to negative the pendency of the case in the court, which must yet pass upon this question of the legal effect of the verdict.

If I look beyond these documents at the whole record in our court, I find that all exceptions have been withdrawn or overruled, including explicitly the question now proposed, and that sentence of death has been passed upon Cleveland, for murder in the first degree. I find that these proceedings were before the court, held by a single judge, as provided by law, and are binding on all until reversed or modified by a judgment on a writ of error. But they are open to revision on such a writ, and the prisoner has a legal right, with the consent of any judge, to such writ of error.

In either view of the facts, the case has not passed beyond the jurisdiction of the court, and the prisoner may bring this precise

question before the court for decision. Might he not, in such an event, justly complain that his case had been prejudged, on this vital point, by all the judges, without any opportunity on his part to be "heard by himself or his counsel," and that, therefore, he has not enjoyed a constitutional right, but has been deprived of an "impartial trial?"

It is true, unquestionably, that the opinions, given under a requisition like this, have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding upon the body asking for them. Whatever the several opinions of the justices may be in this case, they cannot, in any degree, alter, annul, or qualify, or add any force to the judgment already given by the court. This must stand in full force until reversed or modified by judicial action, or commuted, or the prisoner is pardoned by executive powers.

The objection is, therefore, to the prejudgment of a vital question without hearing the party whose life may be dependent upon the decision. Judicial tribunals are excusable if they are sensitively reluctant to strike before hearing. I am not unmindful of the unlimited language of the constitution, in which authority is given to certain departments to require the opinion of the justices of the court "upon important questions of law, and upon solemn occasions. But it must be obvious to any reflecting mind that there is a limit to this power, and to the obligation to answer. When a compliance would violate distinctly and palpably some other constitutional provision, made for the protection of individual rights, or involve a prejudgment of a pending case, by opinions on the points in issue, a conscientious judge may well hesitate or even decline answering.

I am quite sure that no department would, in the exercise of this authority, intentionally overstep the bounds I have indicated. But in testing a principle, we may adduce improbable, but not impossible cases. If, by any means, a private litigant could induce one of the departments to ask the opinion of the justices on the controlling points in his lawsuit with his neighbor, touching their private rights, forwarding with the questions a copy of the papers in the case, would the justices be "obliged" to answer?

Or even if the State itself was a party in a civil suit, to recover land from a private citizen, would the justices be "obliged" to give their opinion in advance, as to the validity of the title of the State or as to the effect of a verdict? In a criminal proceeding the State is a party, and so is the accused, and he is entitled to be protected in his right to an impartial trial, as fully as the State.

It seems to me that the supposed cases clearly illustrate, if they do not demonstrate, my proposition, that there is a necessary limit to the generality of the language used in the constitution.

I have made these preliminary remarks in the nature of a protest, to prevent any inference or conclusion from their omission.

I understand that all the other justices have already returned answers to the question proposed. We have had no opportunity for concert or consultation. I do not suppose that an absolute refusal on my part to comply with the requisition of the council could be of any avail to prevent what I may deem an unfortunate precedent.

I am the more readily reconciled to the course I have concluded to adopt, by the fact that the result of my examination, since I determined to give the opinion asked for, is not adverse or injurious to the prisoner, and by the further fact that any opinion given in this summary manner, and without argument, cannot have any authoritive force in any possible future proceedings in the case.

I will, therefore, answer according to my present convictions and views of the law, as applicable to the precise question presented.

ANSWER.

The answer to the question must depend upon the construction of our statute in connection with constitutional provisions. In some respects they are different from those of other States on this subject.

Until the revision of the statutes in 1841, there was no other definition of murder than this: "if any person shall commit the crime of willful murder, . . . he shall suffer the punishment of death." Chap. 2, Laws of 1821. There was no distinction between different degrees, and it was left to the common law to define the crime.

In the revision of 1841, followed in that of 1857, the legislature undertook to define exactly the offense of murder in these words: "Murder is the unlawful killing of a human being with malice aforethought." This is a single, distinct, and independent crime. The essential characteristic, which distinguishes it from other distinct offenses, is, that it is committed "with malice aforethought." This constitutes murder. The malice aforethought may be either express or implied. But it is murder in either case, and the definition is complete by the use of the words, "malice aforethought," without any addition, qualifying or intensifying the malice aforethought.

I have no doubt, without the statute of 1865 (c. 329), which expressly declares that an indictment like this shall be sufficient in all cases of murder, that, at common law, and under the statute definition, it is sufficient to justify a finding of a verdict of guilty of murder.

It is said that it does not justify the finding that the murder is in the first degree. It was otherwise decided in our court in *State* v. *Verrill*, 54 Maine, 515. It is also contended that a general verdict of guilty is equivalent to a finding of guilty in the first degree, because it is necessarily a finding of all that is charged in the indictment. The solution of the whole matter, as it seems to me, depends upon the decision of the question, whether murder is a single and simple offense, or whether there are two distinct offenses created by the provisions respecting degrees.

It seems to me that it was not the intention of the legislature to create distinct offenses, but one generic crime which might have different degrees of criminality, which degrees might be ascertained in view solely of the punishment to be inflicted.

The language used corroborates this view. The statute defines, in the first and separate section, the offense of murder; and then in subsequent sections says that when murder (*i. e.* as before defined) is committed, with express malice aforethought, it shall be deemed murder of the first degree, and when otherwise committed, murder of the second degree.

If it had been the intention of the law makers to make two distinct offenses, as distinct as murder and manslaughter, or murder

and arson, there would seem to have been no necessity, nor even any proper place, for this definition of murder as a distinct crime. It clearly was not the intention to make three offenses; one, murder, pure and simple,—one, murder in the first degree,—and one, murder in the second degree.

In the case supposed of an intention to make distinct and independent crimes, all that was required was for the legislature to say, "Whoever kills, etc., a human being unlawfully, with express malice aforethought, shall be deemed guilty of murder in the first degree, or of homicide (if they choose thus to distinguish and name it), and be punished by death." And in the next section a like definition, changing the word "express" to "implied," and designating the offense as murder, or murder in the second degree, or by any other name for the crime. These two offenses would include every case of murder, and the general definition of murder would be useless if not absurd. If we had such sections, clearly creating distinct offenses, I do not see how an indictment could be good, under the first, which did not in terms declare that the killing was with express malice aforethought; and I do not think that even legislative sanction could make it sufficient.

But it seems to me plain, that the sections which refer to the degrees were intended to regulate the punishment of the murder established under the first section. The murder might be shown under an indictment conforming to the definition, and a verdict of "guilty of the murder whereof he stands indicted," finds him guilty of all that is charged. But the punishment of the murder is a distinct matter. The statute here comes in and says that another duty shall be performed by the jury, after finding a person guilty of the murder charged, viz., to find the degree as before defined. Strictly, this is no finding under the indictment which relates only to murder as charged, but is a superadded duty to enable the court to apportion the punishment of the murder found. This would have been unnecessary, or superfluous, if the two degrees were distinct and independent crimes, as before explained, or if it was intended that the jury might, under a charge for a higher crime, reduce it to a distinct, lower offense, included in the one specified in the indictment. That power has always existed in all criminal proceedings and did not require this new enactment.

My conclusion is, that the general verdict of guilty, as charged, was properly rendered under this indictment, but I do not think that a sentence of death can be passed without other finding named in the statute. The indictment does not, in terms, cover the charge of express malice aforethought, and the jury have not, by their verdict or answers, given to the court the fact on which alone such sentence of death can be passed. The statute says that the jury shall find the degree. The indictment no more charges one degree than the other. It charges only murder, and the verdict convicts of murder, *i. e.* of killing a human being with malice aforethought. Whether this malice was express or implied is another question to be determined, not necessarily to fix the statute crime on the accused, but to affect the extent of the punishment.

If there could be any doubt of the intention of the legislature in these enactments, it is made plain by the subsequent enactment, which, I believe, is not to be found in the statutes of other States. To meet all possible contingencies it is, by our statute, further provided, that, "when a person is found guilty of murder by confession in open court, the court, from testimony, shall determine the degree of murder, and sentence accordingly."

This plainly shows that a general plea of guilty to an indictment charging, like this, the offense of murder, is not an admission of murder in the first degree. And yet it is as clearly a confession of all that is charged, as a general verdict of guilty is a conviction of all charged in the indictment. But before sentence, the court, after such a plea, must hear testimony and determine the degree. The court, in this respect, is in the same place that a jury is after it has determined that the prisoner is guilty of murder as charged. The confession, in open court, is, as the statute declares, a finding that the prisoner is guilty of murder. The further examination is to apportion the punishment. The court has no constitutional power to try and determine the question of guilt, as charged, or any question of fact constituting the offense. But all that relates to punishment is in the province of the court, and it may, therefore, inquire into the degrees of guilt in the murder found by confession.

I, therefore, answer that in my opinion the jury did not, by the verdict rendered, find Cleveland guilty of murder in the first degree.

EDWARD KENT.

OPINION OF DANFORTH AND WALTON, JJ., ANSWERING THE QUESTIONS IN THE NEGATIVE.

The undersigned have the honor to submit the following answer to the question proposed by the honorable council to the justices of the supreme judicial court by their order of Nov. 1, 1870.

By the R. S., c. 118, § 1, murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied."

By § 2 of the same chapter, it is enacted, that, "When murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable by death, imprisonment for life, or for an unlimited term of years, it shall be deemed murder of the first degree, and punished with death."

Sect. 3 enacts that, "When murder is committed otherwise than is set forth in the preceding section, it shall be deemed murder of the second degree, and punished by imprisonment for life."

It will be seen that the first section gives a general definition of murder. The next two sections contain definitions not of distinct crimes, but of different degrees of the same crime. The crime is one, the degrees are two. The law does not require the indictment to set out the different degrees. It is sufficient if it sets out the crime of murder without alleging it to be of either degree, or it may set out the crime so as to bring it within the definition of the one degree or the other. *State* v. *Verrill*, 54 Maine, 408.

The indictment against Cleveland does not allege that he committed the murder "in perpetrating, or attempting to perpetrate, a crime punishable by death, imprisonment for life, or for an unlimited term of years," nor that it was done "with express malice aforethought."

The words are simply "of his malice aforethought." This language is the proper form of setting out implied malice as well as express. Hence the indictment does not necessarily set out any distinctive element of murder in the first degree. There is nothing in it which we should not expect, or which the law does not require, in murder of the second degree. It is true, the indictment is sufficient to authorize a conviction of murder in the first degree

if the testimony would warrant it; but it is equally true that there is nothing in it in this respect which is not necessary to warrant a conviction of murder in the second degree. Simply saying he did the act "of his malice aforethought" gives no information legally as to whether that malice is express or implied. If express, the murder would be of the first degree; if implied, of the second decree, and whether one or the other, is to be ascertained from the testimony.

It necessarily follows, that assuming all the allegations in the indictment to be true, we have no information as to whether the murder is of the first or second degree.

Turning our attention to the verdict of the jury, we find no additional information there. That only tells us "that the said Howard A. Cleveland is guilty of the murder whereof he stands indicted." But of what murder is he indicted? We have already seen that it does not appear from the indictment whether it is of the first or second degree. That depends upon the testimony, and of this the jury have said nothing. They leave us in entire ignorance of the conclusion (if any) to which they have come upon this point. The most that can be said of this verdict is, that it refers to and thereby makes the indictment a part of itself. In this view it becomes a special verdict, finding just such facts as are set out in the indictment, and no more. So that the verdict renders us no assistance in our pursuit of the important fact in the case, the degree of the murder, or whether the malice be express or implied.

But we are not left to inference alone in this construction of the statute. Sect. 4 of the same chapter would seem to leave no doubt as to its meaning. By that section it is provided that the jury, if the case goes to them, or upon confession of the accused, the court upon testimony are to determine the degree of the murder. This provision is peremptory and unqualified in its terms, leaving nothing to inference, but comprehending all cases, whatever may be the form of the indictment. The provision is thus express that it may be certain that the jury have not only had their attention called to the matter, but that they have considered and decided this important question of fact. And why should there be any hesitation in

giving full force to a provision of the law so explicit? It is not a matter of mere form, but a question of fact vital to the issue, and one to be settled by the testimony, and not from the papers in the case. This question of fact is certainly of the highest importance to the respondent, for upon its decision depends the degree of punishment to be inflicted, whether it be death or otherwise. As already seen in this case, we have no evidence from the record that the question of degree was passed upon by the jury. On the other hand, from the absence of any allusion to it in the verdict, the inference is irresistible that it was not considered by them. If, then, it is a fundamental principle of law, incorporated into our constitution, that the accused shall be entitled to "demand the nature and cause of the accusation," and have all the facts upon which the accusation is based settled by a jury, the same fundamental law would seem to require that a judgment of "guilty of murder in the first degree" should not go against the respondent till the record shows clearly that the jury have decided all the facts upon which that crime rests.

In accordance with these views, it is believed will be found nearly or quite all the judicial decisions in this country where the question has been raised. In most, if not all the States of the Union, will be found statutes upon this subject similar to our own, and not unfrequently has this same question been adjudicated.

In *Kennedy* v. *The State*, 6 Ind. 485, it was held, that the jury need not state the degree in their verdict because murder in the first degree was charged specifically in the indictment.

In *White* v. *Commonwealth*, decided in Pennsylvania and reported in 6 Binny, 182, which has sometimes been relied upon as an authority the other way, the question now under discussion was not raised by the facts in the case, and it is not, for that reason, an authoritative decision.

In *Commonwealth* v. *Earl*, decided in the same State and reported in 1 Wharton, 525, it was held, that a verdict similar to the one in Cleveland's case was sufficient to authorize the court to pass such sentence as the law provided for murder in the first degree. This decision, however, rests upon the fact that the indictment alleged the murder to have been accomplished "by means of poison,"

which, by the law of that State, is necessarily murder in the first degree.

But in the later case of *Johnson* v. *The Commonwealth*, 24 Penn. State, 386, where the indictment as in Cleveland's case did not necessarily show murder in the first degree, the court, in a very elaborate and able opinion, came to the conclusion that a verdict like the one under consideration did not authorize a judgment of murder in the first, but only in the second degree. Lewis, C. J., in the opinion of the court, says, "they (the jury) have found the prisoner 'guilty in manner and form as he stands indicted' without otherwise 'ascertaining' the degree. They have thus made the indictment a part of their verdict; and we are to consider the case as if they had found a special verdict, stating the facts precisely as they are set forth in the indictment. We have seen that the language of the indictment applies as appropriately to the second as to the first degree."

In *State* v. *Dowd*, 19 Conn. 388, the court held, under statutes similar to our own, that in "all cases of murder the degree of criminality must be found as matter of fact;" and without an express finding of murder in the first degree, the court would not be authorized to inflict the punishment prescribed by law for that offense.

The same doctrine has been held in other States, as appears by the following cases: *Dick* v. *The State*, 3 Ohio, 89; *Parks* v. *Same*, 3 Ohio, 101; *State* v. *Town*, Wright's R. 75; *Ford* v. *State*, 12 Md. 514; *McGee* v. *The State*, 8 Mo. 495; *State* v. *Moran*, 7 Clark (Iowa), 236; *Tully* v. *People*, 6 Mich. 273.

We are, therefore, constrained, both from principle and authority, to come to the conclusion that the question proposed must be answered in the negative.

CHARLES DANFORTH.
C. W. WALTON.

OPINION OF BARROWS, J., ANSWERING THE QUESTION IN THE NEGATIVE.

To the question addressed to me by the governor and council, under date of Nov. 1, 1870, as to the construction and effect of the verdict of the jury in the case of Howard A. Cleveland, indicted for murder in Penobscot county, I answer:

It is charged in the indictment that Cleveland did "feloniously, willfully, and of his malice aforethought," kill and murder Warren George. The verdict affirms that he is "guilty of the murder whereof he stands indicted."

In the R. S., c. 118, § 1, it is declared, that "murder is the unlawful killing of a human being with malice aforethought, either express or implied."

Sections two and three of the same chapter define different degrees of this crime, and impose different penalties according to the degree.

By § 2, it appears that when murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable by death, imprisonment for life, or for an unlimited term of years, it shall be deemed murder of the first degree. Murder otherwise committed, according to § 3, shall be deemed murder of the second degree.

By § 4, it is made the duty of the jury, finding a person guilty of murder, to find whether he is guilty of murder in the first or second degree; and when a person is found guilty of murder by confession in open court, the court is required to determine from testimony the degree of murder, and to sentence accordingly. What will suffice as to the form of indictment is elsewhere presented by statute. Laws of 1865, c. 329.

It is not essential that the specific matters which constitute the distinction between the different degrees of the crime should be stated in the indictment. But this being omitted, and the crime being charged in a manner which includes and is applicable to both degrees, we are not at liberty to dispense with these other positive requirements of the statute. The very fact of such omission would seem of itself to create a more stringent necessity that these re-

quirements should be carefully observed in order to prevent all danger of fatal injustice.

I find nothing in the indictment or verdict here which makes it certain that this murder was committed with the premeditated murderous intention towards the individual slain which would constitute express malice aforethought, or that it was done in perpetrating, or attempting to perpetrate either of the crimes referred to in § 2.

The indictment does not set out a killing with express malice aforethought, nor is there any averment that the murder was committed in perpetrating or attempting to perpetrate any other crime whatever. It charges murder, committed willfully, feloniously, and with malice aforethought, but whether that malice was express or implied does not appear. Malice of either kind would make it murder; but it is only murder committed with express malice aforethought, or in the perpetration, or attempted perpetration of certain other crimes, that is to be deemed murder of the first degree, and punished with death. If Cleveland had pleaded guilty to this indictment, it would still have been necessary for the court to determine from testimony the degree of the crime before passing sentence, and to award sentence according to that determination.

The verdict affirms the guilt of the prisoner no more decisively than a plea of guilty would have done; and it would seem that the jury wholly omitted to find whether this murder was of the first or second degree. Without an express finding by the jury upon the testimony, in cases where the accused pleads not guilty and puts himself upon trial, or by the court from testimony produced, where he pleads guilty, I am of the opinion that the party charged cannot, upon an indictment like this, under our statute provisions be adjudged guilty of murder of the first degree.

I cannot doubt that our legislature designed, in § 4, to require a specific finding upon the testimony adduced, by the jury, where the prisoner puts himself upon the country, by the court, where he confesses himself guilty as charged in the indictment, of the degree of the crime in order to make it certain that the attention of the tribunal called upon to pronounce a decision so momentous had been directed to the distinction set forth in the statute.

I do not think that a general verdict of guilty of the murder whereof he stands indicted is equivalent to this. In such a case nothing is to be left to inference or argument. The finding must be explicit and unequivocally expressed.

Accordingly, I answer the question propounded by your excellency and the council in the negative.

WILLIAM G. BARROWS.

OPINION OF DICKERSON, J., ANSWERING THE QUESTION IN THE NEGATIVE.

BELFAST, Dec. 7, 1870.

To the Honorable, the Executive Council of the State of Maine:

GENTLEMEN,—I herewith submit my answer to the question propounded by you, whether the jury, by their verdict, finding Howard A. Cleveland "guilty of the murder whereof he stands indicted," found him guilty of murder in the first degree.

In this State murder is of two degrees, murder of the first degree, and murder of the second degree. Murder of the first degree is punishable with death, and murder of the second degree by imprisonment for life. The question calls for the construction of the following provision of the statute:

"The jury, finding a person guilty of murder, shall find whether he is guilty of murder of the first or second degree. When a person is found guilty of murder by confession in open court, the court, from testimony, shall determine the degree of murder and sentence accordingly." R. S., c. 118, § 4.

Under an indictment for murder of the first degree, it is competent for the jury to find the accused guilty of either of the degrees of murder or of manslaughter. So in other cases, two or more offenses may be embraced in the greater offense charged in the indictment, as that includes the lesser offense. Thus, under an indictment for an assault with intent to kill, the prisoner may be convicted of an assault. In such cases, where murder is not charged, a general verdict of guilty is a finding of guilty of the greater offense, but if the jury find the prisoner guilty of a lesser offense, they say so in their verdict.

It is to be observed, however, that there is no such statutory provision, prescribing the course of proceeding in such cases, as there is in the case of murder. No legitimate argument, therefore, can be drawn from them for dispensing with the finding of the degree of murder, when the jury find a person guilty of that offense.

The provision of the statute above cited proceeds upon the hypothesis that a person may be convicted of either of the degrees of murder under an indictment charging murder of the first degree. If under such an indictment the jury could find the prisoner guilty of murder of the first degree only, there would be no occasion for such provision, as the degree would necessarily be implied in the general verdict of guilty.

The object of the statute is to enable the court to know of a certainty the degree of the murder the prisoner has been found guilty of by the jury, that it may pronounce the proper sentence. How can the court know this but from the special finding of the jury? It cannot presume what degree of murder the jury intended by their general verdict, when they might have intended either degree; nothing can be presumed against a prisoner, in capital cases, and the legal presumption of innocence would require judgment to be rendered for the lesser offense when the degree is left uncertain and indeterminate. The degree of the murder committed determines the penalty incurred; upon it hangs the issue of life or death with the prisoner. This, under the statute, is a fact to be found by the jury, as any other fact. "The jury," says the statute, "shall find whether the prisoner is guily of murder in the first or second degree."

This construction of the statute is confirmed by that clause of the same section which requires the court to determine the degree of murder from testimony when a person is found guilty of murder by confession in open court. A plea of guilty, made in open court, has the same effect as a verdict of guilty. How, then, can the court pronounce sentence upon a verdict of guilty, and not upon a plea of guilty?

It can, judicially, have no more knowledge of what the jury intended by their verdict, than of what the prisoner meant by his

plea. By what authority, then, can the court dispense with the finding of the degree in the one case and not in the other?

I do not attach any special importance to the particular form of the verdict under consideration, "guilty of the murder whereof he stands indicted." The words following the general verdict, "guilty," have no legal effect to explain, limit, or qualify the verdict, and may be regarded as surplusage. These words do not come from the jury, but are added by the clerk in recording the verdict. The verdict, in its present form, must be regarded as a verdict of "guilty," nothing more, nothing less. Of what offense, pray, can a jury convict a prisoner, save the offense "whereof he stands indicted?" There can be no difference between the two forms.

But it may be said that the prisoner was indicted for murder in the first degree, and the jury having found him guilty of the murder whereof he stood indicted, consequently convicted him of murder of the first degree.

To this I answer,

1. That the indictment does not set forth the degree of the murder by name.

2. That if the indictment charges murder of the first degree technically, it technically charges murder of the second degree also; the greater includes the lesser offense; under this indictment the prisoner might have been convicted of murder of the second degree, and no person can be convicted of such an offense whereof he does not stand indicted. It would be erroneous for the court to hold that the prisoner could not be convicted of murder of the second degree, under this indictment, because he does not stand indicted for that offense.

3. The statute is imperative that "the jury shall find the degree of the murder;" and

4. The jury have not found the degree of the murder, and neither the court nor the executive council have the requisite legal knowledge to be able to say that the jury, by their verdict, found Howard A. Cleveland guilty of murder of the first degree, and not of murder of the second degree.

Non constat that the jury were instructed upon the subject of the

different degrees of murder, or that they took that into the account in considering their verdict, and nothing is to be presumed against the prisoner, when his life is suspended on the issue. If, upon rendering their verdict, the jury had been asked to give the degree of the murder, for aught that appears, they might have answered, "murder in the first degree," or "murder in the second degree," or "our attention has not been called to that question; we do not understand the different degrees of murder." "We answer," "guilty of murder."

This question has arisen in Ohio, Maryland, Iowa, Missouri, Michigan, Connecticut, and Pennsylvania, under statutes identical with that of our own State, and the courts of those States have invariably held that the jury must find the degree of the murder specially, or it will be error.

I am aware that in *White* v. *Commonwealth*, 6 Binney, Penn., decided in 1813, Chief Justice Tilgham threw out the dictum "that if the indictment were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner guilty in manner and form, as he stands indicted." The question before the court in that case was, not whether the jury should specially find the degree of murder, but whether the degree of the murder should be set forth in the indictment. The case did not call for the remark of Chief Justice Tilgham; and it has been universally treated as a dictum, not only by the courts in other States but by the court in Pennsylvania in more recent cases. Accordingly it was held in *Johnson* v. *The Commonwealth*, 25 Penn. (decided in 1855), under a statute requiring the jury to find the degree of the murder, that in an indictment charging the killing by drowning, a verdict of "guilty in manner and form as the prisoner stands charged" is not a conviction of murder in the first degree. In that case the sentence of death was reversed and annulled on error, because the jury did not find the degree of the murder and the record remitted to the court to pass such sentence as was authorized for conviction of murder in the second degree.

In *Commonwealth* v. *Earle*, 1 Whart. 525 (1836), on an indictment for murder perpetrated by means of poison, a verdict of

"guilty in manner and form as stated in the indictment," was held to be a good conviction of murder in the first degree, on the ground, as stated by the court, that by a statute of Pennsylvania, murder by poisoning was made murder of the first degree, and that there was no room for doubt as to the degree; if guilty, the prisoner must necessarily be guilty of murder in the first degree. "The provision," say the court in that case, "for ascertainment of the degree by verdict, was intended for cases in which the jury might be at liberty to find the prisoner guilty in the second degree, but as in cases of murder by poisoning the prisoner is guilty, if at all, in the first degree, and as a verdict of guilty in another degree would not be received, the law will not require, though it might endure, the performance of an act so nugatory as an attempt at classification where there is no difference, or the making by verdict of a measure of guilt preëstablished by the law itself."

