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.

TABLE

OF THE CASES REPORTED.

ERRATA.

Page 61, 19th line, for "all" read "in."
" 270, 9th line, for "plaintiff" read "defendants.
" 270, 10th line, for "defendant" read "plaintiff."
" 275, 33d line, for "declaration" read "plea."
" 275, 34th line, for "plaintiff" read "defendants."
" 431, 35th line, for "plaintiff" read "defendants."
" 535, 22d line, for "Pub." read "Spec."

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

KENNEBEC & PORTLAND RAILROAD COMPANY, in equity, *vs.* PORTLAND & KENNEBEC RAILROAD COMPANY and others.

Mortgage of railroad, franchise, and other property—foreclosure of.

The Kennebec & Portland Railroad Company, on the 15th of October, 1852, pursuant to a vote of its directors, mortgaged its road, franchise, and other property to certain persons named, in trust, for the benefit of the holders of a certain class of its bonds, duly issued by the company, with interest payable semi-annually. The company having neglected to pay the interest coupons due on the bonds, on and after April 1, 1856, the trustees, upon due application by the holders of the bonds to an amount exceeding one-third of the amount of the mortgage, on the 18th of October, 1859, in accordance with the Public Laws of 1857, c. 57, gave the public notice, and caused the same to be published, and a copy of the printed notice recorded at the time and place and in the manner prescribed in said statute, for the purpose of obtaining a foreclosure of the mortgage for the breach of its condition. In a bill to redeem, *Held*, by a majority of the court, that the mortgage was legally foreclosed.

BILL IN EQUITY against the Portland & Kennebec Railroad Company, John Patten and Marshal S. Hagar, trustees, Richard D. Rice, George F. Patten, William D. Sewall, Darius Alden, N. M. Whitmore, Geo. F. Shepley, J. B. Brown, and Horatio N. Jose.

Case heard on bill, answer and proofs.

The bill alleges, substantially, that in 1850, the plaintiff corporation was a legal corporation, owning and possessing a railroad extending from Augusta, through Brunswick and Yarmouth, to Portland, thence to a junction with the Portland, Saco & Portsmouth Railroad, at Cape Elizabeth, with a branch from Brunswick to Bath.

That in constructing the road between Augusta and Yarmouth, including the branch, the plaintiff corporation issued stock, known as "original stock," to the amount of seven hundred thousand dollars, and "old preferred stock" to the amount of two hundred and forty thousand dollars, on the last named of which dividends of ten per cent per annum were payable.

That to construct the road from Yarmouth to the Junction, the plaintiffs agreed with persons unknown, that if they would furnish the means, exclusive of land damages, depots, and furniture, the plaintiffs would issue to them stock known as "Yarmouth stock," and secure to the holders thereof the whole income of that portion of the road, until they were paid the principal and ten per cent annual interest, and secure the payment by a first mortgage of that portion of the road and franchise, and that they accordingly issued stock to the amount of two hundred and four thousand and two hundred dollars payable at ten per cent, and secured the same by a mortgage to Reuel Williams, John Patten, and J. B. Carroll, in trust, who accepted.

That to construct and equip the railroad, the plaintiffs, under due legislative authority, borrowed of certain towns along the line of the road, and of persons unknown, eight hundred thousand dollars in money and scrip, and secured them by a mortgage of nineteen-twentieths of the road and franchise to commissioners of the sinking fund, provided by the loan act, and another mortgage of one-twentieth to John Patten, Marshal S. Hagar, and Joseph McKeen, in trust, subject to the former mortgage; that in 1851 the plaintiffs issued and sold bonds, known as "first mortgage bonds," to the amount of two hundred and thirty thousand dollars, with interest payable semi-annually, and secured the same by mortgage to Patten,

Hagar, and McKeen, in trust, subject to the prior mortgages; that in 1852, the plaintiffs issued, and sold in part, "second mortgage" bonds to the amount of two hundred and fifty thousand dollars, and secured them by mortgage to Patten, Hagar, and McKeen, in trust, subject to prior mortgages; that in 1854 the plaintiffs issued "new preferred stock" to the amount of one hundred and twenty thousand dollars, payable with interest at three per cent semi-annually, making the entire cost of the road, completed and equipped, two million five hundred and forty-four thousand two hundred dollars; that in 1853 the old preferred stock was surrendered and new certificates, on which semi-annual dividends of three per cent were payable, were issued to, and received by the holders thereof, and the holders of the Yarmouth stock relinquished, for the benefit of the "old preferred stock," four of the ten per cent, payable as mentioned.

That in 1857, the interest on the first and second mortgage bonds not having been paid, Patten, Hagar, and McKeen, as trustees, in behalf of the bondholders, and for breach of the condition of the mortgages, took the possession and management of the road, franchise, etc., and continued to hold the same until 1864, taking the income, rents, and profits.

That in 1861, one Lambard, Southard, Thompson, Alden, Whitmore, Patten, and Sewall were elected directors of the plaintiff company, and so continued until December, 1864, Lambard being president; that it was their duty to do all things necessary for the faithful administration of the affairs of the corporation; and that the trustees ought to be holden to account to the plaintiffs for what income and profits might have been received under proper management of the road.

That the trustees so carelessly, negligently, and unskillfully managed the road and its affairs, that the net earnings were less by two hundred thousand dollars per annum than they would have been under faithful and proper management.

That the trustees combined with Alden, Whitmore, Sewall, and Patten, a majority of the directors, and with one Rice, Brown,

Shepley, and Jose, together with other persons unknown, contriving and intending to obtain for themselves and their associates the possession, management, and ownership of said road, franchise, etc., bought a large amount of original, preferred, and Yarmouth stock, bonds, mortgages, and other claims which the plaintiffs were liable to pay, amounting to seven hundred thousand dollars, for much less than the real value thereof, with money belonging to the plaintiff company, being earnings of the road.

That the late Reuel Williams owned the original, preferred, and Yarmouth stock, etc., secured by a mortgage of the rolling stock of the road, to the amount of five hundred thousand dollars, and in 1861 offered to sell the same to the trustees, for the benefit of the plaintiffs, for one hundred and thirteen thousand dollars; but the trustees, contriving and intending to obtain for themselves and associates the ownership of the road, improperly declined to accept the offer: that afterwards the same were purchased of Williams by Rice and Alden for the benefit of the trustees and associates, for the purposes mentioned, for the sum of one hundred and thirteen thousand dollars, which was paid out of the earnings and income of the road, and the defendants claim to hold the same.

That directors, Alden, Whitmore, Sewall, and Patten, combining with the trustees and their associates before mentioned, for the purpose of becoming the owners of the road, in violation of their trusts, neglected to pay the interest upon and redeem the bonds.

That in 1863, the plaintiffs, through Lambard, having brought in this court a bill to redeem the mortgages, directors Alden, Whitmore, Sewall, and Patten, without the knowledge of President Lambard, and for the purpose mentioned, called and held a meeting of the directors, and voted to dismiss the bill which was accordingly done.

That the road and franchise, since possession thereof was taken by the trustees, has been of sufficient value if administered according to the true tenor of the trusts, to pay the interest on and redeem the bonds; but the trustees and directors, not regarding their trusts, applied the same to the purchase of stock, bonds, etc., for the benefit

of themselves and associates, and allowed the interest to go unpaid and the bonds and mortgages to remain unredeemed.

That subsequent to 1863, the Portland & Kennebec Railroad Company, as they claim, were created a body corporate, and became possessed of said railroad, property, and franchise, claiming to hold the same by some title derived by, through, or under the mortgages given to secure the first and second mortgage bonds; and the plaintiffs pray that the defendants may set forth by what right and title they claim to hold the same, and have appropriated the same to their own use, and have not paid the dividends on the preferred stock, nor the interest on the first mortgage bonds, nor made provision to pay the principal.

That the Portland & Kennebec Railroad Company took whatever title they have, if any, with notice of the trusts created by the agreements and undertakings of the plaintiffs, and of the equitable rights of the holders of said bonds, and of the old and new preferred stock created thereby, to demand and enforce payment of their interest, dividends, etc., out of the income of said property.

That the trustees and directors and their associates became members of and compose the defendant corporation.

That the money paid for the stock and bonds was used in the construction and equipment of the road, and no dividends have been paid thereon since April 1, 1856.

That in 1862, Marshal Hagar, deceased, and Sarah Hagar, having been duly appointed administratrix of his estate, accepted the trust.

That in 1862, and again in August, 1865, the plaintiffs demanded of the trustees and the Portland & Kennebec Railroad Company a true account in writing, in order that the plaintiffs might pay the amount equitably due, and they unreasonably refused to render the account, and allow a redemption, although the plaintiffs tendered to them the amount due on the — day of —, A. D. 1865.

The prayer of the bill was, among other things,

That the Portland & Kennebec Railroad Company might state the amount of income received by them since they came into pos-

session, and that they and the trustees may be decreed to come to a fair and just account with the plaintiffs in respect to the net income of the mortgaged premises, and be enjoined from using or appropriating the income of said railroad, property, and franchise, otherwise than in accordance with the trusts and equitable liens charged upon the same by the plaintiffs; and that the plaintiffs may be let in, to redeem the mortgaged premises, on payment to the defendants of what shall be due after deducting therefrom what the said trustees and the Portland & Kennebec Railroad Company have, or might have received from the rents, profits, and income of the mortgaged premises; and that the defendants be decreed to pay and account to the plaintiffs for what shall appear to be due on taking account, and deliver possession of the mortgaged premises to the plaintiffs, with the furniture, rolling stock, books, writings, and records relating thereto, and for general relief. Duly signed and sworn to Oct. 24, 1865.

All the defendants answered.

The Portland & Kennebec Railroad Company answered, admitting the lawful existence of the plaintiff corporation, ownership, and possession of the road, the issuing of stocks and the giving of bonds and mortgages, as alleged in the bill; that the interest on the bonds not having been paid, the trustees took possession of the road, franchise, and furniture, in behalf of the bondholders, they having duly organized for that purpose, pursuant to law, and so continued in possession until Jan. 1, 1864, except that they were dispossessed of the furniture by the paramount claim of Reuel Williams.

The defendant denied all knowledge or belief in regard to the trustees' negligence in managing the road, in any combination to defeat the plaintiffs, of the application of the funds as alleged, of any combination, by the directors in the plaintiff corporation, with the trustees and associates to become owners of the road, or of any neglect to pay the interest of and redeem the bonds; or that the earnings were sufficient, with proper administration, to pay the interest of and redeem the bonds; or that the trustees, disregarding their trust, applied the earnings for the benefit of themselves and associates.

The defendant corporation admitted that it was created a body corporate in 1862, by the organization of the second mortgage bondholders into a corporation, after the foreclosure of the mortgage, under the name of the Portland & Kennebec Railroad Company, in pursuance of the statute.

That the plaintiffs neglected and refused to pay the semi-annual coupons upon its second mortgage bonds (as well as those upon its first mortgage bonds) that fell due after April 1, 1856, up to and including those payable April 15, 1859, for more than ninety days after the same fell due and were duly demanded, and the holders of more than one-third of the whole of the second mortgage bonds in amount, secured by said mortgage, on which were the dishonored coupons, applied in writing to the trustees to have the mortgage foreclosed.

That the trustees, on May 18, 1859, foreclosed said mortgage, in accordance with the statute (reciting the details of the action).

That the plaintiffs continued their neglect to pay the dishonored coupons, though payment, after maturity, was demanded, and though the coupons, amounting to over forty thousand dollars, were presented to the trustees more than thirty days before the time of redemption of the mortgage expired, to wit, more than thirty days before May 20, 1862, and remained in the hands of the trustees for payment, long after the expiration of the time of redemption; that none of them were paid, or tender offered, or means procured, or any bill to redeem brought, or any money in the hands of the trustees with which to pay.

That more than three years having elapsed from the time of the publication of the notice, and the mortgaged property not having been redeemed, the second bond mortgage was foreclosed; that on 5th November, 1862, the holders of the second mortgage bond, the mortgage having been foreclosed, organized into a corporation, under the name of the Portland & Kennebec Railroad Company, in pursuance of the statute, and have since continued to be a lawfully created railroad corporation.

That at a lawful meeting of the holders of the first mortgage

bonds, notified and held on Dec. 14, 1859, by a vote duly passed, the trustees were directed to take possession of the mortgaged premises, for the purpose of managing same on behalf of the holders, on September 1st, then next; that they accordingly took possession and continued therein, receiving the earnings thereof, until Jan. 1, 1864, when, in accordance with the statute, the trustees conveyed the right and title, derived by virtue of the deed of the second mortgage in and to the road, franchise, etc., to the defendant corporation; that this corporation negotiated with the first mortgage bondholders to prevent consummation of the proceedings to foreclose, and the coupons since falling due on said first mortgage bonds, city and town bonds, and Yarmouth stock, have been regularly paid out of the earnings.

That the road was in bad condition, inadequately furnished; that no right of way was secured for a long distance from the depot of the Portland, Saco & Portsmouth Railroad, and no depot accommodation; that the trustees, from necessity, made large expenditures, over and above the earnings, to purchase lands for depots, right of way, and to build a new road from Westbrook to the junction, and mortgaged the property therefor.

That by an act passed Jan. 28, 1865, the defendant corporation were authorized to build the road on its new location, to issue stock and raise funds therefor, and to extinguish prior incumbrances; and that they issued and sold stock, bonds, etc., as detailed.

The answer contained a detailed statement of receipts, and denied any payment or tender, or demand of any account or refusal to account.

Denies that the plaintiff was or is possessed or seized of the equity of redemption of the mortgaged premises or any part thereof.

As a majority of the court concur only in the result, the other answers and all the proofs, excepting the following notice of foreclosure, are omitted:

"Whereas the Kennebec & Portland Railroad Company, on the 15th day of October, A. D. 1852, by their mortgage deed of that

date, conveyed to the subscribers, Joseph McKeen, John Patten, and M. S. Hagar, as trustees to take and hold in trust for the security of the holders of the bonds of said company then authorized to be issued, 'all their railroad, as now made, from Portland to Augusta, and from Brunswick to Bath, inclusive, and all their corporate property, real and personal, and the franchise of said company, including the road and superstructure, and all the land conveyed to said company by others, for a description of which reference is to be had to the several deeds recorded in Cumberland, Lincoln, and Kennebec, as well as the right of way paid for, and all the buildings thereon, and the personal property, consisting of engines and tenders, passenger, freight, platform, and dirt cars, snow-ploughs, and apparatus of every description, subject, however, to prior mortgages thereon,' upon the condition and for the purpose of securing the payment of bonds for two hundred and fifty thousand dollars, on the 15th day of October, A. D. 1864, and of well and promptly paying semi-annually the interest on their bonds, dated Oct. 15, 1852 (coupons on said bonds), all which more fully appears by the said mortgage deed, which is recorded with the records of deeds for Kennebec county, book 179, p. 370.

"And whereas the said Kennebec & Portland Railroad Company have refused and neglected to pay to the holders of said bonds, within ninety days after presentation for payment, the interest (coupons of said bonds) due since April 1, 1856, and still refuse and neglect to pay the same. And whereas, on the fifteenth day of April, A. D. 1859, Reuel Williams, owning and holding forty-eight thousand and eight hundred dollars of said bonds; J. L. Cutler, trustee, owning and holding one thousand dollars of said bonds; D. Alden owning and holding seven thousand and six hundred dollars of said bonds; W. A. Brooks owning and holding one thousand dollars of said bonds; Wm. R. Smith, owning and holding fifteen hundred dollars of said bonds; L. W. Lithgow, and, as trustee, owning and holding twenty-five hundred dollars of said bonds; Wm. D. Sewall, owning and holding seven thousand dollars of said bonds; Wm. D. Sewall, trustee, owning and holding thirty-three hundred

dollars of said bonds; Geo. F. Patten owning and holding thirty-five thousand dollars of said bonds, and H. S. Hagar owning and holding forty-three hundred dollars of said bonds; in all, amounting to one hundred and twelve thousand dollars of said bonds, being more than one-third of said mortgage, all the interest (coupons) of said bonds since April 1, 1856, being unpaid and dishonored, made application, in writing, to the subscribers to have said mortgage foreclosed, because the semi-annual interest (coupons) on said bonds have not been paid since April 1, 1856, and now remain unpaid, whereby the conditions of said mortgage deed have been and now are broken.

"Now, therefore, the subscribers give notice, that, by reason of the breach of the condition in said mortgage to them, by said Kennebec & Portland Company, in refusing and neglecting to pay the semi-annual interest (coupons) due upon said bonds since April 1, 1856, they claim to foreclose the said mortgage.

Jos. McKeen, John Patten, M. S. Hagar, } *Trustees as aforesaid.*

"Brunswick, May, 18, 1859."

"Kennebec, ss.

"Clerk's Office, Supreme Judicial Court.
Augusta, May, 1868.

"I hereby certify that the foregoing 'Notice of Foreclosure' was copied by me from the *Kennebec Journal*, the newspaper published by the State printers, and printed at Augusta, in the said county of Kennebec, and was published in said newspaper three weeks successively, to wit, on May 20th and 27th, and June 3d, 1859, and that said copy is a true and correct copy. I further certify that I have examined the newspaper called *The Age*, published at said Augusta, in said county of Kennebec, and find the same notice printed therein in the issues of May 26th, and June 2d and 9th, 1859,—also, the *Eastern Times*, a newspaper published at Bath, in the county of Sagadahoc, and the *Brunswick Telegraph*,

a newspaper published at Brunswick, in the county of Cumberland, and I find the same notice printed in those papers, under the dates respectively of May 20th and 27th, and June 3d, 1859. I further certify, that, in the list of bondholders mentioned in said notice, I find the name of Hagar printed '*M.* S. Hagar' in the *Age*, while in the other papers it is '*H.* S. Hagar.'

WM. M. STRATTON, *Clerk of said Court.*"

"BRUNSWICK, June 20, 1859.

"We hereby certify that we have caused the above notice of foreclosure to be printed three weeks successively in the newspaper published by the State printer, and in a newspaper published in each of the counties into which said K. & P. R. R. extends, viz.: in the *Kennebec Journal*, published at Augusta, in the county of Kennebec; the newspaper published by the State printer, on the 20th and 27th days of May, and the 3d day of June, A. D. 1859; in the *Age*, published in Augusta, in the county of Kennebec, on the twenty-sixth day of May, and the second and third days of June, 1859; in the *Eastern Times*, published in Bath, in the county of Sagadahoc, on the twentieth and twenty-seventh days of May, and the third day of June, 1859; and in the *Brunswick Telegraph*, published in Brunswick, in the county of Cumberland, on the twentieth and twenty-seventh days of May, and the third day of June, 1859. We certify these facts and dates to be recorded in each of said counties, in its Registry of Deeds, within sixty days from the time of each said first publication, in conformity to the provisions of section 55 of chapter 51 of the Revised Statutes of Maine.

JOS. MCKEEN,
JOHN PATTEN,
M. S. HAGAR, } *Trustees as aforesaid.*"

"Recorded according to the original, received June 21, 1859, at 9h. A. M.

Attest: AUGUSTUS F. GERRISH, *Register.*"

A. G. Stinchfield (and with him *Davis & Drummond*), for the plaintiffs.

A. Libby, for the defendant corporation.

J. W. Bradbury, for the trustees and individual defendants.

KENT, J. The object and prayer of this bill is, that the plaintiff corporation may be let in to redeem the mortgaged premises, viz., its road and all its corporate property, described in the deed to trustees for the benefit of what are termed the second mortgage bonds and bondholders.

There is no question that the plaintiff corporation was the original owner of the road, and that it had the rights of a mortgager under the deed referred to. The question, if not the sole question before us is, whether that right of redemption has been legally and effectually foreclosed. If it has been, there would seem to be no equity or title to the property left in the plaintiffs. If it has not been, the plaintiffs should be let in to redeem.

Indeed it would seem, if there has been no legal foreclosure, there can be no legal existence of the defendant corporation,—for that exists only by the fact of a prior extinguishment of the right of redemption. Stat. 1857, c. 57.

In the argument several objections are started touching the validity of the mortgage deed. It is said that the vote of the stockholders did not authorize the president to mortgage the personal property or the franchise, and that therefore the deed, at least as to those particulars, was unauthorized and void.

An answer to this question, which certainly seems formidable, is that the bill nowhere sets up or alleges these matters, but simply sets out the existence of a legal mortgage, but denies any foreclosure and asks to redeem. The argument is, that if there was no legal mortgage no title passed, and the remedy would be at law or in equity to obtain a decree to declare the deed void, for the purpose of removing a cloud from the title of the plaintiffs.

On examination of the bill, it will be seen that it sets out in the

commencement a full and very particular statement and history of the various incumbrances and mortgages which had been created and executed besides the issue of stock certificates. It names the Yarmouth extension, $204,000, to secure which a mortgage was given to trustees. It then alleges that another mortgage was given to other trustees of the railroad and franchise subject to the prior mortgage, to secure certain cities and towns which had loaned money to the corporation. This debt it is stated was $800,000. It next states that the corporation issued "first mortgage bonds" to the amount of $230,000, in the year 1851, payable in ten years, and secured the same by a mortgage to the same individuals as trustees, subject to the mortgages before named. Then comes the allegation in reference to the mortgage now in question, "that afterwards, in the year 1852, the said corporation duly issued, and sold in part, bonds known as the second mortgage bonds, to the amount of $250,000, payable in twelve years with semi-annual interest, according to the tenor of coupons or interest warrants, thereto annexed, and secured the same by a mortgage of said railroad to said Patten, Hagar, and McKeen, who were trustees in the other mortgages, in trust, subject, however, to the other mortgages hereinbefore named." The bill then asserts that "afterwards, in the year 1857, the said trustees," the interest on said first and second mortgage bonds not having been paid by said corporation, "in behalf of such bondholders, and by reason of the condition of the mortgage, given to secure said bonds, took the possession and management of said railroad, franchise, and furniture, and so continued the possession up to 1864."

There is further on a statement that the defendant corporation became possessed of said railroad, property, and franchise by some title derived by, through, or under the mortgages given to secure the first and second mortgage bonds, and a request for a disclosure of the title or claim set up.

The prayer of the bill is "to be let in to redeem the mortgaged premises, on payment to the defendants of what shall appear to be due to them, if anything, after deducting what the trustees and the defendant corporation have, or ought to have received from the

profits and income of said mortgaged premises. The bill also prays for general relief.

The answers of the defendants, all admit the statement of mortgages and incumbrances as made by the plaintiffs. There is, therefore, no issue made by the bill, answers, or proofs, as to the legality or binding force of these several mortgages. The bill is one for redemption and that only, from a certain specified mortgage,—not to cancel or restrict it, or to set it aside. There are, doubtless, many things stated in the bill, and elicited in the proofs which might be of importance, in adjusting accounts and equities, if the foreclosure is found to be ineffectual. But the preliminary and vital question is whether the mortgage has been foreclosed. The bill does not set up any original illegality, or want of binding obligation in the mortgage.

But if these objections, which have been stated in the argument, were fully open, we should be hardly ready to say that they were so clearly established as to require or justify the decision, that the mortgage was void. By the direct vote of the stockholders, authorizing the issue of the second mortgage bonds, the president was authorized "to execute a mortgage of the road and appurtenances, subject to prior mortgages to secure said bonds."