During my examination of this question, I have been unable to find a case where, under a similar statute, a verdict, like the one under consideration and rendered under like circumstances, has been held sufficient to warrant a sentence for murder of the first degree.

The cases of *Kennedy* v. *The State*, 6 Porter, Ind. 485; *Fitzgerald* v. *The People*, 37 N. Y. 413; and *Kennedy* v. *The People*, 39 N. Y. 249, are not of this description, as they were not decided under any statute requiring the jury to find the degree of the murder. To make these cases authority for sustaining the sentence on the verdict under consideration, seems to me to render the statute nugatory in this State; or, in other words, to make the finding under consideration valid as a verdict for murder in the first degree in spite of the statute, because it might be valid if there were no such statute.

I am, therefore, compelled to answer the question propounded in the negative. Yours, faithfully,

J. G. DICKERSON.

OPINION OF TAPLEY, J., ANSWERING THE QUESTION IN THE NEGATIVE.

To the Governor and Executive Council of the State of Maine.

In pursuance of the foregoing proceedings, I herewith communicate my answer to the interrogatory propounded.

Murder is in this State defined by statute, and declared to be the unlawful killing of a human being with malice aforethought, either express or implied. R. S., c. 118, § 1.

This murder is divided into two degrees. "When murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable by death, imprisonment for life, or for an unlimited term of years, it shall be deemed murder of the first degree, and punished with death." R. S., § 2 of same chapter.

"When murder is committed otherwise than is set forth in the preceding section, it shall be deemed murder in the second degree, and punished by imprisonment for life." Same statute, § 3.

To constitute murder, the act must be done with malice aforethought. This may be an express malice or an implied malice.

If the act is done with express malice, it is of the first degree; if done with implied malice, and not in perpetrating or attempting to perpetrate any other offense, it is of the second degree. So it will be perceived, that whether of the first or the second degree depends upon the fact whether it was done with express malice, or implied malice, unless it was done in perpetrating or attempting to perpetrate another offense.

The indictment charges murder generally, viz., an unlawful killing with malice aforethought. It does not charge the act to have been done with express malice, or in attempting to perpetrate any other offense, nor was this necessary to be done to authorize a judgment upon a finding of murder in the first degree. The indictment as framed embraces murder in either degree. The degree is to be ascertained from the evidence. The statute requires a jury, finding a person guilty of murder, to also find whether he is guilty of murder in the first or second degree (§ 4), because simply finding him guilty of murder, does not determine whether it is of the first or of

the second degree, and the court cannot know without such finding whether to inflict the punishment of death, or that of imprisonment for life.

If the indictment embraced only murder in the first degree, there would be no need of the requirement that the jury should also find the degree, because a finding of guilty under it would also determine the degree; but where the indictment embraces both degrees, some mode must be pursued to ascertain the degree. That mode has been provided by the legislature, but was not pursued in this case so far as appears by the record transmitted to me.

From this record it appears that the jury simply found "that the said Howard A. Cleveland 'is guilty of the murder whereof he stands indicted.'"

Inasmuch as he stood indicted for murder generally, either of the first or second degree, as the evidence should prove, this verdict finds him guilty of murder in the second degree as much as it does in the first degree. There is nothing in it to show that it was of the first, and not of the second degree. The jury are the only competent tribunal to determine the question of degree, and they have not determined in this case that it was of the first degree. I therefore answer in the negative. RUFUS P. TAPLEY.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, Jan. 23, 1871.

Ordered, That the justices of the supreme judicial court be requested to furnish the house with their opinions upon the following questions:

Has the legislature authority under the constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns? And if towns thus authorized may assist private parties, may they go

further and establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?

BANGOR, Feb. 10, 1871.

To the House of Representatives of the State of Maine:

To the questions proposed by the legislature, we have the honor to answer as follows:

1. "Has the legislature authority under the constitution to pass laws enabling towns, by gifts of money . . . to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns?"

As the proposed gifts can only be raised by taxation, the question really is, can the legislature constitutionally authorize towns to assess taxes upon their inhabitants and collect the same, for the purpose of giving the proceeds to some favored manufacturer or manufacturing corporation. And as some of the inhabitants may be indisposed to such generosity, the inquiry will arise, whether the legislature can authorize the majority by vote to give away the estates of the minority or any portions thereof, not merely without but against their consent?

Taxation, by the very meaning of the word, is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxes are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the State for the support of government and for all public needs. They are the property of the citizen, taken from the citizen by the government, and they are to be disposed of by it. The necessities of government are more or less extensive according to the greater or lesser extent of governmental interference. Taxation originates from and is imposed by the State. The proceeds are for the government to enable it to carry into effect its mandates and to discharge its manifold functions.

The line of demarcation may not always be clear and distinct, and well defined between what is for public and governmental, and what for private purposes,—between the general legislation for the whole people and the special for the individual. But the questions proposed leave no doubt as to the special phase of legislation to

which they refer. They are obviously limited by and embrace what is special and private, excluding by their very terms whatever may or can by the most enlarged and liberal construction be regarded as relating to municipal, governmental, or public objects of any description whatsoever.

Individuals and corporations embark in manufactures for the purposes of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation, not of loss, but of profit. By the very assumption of the interrogatory, they are engaged in private and corporate undertakings for private and corporate emolument. All municipal, police, educational, public, or governmental purpose, whether of peace or of war, is excluded from our consideration by the manifest purport of the inquiry.

Capital naturally gravitates to the best investment. If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in determining upon the manufacture. But whatever is done, whether by the individual or the corporation, it is done with the same hope and expectation with which the farmer plows his fields and sows his grain,—the anticipated returns.

Now the individual or corporate manufacturing will in the outset promise to be, and in the result will be, either a judicious and gainful undertaking, or an injudicious and losing one. If the manufacturing be gainful, there seems to be no public purpose to be accomplished by assessing a tax on reluctant citizens and coercing its collection to swell the gains of successful enterprise. If the business be a losing one, it is not readily perceived what public or governmental purpose is attained by taxing those who would have received no share of the profits, to pay for the loss of an unprosperous manufacturer, whether arising from folly, incapacity, or other cause. The tax-payer should not be compelled to pay for the loss when he is denied a share of the profit.

It is true the inquiry is, whether the legislature can authorize a town by a major or any vote to give away the property of an unwilling minority to an individual or manufacturing corporation

whom or which such majority may select as donees. The question relates only to manufactures; but if the right of confiscating the private property of individuals for the purpose of giving it away to one branch of industry can be conferred upon towns, one does not easily see when or what bounds can be imposed or limitations made.

The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products,—its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer. Our government is based upon equality of rights. All honest employments are honorable. The State cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The State is equally to protect all, giving no undue advantages or special and exclusive preferences to any.

The constitution provides that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it." But here the question is, whether private property can be taken for private purposes without just or any compensation. No public exigency can require private spoliation for the private benefits of favored individuals. If the citizen is protected in his property by the constitution against the public, much more is he against private rapacity. If the public cannot take private property against the consent of the owner without just compensation, and only when it is required by some public exigency, most assuredly private property cannot be taken for private purposes without just or any compensation, and when it is not needed to meet any public exigency.

If it were proposed to pass an act enabling the inhabitants of the several towns by vote to transfer the farms or the horses or oxen, or a part thereof, from the rightful owner or owners to some manufacturer whom the majority might select, the monstrousness of such proposed legislation would be transparent. But the mode by which

property would be taken from one or many and given to another or others can make no difference in the underlying principle. It is the taking that constitutes the wrong, no matter how taken. Whether the cow or ox be taken from the unwilling owner and given to a manufacturer, or the gift be of the money obtained by a sale made by the collector, or by the payment of the tax to avoid such sale, does not and cannot change the principle. In either case the cow or the ox, or the value thereof, is taken from the owner, and is given away by others without the owner's consent. If a part of one's estate may be given away, another and another portion may upon the same principle be given away, until all is gone. What is this but manifest and undisguised spoliation?

The farmer and the mechanic may as well be donees as the manufacturer, and they alike equally labor for the general benefit in laboring for themselves. If a tax were to be assessed upon estates to be redistributed *per capita*, it would be plain spoliation. Is it any better, any the less spoliation because the gift is to one man or to one corporation rather than to all the inhabitants?

The legislature by the constitution are empowered "to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States."

By the declaration of rights, "all men . . . have certain natural, inherent, and unalienable rights, among which are those of acquiring, possessing, and protecting property," etc. But what inducement is there to acquire property, if the tenure of the acquisition is the will of others? How can one possess and protect property if the legislature can enable a majority to transfer by gift, through the medium of direct taxation for that end, such portions or the whole of one's estate as it may deem expedient? Such a law may be for the benefit of the donee, but it cannot be for that of the people. Grant this power to the legislature and let it be exercised, and all security for property is at an end. The motive to acquire is destroyed. The enjoyment of possession is taken away. The power to protect is gone.

The constitution provides, that no person shall "be deprived of his life, liberty, property, or privileges, but by judgment of his peers

or the law of the land." Property taken by taxation is not taken by the judgment of our peers. A statute in direct violation of the primary principles of justice is not "the law of the land" within the meaning of the constitution. Every citizen holds life, liberty, and property by the law and under its protection. Every enactment is not of itself and necessarily a law or the law of the land. Such is not a statute passed for the very purpose of working a wrong and in violation of the constitution. To declare it to be so would render this part of the constitution nugatory and nonsensical. The phrase is one adopted from Magna Charta. "As to the words from Magna Charta," observes Mr. Justice Johnson in *Bank of Columbia* v. *Oakley*, 4 Wheat. 235, . . . "after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The objects for which money can rightfully be raised must be such as conduce to the public interest, and are for the well being of the people. The true principle is thus stated by the supreme court of Pennsylvania in the case of *Sharpless* v. *Mayor*, 21 Penn. 168, in which the right of taxation to aid railroads was affirmed: "The legislature has no constitutional right to . . . levy a tax or to authorize any municipal corporation to do it, in order to raise funds for any private purpose. No such authority passed to the assembly by any grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest in welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." These views as to the right of imposing taxes seem to have received the sanction of the different courts in which the question has arisen. It would be simply an act of despotic power to sequestrate the property of an individual or individuals directly or indirectly by

the means of taxation, for the purpose of giving it away against the will of the owner, and to those whom others than he may select.

2. Has the legislature authority under the constitution to pass laws enabling towns, by . . . loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said town?

As the bonds of the town should be paid at maturity, and the payment must be met by taxation for that purpose, the issuing of the bonds or the raising of the money in the first instance for the objects contemplated present one and the same question.

The inquiry is of the same character and involves the same considerations as the one already discussed. True, the money is not given, and there is a remote and possible contingency of ultimate repayment. But towns are not banking corporations. The issuing of bonds or the raising of money by taxation for the purpose of assisting individual or corporate enterprise, whether in manufacturing within or without the town, is the simply fostering individual and private enterprise. It may be taking one's money without his consent, to be loaned to an individual whom its owner would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, and at a rate of interest at which he would decline lending to any one. All security of private rights, all protection to property, is at an end when one's money may be taken to be given away or loaned without his permission and at the will of others. It is no answer that the loan may be repaid. It is the owner's money, and its protection is guaranteed to him by the constitution, subject only to the higher rights and needs of the State.

3. May towns "establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?"

Towns were a part of the political organization of New England long before the formation of the constitution of this State. They are created by the government for specific purposes. They are a part of it. They are among its most efficient instrumentalities in carrying out successfully the objects of its very existence. Through their agencies the taxes required for the needs of the State are raised. Extensive powers are conferred on these corporations,—but

they are public corporations for public purposes. They may purchase or build town-houses, where the meetings of the inhabitants are to be held; school-houses, where the youth are to receive instruction; poor-houses, where the pauper is to be supported; police stations, where the criminal may be temporarily restrained,—for these are among the recognized functions of government. So, in case of insurrection or war, they may coöperate with the general government in suppressing the one or in bringing the other to a successful termination. These are only among the illustrations of the exercise of corporate powers and duties. Towns are public corporations, created and existing only for public purposes, not private corporations for the purposes of traffic or manufacturing.

The entering into contract is a consensual act. The formation of a partnership is a contract. The consent of the partners is necessary thereto. The legislature could not, by any statute, compel individuals without their consent to be partners and to assume the liabilities of partnership, and give the control of the funds to those who do not, and take it from those who do furnish the capital. But giving the town authority to establish manufactories is thus coercing a partnership. It is despotically taking the control of capital from its owners and transferring it to others. It is enabling the majority of a town to incur unlimited indebtedness. If the towns can embark in manufacturing, they can create a partnership, by which all the property of the inhabitants is pledged to meet the contingencies of business. If they can embark in manufacturing, why not in mercantile pursuits of any and every description? What conceivable limits are there to the spirit of reckless speculation, especially when those without means may have the power to dispose of and control the estates of those who have?

Capital is the result of foresight, intelligence, and frugality. It is not created by the issuing of bonds or the giving of notes. It is the fruit of saving. Men only save when protected in the enjoyment of their accumulations. When not so protected, one of the strongest motives to save ceases, and with the cessation of the motive, the accumulation of capital ceases. When the government is despotic, when private right is disregarded, when there is no security for and no protection of property, men will cease to accumulate, for they will not save to be robbed.

If it were the special object to lessen industry, to diminish capital and to prevent its increase, the most sure and effective mode to accomplish the result,—there could be none more so,—would be to withdraw the control of capital from its owners and to transfer its management to others, thus creating the greatest possible insecurity. The more numerous the body of men controlling its use and employment, the greater the chances of mismanagement, fraud, waste, and consequent loss. The less the State interferes with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, guardians should be appointed, and who would guard the guardians?

To give the power suggested would be to enable the majority, according to their own will and pleasure, to give, lend, and invest the capital of others, and to the extent of the power exercised, it would be to deprive the owners of the ability to give, lend, or invest their own funds. Let this be done, and the remaining rights of property would be hardly worth the preserving.

To do this, would be to impair or take away the inherent and unalienable right of "acquiring, possessing, and protecting property;" to deprive men of their property neither "by the judgment of their peers" nor "by the law of the land;" to take private property, not for public but for private uses, without compensation, and to undermine the very foundations upon which all good governments rest.

We, therefore, answer the questions proposed in the negative.

JOHN APPLETON,
C. W. WALTON,
CHARLES DANFORTH.

Regarding the question submitted to be substantially this, Can the legislature authorize towns, by gifts of money or loan of bonds, to aid purely private enterprises, in nowise connected with the public use or public exigencies? we answer in the negative.

EDWARD KENT,
RUFUS P. TAPLEY.

To the House of Representatives:

In answer to your request I have the honor to remark, that I concur in the opinion drawn by Chief Justice Appleton, provided his conclusions are drawn from premises rightfully assumed,—which are, whether the legislature can constitutionally authorize towns to assist individuals or corporations to carry on individual enterprises for their own private benefit without regard to any public advantage.

If your inquiries were so restricted and limited, then it may be questionable whether that "solemn occasion" has occurred which would require an opinion from this court; for I apprehend that no member, worthy of a seat in your house, would for a moment hesitate to answer the inquiries in the negative.

Yet I apprehend (although doubtingly) that your questions were intended to include such legislation as would embrace the public interest. If so, they would include the past as well as the future enactments. We should not be required to settle by solemn decision constitutional questions, *ex parte*, where millions of dollars are involved, in the absence of the parties directly interested; and in cases, too, where no complaint has ever been made to us by any party directly or indirectly concerned.

Ordinarily, courts are required to pass upon the constitutionality of acts already passed; if called upon before that time to express an opinion, they either become *quasi* lobby members, or a component part of the legislature, thereby abolishing one independent and coördinate branch of the government.

In conclusion, and in answer to your inquiries, so construed as I have intimated, I reply, that I shall consider all special or private acts to be constitutional, which have passed the ordeal of the house and senate, been approved by the governor, and accepted by the corporation assumed to be benefited thereby, and which the legislature considered to be of public advantage, until an aggrieved party in a court of law or equity appears and shows to the contrary.

Respectfully, etc.,

JONAS CUTTING.

To the Honorable Speaker of the House of Representatives of the State of Maine:

I have the honor herewith to transmit my answers to the interrogatories propounded to me, as one of the justices of the supreme judicial court, by an order of the house of representatives, passed Jan. 25, 1871.

The duty of expounding the constitution of the State is the most delicate and important one that the constitution devolves upon the justices of this court. The gravity of this duty, and the responsibility for its intelligent, upright, and independent performance are, perhaps, on no occasion more conspicuous than when the members of the court are solemnly called upon to pronounce, beforehand, upon the authority of an equal, coördinate, and independent branch of the government, under the constitution. While the momentous nature of such an occasion makes this duty by no means less imperative, it oftentimes renders it far more difficult of performance, by intensifying the necessity for a more careful analysis of the principles of interpretation, and a more thorough scrutiny of the authorities.

It was, therefore, with unaffected diffidence that I approached the consideration of the interrogatories propounded; and whatever estimate may be put upon the correctness of the conclusions to which I have arrived, I am conscious that they are not formed without deliberate consideration, and are such as reason, authority, and a proper regard for the public welfare compelled me to adopt.

It is to be observed, at the outset, that there is a marked distinction between the legislative authority of the national government, and that of the State government, resulting from the distinctive nature of the two governments. The national government being one of derivative and limited powers, congress can only exercise those powers that are conferred upon it by the constitution. On the other hand, the State government, representing the sovereignty of the people, the State legislature possesses all powers of a strictly legislative character which reside either in the State or the people, not limited or restricted in the State or national constitutions. With these qualifications, the legislative functions of the several State legislatures are as absolutely unlimited as those of the British

parliament. Hence the legislative powers of the respective State legislatures differ according to their several State constitutions; and before the decision of any State court, in regard to the constitutionality of an act of the legislature thereof, is receivable as authority for a like statute in another State, it is necessary first to ascertain whether the grant of legislative authority in the two States is the same.

The restrictions upon the authority of the legislature in this State are three-fold. 1. A law must be "reasonable." 2. It must be "for the defense or benefit of the people of this State." 3. It must not be repugnant to the constitution of this State or that of the United States. Con., Art. 4, Part 3, § 1.

Whether a proposed enactment is reasonable or not, in the purview of the constitution, is a question primarily addressed to the sound discretion and intelligent judgment of the legislature; and in general its decision of that question is conclusive. While there are exceptions to this proposition, they are not among the probabilities of legislation, and must be of an extraordinary character to warrant the interference of the judiciary. But when there is a clear excess or abuse of legislative authority, in this respect, the court will not abdicate its prerogative, but will interpose its constitutional right to check or control it.

Whether a law is "for the benefit of the people of this State," in the sense of that word when the sovereign power of taxation is to be invoked for its accomplishment, is, perhaps, a question more difficult of solution. This language is broad and comprehensive, and is to be construed in no narrow or illiberal sense, but in a manner that shall enable the legislature to take enlarged views of State policy, State interests and necessities, to employ the public revenues to give effect to these views, and authorize towns and cities to fulfill the legitimate purposes of their organization by taxation or otherwise.

The benefit sought may be preventive or remedial, moral or sanitary, pecuniary or educational, but the purpose of the law that involves the necessity of taxation must be public. This is the intendment of the constitution, as well as the essence of the meaning of the word taxation, which has for its only legitimate object the

raising of money for public purposes and the proper needs of government. The contemplated benefit may not reach to all parts of the State; it may be local in its character, applying to the people within certain specified territorial limits, who may reasonably be expected to derive some peculiar or special advantage or benefit from a proposed legislation, or work of public convenience and necessity which will not be enjoyed to the same degree by other portions of the State.

Such are the laws providing for the survey of lumber, the inspection of lime, hay, and other articles, the taking of fish in certain waters, the establishment of local tribunals, sanitary and police regulations, public parks and public libraries, the making of roads and bridges, the building of drains and aqueducts, the support of the poor, the widening of streets, the supplying of gas or water to towns or cities, and the erection of public halls and public institutions of learning. It is not the purpose of these laws to confer pecuniary benefit upon private individuals, or increase the value of private property, or furnish employment for the people, in a particular district, but it is to subserve the public convenience and promote the general welfare. The benefits, too, of such laws may be accessible, in general, to all who reside in the territorial limits to which they apply. They are public laws in their design, purpose, mode of application, and effect; and, for the most part, meet wants which private enterprises cannot supply. These laws, too, are administered by officers appointed by State authority, or elected by the local constituencies. Laws of this description have for a long period been enacted by the wisest legislators, upheld by the most learned courts, and sanctioned by the most eminent statesmen of the land.

There is, however, a broad and well-defined distinction between the purpose to be subserved by these laws and the purpose of "laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to carry on manufacturing."

The direct purpose of the laws I have been considering is public. How is it with the law proposed? The argument in support of the constitutionality of such a law is, that the establishment of the business of manufacturing in a town or city promotes the public

prosperity, by increasing the value of private property, inviting in capital and population, and furnishing employment for the people. The direct purpose of the proposed law is thus private in its character; it is to increase the means and improve the property of some, and furnish employment to some, while the benefit, if any, to the public is only reflective, incidental, or secondary. Can a tax be constitutionally imposed by municipal corporations to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom?

Another argument in favor of such legislation is that certain existing local enterprises will not be self-supporting, and that certain others will not be established, if such compulsory aid is not furnished,—an argument in conflict with the theory that a business that cannot stand alone might as well not stand at all, and that the law of demand and supply is the safest regulator of business. But does the inability of A., to carry on or establish manufacturing, afford any constitutional ground for taxing B. to help A. do so? Besides, what guaranty is there that A.'s business will be self-supporting with one installment of B.'s property, and that he may not call for another, and yet another? And what claim has manufacturing to such preference over other branches of industry, commerce, trade, agriculture, and the mechanic arts? These are honorable and beneficial pursuits, and the constitution of this State will be searched in vain to find any powers given to the legislature to authorize towns and cities to discriminate against these employments and in favor of manufacturing, in the matter of taxation. If municipal corporations may assess a tax upon their citizens by authority of law, to encourage one, it may each and all the branches of necessary industry; and the question is reduced to this, Has the legislature the constitutional authority to authorize the towns and cities in this State to tax their inhabitants for the purpose of aiding, establishing, or carrying on, not only manufacturing, properly so called, but also farming, ship-building, trading, inn-keeping, printing, banking, insurance, and any other branch of beneficial industry?

The fact that such legislation is of recent origin is, at least, calculated to cast doubt upon its constitutionality; and it is so in-

consistent, too, with the common-law doctrine of the purposes, powers, and duties of municipal corporations, the generally conceived notions of legislative authority, and of the inviolability of the right of private property, that the statement of this question almost instinctively elicits a negative answer. The object sought by this legislation is confessedly to be accomplished by municipal taxation. The tax, when collected and bestowed upon the favored individual or corporation, becomes at once the private property of the recipient. Henceforth it is such party's to use, control, and dispose of. If this may be done, what becomes of the freedom of industry and the security of private property? If the legislature may authorize towns and cities to raise a thousand dollars for such purpose, by taxation, it may an indefinite sum, limited only by its own discretion, and the will, cupidity, or caprice of the required majority of the municipality. Under such legislation, what citizen can, of a truth, say, "My property is my own, to use, control, and dispose of at pleasure, and is not subject to the paramount right of my neighbors, to devest me of, and bestow upon another, or appropriate to their own benefit?" To exact such a tax is to compel A. to pay a bounty to B., for B.'s private benefit, on the ground that B.'s use of it may secondarily result in some indefinite benefit to A. Such a tax lacks the distinguishing characteristic of legitimate taxation,—a public purpose. By inhibiting the taking of private property for public use, without just compensation to the owner, and then only when the public exigencies require it, the constitution impliedly prohibits the taking of private property for private use. The tax in question violates the rights of private property. It is a tax for private purposes, and, therefore, invalid,—an illegal exaction, under another name, and clearly repugnant to the constitution.

The class of cases under consideration differs in principle materially from those where towns and cities are authorized by the legislature to aid railroad enterprises by loan of their credit or subscription to the stock of railroad corporations. The constitutionality of such legislation has for a long time been sustained by the court in this State and by the courts in more than twenty other States, and their decisions have been approved by the supreme court of the United States, that court having repeatedly held that the inhibition

against taking private property for public purposes, without compensation, contained in the constitution of the United States, does not extend to State legislation, but is restricted to the legislation of congress, and that it is the exclusive right of State courts to dedetermine the constitutionality of State laws, when they are not repugnant to the constitution of the United States, or the constitutional enactments of congress.

The reason for the distinction between these two classes of cases is obvious. Railroads are manifestly the great public convenience, and necessary not on the ground that they incidentally serve to develop the resources of the country, and increase the local value of private property in the municipalities through which they pass, or at which they terminate, but because they primarily and directly afford the necessary facilities to the public for intercommunication between remote sections of the country as public highways, which, in general, can only be furnished through the exercise of the right of eminent domain. The primary purpose of railroads is thus a public one, and on this ground the courts of the several States have held, with singular unanimity, that it is competent for the State legislatures to authorize railroad corporations to exercise the right of eminent domain over the private property needed for their use. It is only on the ground that the purpose of railroad corporations is public, that the constitutionality of such legislation has been upheld, or that it can be maintained. The enhancement of local values and the development of local resources, the multiplied demand for labor and the increase and concentration of capital and population, brought about by the instrumentality of railroads, are incidental considerations, and afford no sufficient warrant for conferring upon railroad corporations the right of eminent domain.

Not only is the public character of railroad corporations established by their office, as public highways, and by the grant of the right of eminent domain to them, but it further appears from the various legislative enactments in regard to the construction of these roads, the provisions for the safety of the public, the constant supervision to be exercised over their management by the railroad commissioners of the State, and the penalties imposed for their neglect or violation of these regulations.