This authority is in terms broad and ample. It seems to us no forced construction, which should hold that the evident design was to give power to mortgage the real and personal property of the corporation, belonging to, used with, and which was in fact, practically, the road and appurtenances. Even if the word "appurtenances" had been omitted, and it had been simply a power to mortgage "the road," it would be too narrow a construction to limit the power to the road-bed and rails. By the terms used, it is evident that the corporation had in view the same property and rights that it had before mortgaged by the deeds to which this is subject. The vote, which authorized the mortgage to secure the first mortgage bonds, was more specific and included, in terms, "the franchise and furniture of the road." It would be difficult to limit, by any satisfactory definition of the words "the road and its appurtenances,"

the force and effect of them, short of a power over all that was the road itself, and all that belonged to it as a railroad. Considering the object of the vote, the prior votes and mortgages referred to in this vote, and the evident intent to give full security on all the property, rights, and interests still remaining in the corporation, we see no reason to doubt, that power was given sufficient to cover the actual grant of the property, including the franchise named in the deed.

But it is objected that the corporation had no power to mortgage its franchise, without the consent of the legislature. The argument is, that the grant being to certain persons and their associates, the law will not sanction or permit the transfer to other persons or corporations.

It is by no means settled that this doctrine is recognized or admitted universally. It is doubted or denied in several cases in different States. The case of *Shepley* v. *G. T. R. R.*, 55 Maine (published since the arguments were made in this case), is substantially a denial by our court of this doctrine, and the reasons there given are cogent and satisfactory, and are based on common sense and practical views, rather than on theoretic speculations, which have little basis in fact or experience.

But it is not denied that if the rule be, as first stated, subsequent ratification or recognition is equal to prior or direct assent by the legislature. An examination of the various enactments in relation to the roads and railroads generally leads to the conclusion that the State cannot and does not object. This objection, it is to be marked, is one resting solely on public policy, and the supposed interest of the State. It is one rather for the State than for the company to interpose.

Again; in this case the franchise — the right to be a corporation and to exact and secure tolls and fare—becomes of little practical importance to the present defendant corporation. If the foreclosure of the mortgage on the other property mortgaged was perfect and sufficient, the statute authorized the body of bondholders to organize as a corporation at once, with all the powers of the for-

mer corporation, and to, in effect, assume a new franchise and act under it. If, then, the franchise of the old corporation was not mortgaged, or if the conveyance of it in mortgage was illegal for want of legislative consent, and if, therefore, it has not passed out of the old corporation, yet, if all the other property has passed to the second bondholders, their new legalized corporation is sufficient for all practical purposes, and exists by the express enactment of the legislature. The complainants recognize the existence of the corporation thus formed, by instituting this bill against them and requiring them by the new name to answer, and to account and to receive what may be found due, and to release the mortgaged property.

The plaintiffs having called in the bill for the disclosure of the defendant's title, and for the grounds on which they assume to hold the railroad and its franchise and property,— the answers place that claim on the ground of the foreclosure of the second bond mortgage, and rest upon that. The answers and evidence show that the foreclosure was made under the provisions of the statute of 1857, by publishing in the newspapers and recording as therein required. The question is whether that foreclosure was effectual.

It is objected in the first place that the statute does not, by its terms and scope, apply to mortgages executed before its passage. We think that it is evident that it was the intention of the legislature to provide a mode for the foreclosure of all existing, as well as all subsequent railroad mortgages. The statute was passed to give what may be considered by those interested, or some of them, a simple and effectual mode of securing and enforcing the rights of both mortgagers and mortgagees in such deeds. The language is sufficiently explicit, "whenever any railroad corporation shall have mortgaged its franchise," etc. The object in view was to reach all this class of conveyances, and the words used are sufficiently retrospective in their scope to include them.

But a more serious question is raised and pressed upon us with force and earnestness, and requires full consideration.

It may be stated to be in substance this: that if the statute is

retrospective, so as to operate upon this mortgage, it is unconstitutional, and therefore void so far as this mortgage is in question. And it is unconstitutional because, if retrospective, it violates the provision of the Constitution of the United States, which prohibits a State from passing any law impairing the obligations of contracts.

It is insisted that this mortgage, having been given in the year 1852, must be governed by the law then existing, as to its redemption or foreclosure, and that the laws or rules then in force were so a part and parcel of the contract and so incorporated into it, that any change in the mode of foreclosure would impair the obligation within the prohibition. In following out this idea it is contended, that, in 1852, there was no mode by which a railroad mortgage like this could be foreclosed, under any of the existing statutes of the State, or by any of the established rules of law, applicable to mortgages and their foreclosure. The only mode by which it could be effected, it is claimed in the argument, is by a bill in equity to foreclose, instituted under the general equity powers of an equity court, by which a sale, or a strict and immediate foreclosure, would be ordered.

It is important to ascertain what provisions of law then existed for the foreclosure of mortgages in Maine, when this contract was entered into.

The statute law had always recognized the existence of a right in the mortgager of real estate to redeem the same after breach of the conditions, and had fixed that term at three years, after the commencement of proceedings to foreclose the equity. At the same time, it had provided by statute the mode of proceeding on the part of the mortgagee to foreclose. These modes were specifically stated and exactly defined. One mode was by entry and possession for the purpose of foreclosing by the written consent of the mortgager or his grantee. One by a peaceable entry, in presence of witnesses, whose certificate of the fact must be recorded in the Registry of Deeds. Another mode was by a suit at law, declaring, in a real action, in the usual form, in which action either party, on motion and proof that the title claimed was in mortgage, might have

a conditional judgment entered as on mortgage, in which it was decreed that if the debt was not paid in two months, an execution for possession should issue. If possession was taken under the judgment at law, the equity would be foreclosed in three years, after such execution of the writ of possession. Another mode of more recent date, but one existing some years before 1852, and now on the statute book, is by a publication in a newspaper without entry or suit, describing the mortgage, the breach of the condition, and intention thereby to foreclose the mortgage. The usual time of redemption, viz., three years, is allowed after the publication. We may say, in passing, that this mode of foreclosure by advertising is in all essential particulars the same as that provided for in the statute of 1857 for railroad mortgages with the same rights and time for redemption.

The foregoing were all the modes by which a mortgage of real estate could be foreclosed in Maine in 1852. It was decided in the case of *Ireland* v. *Abbott*, 24 Maine, 155, that since 1821, in Maine a mortgage of real estate cannot be foreclosed, except by pursuing one of the modes provided by the statute for that purpose.

The law in relation to mortgages of personal property in 1852, gave sixty days after breach for redemption. It was decided in several cases before 1852, that the title of the mortgagee became absolute as to the personal property mortgaged, at the expiration of sixty days without any action or proceeding to foreclose. *Thompson* v. *Moore*, 36 Maine, 47; *Clapp* v. *Glidden*, 39 Maine, 448.

More recently, by subsequent statutes, the mortgagee in such cases must move to foreclose, but in 1852 the title to real estate, whatever that term includes, could be foreclosed in either of the modes pointed out in three years, and the title to personal property by lapse of sixty days after non-payment.

It is claimed that this railroad mortgage could not be foreclosed under any law existing in 1852. It would seem clear enough that whatever came under the name of real estate might be foreclosed, under the statute relating to real estate, and whatever was personal estate would be foreclosed in sixty days, after the failure to pay

any coupons. Now the foreclosure actually attempted in 1859, although, following manifestly the then recent act of 1857, was yet, in substance, a compliance with the provisions of the statutes existing in 1852, viz., the mode by advertising. It is admitted in the argument of the plaintiff's counsel that "a mortgage embracing real estate, and also personal estate, distinct from each other, might be foreclosed as to the realty, as a farm and farming tools on it." But he contends that the connection between the franchise and the easement is different. He urges that the franchise and easements could not be foreclosed by the then existing law, and that, therefore, this mortgage could not be. He admits that the real estate could be foreclosed under the then existing statutes. Perhaps the remarks before made, touching the franchise, might be applicable on this point, if all the real estate, including all that can properly come under that term, and all the personal property, including all that can come under that term, were legally foreclosed, under the statutes existing in 1852, by the published notice as to the one and by the expiration of sixty days, after non-payment, as to the other.

But if there were, in fact, no existing provisions by statute or common law, by which in 1852 this mortgage could be foreclosed, a question would arise, how would the parties stand? Why should not the old common-law doctrine apply, of a forfeiture of the entire property on a failure of strict compliance. But the plaintiff's counsel contends that there was another and existing mode of foreclosure in this State at that time, viz., by a bill in equity by the mortgagee to enforce a foreclosure. And he further contends, that this mode was so a part of the mortgage or contract, that a foreclosure by any other mode impaired the obligation of the contract, as before stated.

This leads us to an examination of the origin and nature of this equity of redemption, and the various modes by which a foreclosure or termination of this equitable right has been allowed to be effected in England and in various States of the Union. The first reflection, after such examination, is that there is no fixed, uniform, and universally acknowledged rule or mode, none that may be said

to accompany every mortgage, as a part of it, and to be the sole and inflexible way to enforce its foreclosure.

It may aid us in the consideration of the precise question before us, which must not be lost sight of, to examine briefly the origin and the judicial history of the equity of redemption, or the right to a reconveyance or restoration of the property conveyed by payment or performance after the day.

There is nothing in the ordinary mortgage deed itself, which by any language gives or indicates any such right. The conveyance is first absolute. It is then qualified with the proviso, that if the note, debt, or claim specified is paid when due, the deed is to be void. In the deed in question the proviso is "if such railroad company shall well and promptly pay," etc. This is the contract at law, as a pledge. There is no intimation of any right to redeem beyond the day of payment.

At common law, as is well settled and perfectly understood, by non-payment, at the day, strictly according to the language of the deed, the mortgaged estate becomes the absolute property of the mortgagee without action or process. The common law has never yielded this doctrine, except when the legislature has changed it. It has left it to the courts of equity to create and to enforce equities. One of the most interesting portions of English judicial history is that which records the long, earnest, vigorous, if not violent struggles between the judges of the common law and equity courts on this matter. The sturdy and obstinate old common-law judges stood firmly and unyieldingly by the contract as it read, and rejected all claims to qualify or extend it, or to create new equities or rights. But the courts of chancery, at an early period, held that until foreclosed by decree the mortgager, by applying within a reasonable time and offering to pay debt, interest, and cost, etc., might redeem the estate forfeited at law. This right to redeem, because it was created by, and could only be enforced in the courts of equity, has been termed the mortgager's "equity of redemption." On the other hand, the mortgagee might, after the estate had become forfeited at law, file a bill in chancery to foreclose the equity. Where-

upon the court, after account taken, will direct payment to be made within six months thereafter, or, in default, that the mortgage shall be foreclosed. The chief clerk appoints a day for payment, and upon default the mortgagee may obtain a final decree or order for foreclosure, which, when signed and enrolled, will foreclose the mortgage and fix the title absolutely in the mortgagee. A sale would sometimes be decreed in special cases, where in the judgment of the equity court it would be right and best for all parties. But a sale, unless by statute requirement, will not be ordered as a right, vested and fixed, which a party may insist upon. A sale under the general equity jurisdiction is by no means the certain or even the common mode of foreclosing the equity. It is true, that the original jurisdiction of the court of equity which it assumed by main strength, has been extended and regulated in England by statutes recently. And the cases in which the court may direct a sale, instead of a foreclosure of the title, have been enlarged and specified by English statutes of 15 and 16 Vict. But this rests on statutes not enacted and not in force here.

It is important to mark and remember the distinction between the powers and directions given by statute, and those which have been the creation of the courts of equity.

An important question here arises, as to the origin and history of this equity of redemption in this country, and particularly in our own and our mother State, Massachusetts.

It was and has ever been one of the boasts of New England, that our fathers brought here and established by naturalization the "common law of England." It has ever been in force here in its strictness, and its wonderful flexibility and power of adaptation to new relations and new exigencies. It is, to-day, the law of the land, except as changed by statute, or obsolete as to certain portions, by time and the extinction of customs and interests.

But our fathers did not bring with them to Massachusetts the court of equity, or the equity law, as expounded or created by that court. They did not bring the civil law, or any of its outgrowths, although, like wise men founding an empire, they, from time to time,

incorporated into their statute law many principles of equity and many modifications of the stern strictness of the old common law.

There is no doubt, that, from early times, the colonial laws recognized and yielded to the doctrine of a saving of strict forfeiture in mortgages by payment after the day, and provided a mode of securing that right by statute. At the same time, they took care to provide a mode of foreclosure and a limitation of the time during which the right to redeem might be claimed. They saw that the moment you depart from the strictness of the common law, two things are to be regarded as essential and vital. First, if the right to redeem, beyond the day, is given to one party, a right to enforce a forfeiture and foreclosure, within a reasonable time, must be given to the other.

Otherwise, the right might continue indefinitely. Now both these rights were created, and existed by statute, here and in Massachusetts, and always so in this State. The equity of redemption here was not the creation or creature of an equity court struggling and disputing with the courts of common law, and in danger of strangulation if it came within the grasp of one of the black-letter judges. Both rights here existed by positive law and legislative enactments. But the rights of both parties were well defined, both as to what mortgages came within the provision, and how the foreclosure might be enforced, and how the equity of redemption might be made available. Mortgages of real estate, alone, were provided for. Or rather, we should say, this right of equity and this right of foreclosure existed only in those cases where the statute gave or recognized them. There was no indefinite equity of redemption, created by equity courts, which could not be enforced by the existing modes, as pointed out in the statutes, but could only be foreclosed by a bill in equity. It may here be remarked, that, until quite recently, we have had no statute giving any right of redemption of pledges or mortgaged personal property, by payment beyond the day. And we have never known of any claim that such an equity existed and could be maintained by any process in law or equity. The strict old common law applied to such mortgages or pledges of personal

property here, until the recent statutes. The fact is illustrative of the position, that these rights are here the creation of positive law. Or, in other words, that the common law is the law of the land until some other power, sufficient to do it, has changed or modified it.

The equity of redemption, in real estate, has always, with us, been a well-defined and determined right. It is the right to redeem, by payment or performance, in three years after entry or process to foreclose the estate. It is, in one sense, a definite legal estate, for it has always been subject to conveyance by deed, and to seizure and sale on execution against the mortgager for his debts.

The process to enforce this right is given by statute, and is by a bill in equity. But the foreclosure, on the part of the mortgagee, has never been in this State by any process in equity. Such a mode is entirely unknown in our practice. There is no such authority given in the statute regulating mortgages. The statute is distinct in giving the remedy, by bill in equity, for redemption. But it gives, in detail, the modes by which a mortgagee, desirous of foreclosure, may proceed to effect his object. We have before stated all these modes, viz., by entry, by consent, by suit at law, by entry before witnesses, and by advertisement in a newspaper.

We repeat, because it is in our view an important fact, that the mode of foreclosing a mortgage, by a bill in equity, has never been known in this State. No such case can be found, we are quite sure, on our records. If the right existed in 1852, it was a dormant right, never having been used or recognized, nor specified in the statute before named as one of the modes to be pursued. If existing anywhere it must have been a latent, dormant, and undeveloped process inherent in this court, as a court of equity, in the same manner as it was claimed in early days by the English court of chancery.

But this court never has been a court of unlimited, general equity jurisdiction. It has never claimed or admitted the possession of such powers. Its equity powers are entirely the creation of the statutes, and have been, by statute, from time to time enlarged,

but always precisely defined. It was decided in *Leighton* v. *Leighton*, 32 Maine, 402, that this court has equity jurisdiction in those cases only in which it is conferred by statute. It was even held that where the statute gave expressly to the court equity jurisdiction "in all cases of waste," yet that this language did not give to the court all the powers possessed by courts having general equity jurisdiction in the matter of waste, but only to cases of waste at common law, where there was a privity of estate. It was admitted that the case of waste, presented by that bill, might justify a general chancery court, with full equity jurisdiction, in granting an injunction. The same point was so decided in Massachusetts in 5 Met. 150.

The well-settled doctrine, as expressed in the cases cited below, is that the equity powers of this court are conferred by statute and are there enumerated, beyond which is forbidden ground.

T. & C. R. R. v. *Myers*, 41 Maine, 109; *Hayford* v. *Dyer*, 40 Maine, 245; *Woodward* v. *Cowing*, 41 Maine, 9; *Frost* v. *Butler*, 7 Maine, 231; *Smith* v. *Ellis*, 29 Maine, 442.

It has been held that whatever the rules in equity might be as to set-off, they cannot prevail in this State when they are at variance with the provisions of our statutes relating to that subject. And so as to issuing injunctions. It is only when the power is given by statute that they can be issued. This was the condition of the law and the court, in relation to mortgages, in 1852, when this mortgage was executed. And we are now prepared to examine the precise question raised in this part of the case by the plaintiff. It is, as we understand it, nakedly just this. That the statute law of Maine, as it existed in 1852, was not applicable to mortgages of railroads; that, from the peculiar nature of these mortgages, there could be no foreclosure of them, except by bill in equity, without special provision of statute therefor, and that no such statute could be applied to such existing or prior mortgage, because it would violate the provision of the United States constitution, before named, prohibiting a State from enacting any law impairing the obligation of contracts. It is urged, that this was in substance in the nature of

a vested right, and so a part of the contract. That any other mode of foreclosure, although under a statute made for such cases, would violate the obligation of the contract.

It is strenuously pressed, in various forms, that a foreclosure by sale under a decree would be more advantageous to the mortgager, than a foreclosure of the title, so as to secure it to the mortgagee, and that this was a right inhering in the contract, and not part of the remedy. One answer to this view is to be found in what has before been shown, that a sale is by no means, even in the English practice, a fixed rule or established right in every case, nor is it a mode which either party can insist upon. The foreclosure may be strict, without sale, upon short notice and with not more than six months' time to redeem. The length of the Chancellor's foot is not more uncertain, than the precise order he may make.

It is, however, urged that where the foreclosure is by bill, all these chances are open in a court of general equity jurisdiction.

But if we come back to strict law or right, the question at once arises, whether, as matter of fact, there did not exist in 1852 any statute or other law in Maine, not merely giving the right, but compelling a party to foreclose any mortgage by a bill in equity? We have seen that no such law or rule was known or in use. Is not the argument on the other side stronger, that, as any equity of redemption can here only arise from or out of the law, and is not inherent in the common-law contract, if there comes up a new case before unknown and unprovided for, which, by reason of its character and complication cannot be dealt with, either as to its redemption beyond the day, or its foreclosure by existing laws, there is no equity of redemption, but the case, and the contract, and the deed, must stand and be regulated as to the rights of both parties by its terms at common law.

If there is a legal equity of redemption in such a case, how is it created? Can this court, with its limited chancery powers, create new species unknown to the statute or the common law? Can we make such an equity without a statute giving us the powers? And, on the other hand, can we say that we have power to create a new

mode of foreclosure, beyond those so clearly and precisely given in the statute, giving not merely a new mode, but leaving the time, terms, and conditions of foreclosure to the discretion of a judge? Would not this be judicial legislation, or the assumption of all the equity of unlimited equity courts?

But if we assume that an equity of redemption could or might be thus created or recognized, it is apparent that it would be the creation of the law, by the court. At the same time, of course, the same law must create or recognize a right to foreclose and extinguish this equity. Now, if the law thus creates both, why may not the law through the law-making power define, limit, and provide a mode of enforcing this indefinite and latent power? How would such a statute-remedy violate the obligation of the contract? Clearly not unless it affected some distinct right or obligation, secured to a party to the contract, and entering into and making a part of it at the time of its creation.

It is important to keep in view the exact proposition, by which it is attempted to demonstrate that the obligation of this contract is violated. It is not that the obligation at common law is affected, but that an outgrowth of that contract (which is the creation of the court, or at best of the law) was one part of the original contract and incorporated into it, and that this right to redeem, thus created, could not be foreclosed by any existing statute, but only by a decree of sale by a court of equity, and that the legislature had no power to provide any other mode.

The first and sufficient answer to this proposition in this case is, that, as we have seen, there never had been, and was not at the time of the execution of this mortgage, any such existing right to this mode of foreclosure. It was unknown to our law and our practice. It has never to this day been known in our judicial tribunals. How then could it be regarded so a part of a contract, so fixed and so incorporated into it, so certain and unchangeable a right as against all other modes of foreclosure, that no judge, and no legislature could adopt any other mode, without violating the constitution of the United States?

As a matter of fact, then, we find no such existing law, rule, or right that prescribes this single mode of foreclosure, and, therefore, no basis for the essential proposition.

We are not without direct authority in our own court, touching the equity powers of this court, in reference to foreclosure of mortgages. It appears that in the revision of the statutes in 1841, an attempt was made to define the powers of the court, as a court of equity, in one section of the statute relating, not to mortgages but to the supreme judicial court and its jurisdiction. R. S., c. 96, 1841. Among the cases named, as those which the court might hear and determine as a court of equity, "when the parties have not a plain and adequate remedy at law," are the following:

"All suits for the redemption and foreclosure of mortgaged estates."

It was evident to every lawyer that the words "and foreclosure' were inserted by mistake, or if not, that they were entirely inoperative, and could not and did not confer any power on the court to alter the existing law as to the mode of foreclosing. The parties had a plain and an adequate remedy at law, and no mortgage could be foreclosed, except in the way the statute had pointed out.

The words in question had never been used before in any statute, and at most could only be applied when there was not a plain and adequate remedy by existing law, or by using equity to enforce existing modes of foreclosure. The statute gives no new power and no new mode.

It is worthy of remark, that, although the provision remained in the statute from 1841 to the new revision in 1857, yet no case can be found where it has been attempted to foreclose by bill in equity under it.

But the court was soon called upon to notice this interpolation, and to give a construction to it. In the case of *Shaw* v. *Gray*, 23 Maine, 178 (decided in 1843), the court says: "A court, having general equity powers, might compel him to place himself in the condition he would have been in, if he had merely procured the

mortgage to be discharged. . . . But the powers of this court, as a court of equity, are specific and limited by statute. In regard to mortgages, it is confined to suits for the redemption or foreclosure thereof. What is to be understood, in this instance, by foreclosure, it may be difficult to ascertain; for the legislature have prescribed, with precision, what shall be done to foreclose a mortgage. This court, it is believed, are not vested with the power to decree a foreclosure in any case. The acts which are to foreclose a mortgage are, in every case, to be those of the mortgagee, or of those standing in the place of the mortgagee. It is not presumable that the legislature intended to superadd a power in this court, to adjudge or decree a foreclosure, upon grounds other than what they have specifically enacted to be such. As to suits for redemption, the power delegated must have reference to the mode of proceeding particularly prescribed for the purpose."

Again, in 1845, the court, in *Chase* v. *Palmer*, 25 Maine, 345, says: "The proper proceeding against him would seem to be to obtain possession of, or to foreclose the mortgage. Yet we do not understand such to be the object of the bill. And if it were, though the court, by the R. S., c. 96, 1841, is in terms authorized to take cognizance, as a court of equity, of suits 'for the redemption and foreclosure of mortgaged estates,' it is believed that the statute concerning mortgages (c. 125) actually precludes any action of this court, sitting in equity, on the subject of foreclosing mortgages; the provisions of that statute containing the rules which must govern in reference thereto; and none of them having reference to the action of a court of equity. The language of the statute, therefore, as to foreclosing mortgages in a court of equity, is inappropriate, and must have been introduced inadvertently, without recurring to the specific provisions enacted for the purpose."

In the report on the new revision of the statutes, in 1857, made to the legislature by the late Chief Justice Shepley, who was a member of the court when the decision before cited was made, and who has been familiar with the law and the practice of this State since its formation, we find this note referring to this language in

the statute of 1841, giving his reasons for omitting them in the revision. He says: "The words 'and foreclosure' are omitted as suited to mislead; the court having decided that it had no jurisdiction to foreclose a mortgage. 23 Maine, 174; 25 Maine, 341."

We find that the legislature adopted the suggestion and omitted these words in the R. S. of 1857. The clause there reads, "For the redemption of estates mortgaged." The foreclosure in this case was commenced in 1859, after the statutes of 1857 went into operation.

It seems, then, that the court of this State gave a construction to the language used in the statute of 1841, and decided that, even when the words in question were in the statute, the court had no jurisdiction and no power to entertain a bill in equity, to foreclose any mortgage, for the reasons set forth in their opinions. No mortgage was, in fact, thus foreclosed, whilst the words remained in the statute.

The legislature, under the suggestion before quoted, struck the words out in the revision. This was a clear, affirmative act, by which the legislature declared that no power should rest in the court to foreclose a mortgage by bill in equity. It was not a mere omission to provide that mode, but, under the circumstances, equal to a clear declaration that no such power existed or should be exercised.

The former statute, it was declared by the court, so far as these words are concerned, whilst existing, gave no power to foreclose in equity. The legislature affirmed the same doctrine, and omitted the words as useless and tending to mislead. So that there never was a time when the court had the power claimed. And even if there had been such power from 1841 to 1857, it was taken away by the omission in the new statute, which was in force when this foreclosure was attempted. The mortgagees were not bound to institute proceeding for foreclosure, until they saw fit, under a claim from the bondholders. It is for the mortgagee to determine when he will foreclose.

Even if the language, in the law of 1841, had any practical force,

yet surely the legislature might take away that power or mode of foreclosure, if they left the essential rights of the parties as they were prescribed and fixed by law, as to foreclosure, intact and unchanged. For those words gave no new rights to either party, or to the court to create any, or to decree any new mode of foreclosure as decided by the court in the above cases.

The legislature has power to alter remedies at pleasure. It could hardly be contended that this naked expression in the law of 1841, even if it had any force, so entered into and became part of the contract, as elsewhere explained, that mortgages executed between 1841 and 1857 must be foreclosed by a bill in equity, even after its repeal and in no other mode, and that the legislature had no power to alter or repeal the clause, because by so doing they would impair the obligation of the contract.

It will be observed that the words in question do not create or imply any new mode of foreclosure. Had not a mortagee, during this time, a right to foreclose by any of the modes pointed out in the statute then existing, by entry or suit or advertising? Clearly the provision, if operative, did not take away the right to use existing modes of foreclosure. If it did, then all the attempted foreclosures, during these sixteen years, are void. A result, to say the least, alarming in view of its effects in unsettling titles. But it did not.

The case does not, therefore, raise the question how far the legislature may alter or limit or extend a certain fixed and established mode or remedy, nor whether a given case comes under the definition of a remedy, or is one where a substantial right is violated or taken away. It is common learning, that the legislature may change at will remedies, but cannot impair rights or obligations. It might, probably, be seriously questioned whether the legislature could constitutionally abridge the time of redemption existing by statute at the time the mortgage was given, say from three years to one year. This would be taking away a fixed right, one that existed when the contract was made, given by the statute law of the State. It would take away two years' time, and give nothing in lieu

or exchange. But it could hardly be questioned that the legislature might vary or add to or diminish the different modes of foreclosure as to existing mortgages, provided no essential right that before existed was impaired. If the essential things, viz., on one side, three years' right to redeem, and on the other a mode of foreclosure by which reasonable notice must be given to the mortgager, are preserved, it matters but little what forms are adopted to enforce these rights. If a new case, not covered by existing statutes, arises, it would seem to be plainly the right and duty of the legislature to provide a mode by which the rights of both parties might be secured, following, if it saw fit, existing laws and forms and modes of proceeding as far as applicable, either to foreclose or to redeem. There could seem to be no objection to this unless it is plainly shown that some fixed, vested, or inherent right, existing at the time of the contract, is violated, as before stated.

Now in this case, the mode adopted by the statute was in substance and effect identical with one of the modes existing in 1852, viz., by advertising in a newspaper a certain number of times. The new statute gives the same time for redemption as the previous one, three full years. There is no objection made, that the time or notice was not sufficient, or that any right in these particulars had been infringed. The sole objection is that the mode of foreclosure was an infringement of an existing, fixed, and unalterable right to have a decree of absolute sale of the property within sixty days or some very short time. It might deserve consideration whether the granting of three years' time for redemption, if it were in lieu of a peremptory sale, would impair or diminish the right. But it is unnecessary to discuss this point. If it were essential, we might be unable to find the fact established that the complainant's essential rights were actually abridged, diminished, or injuriously affected by a three years' right of redemption before foreclosure, instead of a peremptory and immediate sale at auction. By our law, real estate is levied upon by an appraisement of three disinterested men, and the title is thus conveyed to the creditor, subject to a right of redemption in one year after the levy, by paying the appraised value

and interest. In many other States such execution is levied by a sale of the premises by the sheriff, without any right of redemption. By our law, also, a lien can be created on real estate, by an attachment of it on *mesne process*, which holds good until a levy on the execution, if made within thirty days after judgment. Now if, in a State where the levy is made by sale, and such lien by attachment is recognized, the legislature, after such attachment and before judgment, should change the mode by adopting our law, by which all subsequent levies should be by the appraisement of three disinterested men, the debtor having a right to redeem in a year, could the debtor object that his right had been injuriously affected, and the constitution of the United States infringed?

No one pretends that a mere change of form in the proceedings, or the substitution of one form of remedy for another, by which the same substantial result is reached, can work such a result. It must appear, distinctly, that some fixed and absolute right or condition of the contract is impaired injuriously, to the party complaining. That fact must be found and clearly established before any question of this nature can arise.

Our attention has been particularly called to the case of *Bronson* v. *Kinzie*, 1 Howard, 311, and it is cited as sustaining the argument on the part of the complainants. On a careful examination, we do not find anything in the decision of that case, that militates with the views before expressed in this opinion.

The facts in that case were, in brief, these: A mortgage given in Illinois, to secure payment of money on a day certain, containing a stipulation that if default be made in payment of principal or interest, the mortgagee might enter upon and sell the mortgaged premises at auction, and retain the amount due to him, rendering the surplus, if any, to the mortgager.

After this mortgage was executed, and before this bill to foreclose was filed, the legislature of Illinois passed a statute, which in terms applied to this mortgage, by which, in substance, a new equity of redemption in the mortgager was created, by giving him a right to redeem, after a sale, under a decree of a court of chancery for

foreclosure, by paying the purchase-money and interest in twelve months after the sale; and, further, if the debtor did not pay within that time, any judgment creditor might, on like terms, within fifteen months, pay and thus redeem for his own benefit. Another statute, enacted at the same session, also provided that in all sales for foreclosure, under a decree in chancery, the property should first be appraised by disinterested men, and if two-thirds of the appraisal was not bid, it should not be struck off.

The question before the court arose under a bill for foreclosure; the complainant claiming that he had a right to have a decree of foreclosure and sale, under the law of Illinois, as it existed before the new statutes were passed.

The court based the decision of a majority, in favor of the complainant, on the ground that the obligation of the contract "depended upon the laws of Illinois, at the time the deed was executed; and that at that time, by that law, a mortgagee had an absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagers." The court says: "This is his right, by the law of the contract, and it is the duty of the court to maintain and enforce it." This "right," as before shown, does not, by the law of Maine, exist in the mortgagee and never has, and, therefore, this decision rests upon a vital fact, not found in the case before us. It is admitted, in the argument in this case, that there was no statute law authorizing a foreclosure by a bill in equity, providing in its terms a mode of procedure, nor is it asserted that any such course was ever known in our practice. The argument is that such a course of proceeding was according to general equity practice, in courts of general equity jurisdiction, and might, therefore, have been resorted to in this case, and that, in fact, it was the only mode by which this mortgage could have been foreclosed. We have fully considered this proposition.

The court, in the case under consideration, after stating the common-law doctrine of absolute forfeiture of the estate, at the day, by

non-payment, and the equity view of a resulting trust after the debt is paid, says that "courts of equity lend their aid, either to the mortgager or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgager, direct a reconveyance to him upon payment of the money." We have in Maine, by our statute, authorized this form of proceeding, on the part of the mortgager, to redeem. The court then goes on to say: "And upon application of the mortgagee it will order a sale of the property to discharge the debt. But as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid, and he is entitled to the aid of the court to extinguish the equitable title of the mortgager in order that he may obtain the benefit of his security." Then follows the language first quoted, as to his "absolute and undoubted right" to such a mode of foreclosure. The court then says: "When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. It must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time."

The opinion holds that by those laws then existing the mortgagee, in an ordinary mortgage, independent of the special right of sale stipulated in that deed, had a fixed, certain, and definite right to a foreclosure, under a bill in equity instituted by him, and to a decree of the court of equity for an absolute and immediate sale of the premises, by which his debt might be paid. That this law was incorporated into the contract and became a part of it. By the existing laws and practice of Illinois, mortgages are foreclosed by bill in equity.

The statute of Illinois did not attempt to change any form or take away the right to obtain a decree for a sale, but undertook, in the first place, to create a new equity of redemption after such sale, first for one year to the debtor, and he failing to redeem, for fifteen months to any judgment creditor of the debtor. And, not content with this, by a subsequent act, abrogated the right to sell under

such decree, unless two thirds of a value fixed by appraisers should be offered at the auction sale. The court did not regard these new provisions as a mere change of remedy, a mere alteration of the form of reaching the same result, but as creating new and distinct rights and conditions, in and under the contract, injurious and unjust to the mortgagee, by giving a new estate, which before had no existence, to the debtor, and in a contingency to any judgment creditor. "If," say the court, "such rights may be added to the original contract, by subsequent legislation, it would be difficult to say at what point they must stop. The statute gives to the mortgager and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired, when the mortgage was made. Such modifications of a contract, by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligation and is forbidden by the constitution."

The court also animadverts on the other provision, as to the new condition annexed to the sale, and shows how it might operate to prevent any sale or greatly delay the remedy of the creditors.

The court is careful to distinguish between a remedy and a right. It says: "Although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself."

This case, we may remark, would more nearly resemble the one before us, if the debtor in Illinois had complained against the creditor, when he, abandoning his original right to foreclose absolutely by sale, had proceeded under the new statutes, yielding the new right of redemption to the debtor and causing an appraisement to be made. The court could hardly find grounds for sustaining such

complaints, where it was manifest that no proceedings, injurious to the debtor, were shown or could be established.

The real question before us is, whether the debtors or the mortgagers have a right to insist upon a particular mode of foreclosure of his mortgage, when the mode adopted and sanctioned by the legislature is perfectly satisfactory to the mortgagee and has been adopted by him. What obligation of the contract is violated, under proceedings which secure the right to redeem amply and to the full extent known under any law of the State? How is he injuriously affected?

But even if we had before us the mortgagee, complaining of the statute mode of foreclosure and claiming a decree for a peremptory sale, our answer must be, "we can find no law or practice in this State, which gives you a right thus to foreclose. None such existed when you took the mortgage, and therefore no such right could make a part of your contract, as it did in the case cited under the laws of Illinois." The distinction between the cases is obvious and clearly marked in several particulars, but chiefly and fundamentally in the existence in one case, and the non-existence in the other of this fixed right. Our view of the effect of the mode of foreclosure, adopted in this case, has been fully stated. It is in substance that it neither gives any new right nor takes away from either party any vested or conceded or established right existing or in force when the contract was entered into, and violates no provision of the constitution of the United States.

The result upon this part of the case is, that, in form and substance, the foreclosure was sufficient to extinguish the right of redemption as claimed by respondents, unless rendered inoperative from other causes and for other reasons, hereafter to be considered.

But the complainants urge that the redemption should be open to them, even if the proceedings should be found to have been regular in form, and such as would bar them in the absence of other facts. They insist that the trustees were guilty of such laches, bad management, and illegal if not fraudulent combinations with other par-

ties to secure a foreclosure, when it might, and should have been, prevented by them; that the whole proceedings, however formal, should be set aside as in fact a fraud upon the plaintiff corporation, subjecting them to a foreclosure, when it was the duty and within the power of the trustees to have prevented it.

In considering this branch of the case, it becomes important to ascertain the exact condition of the trustees, and their relation to the several parties in interest. They were appointed by the stockholders of the plaintiff corporation at the time the vote was passed, authorizing the issue of the second mortgage bonds, and before any of the bonds had been sold, and, of course, before there were any second bondholders in existence. The deed to the trustees was executed within ten days after the vote.

At this time, the corporation was in possession and running and managing the road. The trustees were then mere mortgagees, out of possession, with no other rights or duties than such as related to holding and enforcing the mortgage. This deed was delivered in October, 1852, and the bonds thus secured were sold to different holders. The coupons were paid until 1856, but after the first of April of that year, payment of the coupons of this class ceased, and also of the first mortgage bonds, to secure which, a prior and similar mortgage had been made to the same individuals as trustees.

After this failure to pay the coupons due, the directors of the corporation by vote authorized "the president to enter into an arrangement with the trustees of the holders of the bonds, whereby they may take possession of the road" upon certain conditions or understandings. In this vote the directors admit the non-payment, and give their consent that trustees might enter and take possession of the road, under their mortgage deed, and hold the same until the interest due upon those bonds should be paid. The vote then specifically points out how the proceeds are to be applied, and the order and priority of payment. The last of all being the "coupons on the bonds of 1852" (the second mortgage bonds).

It does not distinctly appear that any subsequent formal agreement was made by the president and trustees. But this vote of

the directors, who spoke and acted for the corporation, clearly indicates a conviction that the corporation was unable to meet its immediate liabilities, and was willing that the trustees should take possession and apply the proceeds according to the order set down.

The counsel for the plaintiff corporation, in his argument, assumes and claims that the possession taken by the trustees in September, 1857, was taken under this vote, and was continued under its terms and conditions. The paper appears among the exhibits of the defendants. It is not signed by the trustees or president, but shows only votes of directors. The answer of the surviving trustee (Mr. J. Patten) states that this entry, under the second mortgage, was made in accordance with the directions duly given by the second bondholders, at a meeting duly called, organized, and held for that purpose. The R. S. of 1857, c. 51, authorized such proceedings. We do not find among the exhibits any copy of such vote of the bondholders.

But if the entry and the taking of possession were in either mode, it is clear it was not taken for the purpose of foreclosing the mortgage. It was a possession for the purpose of taking the income, earnings, and receipts of the road, to be applied, if the entry was made under the vote of the directors, according to its terms, if under the vote and direction of the bondholders, according to the provisions of the statute.

The trustees were thus in possession. They evidently had duties to perform toward two parties. One, the corporation that designated them and whose property and railroad they had taken, the other, the bondholders for whom they held the property in trust and in mortgage. It was substantially the case of a mortgagee in possession before breach of the condition, or before entry for the purpose of foreclosure.

As such trustees it was their duty to manage the property with reasonable care, prudence, and faithfulness, to apply the net income according to the legal rights of all parties. But it is evident that under that entry and possession the mortgage in question was not and could not be foreclosed so as to devest the equity of the corpo-

ration. The trustees, thus holding, might be liable to the parties in interest for any neglect, fraud, or misconduct, but such possession, however long continued, would not extinguish the equity.

But in May, 1859, a number of the holders of the second mortgage bonds applied to the same trustees, then in possession as before described, to foreclose the second mortgage on the ground that the interest coupons thereon had not been paid since April, 1856.

In compliance with this request, the trustees proceeded to advertise for a foreclosure in pursuance of the statute of 1857. According to that statute, which, in this respect, resembles the general statute of 1841, this notice would be effectual to foreclose, although no possession was taken under it. This mode, indeed, gives no right of possession, nor, in itself, does it affect any existing possession. The trustees remained, as before, in possession under their first entry. The notice for foreclosure, however, was a fact which was of great importance, and of vital interest to both the parties for whom they were trustees.

A mortgagee in possession is, undoubtedly, in an important sense, a trustee for the mortgager and bound to regard his interest. These trustees knew that in three years the equity would be foreclosed and it was their duty to prevent this consequence if they could legally, and had the means or money in their hands which they could properly and consistently, with their obligations to others, and with their duty under the law or stipulations under which they acted, apply to the payment of those second mortgage coupons, due and unpaid. And we think, further, that if, having such means, they diverted them to other illegitimate objects, or entered into combinations with others to allow the time of redemption to run out, when it could have been prevented by the use of earnings or assets in their hands, which might, under their responsibilities and duties, have been so applied that the foreclosure should not be set up or be held effectual.

Again; if by intentional mismanagement or neglect, or by such gross and clearly proved misfeasance in their office and inattention to the wants and interests of the road as would amount to con-

structive fraud, the income was thereby reduced so as to affect the net profits, which a different mode of administration would have produced, which profits would have been or might have been, with other means in their hands, properly applied to the payment of these coupons, before the three years would have expired, and would have been sufficient, that the same result as to the strict foreclosure would follow. It would be against right, reason, and fair dealing to hold otherwise.

This brings us to the consideration of the charges in the bill on these points. We must keep in mind the fact that the two parties are the corporation and the body of second bondholders, and that it is the acts and proceedings and conduct of the trustees that are in question. The questions raised touch them only in the result, although any connection or combination with others, if proved, may be important and may properly be considered if they bear upon that point.

The obligation was on the corporation to pay its debts, but as the source from which the money to pay them was expected to be derived was given into the hands of the trustees, it is but reasonable to require, in behalf of the original corporation, that the road should be managed, and the income applied, so that, if possible within the prescribed duties and obligations, a foreclosure might be prevented. At the same time the trustees are not to be held to do impossibilities, or what they had not legitimate means to do. They were not in possession, it must be remembered, of unlimited and unrestricted powers to do what they pleased with the income of the road. The law (R. S., c. 51) plainly points out their duty and limits, and specifies the order of appropriation of the income they may receive. This statute should be read in this connection.

The vote of the directors, as before shown, clearly and distinctly required a specific and progressing order of payments or appropriation to separate classes of claims, under seven heads, each being postponed to the preceding.

This brings us to a consideration and examination of the precise allegations in the bill, which are the only grounds which we can properly consider.

It is nowhere directly asserted in the bill that the trustees, at the time when the foreclosure, as claimed, became perfected, or at any other time had, actually, money in their hands, which they might legally and should have applied to the payment of the coupons due on these bonds. But it is alleged, "that the said trustees so carelessly, negligently, and unskillfully managed said railroad and its affairs, while in the possession thereof, that the net earnings and income received by them were much less, to wit, in the sum of two hundred thousand dollars per annum, than they should have been and would have been if the same had been faithfully and properly managed by said trustees, and in accordance with the spirit and fair intent of said trusts."

There is another allegation in substance the same. It is that from the time when the trustees became possessed of the railroad, it has been of great value, and sufficient, if administered according to the true tenor and effect of the trust, and of the equitable liens with which the same was charged by the corporation, to have paid the interest upon the bonds, and should have been so applied. There is also an allegation that a majority of the directors, combining with the trustees for the purpose of becoming the owners of the railroad, neglected to pay the interest upon and redeem the bonds.

There is no allegation in the bill of willful, intentional, corrupt, or designed mismanagement or neglect. The charge is of negligence and unskillfulness. The trustees were John Patten, Joseph McKeen, and M. S. Hagar. They were designated by the plaintiff corporation for the trusts imposed by the deed, and for all the duties which might thereafter devolve upon them as such trustees.

The corporation knew them and reposed great trust and confidence in them. It is apparent from the evidence, that it was well known to all, that they were not men having experience in the direct management of an operating railroad. It would hardly be reasonable to hold them responsible under the circumstances, for the highest skill, or for failure, in managing the road up to the highest point of success which it is possible might have been reached by experienced, long-tried, and exceptionable managers.

The charge is general. No specification of any particular instances, or detail of any definite failure or mismanagement is set forth in the bill.

The answer of the surviving trustee (Mr. Patten) distinctly denies the charge of mismanagement, and asserts the contrary. He avers that they did their best, and employed as superintendent a man of good reputation for skill, integrity, and experience, and gave their personal attention so far as required.

Is this denial overcome by the proof? In judging of the success and management of the road, it is fair to regard the condition in which it was, financially and structurally, when the trustees received it. Its financial condition is referred to, and may be gathered from the vote of the directors in 1856 before referred to. It is there stated as a reason for consenting to surrender the road to the trustees, that the coupons had not been paid, and that the directors had not the means at present to take up these coupons.

Comparing the receipts and expenditures after the trustees took possession, with those of the immediately preceding years, we do not find the comparison unfavorable to the trustees. It is shown that the credit of the road was at a low ebb, and that the trustees used their private credit, at times, to keep it in operation. It does not appear that the corporation or its officers or the stockholders, at any time before the foreclosure, preferred complaints in any formal manner, if at all, as to the mismanagement of the road.

The testimony on this point introduced by the plaintiffs is rather of general impressions, beliefs, and suspicions that matters were not managed as well as they might be, than of any definite and distinct facts. It would be difficult for any master or auditor to state or fix upon any specific instance of neglect or want of skill, for which a sum of money should be charged to the trustees. It may be granted that the road, owing to various causes, was not yielding what might have been secured by a first-class road in a first-rate condition in all respects. There may have been, and probably were mistakes, and errors and miscalculations and disappointments to some persons who desired to use the road for transportation. It would be tedious

and useless to go over all the evidence bearing on this point. On a careful and candid examination of it all, we have no hesitation in coming to the conclusion that the evidence fails to overcome the answers on this point, or to establish the charge within the rule before stated.

The next charge in the bill is, in substance, that the three trustees McKeen, Patten, and Hagar, "while acting as trustees and being in possession, combining with a majority of the directors named, and with R. D. Rice, John B. Brown, George F. Shepley, and H. N. Jose and others, contriving and intending to obtain for themselves and their associates the possession, management, and ownership of the railroad, franchise, and rolling stock, and to deprive the plaintiff corporation of the same, for that purpose bought in a large amount of different kinds of stock, bonds, coupons, and mortgages and other claims, which the plaintiff corporation was bound to pay and redeem, amounting to about seven hundred thousand dollars, and the plaintiffs allege that they are informed and believe, that these purchases were made with the money belonging to the corporation, being the earnings of the railroad, and that all this was done by the said trustees, directors, and other persons in connection and combination, for the purpose and with the intent as before set forth.

To this charge Mr. Patten answers, that it is not true; that he never had part in or knew of any such combination or purchase; that the other trustees, so far as he knows or believes, never combined or purchased as charged; that he has no knowledge or belief that any such purchase was made by the other trustees or other persons named in the bill. Mr. McKeen and Mr. Hagar, both deceased, before the bill was filed, or before any answer was made. Mrs. Hagar, as administratrix of her husband, in her answer, adopts the answer and denial of Mr. Patten. All the other parties to the bill, in their answers, deny any such combination or purpose, or any connection of the trustees, as such, with any purchases.

We cannot find evidence in the case to overcome the denials. The testimony of defendants sustains the denial in the answers of

any such fraudulent or unfaithful and dishonest combination, purpose, and acts on the part of the trustees. The testimony on the part of the plaintiffs fails to sustain it. The accounts, as presented, do not show any appropriations of the earnings of the road for such purpose. We speak now of the general charge of combination between the directors, trustees, and other persons to purchase the stock, bonds, coupons, etc., of the road, and the actual application of the funds of the corporation for the purpose of obtaining possession of the road and its entire franchise and property. The next charge, however, is more specific, and relates to what is called the Williams purchase, and is evidently more relied upon than the general charge above stated.