I am aware of the recent decisions in some of the western States against the constitutional right of the State legislatures to authorize municipal corporations to loan their credits to, or take stock in railroad corporations. But after the earlier, oft repeated, and, as it seems to me, better considered opinions of the courts of other States, in support of this right, I do not feel at liberty to accept the conclusions of the courts in Iowa, Wisconsin, and Michigan upon this subject. I am, however, disposed to adopt the language of the supreme court in Pennsylvania in *Hammond* v. *City of Philadelphia*, Am. Law Reg. for July, 1869: "We must say at some time to this tide of special taxation, 'Thus far shalt thou go, and no farther.' To our own decisions, so far as they have gone, we mean to adhere. We are now asked to take a step much in advance of them. This we would not be justified, by the principles of the constitution, in doing."

In discussing the questions propounded, I have not taken into consideration the authority of the legislature to determine conclusively whether a law "is for the benefit of the people of this State," in respect to general matters of legislation, but only where a law requires the exercise of the power of taxation. The power of taxation is a sovereign power; and it has been uniformly held that it is the province of the supreme court in the last resort to decide whether this power has been exercised in derogation of the constitution. Without such authority in the court, it is difficult to see what power it has, under the constitution, to prevent, check, or control the excess or abuse of legislative authority, in respect to matters of the gravest import to the people.

Neither have I, by any means, considered the case of laws designed to meet the public exigencies, when, by some extraordinary calamity, the homes, houses, places and means of business in a town or city have been destroyed, and its inhabitants have thereby been rendered houseless, homeless, and destitute of employment.

I have, therefore, to answer the several interrogatories proposed in the negative.

I have the honor to be, yours, faithfully,

J. G. Dickerson.

Belfast, Feb. 13, 1871.

BRUNSWICK, Feb. 10, 1871.

To the Honorable Speaker and House of Representatives of the State of Maine:

It is obvious that the scheme of legislation referred to in the questions propounded by you, under date of Jan. 23, 1871, involves, in some of its phases, a necessity for taxation, and, in all the others, a liability to be obliged to resort to it.

We are called upon, therefore, to consider and discuss the constitutional limits of this power of taxation.

I answer the first question in the negative, because—

1. It is against common right, and beyond the legitimate sphere of legislation, to raise, under color of taxation, any sums of money except those which are required to promote the appropriate objects for which the government was instituted. These objects are defined in the preamble to the constitution of our State.

To that constitution, which is the source and origin of the authority which the legislative department may exercise, we must look to ascertain the nature and limitations of the power of legislation in this respect.

The preamble declares, that the people of Maine entered into that compact which lies at the foundation of our government, "in order to establish justice, insure tranquillity, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty." Any object which cannot be classed under one or other of these heads is beyond the proper scope of legislation. To raise money for the purposes above enumerated is the proper and the only legitimate exercise of the power of taxation.

"The revenues of the State are a portion that each subject gives of his property in order to secure or to have the agreeable enjoyment of the remainder. To fix these revenues in a proper manner, regard should be had both to the necessities of the State and those of the subject. The real wants of the people ought never to give way to the imaginary wants of the State.

"Imaginary wants are those which flow from the passions and from the weakness of the governors, from the charms of an extraordinary project, from the distempered desire of vain-glory, and

from a certain impotency of mind rendering it incapable of withstanding the attacks of fancy. Often has it happened that ministers of a restless disposition have imagined that the wants of their own little and ignoble souls were those of the State."—*Montesquieu, Spirit of Laws*, Book XIII. c. 1.

Here, where all citizens are in a certain sense "governors" and "ministers" as well as "subjects," and projects for legislation looking mainly to private gain and emolument, though well cloaked under specious pretences of regard for the public weal, are as numerous as the locusts in Egypt, these suggestions of the wisdom and prudence of our old days ought to be carefully regarded; and it is especially becoming in our legislators to be cautious not to overstep the constitutional boundaries of their authority, nor to inaugurate a system of legislation, the manifest end and aim of which is to enhance private gain at the public expense.

See now how the whole body of our legislation, during the fifty years that we have existed as a State, ranges itself under one of the heads enumerated in the preamble to the constitution, "to establish justice, insure tranquillity, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the benefits of liberty."

For these purposes taxation is legitimate, and as to some of them, at least, where the power can be more conveniently and intelligently exercised in the primary assemblies of the people, in their town meetings, the power of the legislature to authorize the towns to raise the sums necessary within their own borders, cannot be doubted.

But under which of these heads can projects like those referred to in your interrogatory be classed? Doubtless the specious but deceptive claim of their advocates will be, that they tend to promote the common welfare. But to know for a certainty that that claim cannot be allowed, we have only to look at the definition of the word common when used in such a connection. "Common,—belonging to the public; having no separate owner; general; serving for the use of all,—universal; belonging to all."—*Webster's Dictionary.*

It is to promote the common welfare, as thus defined, that you

have authority to legislate and to raise money by taxation; and you can confer upon towns no delegated authority exceeding this. In fine, it is a principle that lies at the very foundation of all legitimate exercise of the power of taxation that the revenue shall be raised for public purposes alone, and not for private profit and advantage. This alone makes the distinction between lawful taxation and public plunder.

But the subtle and sophistical argument of those who are seeking their own private advantage by the use of the public purse is, that the successful establishment of a manufacturing business, though the profits of it enure to private individuals or corporations, is indirectly a benefit to the community. But this is not an answer; it is simply a pretext for an evasion of the fundamental principle above stated. What is the object of the proposed legislation? There can be but one answer.

It is proposed "to pass laws enabling towns by gifts of money or loans of bonds to assist individuals or corporations to establish or carry on manufacturing of various kinds." The business and its emoluments are to belong to and be controlled by the individuals or corporations to whom these gifts of public money or loans of public credit are to be made. It is obvious that the aid to the individual or corporation is the primary and proximate object of the law, and that the public benefit is incidental and secondary,—too remote to be termed an object of the law, even if it were not also merely contingent upon the skill and good fortune in business of the party to whom the donation is made.

All productive employments honestly carried on are creditable to their projectors, and if prudently managed with due heed to the inexorable laws of demand and supply are likely not only to make ample returns to those having the control of them, but to be incidentally advantageous to the community in which they are located; but it passes the limits of constitutional legislation to make any one of them a pensioner upon the public funds derived from unwilling contributions levied upon the rest in the form of taxes. This violates the cardinal principle that the State shall give all alike the benefit of equal laws without favoritism or partiality.

In testing the constitutionality of a law imposing a public bur-

den, the naked question is, Is the object one of those which the government was instituted to provide for according to the terms of the compact into which the people entered when they formed their constitution, or is it one which by long-settled usage has been left to be fostered by private enterprise, industry, and liberality, because its profits flow directly into the pockets of private individuals or corporations, and the benefit which it confers on the community is only incidental and secondary? If it falls within the latter class, it is without the pale of constitutional legislation.

It is the plain legal duty of those who seek a profit for themselves out of the carrying on of a manufacturing employment to furnish the capital or credit necessary to maintain it. If the undertaking is too great for a single individual, the State stands ready to furnish to all alike the means of combining for the purpose under liberal and equal laws as an association or as a corporation; but under our constitution as it stands, it is not at liberty to go further and assess the moneys with which the experiment is to be tried upon those who are entitled to no part of the dividends, if any accrue. In *Freeland* v. *Hastings*, 10 Allen, 570, one of the questions before the supreme court of Massachusetts was, whether it was competent for the legislature to pass a law authorizing towns to reimburse those who had procured substitutes. Bigelow, chief justice, giving the opinion of the court, remarks as follows: "It is obvious that money paid by an individual to procure a substitute in his stead is not paid primarily or chiefly for a public object, but to purchase a personal exemption from a duty or liability to which he is subject by law." And he stated the conclusion of the court upon the question in these terms: "We know of no rule or principle on which a valid authority to raise money by taxation, to be appropriated to the repayment of money expended by individuals for such a purpose could be granted by the legislature. A statute conferring such a power would be obnoxious to the objection that it authorized the raising of money by taxation for the exclusive benefit of particular individuals; that it relieved one citizen from the performance of a legal duty at the public expense, and appropriated money for a private purpose which could only be raised and used for public objects. It is hardly necessary to say that a statute designed to accomplish such purposes

would be against common right, and would transcend the authority conferred on the legislature by the constitution."

The law which contemplates the raising of money by taxation to aid individuals or corporations in establishing or carrying on a manufacturing business for their own benefit and behoof, is liable to the same objections, and equally transcends the authority conferred on the legislature by the constitution.

Is it said that the rule laid down is not an inflexible or universal one,—that there are exceptions,—that the law providing for the support of paupers is one? Not so. Among the rights declared natural and inherent in all human beings by our constitution, is the right to life, and that necessarily includes and carries with it a right to the means of sustaining life. It is not merely common humanity, but common justice, that demands that no one shall be suffered to languish for lack of food, clothing, and other necessaries of life. To provide the means of preventing it is strictly within the line of public duty.

Thus far we may safely proceed toward an agrarian distribution of the fruits of the earth and the products of human industry; and in doing so, we are only establishing justice and insuring tranquillity. But this is no precedent for going further, and furnishing to any beggar, however wealthy, influential, or clamorous (and these are they whose applications are likely to be successful), out of the public treasury the means of trying some pet scheme for adding to his own gains at the public risk.

Neither can it be said that the statutory provisions for education, nor the occasional grants made to seminaries of learning, are liable to objection on the same score. One of the declared objects of the constitutional compact is to secure to ourselves and our posterity the blessings of liberty. The most effective instrumentality to this end is found in our schools and seminaries. Indeed, the nearest approach to an exception to the fundamental principle we have adverted to that has ever been in any manner recognized as valid by the courts, is to be found in the acts authorizing towns to loan their credit for the purpose of aiding in the construction of railroads.

It would be easy to make a distinction between that class of acts and those which are now proposed, in the very vital matter of the

relation which railroads bear to those objects which are confessedly public and expressly recognized in the constitution as the objects for which the government was formed, and to the whole people, as a means of intercommunication, but more especially because they are becoming almost indispensable in order "to provide for our mutual defense," affording as they do means of transportation for men and munitions of war in numbers and quantities, and at a rate of speed which can be attained in no other way.

But the question of the validity of these acts is not the one now before us, and the true answer to those who rely on their analogy to the system of legislation here, and now under consideration as an argument in favor of the validity of the latter, is that the fact that one step of doubtful propriety has been taken is never a good reason for taking a further step in the same direction, but rather, on the contrary, it should induce us to pause and revert to fixed principles.

I have thus far been considering the class of acts referred to in your first question, authorizing towns to make gifts of money or loans of credit to assist individuals and corporations to establish or carry on manufacturing business of various kinds within or without the limits of such towns; and I have called attention to a fundamental principle regulating the power of taxation which forbids it for any but public objects, and have shown that those are not public objects which cannot be classed with those to secure which government was instituted, nor can those burdens be said to be imposed for public purposes which enure primarily to the advantage of private individuals or corporations, affording to the community only a secondary and incidental benefit.

We are now to consider the question of the constitutional validity of the class of proposed acts referred to in your second question,—acts authorizing towns to establish manufactures on their own account, and run them by the ordinary town officers or otherwise. It seems hardly possible that any one will be found to affirm that undertakings of this description can, by even the greatest latitude of construction, be included among the objects for which the government, and the power to raise money by taxation to meet the wants and accomplish the aims of the government, were created.

What has been already said about the invalidity of assessments made for any other than the legitimate purposes of government applies to the legislation referred to in the second question.

But I answer both these questions in the negative, because—

2. Such legislation would be utterly subversive of so much of Art. I, § 1, of the constitution as affirms the right of our citizens as individuals to acquire, possess, and protect property,—a right which may be conveniently designated as the right of private property.

Taxation, however heavy, if limited to the objects which the government was instituted to secure, does not infringe this right, because its very existence depends upon the maintenance of civil government; but taxation for any other purpose is a practical denial of the right, and a handing over of every man's property to those who can command a majority of the votes in his State or precinct.

It seems unnecessary to elaborate or illustrate these positions, or to attempt to prove the self-evident proposition that government was not instituted for the purpose of engaging in manufactures or trade. The right of private property is not only declared in the constitution to be one of the natural rights of all men, but its security is guarded by further constitutional provisions forbidding the taking of such property, even for public uses, without just compensation, nor unless the public exigencies require it.

Touching this right, Weston, C. J., remarks in *Comins* v. *Bradbury*, 10 Maine, 449, most truthfully as follows: "And the history and experience of mankind proves that it is essential to individual and to public prosperity, that every man should be secure in the enjoyment of the fruits of his own industry. The force of this principle cannot in any degree be impaired, without relaxing the springs of exertion and enterprise."

What must necessarily be the effect of this proposed intrusion of municipal organizations, backed by the power of taxation, into the field which immemorial usage has hitherto reserved to private energy and enterprise? What private operator could venture to compete with those who should be made the recipients of the public favor, or with the municipality in which he lives controlling all the property taxable in that precinct, for the support of its own

operations in the same line? Government monopolies in manufactures and trade have sometimes existed in despotic or semi-despotic governments; but the inevitable effect of them is "to relax the springs of exertion and enterprise."

It is true it may be said that this consideration bears upon the expediency rather than upon the constitutionality of these schemes; but behind this stands the fatal objection to any legislation of the description proposed, that when you compel a man to contribute, at the fiat of a town meeting, to objects other than those which the government was framed to secure, you destroy his constitutional right to possess and protect property, which he can thereafterwards only hold subject to the determination of a majority of his townspeople.

The people of Maine have not yet adopted a constitution which, upon any reasonable interpretation, makes the tenure of private property so uncertain. WILLIAM G. BARROWS.

To the House of Representatives of the State of Maine:

I have the honor herewith to submit the following communication in answer to the interrogatories annexed.

RUFUS P. TAPLEY.

OPINION BY TAPLEY, J.

These inquiries do not leave my mind entirely clear as to the information sought by them. If they relate to purely private enterprises in nowise connected with public uses or the public exigencies, I answer without hesitation in the negative. This conclusion is so clear to my mind, and so free from all doubt, that I can hardly persuade myself that the house of representatives really needed or desired the opinion of any one upon the subject. Coupled with this fact is the fact somewhat notorious that an opinion is somewhat prevalent that the aid referred to may legitimately be given when the enterprise is regarded as beneficial both to the public and the private individual. If the inquiry relates to those cases where the public interest as well as private benefit is to be subserved, something more than a simple affirmative or negative answer seems to be required. The doubt which remains in my mind as to the real

design and purpose of the inquiry must be my apology if I go beyond their scope and purpose.

In the determination of questions of law the court always receive great aid from the researches and discussions of able counsel acting for interested parties, and when questions are presented in the manner these now come to us we proceed to their determination with some hesitation and embarrassment.

The reflection, also, that the same questions may arise between party and party in the course of legal proceedings in the courts, together with the fact that other official duties limit and circumscribe us in the time to be devoted to the investigation, still further increase the embarrassments of such occasions.

We can only proceed in the investigation upon the views of the law appertaining to the question, as they appear to us upon first presentation, and anticipate as well as we can the ground which may be urged for or against the proposition presented, never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion.

Under whatever form of proceeding the aid contemplated is furnished in any given case, I think, if justified, its justification must be found in that principle of all governments which invests the sovereign power with the right to take and use any property within its jurisdiction for necessary public uses. This is a principle not peculiar to our government or our form of government, but one existing in all governments, and one not resting upon edict, but one resulting from necessity. It is sometimes termed the right of eminent domain.

EMINENT DOMAIN.

Chancellor Kent says of this right, "private property must, in many instances, yield to the general interest. The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses, and for public uses only." Kent's Com., vol. 2, p. 333.

Judge Story says, "the right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all

citizens within the territorial sovereignty to public purposes." 11 Peters, 641.

Numerous definitions of this right might be cited, all of which convey the same idea. Under our constitution a limitation is imposed upon this right; it is in these words: "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Maine Laws, Art. 1, § 21.

Under this provision of the constitution it has been said by the supreme court of this State in one case, that "the right of eminent domain is an attribute of sovereignty, and confers upon the legislature authority to take private property for public uses when the public exigencies require it, subject only to that provision in our constitution which exacts just compensation." 47 Maine, 345.

In another case it is said, "except for public uses private property may not be taken by the dominant power of the State, nor for public uses without just compensation; nor even then unless the public exigencies require." 40 Maine, 317.

Without entering at this time into a discussion or recapitulation of the reasons for the rule, and the necessities which require it, I hold that the taking of private property, against the will of the owner, must find a justification in some public use and under some public exigency, and accompanied by a just compensation, and this is true whether the property be taken by a direct seizure of it in specie, and irrevocably committing it to a use, or by the indirect method of a loan, accompanied by some fancied or real security for a subsequent reimbursement.

Some distinction has been sought to be made between the right to seize specific articles of property for a public use, and obtaining money through the ordinary forms of taxation, and we sometimes hear of a justification under the taxing power of the government. I am not able to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right as described by Judge Story, "of the sovereign power to appropriate, not only the public property, but the private property, of all citizens within the territorial sovereignty, to public purposes." The difference is in the mode of taking only.

The use in both instances is a public one, and in both instances

the right is founded upon the same principle. Certain principles govern the modes of procedure in each case, but the elemental authority rests upon the principle that the property within the sovereignty is held subservient to the necessities of the sovereignty.

PUBLIC USE.

What is a public use is abstractly a question of law, and like many other unambiguous expressions, having a technical meaning, is not so easily defined in other terms as one would ordinarily suppose. It must, undoubtedly, be a use designed to subserve some public interest or demand, an interest or need of a public character as contradistinguished from that of a private character. It need not be a use in which all the individuals of the public are equally interested. One may be benefited very much more than another, and yet it may be a public use within the meaning of the constitution. Numerous cases have decided this point, and it matters not that some private interest may be subserved to a much higher degree than the public, it may nevertheless be, within the purview of the constitution, a public use.

PUBLIC EXIGENCY.

So it may be said that what is a public exigency may be regarded as a question of law. Exigencies may be of very different degrees. Very different circumstances may produce exigencies. One may present an imperative demand and absolute necessity, an indispensable want and need, another may show that a certain use or object is highly desirable and will result in a manifest advantage and benefit to the public. The degree of exigency is not declared by the constitution. It is stated in general terms, but it being in the nature of a limitation upon the general law of eminent domain, I think it may well be assumed that something beyond a possible or probable advantage or benefit of a slight character was designed. That the mere fact that some unimportant use or benefit might be received is not enough, but that it must be such an use as the public needs and requires for its welfare and safety; a substantial thing it ought to be possessed of.

JUST COMPENSATION.

This term is so clear that it needs no comment by the court at this time. If any questions can arise concerning it, they arise rather upon the mode of determining what will amount to a just compensation rather than the meaning of the term.

This constitutional provision (Sedgwick on Com. Law, 554) of which I have spoken as imposing a restriction or limitation upon the general law of eminent domain, evidently refers to the power to take the property in specie of one man and use it for the public, rather than that power possessed by the sovereign to seize in the form of taxation a ratable proportion of the whole for the benefit of the whole. When the property of one man is seized and used for the benefit of the whole community, it is just and equitable that the community should compensate him for his loss and their gain. He, among others of the community, contributes ratably to that compensation. When, however, for the ordinary purposes and expenses of the government, all are called upon to contribute according to the property they possess, the burden is equally borne by all, and each has his compensation in the general good promoted.

So far there is no difficulty in giving an answer to the inquiry proposed. The difficulties which arise are of a different character, and are upon questions of fact rather than questions of law. The perplexing question in some cases is, whether or not the object is a public one; whether the uses to which the means sought to be applied are public uses; and if property in specie is to be seized, whether a public exigency exists requiring it. If these facts exist, the right to take is established, and the only remaining question is one of policy and propriety under the circumstances.

As before remarked, whether or not these facts exist is not a question of law for the court. The result of such an investigation must depend upon circumstances made apparent by proof. In one instance clearly and indubitably shown, in another less clearly shown and of doubtful existence, and in another wanting entirely in all those elements necessary to bring it within the rule.

When facts are agreed, the results which legally flow from them are those produced by an application of the law, and what the results are, thus flowing from the facts agreed, are questions of law.

Were we here to give a simple affirmative or negative answer to the inquiries made, we must decide not only the law (unless the first construction we have given your inquiry is the right one) but the fact. We must go beyond the judicial line of inquiry and enter upon another. The decision of the one would be judicial, and as such entitled to respect coming from the court of last resort. The decision of the other would be extrajudicial, that of so many citizens, founded upon facts happening to be within the knowledge of those who form the opinion, and entitled to no more consideration than that of other persons equally intelligent, formed upon an imperfect knowledge of the facts, and, as courts are human, arriving in many instances to widely different conclusions.

The law is not thus uncertain; it rests upon certain well-defined and unquestioned principles.

The inquiry arises, then, who shall determine the question of fact? In my opinion it is the legislature, "all power is inherent in the people, and instituted for their benefit," is the language used in the "declaration of rights." They must determine, through the legislative department, when a law becomes necessary, and what law has become necessary. They must determine whether a thing is or not needed for a public use, and whether the public exigency requires it. Having so determined, there is no appeal to the judiciary. The judiciary are but a coördinate department of the government. They cannot make or unmake laws. When a case arises for the application of the law, they determine what the law is applicable to the case. If they should find two laws laid down relative to the matter, one a legislative enactment, and the other a constitutional provision made by the people before the legislature was formed, the law declared in the constitution is to them the paramount law, and the case is decided by that paramount law.

In this there is no conflict of action. It is a simple determination of each cause as it arises upon the laws as they exist. The common law must yield to the statute, and the statute to the constitution.

In Mr. Cooley's work upon Constitutional Limitations, he says: "The authority to determine in any case whether it is needful to exercise this power (of taking private property) must rest with the State itself." Page 528.

Mr. Justice Denio, in the case of *People* v. *Smith*, 21 N. Y., says: "The necessity for appropriating private property for the use of the public, or of the government, is not a judicial question. The power resides in the legislature. . . . The exercise of the right of eminent domain stands on the same ground with power of taxation. Both are emanations of the law-making power. They are attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts."

Chancellor Kent says, "it undoubtedly must rest as a general rule in the wisdom of the legislature to determine when public uses require the assumption of private property." 11 Kent's Com. § 34, p. 415.

In the case of *Spring* v. *Russell*, 7 Greenl. 273, Chief Justice Mellen, giving the opinion of our court, says, "It is the unquestioned province of the legislature to determine as to the wisdom and expediency of a law, and how far the public interest is concerned."

When they arrive at the practical point of determining whether, in a given instance, the case is shown to be within these rules, the constituent must rely upon the intelligence and integrity of his representative. It is upon these he must rely in regard to all matters of legislation; with respect to the confiscation of his own property, in undue and unequal proportions compared with the contributions of others, he may rest securely upon the constitutional requirement of compensation when one mode is pursued, and an equal apportionment upon all, according to value, when the mode of taxation is pursued.

POWER OF TAXATION.

Perhaps something should be said concerning the general power of taxing possessed by the government,—or rather something concerning the limitations, if any, imposed upon it.

Taxes should be imposed or levied for those purposes which properly constitute the public burden. They are levied to secure the performance of public duties, and relieve public necessities. These public burdens, public duties and necessities, are often the call of the public good and general welfare of the people, to be

promoted through a great variety of channels; and the legislative department being the judge of those, the uses for public purposes have no limitation but that dictated by legislative wisdom, discretion, and conscience. A few citations of the opinions entertained by eminent men may serve to throw some light upon it.

In the same work from which I have before cited, Cooley's Constitutional Limitations, it is said: "The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts can scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, and enjoyment; to every species of possession; and it imposes a burden, which in case of failure to discharge, it may be followed by seizure and sale, or confiscation of property. No attribute of government is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life, than through this power." Page 479.

Chief Justice Marshall said, "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised in the object to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature, and on the influence of the constituents over their representatives to guard them against its abuse." 4 Wheaton, 428.

In another case the same learned jurist said: "This vital power may be abused, but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally." 4 Peters, 563.

Mr. Cooley says, "In determining this question, the legislature cannot be held to any narrow or technical rule. Certain expenditures are absolutely necessary to the continual existence of the government; but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. The officers of the government must be paid, the laws printed, roads constructed, and public buildings erected; but with a view to the general well-being of society, it may also be important that the children of the State should be educated, the poor kept from starvation, losses in public services indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will, therefore, be necessary expenditures, and expenditures which rest upon considerations of policy alone, and in regard to the one as much as to the other, the decision of that department, to which alone questions of State policy are addressed, must be accepted as conclusive." Page 488.

In one case it is said, "If there be the least possibility that the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive." 32 Crom. 138.

The history of the State for the half century of its existence furnishes me no evidence of a want of intelligence, integrity, or just regard for the reserved rights of the people existing in their representatives. They need no opinion of mine as to whether the measures contemplated by the inquiry are politic or impolitic. It is to their judgment and not mine to which this question is addressed. The corrective, if any is needed for their acts, lies not in the courts if the act is within the line of constitutional authority, but with the people.

The various enactments, public and private, now found upon our statute books, show that the people of the State as a body have not been unmindful of the means necessary to promote the general good, whether it be by fostering institutions of learning, developing the natural and material resources of the State, encouraging agriculture and arts, or aiding in constructing ready and easy means

of communication and intercourse with each other. While some of these statutes seem to some to have gone to the very verge of constitutional limitation and authority, their results as a whole have exhibited the wisdom of those who designed them. As the State advances in population and available means of the enjoyment of a higher degree of civilization, old necessities no longer exist, and new ones take their place, and, as before remarked, when and where they exist must be and will be determined by the people acting through the legislative department of the government; and when the legislative department has declared that certain uses are of public utility, importance, and necessity, or that a public exigency has arisen, the courts, as a coördinate branch of government, ought not, and I trust will not, substitute their own judgment for that of the people thus expressed, and render nugatory their solemn acts performed under the solemn engagements they assume in the execution of duties devolving upon them.

The experience of the past will furnish some guide for the future. The deliberate judgment of others, formed under similar circumstances, is entitled to some consideration, at least, in forming our opinions. Changing conditions of men bring with them new demands, demands that must be granted or refused upon the application of old principles; principles although of long standing yet designed to meet the varying conditions of society; so inflexible as to preserve the rights of all, and yet so flexible as to meet all the requirements of a government designed to promote, to the highest degree, political equality in government and intelligence and morality in the people.

If the aid contemplated relates to purely private enterprises, in nowise connected with public uses or public exigencies, I answer in the negative. If, however, it relates to public uses and necessities connected with private, I answer, there may be cases where such aid may be legitimately authorized. RUFUS P. TAPLEY.

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ABANDONMENT.

See PAUPER, 1, 3.

ABATEMENT.

1. A plea in abatement must be direct and positive, and not argumentative. *Severy* v. *Nye*, 246.

2. Thus, in an action against a sheriff for the wrongful official acts of his deputy, a plea in abatement alleging substantially that the alleged trespass accrued to the plaintiff by reason of the official acts of the defendant's deputy, for which the defendant was legally responsible; that the plaintiff had his election to bring his action therefor directly against the deputy or the defendant; that he elected to and did bring it against the deputy, and the same is still pending and undetermined; and "that by bringing his said suit directly against said deputy, the plaintiff elected to release and did thereby release this defendant from all further liability for the supposed trespasses," etc., is bad. *Ib.*

3. The pendency of an action of trespass against a deputy-sheriff for his wrongful acts done under color of his office, cannot be pleaded in abatement in an action against the sheriff for the same cause. *Ib.*

4. R. S., c. 86, § 16, providing that the principal defendant in a trustee process, on whom no personal service of the writ has been made, "may assume the defense of the suit," does not permit him, after the time allowed therefor by the rule of court, to file a motion in abatement for the want of service upon him. *Steward* v. *Walker*, 299.

5. Thus, a resident of the county summoned as trustee disclosed at the March term, 1867, that he was executor of a certain will, and that it was then uncertain whether anything, or if anything, how much would ever be due to the principal defendant. There having been no service upon the principal defendant, except a nominal attachment, notice to him by publication in a newspaper was ordered, but never given, and the action stood continued for the further disclosure of the trustee until September term, 1869, when, on the second day of that term, the principal defendant volunteered a special appearance by attorney, and filed a motion in abatement on the ground that the supposed trustee was never trustee of the principal defendant; that none of his property had been attached, nor any personal service made on him. The next day the trustee was discharged. *Held*, That the principal defendant cannot voluntarily assume the defense by pleading in abatement after the time fixed by the rule; and that the action be dismissed without costs. *Ib.*

6. In an action on a promissory note, signed by the defendants as directors, wherein a voluntary association, called "the Machias Mining Company, promise to pay Ellis M. Smith or order" the sum named at the time specified; *Held*, (1) That all the members of the association, if any, being liable, the action should be against all; but (2) That the action against the defendants alone is maintainable, unless they plead in abatement the non-joinder of their associates.
McGreary v. *Chandler*, 537.

See REPLEVIN, 3.

ABORIGINES.

See REAL ACTION, 4.

ABROGATION.

See DEED, 19.

ACCOMPLICE.

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ACTION.

1. Under Public Laws of 1859, c. 114, § 1, the mortgagee of personal property attached on a writ against the mortgager, could not commence an action against the attaching officer until forty-eight hours after he had given him a "written notice of his claim, and a statement of the amount actually due to him on the mortgage." *Nichols* v. *Perry*, 29.

2. A husband cannot, even with his wife's consent, maintain an action in his own name alone, for an injury to his wife's horse occasioned by a defect in a highway, while he, having exclusive possession and control of the horse with the wife's consent, was driving along the road alone.
Green v. *Inhabitants of North Yarmouth*, 54.

3. A child of nine years, who, in the daytime, jumps from a sidewalk, lawfully constructed by a railroad company on the side of its railway-bridge, upon the properly constructed draw, while the same is being lawfully closed, is so

wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom. *Brown* v. *E. & N. A. R. R. Co.*, 384.

See ABATEMENT, 6. ASSIGNMENT, 2. ASSUMPSIT. ATTACHMENT, 1. BILLS, &c., 1, 3, 4. CONTRACT, 1. DAMAGES, 2. DECEIT, 1. EQUITY, 9, 12. EXECUTOR, &c., 1, 4. FRAUDS, &c., 1, 2, 3. INFANT, 3.

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AGENCY.

Where, after judgment on a marine policy recovered in the name of the owner of one-eighth interest, alone, the owner of the remaining seven-eighths settled with the attorney recovering judgment, by agreeing with him as to the amount of fees he should receive, and receiving from him the balance of a partial collection on the execution, after the deduction of the amount of his fees, together with the execution, the balance of which the defendant subsequently collected, and thereupon agreed to pay to the assignee of the one-eighth interest, his share thereof; it was held, that the acts of the defendant constituted a ratification of the original suit, and that assumpsit would lie upon the special promise by the assignee. *Vose* v. *Treat*, 379.

AGREEMENT.

See AGENCY. CONTRACT. DEBT. SURETY, 2.

AMENDMENT.

1. By R. S. of 1857, c. 82, § 12 (R. S., c. 82, § 11), when there are two or more defendants, the writ may be amended by striking out one or more of them on payment of costs to him to that time. *Fuller* v. *Miller*, 40.

2. Thus, where at a certain term, one of two defendants was defaulted, and, at a subsequent term, the plaintiff discontinued as to the defaulted defendant, and recovered judgment against the other,—the former was held entitled to costs to the time of the discontinuance. *Ib.*

See REPLEVIN, 4.

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See STATEMENT OF AMOUNT.

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See REAL ACTION, 5.

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ASSESSORS.

See TAX, 5, 12.

ASSETS.

See CORPORATION, 1.

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See ASSUMPSIT, 3, 6. EXCEPTIONS, 2.

ASSIGNMENT.

1. A certificate that a certain person named "is the owner of five fortieth parts of the letters-patent and property of the M. T. Co.," . . . and stipulating "that whenever an incorporated company shall be organized . . . the holder hereof shall be entitled to receive its equivalent value in the certificate of shares in the capital stock of such company," does not operate as an assignment to the holder of any interest in the letters-patent. *Hope Iron Works* v. *Holden*, 146.

2. No effectual assignment of a sum that may be recovered in an action of trespass for a personal assault can be made before final judgment.
McGlinchy v. *Hall*, 152.

See CONTRACT, 6. DAMAGES, 2. DOWER, 2. EXCEPTIONS, 2. FENCE VIEWER, 1. MORTGAGE, 1.

ASSIGNOR.

See EXCEPTIONS, 2.

ASSOCIATE.

See ABATEMENT, 6. DEED, 19.

ASSOCIATION.

See ABATEMENT, 6. DEED, 19.

ASSUMING DEFENSE.

See ABATEMENT, 4.

ASSUMPSIT.

1. If the parties to an illegal contract are not in *pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in an action for money had and received. *Concord* v. *Delaney*, 309.

2. The plaintiff town, at a legal meeting called for the purpose, "voted to raise six hundred and twenty-five dollars to each man who enlists to fill Concord's quota on the last call," and that "the selectmen hire money and pay the volunteers after they are mustered into the Unites States service." Thereupon the selectmen hired the money and paid fifty-four hundred dollars to the defendants, who fraudulently assured them that pursuant to their contract with the selectmen, the defendants had caused to be enlisted, accepted, and placed to the quota of the plaintiff town nine men for three years each, when in fact eight of the men were enlisted and credited for one year only. In an action for money had and received to recover back the money paid, *Held*, that the action is maintainable, without first placing the defendants in *statu quo*. *Ib.*

3. Where, after judgment on a marine policy recovered in the name of the owner of one-eighth interest, alone, the owner of the remaining seven-eighths settled with the attorney recovering judgment, by agreeing with him as to the amount of fees he should receive, and receiving from him the balance of a partial collection on the execution, after the deduction of the amount of his fees, together with the execution, the balance of which the defendant subsequently collected, and thereupon agreed to pay to the assignee of the one-eighth interest, his share thereof; it was held, that the acts of the defendant constituted a ratification of the original suit, and that assumpsit would lie upon the special promise of the assignee. *Vose* v. *Treat*, 379.

4. Assumpsit will not lie by a resident owner to recover from his town money paid under protest to redeem land sold for taxes raised for a legal purpose, but assessed in an irregular or defective manner. *Rogers* v. *Greenbush*, 390.

5. *It seems*, that the form of protestation, under which a tax is paid with a view of recovering it back, is immaterial; but it must be a distinct and definite protest against paying the particular tax on the ground of its illegality. *Ib.*

6. By accepting a deed of real estate "subject to all the" grantor's "liabilities" to the assignee of the grantor's lessee, the grantee assumes the performance of the condition, from which the law will imply a promise on which an action of assumpsit will lie. *Rising Sun Lodge of Masons* v. *Buck*, 426.

7. Thus, in December, 1850, the owner of a two-story building, by a lease under seal demised to the treasurer of a lodge of Odd Fellows the upper room, with the right to assign the same, for the term of ninety-nine years, covenanting in the lease that the lessor's "administrators and assigns shall, at their own cost, at all times during said term, well and sufficiently repair, maintain, and keep the outside of said building with diligence and in good and proper order and condition, ... and all the grants, covenants, and conditions herein contained, shall extend to and be binding on the parties and their legal representatives respectively." In April, 1861, the said treasurer assigned the lease to the plaintiffs. In January, 1866, the owner of the building conveyed it to the defendant, "subject to all" the grantor's "liabilities to the" plaintiffs "for the hall." Subsequently, upon being notified by the plaintiffs that the roof was out of repair, the defendant neglected to make the necessary repairs, whereupon the plaintiffs made them and brought *indebitatus assumpsit* to recover compensation for the same; *Held*, that the action was maintainable. *Ib.*

8. The widow of the intestate cannot maintain assumpsit against a third person, to whom the insurance company had paid the money due on the policy, to recover the proportion which descends to her by virtue of R. S., c. 75, § 10. *Lee* v. *Chase*, 432.

See CONTRACT, 1. INFANT, 4.

ATTACHMENT.

1. Under Public Laws of 1859, c. 114, § 1, the mortgagee of personal property attached on a writ against the mortgager, could not commence an action against the attaching officer until forty-eight hours after he had given him a "written notice of his claim, and a statement of the amount actually due to him on the mortgage." *Nichols* v. *Perry*, 29.

2. The fact that the officer knew there was such a mortgage on record, and took a bond of indemnity from the attaching creditor, would not excuse the mortgagee's omission to give the statute notice. *Nichols* v. *Perry*, 29.

3. A written notice to an attaching officer that "there is now actually due me," from the mortgager "on note and account, exceeding nine hundred dollars," is a sufficient "statement of the amount." *Ib.*

4. The notice need not allege, in so many words, that the amount stated is "actually and justly due on the mortgage," if it appear from the whole notice. *Ib.*

5. When a person is adjudged a trustee for "specific property in his hands, which he is bound to deliver at a future day," a demand need not be made upon him "within thirty days next after final judgment," to prevent a dissolution of the attachment. *Woods* v. *Cooke*, 282.

6. When a debtor owns a horse and colt and a pair of oxen, he may elect which shall be exempted from attachment if he avail himself of the privilege when the attachment is about to be made. *Colson* v. *Wilson*, 416.

7. If, having the opportunity to make the election, he fails to do so, he will be deemed to have waived his right to hold them exempt from attachment. *Ib.*

8. Where the owner of a pair of oxen, having the opportunity, omitted to elect to have them exempted from attachment, and the mortgagee of the oxen omitted for the space of ten days, after due notice of their having been attached, to "deliver to the officer a true account of the amount due on" his mortgage, as required by Public Laws of 1859, c. 114, § 2 (R. S., c. 81, § 43), the mortgagee "thereby waived the right to hold the property" on his mortgage. *Ib.*

9. The Stat. of 1838, c. 344, § 4, which provided that it should be necessary to the validity of an attachment of real estate that the plaintiff should set out in his writ, specifically, the demand or claim on which his action is founded, applied to suits pending at the time the act took effect as well as to those subsequently commenced. *Poor* v. *Larrabee*, 543.

See EXECUTION, 4. LIEN, 5.

ATTORNEY.

See AGENCY. MORTGAGE, 4.

AUCTION.

See EXECUTION, 3. DEED, 15.

BANK.

A bank is bound to take ordinary care only of United States bonds pledged to it as collateral security for the payment of a note discounted by the bank. *Jenkins* v. *National Village Bank of Bowdoinham*, 275.

See CONTRACT, 4. EVIDENCE, 10. TROVER, 1.

BENEFICIAL INTEREST.

See DEED, 19.

BILL OF SALE.

See DEBT.

BILLS AND PROMISSORY NOTES.

1. Where the obligor of a bond, for the conveyance of certain land to the obligee, upon the latter's payment of certain notes, at maturity, conveys away the land, upon the failure of the obligee to pay the notes according to their tenor, the administrator of the estate of the obligor cannot enforce payment of them. *Little* v. *Thurston*, 86.

2. When no place of payment is named in a promissory note, it must be construed according to the law of the place where it is made. *Stickney* v. *Jordan*, 106.

3. Compound interest is recoverable in this State, in an action on a promissory note given in New Hampshire, to a payee, resident there, and made payable with interest annually. *Ib.*

4. A woman, after a divorce *a vinculo*, may maintain an action against her former husband, on a promissory note given by him to her in 1861, during coverture, for money borrowed of and belonging to her. *Webster* v. *Webster*, 139.

5. On April 28, 1855, J. & Co., for their own benefit, gave their negotiable promissory note to F., the plaintiff's intestate and the defendant, each of whom indorsed it and duly received notice of its having been protested for non-payment. On April 30, 1855, J. & Co. mortgaged an ample stock of goods to the defendant and another to secure the payment of this and another note, but, in the following October, the defendant discharged the mortgage without receiving payment of the former note. On Dec. 29, 1858, F. took up the note, and, on Dec. 24, 1864, demanded one-third of the amount paid therefor of the plaintiff as administratrix, who paid it and thereupon brought this suit for the amount thus paid. *Held*, that whatever cause of action the plaintiff may have had against the defendant by reason of the note was barred by the statute of limitations. *Luce* v. *McLoon*, 321.

6. If the payee of a negotiable promissory note, by his indorsement thereof "without recourse," impliedly warrants that it was given for a valuable consideration, such liability accrues when the indorsement is made; and the statute of limitations then begin to run. *Blethen* v. *Lovering*, 437.

See ABATEMENT, 6. CONTRACT, 2, 3. INTEREST, 1, 2. LIMITATIONS, &c., 2. SURETY, 2.

BETTERMENTS.

1. Public Laws of 1843, c. 6, § 1, embodied in R. S. of 1857, c. 104, § 23, did not affect the rights of reversioners in any improvements made prior to the time when that statute took effect. *Poor* v. *Larrabee*, 543.

2. *Aliter*, as to improvements made since. *Ib.*

BOND.

1. A bond in a penal sum, given by the treasurer of State, with sureties, to the State, conditioned for the faithful performance of the official duties of the treasurer; that he will render an account, when required by the legislature, of all sums of money he shall receive into the treasury, and pay to his successor or any other person appointed by the legislature to receive the same, all such sums of money and property upon settlement of his accounts as shall be found due from him, as treasurer, to the State; "that during his continuance, in office, he will not engage in any business of trade or commerce, or as a broker, nor as agent or factor for any merchant or trader;" "that he will render a true account . . . to the legislature . . . on the first Wednesday of January" following the date of such bond, and faithfully and without delay deliver to his successor all the moneys, books, property, and appurtenances of said office remaining in his hands, and pay over all such balances as shall appear due, etc., is a "contract in a penal sum for the performance of covenants or agreements" within R. S., c. 82, § 16. *State* v. *Peck*, 123.

2. The defendant, by a sealed obligation in the ordinary form of a bond, "acknowledged himself bound and obliged unto" the plaintiff "in the sum of five hundred dollars," . . . conditioned that, "in part consideration of" the sale by the defendant of his fish-market and fixtures and stock to the plaintiff, he will not engage in the retail sale of fish, within the city of Biddeford, so long "as the plaintiff shall remain in the business;" *Held*, (1) That by engaging in the retail sale of oysters within the time and place mentioned, was a breach of the condition; and, (2) That the sum of five hundred dollars constituted a penalty, and not liquidated damages. *Caswell* v. *Johnson*, 164.

See BILLS, &c., 1. DECEIT, 1. EVIDENCE, 12, 13, 14. EXCEPTIONS, 3. EXECUTOR, &c., 3. PRACTICE, 22, 23. REPLEVIN, 1, 3, 5, 7.

BOND OF INDEMNITY.

See ATTACHMENT, 2.

BOUNDARY.

See DEED, 7.

BOUNTY.

1. Where, under an article in the warrant for a town-meeting held in May, 1861 "to see what action the town will take relative to aiding the State in complying with the late requisition of the president of the United States, on the State of Maine, for men and means to suppress the rebellion," the town "voted that the soldiers from this town have five dollars per month added to the government pay,"—proof that the plaintiff entered the army Dec. 21, 1861, without evidence that he entered under the first call, will not entitle him to recover. *Gordon* v. *Readfield*, 293.

2. Where a resolve of a city government provided, "That for the purpose of promoting enlistments to fill the city's quota, under" a specified call of the president, a certain bounty should "be paid to each man who has volunteered, or shall volunteer," . . . "the mayor to draw his order on the city treasurer" therefor, "on receiving satisfactory evidence that such man has volunteered, and been accepted and mustered into the military service as a part of said quota," proof that the person claiming the bounty was duly accepted and credited upon that quota by the proper authority is essential to a recovery. *Patten* v. *Bangor*, 345.

3. The memorandum, "credited 4th district, Penobscot county, 3d ward, Bangor city, Me.," made upon the "muster and descriptive roll of the detachment," to which he belonged, by the mustering officer in Florida, where the volunteer reënlisted, did not fix the volunteer upon that quota. *Ib.*

BREACH OF CONDITION.

See DEED, 2, 3, 4. PLEADING, 4.

BROTHER-IN-LAW.

See FENCE VIEWER, 1.

CANCELLATION OF DEED.

See DEED, 11.

CAPITAL.

See CORPORATION, 1.

CARRIER.

1. When a passenger enters a railway train, and pays the regular fare to be transported from one particular station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station. *State* v. *Grand Trunk Railway of Canada*, 176.

2. And when such train turns out upon a side-track, at an intermediate station, and there stops to await the crossing of another train out of time, and the passenger, not destined to that station, without objection made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. *Ib.*

3. When such passenger thus leaves the car, and is on the platform, or near the track when his train is about to start, or the coming train has signalled its approach, the corporation, through its officer or servant, should give reasonable and seasonable notice for such passenger to return to the car, by using

proper diligence, caution, and care; and if there be an established signal by the blowing of the whistle for passengers to resume their places in the cars, that should also be given. *State* v. *Grand Trunk Railway of Canada*, 176.

4. But if the passenger go out of sight, and out of the reach of the voice which gives the usual loud and distinct notice for all passengers to repair on board, the corporation is not required to go after him. *Ib.*

5. If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger,—the corporation incurs the same liability for his safety as if he were in their regular passenger train. *Dunn* v. *Grand Trunk Railway of Can.*, 187.

CASE.

A child of nine years, who, in the day-time, jumps from a sidewalk, lawfully constructed by a railroad company on the side of its railway-bridge, upon the properly constructed draw, while the same is being lawfully closed, is so wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom. *Brown* v. *E. & N. A. R. Co.*, 384.

See DECEIT, 1.

CASH-ITEM.

See EVIDENCE, 1.

CASHIER.

See CONTRACT, 4.

CERTIFICATE.

See ASSIGNMENT, 1. CONTRACT, 3. TAX, 5, 15.

CHARITY.

See PUBLIC CHARITY.

CHIEF ENGINEER.

See CONTRACT, 5.

CHILD.

See ACTION, 3. CITIZEN, 2.

CITATION.

See EVIDENCE, 14. EXECUTOR, &C., 4.

CITIZEN.

1. By virtue of the act of congress, approved Feb. 10, 1855, c. 71, a person born out of the jurisdiction of the United States is a citizen thereof, if, at the time of his birth, his father was a citizen of the United States.

Oldtown v. *Bangor*, 353.

2. If a naturalized citizen, after obtaining a legal settlement in a town in this State, removes to the province of New Brunswick, his child born there, upon coming into the State takes the settlement of his father, although the father does not return. *Ib.*

CITY GOVERNMENT.

See BOUNTY, 2.

CITY ORDINANCE.

See WAY, 3.

CLAIMANT.

See LIEN, 3, 6.

COLLATERAL QUESTION.

See EVIDENCE, 5.

COLLATERAL SECURITY.

See BANK, 1.

COLLECTOR.

See TAX, 11.

COLLECTOR'S CERTIFICATE.

See TAX, 15.

COLLECTOR'S NOTICE OF SALE.

See TAX, 13, 14, 15.

COLLECTOR'S RETURN.

See TAX, 15, 16.

COLLECTOR'S WARRANT.

See TAX, 11, 12.

COMMON LAW LIABILITY.

See CONTRACT, 4.

COMPOUND INTEREST.

See BILLS, &c., 3.

CONDITION.

See ASSUMPSIT, 6, 7. DEED, 1, 2, 3, 4, 9, 19. PENALTY, 1. REPLEVIN, 1.

CONDITION SUBSEQUENT.

See DEED, 1, 2, 3, 4. MILL, &c., 1. TOWN, 1.

CONDUCTOR.

See CARRIER, 5.

CONSIDERATION.

See CONTRACT, 3, 9. DECEIT, 1.

CONSTITUTIONAL LAW.

1. The legislature has no authority under the Constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns. *Opinions of Judges*, 590.
2. Nor to authorize towns to establish manufactures entirely on their own account, and run them by the ordinary town officers, or otherwise. *Ib.*

CONSTRUCTION.

See INSURANCE, 3, 4, 5. LEASE, 1. MILLS, &c., 2.

CONTRACT.

1. On May 12th, the defendant purchased by sample of the plaintiffs sixty-six barrels of sound beans. On the 24th June, the defendant ordered, and on the 26th received from the plaintiffs fifteen barrels of medium beans, and thereupon, for the first time, notified the plaintiffs that fifteen barrels of the former lot were mouldy, and he had ordered the latter lot to replace the mouldy ones, which he then returned. In an action to recover for the latter lot, *Held*, that the latter lot could not be substituted for the mouldy beans without the assent of the plaintiffs, and that the plaintiff could recover their value on account annexed. *Woodward* v. *Libbey*, 42.

2. Where the payee of a promissory note, payable on time, without interest, upon being asked by the maker if he would accept partial prepayments, and allow interest on them, replied, "I think it will be all right, there will be no trouble about it," the maker might thereby understand the payee as assenting to the allowance of interest. *Parker* v. *Moody*, 70.

3. A writing acknowledging that the subscriber had received the promissory note of another "for five shares of stock in the M. T. Co., and certificates of stock are to issue to" the maker of the note for the same, when ready for issue,—is not a contract for the future sale of the shares, but a recognition that the shares themselves were the consideration of the note. *Hope I. Works* v. *Holden*, 146.

4. A writing, executed by the cashier, acknowledging the receipt by the bank of certain United States bonds from the maker of a note discounted by the bank, "to be returned to him on the payment of his note in four months, dated May 9, 1866," is not a contract which increases the common-law liability of the bank, even if the cashier had the authority to do so. *Jenkins* v. *National V. Bank of Bowdoinham*, 275.

5. A railroad sub-contractor, by his written agreement with the contractor, agreed "to construct and complete all the grading, earth, rock, and masonry for the road-bed of the Somerset railroad, from the third station north of Otis Hill road-crossing, to the Kennebec river;" "that if any work shall be done by said sub-contractor which is not included in this contract, the price and value of said work shall be determined by the chief engineer;" "that the said work, during its progress, shall be subject to the supervision and inspection of said engineer, and shall be made to conform, in every respect, to his satisfaction;" "that with a view of preventing all disputes and misunderstandings, and for the speedy adjustment of such as may occur, the chief engineer shall determine the amount or quantity of the several kinds of work herein contracted to be done, and shall decide every question which can or may arise relating to the execution of work under this contract, on the part of the sub-contractor, and his decision shall be final." The sub-contractor did work on the foundation of the bridge across the Kennebec river, which was accepted and its value estimated by the chief engineer. *Held*, that the work on the bridge foundation was done under the contract. *Rogers* v. *Hogan*, 305.

6. And an assignment of such a contract by the sub-contractor, and "all the rights and privileges therein mentioned," except the ten per cent due "on all earth, excavations of earth, and masonry and stone delivered on the road to the first of March," carries the value of the work on the foundation of the bridge as estimated by the chief engineer. *Rogers* v. *Hogan*, 305.