The charge in the bill is, in substance, that Reuel Williams, deceased, was the owner in his lifetime of original, preferred, and Yarmouth stock, bonds, coupons, and claims secured by a mortgage of the rolling stock, to the amount of five hundred thousand dollars, or thereabouts, and that in the year 1861 he offered to sell and dispose of the same to the trustees, for the benefit of the plaintiffs, for $113,000, or about that sum, being much less than the real value; but the trustees, contriving and intending to obtain for themselves and their associates the ownership of the road, declined to accept the offer and make that purchase, which, in the proper exercise of their trusts, they should have made.

This charge is also very distinctly and positively denied in the answers, and we find no testimony which establishes the facts charged against these denials, and the testimony of those who were concerned in the actual sale and transfer of these securities by Mr. Williams.

But the bill proceeds to make another charge against the trustees, in relation to this Williams' purchase, and avers that after declining to purchase for the corporation, as before stated, Rice and Alden purchased them of Williams for the benefit of the trustees and their associates, and for the purposes before set forth, for the same sum ($113,000) which was paid to Williams out of the earnings, income, and profits of the road; and that instead of surrendering the said

purchased securities and obligations to the original corporation, as in justice they should, they claim to hold the same against and to recover the same in full of them.

Then follows the several allegations before referred to, that the trustees, directors, and the other persons before named combined together for the purpose of becoming owners of the road, and to effect that object, in violation of their trusts, neglected to pay the interest upon and redeem the bonds.

This matter of the Williams purchase forms a prominent part of the evidence and arguments in the case. The answers deny the charge of any connection of the trustees, in their capacity, in the original purchase from Mr. Williams.

On a careful examination and consideration of the evidence on this point, we cannot find sufficient evidence to sustain the allegation as made, viz., that the purchase by Rice and Alden of Williams was made for the benefit of the trustees alone, or with associates, in pursuance of a combination or agreement or understanding between the persons and parties named, to obtain possession and the property in the railroad for themselves, in fraud or wrong against the corporation, and that the earnings of the road were used for that fraudulent purpose. There is evidence which tends strongly to prove that one of the trustees (Mr. Hagar) had had conversation with Rice, concerning his proposed purchase, and that he was willing and desirous of being one of the company to purchase, if the terms were satisfactory. He died before the final contract with the trustees, but his administratrix was allowed to come in as one of the company (Rice and others), who sold to the trustees. But there is no sufficient evidence that in whatever he did or commenced, in relation to or in connection with the purchase by Rice of Williams, he was acting in his capacity of trustee, or using or promising to use the earnings of the road to carry out any illegal purpose. He seems to have acted as a private individual on his individual responsibility in this matter. And he was but one of three persons on the board, and could not if he would thus divert the earnings without the consent of his associates, acting as a board.

The facts do not show, to our apprehension, the combination and purpose as charged against the trustees. They do show that there was a proposal and plan started to obtain, by purchase, of Mr. Williams his securities and claims, and that this plan and purpose was understood by several persons, and that there was a more or less distinct and binding agreement or understanding between Rice and other persons as to participation in the trade, and that these persons were some of them directors and some owners, by purchase and otherwise, of the bonds of the company. There is a considerable indefiniteness and want of clearness in some parts of the testimony as to this purchase, so far as others than the trustees were concerned.

But we must remember that the second bondholders, whose mortgage is, if foreclosed, the entire basis of the defense, were not responsible for the acts, intentions, or combinations of the directors or stockholdhers of the plaintiff corporation, or of the holders of other bonds. The trustees named in the deed were their trustees, and it is their acts or neglects alone, that the second mortgage bondholders can be held answerable for.

Now how stood matters from the time of possession by the trustees, up to the time of foreclosure, in May, 1862? The trustees had assumed a second possession, anew, for the first bondholders in September, 1860, about one year and a quarter after the possession taken under the second mortgage in question. But it is to be marked, that in neither case did they enter for the purpose of foreclosure, nor have they ever claimed a foreclosure by virtue of an entry, and continued possession. The foreclosure, if legally made, was made solely by virtue of the published notice, and the expiration of three years from its date, and so far as the foreclosure is in question, the possession is immaterial. There are allegations that the first bondholders commenced proceedings to foreclose, but we find no evidence of such attempt among the exhibits. The whole question rests upon the proposition that the mortgage of second bondholders was legally foreclosed. If not, the defense fails confessedly.

Although the evidence does not satisfy us that there was any unfaithful combination, on the part of the trustees, with others, to use the funds of the company to purchase the securities of Mr. Williams as before stated, yet it is admitted and clearly proved that the trustees did afterwards negotiate with Rice, the purchaser, for the sale and surrender to them of a portion of the bonds, etc., obtained from Mr. Williams, and agreed to pay therefor the sum of $110,000. The contract, as finally consummated, was dated Feb. 17, 1862, and the trustees, McKeen and Patten, agree to pay the above sum in semi-annual payments of $10,000 each, with interest, the first payment to be made on the 20th of March, 1862. These payments were to be made out of the net earnings of the road after paying certain special claims, being those which had priority over the first and second bonds. This contract was entered into in pursuance of the vote of the first and second bondholders, who had been separately organized into corporate bodies, under the statute of 1857. This contract, it will be observed, was signed about three months before the foreclosure of the second mortgage, under the advertisement.

It appears from the accounts, as stated, that in the year 1862, $28,300 was paid on this purchase, and the balance was paid in full in the year 1863.

The question is now reduced to this, whether the trustees, under the direction of the bondholders, diverted money and means in their possession and control which ought to have been applied to the payment of the over-due coupons of the second mortgage bonds by which the foreclosure might have been prevented. If they did, we do not see any reason why the foreclosure should not be disregarded and the plaintiffs let in to redeem. It was their duty to prevent a foreclosure, if they had means sufficient, which, without violation of prior rights, or the law or the obligation imposed and resting upon them, they could thus use.

They say they had no such means. As before stated, the bill does not directly assert that they had. It does charge that the directors, combining with the trustees and others, for the purpose

of becoming the owners of the road, neglected to pay the interest upon and to redeem the bonds. But the directors were the officers and agents of the plaintiff corporation, the bondholders were not responsible for or liable to account for the neglects or misdeeds of such directors.

The bill, in its whole structure, seems to be based upon the alleged unfaithful, if not corrupt combination and plan between the directors, trustees, and others to defeat a redemption. We have before considered these charges in detail. Nevertheless, we should have little hesitation in holding, even in the absence of proof of the combination or conspiracy, that, if the trustees had funds in their hands which they might legally and properly (as before explained) have paid to redeem these coupons of the second mortgage bonds, their neglect or omission to do so would have saved the foreclosure.

The three years for redemption expired about May 18, 1862. In order to save the foreclosure, the whole amount due on these coupons must have been paid. The payment of even a large amount, if not sufficient to pay the "uttermost farthing," would have been of no avail. Now the trustees say that they could not do this for two reasons. The first, that they had at no time, after they took possession, net earnings sufficient to meet these demands. That the arrears of coupons on these bonds, in May, 1862, was between seventy and one hundred thousand dollars.

And they say, secondly, that whatever surplus means they had, they were bound to apply to demands of a prior date, having by the statute and by law precedence. They say that if they had paid these coupons, they would have been liable to other parties and to the charge of mismanagement in their office. They say that the question here must be determined by the state of facts existing prior to May 18, 1862, and that subsequent events or subsequent success or subsequent application of the money or assets of the new company or of the bondholders after foreclosure cannot change or vary the legal rights of the parties.

If the trustees had not funds which they could and should have used for this redemption, the plaintiff and complaining corporation

knew that the foreclosure had been commenced; that in three years it would be complete, if the whole of this debt against them was not paid; that the corporation, and not the trustees, were the debtors; that if the trustees had no such funds at the day, the forfeiture of the estate was inevitable, and yet it does not appear that any effort or any offer of aid was made by the corporation or individual stockholders, but the time was allowed to elapse with all the resulting consequences of a new corporation, etc., provided in the statute. These facts and considerations might not be sufficient to estop the complainants, if the charges made had been sustained, but they cannot escape notice as belonging to the history of the case and the consideration of the proceedings of the trustees.

After a careful consideration of this part and the evidence to sustain these grounds of the case, we can find no sufficient reason for declaring the foreclosure ineffectual.

There would seem to be no legal objection arising from the subsequent acts of the trustees, or of the new corporation, if the trustees were not guilty of want of due diligence, in not redeeming before the expiration of the three years, as before explained. The only legitimate use that could be made of these subsequent facts, either in relation to the income of the road, or of the use of the funds, would be to connect them as far as they bore upon the previous proceedings. But taking the whole evidence together, and keeping in mind the exact point to be established, our conclusion is that the bill must be dismissed. *The bill dismissed.*

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

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

BARROWS, J., did not concur.

The following dissenting opinion was drawn by

TAPLEY, J. The complainants in this bill being an existing corporation, duly chartered and organized under the laws of this State, on the 15th day of October, 1852, made a mortgage to certain

persons named as trustees, and for purposes indicated in the mortgage. The description in the mortgage is of "all their corporate property, real and personal, and the franchise of said company," "and the right of way."

On the 18th day of May, 1859, the said trustees, claiming there had been a breach of the conditions of this mortgage, gave notice that they claimed to foreclose it, and proceeded to effect a foreclosure of the same, by pursuing the mode pointed out in R. S. of 1857, c. 51, § 55.

It is now claimed that the proceedings thus had, and the lapse of time thereafter without redemption, have invested the respondents with all the chartered rights of the complainants.

The complainants, on the other hand, contend that the procedure was wholly ineffectual, because inapplicable to this mortgage.

The mortgage thus sought to be foreclosed was made on the 15th day of October, 1852.

The statute under which proceedings were had for the purpose of foreclosure was first passed in 1857.

One question discussed is whether this statute affected mortgages made before it was passed.

The first section of the act referred to (now § 53, c. 51, of R. S. of 1857) provides that "Whenever a railroad corporation shall have mortgaged its railroad and franchise to secure the payment of any of its bonds or coupons, whether such mortgage was made directly to the holders of such obligations or to trustees for their use, the refusal or neglect to pay any such bond or coupon within ninety days after a presentment (subsequent to its pay-day), to the treasurer or president, for payment, shall be deemed a breach of the condition of the mortgage."

This is the only section affording any light in the settlement of this question.

An act of the legislature will not be regarded as retroactive, unless the intent plainly appear from the act itself, either by its terms or by necessary implication. The presumption of law is against it. This view has been expressed by many of the ablest jurists in this country and in England for many years.

Although it may seem like "but repeating household words" to note any of them, yet I think a reference to a few of them now may be of utility.

In Mr. Sedgwick's work on Statutory and Constitutional Law, may be found some comments and citations upon this matter. He says: "The effort of the English court appears, indeed, always to be to give the statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt."

The principle, say the English Court of Exchequer (2 Exch. 22), "is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."

In an early case in N. Y. (4 J. R. 45), Thompson, J., said: "It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact. How unjust, then, the imputation against the legislature, that they intend a law to be of that description, unless the most clear and unequivocal expressions are adopted." Kent, J., said, on the same case: "I think it can be shown that the act cannot be adjudged to operate either as a new rule for the government of a past case, or as interpreting a former statute for the direction of the courts; and I should be unwilling to consider any act so intended, unless that intention was made manifest by express words; because it would be a violation of fundamental principles, which is never to be presumed."

Various other cases are referred to in the same State, by the learned author, sustaining these propositions. In a case in Mississippi, it is said a retrospective operation should not be allowed unless required by "express command or by necessary and unavoidable implication."

"It is a general rule, applicable to all laws, that, generally, they are to be considered as prospective, and not to prejudice or affect the past transactions of the subject. It is not intended by this rule

that the legislature cannot, in some cases, make laws with a retrospective operation. But this effect is not to be given to a statute, unless such intention is manifestly expressed." *Whitman* v. *Hapgood*, 10 Mass. 437.

"For it must be admitted that all retrospective laws are repugnant to the principles of sound legislation and the permanent security of rights." *Inhabitants of Somerset* v. *Inhabitants of Dighton*, 12 Mass. 383.

In our own court, in the case of *Hastings* v. *Lane*, 15 Maine, 134, Shepley, J., in delivering the opinion of the court, says: "In the case of *Dash* v. *Van Kluck*, 7 Johns. 477, Kent, C. J., states it to be a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. The same rule is recognized in *Whitman* v. *Hapgood*, 13 Mass. 464. And such must be regarded the settled rule unless the intention to have it operate retrospectively is clearly expressed."

No statute is to be held retrospective or in violation of any constitutional provision when it affects rights, unless such shall be the necessary construction. *Given* v. *Marr*, 27 Maine, 212.

In the case of *Bryant* v. *Merrill*, 55 Maine, 515, decided by the court as now constituted, Dickerson, J., in giving the opinion, says: "A retroactive effect will not be given to a statute unless it clearly appears that such was the intention of the legislature." The discussion in that case shows how rigidly the rule was adhered to, the judge saying, "It is not from inference alone that a statute of such grave character should be held to have a retroactive effect."

Citations of this kind could be multiplied to great numbers, and from every State in the Union, showing how clear, exact, and rigid is the rule, and how strictly adhered to.

The same rule of construction prevails in the Federal courts. Judge Story, in *Prince* v. *United States* (2 Gall. 204), says: "It is a general rule that statutes are to be construed to operate *in futuro* unless from the language a retrospective effect be clearly intended."

In *Harvey* v. *Tyler*, 2 Wall. Sup. Ct. Rep. 328, the court say: "It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

Numerous other cases might be cited, and they all concur in stating the rule as in this last case, viz., to give a retroactive effect to a statute, the court must find some expressed intention of the legislature in the act, that such was their design, or this conclusion must be forced by necessary implication from the act. It is not enough that the language of the act is susceptible of such a construction; the intention must be "manifest," "clear," "indubitable," and free from doubt.

As before remarked, this may seem very much like the repetition of "household words," the reiteration of an "undeniable proposition," and, therefore, unnecessary; but the observation of all has, I think, led to the conclusion that such rules when they become maxims of the law lose all their application, somewhat of their force, unless occasionally examined with a view to understand their full force and legal effect.

In view of this rule, how stands the statute before us upon this question.

It will be noticed that the first, and indeed the controlling word used is *whenever*, and not *wherever*.

Wherever would have more clearly and distinctly signified "in all instances;" as if it had read, "in all instances where a railroad shall have mortgaged, etc." The word *whenever* is not so significant of a design to embrace all instances past and future. It is an adverb of time rather than place, and, speaking from that time, its indication is future rather than past. It is also coupled with the words "shall have," belonging to the future perfect tense, and indicating an act to be done and perfected in the future, before the happening of some other event. These words used with the word *whenever* are strongly indicative of the future. Indeed, they hardly seem susceptible of any other construction.

This section also provides what shall be considered a breach of

the mortgage; it introduces a statutory breach upon the happening of which only can the remedy provided be applied. It fixes the acts to be done. Requires demand, and names the persons upon whom demand is to be made. It fixes a specified time which must elapse before there is a legal default, none of which were required by any existing law.

If we hold this law retroactive we must assume these things were done and required with reference to past contracts, and supersede all former laws so far as they are inconsistent with it. We must ignore the rule of construction we have found to be of such ancient date and so well preserved, and substitute in its stead the very reverse of it.

If we adhere to the rule, we shall find everything in the act consistent with it.

Its phraseology is literally prospective. It requires a violent hand to make it otherwise. Its provisions in substance, as well as in form, are all consistent with prospective action only. To assume that the legislature intended to declare there had been no default in any past mortgage of this character, except where the specific demand contained in this act had been made, and the time therein mentioned had elapsed, is to charge upon them an act neither creditable to their intelligence or integrity.

If there had been a breach in existing contracts of this kind, under existing laws, there was a manifest impropriety in undertaking to declare that there had been none, or to render nugatory the defaults then existing.

If there had been no such breaches in the past, there was no occasion for retroactive legislation concerning them; in any event it would seem that so much of the act was designed to be prospective only.

To these suggestions may be added the inquiry, by way of argument, if the legislature had designed this statute, so important in all its bearings, a statute affecting materially both public and private rights; one in which the new element of transferring a franchise, and rights acquired under the law of eminent domain is introduced,

should have a retroactive effect, would they not have declared it in plain and unmistakable terms? Is not the absence of clear, unequivocal expression of such design very strong proof of the absence of such design?

Now looking at this act, as we find it upon the statute book, is there anything in it which "clearly" indicates the design of the legislature to make it retroactive? Does it by "express provision" require such a construction?

Does such a construction arise by "necessary implication" from its provisions?

I think these questions must be answered in the negative.

Instead of these things appearing, it seems to me the contrary appears, and instead of being a case requiring the court to give it a retroactive effect, it is one by its own terms forbidding such a construction.

It is admitted that all the proceedings had for the purpose of foreclosure have been had under the statute of 1857, and it follows, if the statute was not retroactive, they have acquired no title by virtue of its provisions.

It is further argued that if this statute be regarded as retroactive in its operation and affecting the mortgage in this case, it would impair the obligation of the mortgage contract and be invalid as to these complainants.

If it should appear, upon examination, to operate injuriously upon existing mortgages, it would present another strong reason why the court should not give it a retroactive effect, and this reason would be equally strong and cogent whether it affected the one party or the other injuriously, for we cannot hold it retroactive as to one party and not as to the other.

The party whose interests are operated upon beneficially might not be in a condition to complain of the change in the law, while the party whose rights were injuriously affected might; but the fact that the rights of one party to the contract were injuriously affected would raise a strong presumption against the idea that the statute should operate upon past contracts irrespective of the posi-

tion they occupy, in any case before the court. The same party might in one case be complainant, and in another respondent, and the statute of retroaction in one case must be held to be so in the other.

This leads us to the consideration of whether or not any change in the law was affected by the statute, and what that change was.

It will not require much argument to show there was a change, and that a change was designed. We can hardly suppose the legislature went to work to simply reënact that which was in existence, but that in such a statute important changes were designed, and it is only necessary to read the statutes, as they existed, relative to mortgages in 1852 and the statute of 1857, to lead to the conclusion, that, in point of fact, important changes were made.

In this connection it is well to note that the statute of 1857 was not one of substitution, but was either affording a new remedy where none existed, or a cumulative one where there was another provided by law. It did not attempt the repeal of any existing law. Such as were in existence remained as before.

At the time this mortgage was made, the statute of the State provided certain methods of proceeding, whereby the right which a mortgager had of redeeming real estate mortgaged by him might be foreclosed.

These statutory provisions are found in c. 125 of the R. S. of 1841.

Two classes of cases are distinctly provided for, and entirely distinct methods provided for each class.

The first class is where possession is had by the mortgagee (§§ 3 and 4), and the second class is where no possession is had (§§ 5 and 6).

In the first class a possession obtained in either of the modes there described, "being continued for the three following years, shall forever foreclose the right of redemption."

These modes were, first, an action at law, and obtaining possession under a writ of possession; second, entering into possession,

and holding the same by consent in writing of the mortgager, or the person holding under him; and third, entering peaceably, openly, and not opposed, in the presence of two witnesses, and taking possession of the premises. In the last case certain certificates are required to be made and recorded.

The second class of cases is where the mortgagee "is not desirous of taking and holding possession of the premises." In such case "he may proceed for the purpose of foreclosure, in either of the two following modes, viz.: first, he may give public notice in the newspaper, printed in the county where the premises are situated, or if there be none such, then in an adjoining county, or in the newspaper published by the printer to the State, three weeks successively, of his claim by mortgage on such real estate, describing such premises intelligibly, and naming the date of the mortgage, and that the condition in the same has been broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds, in which the mortgage deed is, or by law ought to be recorded, within thirty days after such last publication; or, second, he may cause a copy of such notice to be served and attested as a true copy, by the sheriff of the county or his deputy, in which the mortgager or his assignee lives, if in this State, by a delivery to him in hand, or by leaving the same at his place of last and usual abode; and shall cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service in manner aforesaid."

"The mortgager, or person claiming under him, may redeem the mortgaged premises within three years next after taking possession, or publication or service of notice mentioned in the preceding sections, and if not so redeemed, his right of redemption shall be forever foreclosed."

These are all the statutory provisions relating to the foreclosure or mortgages of real estate.

The same chapter by § 30 provides, that, "When the condition of any mortgage of personal property has been broken, the mort-

gager, or any person lawfully claiming or holding under him, may redeem the same at any time within sixty days next after said breach, unless the property shall have been sold in the mean time, in pursuance of the contract between the parties, or on execution for the debt of the mortgager."

This is all the statutory right of redemption given in cases of personal property.

With this view of the law before us it is well to recur to the mortgage to see what was sought to be conveyed. Upon examination of that it will be found to describe it as, "All their corporate property, real and personal, and the franchise of said company including the road and superstructure, and all the land conveyed to said company by others," "as well as the right of way paid for, and all the buildings thereon, and the personal property, consisting of engines and tenders, passenger, freight, platform, and dirt cars, snow-ploughs, and apparatus of every description." Here we have real estate, personal property, right of way, and franchise, *eo nomine*, all in the same instrument.

What corporeal things would be affected by proceedings under the statute relative to real estate, and what under that relative to personal property, it is not necessary now to determine.

That a franchise comes within the purview of either section before referred to, we think will hardly be contended by any. In the enumeration of the securities in the mortgage, it does not seem to be treated as belonging to either, but as an independent right, as indeed it is, incorporeal in existence. We are not aware that it has ever been regarded the subject of seizure, and sale upon execution.

A franchise, says Bouvier, is a certain privilege conferred by grant from the government, and vested in individuals, and has no inheritable quality. Substantially the same definition is given by Burrill. Chancellor Kent says the same, and adds, "corporations or bodies politic are the most usual franchises known in our law; these incorporated franchises seem, indeed, with some impropriety, to be classed by writers among hereditaments, since they have no inher-

itable quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die, but to be clothed with a kind of legal immortality." 3 Kent's Com. 459.

It is undoubtedly a privilege which the sovereign power alone can grant, whether it be the king or the people assembled in legislative bodies.

Now what was the franchise in this case, specified in this mortgage as "the franchise of said company." A recurrence to the grant (its charter) will show substantially, it was the privilege of being a body politic and possessing the powers incident to such bodies; the privilege of taking lands of individuals *in invitum* for the purpose of constructing a railway; and the right to construct, maintain, and manage such railway, and in so doing levy and collect tolls upon and from travelers thereon.

Now assuming the corporation had a right and full power to make a conditional sale and transfer of their franchise received from the State (the very right, among other things, to be a corporation), to what provision of the statute law was it subject?

Was it subject to that which pertains to real estate? Was the right to be a body politic real estate? Is the right to construct a railway real estate? Is the right to levy tolls upon passengers, when it is constructed, real estate? Were these things designed to be embraced within a term that had for centuries been well defined, and used in this statute and those from which it was copied long before railroad franchises were thought of? Such an idea may well be characterized as ridiculous.

Were these rights appurtenant to the real estate of the company? This would seem to be answered by the fact that they existed before the company had any real estate, and that they are the subject of specific grant, and that, too, from the sovereign power, and not possessed by any individual owner of the land they now own, and could not have passed from them to the corporation.