7. If the parties to an illegal contract are not in *pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in an action for money had and received. *Concord* v. *Delaney*, 309.

8. One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former. *Paul* v. *Meservey*, 419.

9. Thus, where, pursuant to the sale by the plaintiff to the defendant of a mare with foal, the defendant paid the plaintiff twenty-five dollars, and agreed to let him have the colt when four months old, unless he should conclude to keep the colt and pay the plaintiff fifty dollars therefor; but in accordance with a subsequent contract, the plaintiff took back the mare before foaling time, sold her to a third person, and let the defendant have a two years old colt upon the defendant's paying him thirty-seven and one-half dollars boot-money; *Held*, that when the plaintiff took back the mare and sold her, the consideration for the promise of the fifty dollars failed. *Ib.*

See BOND, 1. CARRIER, 1. INFANT, 1.

CONTRADICTION.

See EVIDENCE, 2, 3.

CONVERSION.

See TROVER, 3.

CORPORATION.

1. By R. S. of 1857, c. 48, § 9, manufacturing corporations are prohibited to contract debts exceeding, at any one time, the amount of their capital invested within the State in real estate and fixtures thereon, including machinery; and from becoming indebted to an amount exceeding one-half their capital paid in and remaining undivided, and of their other property and assets. When they comply with these prohibitions and limitations, their stockholders are relieved from all individual liability for their debts. When either of these limitations is violated, their stockholders become individually liable for debts of the corporation in the manner provided in c. 46. *Lovegrove* v. *Hunt*, 9.

2. The liability arising under c. 48, § 9 is to be made available to creditors of the corporation in the manner prescribed in c. 46, § 24. *Ib.*

See CARRIER, 1, 3, 4. DEED, 19.

COSTS.

The prevailing plaintiff, in an action of trespass *quare clausum*, is entitled to have the reasonable costs of a survey made by order of court included in the taxation of his costs. *Leighton* v. *Haynes*, 408.

See AMENDMENT, 1. PRACTICE, 2. SET-OFF, 2.

COUNTY.

See DEED, 19.

COUNTY COMMISSIONERS.

The court of county commissioners is not a court of record within the meaning of R. S. of 1857, c. 81, § 92 (R. S., c. 81, § 79).

Mooers v. *Ken. & Portl. R. R. Co.*, 279.

See EQUITY, 3. INDICTMENT, 1. LIMITATIONS, &c., 1. NUISANCE, 1.

COURT OF RECORD.

See COUNTY COMMISSIONERS.

COVERTURE.

See DIVORCE, 3.

DAM.

See DEED, 6.

DAMAGES.

1. Where, in an action under R. S., c. 51, § 31, to recover damages for property injured by fire, communicated by a locomotive engine, the plaintiff has an absolute title to the whole property destroyed, he may recover for the whole injury although he held the title as security for a debt, and had agreed, that, upon payment of the debt, he would reconvey.

Bean v. *At. & St. L. R. Co.*, 82.

2. And where the plaintiff had a policy of insurance upon a building thus destroyed, and, upon payment of the amount of the debt for which he held the property as security by the insurers, he assigned to them the statute claim with a stipulation on their part, that any excess recovered by the insurers, beyond the amount paid to him by them, should belong to him,—the insurers may recover in the name of the plaintiff, for the whole injury. *Ib.*

3. In an action against a town for an injury to a stage-coach caused solely by a defect in a highway, the loss of the use of the coach for a reasonable time, while it is being repaired, is not an element of damage.
McLaughlin v. *Bangor*, 398.

4. A defendant in replevin is entitled to the value of the property replevied at the time of rendition of judgment for a return. *Tuck* v. *Moses*, 461.

5. A large quantity of wood having been replevied from an attaching officer, the actions in which the attachments were made proceeded to judgment and execution, and the full value of the word was insufficient to satisfy the executions. The replevin writ was abated because the replevin bond was not "in double the value of the goods to be replevied;" but it was good at common law, and "conditioned as in the prescribed form of the writ." Judgment was thereupon rendered for a return, but not complied with. In an action upon the bond, *Held*, That the market value of the wood having increased since it was replevied, the defendants were liable, (1) for the value of the wood at the date of the judgment for return, with interest at six per cent from the date of that judgment to the date of the judgment on the bond; (2) the cost in the replevin suit with interest for the same time; and (3) for a sum equal to twelve per cent on the value of the wood when replevied from the date of the judgment in the suit in which it was attached, to the date of the judgment for return. *Ib.*

See EQUITY, 3, 4. INFANT, 2.

DATE.

See DEED, 15, 17, 18.

DEBT.

An action of debt will not lie on a sealed instrument wherein is contained no promise to pay any sum of money under any terms or conditions, but a bill of sale of certain tools used in and about the boot and shoe business, together with the vendor's good-will, and an agreement "not to carry on the boot and shoe business in the city of Portland for one year from the date hereof."
Mitchell v. *McNabb*, 506.

DECEIT.

An action on the case for deceit will not lie for inducing the plaintiff to convey to the defendant certain real estate in consideration of a loan of a certain sum of money, and a promise on the part of the defendant to execute to the plaintiff a bond for the reconveyance, on payment of the loan, and a refusal to execute the bond after the conveyance. *Long* v. *Woodman*, 49.

DECLARATION.

See VARIANCE, 1.

DEDICATION.

See WAY, 7.

DEED.

1. Where, "in consideration of having a meeting-house erected and continued upon it," the owner of a certain lot of land duly executed and delivered to the "proprietors of the South Chapel, in Fryeburg," a deed thereof, with the stipulation therein that the "lot being given for a meeting-house lot, is to revert to me, unless it should be improved for that purpose," *habendum* "to the said proprietors and their successors forever, provided it be improved for the above purpose,"—an estate in freehold upon condition subsequent passed.
Osgood v. *Abbott*, 73.

2. What facts fall short of constituting a breach of such condition. *Ib.*

3. Notwithstanding the breach of such condition, the estate will continue in the grantee until defeated by an actual entry made for the purpose of claiming a forfeiture by some one having the right so to do. *Ib.*

4. The heirs of the grantor, after the death of the latter, and after breach, may make such entry. *Ib.*

5. What facts fall short of constituting such an entry. *Ib.*

6. The grant by deed of "a full and perfect right to flow all land belonging to" the grantors, "situated in" a certain town, "and adjoining the Brown brook, so-called, meaning, nevertheless, to grant no right of flowage which would injure *of effect* the privilege of the Philpot mill, so-called,"—conveyed the right to flow such only of the grantors' lands there as would be flowed by a dam, so constructed as not to interfere with the Philpot mill-privilege as it existed at the date of the grant. *Webster* v. *Holland*, 168.

7. When a line described in a deed as running from a given point, is soon afterwards located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed.
Knowles v. *Toothaker*, 172.

8. Thus, Henry Smith conveyed to the defendant so much of his land as lay north of a line extending from a given point easterly, and "parallel with the north line of lot No. 9, to the county road," and thereupon, after causing the line to be surveyed, and marked on the face of the earth by stakes and stones and spotted trees, they built thereon a fence, intending it as the division fence, and respectively occupied thereto for six years, when Smith conveyed his remaining land to the plaintiff's grantor, running "to land supposed to be owned by" the defendant, "thence easterly on said" defendant's "south line to the county road;" *Held*, that the clause, "thence easterly on the said defendant's south line," limited the plaintiff's land to the fence, although the real line, as given in the deed, lay some rods north of the fence. *Ib.*

9. M. L. conveyed land, by deed of warranty, to his father, S. L., conditioned that, if the grantor "maintained and supported" S. L. and wife, and paid his sister S. three hundred dollars, the deed should be void. Subsequently, M. L.

having died without issue, the land descended to S. L., who thereupon conveyed it to his other son, M., by deed of quitclaim, "in consideration of the conditions to be performed for me and mine by" M., "agreeably to the deed of the late M. L. to me;" the acceptance of the latter deed rendered M. personally liable to perform the conditions mentioned, but created no lien upon the land. *Norris* v. *Laberee*, 260.

10. In such case, the deed having been made as the parties intended, without any wrongful insertions or negligent omissions, a court of equity will not, after twenty years, interfere to reform it, so that it will have the legal effect expected. *Ib.*

11. Nor to cancel a deed, alleged to be fraudulent, on the prayer of one having no interest in the land thus conveyed. *Ib.*

12. If a deed of real estate describes one of the lines as ending at a point on one side of a street "opposite" a point on the other side, a straight line between the two points must cross the street at a right angle; and parol evidence is not admissible to show that a line ending at a different point was intended. *Bradley* v. *Wilson*, 357.

13. In a deed from the Penobscot Indians, to the Commonwealth of Massachusetts, releasing all right, title, and interest to the lands lying on each side of the Penobscot river, commencing at Nichols Rock and extending up the river thirty miles, was the following clause: "Excepting and reserving to the said tribe all the islands in said river above Oldtown, including said Oldtown Island, within the limits of the said thirty miles," *Held*, that five islands lying along side of Oldtown Island, were not embraced within the exception. *Penobscot Indians* v. *Veazie*, 402.

14. A deed of land given by the treasurer of State for the non-payment of a State tax, describing the premises as "one-fourth, No. 5, R. 8, W. E. L. S.," is void on account of the vagueness of the description of the premises. *Larrabee* v. *Hodgkins*, 412.

15. If, under a license duly issued by the probate court, an administrator, after taking the oath and giving the bond prescribed by the statute, regularly sell the land described in his license, at public auction, and execute and deliver a deed thereof to the purchaser, within a year from the date of his license, then the title passes, although the deed was not acknowledged until after the expiration of the year. *Poor* v. *Larrabee*, 543.

16. *Aliter*, where the land was duly sold and struck off to the purchaser, but the deed thereof was not executed and delivered until afterwards. *Ib.*

17. In the absence of other evidence a deed may be presumed to have been executed and delivered on the day of its date. *Ib.*

18. Where an administrator's deed was dated within a year from the date of his license, but was not acknowledged until after, the more prudent course, in the absence of other controlling facts, is to require such a turn to be given to all doubtful matters *ut res magis valeat quam pereat.* *Ib.*

19. In 1802, John Church, by his deed of warranty, in consideration of $100, conveyed certain land, covering the demanded premises, to "David Moors, treasurer of the First Meeting-house Society in the center of Farmington," a voluntary, unincorporated association, "and his successors in said office, for the use of

said society so long as it shall be improved for public use," *habendum* "to the said Moors and his successors in said office, to the use of said society to their use and benefit forever." A meeting-house was soon afterwards erected upon a portion of the land, pews sold, and the house occupied for public worship by several denominations for a series of years. In 1822, pursuant to action of the association, several of the original associates, "their associates and assigns," were incorporated into a body politic by the name of "The Proprietors of the Center Meeting-house in Farmington," and the act of incorporation provided "that the land heretofore conveyed to D. Moors, treasurer of said proprietors, and now deceased, . . . be and hereby is confirmed to such treasurer as said proprietors shall hereafter choose for the use and benefit of said proprietors, . . . and the treasurer, so hereafter to be chosen, shall be, to all intents and purposes, the successor of said Moors." The proprietors organized under their charter, chose John Church, jr., treasurer, confirmed all votes passed prior to incorporation, and, in 1824, erected forty-five pews in the gallery, and sold them, and their treasurer executed deeds thereof to the purchasers. In the same year, by an additional act of the legislature, the proprietors were authorized to make alterations, additions, and improvements of the house and such improvement of the land "as is designated and intended in the grant thereof." In June, 1839, pursuant to a vote duly recited in the deed, "The Proprietors of the Center Meeting-house in Farmington, by John Church, jr., their treasurer, in consideration of one dollar," executed and delivered unto the inhabitants of the county of Franklin and their successors forever, a deed of quitclaim of the demanded premises, with a covenant of warranty against the "lawful claims and demands of all persons claiming by, through, or under them," "for the purpose of a site for a court-house, for the use of said county, provided the same shall be accepted by the county commissioners as a full equivalent of all claims of said county on any individuals thereof for furnishing a court-house for ten years, reserving the use of said meeting-house for town meetings and meetings of worship in the lower story so long as the same shall remain standing, but with liberty to the county to rebuild, alter, repair, or fit up the same in a proper manner for holding the courts, and also conditioned that said deed shall be void whenever a court-house is erected on any other site." In February, 1838, John Church quitclaimed to The Proprietors of the Center Meeting-house the land originally granted to Moors, including the site of the old meeting-house, to be "always used for some public building, court-house, town-house, or meeting-house." In 1839, the county took possession, removed most of the pews in the second story, fitted it up for a court-room, and have retained possession thereof and held courts therein ever since. In 1852, the remaining gallery-pews were removed against the objections of the owners, and further repairs made. In 1867, at an annual meeting of the proprietors, the plaintiff was duly chosen treasurer, and certain others trustees, who were instructed by a vote of the proprietors "to take such measures for the defense of" the proprietors' "rights in the Center Meeting-house as they think proper," under which vote the plaintiff, as treasurer, brought this real action to recover possession of the premises claiming the legal title to be in the treasurer as trustee of the proprietors; *Held*, (1) That Moors took a fee-simple conditional in trust for the use and benefit of the original associates and those who might afterwards become members of the association by the purchase or inheritance of pews; (2) That at the decease of Moors, the estate descended to his heirs at

law charged with the trust; (3) That the plaintiff, as the successor of John Church, jr., is estopped by the deed of the proprietors, executed by the latter; (4) That the plaintiff, as treasurer, cannot assert a title against the grantee of the proprietors; (5) Whether the legislature could and did by the additional act transfer the legal title from Moors' heirs to the treasurer of the corporation to be chosen, *quære*; (6) That if such act did operate as such a transfer, it vested both the legal and equitable estate as a use executed in the corporation; (7) That the effect of J. Church's quitclaim deed to the corporation in 1838 was to abrogate the conditions annexed to the original grant so far as they attached to the immediate site of the meeting-house; (8) That the pew-owners did not become tenants in common of the estate on which the house stood, but were entitled to a beneficial interest, and as against the grantees of the corporation could vindicate their rights only in equity; (9) That the county may avail itself of the limitation bar; and (10) That the case exhibits none of the elements of a public charity. *Craig* v. *Franklin Co.*, 479.

See ASSUMPSIT, 6, 7. PAROL DEMISE. REAL ACTION, 4.

DEFAULT.

See JUDGMENT, 3. LIEN, 6.

DEFECT IN HIGHWAY.

See HUSBAND, &c., 1. WAY, 3, 4, 5.

DEFENSE.

See DAMAGES, 3. ASSUMING DEFENSE.

DEMAND.

See ATTACHMENT, 5. EQUITY, 4. TAX, 13. TROVER, 3.

DEMISE.

See PAROL DEMISE.

DEMURRER.

See EQUITY, 3, 4, 10. PLEADING, 4, 6, 8.

DEPOSIT.

See EVIDENCE, 12, 13. EXECUTOR, &c., 3. PRACTICE, 22, 23, 24.

DEPOSITION.

See EQUITY, 1. PRACTICE, 10, 11.

DEPUTY-SHERIFF.

See ABATEMENT, 2, 3.

DESCENT.

See DEED, 19.

DESCRIPTION.

See DEED, 14. TAX, 6, 7, 8, 9, 14.

DIRECTOR.

See ABATEMENT, 6.

DISAGREEMENT.

See PRACTICE, 5, 9.

DISCONTINUANCE.

See PRACTICE, 2.

DISQUALIFICATION.

See JUROR, 1.

DISSOLUTION.

See TRUSTEE PROCESS, 4.

DISTRIBUTION.

See PROBATE COURT, 2, 3.

DIVORCE.

1. Upon a libel therefor, in behalf of the wife, alleging constant faithfulness on her part, but extreme cruelty on a day certain, and on divers other days and times since that day, on the part of her husband, to which the respondent pleaded

traversing all the allegations therein, the unreversed judgment of a court having jurisdiction of process and parties, adjudicating that "the allegations of said libel being satisfactorily proved," a divorce, *a mensa*, is decreed, is conclusive between the parties, as to their conduct towards each other during the continuance of their matrimonial relation to the date of the judgment. *Slade* v. *Slade*, 157.

2. The parties to a libel for divorce, *a vinculo*, tried by the presiding justice, at *nisi prius*, are entitled to the right of alleging exceptions to rulings admitting testimony. *Ib.*

3. A woman, after a divorce *a vinculo*, may maintain an action against her former husband, on a promissory note given by him to her in 1861, during coverture, for money borrowed of and belonging to her. *Webster* v. *Webster*, 139.

4. The fact that the husband has already obtained a divorce *a vinculo*, is no bar to the granting of a like divorce to the wife, when, in the exercise of a sound discretion, it is deemed reasonable and proper. *Stilphen* v. *Stilphen*, 508.

See PLEADING, 9.

DOMICILE.

1. The jurisdiction assumed by a judge of probate, so far as it depends upon the residence of any person, cannot be contested except on appeal in the original case, unless there is fraud, or want of jurisdiction apparent upon the face of the record. *Record* v. *Howard*, 225.

2. Administration commenced upon the assumption that the deceased was a citizen of Maine, must be closed upon the same assumption, and it will not be competent for parties adversely interested to show that the deceased was a citizen of another State to affect the distribution of the estate. *Ib.*

3. Thus, where administration was granted upon a representation that the deceased at the time of her death was a citizen of Maine, and the record states that this fact was made fully to appear, and there was no suggestion of fraud, and no appeal from the decree of the probate court granting the administration, and the settlement of the estate was proceeded with till the administrator had settled his fourth, and final account, and had applied for an order of final distribution; *Held*, that the domicile of the deceased, at the time of her death, must be regarded as conclusively settled, not only for the purpose of giving jurisdiction to the probate court, but also for the purpose of distributing the estate; and that it was not competent to show that the domicile of the deceased, at the time of her death, was in Ohio, and not in Maine, either to show want of jurisdiction in the probate court, or to affect the distribution of the estate. *Ib.*

DOWER.

1. Where a mortgager of real estate, in his lifetime, assigned his property for the benefit of his creditors, and his assignees sold the equity of redemption to the tenants, making the conveyance "subject to a mortgage . . . to be provided for by the purchasers," a payment of the amount due on the mortgage, by the tenants, and an assignment thereof to themselves, operate as an extinguish-

ment of the mortgage; and the mortgager's widow, if she did not join in the deed, may recover dower in the premises, notwithstanding she joined in the mortgage for the purpose of releasing her dower. *Hatch* v. *Palmer*, 271.

2. An assignment of dower made by commissioners appointed without objection by the court of probate, and duly returned to and accepted by the judge of probate, is final and conclusive upon all parties thereto and their privies, when the decree of acceptance is not appealed from. *Poor* v. *Larrabee*, 543.

DRAW.

See ACTION, 3.

EGRESS.

See CARRIER, 1.

ELECTION.

See ATTACHMENT, 7, 8.

ENTRY.

See DEED, 3, 4, 5.

EQUITY.

1. In the hearing of a bill in equity, brought to compel the administrator of the estate of the plaintiff's husband to indorse a note alleged to have been given to her by her husband, the deposition of the plaintiff, to prove the gift, is inadmissible. *Trowbridge* v. *Holden*, 117.

2. A bill alleged, substantially, that the respondent, with intent to defraud the complainant, willfully and knowingly made to him a series of false and fraudulent representations, specifically set out, as to matters of fact relating to the "McKay Sole Sewing Machine," and the "Foreign Sole Sewing Machine Company;" and, that by means of such representations, he induced the complainant to purchase of him a large number of worthless shares in a mock company, and to give him in exchange therefor, a conveyance of several lots of land situate in this State, praying that the conveyance be decreed void and the respondent ordered to reconvey to the complainant. On demurrer, *Held*, that the bill be sustained. *Clark* v. *Robinson*, 133.

3. To a bill in equity brought under R. S., c. 51, § 10, "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, the objection that the damages were fixed by the county commissioners, more than six years before the filing of the bill, may be taken as a defense by demurrer. *Mooers* v. *Ken. & Portl. R. R. Co.*, 279.

4. A bill "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, must allege a specific demand, on a day certain, more than thirty days before the filing of the bill, or it will be bad on demurrer. *Mooers* v. *Ken. & Port. R. R. Co.*, 279.

5. If the creditor of a husband would hold land conveyed to the wife by a *bona fide* grantee of the husband, and paid for out of the property of the husband, he must do it by a bill in equity and not by a levy. *Webster* v. *Folsom*, 230.

6. And it makes no difference that the husband's conveyance was made with a design, on his part, to defraud his creditors, and that the wife participated in such design, and joined in the deed for the purpose of releasing her right in dower. *Ib.*

7. Where a deed has been made as the parties intended, without any wrongful insertions or negligent omissions, a court of equity will not after twenty years, interfere to reform it, so that it will have the legal effect expected. *Norris* v. *Laberee*, 260.

8. Nor to cancel a deed, alleged to be fraudulent, on the prayer of one having no interest in the land thus conveyed. *Ib.*

9. A suit in equity cannot be maintained by one who has assigned all his interest in the subject-matter of the suit. *Crooker* v. *Rogers*, 339.

10. The plaintiff's want of equitable interest need not be taken advantage of by demurrer, but the objection may be taken at the hearing on the merits. *Ib.*

11. When the sole surviving defendant in a bill in equity has no interest in the subject-matter of the suit, the bill will be dismissed. *Ib.*

12. A bill in equity cannot be maintained when its only object is to recover a sum of money alleged to be in the hands of the defendant, inasmuch as the plaintiff has a plain, adequate, and complete remedy at law therefor, in an action for money had and received. *Ib.*

13. A bill to redeem land mortgaged may be maintained in the county where the defendant resides, although all the land lies in two other counties. *Smith* v. *Larrabee*, 361.

See DEED, 19.

EQUITY OF REDEMPTION.

See DOWER, 1. EXECUTION, 1, 3. TRUSTEE PROCESS, 3, 5.

ERROR.

See EXECUTION, 6.

ESTOPPEL.

1. In February, 1845, the plaintiffs' father with others, having undertaken to organize themselves into a corporation, under the name of the "Proprietors of the South Chapel in Fryeburg," for the purpose of procuring a site and erecting

thereon a meeting-house, and owning, managing, and disposing of the pews therein, signed, with his associates, a subscription paper, wherein it was stipulated that the meeting-house should "be for the use of the Methodist Episcopal church and society, so long as they shall furnish preachers acceptable to a majority of the proprietors," and wherein he agreed to be responsible for three of the twenty-five shares, "and a meeting-house lot." In June following, he, "in consideration of having a meeting-house erected and continued" on a certain lot, "by the proprietors of the South Chapel in Fryeburg," conveyed it to them, with the stipulation that the "lot being given for a meeting-house lot, is to revert to me, unless it should be improved for that purpose," *habendum* "to the said proprietors and their successors forever, provided it be improved for the above purpose." The same year, the proprietors erected and suitably furnished a meeting-house on the lot, in which there was regular preaching by Methodists from the time of its completion until 1859, when the preaching ceased, the house was suffered to get out of repair, and the stoves and furniture were removed for safety to neighboring dwellings. In 1864, the plaintiffs' father died, intestate. In 1866, the defendants, under the direction of persons acting as the superintending committee of the proprietors, entered, reshingled, and otherwise repaired the house, since which time there has been regular preaching therein by the Methodists. In trespass for entering to repair the house, *Held*, (1) That the plaintiffs are estopped by their father's deed to deny the existence of the "Proprietors of the South Chapel in Fryeburg;" (2) That the defendants can assert the estoppel. *Osgood* v. *Abbott*, 73.

2. The principles of R. S. of 1857, c. 18, § 62, providing that the repair of a way within six years before the cause of action accrued, estops the town to deny the location, apply to a sidewalk. *McCann* v. *Bangor*, 348.

See DEED, 19.

EVIDENCE.

1. A cash item of six dollars and sixty-seven cents is the largest amount that can be proved by a party's book and suppletory oath. *Kelton* v. *Hill*, 114.

2. Statements made by a person out of court, which are inconsistent with his material testimony in the trial of a cause, are competent by way of contradiction. *State* v. *Kingsbury*, 238.

3. Thus where, in the trial of a person for procuring another to maliciously burn a certain meeting-house, the wife of the defendant had testified that no inducements, as testified to by the accomplice, were held forth, on a certain occasion, nor means furnished him by her husband for firing the meeting-house,—it is competent for the purpose of contradicting her, to prove that when her husband was first arrested, and she was informed that the accomplice had turned State's evidence, and charged her husband with inciting him to fire the building, she replied, "Well, he never would have done it if it had not been for others,—others were more to blame than he was." *Ib.*

4. Where, in the trial of a person charged with maliciously burning a meeting-house, it was in evidence that the accomplice fired the building by means of a can of kerosene oil furnished for the purpose by the defendant, testimony that the shirt of the accomplice, when he fired the building, had kerosene stains upon it, is admissible. *Ib.*

5. Answers to collateral questions in cross-examination are conclusive.
State v. *Kingsbury*, 238.

6. Such as asking one, who fired a building at the alleged instigation of the defendant, if he had a mania or strong desire to see burning buildings, or whether or not under the influence of such a feeling he had fired other buildings. *Ib.*

7. R. S. of 1857, c. 119, § 3, recognize meeting-houses as erected for public uses; and proof that such a house was occupied for public worship is sufficient. *Ib.*

8. Telegraphic communications are not privileged. *State* v. *Litchfield*, 267.

9. A telegraphic operator is bound, as a witness, to disclose them. *Ib.*

10. When the evidence equally sustains each of the propositions, that bonds deposited in a bank were either lost, stolen, or misdelivered, neither of them can be regarded as established.
Dearborn v. *National Vill. Bank of Bowdoinham*, 275.