Another inquiry suggests itself, and that is, why does it appertain any more to the real estate of the corporation than it does to its

personal property, every particle of which comes to them long after the franchise has been granted and accepted.

It seems to me quite apparent that it is not subject to the provisions of the statute before referred to (c. 125 R. S., 1841).

It is said if this be so, why should not the old common-law doctrine apply of a forfeiture of the entire right on failure of strict compliance with the terms of the deed? Such, inevitably, would be the result if no relief from that forfeiture could, under any existing law, be obtained, and then we should have the anomalous case of one set of individuals owning the franchise, and another owning the real estate, personal property, and easement of a railroad, neither very valuable possessed alone, and one, the franchise, entirely useless without the other, and the right of redemption in the company property of little or no value, because the franchise had absolutely and irrevocably passed from them.

If one rule is applied to the realty, and another to the personal property, and still another to the franchise, there is this constant liability to separation and destruction by separation; yet such must have been the case in 1856, when the complainants failed to pay the interest due on the obligations secured, if there was no other remedy than that found in the statute quoted. The franchise must have passed by irredeemable forfeiture immediately, and the title passed to the personal property in the same way, at the expiration of sixty days after the breach, while the real estate and all its appurtenances, however extensive they were, remained the property of those who were the corporation; and we might here inquire, to whom passed the franchise and who became invested with the franchise named in the mortgage, made not to the holders of the obligations but to trustees for their benefit? We are now contemplating the state of affairs prior to the passage of the act of 1857, upon the assumption that it was competent for the company to make such a mortgage, and the only relief that could be given from the consequences of a non-compliance with the terms of the deed must be found in the statute we have referred to.

Assuming, then, as contended by the respondents, that there were

no other provisions of law than those contained in the chapter referred to touching this matter, and that the statute of 1857 is retroactive, how stands the case?

By the act of 1857, whenever a railroad corporation shall have mortgaged its railroad and franchise, certain proceedings may be had to foreclose the mortgage, and at any time within three years from the commencement of such proceedings the mortgagers, or persons claiming under them, were authorized to redeem by payment or tender of payment of the amount of overdue bonds and coupons secured by said mortgage (§ 55, c. 51, R. S., 1857).

This law, if binding and retroactive, would give a right of redemption from the forfeiture of the franchise where none before existed, and where, by the common law, it had actually been vested in others, and passed from these complainants a year before the act of 1857 was passed.

It appears there was a non-compliance with the terms of the deed in April, 1856, and for this these respondents proceeded, under the statute of 1857, to foreclose. As a practical question, where was the franchise from April, 1856, to the time of the passage of the act of 1857? If it had passed to these respondents, was there, during that time, any law by which these complainants could be relieved from the effects of a forfeiture by the non-compliance with the conditions of the deed? The respondents say, none but the provisions of c. 125, R. S., 1841, and those, it will be perceived, were entirely inapplicable to this franchise. The consequence is, as before stated, that the statute of 1857 gives a right of redemption for the three years after a perfect indefeasible title had vested in the mortgagee and been thus vested nearly one year.

Then, as to the personal property, if the provisions of c. 125, R. S., 1841, were applicable to it, a perfect and indefeasible title in it had vested in the mortgagees, upon the expiration of sixty days from April 1, 1856, and long before the act of 1857 was passed; yet, regardless of this, the act of 1857 would give a three years' right of redemption, instead of the sixty days which had elapsed.

To meet this obvious condition of things, concerning the franchise,

it is said: "In this case the franchise, the right to be a corporation and to exact and secure tolls and fare, becomes of little practical importance to the present defendant corporation. If the foreclosure of the mortgage, on the other property mortgaged, was perfect and sufficient, the statute authorized the body of bondholders to organize as a corporation and to, in effect, assume a new franchise."

If this position is, in fact, true, we should find two corporations possessing the same franchise. The franchises of the old corporation would remain undisturbed, applicable to the whole line of road, and a new franchise, authorizing the same thing to be done in the same place and at the same time, would be held by another body of individuals,— a state of affairs, to say the least of it, a little embarrassing.

But the answer to this proposition does not rest upon such anomalous or incongruous results, but is found, in the statute itself, giving not a new franchise, but transferring that belonging to the complainants.

The proposition made would entirely ignore the conveyance of the franchise, and proceed as if it was a nullity. Now upon recurring to the act of 1857 it will be seen that it applies only to those cases where the franchise is conveyed (§ 53, c. 51, R. S., 1857), and that "if the foreclosure be effectual, it shall enure to the benefit of all the holders of bonds and coupons provided for in its condition. And they, their assigns, and successors are hereby constituted a company, incorporated and chartered, as of the day of the foreclosure, for all the purposes of the original company, with all the chartered and legal rights and immunities which pertained to the original company at the time of the foreclosure; and it shall be the duty of the trustees, by deed of release, to convey to such new company all the rights and interest by them held in said railroad, appurtenances, and franchise, and other property, by virtue of their deed of trust and the foreclosure thereof" (§ 57, same chap.).

These provisions of the statute, relied upon, afford a complete answer to the proposition.

Then if we hold the act retroactive and valid, the consequence

is, the creation of a right of redemption where none before existed, and an indefeasible title had accrued, as to the franchise, and the extension of a right of redemption as to the personal property which had vested long before the act was passed, an extension in time very much beyond that which existed when the contract was made.

Such consequences, it seems to me, ought, in the absence of "express words" of retroaction or by "necessary implication," to forbid the construction contended for; and again I remark, the fact that such provisions operate beneficially to these complainants, cannot in the least degree change the fact that the statute is prospective only. In the consideration of this question it matters not who are complainants or who respondents. In familiar but expressive phrase, "it is or it isn't" retroactive, and this irrespective of parties. Whatever their position as to each other, it acts with the same effect upon the contract, and cannot be retroactive as to one and prospective as to others.

In this connection I will merely advert to one other thing appearing in the case, viz., "the right of way" which is attempted to be conveyed; without, at this time, discussing the right to transfer an easement of this kind, acquired by virtue of the law of eminent domain, we may well inquire under what provision of the law for the foreclosure of mortgages, in c. 125 of R. S. of 1841, would that kind of right fall.

Is it real estate? Is it anything more or less than an incorporeal right? The fee in the land remains in the original owner; his right to use, occupy, and assign is as full as before, if the use and occupation does not conflict with the limited right of use granted by the legislature. It must be remembered that it is not a general right of way that is granted, but one limited in its use and connected with the franchise granted at the same time. It is, to say the least, extremely difficult to see how, under the law as it stood in 1852, they could be separated, and it is quite evident if separated the right of way would be of no practical utility.

These and other considerations, excluded by the length to which this discussion has extended, impress my mind with the impolicy

and indeed injustice of a judicial decree, that a statute shall operate retroactively, when the legislative powers have not so declared, and I am clearly of the opinion, that, under the rules of construction applicable in such cases, the act is not retroactive, and its provisions do not affect mortgages in existence at the time it was made.

The question we have discussed thus far is, whether or not the act of 1857 was designed to be, and is, in fact, retroactive, affecting alike past and future mortgages.

It remains now to consider the other branch of the proposition, and that is its conflict with the constitutional inhibition of legislation which impairs the obligation of existing contracts.

Further argument or proof that it does this, seems to me to be unnecessary. The answer made is not a denial, but an allegation that this conflict is beneficial instead of injurious to the complainants. Assuming, for the present, such to be the case, is the act any the less in conflict with the constitutional provision referred to? Does it make any difference whose interests are sacrificed in determining the naked question of conflict? It seems to me this, too, is too plain for argument, and that the answer in nowise meets the material proposition that it is thus in conflict. If thus in conflict, and the parties were reversed, could the act be sustained as a rule of action?

Judge Taney, in delivering the opinion of the supreme court of the United States, in *Bronson* v. *Kenzie*, 1 Howard, 311, says: "As concerns the obligation of the contract, upon which this controversy has arisen, they depend upon the laws of Illinois (Maine) as they stood at the time the mortgage deed was executed. . . . In other words, the existing laws created and defined the legal and equitable obligations of the mortgage contract. If the laws of the State, passed afterward, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. . . . Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting

on this remedy, or directly on the contract itself. In either case it is prohibited by the constitution. . . . It was undoubtedly adopted as a part of the constitution, for a great and useful purpose. It was to maintain the integrity of contracts, and secure their faithful execution throughout this Union by placing them under the protection of the constitution of the United States; and it would ill become the court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and remedy, which would render this provision illusive and nugatory; mere words of form affording no protection and producing no practical results. . . . Mortgages made since the passage of those laws must undoubtedly be governed by them, for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction."

In *Green* v. *Biddle*, 8 Wheaton, 75, it is said, if the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired and rendered insecure, according to the nature and extent of such circumstances.

The foreclosure of a mortgage and the sale of the mortgaged premises must "take place according to the statutes in force at the time of making the mortgage, at least so far as the substantial rights of the mortgagee would otherwise be injuriously affected. *Shuts* v. *Peabody*, 7 Blackford, 613; Id. 154, cited in note 4 Kent's Com. 182.

These citations fully sustain the position, that the rights of parties under such contracts must be determined by the law as it stood when they were made.

In the apt and appropriate words of Chief Justice Taney, "the existing laws created and defined the legal and equitable obligations of the mortgage contract."

They sustain also the proposition, if the obligation of the contract is, in effect, impaired, whether done by acting on the remedy, or directly on the contract itself, it is equally in conflict with the provision of the federal constitution, before referred to, and cannot be sustained.

That there is such a conflict between the statute of 1857, if retroactive, and the constitutional provision referred to, it seems to me admits of no doubt, and we are again brought back to the allegation that this conflict is not injurious, but rather beneficial to the complainants, and, therefore, in this case immaterial.

It will be perceived that this proposition will make the act of 1857 a law for this contract or not, at the option of the respondents. If the respondents choose to adopt it, it is the law. If they choose to reject it, it is not. So that the complainants have this for their law or not as the respondents may choose. If it be thus optional with them, why may they not say to these complainants, that as to you, we choose to regard this as a valid and subsisting law, but as to the first mortgagees, as void? As to our foreclosure effectual, but should the first mortgagees pursue the same course, ineffectual.

The question here may have at present no other practical application than the determination of the principle invoked, for the respondents in their answer say that they "have made arrangements with the first mortgage bondholders, to prevent the consummation of the proceedings to foreclose that mortgage." Should these arrangements fail, the parties might stand different.

Is a law thus optional, or is it not rather a law applicable to the contract, and not subservient to the wishes of the person. Again we come to the phrase, it is a law or it is not.

It seems to me clear, that the law so far as it impairs the obligation of the mortgage contract, in this case, is void.

Is there any rule of practice or pleading, at law or in equity, which prohibits a party from setting up the invalidity of law, relied upon by the opposite party? I find no decided case holding such a doctrine. All the authorities, when treating of this question, say such statutes are void.

It is indeed no rule of action in the construction and execution of those contracts thus affected by it.

The complainants do not rest upon this position, but present another which requires consideration.

They urge that the statutory provisions existing in 1852 for the

foreclosure of mortgages do not reach and cover a mortgage like this, and were not designed so to do; that they applied to cases of the ordinary mortgage of real estate, and that no proceedings at all were required in case of the ordinary mortgage of personal property.

The remedy, if any existing, by which the right of redemption in the case at bar could be closed upon the complainants, they contend, was by appeal to the equity court.

This idea is strenuously opposed, and is as strenuously insisted upon.

I find no clearer, better, and perhaps more authoritative statement of the law applicable to mortgages, where not modified by statute, than in the case already cited of *Bronson* v. *Kinzie*. Chief Justice Taney there says: "According to the long-settled rules of law and equity, in all the States whose jurisprudence has been modelled upon the principles of the common law, the legal title to the premises in question vested in the mortgagee, upon the failure of the mortgager to comply with the conditions contained in the proviso; and at law he had a right to sue for and recover the land itself. But in equity this legal title is regarded as a trust estate to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgager. *Conrad* v. *The Atlantic Insurance Co.*, 1 Pet. 441.

It is upon this construction of the contract that courts of equity lend their aid, either to the mortgager or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgager, direct the reconveyance of the property to him upon the payment of the money; and upon the application of the mortgagee it will order a sale of the property to discharge the debt. But as courts of equity follow the law, they acknowledge the legal title of the mortgagee; and never deprive him of his right at law, until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgager, in order that he may obtain the benefit of his security. For this purpose it is his absolute and undoubted right, under an ordinary mortgage

deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgager. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it without reasonable delay."

If we regard this as a correct statement of the law where no statutory provisions exist modifying it, we are brought directly to the question whether any such statutory provisions existed in Maine at the time the mortgage in question was made.

We have before recited all that were then in force, and considered their inapplicability to the franchise and the right of way, and being inapplicable to them, their inaptitude as to the real and personal property embraced in the mortgage.

That they fail to reach the necessities of such a case it seems to me quite apparent, and that there was no way under the provisions of those statutes by which any equity of redemption, held by the complainants under their mortgage, could be closed. Indeed, I understand counsel upon both sides to assert this, and rely upon it, the respondents urging it as a reason why the statute of 1857 should be held by the court to be retroactive.

At this point I deduce this argument, viz., if these statutes did not reach this mortgage, then they did not modify the law relative to it, as we find it stated by Chief Justice Taney, in *Bronson* v. *Kinzie*, and the law, as there stated by him, is applicable to this case for the same reason he gave for its being applicable to that case, viz., because "no statute had been passed by the State, changing the rules of law or equity in relation to a contract of this kind, and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated."

If these statutes were apt and applicable to the case, there was no propriety in proceeding, under the statute of 1857, to foreclose, and certainly no necessity for the court to declare the act retroactive.

But it is suggested that even if this be so, this court has no

jurisdiction, as a court of equity, to foreclose a mortgage, since the statutes provided a specific course of procedure in that matter, and several decisions are referred to in support of this position.

It is, I think, sufficient, or well at least to say here, in regard to those cases, that neither of them involved such a question, and the remark there made, concerning the power of this court to decree a foreclosure in any mortgage, is entitled to the force only which may properly be attached to a *dictum* of the court. The remark was made with a clear statutory provision conferring power as a court of equity in the foreclosure as well as redemption of mortgages. R. S., 1841, c. 96, § 10. Another thing should be noted, the remark was made concerning mortgages clearly within the statutory provisions referred to in c. 125 of R. S. of 1841, and did not apply to those not within the provisions of that statute, for the court say: "The legislature have prescribed with precision what shall be done to foreclose a mortgage. It is not presumable that the legislature intended to superadd a power in this court to adjudge and decree a foreclosure upon grounds other than what they have specifically enacted to be such." If the case at bar comes within the class referred to, viz., those which had been specifically provided for, then the reasoning used might be applied to it, whether conclusive or not; but not being within that class, neither the reasoning nor the *dictum* which results from it applies. However this may be, it is said that in the revision of 1857 this provision was left out, the court having decided it had no jurisdiction to foreclose a mortgage, and, therefore, there was no such power possessed by the court at the time these proceedings to foreclose were commenced.

This last proposition is of little consequence if the former was correct. The leaving out of a statute something that was not in it before, does not very materially change it. If it was there, however, leaving it out would materially change the statute, and that subsequent to the making of the mortgage in this case.

It is very clear that it was provided by statute that this court, "as a court of equity," "had power to hear and determine" "all suits for the redemption or foreclosure of mortgaged estates"

(R. S., c. 96, § 10), and possibly had such a case arisen as that at bar, instead of those cited, the court would have concluded that this provision applied only to such cases as were not provided for in c. 125; that recognizing the law, as stated by Chief Justice Taney in *Bronson* v. *Kinzie*, they would have recognized the ancient maxim, *ubi jus, ibi remedium*, and given it the reasonable application to such cases.

I do not, however, think it necessary to discuss any further, at this time, the effect of the introduction or exclusion of the specific words, "or foreclosure," upon any mortgage made while they remained upon the statute-book, for I feel quite certain that in any case where no other provisions of law are applicable, the power of this court over trusts would furnish a complete and ample remedy, so that all cases of mortgage, whether coming within the statutory cases provided for or not, would find a means of execution. In the language of Chief Justice Taney, "In equity the legal title which vests in the mortgagee is regarded as a trust estate to secure the payment of the money; and, therefore, when the debt is discharged there is a resulting trust for the mortgager."

The case at bar, however, differs from the ordinary mortgage or is not dependent upon this principle to raise a trust. It is upon its face a declared deed of trust made to others than the holders of the obligations to be secured, and it may well be doubted if it is at all subject to any of the rules pertaining to mortgages, being not a mortgage in the ordinary use of the word, but a deed of trust upon conditions annexed.

In this deed the trustees were appointed by the grantors, and named as trustees to hold the property as a security for others, and runs to the trustees and "their successors in that trust."

The fact that it is a deed with defeasance, does not make it any the less a deed of trust.

The relation of trustee and *cestui que trust* is created by the instrument itself, and existed from the moment of its execution.

It was, in its inception, a declared trust and a trust by deed.

The fact that there is a condition annexed to the deed, which, if

performed, would extinguish the trust, does not change the character they hold in either before or after the breach of that condition. They are, both before and after such breach, trustees, and must answer to all parties interested as such. Had the condition been performed, they would have been answerable as such, and if they take anything by non-performance, they take as such.

It appears to me they are clearly answerable as such in the present instance, and that the other parties claiming to hold under them, with a full knowledge of the trust, and indeed claiming under it, as well as claiming to be the only *cestuis que trust*, are properly made parties to the bill.

If it shall appear that the debt is discharged, the court may direct a reconveyance by the trustees. If not, it may direct such reconveyance, upon such discharge, at such times as it shall determine.

If it shall find the trustees guilty of fraud or negligence in the execution of the trust, of which the other parties were or were not the guilty participators, such decrees can be made as will do equity in the case.

If this view of the law, as applicable to this case, be correct, it becomes apparent that the act of 1857, if it had been designed to be retroactive, would have so materially changed the rights of parties that it could not be sustained on application to the case at bar.

I hold, therefore,

1. That the statute of 1857, c. 57, was not retroactive, and did not affect this contract.

2. That the statute laws of this State existing in 1852 and prior to 1857, providing methods of foreclosing mortgages of real estate, and those pertaining to personal property, were not applicable to the deed in this case.

3. That the statutes having in nowise modified or changed the rights of these complainants, the trustees held the title in trust, and are answerable as such.

4. That this court, as a court of equity having jurisdiction over

trusts, may make such decrees as the equitable rights of the parties may require.

5. That a master should be appointed with appropriate instructions, and such decrees should be made in the premises as shall secure the equitable rights of both parties.

TOWN OF WATERVILLE, petitioners, *vs.* COUNTY COMMISSIONERS OF KENNEBEC COUNTY.

Regular session of county commissioners—what is. Legislature—constitutional authority of, to apportion expense of erecting bridges.

A session of county commissioners held by adjournment from a regular session, is a "regular session" within the meaning of R. S. c. 18, § 1.

The legislature may, by private statute, authorize county commissioners to lay out a highway across a river running between two towns, and apportion the expense of erecting and maintaining the bridge upon the towns, in proportion to their respective State valuations.*

This court will not declare such a statute invalid, as being unreasonable, and hence in contravention of Art. IV. Part III. § 1, of the constitution of this State, when it is not made to appear that it operates unequally or oppressively.

ON REPORT.

PETITION for a writ of prohibition.

The petition, signed by the town agent and selectmen of the town of Waterville, specially instructed thereto by a vote of the town, alleged substantially, that in February 1870, a notice from the county commissioners, dated Feb. 9, 1870, upon a petition (rep-

Act of Jan. 21, 1870.

SECT. 1. The county commissioners of Kennebec county are hereby authorized, if they deem public convenience and necessity require it, to lay out a highway across the Kennebec river, between the towns of Waterville and Winslow, and terminating in some highway already existing in each of said towns.

SECT. 2. The existing laws in relation to the laying out of highways shall govern them in their proceedings, except that there shall be no appeal from their

resenting that public convenience and necessity demanded a bridge across Kennebec river, near Ticonic Falls, between the towns of Waterville and Winslow, and praying that a free bridge be built without unnecessary delay, in accordance with an act of the legislature, approved Jan. 21, 1870), was served by copy upon the town clerk; that the act of the legislature (set out in terms) is without precedent, by attempting to impose heavy and unjust burdens upon Waterville, wholly unlike those imposed upon any other town; that it attempts to take Waterville out of the operation of the general laws of the State; to compel Waterville to convert a toll-bridge into a free bridge, and to pay more than three-fourths of the entire expense; and to build more than one-fourth of said bridge upon the territory of Winslow; to deprive Waterville of the right of appeal from the decision of the county commissioners under the general laws, without repealing the general law, but leaving it in full force for the benefit of all other towns; that said act is arbitrary, oppressive, and grossly unjust, and that the petitioners are advised and they believe it to be unconstitutional and void.

That the petition, under which the county commissioners pro-

decision, in laying out or in refusing to lay out such highway. And they may make return of their doings at any adjourned session, and enter the same of record at once; and when such return is made, said towns may proceed at once to construct said highway, if the same has been laid out.

SECT. 3. If said commissioners shall determine to lay out said highway, they shall also determine the proportion of the expense of erecting and maintaining the bridge across said river, to be borne by each of the towns of Waterville and Winslow, which expense shall be borne by said towns in proportion to their respective State valuations of 1870, and of the subsequent State valuations. Such determination shall be included in their record, and be binding upon said towns, until changed by authority of the legislature.

SECT. 4. The selectmen of said towns are empowered, in case such highway shall be laid out, to contract for the erection of such bridge on behalf of their respective towns jointly; but each town shall be liable for its proportion of the expense thereof and no more. Said towns are authorized, at any meeting called for the purpose, to raise or hire money for defraying the expense of erecting the bridge.

SECT. 5. If the selectmen of said towns fail to contract for the erection of the bridge, within such time as the commissioners shall fix, the commissioners shall proceed in the manner provided in section 27 of chapter 18 of the revised statutes.

fessed to act, was not presented at any regular session, but at an adjourned session; and that these petitioners at the time appointed for the pretended hearing on said petition filed a written protest against the jurisdiction of the commissioners which they totally disregarded.

That these petitioners notified the commissioners that they claimed the right of appeal from their decision under the general law; that it was disregarded, and the commissioners proceeded to require and order them to contract by May 16, 1870, to build said bridge.

The answer admitted the facts alleged, but did not admit the private act of Jan. 21, 1870, to be unconstitutional, nor that the petition under which the commissioners acted was not entered at a regular session, but on the contrary the respondents allege, that said petition was presented at the regular December session, held by an adjournment thereof on the 9th day of February, 1870.

That at the April session of the county commissioners, held by adjournment on May 17, 1870, D. L. Milliken and others filed a petition for the appointment of an agent to construct the bridge, on the ground that the town had refused to contract for the building of the bridge, and notice returnable thereon May 26, 1870, when said towns not offering to show cause why they should not thus contract, and it appearing that Waterville refused so to do, the county commissioners appointed one Phelps as such agent, to complete the bridge by May 1, 1871; that the agent, after due notice, on June 16, 1870, contracted with certain persons named to erect and complete said bridge by May 1, 1871, for $30,000, which contract was duly approved by the commissioners June 17, 1870; that said contractors, at the date of this answer, were at work erecting said bridge.

In addition to the facts set forth in the petition and answer, the parties admitted that—

The regular sessions of the county commissioners for Kennebec county were fixed, by statute, on the third Tuesday of December, April, and August; that the regular session for December, 1869, began on the third Tuesday, and was adjourned from January 5th,

to Feb. 9, 1870; that the petition on which the highway and bridge were located was drawn and presented after the passage of the act of Jan. 21, 1870, and on or before Feb. 9, 1870.

The width of the river between Waterville and Winslow was between 550 and 600 feet; that the records of the county commissioners and all other papers and documents on the commissioners' files, touching the premises, should be admitted.

The March term, 1870, of the supreme judicial court for Kennebec county, adjourned *sine die*, April 13, 1870, and the report of the county commissioners, locating the way and bridge, was made April 21, 1870.

Service of this petition was made on respondents May 16, 1870, by copy and of order of court; and that, notwithstanding such service, the respondents proceeded to appoint an agent, and made the contract for building the bridge set forth in the answer, and that its construction was still going on at the time of the trial of this petition.

Upon the petition, answer, and facts agreed, the court to enter such judgment as shall be in accordance with the law of the case.

D. D. Stewart & S. Heath, for the petitioners.

Lewis v. *Webb*, 3 Greenl. 336; *Holden* v. *James*, 11 Mass. 405; Opinion of Justices, 4 N. H. 565, 568; Picquet, Appellant, 5 Pick. 68, 69, 70, 71; *Durham* v. *Lewiston*, 4 Greenl. 143; *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Proprs. Ken. Pur.* v. *Laboree*, 2 Greenl. 290.

Piper v. *Pearson*, 2 Gray, 122; *Fisher* v. *McGirr*, 1 Gray, 1; *Greene* v. *Briggs*, 1 Curtis, 66, 311.

As to the remedy, *Harriman* v. *Co. Com. of Waldo*, 53 Maine, 83; 3 Bl. Com. 112, 113; 2 Chit. Gen. Pr. 355, 356; 2 Sellon's Pr. 308, 309, 332; Colby's Pr. 347; *Washburn* v. *Phillips*, 2 Met. 296; *Scollay* v. *Dunn*, *Quin.* Mass. 75; *United States* v. *Peters*, 3 Dall. 121; *Appo* v. *The People*, 20 N. Y. 540, 541.

1 Saunders, 136, note 2; *Mayo* v. *Jones*, 12 Gratt. 17; *Exparte Williams*, 4 Pike, 537, 543.

Writ of prohibition is a writ of right. *Exparte Smith*, 2 Crbmp. M. & R. 753; *Knowles* v. *Holden*, 30 Eng. L. & Eq. 590; *Jackson* v. *Beaumont*, 32 Eng. L. & Eq. 588.

And lies, though an appeal might be taken. *Gould* v. *Gapper*, 5 East, 362; *Chesterton* v. *Farlar*, 7 Ad. & Ell. 713; *Burder* v. *Keley*, 12 Ad. & Ell. 233, 265.

As to the session when the petition for the laying out should be entered. R. S., c. 18, § 15; Stat. of 1871, c. 188, § 2; *Russell* v. *Co. Com. Franklin*, 51 Maine, 384; *Harkness* v. *Waldo Co. Com.*, 26 Maine, 353, is not applicable to a case wherein the whole cause of action arose after the commencement of a regular session. *Parsonsfield* v. *Lord*, 23 Maine, 511.

A. Libby, for the respondents.

TAPLEY, J. Two questions arise in this case; one pertains to the validity of an act of the legislature, passed Jan. 21, 1870, upon which these proceedings are founded, and the other concerns the jurisdiction of the county commissioners of the county of Kennebec, in this particular case.

The act in question authorized the county commissioners of Kennebec county, "If they deem public convenience and necessity require it, to lay out a highway across the Kennebec river, between the towns of Waterville and Winslow, and terminating in some highway already existing in each of said towns."

It also authorized them to "determine the proportion of the expenses of erecting and maintaining the bridge across said river, to be borne by each of the towns of Waterville and Winslow, which expense shall be borne by said towns, in proportion to their respective valuations of 1870, and the subsequent State valuations."

It appears by the report that the width of river, between Waterville and Winslow, is between 550 and 600 feet. Where in this space is the dividing line between the two towns does not anywhere appear.

By the general laws of the State, towns are required to construct and maintain ways legally located within their limits; and if they

do not within such time as required by law, upon proper proceedings had, an agent may be appointed to perform the duty at the expense of the delinquent town.

It is suggested in argument that the act of 1870, before alluded to, is void, as being an attempted exercise of power not possessed by the legislature, in that it imposes the burden of making and maintaining this highway upon the two towns of Waterville and Winslow, in different proportions from that which would have been imposed under the general law, and therefore unreasonable.

The expense of the work in controversy is, under the act of 1870, to be borne by these two towns in proportion to their respective valuations. Now whether or not the provisions of the act of 1870 impose upon the petitioners a greater or less burden than would have been imposed under the general law, we cannot say. As before remarked, where the dividing line between these towns is, we have no evidence adduced.

Their boundaries may be described in their several acts of incorporation, but where upon the face of the earth, with respect to this structure, it is, cannot be gathered from those acts.

The expense to be borne by each town, in its mathematical proportions, appears from the report of the commissioners. What the proportion would have been under the general law, we are not informed and have no means of ascertaining.

The particular provision of the constitution, which it is supposed has been disregarded in the passage of the act in question, is that which defines the legislative power. This provision requires it to "make and establish all reasonable laws and regulations for the defense and benefit of the people." Art. IV. Part III. § 1, Constitution of Maine.

This law, it is claimed, is not reasonable.

If it was a question for us, whether or not this law was reasonable as it regards the duties the citizens of this locality owe to each other in opening and maintaining a communication across this river, in view of the benefits it would confer upon each, we have not presented to us the proofs of such facts as would be necessary for

such an adjudication. We must assume that all such facts were duly presented to and considered by the law-making power, and that they deemed the act reasonable and within the powers conferred upon them by the constitution to enact.

The objection seems to be, that it was a special act passed to meet some real or supposed necessity, in a more equitable manner than could be done under the general law, and it is urged that inasmuch as a general law was in existence, touching the supposed exigencies of this case, any special law which changed the rights and liabilities of any person interested, or suspended, as to him, the general law would be unconstitutional as being unreasonable.

We believe this is the proposition narrowed down to its essential elements.

The act in question does not seek to suspend the general law in its application to the locality in question, or to the parties to the proceeding, so far as relates to making the location or apportioning the expense. The power to proceed under the general law remained as full as before.

It nowhere, in terms or by necessary implication, repeals the existing law or suspends the operation of it. It simply confers new powers upon the commissioners in reference to this particular structure, if they, under this act, "determine to lay out said highway." It deals with a supposed necessity, existing in a particular locality, under such circumstances that the general law fails to meet all the provisions equity and justice require should be made. It finds a locality existing within the limits of two municipal corporations interested in the construction of a way, and requires the expense of making and maintaining it to be paid by this locality, by an equal taxation of the property contained therein, irrespective of the mere divisional line of municipal authority existing between them. Being a locality interested in the public work, in apportioning the burden, it looks rather to the locality than its divisions into municipalities.

The question now recurs, have the legislature no power, in extraordinary cases, to make such rules additional to those in existence as shall do substantial justice between the parties, or must it

leave them to suffer from those inequalities sometimes arising from the application of general rules to all the varying circumstances of life.

We think they are not confined by the constitution to such an unjust rule of action.

The laws they pass must be equal, just, and reasonable. The existence or non-existence of these elements must be ascertained by a reference to the subjects upon which they act, the persons whom they affect, and their relation to such subjects.

No general law can be passed which will operate in the same manner upon every state of facts which may arise under it. Human wisdom has not yet reached that perfection. While the ordinary condition of things lies within the pale of legislative protection, the extraordinary is not excluded, neither must both, to the detriment of both, be crowded under the same enactment. What may be just and reasonable in one case may be most unjust and unreasonable in another.

In *Commonwealth* v. *Newburyport*, 103 Mass. 129, the court say, "Although the general law provides for the maintenance of all roads and bridges by imposing the duty upon each town to support those that are within their limits, yet the legislature may, undoubtedly, by general provision or by special statute, modify the general rule, in particular cases, in order to make the distribution of the burden more equal than it might otherwise prove to be in its operation. This it does by authorizing or requiring the county to assume a part of the expense of certain roads or bridges; thus indirectly imposing upon all the other towns in the county a part of the burden which, by the general rule, would fall upon the town within which the road or bridge was situate; or by authorizing a part of such expense to be imposed upon particular towns near to or benefited by such road or bridge."

The same principle is sustained in the case of *Haverhill Bridge Proprietors* v. *Co. Com. of Essex Co.*, 103 Mass. 120; and again in *Dow* v. *Wakefield*, same vol. p. 267.

Nor is this principle new in the legislature of this State. It is

recognized in all those cases of "village corporations," instituted for the purpose of securing a more perfect construction of streets and sidewalks, in the more populous parts of the towns, for maintaining fire apparatus, night watch and police force, construction of reservoirs and aqueducts, and various matters to improve the social condition of the population, and made more necessary and easily attainable by the density of population.

All these matters were within the powers of the several towns in which those corporations were constructed to provide, but grounded upon the fact that certain portions of the population of these towns were more directly interested in those expenditures than their neighbors, and that it is just and reasonable that they should bear the increased burden, these special laws were passed.

In several instances, the county commissoners have been authorized to build bridges and assess the expense upon the counties. In some of these cases the bridges cross tide waters, and in others, rivers and streams of much less magnitude than that of the Kennebec at the point in question.

There is no law of nature, or law grounded in natural justice, that necessarily confers the duty and obligation of making and supporting such public works, to the people residing within certain municipal divisions. The general law, fixing the liabilities in these cases, is an exercise of a right existing in the legislature to adjust these matters as they deem reasonable and just; and whenever they find an extraordinary case requiring some special provision to secure an equality in "bearing public burdens," we have no doubt it is competent for those to make such provisions, and it is but the exercise of powers necessary for the performance of a duty.

Looking at the act in question, with such other matters as are presented by the court, we discover nothing that would justify us in pronouncing this act of the legislature void.

It is further contended that under the provisions of this act, and the general law relating to the location of highways, the original petition for its location must be presented at a regular session of the county commissioners, and that the petition in this case having been

entered at an adjourned term, the commissioners had no jurisdiction.

The report shows that the "regular session" commenced on the 3d Tuesday of December, 1869, and was adjourned from Jan. 5, 1870, to Feb. 9, 1870, at which time the petition in this case was entered.

This, we have no doubt, was a compliance with the statute, as heretofore construed in several cases. *Harkness* v. *Co. Com. of Waldo*, 26 Maine, 353; *Parsonsfield* v. *Lord*, 23 Maine, 511.

Writ denied.

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

BARROWS, J., concurred in the result.

Mem. TOWN OF WATERVILLE, APPELLANTS, FROM DECISION OF COUNTY COMMISSIONERS FOR KENNEBEC COUNTY.

APPEAL from the decision of the county commissioners for the county of Kennebec, locating a highway and a bridge across the Kennebec river, between Waterville and Winslow, on April 12, 1870, under a private act of the legislature of Jan. 21, 1870. The town of Waterville appeared before the commissioners at the time of the hearing, and duly appealed from their decision making the location. The commissioners denied the right of appeal and ordered the location to be recorded at the same term (April) at which the report was made, being the next term after said location was made, and ordered the proceedings closed.

For the purpose of bringing the question directly before the full court, the presiding judge at the October term, 1870, of this court, ruled, *pro forma*, that no right of appeal existed, and declined to appoint a committee, and dismissed the appeal. Thereupon the appellants alleged exceptions.

After argument, the full court sustained the ruling at *nisi prius*.

ELISHA ATKINS and another *vs.* A. D. BROWN.

Pleading. Promissory note — construction of. Money paid — what will support.

A promissory note of the tenor,— "Portland, Aug. 29, 1863. One month after date, we promise to pay to the order of E. Atkins & Co., four hundred and forty-four dollars. Value received. Augusta Shovel Co. A. D. Brown, Pres."—will not sustain a count against A. D. Brown alone, describing it as his note or as the joint and several note of the Augusta Shovel Co. and A. D. Brown.

The defendant originally owning three-fifths, after purchasing the remaining stock of the Augusta Shovel Co., gave to the plaintiffs a note of the following tenor,—"Portland, Aug. 29, 1863. One month after date, we promise to pay to the order of E. Atkins & Co. four hundred and forty-four dollars. Value received. Augusta Shovel Co. A. D. Brown, Pres.,"—which being discounted at a bank, Brown paid one hundred dollars on it, and on Dec. 18, 1863, wrote the plaintiffs requesting them to allow on the note a balance of account due him, for property of the Shovel Company, purchased of him by the plaintiffs, and "to take up the note and we can arrange the balance when I see you. I have written the cashier that you will take care of the note." Upon receipt of the letter, the plaintiffs took up the note, and the defendant subsequently promised to pay them. *Held*, that the evidence sustained a count for money paid.

ON REPORT.

ASSUMPSIT, the declaration containing the following counts:

1. "For that said defendant, at Portland, on the 29th day of August, A. D. 1863, by his note of hand of that date, by him signed, for value received, promised the plaintiffs to pay them, or their order, four hundred and forty-four dollars and twenty-nine cents, in one month after date; yet though often requested, he has not paid the same.

2. "Also, for that said defendant, at Augusta, on the day of the date hereof, being indebted to the plaintiffs in the sum of three hundred and fifty dollars, for so much money before that time, had and received by the defendant to the use of the plaintiffs, and for the same sum paid, laid out and expended by the plaintiffs, at the request and for the benefit of the defendant, then and there, in consideration

thereof, promised the plaintiffs to pay them the same sum on demand; yet, though often requested, he has not paid it, but neglects and refuses to do so.

3. "Also, for that the defendant and the Augusta Shovel Company at Portland, on the 29th day of August, 1863, by their promissory note of that date, by them signed, for value received, jointly and severally promised the plaintiffs to pay them or their order, four hundred and forty-four dollars and twenty-nine cents, in one month after date; yet though often requested, neither the defendant nor the Augusta Shovel Company has ever paid the same, but neglects and refuses so to do.

The note declared on and produced as evidence to support the first and third counts, was of the following tenor:

"$444.29. PORTLAND, Aug. 29, 1863.

One month after date, we promise to pay to the order of E. Atkins & Co. four hundred and forty-four dollars and twenty-nine cents. Value received.

AUGUSTA SHOVEL CO.
A. D. BROWN, *Pres.*"

It appeared that the note was given by the defendant to the plaintiffs, for the debt of the company, and discounted at Freeman's Bank.

Oct. 29, 1863, the defendant wrote the plaintiffs, "I will take care of note in a few days."

Dec. 1, 1863, he wrote to them, "I paid in at Freeman's Bank on our note the day I was there."

Dec. 18, 1863, he wrote them, "I paid $100 on the note, when at Augusta, to the cashier. Will you collect the balance of Baker & Co. (suppose you are one), and take up the note, and we can arrange the balance when I see you. I have written the cashier you will take care of the note. Amount of note $444,—cash of A. D. B., $100 = $344 — $153 (you owe me) = $191 balance to pay."

There was a memorandum on the note as follows: "Bal. paid by E. Atkins, Dec. 24, $350.47."

It appears that the plaintiffs paid the note the latter part of December or fore part of January, and that the defendant repeatedly promised to pay the balance paid by the plaintiffs after deducting the amount of shafting which Brown sold to the plaintiffs, and formerly belonging to the Shovel Company, amounting to $146.72.

On the part of the defense it appeared that the Augusta Shovel Company was organized Oct. 13, 1860; that Brown was president, owning three-fifths of the stock; that as president he was chief manager, and was authorized to sign notes and negotiate its business; and that the defendant, some time after 1862, bought in all the stock.

The case was withdrawn from the jury and reported to the full court, who were to render judgment for the plaintiffs or defendant, as the law required.

J. Baker, for the plaintiffs.

A. Libbey, for the defendant, applying the test laid down in *Bradlee* v. *Boston Glass Co.*, 16 Pick. 347, contended that the note was that of the company and cited R. S. c. 1, Rule XXI, § 4; *Andrews* v. *Estes*, 11 Me. 267; *Dyer* v. *Burnham*, 25 Me. 1; *Rogers* v. *March*, 33 Me. 106; *Kidder* v. *Knox*, 48 Me. 551.

BARROWS, J. The plaintiffs cannot recover on either of the counts upon the note. In the first count it is described as the individual note of the defendant; in the third, as the joint and several note of the Augusta Shovel Co. and the defendant. If it could be construed as a note upon which the defendant was originally liable at all, he must have been liable upon it only jointly with the Augusta Shovel Co. The note cannot be said to be correctly described in either of these counts, and therefore will not support either of them. If it had been correctly described in a count setting it forth as the joint note of the Augusta Shovel Co. and the defendant, perhaps it might have been said that the non-joinder of the Shovel Co. could only be pleaded in abatement, and the only question under the general issue would be whether the defendant had made him-

self personally liable as a joint promisor by his signature. But to make the note admissible under either of those counts, it should have been correctly described according to its tenor or its legal import.

Had it been described as the joint note of the Augusta Shovel Co. and the defendant, the case of *Draper* v. *Mass. Steam Heating Co.*, 5 Allen, 338, is an authority which it would be difficult for the plaintiffs to overcome, although we might think, as did the court in that case, that "it would have been better if the name of the principal had been inserted in the body of the contract, or if the word 'by' had preceded the defendant's name in the signature."

It remains for us to examine the evidence offered in support of the count for money paid. Whatever the true construction of the original note may be, it was competent for the defendant, if he saw fit, to request the plaintiffs to take that note up at the bank upon his own individual account and responsibility and for his accommodation, and this he seems to have done. Upon the uncontradicted testimony in the case, we find that before the note was given, the defendant, originally the owner of three-fifths, had bought up all the remaining stock of the Augusta Shovel Co., so that if the note was to be paid at all, it made no difference to him pecuniarily whether he or the company paid it; that the company had sold the principal part of their property to the Portland Shovel Manufacturing Co., and the defendant had removed to Portland, from whence under these circumstances he wrote a few weeks after the note matured requesting, over his own signature, these plaintiffs to take up that note which had been discounted at the bank and to allow upon it the amount which he claims as due him for property of the A. S. Co. which the plaintiffs had purchased of him (amounting, as he states it in his letter, to $153, and as the plaintiffs state it in the testimony to $146.72), and promising in substance to pay the balance to the plaintiffs. It appears that upon the reception of this letter the plaintiffs did take up the note Dec. 24, 1863, paying at the bank $350.47, and that the defendant in subsequent conversations with one of the plaintiffs repeatedly promised to pay the sum

they had thus paid out at his request less the amount they had received in goods of the Shovel Co. as above stated. We think this evidence sustains the count for money paid on this note, and that there should be *Judgment for plaintiffs for $203.75, and interest from Dec. 24, 1863.*

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

MARY C. STRATTON *vs.* AI STAPLES.

Case—for negligence in not guarding a roll-way with railing. Waiver as to ambiguity of judge's charge.

On the premises of the defendant, within one foot of the sidewalk of a public street, was a decending roll-way leading to the basement of the defendant's block of stores. The entrance to the south store, occupied by the defendant's tenant as a drug store, was up four narrow steps immediately south of the rol - way. In front of the stores north of the roll-way was a continuous platform extending from the north end of the block to the roll-way. The roll-way was unprovided with railing or other safeguard except a buttress on either side thereof rising nine inches above the level of the platform. The plaintiff went upon the north end of the platform in the evening, and while passing along in the exercise of ordinary care for the purpose of entering the drug store on legitimate business, fell into the roll-way and was injured. *Held*, that the place was unsafe, and the defendant liable.

All objections to the charge of a presiding judge on the ground of ambiguity or inadequacy of expression in relation to matters of minor importance, will be considered as waived, unless made at the time of trial.

CASE to recover damages for a personal injury received by the plaintiff by falling into a "roll-way" leading to the basement of defendant's block of stores, by reason of alleged negligence of the defendant in leaving the roll-way unfenced and unprotected.

The defendant was the owner of the block of stores on the west side of State street, in Augusta, opposite the court-house, known as Concert Hall block, and consisting of four stores. The south tene-

ment was occupied as a drug store by defendant's tenant, and defendant's counting-room was in the next store northward. Between the drug store and defendant's counting-room, on the premises of the defendant and within one foot of the west line of the sidewalk, was a roll-way, under the control of the defendant, leading to the basement of the block. In front of the three stores north of the roll-way was a continuous platform three feet and eight inches wide with two continuous steps, each sixteen inches wide. The platform and steps were all on defendant's land, the first step commencing in the west line of the sidewalk and extended from the north end of the block down to the roll-way. Directly south of the roll-way were four narrow steps leading to the drug store. The roll-way was unprovided with railing or other safeguard, except buttresses rising nine inches above the level of the platform. The distance from the top of the buttresses to the bottom of the roll-way was seven feet and five inches.

Under the direction of the presiding judge the jury took a view of the premises.

The plaintiff testified that she visited the premises about seven and one-half o'clock on the evening of December 11, 1866, for the purpose of having a business interview with the defendant at his store; that not knowing which one of the stores was occupied by him, she went upon the platform near the north end of the building and looked at the doors as she walked along to ascertain; that seeing a light in the drug store at the south end, she decided to go in there and inquire for him; that not knowing of the existence of this roll-way, but supposing that the platform continued past the entrance to the drug store at the south end of the block, she walked directly on, stumbled over the north buttress and fell into the roll-way; whereby she was severely cut and bruised and her spine badly injured.

The evidence for the plaintiff tended to show that it was a dark night, that little or no light was reflected upon the platform north of the roll-way, and that the roll-way itself was utterly dark at the time of the accident.

The evidence for the defendant tended to show that at the time of the accident there were brilliant lights in the windows nearest the roll-way and also a light in the basement, and that the plaintiff was looking in at the window when she fell.

The presiding judge instructed the jury, *inter alia*, as follows: "It seems that neither the platform nor the cellar-way were within the limits of the street. So that for those who had occasion to travel on the public sidewalk, if they saw fit to go upon this platform, having no business there, and thereby sustained an injury, the defendant would not be liable. But for all persons who had occasion to go upon the platform in order to enter either of the stores of the defendant on legitimate business, he would be liable for all damages occasioned by these erections, provided they were unsafe or dangerous. You have been and viewed the premises, and taking the evidence of your own senses, it will be for you to say whether that cellar-way was unsafe or dangerous.

"The next question is, was the plaintiff legitimately upon the sidewalk or platform? You have heard her statement as to her business with the defendant. It is unnecessary for me to allude to the testimony, it is all with you. If you find that she was legitimately on the platform, then the second allegation is made out.

"Then the question arises, was she in the exercise of common and ordinary care at the time of this accident? You perceive that the platform was continued from the north end of the block down to this cellar-way, so that a person could go from one store to another on this platform, but could not go to the drug store in the same block. In relation to the quantity of light at the time of the accident, you will look at the testimony. It is a question entirely for you. The burden of proof is upon the plaintiff to satisfy you affirmatively of these three allegations. If she fails in one or all of them the defendant will be entitled to your verdict.

"There is no disagreement as to the questions of law. I have given them to you as they have been understood by both counsel. It is, therefore, a pure question of fact for you to consider, as to these various propositions."

The jury returned a verdict for the plaintiff, and assessed damages in the sum of $1,250.