11. If a deed of real estate describes one of the lines as ending at a point on one side of a street "opposite" a point on the other side, a straight line between the two points must cross the street at a right angle; and parol evidence is not admissible to show that a line ending at a different point was intended.
Bradley v. *Wilson*, 357.

12. In the trial of an action on an administrator's bond for an alleged breach in knowingly omitting to include in his inventory an amount of money deposited in a savings bank, it is not competent for the administrator to show by a witness that about the time the administrator was appointed and before he returned his inventory, the witness consulted counsel in behalf of the administrator as to whether or not the deposit should be inventoried, and that the witness communicated to the administrator the advice given.
Bourne v. *Stevenson*, 499.

13. Nor, in such case, is it competent for the administrator to testify that in omitting to inventory the deposit he acted upon the belief, after being so advised by counsel, that it was not a part of the intestate's estate, and that he had no right to include it in his inventory. *Ib.*

14. The judgment of the probate court upon a citation to the administrator to inventory certain property belonging to the estate of his intestate, is not admissible in an action upon the administrator's bond, especially when an appeal from such judgment is pending. *Ib.*

15. The record, "Oxford, ss., March 3, 1862, personally appeared William Woodsum, and took the oath necessary to qualify him to discharge the duties of clerk of the town of Peru for the ensuing year, according to law, before me, Samuel Holmes, moderator. A true copy of certificate, William Woodsum, town clerk," is sufficient evidence of a compliance with R. S., c. 3, § 17; and that the oath prescribed in § 14 was administered. *Greene* v. *Lunt*, 518.

See EQUITY, 1. LIEN, 6. MORTGAGE, 4.

EXCEPTION AND RESERVATION.

See DEED, 13.

EXCEPTIONS.

1. A party cannot sustain exceptions to an instruction which is more favorable to him than the one which he requested to be given. *Staples* v. *Wellington*, 453.

2. Thus, where a requested instruction contained the two propositions, (1) that the assignee of a debt need not notify the debtor of the assignment, and (2) that if notice were given by the assignor or any third person, it would be sufficient to put the debtor upon inquiry to ascertain the fact; and the instruction given negatived the necessity of notice by the assignee, and affirmed the sufficiency of notice from any reliable source, as withdrawing the right of the debtor to pay the assignor; *Held*, that as a notice, coming from an unreliable source, would not be sufficient to induce inquiry, the instruction given was more favorable to the debtor than the one requested by him, and that he cannot sustain exceptions thereto. *Ib.*

3. In the trial of an action on an administrator's bond for an alleged breach in knowingly omitting to inventory a certain sum of money deposited in a savings bank and belonging to the estate, the presiding judge declined to instruct the jury, at the defendant's request, that if they believed the testimony of a certain witness as to what the intestate said and did when the bank-book was put into the witness' hand, that transaction amounted to a gift of the money to two certain persons; but he did accurately state to the jury the law concerning gifts; *Held*, that the defendant had no cause for exception. *Bourne* v. *Stevenson*, 499.

See DIVORCE, 2. PRACTICE, 10, 11, 21, 24.

EXECUTION.

1. It is not necessary that an officer's return of a sale of an equity of redeeming land from a mortgage should specify the day or hour or particular place of the sale. *Townsend* v. *Meader*, 288.

2. It is sufficient in this respect if it appear by the return that the time required by the statute intervened between the time of giving the notice and that of making the sale. *Ib.*

3. Thus, a return of a sale of an equity of redeeming land situated in Gardiner, is sufficient as to notice which recites that "on the first day of September, 1858, I gave notice in writing of the time and place of sale to the within named" debtor, "in person, and I gave public notice of the time and place by posting up notifications thereof in two public places in . . . two adjoining towns, and also in a public place in" Gardiner, "thirty days before the time of sale; and I also caused an advertisement of the time and place of sale to be published three weeks successively before the day of sale in the *Northern Home Journal*, a public newspaper printed in" Gardiner, "in said county; and afterwards, on the sixth day of October, at a public auction held at the Gardiner hotel, in the city of Gardiner, I sold," etc. *Ib.*

4. A levy upon real estate, made by virtue of an execution issued upon a judgment, wherein the debt or damage recovered exceeds the amount of the *ad damnum*, dates from the time of the levy, and does not relate back to the time of the attachment. *Morse* v. *Sleeper*, 329.

5. Such a levy is effectual to pass the debtor's title to the creditor and his assigns. *Morse* v. *Sleeper*, 329.

6. By reason of R. S. of 1857, c. 82, § 10, such an error cannot be made available for the purpose of reversing the judgment, "when the person and case can be rightly understood." *Ib.*

7. A levy made upon an undivided fifth of the execution debtor's estate held in common, is valid under R. S. of 1857, c. 76, § 7, provided the return states the debtor's ownership of the part taken, although it should appear that the debtor actually owned more. *Ib.*

8. It is essential to the validity of a levy made upon an undivided portion of the land, of which the execution debtor is seized in fee and in severalty, that it appear by the return that the premises levied on could not be "divided by metes and bounds without damage to the whole." *Ib.*

9. A levy upon the land of one of the several execution debtors will be invalid unless the return show with certainty that the debtor, whose estate has been taken, chose one of the appraisers, or neglected to do so upon being duly notified. *Ib.*

See SCIRE FACIAS, 1. SET-OFF, 1, 3.

EXECUTOR AND ADMINISTRATOR.

1. The legal representative of an intestate estate is the only party who can recover money due on a policy of insurance upon the life of the intestate. *Lee* v. *Chase*, 432.

2. To recover against a defendant, as an executor *de son tort*, under R. S., c. 64, § 37, the defendant should be declared against as an executor. *Ib.*

3. An omission on the part of an administrator to include in his inventory, within the time prescribed by the statute, an amount of money deposited in a savings institution, known by him when he accepted his trust to belong to the estate of his intestate, is a breach of his official bond. *Bourne* v. *Stevenson*, 499.

4. A citation to the administrator to inventory property belonging to the estate is not a necessary prerequisite to the maintenance of an action on the administrator's bond, for knowingly omitting to inventory such property. *Ib.*

See BILLS, &C., 1. EQUITY, 1. EVIDENCE, 12, 13, 14. EXCEPTIONS, 3. PRACTICE, 22, 23, 24. PROBATE COURT, 2, 3. REVERSION, 1.

EXEMPTION FROM ATTACHMENT.

See ATTACHMENT, 6, 7, 8.

EXEMPTION.

See ATTACHMENT, 6, 7, 8.

EXTINGUISHMENT.

See MORTGAGE, 1.

FARE.

See CARRIER, 1, 5.

FEE-SIMPLE.

See DEED, 19. REAL ACTION, 1.

FEE-TAIL.

See REAL ACTION, 1. WILL, 2.

FENCE VIEWERS.

An assignment of a partition fence by fence-viewers, one of whom is a brother-in-law of one of the owners of the adjacent land, is void.
Conant v. *Norris*, 451.

FIRE.

See DAMAGES, 1.

FIRST EXECUTION.

See SET-OFF, 3.

FISH.

See BOND, 2.

FIXTURE.

See CORPORATION, 1.

FLOWAGE.

See DEED, 6. MILL, &c., 1, 2.

FORECLOSURE.

See MORTGAGE, 2, 3, 4, 5.

FORFEITURE.

See DEED, 3. MILL, &c., 1.

FRAUDULENT CONCEALMENT.

See LIMITATIONS, &c., 4, 5.

FRAUDULENT CONVEYANCE.

See EQUITY, 6.

FRAUDULENT DEED.

See EQUITY, 8.

FRAUDULENT REPRESENTATION.

See EQUITY, 2.

FRAUDS, STATUTE OF.

1. A verbal promise to pay the debt of another, in consideration of funds in the hands of the party promising, is not within the statute of frauds, and may be enforced. *Stewart* v. *Campbell*, 439.
2. But a verbal promise to pay the debt of another, in consideration of forbearance of the creditor to sue the debtor, is within the statute of frauds, and cannot be enforced. *Ib.*
3. Thus, the plaintiff's debtor, having a debt against one D., and a lien therefor upon a vessel which D. was building for the defendants, told the plaintiff that inasmuch as D. had refused to pay the plaintiff's demand, according to a previous promise, the plaintiff should have the benefit of his lien-claim. Whereupon, the defendants told the plaintiff that they did not want the vessel detained for so small a bill, and promised him that if D., upon his return, did not pay him the sum owed by his debtor, they would see it paid. The plaintiff did not discharge his debtor, nor did his debtor release D. or his lien on the vessel, though he did not enforce it as he would have done, had he not believed the debt would be paid by D. or the defendants. In an action to recover of the defendants the plaintiff's debt against his debtor; *Held*, that the promise is within the statute of frauds. *Ib.*

FREIGHT TRAIN.

See CARRIER, 5.

GENERAL ISSUE.

See PLEADING, 7.

GENERAL PERFORMANCE.

See PLEADING, 2.

GIFT.

To establish a gift of the note of a third person, from a husband to his wife, the evidence should be such as to satisfy the court not only that the donor said and did what is necessary to constitute a valid gift, but that it was, in very deed, his intention, at the time, to part with his own property in it, and bestow it upon the donee, for her independent and individual use.

Trowbridge v. *Holden*, 117.

See EQUITY, 1. EXCEPTIONS, 3.

GOOD-WILL.

See DEBT.

GRANT.

See DEED, 6. MILL, &c., 2.

HALLUCINATION.

See INSANITY.

HEIRS MALE.

See WILL, 3.

HIGHWAY,

See WAY, 1.

HIGHWAY SURVEYOR.

See TAX, 12.

HUSBAND AND WIFE.

A husband cannot, even with his wife's consent, maintain an action in his own name alone, for an injury to his wife's horse occasioned by a defect in a highway, while he, having exclusive possession and control of the horse with the wife's consent, was driving along the road alone.

Green v. *N. Yarmouth*, 54.

See EQUITY, 5. EVIDENCE, 3. GIFT, 1.

ILLEGAL CONTRACT.

See CONTRACT, 7.

INCONSISTENT STATEMENT.

See EVIDENCE, 2.

IMPLIED PROMISE.

See ASSUMPSIT, 6, 7.

IMPLIED WARRANTY.

See BILLS, &c., 6.

INDICTMENT.

1. An indictment founded on R. S., c. 51, § 13, is fatally defective unless it allege substantially that the railroad crosses the highway in a manner not determined in writing by the county commissioners.

State v. *Portl., S., & Ports. R. R. Co.*, 46.

2. An allegation that the defendants "did unlawfully and injuriously lay, place, and put down, and cause to be laid, placed, and put down three certain tracks with iron rails in, upon, across, and over said highway," is not sufficient. *Ib.*

See PRACTICE, 8, 26.

INDIVIDUAL LIABILITY.

See CORPORATION, 1, 2.

INDIVIDUAL USE.

See GIFT, 1.

INDIAN TITLE.

See REAL ACTION, 4.

INDORSEMENT.

See BILLS, &c., 5, 6.

INFANT.

1. When an infant has legally avoided his contract for labor, the rights of the parties thereto are precisely the same as if it had never been made. *Derocher* v. *Continental Mills*, 217.
2. Thus, where a minor, who agrees to work for a manufacturing corporation six months, at least, and give no less than two weeks' notice before leaving, but does leave before the expiration of the time, and without giving such notice, he is not liable to have the damages occasioned thereby deducted from what he would otherwise be entitled to recover for his labor. *Ib.*
3. A minor may maintain an action by his mother and next friend, with her consent, on an express contract for his services, made on his own account, after the death of his father. *Boynton* v. *Clay*, 236.
4. An infant is liable in assumpsit for money stolen, and for the proceeds of property stolen by him, and converted into money. *Shaw* v. *Coffin*, 254.

INGRESS.

See CARRIER, 1.

INJUNCTION.

See EQUITY, 3.

IN PARI DELICTO.

See ASSUMPSIT, 1.

INSANITY.

There is no presumption of law as to the continuance of a temporary hallucination or delusion resulting from disease; and a party claiming to avoid a contract by reason thereof, must show its existence at the time of the making of the contract, and that the hallucination was of a character affecting his capacity to make the contract sought to be avoided. *Staples* v. *Wellington*, 453.

INSTRUCTION.

See PRACTICE, 3, 22, 23, 24.

INSURANCE.

1. Where, in an action under R. S., c. 51, § 31, to recover damages for property injured by fire, communicated by a locomotive engine, the plaintiff has an absolute title to the whole property destroyed, he may recover for the whole injury although he held the title as security for a debt, and had agreed, that, upon payment of the debt, he would reconvey.

   Bean v. *At. & St. L. R. Co.*, 82.

2. And where the plaintiff had a policy of insurance upon a building thus destroyed, and, upon payment of the amount of the debt for which he held the property as security by the insurers, he assigned to them the statute claim with a stipulation on their part, that any excess recovered by the insurers, beyond the amount paid to him by them, should belong to him,—the insurers may recover in the name of the plaintiff, for the whole injury. *Ib.*

3. In a policy of insurance on a vessel, the words, "prohibited from the River and Gulf of St. Lawrence between September first and May first," constitute a warranty that the vessel shall not enter those waters within the time mentioned. *Cobb* v. *Lime Rock F. & M. Ins. Co.*, 326.

4. The words are to be construed in their ordinary and popular sense, unless by some known usage of trade they have a different meaning. *Ib.*

5. The usage or the construction given to particular words in Boston, Mass., will not affect a policy of insurance upon a vessel made at Rockland, Maine, containing the same words, unless a similar usage or the same construction is shown to exist in the latter place. *Ib.*

6. Where, after judgment on a marine policy recovered in the name of the owner of one-eighth interest, alone, the owner of the remaining seven-eighths settled with the attorney recovering judgment, by agreeing with him as to the amount of fees he should receive, and receiving from him the balance of a partial collection on the execution, after the deduction of the amount of his fees, together with the execution, the balance of which the defendant subsequently collected, and thereupon agreed to pay to the assignee of the one-eighth interest, his share thereof; it was held, that the acts of the defendant constituted a ratification of the original suit, and that assumpsit would lie upon the special promise by the assignee. *Vose* v. *Treat*, 379.

See DAMAGES, 2. PARTNERSHIP, 1.

INTENTION.

See GIFT, 1. PAUPER, 1.

INTEREST.

1. In the absence of any special agreement to that effect, interest cannot be law-

fully claimed on partial prepayments made on a promissory note payable on time, without interest. *Parker* v. *Moody*, 70.

2. Where the payee of a promissory note, payable on time, without interest, upon being asked by the maker if he would accept partial prepayments, and allow interest on them, replied, "I think it will be all right, there will be no trouble about it," the maker might thereby understand the payee as assenting to the allowance of interest. *Ib.*

See COMPOUND INTEREST, 1.

INTERMEDIATE STATION.

See CARRIER, 1, 2.

INTERRUPTION OF RESIDENCE.

See PAUPER, 2.

INTOXICATING LIQUORS.

See PAYMENT, 1.

INVENTORY.

See EVIDENCE, 12, 13, 14. EXCEPTIONS, 3. EXECUTOR, &C., 3, 4. PRACTICE, 22, 23. TAX, 5.

INVOICE.

See TAX, 10.

ITEM OF CREDIT.

See MUTUAL ACCOUNT, &C., 1. PRACTICE, 3.

JUDGE OF PROBATE.

See PROBATE COURT.

JUDGMENT.

1. Upon a libel therefor, in behalf of the wife, alleging constant faithfulness on her part, but extreme cruelty on a day certain, and on divers other days and times since that day, on the part of her husband, to which the respondent pleaded

traversing all the allegations therein, the unreversed judgment of a court having jurisdiction of process and parties, adjudicating that "the allegations of said libel being satisfactorily proved," a divorce, *a mensa*, is decreed, is conclusive between the parties, as to their conduct towards each other during the continuance of their matrimonial relation to the date of the judgment.
Slade v. *Slade*, 157.

2. By virtue of the 35th Rule of Court, unless the prevailing party, within three months after judgment is ordered, files all papers and documents necessary to enable the clerk to make and enter the judgment and complete the record, judgment cannot be afterwards recorded unless, upon petition and notice to the adverse party, the court, at a subsequent term, order it.
Townsend v. *Meader*, 288.

3. Hence, if the defendant be defaulted in an action upon a mortgage, and the plaintiff refuse to file the papers necessary to enable the judgment to be made up, an entry upon the docket of "judgment as on a mortgage," made at the instigation of the defendant, after default and adjournment of the court, is not binding upon the plaintiff. *Ib.*

4. When an action by trustee process is commenced prior to one by the principal defendant against the trustee, a judgment in the latter action in favor of the trustee is not conclusive upon the plaintiff in the former upon the question of the trustee's discharge. *Webster* v. *Adams*, 317.

5. By reason of R. S., c. 82, § 10, a judgment wherein the debt or damage exceeds the amount of the *ad damnum*, cannot for that reason be reversed "when the person and case can be rightly understood." *Morse* v. *Sleeper*, 329.

See DIVORCE, 1. LIMITATIONS, &c., 1. PLEADING, 4, 6. SET-OFF, 1. TRUSTEE PROCESS, 4. ASSIGNMENT, 2. EXECUTION, 6. DOWER, 2. REPLEVIN, 2, 4, 6, 7.

JURISDICTION.

See PROBATE COURT, 1, 2, 3.

JUROR.

To be a sufficient ground for disqualifying a juror from sitting in the trial of a criminal prosecution, the opinion formed by him must be fixed and unconditional. *State* v. *Kingsbury*, 238.

JURY.

See PRACTICE, 5, 9, 12.

LAW AND FACT.

1. The question, "For how much of the amount due from the defendant, the laborer has a lien on the vessel attached," is, under R. S., c. 91, § 16, at the

request of either party, to be determined by a jury; and if a jury-trial be waived, this question shall be decided by the court, on a hearing or report of an auditor appointed by the court. *McCabe* v. *McRea*, 95.

2. Where the amount of an item of credit in a plaintiff's account, annexed to the writ, is conceded by both parties to be erroneous, and no specific amount is agreed upon, it is for the jury to fix the amount from the evidence. *Kelton* v. *Hill*, 114.

3. The degree of credit to be given to any witness, including an accomplice, is to be determined by the jury. *State* v. *Litchfield*, 267.

LEASE.

If a lease of land be made to a person, "to hold for the term of the life of the said" lessee, "and the life of her husband" named, "and the life of" another person named, the estate is not terminated with the death of the lessee. *Flagg* v. *Badger*, 258.

LEGAL DISABILITY.

See REVERSIONER.

LETTERS-PATENT.

See ASSIGNMENT, 1.

LEVY.

See EXECUTION, 4, 5, 7, 8, 9. EQUITY, 5.

LEX LOCI CONTRACTUS.

See BILLS, &c., 2.

LIBEL.

See DIVORCE, 1, 2. PLEADING, 9.

LICENSE.

1. If, under a license duly issued by the probate court, an administrator, after taking the oath and giving the bond prescribed by the statute, regularly sell the land described in his license, at public auction, and execute and deliver a deed thereof to the purchaser, within a year from the date of his license, then the title passes, although the deed was not acknowledged until after the expiration of the year. *Poor* v. *Larrabee*, 543.

2. *Aliter*, where the land was duly sold and struck off to the purchaser within the year, but the deed thereof was not executed and delivered until afterwards. *Poor* v. *Larrabee*, 543.

See DEED, 18. REVERSIONER.

LIEN.

1. The writ for enforcing a laborer's lien on a vessel, under Public Laws of 1858, c. 15 (R. S., c. 91, § 7), need not allege whether the labor was done before or after she was launched. *McCabe* v. *McRea*, 95.

2. The lien attaches, notwithstanding the labor was performed for one who contracted with the owner. *Ib.*

3. If the claimant would avoid the lien, he must show that the laborer has knowingly surrendered or waived it. *Ib.*

4. A person claiming a lien, for labor on a vessel, is required to state in his specification, the name of the owner only when he knows it. *Ib.*

5. It is no defense, to an action for enforcing a lien on a vessel after she is launched, that the officer making the attachment took a receiptor. *Ib.*

6. Where, in an action to enforce a lien upon a vessel, brought by a laborer against one who contracted with the owner, the defendant is defaulted, such default is not evidence against the claimant as to the amount of the lien on the vessel. *Ib.*

See DEED, 9. LAW, &c., 1. TAX, 6.

LIFE-ESTATE.

See REVERSIONER. WILL, 1, 2.

LIMITATIONS, STATUTE OF.

1. To a judgment of county commissioners, fixing the damages for real estate taken for the location of a railroad, the statute of limitations is a bar after six years. *Mooers* v. *Ken. & P. R. R. Co.*, 279.

2. On April 28, 1855, J. & Co., for their own benefit, gave their negotiable promissory note to F., the plaintiff's intestate and the defendant, each of whom indorsed it and duly received notice of its having been protested for non-payment. On April 30, 1855, J. & Co. mortgaged an ample stock of goods to the defendant and another to secure the payment of this and another note, but, in the following October, the defendant discharged the mortgage without receiving payment of the former note. On Dec. 29, 1858, F. took up the note, and, on Dec. 24, 1864, demanded one-third of the amount paid therefor of the plaintiff as administratrix, who paid it and thereupon brought this suit for the amount thus paid. *Held*, that whatever cause of action the plaintiff may have had against the defendant by reason of the note was barred by the statute of limitations. *Luce* v. *McLoon*, 321.

3. In order that an item of credit in an open and mutual account current may take the account out of the operation of the statute of limitations, it must appear that the credit was authorized by the defendant himself, or some one legally competent to act for him. *Sawyer* v. *Lufkin*, 429.

4. If the payee of a negotiable promissory note, by his indorsement thereof "without recourse," impliedly warrants that it was given for a valuable consideration, such liability accrues when the indorsement is made; and the statute of limitations then begin to run. *Blethen* v. *Lovering*, 437.

5. The "fraudulent concealment of the cause of action" must be proved in order to avoid the statute of limitations upon that ground. *Ib.*

6. The statute of limitations does not begin to run against a reversioner during the continuance of the particular estate. *Poor* v. *Larrabee*, 543.

See DEED, 19.

LINE.

See DEED, 7.

LIQUIDATED DAMAGES.

See BOND, 2. PENALTY.

LIQUORS.

See PAYMENT, 1.

LISTS.

See TAX, 9, 12.

LOCATION OF RAILROAD.

See EQUITY, 34.

LOCOMOTIVE.

See DAMAGES, 1.

MACHINERY.

See CORPORATION, 1.

MALICIOUS BURNING.

See EVIDENCE, 3, 4.

MANDAMUS.

Whether mandamus would be a proper remedy for the raiload company to compel the issuing of the bonds of the town, in case the conditions of the vote had been complied with by the railroad company, *quære.*

P. & O. R. R. Co. v. *Hartford,* 23.

MANUFACTURING CORPORATION.

See CORPORATION, 1. INFANT, 2.

MAXIM.

See DEED, 18.

MEETING-HOUSE.

See DEED, 1, 19. ESTOPPEL, 1. EVIDENCE, 3, 4, 7.

MILL AND MILL-DAM.

1. The fact that a fee, of which a complainant is sole seized, is liable to be defeated by the non-performance of some condition subsequent by some former owner, will not preclude the complainant from recovering of a stranger to the title the damages sustained by flowage while he is in possession, no one having entered to claim a forfeiture for condition broken. *Webster* v. *Holland,* 168.

6. The grant by deed of "a full and perfect right to flow all land belonging to" the grantors, "situated in" a certain town, "and adjoining the Brown brook, so-called, meaning, nevertheless, to grant no right of flowage which would injure *of effect* the privilege of the Philpot mill, so-called,"—conveyed the right to flow such only of the grantors' lands there as would be flowed by a dam, so constructed as not to interfere with the Philpot mill-privilege as it existed at the date of the grant. *Ib.*

MILL-PRIVILEGE.

See DEED, 6.

MINOR.

See INFANT, 2.

MOCK COMPANY.

See EQUITY, 2.

MODERATOR.

See EVIDENCE, 15.

MOMENTARY SEISIN.

See SEISIN, &c., 2.

MONEY HAD AND RECEIVED.

See CONTRACT, 7.

MORTGAGE.

1. Where a mortgager of real estate, in his lifetime, assigned his property for the benefit of his creditors, and his assignees sold the equity of redemption to the tenants, making the conveyance "subject to a mortgage . . . to be provided for by the purchasers," a payment of the amount due on the mortgage, by the tenants, and an assignment thereof to themselves, operate as an extinguishment of the mortgage; and the mortgager's widow, if she did not join in the deed, may recover dower in the premises, notwithstanding she joined in the mortgage for the purpose of releasing her dower. *Hatch* v. *Palmer*, 271.

2. When a mortgage describes two parcels of land in different counties, and the notice for foreclosure, describing both parcels, is published according to law in a newspaper printed in each county, a copy of the notice published in each county, with the name and date of the paper in each county in which it was last published, duly recorded in the respective registries, is a sufficient recording under R. S. of 1841, c. 125, § 5 (R. S., c. 90, § 5). *Smith* v. *Larrabee*, 361.

3. A notice, describing land as "one undivided sixth part of township numbered four in the fifteenth range in the county of Piscataquis, and of township numbered four in the sixteenth range in the county of Somerset, subject to the reservation of public lots," and referring to the mortgage described by naming the parties, and date, and the book and page of registration, contains an intelligible description. *Ib.*

4. Where a published notice is signed with the name of the mortgagee "by" A. W. P., "his attorney," and the mortgager subsequently recognizes and adopts the proceeding as effectual, he may rely on these facts as, *prima facie*, sufficient evidence of the authority of the attorney. *Ib.*

5. The giving of permits to cut timber on mortgaged land by the mortgagee, and the receiving of stumpage after publishing notice for the purpose of foreclosure, are not a waiver of such attempted foreclosure. *Ib.*

See ATTACHMENT, 1, 2, 3, 4, 8. EXECUTION, 1. REAL ACTION, 7.

MURDER.

See PRACTICE, 25, 26.

MUSTERING OFFICER.

See BOUNTY, 2, 3.

MUTUAL ACCOUNT CURRENT.

In order that an item of credit in an open and mutual account current may take the account out of the operation of the statute of limitations, it must appear that the credit was authorized by the defendant himself, or some one legally competent to act for him. *Sawyer* v. *Lufkin*, 429.

NATURALIZED CITIZEN.

See CITIZEN, 2.

NEW TRIAL.

1. By R. S., c. 82, § 33, when a motion is made to have a verdict set aside as being against law or evidence, a report of the whole evidence shall be signed by the presiding judge. A report, certified by the counsel to be a correct report of all the material evidence in the case, is not sufficient. *Bartlett* v. *Lewis*, 350.
2. A motion founded on any alleged cause not shown by the evidence reported, accompanied by depositions annexed, and not by testimony "heard and reported by the judge," is not in compliance with the second clause of § 33. *Ib.*
3. The verdict and the nature and grounds of the action and of the defense should appear in a motion to have a verdict set aside as being against law or evidence. *Ib.*
4. A verdict, founded upon conflicting testimony, will not be set aside as being against the weight of evidence, unless it be flagrantly erroneous. *Staples* v. *Wellington*, 453.

See PRACTICE, 12.

NEXT FRIEND.

See INFANT, 3.

NON-JOINDER.

See ABATEMENT, 6.

NONSUIT.

See PRACTICE, 18.

NOTICE.

See ABATEMENT, 5. ATTACHMENT, 2. CARRIER, 3, 4. EXECUTION, 3. EXCEPTIONS, 2. INFANT, 2. JUDGMENT, 2. MORTGAGE, 2, 3, 4, 5. PRACTICE, 13. RULE OF COURT, 1. TAX, 12, 13, 14, 15, 16, 17. WAY, 5.

NUISANCE.

By virtue of R. S. of 1857, c. 51, § 15 (R. S., c. 51, § 13), a railroad crossing not made in the "manner" "determined in writing by the county commissioners," is to be regarded as a nuisance. *State* v. *P. S. & P. R. R. Co.*, 46.

OATH.

See EVIDENCE, 15.

OBSTRUCTION.

See WAY, 4, 5.

OFFICER'S RETURN.

See EXECUTION, 1, 2, 3, 7, 8, 9. REPLEVIN, 4.

ORDINARY CARE.

See ACTION, 3. BANK, 1.

OWNER.

See AGENCY. LIEN, 2, 4, 6.

OYSTER.

See BOND, 2.

PAROL DEMISE.

Where one of three joint grantees paid no part of the purchase-money, and claimed neither possession nor title under the deed, nor exercised any control over the premises, he may be considered as having made a parol demise of his interest to the other grantees; and such a transfer, followed by more than

forty years exclusive possession on the part of his co-grantees and their assigns, would bar any claim which he might thereafter assert.
Webster v. *Holland*, 168.

PAROL EVIDENCE.

See DEED, 12.

PARTIAL PREPAYMENT.

See CONTRACT, 2. INTEREST, 2.

PARTNERSHIP.

One partner cannot bind his firm by signing their name to a renewal note of a premium note given by such partner in the name of the firm for a policy of insurance upon his individual property. *Lime R. F. & M. Ins. Co.* v. *Treat*, 415.

PARTY'S BOOK.

See EVIDENCE, 1.

PASSENGER.

See CARRIER, 1, 2, 3, 4, 5.

PASSENGER TRAIN.

See CARRIER, 5.

PAUPER.

1. When a person leaves his place of residence with everything he has, without any intention as to returning, he has, under the pauper statute, abandoned it, whether he has established another or not. *No. Yarmouth* v. *West Gardiner*, 207.
2. And the interruption of a residence does not depend, in any degree, upon the fact whether he did or did not return. *Ib.*
3. A residence once established may be abandoned without having acquired another. *Ib.*
4. If a naturalized citizen, after obtaining a legal settlement in a town in this State, removes to the province of New Brunswick, his child born there, upon coming into the State takes the settlement of his father, although the father does not return. *Oldtown* v. *Bangor*, 353.

PAYMENT.

If enough of the payments made on an account be subsequently applied by the creditor to liquidate the items consisting of liquors sold in violation of law; and a statement of the account, omitting therefrom the liquor items, and their equivalent in credits be sent to the debtor, who thereupon replies that he will pay the same—the appropriations will be deemed made by mutual assent, and they cannot be revoked without such assent. *Plummer* v. *Erskine*, 59.

See BANK, 1. MORTGAGE, 1.

PENALTY.

The defendant, by a sealed obligation in the ordinary form of a bond, "acknowledged himself bound and obliged unto" the plaintiff "in the sum of five hundred dollars," ... conditioned that, "in part consideration of" the sale by the defendant of his fish-market and fixtures and stock to the plaintiff, he will not engage in the retail sale of fish, within the city of Biddeford, so long "as the plaintiff shall remain in the business;" *Held*, (1) That by engaging in the retail sale of oysters within the time and place mentioned, was a breach of the condition; and, (2) That the sum of five hundred dollars constituted a penalty, and not liquidated damages. *Caswell* v. *Johnson*, 164.

PENDENCY OF ACTION.

See ABATEMENT, 3. RELEASE, 1.

PERFORMANCE OF CONDITION.

See ASSUMPSIT, 6.

PERFORMANCE OF COVENANT.

See BOND, 1.

PERMIT.

See MORTGAGE, 5.

PEW.

See PEW-OWNER.

PEW-OWNER.

In 1802, John Church, by his deed of warranty, in consideration of $100, conveyed certain land, covering the demanded premises, to "David Moors, treasurer

of the First Meeting-house Society in the center of Farmington," a voluntary, unincorporated association, " and his successors in said office, for the use of said society so long as it shall be improved for public use," *habendum* " to the said Moors and his successors in said office, to the use of said society to their use and benefit forever." A meeting-house was soon afterwards erected upon a portion of the land, pews sold, and the house occupied for public worship by several denominations for a series of years. In 1822, pursuant to action of the association, several of the original associates, "their associates and assigns," were incorporated into a body politic by the name of " The Proprietors of the Center Meeting-house in Farmington," and the act of incorporation provided " that the land heretofore conveyed to D. Moors, treasurer of said proprietors, and now deceased, . . . be and hereby is confirmed to such treasurer as said proprietors shall hereafter choose for the use and benefit of said proprietors, . . . and the treasurer, so hereafter to be chosen, shall be, to all intents and purposes, the successor of said Moors." The proprietors organized under their charter, chose John Church, jr., treasurer, confirmed all votes passed prior to incorporation, and, in 1824, erected forty-five pews in the gallery, and sold them, and their treasurer executed deeds thereof to the purchasers. In the same year, by an additional act of the legislature, the proprietors were authorized to make alterations, additions, and improvements of the house and such improvement of the land " as is designated and intended in the grant thereof." In June, 1839, pursuant to a vote duly recited in the deed, " The Proprietors of the Center Meeting-house in Farmington, by John Church, jr., their treasurer, in consideration of one dollar," executed and delivered unto the inhabitants of the county of Franklin and their successors forever, a deed of quitclaim of the demanded premises, with a covenant of warranty against the " lawful claims and demands of all persons claiming by, through, or under them," " for the purpose of a site for a court-house, for the use of said county, provided the same shall be accepted by the county commissioners as a full equivalent of all claims of said county on any individuals thereof for furnishing a court-house for ten years, reserving the use of said meeting-house for town meetings and meetings of worship in the lower story so long as the same shall remain standing, but with liberty to the county to rebuild, alter, repair, or fit up the same in a proper manner for holding the courts, and also conditioned that said deed shall be void whenever a court-house is erected on any other site." In February, 1838, John Church quitclaimed to The Proprietors of the Center Meeting-house the land originally granted to Moors, including the site of the old meeting-house, to be " always used for some public building, court-house, town-house, or meeting-house." In 1839, the county took possession, removed most of the pews in the second story, fitted it up for a court-room, and have retained possession thereof and held courts therein ever since. In 1852, the remaining gallery-pews were removed against the objections of the owners, and further repairs made. In 1867, at an annual meeting of the proprietors, the plaintiff was duly chosen treasurer, and certain others trustees, who were instructed by a vote of the proprietors " to take such measures for the defense of" the proprietors' " rights in the Center Meeting-house as they think proper," under which vote the plaintiff, as treasurer, brought this real action to recover possession of the premises claiming the legal title to be in the treasurer as trustee of the proprietors; *Held*, (1) That Moors took a fee-simple conditional in trust for the use and benefit of the original associates and those who might after-

wards become members of the association by the purchase or inheritance of pews; (2) That the pew-owners did not become tenants in common of the estate on which the house stood, but were entitled to a beneficial interest, and as against the grantees of the corporation could vindicate their rights only in equity. *Craig* v. *Franklin Co.*, 479.

PLACE OF PAYMENT.

See BILLS, &c., 2.

PLEADING.

1. In assumpsit by a toll-bridge corporation against a stockholder therein to recover certain assessments on his stock, it must be alleged that the assessments sought to be recovered were due and payable when the action was commenced. *Bethel & H. T. Bridge Co.* v. *Bean*, 89.

2. To a plea of general performance of the conditions of the bond of the treasurer of State, the plaintiff replied that the principal defendant "continued to hold and exercise the office of treasurer of State, to which he was chosen, as in said condition of said writing obligatory mentioned, . . . from Jan. 13, 1858, to Feb. 4, 1859; that during said time, . . . on Jan. 14, 1858, and on divers other days and times between that day and the said Feb. 4, 1859, at," etc., the principal defendant, "as such treasurer, had and received divers sums of money amounting in the whole to the sum of thirty-nine thousand, two hundred and thirty-one dollars and nineteen cents, belonging to the State, and hath not accounted for or paid to the State the same, or any part thereof, although often requested so to do, but hath therein wholly failed, and made default;" "and that the same is still wholly unpaid and unsatisfied, contrary to the form and effect of the said condition of the said writing obligatory." On special demurrer, *Held*, that the replication sets out the breach with sufficient particularity and precision. *State* v. *Peck*, 123.

3. In such cases, general pleading is allowable when the facts constituting the breach lie more in the knowledge of the opposite party than of the party pleading. *Ib.*

4. Where the aggregate amount of the breaches is set out in the replication, and the replication is adjudged good on demurrer, judgment must go for the amount thus claimed, unless the demurrer is, with the consent of the other party, and by leave of the court, withdrawn under R. S., c. 82, § 19. *Ib.*

5. In a plea of *puis darrein continuance*, the day of the continuance must be set forth. *Jewett* v. *Jewettt*, 234.

6. If on demurrer to such plea, the judgment be against the defendant, it will be peremptory. *Ib.*

7. When an action against a town for damages by reason of a defect in its highway is brought in a county other than that in which the town is situated, advantage of the fact may be taken under the general issue. *Haskell* v. *Woolwich*, 535.

8. When the pleadings end in a demurrer, the court must decide against the party who committed the first error. *Stilphen* v. *Stilphen*, 508.

9. If a libelee would take advantage of the fact that during the pendency of the libel against him, he had obtained a divorce from the libelant, it must be done by a plea of *puis darrein continuance*. *Stilphen* v. *Stilphen*, 508.

10. Such a plea must not be pleaded in bar generally, but to the further maintenance of the suit. *Ib.*

See ABATEMENT, 1, 2, 3, 4, 5, 6. DAMAGES, 2. EQUITY, 4, 9, 10, 13. EXECUTOR, &c., 2. HUSBAND, &c., 1. LIEN, 1, 14. SCIRE-FACIAS, 2. VARIANCE, 1.

POLL.

See TAX, 5, 9.

PRACTICE.

1. By R. S. of 1857, c. 82, § 12 (R. S., c. 82, § 11), when there are two or more defendants, the writ may be amended by striking out one or more of them on payment of costs to him to that time. *Fuller* v. *Miller*, 40.

2. Thus, where at a certain term, one of two defendants was defaulted, and, at a subsequent term, the plaintiff discontinued as to the defaulted defendant, and recovered judgment against the other,—the former was held entitled to costs to the time of the discontinuance. *Ib.*

3. Where the amount of an item of credit in a plaintiff's account, annexed to the writ, is conceded by both parties to be erroneous, and no specific amount is agreed upon, it is for the jury to fix the amount from the evidence; and it is erroneous in such case to instruct the jury that they may allow the defendants' account in set-off, inasmuch as its amount is less than the plaintiff's item of credit. *Kelton* v. *Hill*, 114.

4. Where the aggregate amount of the breaches of a bond is set out in the replication, and the replication is adjudged good on demurrer, judgment must go for the amount thus claimed, unless the demurrer is, with the consent of the other party, and by leave of the court, withdrawn under R. S. c. 82, § 19. *State* v. *Peck*, 123.

5. The fact that the jury were unable to agree upon one of four questions submitted to them, cannot be presented to the full court upon a motion to set aside the verdict as being against the evidence. *Hope I. Works* v. *Holden*, 146.

6. The parties to a libel for divorce, *a vinculo*, tried by the presiding justice, at *nisi prius*, are entitled to the right of alleging exceptions to rulings admitting testimony. *Slade* v. *Slade*, 157.

7. And a party is not deprived of such right by waiving a previous request for a jury trial. *Ib.*

8. In the trial of a railroad corporation on an indictment under R. S. of 1857, c. 51, § 42, the same rules of evidence and the same principles of law should be applied as in analogous civil actions for damages. *State* v. *Grand Trunk Railway of Can.*, 176.

9. The fact that the jury failed to agree upon the answer to the question whether the plaintiff was driving at a faster rate than six miles an hour, does not ren-

der it reasonably certain that a general verdict for the plaintiff, in an action, for an injury sustained by reason of a defective way, is erroneous. *Baker* v. *Portland*, 199.

10. The question of the admissibility in evidence, of certain answers in a deposition, cannot be presented to the full court unless the bill of exceptions contains a copy of such answers. *Webster* v. *Folsom*, 230.

11. A provision, in the bill of exceptions, that the depositions "may be referred to, but not copied," is not sufficient. *Ib.*

12. The admission of irrelevant testimony will not be deemed sufficient ground for a new trial, when the jury were expressly instructed to disregard it. *State* v. *Kingsbury*, 238.

13. Notice to a person receiving a telegram to produce it is seasonable, if given before the trial commences. *State* v. *Litchfield*, 267.

14. By the 17th rule of court, a motion for a new trial "must be filed within two days after verdict, unless the court for good cause, by special order, enlarge the time." *Bartlett* v. *Lewis*, 350.

15. By R. S., c. 82, § 33, when a motion is made to have a verdict set aside as being against law or evidence, a report of the whole evidence shall be signed by the presiding judge. A report, certified by the counsel to be a correct report of all the material evidence in the case, is not sufficient. *Ib.*

16. A motion founded on any alleged cause not shown by the evidence reported, accompanied by depositions annexed, and not by testimony "heard and reported by the judge," is not in compliance with the second clause of § 33. *Ib.*

17. The verdict and the nature and grounds of the action and of the defense should appear in a motion to have a verdict set aside as being against law or evidence. *Ib.*

18. When the facts are not controverted, a nonsuit may properly be granted, if a verdict in favor of the plaintiff upon the proofs offered by him would be set aside as being against evidence. *Brown* v. *E. & N. A. R. Co.*, 384.

19. To be available, the grounds of objection to the admissibility of testimony must be stated when it is offered. *Staples* v. *Wellington*, 453.

20. A party is not injured by the exclusion of an admissible statement contained in an answer in a deposition, when the same statement in other portions of the deposition is received. *Ib.*

21. A party cannot sustain exceptions to an instruction which is more favorable to him than the one which he requested to be given. *Ib.*

22. Thus, where a requested instruction contained the two propositions, (1) that the assignee of a debt need not notify the debtor of the assignment, and (2) that if notice were given by the assignor or any third person, it would be sufficient to put the debtor upon inquiry to ascertain the fact; and the instruction given negatived the necessity of notice by the assignee, and affirmed the sufficiency of notice from any reliable source, as withdrawing the right of the debtor to pay the assignor; *Held*, that as a notice, coming from an unreliable source, would not be sufficient to induce inquiry, the instruction given was more favorable to the debtor than the one requested by him, and that he cannot sustain exceptions thereto. *Ib.*

23. In the trial of an action on an administrator's bond, for an alleged breach in knowingly omitting to inventory a certain sum of money deposited in a savings bank and belonging to the estate, the presiding judge declined to instruct the jury, at the defendant's request, that if they believed the testimony of a certain witness as to what the intestate said and did when the bank-book was put into the witness' hand, that transaction amounted to a gift of the money to two certain persons; but he did accurately state to the jury the law concerning gifts; *Held*, that the defendant had no cause for exception.
Bourne v. *Stevenson*, 499.

24. So with the requested instruction that "if the deposit was claimed" by the two persons named, "and none of it was ever received by the administrator, then the omission was no breach." *Ib.*

25. When, in the trial of such an action, no instructions are asked in relation to the administrator's knowledge of the existence and of the intestate's ownership of the deposit, and no exception is taken to those given upon the subject, the instructions will be presumed to be correct. *Ib.*

26. The statutes of this State require that the "jury, finding a person guilty of murder, shall find whether he is guilty of murder in the first or second degree."
State v. *Cleveland*, 564.

27. Upon an indictment which charges the defendant with the crime of murder generally, without specifying the degree of the crime, a general verdict that the defendant is "guilty of the murder whereof he stands indicted," is not a finding that he is guilty of murder of the first degree, according to the provisions of the statutes in such cases made and provided. *Ib.*

See EQUITY, 3, 9–13. JUDGMENT, 2, 3. PLEADING, 4, 6, 7. REPLEVIN, 3. SEISIN and DISSEISIN, 1.

PRESCRIPTION.

See PAROL DEMISE. REAL ACTION, 10.

PRESUMPTION.

See DEED, 17. INSANITY. SCIRE-FACIAS, 3. PRACTICE, 24.

PREVAILING PARTY.

See RULE OF COURT, 1.

PROBATE COURT.

1. The jurisdiction assumed by a judge of probate, so far as it depends upon the residence of any person, cannot be contested except on appeal in the original case, unless there is fraud, or want of jurisdiction apparent upon the face of the record. *Record* v. *Howard*, 225.

2. Administration commenced upon the assumption that the deceased was a citizen of Maine, must be closed upon the same assumption, and it will not be competent for parties adversely interested to show that the deceased was a citizen of another State to affect the distribution of the estate.

Record v. *Howard*, 225.

3. Thus, where administration was granted upon a representation that the deceased at the time of her death was a citizen of Maine, and the record states that this fact was made fully to appear, and there was no suggestion of fraud, and no appeal from the decree of the probate court granting the administration, and the settlement of the estate was proceeded with till the administrator had settled his fourth, and final account, and had applied for an order of final distribution; *Held*, that the domicile of the deceased, at the time of her death, must be regarded as conclusively settled, not only for the purpose of giving jurisdiction to the probate court, but also for the purpose of distributing the estate; and that it was not competent to show that the domicile of the deceased, at the time of her death, was in Ohio, and not in Maine, either to show want of jurisdiction in the probate court, or to affect the distribution of the estate. *Ib.*

See EVIDENCE, 14.

PROTESTATION.

See ASSUMPSIT, 4, 5.

PUBLIC CHARITY.

In 1802, John Church, by his deed of warranty, in consideration of $100, conveyed certain land, covering the demanded premises, to "David Moors, treasurer of the First Meeting-house Society in the center of Farmington," a voluntary, unincorporated association, "and his successors in said office, for the use of said society so long as it shall be improved for public use," *habendum* "to the said Moors and his successors in said office, to the use of said society to their use and benefit forever." A meeting-house was soon afterwards erected upon a portion of the land, pews sold, and the house occupied for public worship by several denominations for a series of years. In 1822, pursuant to action of the association, several of the original associates, "their associates and assigns," were incorporated into a body politic by the name of "The Proprietors of the Center Meeting-house in Farmington," and the act of incorporation provided "that the land heretofore conveyed to D. Moors, treasurer of said proprietors, and now deceased, . . . be and hereby is confirmed to such treasurer as said proprietors shall hereafter choose for the use and benefit of said proprietors, . . . and the treasurer, so hereafter to be chosen, shall be, to all intents and purposes, the successor of said Moors." The proprietors organized under their charter, chose John Church, jr., treasurer, confirmed all votes passed prior to incorporation, and, in 1824, erected forty-five pews in the gallery, and sold them, and their treasurer executed deeds thereof to the purchasers. In the same year, by an additional act of the legislature, the proprietors were authorized to make alterations, additions, and improvements of the house and such improvement of the land "as is designated and intended in the grant

thereof." In June, 1839, pursuant to a vote duly recited in the deed, "The Proprietors of the Center Meeting-house in Farmington, by John Church, jr., their treasurer, in consideration of one dollar," executed and delivered unto the inhabitants of the county of Franklin and their successors forever, a deed of quitclaim of the demanded premises, with a covenant of warranty against the "lawful claims and demands of all persons claiming by, through, or under them," "for the purpose of a site for a court-house, for the use of said county, provided the same shall be accepted by the county commissioners as a full equivalent of all claims of said county on any individuals thereof for furnishing a court-house for ten years, reserving the use of said meeting-house for town meetings and meetings of worship in the lower story so long as the same shall remain standing, but with liberty to the county to rebuild, alter, repair, or fit up the same in a proper manner for holding the courts, and also conditioned that said deed shall be void whenever a court-house is erected on any other site." In February, 1838, John Church quitclaimed to The Proprietors of the Center Meeting-house the land originally granted to Moors, including the site of the old meeting-house, to be "always used for some public building, court-house, town-house, or meeting-house." In 1839, the county took possession, removed most of the pews in the second story, fitted it up for a court-room, and have retained possession thereof and held courts therein ever since. In 1852, the remaining gallery-pews were removed against the objections of the owners, and further repairs made. In 1867, at an annual meeting of the proprietors, the plaintiff was duly chosen treasurer, and certain others trustees, who were instructed by a vote of the proprietors "to take such measures for the defense of" the proprietors' "rights in the Center Meeting-house as they think proper," under which vote the plaintiff, as treasurer, brought this real action to recover possession of the premises claiming the legal title to be in the treasurer as trustee of the proprietors; *Held*, That the case exhibits none of the elements of a public charity.

Craig v. *Franklin County*, 479.

PUBLIC WORSHIP.

See EVIDENCE, 7.

PUBLIC USE.

See EVIDENCE, 7.

PUIS DARREIN CONTINUANCE.

See PLEADING, 5, 9, 10.

PURCHASER.

See DEED, 16.

PURCHASE-MONEY.

See PAROL DEMISE.

QUOTA.

1. Where a resolve of a city government provided, "That for the purpose of promoting enlistments to fill the city's quota, under" a specified call of the president, a certain bounty should "be paid to each man who has volunteered, or shall volunteer,"... "the mayor to draw his order on the city treasurer" therefor, "on receiving satisfactory evidence that such man has volunteered, and been accepted and mustered into the military service as a part of said quota," proof that the person claiming the bounty was duly accepted and credited upon that quota by the proper authority is essential to a recovery. *Patten* v. *Bangor*, 345.

2. The memorandum, "credited 4th district, Penobscot county, 3d ward, Bangor city, Me.," made upon the "muster and descriptive roll of the detachment," to which he belonged, by the mustering officer in Florida, where the volunteer reënlisted, did not fix the volunteer upon that quota. *Ib.*

See ASSUMPSIT, 2.

RAILROAD.

1. A railroad corporation, whose track is located within the limits of a highway' may load and unload one of its cars while temporarily standing for that purpose in the street, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the way for the ordinary purposes of travel. *Mathews* v. *Kelsey*, 56.

2. And for the purpose of unloading a car of flour, a merchant, whose store is on the street, may use skids, temporarily elevated above the ground and extending from the car-door, fifty feet to the store, provided there is ample room between the car and the opposite side of the street to accommodate the travel of the street. *Ib.*

3. A child of nine years, who, in the day-time, jumps from a sidewalk, lawfully constructed by a railroad company on the side of its railway-bridge, upon the properly constructed draw, while the same is being lawfully closed, is so wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom. *Brown* v. *E. & N. A. R. Co.*, 384.

See INDICTMENT.

RAILROAD BRIDGE.

See ACTION, 3.

RAILROAD-CROSSING.

See INDICTMENT, 1. NUISANCE, 1.

RATIFICATION.

See AGENT, 1.

REAL ACTION.

1. By virtue of R. S., c. 104, §§ 3 and 8, a real action in which the writ claims an estate in fee-simple, cannot be maintained by proof of one in fee-tail only. *Hamilton* v. *Wentworth*, 101.

2. Under the general issue in a real action, the defendant may disprove the seisin of the plaintiff, as alleged in the writ, by showing that the plaintiff's grantor had previously conveyed the title to a third person, although the defendant does not claim under him. *Morse* v. *Sleeper*, 329.