W. P. Whitehouse, for plaintiff, cited *Indemaur* v. *Dames*, Eng. Law Rep. 1 C. P. 274, and 2 C. P. 311; *Hadley* v. *Taylor*, 1 C. P. 53; *Regina* v. *Watts*, 1 Salkeld, 357; *Cheetham* v. *Hampson*, 4 Term R. 318; *Rockwood* v. *Wilson*, 11 Cush. 221; *Lowell* v. *Spaulding*, 4 Cush. 277; *Davis* v. *Jenning*, 1 Met. 221.

S. Lancaster & J. Baker, for defendant.

The court submitted to the jury the question whether the plaintiff was legitimately upon the sidewalk or platform. This instruction was wrong in two respects: first, there being no dispute about the facts, it became purely a question of law whether plaintiff was legitimately on the platform or not; second, the court made no distinction between being on the platform, at the point where the accident happened, and being "on the platform" generally. It is seven times repeated, "if she was legitimately upon the platform." A customer might have business at the north store, and so would be "legitimately on the platform." Then he might loaf along by the other stores, without any business, till he reached the buttress and fell over. Would the court say he could recover? This instruction was too broad and indefinite, and calculated to mislead the jury, as it did.

The plaintiff has proved, conclusively, that she was going to the drug store at the time of the injury. The law required her to go in the way provided and held out by the owner, by construction or other acts, and allowed her to go in no other way. *Todd* v. *Railroad*, 7 Allen, 207; *Sweeny* v. *Railroad*, 10 Allen, 368; *Chapman* v. *Rothwell*, El., Bl. and El. 168; *Hounsel* v. *Smith*, 7 C. B. (N. S.) 738; *Elliot* v. *Pray*, 10 Allen, 378; *Zeebisch* v. *Tarbell*, 10 Allen, 385. But the strongest case is that of *Bancroft* v. *Railroad*, 97 Mass. 275.

Now, in the case at bar, the steps leading to the drug store are no part of the platform and never were.

They are not constructed on the same plan, but consist of four

narrow steps, instead of two steps and the broad platform. These stairs being the only means of access to the drug store provided by the owner, the law requires every person, having business at that store, to take this provided way, and the defendant cannot be responsible when a person takes any other way, for he has held out no other way to the public to visit this store. The plaintiff undertook to go there, not by the way provided by defendant, the straight and narrow way, but by a way of her own invention, along the platform, over the buttress, and across the cellar-way, and so, in the language of Chief Justice Bigelow, in *Bancroft* v. *Railroad*, she "voluntarily incurred a risk, for the consequences of which she cannot hold other persons responsible."

WALTON, J. This case is before the law court on a motion to set aside the verdict as against evidence, on a motion for a new trial on the ground of newly discovered evidence, and on exceptions to the rulings of the presiding judge.

1. Of the motion for a new trial, on the ground that the verdict is against evidence. The defendant contends that the plaintiff was not in the exercise of due care and prudence, and that he was guilty of no negligence; and that the verdict is clearly against the weight of the evidence on both these points. Our conclusion is, that the evidence was sufficient to bring both these questions fairly within the province of the jury to decide, and that we cannot disturb the verdict on either of these grounds. Nor do we think the damages excessive.

2. Of the motion for a new trial on the ground of newly discovered evidence. We think this motion, also, must be overruled. In our judgment the evidence is not of such a character as would be likely to change the result; and we see no reason why the plaintiff might not, by the use of due diligence, have discovered it before the trial as well as afterwards.

3. Of the exceptions. The defendant contends that the presiding judge erred in submitting to the jury the question whether the plaintiff was legitimately on the defendant's platform at the time of

the injury. He says the instruction was wrong in two respects: first, because it was a question of law, and not a question of fact, whether the plaintiff was legitimately on the platform or not, and should have been decided by the court; secondly, because the court made no distinction between that part of the platform where it would be necessary for the plaintiff to be in going to and returning from the defendant's store, and the place where she was at the time of the accident. What the judge said was this: "The next question which arises is, was the plaintiff legitimately on the sidewalk or platform? You have heard her statement as to her business with the defendant; it is unnecessary for me to allude to the testimony; it is all with you; if you find that she was legitimately on the platform, then the second allegation is made out." This is all that was said on the point. The presiding judge seems to have treated it as one of minor importance, or one in relation to which there was no real dispute, and therefore disposed of it as briefly as possible. This it is often wise for a judge to do. To be enlarging and refining upon points, either of law or fact, about which there is no real dispute, is an evil. It distracts and burdens the memory of the jurors unnecessarily. The better course is to make the charge as full as possible on the vital points of the case, and as brief as possible on the unimportant ones. If either party thinks the charge is not as full on some of the points as it ought to be; or, if he thinks some of the expressions used are ambiguous, or do not sufficiently discriminate between the law and the fact, the proper course is for his counsel to call the attention of the court to the fact, and to ask that other and more appropriate instructions be given. If this is not done, all objections on that account will be regarded as waived. No objection appears to have been made to either the form or the substance of the charge at the time it was delivered. The judge told the jury that he had given them the law as it was understood by both counsel, that there was no disagreement in relation to it. This statement seems to have been acquiesced in by both parties and their counsel. All objections to the charge must, therefore, be regarded as waived.

We have given to this case much thought and a very careful consideration. Whether the plaintiff herself was not guilty of contributory negligence, and whether the defendant was guilty of actionable negligence, are, in our judgment, very close questions. Neither the plaintiff's care nor the defendant's negligence is very clearly established. But both questions seem to have been very fully and very fairly submitted to the jury, and the parties must abide by the result. *Motions and exceptions overruled.*

Judgment on the verdict.

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

WILLIAM WYMAN, in equity, *vs.* HENRY L. FOX and another.

Execution — Levy of, on real estate fraudulently conveyed — title completed by bill in equity. Widow's rights as dowress — not affected by her being party to fraudulent conveyance.

If the administrator of an estate, decreed insolvent, assume the defense of an action pending against his intestate, and neglect to suggest the insolvency upon the record, the execution, regularly issued upon the judgment recovered against the administrator, may be levied on the real estate of the intestate fraudulently conveyed by him.*

If a person, having the legal title to real estate, incur a debt, and subsequently convey his estate, in fraud of his creditor, to his wife, who makes a similar conveyance thereof to her brother in trust for herself, the creditor thus defrauded may extend his execution issued upon the judgment recovered upon his debt upon the land thus fraudulently conveyed, and perfect his title by a bill in equity against the wife and her grantee.

And where the judgment is recovered subsequent to the decease of the debtor, the rights of his widow as dowress, though she be a party to the fraudulent conveyance, will not be affected thereby.

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* See R. S. of 1871, c. 81, § 65.

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

The bill alleges, substantially, that on May 13, 1856, the plaintiff was creditor of one Amos Wyman, deceased, whose estate was rendered insolvent; that he recovered judgment and execution against the estate of the deceased at the March term, 1865; that he duly levied his execution on two parcels of land described on May 25, 1865; that on May 13, 1856, said Amos owned said pieces of land and conveyed the same to his wife (one of the defendants) without any consideration, and with intent to defraud his creditors, of which she was connusant; that on June 15, 1858, the said Amos and his wife joined in a conveyance of the said land to the other defendant, brother of the first defendant, without any consideration, and with intent on the part of all parties to defraud Amos's creditors, etc., and praying for answer and a decree of release by the defendants to the plaintiff.

The facts are sufficiently stated in the opinion.

J. Baker, for the plaintiff.

Stinchfield, for the defendants.

APPLETON, C. J. The plaintiff being a creditor of Amos Wyman by virtue of a bond bearing date 22nd July, 1840, commenced a suit thereon July 18, 1860. While this suit was pending, Amos Wyman deceased, and an administrator was appointed, by whom the estate was rendered insolvent. The administrator assumed the defense of the suit, but neglected to suggest the insolvency on record and to pray a stay of execution. The plaintiff obtained judgment, and execution issued thereon, which was satisfied by a levy upon real estate, the title to which was once in Amos Wyman, and which, as the plaintiff alleges, he fraudulently conveyed to his wife who conveyed the same to her brother, the other defendant, Henry L. Fox, in whom the title as of record now remains, to hold in trust for herself.

It was held in *Sturgis* v. *Reed*, 2 Greenl. 109, that if an administrator of an estate represented insolvent, assume the defense of

an action against his intestate, and neglect to suggest the insolvency on record, and pray a stay of execution, so that execution is issued, the same cannot be set aside and an extent in due form on the real estate of his intestate is valid. This decision was reaffirmed in *Frost* v. *Illsley*, 54 Maine, 348; and in *Wyman* v. *Fox*, 55 Maine, 523.

The plaintiff having made a levy, to which no exceptions are taken, upon lands once belonging to Amos Wyman, has brought this bill to compel the defendants to release to him their title, which he claims to be in fraud of the creditors of said Wyman. As the debtor had the legal title to the land levied upon when the debt was contracted, upon which judgment was rendered, execution issued and the levy made, if the conveyance from the debtor to his wife and from her to the other defendant was in fraud of the creditors of the grantee, a creditor thus defrauded may levy his execution on the land fraudulently conveyed, and then proceed to perfect his title by bill in equity. *Webster* v. *Clarke*, 25 Maine, 313; *Webster* v. *Withey*, 25 Maine, 327; *Corey* v. *Greene*, 51 Maine, 114.

It is in proof, that, on 13th May, 1856, Amos Wyman conveyed the premises levied upon to his wife, Charlotte H. Wyman, and that they by their joint deed of warranty, on 26th June, 1858, conveyed the same to the defendant Fox, a brother of Mrs. Wyman.

The plaintiff, at the time of these conveyances, was a creditor of Amos Wyman. The evidence fails to show any valid consideration for the conveyance from him to his wife. It is in proof, from the repeated declarations of the grantor and grantee, that this conveyance was to hinder, delay, and defraud the creditors of the grantor, and that to accomplish this was alike the purpose of the grantor and the grantee. That such was the object is further shown by their conveyance to the defendant Fox, a resident of Massachusetts, who paid nothing for the conveyance, and never occupied, managed, or controlled the estate, but permitted his grantors to occupy the same without rent during their joint lives, and since the de-

cease of Amos Wyman has permitted his sister to continue the same occupation to the present time. This conveyance, too, was fraudulent.

The decree, therefore, must be, that the defendants release their interest in the land levied upon, except the dower of Mrs. Wyman, her rights as dowress not being affected. The plaintiff cannot take advantage of her conveyance to Fox, nor is she estopped thereby as against him. *Robinson* v. *Bates*, 3 Met. 40.

Bill is sustained. The defendants are to release to the plaintiff all their interest in the premises described in the plaintiff's bill, except the dower to which Mrs. Wyman is entitled, and the plaintiff to recover costs, and a decree to be entered accordingly.

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

THOMAS DINSMORE, administrator, *vs.* JOHN R. WEBBER.

Infant's contract—rescission of by administrator.

A contract between a minor and his master whereby the former paid his bounty money to the latter in consideration of his consent to the minor's enlistment, may, after the minor's decease, intestate, be rescinded by the administrator of his estate, and the money recovered back.

ON REPORT.

ASSUMPSIT to recover three hundred dollars, money received by the defendant from the town of China as the bounty for the enlistment upon China's quota into the military service of the United States, of the plaintiff's intestate.

The writ was dated Feb. 10, 1869, and it contained one count on an account annexed, and another for money had and received on January 9, 1864.

The receipt of the money being admitted by the defendant, the plaintiff stopped; whereupon the defendant offered to prove that

the plaintiff's intestate was a minor about seventeen years of age, lawfully bound to him by the overseers of the poor of the town of China, and that he had been with the defendant under the indentures about three years; that the minor desired to enlist into the army, but the defendant objected on the ground that he was legally entitled to his services; that it was finally agreed that if the defendant would consent to the enlistment, the minor should let the defendant have his bounty-money; that the defendant did thus consent, and the money was accordingly paid by the officers of China to the defendant under the agreement, and with the consent of the plaintiff's intestate.

The presiding judge ruled that the foregoing facts, if proved, would not constitute a defense to the action. Thereupon the defendant submitted to a default, with leave to report the case to the law court. If the court should be of the opinion that the evidence offered should not be received, the default to stand and the defendant to be heard in damages.

J. Baker, for the plaintiff.

A. Libbey, for the defendant.

The defendant was legally entitled to the minor's services until he should become of age. The minor could obtain town and government bounty only by consent of the defendant, and a reliquishment of services while in the service. The minor agreed with the defendant that if he would give his consent, the defendant should receive the town bounty. The contract was executed by both parties.

The minor cannot recover back the money paid in execution of the contract, without restoring to the defendant what he parted with. *Breed* v. *Judd*, 1 Gray, 455; *Robinson* v. *Weeks*, 56 Me. 102.

If the contract was voidable by the minor, his administrator could not rescind. Infancy is a personal privilege, and none but the infant can rescind an executed contract. The evidence offered should have been admitted. *Oliver* v. *Houdlette*, 13 Mass. 237.

APPLETON, C. J. The bounty money paid upon a minor's enlistment belongs to the person enlisting and not to his parent or master. The alleged contract between the plaintiff's intestate and the defendant was voidable, and might have been avoided by him during his life-time. *Mears.* v. *Bickford*, 55 Maine, 528; *Kelley* v. *Sprowle*, 97 Mass. 169; *Banks* v. *Conant*, 14 Allen, 497.

The plaintiff represents the intestate and has his right of rescission. *Hardy* v. *Waters*, 38 Maine, 450; *Roberts* v. *Wiggin*, 1 N. H. 74; *Person* v. *Chase*, 37 Vt. 647; *Hussey* v. *Jewett*, 9 Mass. 100.

As the infant could have rescinded the alleged contract, so can his executor or administrator. *The default to stand.*

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

GEORGE W. COTTLE *vs.* HIRAM S. YOUNG.

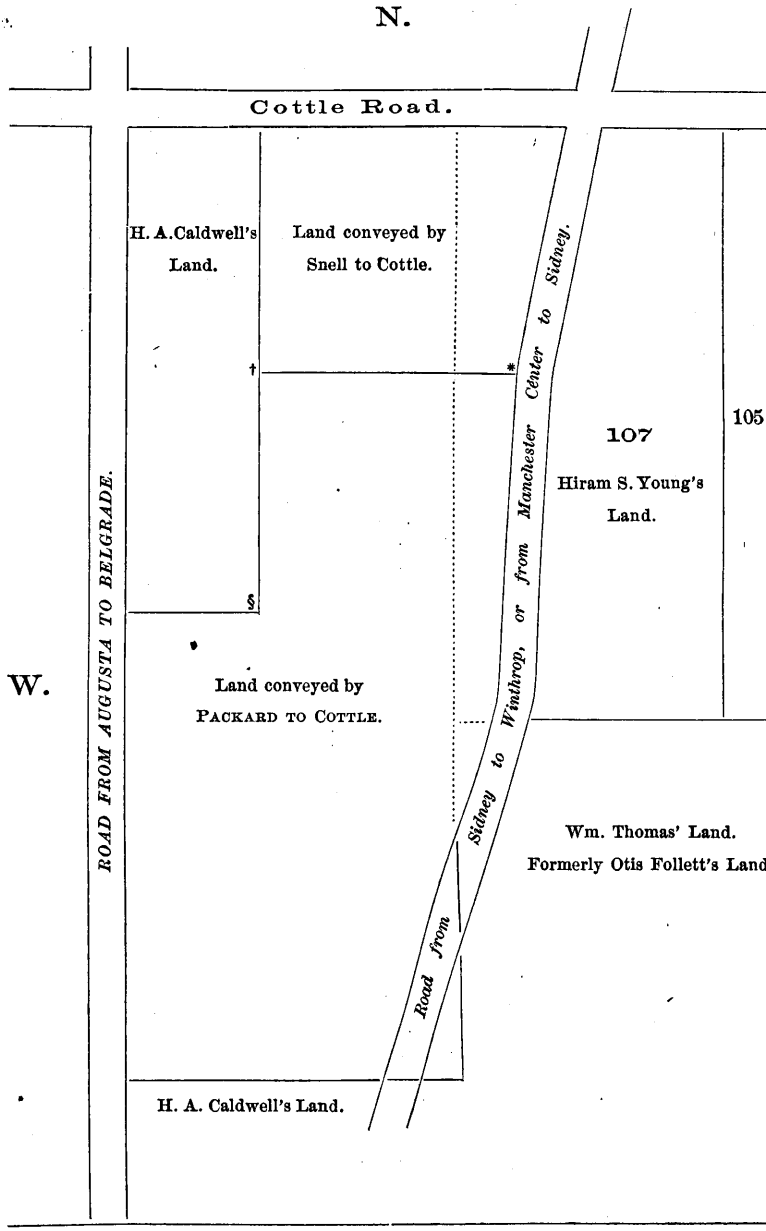
Deed — boundaries of — construction of. Reservation. Prescription.

Where the first call in a deed bounds the land "on the east by" a certain road, and the fourth and last call makes the "south line to be a straight line from" a point named, "to the southerly post in a pair of bars, on the road named," *Held*, that the center of the road is the east line of the land.

A road crossed the south-east corner of a parcel of land described as, "beginning on the west side of the road, at the south-east corner of" the northerly adjoining lot; thence westerly and southerly, certain distances, to the south-west corner; thence easterly across the road a certain distance; thence northerly "to the road named, and crossing the road and running on the westerly line thereof to the first-mentioned bound,— excepting and reserving to the public the road crossing the premises." *Held*, that so much of the road as lay "on the westerly line thereof" was excluded from the grant; that so much as lay within the lines mentioned, was included; and that the exception referred to the rights of the public in the road, and not to the road itself.

An offer to show that the defendant, in an action of trespass had had the undisputed privilege of cutting the grass in dispute for thirty years, is not an offer to show the acquisition of a right by prescription.

Cottle *v.* Young.



* South post of a pair of bars, and south-east corner of land of Geo. W. Cottle. † Hemlock tree. § Stakes and stones.

ON REPORT.

TRESPASS to recover damages for carrying away earth and grass from the west side of the center of the road leading from Sidney to Winthrop, near to the pair of bars as represented on the diagram.

The plaintiff claimed to own to the center of the road. His title is set out in the premises of the two deeds described in the opinion.

The defendant's title was derived from one Shedd, whose deed described the premises as follows: "Beginning in the north-west corner of lot numbered 107, thence south south-west by Bernsly Caldwell's land, to land lately owned by Otis Follett; thence east south-east by said Follett's land, and across lots No. 107 and 105; thence to the north-east corner of lot No. 105; thence by a road west north-west to lot No. 107, and on the same course to the first bound, — excepting a piece of land conveyed by Robert Brinley to Bernsly Caldwell."

The piece of land conveyed by Brinley to Caldwell, and comprising the foregoing exception, is described as follows:

"Beginning at the north-west corner of lot No. 107, thence southerly the course of said lot, to land owned by Otis Follett; thence east south-east by said Follett's land, to a road leading from Sidney to Winthrop; thence northerly in the course of said road, to the north end of lot 107; thence westerly to the first bound."

The defendant offered to prove that he had had the undisputed privilege of cutting the grass on the spot in dispute for thirty years, but the presiding judge excluded it.

The case was then reported to the full court, with the agreement that if the plaintiff was entitled to hold to the center of the road leading from Sidney to Winthrop, the defendant was to be defaulted, and damages assessed by the clerk, unless the evidence offered and excluded should have been admitted.

S. Lancaster, for the plaintiff.

Snell owned the land conveyed by Brinley to Caldwell, when he conveyed to plaintiff, and his east line was to the center of the road. Snell intended to convey all and not reserve the strip lying between center of the road and the west line of the road. If he did not convey then he owns it now. Same may be said of his deed to Packard, and Packard to plaintiff.

Snell's deed to the plaintiff, conveying to the center of the road, the place of beginning in Packard's deed to Cottle being the "south-east corner of said Cottle's south line," would be the center of the road. Washb. on Real Prop. ed. 1862, 635.

On the reservation "to the public," counsel cited *Pike* v. *Monroe*, 36 Maine, 309; *Brackett* v. *Persons Unknown*, 53 Maine, 238.

S. Titcomb, for the defendant.

APPLETON, C. J. There seems to be no conflict between the title of the plaintiff and that of the defendant. Each holds what is conveyed to him.

The plaintiff can recover only on the strength of his own title. The only question is whether the plaintiff is bounded by the center of the road leading from Sidney to Winthrop, and that depends upon the true construction of the deeds under which his title is derived.

The deed from George Snell to the plaintiff, dated Sept. 8, 1865, describes the premises conveyed as follows: "A certain piece of and situate in said town of Manchester, and bounded as follows: on the east by the road leading from Sidney to Winthrop, on the north by the road leading from the first-named road to the Cottle house, and known as the Cottle road, on the west by the land of Henry A. Caldwell, and on the south by other land of mine, the south line to be a straight line from a certain hemlock in or near the line between me and Henry A. Caldwell, to the southerly post in a pair of bars in the south-easterly corner of the piece hereby conveyed; this pair of bars being on the road first named, containing twenty acres more or less."

The tract conveyed is bounded "on the east by the road leading from Sidney to Winthrop." The road is the boundary, and when land is bounded by a road, the grant is to the center of the road. The termination of the last line, "at the southerly post in the pair of bars in the south-easterly corner of the piece hereby conveyed; this pair of bars being on the road first named," does not change the eastern boundary before given. It merely designates the course and place of the line running to the road, but does not limit or restrict it from extending to the center of the road. It runs to a monument on the road, and that is all. It could not well run to one in the road. Taking the whole language of the deed together, the road must be regarded as the easterly boundary. *Reed's petition*, 13 N. H. 384.

The deed from Caleb Packard to the plaintiff, dated Sept. 25, 1866, conveys "a certain piece or parcel of land, with the buildings thereon, situate in said Manchester, and bounded and described as follows: "Beginning on the west side of the road leading from Manchester Center to Sidney, at the south-east corner of land of George W. Cottle; thence running westerly, on Cottle's south line, about seventy-five rods, to land of H. A. Caldwell; thence southerly, on Caldwell's easterly line, fifty rods more or less, to a stake and stones for a corner; thence westerly, on said Caldwell's south line, to the road leading from Augusta to Belgrade; thence southerly, on the eastern line of said last-mentioned road, one hundred rods more or less to said Caldwell's land; thence easterly, on said Caldwell's northerly line one hundred rods more or less to land of William Thomas; thence northerly on said Thomas' west line to the first-named road, and crossing said road and running on the westerly line thereof to the first-mentioned bounds, containing eighty acres more or less, being part of the Bernsly Caldwell farm, so called, excepting and reserving to the public the road crossing said premises."

The road leading from Manchester Center to Sidney is the same road which in some of the deeds is described as leading from Sidney to Winthrop.

The exception or reservation in the last clause of the deed is of the public rights in the road crossing said premises. It is not of the road, for that is included in the grant, but of the rights of the public therein.

It is undoubtedly true that where land is sold bounded by, upon, or along a highway, the thread or center line of the same is to be presumed to be the limit and boundary of such land. But it is equally true that the grantor, by apt and fitting words, may exclude this presumption and reserve the entire road to himself, subject to the easement of the public. He may bound his grantee by the line of the road and not by the road itself.