3. The simple evidence that land has been fraudulently conveyed by a debtor, and that the fraudulent grantee has quitclaimed all his right, title, and interest to a third person, will not prevent a prior creditor, subsequently levying his execution thereon under R. S. of 1857, c. 76, § 13, from acquiring the "momentary seisin" necessary to enable him to try the title with the party in possession not claiming under such conveyances. *Ib.*

4. The title of the government is superior to that of the aborigines. *Pen. Indians* v. *Veazie*, 402.

5. Where the State conveyed land to the grantor of the defendants' ancestor, more than thirty years ago, and the defendants, and those under whom they claim, have held the possession and claimed to be the owners of the land during all that time, it is not competent for a tribe of Indians, who do not appear to have any title to the premises, to question the regularity of the sale by the State. *Ib.*

6. If the demandant in a real action, after verdict in his favor, but before judgment, convey the real estate in controversy to a third person, such conveyance will not prevent a judgment in his favor in a review of the action, if he is otherwise entitled to it. *Berry* v. *Whitaker*, 422.

7. An administrator cannot commence or prosecute a writ of review in a real action not brought to foreclose a mortgage. *Ib.*

8. In the trial of a real action, it is competent for the defendant in possession, under the general issue, to disprove the seisin of the demandants as alleged in the writ, by showing that the party, under whom they claim, had neither title nor possession at the time of the conveyance under which they claim. *Poor* v. *Larrabee*, 543.

9. Thus, where the demandants' title depended upon an alleged attachment, seasonably followed by a levy on real estate made in favor of the demandants' grantor against his debtor, the tenant may, for the purpose of disproving the demandants' seisin within twenty years, show that the alleged attachment was void, and that after the attachment, but prior to the levy, the debtor was decreed a bankrupt under the United States Bankrupt Act of 1841, and that the demandants' grantor's debtor did not have possession when the levy was made. *Ib.*

10. The administrator of the intestate estate, to which belonged the lots of land in controversy, under a license from the probate court, conveyed them to the

defendants' grantors, and the widow, to whom the land had been assigned as dower against common right, joined in the deeds, to convey and release her dower. Thereupon the defendants' grantors entered and erected a brick block upon the premises. In a real action by the grantee of the levying creditors of the heirs of the intestate; *Held*, (1) That during the life of the widow, the defendants cannot be regarded as holding adversely to the reversioners; and (2) That it is incompetent for the defendants to question the regularity of the probate proceedings by which the dower was assigned. *Ib.*

See JUDGMENT, 2, 3.

REAL ESTATE.

See CORPORATION, 1. DECEIT, 1. DEED, 12.

REASONABLE NOTICE.

See CARRIER, 3, 4.

REBELLION.

See BOUNTY, 1.

RECEIPT.

See CONTRACT, 4.

RECEIPTOR.

See LIEN, 5.

RECORD.

See EVIDENCE, 15. MORTGAGE, 2. TAX, 10.

REFORMING OF DEED.

See DEED, 10. EQUITY, 7.

REGISTRATION.

See MORTGAGE, 2, 3.

RELEASE.

The pendency of an action of trespass against a deputy-sheriff for his wrongful acts done under color of his office, when an action against the sheriff for the same cause is entered, is not a release of the latter action.

Severy v. *Nye*, 246.

RENT.

See SET-OFF, 1.

REPLEVIN.

1. If a replevin bond be not "in double the value of the goods to be replevied," but good at common law and "conditioned as in the prescribed form of the writ," the condition will receive the same construction as if the bond were a statute bond. *Tuck* v. *Moses*, 461.
2. The judgment for a return is the final judgment in replevin, and is conclusive upon the parties as to the matters embraced within it. *Ib.*
3. An action of replevin is not disposed of until the question of return of the property is acted upon, notwithstanding the writ may have been abated upon the ground that the penal sum of the bond was too small; and until then, both parties are in court with a legal right to be heard. *Ib.*
4. The officer's return upon a replevin writ is a part of the record; and when a judgment for return has once been rendered, an amendment of the officer's return cannot change or control it. *Ib.*
5. In an action upon a replevin bond, it is competent for the defendants to show in mitigation of damages that since the taking by the replevin writ, the plaintiff's interest in whole or in part has ceased to exist, the actual damages to the plaintiff or those he represents being the simple question involved. *Ib.*
6. A defendant in replevin is entitled to the value of the property replevied at the time of rendition of judgment for a return. *Ib.*
7. A large quantity of wood having been replevied from an attaching officer, the actions in which the attachments were made proceeded to judgment and execution, and the full value of the wood was insufficient to satisfy the executions. The replevin writ was abated because the replevin bond was not "in double the value of the goods to be replevied;" but it was good at common law, and "conditioned as in the prescribed form of the writ." Judgment was thereupon rendered for a return, but not complied with. In an action upon the bond, *Held*, That the market value of the wood having increased since it was replevied, the defendants were liable, (1) for the value of the wood at the date of the judgment for return, with interest at six per cent from the date of that judgment to the date of the judgment on the bond; (2) the cost in the replevin suit with interest for the same time; and (3) for a sum equal to twelve per cent on the value of the wood when replevied from the date of the judgment in the suit in which it was attached, to the date of the judgment for return. *Ib.*

REPLICATION.

See PLEADING, 2, 4.

RESCISION.

See CONTRACT, 8.

RESIDENCE.

See DOMICILE, 1. PAUPER, 1, 2, 3.

RESIDENT OWNER.

See ASSUMPSIT, 4. TAX, 6.

RETURN-DAY.

See SCIRE-FACIAS, 1.

REVERSIONER.

A reversioner, during the continuance of the life-estate, is under "legal disability" within the meaning of Public Laws of 1821, c. 52, § 12 (R. S. of 1857, c. 71, § 28), so that he may bring an action within five years after the termination of the life-estate to recover land sold under an administrator's license, more than five years before the commencement of the action. *Poor* v. *Larrabee*, 543.

See BETTERMENT, 1, 2. LIMITATIONS, &c., 6.

REVIEW.

1. If the demandant in a real action, after verdict in his favor, but before judgment, convey the real estate in controversy to a third person, such conveyance will not prevent a judgment in his favor in a review of the action, if he is otherwise entitled to it. *Berry* v. *Whitaker*, 422.

2. An administrator cannot commence or prosecute a writ of review in a real action not brought to foreclose a mortgage. *Ib.*

REVOCATION.

See PAYMENT, 1.

RIGHT.

See TAX, 14.

RULE OF COURT.

1. By virtue of the 35th Rule of Court, unless the prevailing party, within three months after judgment is ordered, files all papers and documents necessary

to enable the clerk to make and enter the judgment and complete the record, judgment cannot be afterwards recorded unless, upon petition and notice to the adverse party, the court, at a subsequent term, order it.

Townsend v. *Meader*, 288.

2. By the 17th rule of court, a motion for a new trial "must be filed within two days after verdict, unless the court for good cause, by special order, enlarge the time." *Bartlett* v. *Lewis*, 350.

See ABATEMENT, 4.

SALE.

See CONTRACT, 3. EXECUTOR, 1. TAX, 9, 13, 16, 17.

SALOON CAR.

See CARRIER, 5.

SAMPLE.

See CONTRACT, 1.

SCIRE-FACIAS.

1. The return of "unsatisfied" made before the return-day upon an execution against the principal defendant, will not authorize the issuing of a writ of *scire-facias* after the return-day against the person adjudged trustee.

Austin v. *Goodale*, 109.

2. Where the respondent, as mortgagee, in possession of mortgaged chattels, at the March term, 1869, was charged as trustee "conditionally, namely, if the plaintiff pay him $2000 and interest from" a specified date, "within sixty days after the final judgment," an averment that the plaintiff tendered to the respondent "said $2000 and interest within said sixty days, to wit, on the seventeenth of May, 1869," is, on demurrer, a sufficient allegation of a compliance with the condition. *Woods* v. *Cooke*, 282.

2. And it will be presumed that the court, in fixing the time within which the money should be paid, complied with R. S., c. 86, § 50; and an averment of tender within the time thus fixed, is equivalent to an averment of a tender "while the equity of redemption existed." *Ib.*

SEALED INSTRUMENT.

See DEBT.

SEISIN AND DISSEISIN.

1. Under the general issue in a real action, the defendant may disprove the seisin of the plaintiff, as alleged in the writ, by showing that the plaintiff's grantor had previously conveyed the title to a third person, although the defendant does not claim under him. *Morse* v. *Sleeper*, 329.

2. The simple evidence that land has been fraudulently conveyed by a debtor, and that the fraudulent grantee has quitclaimed all his right, title, and interest to a third person, will not prevent a prior creditor, subsequently levying his execution thereon under R. S. of 1857, c. 76, § 13, from acquiring the "momentary seisin" necessary to enable him to try the title with the party in possession not claiming under such conveyances. *Morse* v. *Sleeper*, 329.

See REAL ACTION, 8, 9.

SELECTMEN.

See ASSUMPSIT, 2.

SET-OFF.

1. The creditor in an execution issued on a judgment in which the debt or damage recovered is for rent, "became entitled to the sum due thereon," within the meaning of R. S., c. 84, § 27, when his cause of action accrued. *McGlinchy* v. *Hall*, 152.

2. He is not so entitled to costs until he has obtained a judgment therefor. *Ib.*

3. "The first execution" in the same section is the one issued upon the judgment in the action which was first commenced. *Ib.*

SETTLEMENT.

See CITIZEN, 2.

SHERIFF.

See ABATEMENT, 2, 3.

SIDEWALK.

See ESTOPPEL, 2.

SIGNAL.

See CARRIER, 3.

SKID.

See WAY, 2.

SOLDIER.

See BOUNTY, 1.

SPECIFIC PROPERTY.

See ATTACHMENT, 5.

STAMP.

The act of congress of June 30, 1864, c. 173, § 17, does not require the certificate of discharge of a poor debtor, on his disclosure, to be stamped.
Angier v. *Smalley*, 425.

STATEMENT OF AMOUNT.

See ATTACHMENT, 3, 4.

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See EVIDENCE, 3.

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See EVIDENCE, 1.

SURETY.

1. A surety has a right to have his liability remain precisely as he himself has fixed it; and any change in the contract or duty, for the performance of which he is holden, made without his consent, will discharge him.
Andrews v. *Marrett*, 539.

2. Thus, where the holder of an over-due, non-negotiable promissory note, knowing one of the signers to be a surety, accepted from the principal debtor four new negotiable notes, three of which were payable at a future day, and the other on demand after date, and agreed that the original note should remain in his hands as collateral security for the payment of the new ones, all without the knowledge or consent of the surety; *Held*, that the effect of this arrangement was to enlarge the time of payment for a part of the debt, and to change the character and terms of the contract with respect to the whole of it, and that the surety was thereby discharged. *Ib.*

SURVEY.

See COSTS, 1.

TAX.

1. Assumpsit will not lie by a resident owner to recover from his town money paid under protest to redeem land sold for taxes raised for a legal purpose, but assessed in an irregular or defective manner. *Rogers* v. *Greenbush*, 390.

2. *It seems*, that the form of protestation, under which a tax is paid with a view of recovering it back, is immaterial; but it must be a distinct and definite protest against paying the particular tax on the ground of its illegality. *Ib.*

3. Chapter 199 of the Public Laws of 1868 (R. S., c. 6, § 163), limiting the right of recovery to "money raised for an unlawful purpose," does not apply to a case pending when the act took effect. *Rogers* v. *Greenbush*, 395.

4. A deed of land given by the treasurer of State for the non-payment of a State tax, describing the premises as "one-fourth, No. 5, R. 8, W. E. L. S.," is void on account of the vagueness of the description of the premises.
Larrabee v. *Hodgkins*, 412.

5. The certificate duly assigned by the assessors, "that the foregoing pages contain an inventory of polls and estate, real and personal, liable to be taxed in" a town named, sufficiently indicates that the real estate described above lay in such town. *Greene* v. *Lunt*, 518.

6. In the assessment of taxes on land of resident owners, the parcels taxed must be definitely and distinctly described, or no lien will attach. *Ib.*

7. Thus, neither of the following descriptions is sufficient: "Part of the two river lots joining N. Walker's and Pettingill farm, lots 1 and 2, range 1, 100 acres;" "A piece of land north-westerly of and adjoining S. G. Wait's land, lot 5, range 3, 6 acres;" "One-half of lot north-westerly of Luther Jackson's farm, lot 2, range 2, 50 acres;" "The lot joining B. Walton's farm, lot 1, range 2, 85 acres;" "A piece of land between A. J. Churchill and J. H. Weymouth, part of lot 7, range 3, 27 acres;" "One-half island opposite S. Holmes', 15 acres;" "A part

of E. A. Pollard's farm, lot 6, range 5, 25 acres;" "Part of lot joining Josiah Hall's, lot 1, range 5, 40 acres;" "The lot being southerly and joining J. P. Hopkins' and S. R. Newell's wood-land, lot 3, range 4, 60 acres;" "Half of lot westerly of J. S. Holmes' farm and adjoining it, lot 4, range 2, 50 acres;" "A piece of land easterly of Worthly Pond, joining W. Harlen's farm, lot 7, range 5, 8 acres." *Greene* v. *Lunt*, 418.

8. But each of the following is sufficient: "The island opposite N. Walker's, and above Alden's Ferry;" "Second lot from S. Holmes', lot 4, range 3, 100 acres;" "Second lot from D. L. Conant's land, lot 3, range 3, 85 acres;" "Larry Farm on the hill formerly owned by S. Roberts, being part of lot 1, in ranges 3 and 4, 75 acres;" and "Second lot from J. Lunt's, lot 6, range 3, 100 acres." *Ib.*

9. The sale of land for taxes will not be illegal, because the lists of assessments upon the polls and estates required by R. S., c. 6, § 56, contain no description of the lands assessed other than the number of acres and the numbers of the lots and ranges in which they are situated. *Ib.*

10. Nor because it does not affirmatively appear that "a record of the assessment and of the invoice and valuation from which it was made," "or a copy of it," was deposited in the assessors' or clerk's office, "before the taxes were committed to the proper officer for collection." *Ib.*

11. Nor because the warrant to the collector for the collection of State, county, and town taxes also contained a direction to collect a certain "sum voted by the inhabitants of school district, No. 9," when it did not appear that the provisions of R. S., c. 11, § 39, had been complied with. *Ib.*

12. Nor because it contained a direction to collect a deficient highway-tax when it did not appear that the highway surveyor gave the statute notice to the delinquent tax-payer, or returned to the assessors the lists required by R. S., c. 18, § 45. *Ib.*

13. Nor because it does not appear that prior to the notice of sale, the collector made a demand on the owner for the tax on the land advertised. *Ib.*

14. Nor because the collector's notice of sale did not designate the owner's "right," or contain any such description of the land "as is necessary to render it certain and plain," other than the number of acres and the number of lot and range. *Ib.*

15. Nor because the collector's certificate upon the notice filed with the town clerk did not specify what notice was given. *Ib.*

16. Nor because there was no evidence that the owner was notified of the sale as required by § 151, except so far as it appeared from the collector's return upon the back of the notice, and in his "return with a particular statement of his doings in making the sale," that he has "given the notice of said intended sale as required by law." *Ib.*

17. Nor because the collector's return to the town treasurer was not made within four days of the time notified for the sale, but was made within four days of the time to which the sale was adjourned and actually made. *Ib.*

TELEGRAM.

See PRACTICE, 13.

TELEGRAPHIC COMMUNICATION.

See EVIDENCE, 8.

TELEGRAPHIC OPERATOR.

See WITNESS, 1.

TENANT IN COMMON.

See PEW-OWNER.

TENDER.

See SCIRE-FACIAS, 3.

TIME.

See DEED, 15, 17, 18. EXECUTION, 2. INFANT, 2. REVERSIONER. SCIRE-FACIAS, 3. TAX, 17.

TITLE OF THE GOVERNMENT.

See REAL ACTION, 4.

TOLL-BRIDGE.

See PLEADING, 1.

TEMPORARY HALLUCINATION.

See INSANITY.

TOWN.

1. A town, by virtue of Public Laws of 1867, c. 119, by two-thirds of the voters present at a legal meeting, voted to loan its credit to aid in the extension of a railroad, by issuing interest-bearing bonds to a certain amount in exchange for a like amount of preferred stock in the railroad, "at such time as the railroad company shall build its railroad to Canton Mills, provided it shall be completed to Canton Mills, and the cars are running and transporting freight and passengers over the road from Mechanic Falls to Canton Mills, on or before Jan. 1, 1870;" otherwise the vote should be void. *Held*, that the condition required a completion of the road, as well as a running of the cars, before the aid could be demanded. *P. & O. C. R. R. Co.* v. *Hartford*, 23.

2. And where the town, at a subsequent legal meeting, by a majority of the inhabitants present and voting, voted, "To issue bonds to the Portland & Oxford Central Railroad Company, for the sum named in the previous vote, taking a

like amount of preferred stock in said road, in exchange, as contemplated in" the former note; *Held*, (1) That as the vote passed by only a majority, the company could claim no rights under it, as a vote under c. 119; (2) That the majority could not waive the condition of the former vote; and (3) That the latter vote does not, in terms, purport to modify the conditions of the former.
P. & O. C. R. R. Co. v. *Hartford*, 23.

TOWN BONDS.

See MANDAMUS.

TOWN CLERK.

See EVIDENCE, 15. TAX, 15.

TOWN TREASURER.

See TAX, 17.

TOWN-MEETING.

See BOUNTY, 1.

TREASURER OF STATE.

See BOND, 1.

TRESPASS.

See ABATEMENT, 2, 3. ASSIGNMENT, 2.

TROVER.

1. Trover cannot be maintained against a bank for United States bonds deposited therein, but which have been either lost or stolen therefrom.
Dearbourn v. *U. N. Bank*, 273.

2. When the evidence equally sustains each of the propositions, that bonds deposited in a bank were either lost, stolen, or misdelivered, neither of them can be regarded as established. *Ib.*

3. Demand and refusal will not be sufficient evidence of conversion, when it also appears that the property demanded was not at the time in the possession or control of the person on whom the demand was made, but that it had been previously lost, or stolen, or misdelivered. *Ib.*

TRUST.

See DEED, 19.

TRUSTEE PROCESS.

1. A person summoned as trustee will be charged when he declines, in answer to an interrogatory calling therefor, to state the facts which may be important in determining his true legal position towards the principal defendant, and in testing the correctness of his own legal conclusion that he does not owe the principal defendant, or has nothing in his hands for which he is legally accountable to him. *Mansfield* v. *N. E. Exp. Co.*, 35.

2. Where the respondent, as mortgagee, in possession of mortgaged chattels, at the March term, 1869, was charged as trustee "conditionally, namely, if the plaintiff pay him $2000 and interest from" a specified date, "within sixty days after the final judgment," an averment that the plaintiff tendered to the respondent "said $2000 and interest within sixty days, to wit, on the seventeenth of May, 1869," is, on demurrer, a sufficient allegation of a compliance with the condition. *Woods* v. *Cooke*, 282.

3. And it will be presumed that the court, in fixing the time within which the money should be paid, complied with R. S., c. 86, § 50; and an averment of tender within the time thus fixed, is equivalent to an averment of a tender "while the equity of redemption existed." *Ib.*

4. When a person is adjudged a trustee for "specific property in his hands, which he is bound to deliver at a future day," a demand need not be made upon him "within thirty days next after final judgment," to prevent a dissolution of the attachment. *Ib.*

5. But when the court, under R. S., c. 86, § 50, fixes a time, during the life of the equity of redemption of personal property, within which the plaintiff may tender the amount due on the mortgage, a demand, within thirty days next after the tender by the attaching creditor, is necessary, under § 73, to fix the liability of the trustee. *Ib.*

6. When an action by trustee process is commenced prior to one by the principal defendant against the trustee, a judgment in the latter action in favor of the trustee is not conclusive upon the plaintiff in the former upon the question of the trustee's discharge. *Webster* v. *Adams*, 317.

See ABATEMENT, 4, 5.

USAGE.

1. Words are to be construed in their ordinary and popular sense, unless by some known usage of trade they have a different meaning. *Cobb* v. *Lime Rock F. & M. Ins. Co.*, 326.

2. The usage or the construction given to particular words in Boston, Mass., will not affect a policy of insurance upon a vessel made at Rockland, Maine, containing the same words, unless a similar usage or the same construction is shown to exist in the latter place. *Ib.*

USE EXECUTED.

See DEED, 19.

USE AND OCCUPATION.

See EQUITY, 4.

USER.

See WAY.

U. S. BONDS.

See BANK, 1. CONTRACT, 1. TROVER, 1.

VALUATION.

See TAX, 10.

VARIANCE.

A declaration setting out an unconditional promise to pay a specified sum in money, is not supported by proof of a promise to pay partly in certain notes of a third person at fifty cents on the dollar, and the balance in money.
Swanton v. *Lynch*, 294.

VENUE.

See EQUITY, 13. PLEADING, 7.

VERBAL PROMISE.

See FRAUDS, &c., 1, 2, 3.

VERDICT.

See NEW TRIAL, 3, 4.

VESSEL.

See LIEN, 1, 2, 3, 4, 5, 6.

VESTED REMAINDER.

See WILL, 1.

VOLUNTARY ASSOCIATION.

See ABATEMENT, 6.

VOLUNTEER.

See ASSUMPSIT, 2. QUOTA, 1, 2.

VOTE.

See BOUNTY, 1. TOWN, 1, 2.

WAIVER.

See ATTACHMENT, 7, 8. MORTGAGE, 5.

WARRANT.

See BOUNTY, 1. TAX, 11, 12.

WARRANTY.

See BILLS, &c., 6. INSURANCE, 3.

WASTE.

See WILL, 2.

WAY.

1. A railroad corporation, whose track is located within the limits of a highway, may load and unload one of its cars while temporarily standing for that purpose in the street, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the way for the ordinary purposes of travel. *Mathews* v. *Kelsey*, 56.
2. And for the purpose of unloading a car of flour, a merchant, whose store is on the street, may use skids, temporarily elevated above the ground and extending from the car-door, fifty feet to the store, provided there is ample room between the car and the opposite side of the street to accommodate the travel of the street. *Ib.*
3. The fact that, when a resident of a city was injured by reason of a defective way, which the city was bound to keep in repair, he was driving at a "faster rate than six miles an hour," in violation of a city ordinance, is no bar to his right to recover damages for such injury, if such driving did not in any degree contribute to produce it. *Baker* v. *Portland*, 199.

4. The law imposes no duty upon any inhabitant of a town, other than a town-officer, who perceives an obstruction on a highway, to remove it as soon as by due diligence he can do it. *Ham* v. *Wales*, 222.

5. Hence, in the trial of an action against a town for an injury occasioned by reason of an obstruction suffered to remain on a highway, it is erroneous to instruct the jury that "notice of a defect to any inhabitant of the town, of sufficient intelligence to know and appreciate the danger, and for a sufficient length of time to enable such person, by the use of due diligence to remove it, or to give notice to other inhabitants of the town of its existence, so as to enable them to remove it, if the person, to whom the defect was first known, was not a competent or suitable person to do it, was all the law required." *Ib.*

6. The principles of R. S. of 1857, c. 18, § 62, providing that the repair of a way within six years before the cause of action accrued, estops the town to deny the location, apply to a sidewalk. *McCann* v. *Bangor*, 348.

7. When there is a long-continued user of a highway which the town or city has repaired, or there is a dedication made and accepted, the town or city is liable for injuries received solely from the defects of the way. *Ib.*

8. In an action against a town for an injury to a stage-coach caused solely by a defect in a highway, the loss of the use of the coach for a reasonable time, while it is being repaired, is not an element of damage.
McLaughlin v. *Bangor*, 398.

See PLEADING, 7.

WIDOW.

See ASSUMPSIT, 8. DOWER, 1. EQUITY, 1.

WILL.

1. A will, after devising the testator's property to his wife Jane, "during her natural life," continued: "After the death of my wife Jane, it is my will that my son Reuel have all the property, both real and personal, which may then remain, by paying out" "in six months after her death" to each of the testator's two sons by a former wife, a certain legacy, and in one year after their mother's death, a certain bequest to each of two children by his wife Jane, a brother and sister of Reuel. Jane survived her son Reuel, who, without paying any of the bequests, died intestate and unmarried, and she remained a widow until she died intestate. On the trial of a petition for partition brought by the testator's children by the former wife against the surviving children by the latter, *Held*, (1) That the will gave to the wife, Jane, a life-estate; (2) To his son Reuel a vested remainder in fee-simple, liable to be devested only by non-payment of the bequests to the other children as a condition subsequent, and an actual entry on the part of those entitled to claim a forfeiture by reason of a breach of the condition; (3) On the death of Reuel, the property descended in equal shares to his mother, brothers, and sister; and that, (4) On the death of his mother, her fifth descended to her children.
Leighton v. *Leighton*, 63.

2. A testator devised unto his grandson certain land, "to have and to hold the same to him, the said" devisee, "for and during the term of his natural life, without impeachment of waste; and after his decease, to the heirs male of his body; and in default of heirs male, to the heirs female of his body; and for want of heirs female, to" the testator's son M. during the term of his natural life; and after his decease, to his heirs in tail. *Held*, That the grandson of the testator named took an estate for life, and that at his decease, his eldest surviving son an estate in fee-tail. *Hamilton* v. *Wentworth*, 101.

3. The words "heirs male" in such case are to be construed as words of purchase and not of limitation. *Ib.*

WITNESS.

A telegraphic operator is bound, as a witness, to disclose telegraphic communications. *State* v. *Litchfield*, 267.

WRIT.

See ABATEMENT, 4, 5. PRACTICE, 1.