The grantor, in the deed last referred to, has very clearly excluded the road leading from Manchester Center to Sidney from his grant. He begins on the west side of the road at the south-east corner of the plaintiff's land. The deed, after various courses and distances, gives a "line to the first-named road," but it does not stop there. It crosses the road and runs on "the westerly line thereof to the first-mentioned bounds." The easterly line of the land conveyed is bounded not by the road, but by the westerly line of the road, after having crossed the road to reach that line. Both termini on the road are on the westerly side thereof, and the line is its westerly line. The description given manifestly excludes the road by the westerly side of which the plaintiff is bounded. *Smith* v. *Slocomb*, 9 Gray, 36; *Tyler* v. *Hammond*, 11 Pick. 193.

The distinction between the two deeds under which the plaintiff derives his title is, that by the first deed he is bounded on the road which clearly goes to its center, and in the second his boundary is the westerly line of the road, thereby excluding the road.

The offer of the defendant to show that he had the undisputed privilege of cutting the grass in dispute for thirty years is not an offer to show the acquisition of a right by prescription or by adverse possession. It would rather exclude the idea of any cutting by rightful title. It implies that it was the result of a privilege granted, the

extent of which was indefinite and which might at any time be withdrawn.

Defendant defaulted, and damages are to be assessed only for the hay cut on the road leading from Sidney to Winthrop, east of the land conveyed by George Snell to the plaintiff, by deed dated Sept. 8, 1865, or on the portion of the said road included in the deed given by Packard to the plaintiff, if any, and if none, then the plaintiff to become nonsuit.

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

JOHN I. COOMBS *vs.* ELISHA GORDEN.

Personal property — officer's sale of.

A sale on *mesne process* of the personal property of a stranger to the process, conveys no title to the vendee; and the real owner may replevy it from the purchaser after it has come into his possession.

ON EXCEPTIONS.

REPLEVIN for two steers. Plea *non cepit*, and brief statement that the defendant purchased the steers at a public auction, held by a deputy-sheriff for this county, on a writ in favor of B. F. Butler against F. L. Wentworth.

All the proceedings relating to the sale were regular.

The presiding judge ruled, that the defendant acquired no title by virtue of the sale as against the plaintiff; and the defendant alleged exceptions.

E. Kempton, for the defendant, contended,

That the sale operated a legal transfer to the purchaser; that replevin will lie against the officer before the sale, and trespass and trover against him after the sale and delivery; but that replevin will not lie against the purchaser. 3 Dane's Ab. c. 77, Art. 11, § 5; Chit. Pl. 153, 169; 14 Mass. 491, 521; 8 Cranch 29, 30; 8 Johns.

333, 361. That the cases in 8 Cush. 41, and 4 Gray, 311, are merely *dicta*.

In all the cases in Maine the action has invariably been trespass or trover against the officer, and not replevin against the purchaser.

Sheriffs' sales take the place of *markets overt* of the common law.

The sheriff is under bond, and can satisfy the real owner.

Counsel cited R. S. c. 96, § 8; c. 81, § 66.

E. O. Bean, for the plaintiff.

DANFORTH, J. In this country *markets overt*, as established in England, have never been recognized as legal institutions. Aside from these, here as everywhere, there is no principle of the common law by which any person's property can be taken from him for any other than a public purpose, excepting by his own consent, or by "due process of law." By the constitution of our State this in substance is made a positive enactment. The authority of a sheriff to sell property on execution is not a common-law power, but is given and regulated by the statute.

It is not, then, like a sale in *market overt*, nor can we apply to it the same reasoning. No principle of law, no authority has been cited to show the ruling, complained of in this case, erroneous. It may be safely assumed, then, that by the common law there is no cause of complaint.

We think there is just as little cause under any provisions of the statute.

Almost from time immemorial the statute has authorized the sale of a debtor's personal property on execution, and yet we find no case in which the doctrine contended for, that the sale of the property of a third person, against whom the execution does not run, conveys a good title, is sustained. Many cases may be found in which it has been held, that a sale upon execution, will convey all the debtor's interest therein, though all the provisions of law in relation to such sale may not have been complied with. But none go

any further, and even so far we find the cases conflicting, and all, to which our attention has been directed, hold that even the debtor's interest is not passed unless the officer is authorized to act by a legal precept. In *May* v. *Thomas*, 48 Me. 397, on a careful review of the authorities, it was held that the true rule, as adopted in this State, is that a sale "on judicial process," by an officer "authorized by law, and having an official jurisdiction over the proceedings, will transfer the debtor's title to a *bona fide* purchaser." By this it would seem that to convey the debtor's interest even, it is necessary that the officer should be "authorized by law, and have official jurisdiction over the proceedings." In conformity to this it was held in *Sanfason* v. *Martin*, 55 Maine, 110, that an insufficient precept did not enable the officer to convey the debtor's title. If the debtor's interest cannot be transferred without a legal precept, it would follow that the property of a third person could not be when the officer has no legal authority whatever to make the sale, and, of course, can have no "official jurisdiction over the proceedings." It is, however, assumed in the case at bar that the officer had a legal precept, and was therefore legally authorized to act. It may be true, that as against the debtor his process was sufficient, but as against the plaintiff in this case who was the owner of the property sold he had none whatever, nothing which gave or purported to give him any jurisdiction or authority over the property in question. Without jurisdiction over the subject-matter the acts of the officer were simply void, and could convey no rights to the purchaser. So in a sale of property exempt from attachment no title passes, because, although the execution may be legal, it is illegal for that purpose, and gives the officer no authority to make that sale. In *Williams* v. *Miller*, 16 Conn. 144, this precise question was raised, and it was held that "a sale on execution of property exempt from attachment, or belonging to a stranger to the process, conveys no title to the vendee." The same doctrine is recognized in *Bartholomew* v. *Warren*, 32 Conn. 102. So in *Jones* v. *Chitty*, 1 Burrow, 32, the same doctrine is enunciated. In the opinion it is said: "It is admitted that the vendee is not protected here,

because, at the time of the sale, the sheriff had no authority to sell." The want of authority resulted from the fact that at the time of the sale the debtor did not own the property. The same doctrine is laid down in *Buffum* v. *Drew*, 8 Cush. 41. In this respect, it is believed, no case can be found sustaining or suggesting any other principle. No provision of our statutes has been cited inconsistent with these decisions. On the other hand, a correct construction of them would seem to establish the same doctrines. R. S. c. 96, § 8, provides that all property, "unlawfully taken or detained" or "taken on execution," may be replevied. If the officer takes the property of a stranger to the process, this statute authorizes a replevin so long as he has it in possession.

After the possession is changed by the sale there is no longer occasion for replevin against him. But surely no language of this statute can be construed as giving the vendee any rights which the officer could not legally sell. Therefore the property in the hands of the purchaser is unlawfully detained, and as such liable to replevin within the words of the act.

It may be true that under the proceedings provided in c. 81, §§ 42 and 43, the claimant may, by delay, waive his right to the property. But in the case at bar no such proceedings appear, and we cannot assume their existence without proof. Besides, these provisions relate to property under mortgage or pledge, in which the debtor has or is supposed to have an attachable interest, and not to that to which the title of the claimant is absolute.

It may, perhaps, as suggested in the argument, be for the interest of both debtor and creditor that a sale, on execution, of property belonging to a stranger to the process, should convey a good title.

But to deprive a party of his property, without any fault of his own, to accommodate a creditor who finds some difficulty in collecting his debt, or to prosecute the interest of an unwilling or irresponsible debtor, would seem to be as void of justice as it is of law. *Exceptions overruled.*

Appleton, C. J.; Cutting, Kent, Barrows, and Tapley, JJ., concurred.

ELIAS PLIMPTON *vs.* FRANCIS G. RICHARDS and others, Executors.

Torts—executors as such not liable for.

Case will not lie against executors as such for damages caused by their raising the dam on a stream, whereby the plaintiff's mill was flowed, when the dam and the lands on which it is situated had, under the will of their testator, become vested in the executors and others.

ON EXCEPTIONS.

CASE for damages alleged to be caused by the flowing back of the water of the Cobbossecontee stream, in Gardiner, upon the plaintiff's mills on Purgatory stream, in Litchfield.

So much of the writ as is essential was as follows: "We command you to attach the goods and estate which were of Robert Hallowell Gardiner, late of Gardiner, in said county of Kennebec, deceased, in the hands and custody, and under the administration of Frederic Gardiner, J. W. T. Gardiner, and Francis G. Richards, executors of the last will and testament of the said R. H. Gardiner, Esq., to the value of two hundred dollars, and summon the said defendants, in their said capacity as executors as aforesaid, to answer," etc.

After setting out the plaintiff's seisin in his mills on Purgatory stream, and their long use and occupation by him, and his right to the use of the water, etc., the declaration alleged as follows: "And being so thereof seized, the said defendants, in their capacity as executors as aforesaid, not being ignorant of the premises, but contriving and intending to injure the plaintiff, and deprive him of the use and benefit of said mills, mill-dam, and mill-privilege, did . . . erect, build, maintain, and keep up a certain dam upon and across the said Cobbossecontee stream," etc.

There was evidence tending to show that the plaintiff was the owner of certain mills situated on Purgatory stream on the first day of April, 1867, and continued to own the same until the date of the

writ October 3, 1868; that during that time the whole of his mills were obstructed by back water, and that his works were flowed and his mills otherwise injured; that in the fall of 1866 the dam belonging to Robert H. Gardiner, at the time of his decease, was raised by the defendants by their putting on flash-boards, and that this raising of the dam and the stopping up of the waste-way in the dam caused the damage complained of.

The will of the testator, Gardiner, contained the following, including the dam and lands on which it was situate:

"Item 12. I give and bequeath all the rest and residue of my property to my sons, Robert Hallowell and Frederic, and my son-in-law, Richard Sullivan, jr., and my grandson, F. G. Richards, in trust, to manage the same as they shall think proper, and apply the income thereof to the payment of my just debts, and the annuities herein bequeathed; and I do hereby empower them to sell any portion of my real estate, and to give a good and sufficient deed of the same; and I direct my trustees to pay all my just debts, and after that is done, and the annuities herein bequeathed provided for, to divide all my remaining property in six equal portions, one of which I give to each of my children, Robert Hallowell Gardiner, J. W. Tudor Gardiner, Frederic Gardiner, Anne R. Richards, Henrietta Sullivan, and Eleanor Gardiner. This division to be so made that my homestead shall be given to my son Robert, with such conditions or additions as shall make his share equal in value to the others. And I further direct that the portions which will become due to my daughters shall be put in trust, the income to be paid to them severally during their lives, and the principal subject to their disposition at their decease.

"Item 13. I appoint my sons, Robert Hallowell and Frederic, and my son-in-law, Richard Sullivan, jr., executors and trustees of this my last will; also my grandson, Francis G. Richards."

By a codicil, he afterwards appointed his son, J. W. T. Gardiner, as joint trustee and executor. But the defendants only, viz., Francis G. Richards, Frederic Gardiner, and J. W. T. Gardiner, qualified as executors by giving bond.

The defendants' counsel requested the court to make the following rulings, which were refused:

1. That this action cannot be maintained against the defendants as executors of the will of R. H. Gardiner; because neither by his will, nor by the law, have they, as executors, any possession, right of possession, or control over the upper dam, or dam No. 1, where it is alleged that the flash-board was put on.

2. That this action cannot be maintained in its present form against the defendants for any torts or acts committed by them in their private and individual capacity, because the action is brought against the estate of R. H. Gardiner, and against the defendants solely in their capacity as executors of said estate.

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

L. Clay, for the plaintiff.

J. Baker, for the defendants.

APPLETON, C. J. This is an action on the case against the defendants, as executors under the will of Robert H. Gardiner, to recover damages alleged to be caused by raising the dam on Cobbossecontee stream, in Gardiner, by which the plaintiff's lands are flowed.

The writ alleges that the defendants, "in their capacity as executors, contriving and intending to injure the plaintiff and deprive him of the use and benefit of (his) said mills, mill-dam, and privilege, did . . . erect, build, maintain, and keep a certain dam upon and across the said Cobbossecontee stream," etc.

By the will of Gardiner, it appears that the title to the dam and the land upon which the dam and mills are built is in the defendants, as trustees. All the real estate of the testator vested in them, subject only to be divested for the payment of his debts.

The duties and responsibilities of trustees and of executors are distinct and different. They act in different capacities and under different liabilities. They are legally as distinct as if they were different individuals.

The action is practically against the estate of Mr. Gardiner, for if the defendants are rightfully sued as executors, the estate must be responsible. It is not against them for any wrongful acts of their testator. It is for their own wrong-doings. But their wrong-doings were not official as executors. It was no part of their duty to commit trespass upon the rights of others. If they did they would be liable as individuals. It would be monstrous to hold that judgment and execution should issue against the estate of their testator for torts which they could have no authority by virtue of their executorship to commit. If an executor commits a trespass, it is his individual and personal act, not his representative act as the executor of his testator. He is to settle the estate, not destroy it.

If the defendants, in the acts complained of, were acting in their capacity as trustees in whom the legal title was vested, that would not render them liable as executors. Nor would their bondsmen, as executors, be responsible for any torts committed by them as trustees. *Exceptions sustained.*

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

GEORGE S. C. DOW, in equity, *vs.* DUDLEY W. MOOR, administrator, and another.

Mortgage — foreclosure of — waived by receipt of part-payment.

The receipt, after foreclosure, of a part of the debt secured by a mortgage of real estate, under an express understanding that the foreclosure was opened, will be deemed a waiver of the foreclosure.

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

APPLETON, C. J. On 8th September, 1853, John R. Dow mortgaged to Elizabeth C. Dow a part of the Levi Dow farm in Waterville, to secure the sum of fifteen hundred dollars.

On Sept. 25, 1857, Elizabeth C. Dow assigned the mortgage to Paulina Bacheller.

On 22d July, 1858, Paulina Bacheller, the assignment of the mortgage to her not being recorded, caused a notice of her intention to foreclose the mortgage to be published in one of the public newspapers printed in the county of Kennebec, for three weeks successively, the last publication being on July 22, 1858. The notice of foreclosure was duly recorded in the Kennebec Registry of Deeds, so that the right of redeeming the mortgage, if the proceedings were in accordance with the statute, or if there was no waiver of the foreclosure, expired on 29th July, 1861.

On 27th October, 1865, Paulina Bacheller and O. R. Bacheller, her husband, released to Wyman B. S. Moor "all their right, title, and interest" in the mortgaged premises, for the consideration of four hundred and five dollars paid by said Moor.

On 15th September, 1866, said Moor obligated himself, by a writing under his hand, to convey by a quitclaim deed all his interest in the premises to one Justus Charles, on the payment to him of $619.42 within two years from its date.

The bill was against Wyman B. S. Moor and Justus Charles, and upon the death of said Moor, D. W. Moor, the administrator upon his estate, entered an appearance and assumed the defense.

The plaintiff, to sustain his title, introduced a deed from John R. Dow to Mary M. Chandler, of the equity of redemption of the mortgaged premises, dated 18th April, 1856, for the consideration of $552, and a deed from said Chandler to himself, dated Jan. 5, 1867, for the consideration of $500.

According to the testimony in the case, the plaintiff must be regarded a *bona fide* purchaser of the equity of redemption, having paid the full value therefor and perhaps more.

It appears that shortly after the alleged foreclosure by Mrs. Bacheller, her husband, acting for her, stated the amount due Sept. 8, 1861, upon the mortgage, at $1009.97, and that on the 27th October, 1865, when the mortgaged estate was transferred to W. B. S. Moor, there was due but $405, the difference between those sums having been paid to Mrs. Bacheller in the intervening time.

It fully appears from the testimony of O. R. Bacheller, as well as from his letters introduced in the case, that Mrs. Bacheller did not claim an absolute title by foreclosure, but treated the mortgage as subsisting, and claimed only the amount due on the notes secured thereby.

The evidence further shows that the assignee of the mortgage waived the foreclosure by receiving large payments upon the notes secured, under the express understanding that the foreclosure was opened. As between the owner of the equity and the assignee of the mortgage the foreclosure must be regarded as opened.

The receipt of part of the debt due after a foreclosure must be deemed a waiver of the foreclosure, especially when received under an agreement to that effect. *Deming* v. *Cummings*, 11 N. H. 483; *McNeil* v. *Call*, 19 N. H. 403; *Moore* v. *Besom*, 44 N. H. 215.

Wyman B. S. Moor had no negotiations with Mrs. Bacheller on the subject. He procured his title through the intervention of Paul L. Chandler, who was fully aware that the alleged foreclosure was waived. Notice to Chandler was notice to his principal. His title was by deed of release in which the right, title, and interest of the releasor only was conveyed.

In *Oliver* v. *Piatt*, 3 How. 333, the supreme court of the United States held, "That a purchaser by quitclaim, without any covenants of warranty, is not entitled to protection as a purchaser for a valuable consideration, without notice, and he takes only what the vendor could lawfully convey."

Justus Charles was informed of all the facts relating to the opening of the foreclosure.

It follows that neither Moor nor Charles can have any rights superior to those of Mrs. Bacheller, and it has been seen that she held the mortgage as subsisting, having received payments after the alleged foreclosure, as well as having waived by letter and otherwise her strict legal rights. As the plaintiff's right of redemption existed against Mrs. Bacheller, so it equally does against the defendants whose title is only a naked release given them with a full knowledge of all the facts.

As the defendants did not answer the plaintiff's demand of an account of what was due under the mortgage, and claim a foreclosure under the same, the plaintiff is entitled to his costs.

The plaintiff is entitled to redeem upon payment of $405 and interest from Oct. 27, 1865, deducting therefrom the rents and profits, if any have been received, and the cost of this suit, and a decree is to be entered accordingly.

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

J. Baker, for the plaintiff.

A. Libbey & S. Heath, for the defendants.

I. A. STANWOOD *vs.* NATHAN O. MITCHELL.

Referees—power of.

The plaintiff claimed to be a member of a firm consisting of himself, the defendant, and others; that the profits earned had from time to time been apportioned and paid over by the defendant, as agent and business manager of the firm, to all the members except himself; and that the dividend belonging to him was retained by the defendant. The defendant contended that by the articles of copartnership members were entitled to the profits only in proportion to the assessments paid; that the plaintiff did not pay his assessments for the last year, but that the defendant did pay what the plaintiff should have paid, and claimed the earnings accordingly. The matter in controversy between the parties was submitted to referees, who found that the plaintiff was a member of the firm; that he did not pay, but that the defendant paid for him his assessment for the past year; and awarded that the defendant pay to the plaintiff the balance of the dividend earned by his share after deducting the money paid by the defendant for the plaintiff and certain interest and bonus. On motion to accept the report of the referees, *Held*, that the report be accepted.

ON EXCEPTIONS.

The parties submitted, under R. S. c. 108, the following demand, signed by the plaintiff and annexed to the submission:

"I claim that I am one of the copartners in the firm of N. O. Mitchell & Co., in an ice operation, and as such am entitled to

one-sixteenth of all the property and profits of said firm, and that said profits amount to five thousand dollars, with interest on the same, from the several times when the dividends were made or the money received by said Mitchell on said one-sixteenth.

"I also claim damages of said Mitchell, because he has restrained me, by his actions, from disposing of my interest in said partnership property."

After a hearing, the referees reported that they find "that said I. A. Stanwood was and is a member of the copartnership of N. O. Mitchell & Co., concerned in an ice operation; that he did not put in any capital of his own toward paying the expenses of their operations last winter, but that said Nathan O. Mitchell did pay for him the sum of twelve hundred and fifty dollars; and we allow said Mitchell to retain, on that account, the first dividend of twelve hundred and fifty dollars, made to the members of the copartnership, Aug. 10, 1870, and also allow him, as interest and bonus for advancing the same, the sum of eighty-seven dollars and fifty cents. We also find that said Stanwood was and is the owner of one-sixteenth of all the property of the copartnership as fully paid up. We also find that the net profits of said one-sixteenth arising from the operations of last winter, already divided and received by said Mitchell, were three thousand two hundred and eighty dollars and seventy-eight cents; that interest added thereto, from the times when received, make it amount to $3,322.82; that from this we deduct, as aforesaid, the eighty-seven dollars and fifty cents, interest and bonus for Mitchell's advancement, leaving a balance of $3,235.78 now due from said Mitchell to said Stanwood; and we, therefore, determine and award, and this is our final determination and award in the premises, that said Stanwood shall recover of said Mitchell, three thousand two hundred and thirty-five dollars and seventy-eight cents, as debt, with interest thereon from Dec. 28, 1870, to the rendition of judgment."

The defendant filed the following objections to the acceptance of the report: "That N. O. Mitchell, Enoch Miller, C. A. and J. D. White, John T. Richards, William F. Richards, I. A. Stanwood,

and Josiah Maxcy, of Gardiner, Benjamin Clark, of Pittston, and James S. Barker, of Lynn, Massachusetts, formed a copartnership on the 22d day of January, A. D. 1870, under the firm name of N. O. Mitchell & Co., for the purpose of carrying on the business of procuring ice in the town of Dresden, on premises leased to said Mitchell and one Charles W. Waitt, by Warren Hathorn, for the term of ten years, said Waitt having assigned his interest in said lease to said Mitchell, and said Mitchell having assigned the same to said company; and the said members of said firm severally signed articles of copartnership of that date, in which it was stipulated that in case any of the persons belonging to said company should fail to advance their proportion of the necessary expenses of carrying on the business, then they should be entitled to the profits of the business, only in proportion to what they had paid.

"The company built houses, and carried on the business as proposed, and assessments were made upon the members according to their several shares. But the said Stanwood failed to pay any portion of the expenses or assessments made upon his share, whereupon a contention arose as to said Stanwood's rights and interests in the copartnership and its property; he contending that said Mitchell agreed to advance his assessments for him, and had advanced them; said Mitchell contending that such advancements as he had made, were made for his own interests; that Stanwood had ceased to be a member of said company; that he had forfeited all right to the copartnership property, and that said Stanwood's interest in the copartnership and its property had become the property of said Mitchell by reason of his advancements; while other members of the company contended that if any forfeiture had occurred, it would inure to the benefit of the company.

"Said Mitchell acted as the agent or business manager of said company, received all assessments paid in, made all purchases and all sales, and received the pay from all sales.

"Prior to the submission, said Mitchell had, at different times, apportioned and paid over to members of the company, portions of the profits accrued, according to their several shares, retaining

and claiming as his own the share which would have been apportioned to said Stanwood, but for said controversy as to his forfeiture; but no such division or apportionment of profits had been made by action of the company, nor had said Mitchell ever promised to pay said Stanwood any portion of the money so retained in his hands. The affairs of the company had not been fully settled, and have not been yet; there still being undivided funds in the hands of said Mitchell belonging to the company, aside from funds retained on the said disputed Stanwood share, and there still remains other undivided property belonging to the company, and unadjusted matters."

Wherefore he contends:

1. That the claim made by Stanwood and annexed to the submission, that he was one of the copartners of the firm of N. O. Mitchell & Co., was a question between him and the said firm; that the parties to this submission had no authority to submit that question, and that the referees had no authority under the submission to determine it.

2. That the claim made by said Stanwood and annexed to said submission, that he, as a member of said copartnership, was entitled to one-sixteenth of all the property and profits of said company, was a claim against said company, which could not be valid unless he was a member of said copartnership, and therefore the parties to this submission had no authority to submit that question, and the referees had no authority under the submission to determine it.

3. That said referees had no authority under said submission to determine what interests and rights the said Stanwood had or has in or unto any of the copartnership property of the said firm of N. O. Mitchell & Co.

4. That the referees, in determining that said Stanwood is the owner of one-sixteenth of all the property of the copartnership, undertake to determine the title to real estate which they had no authority under the submission to do.

The presiding judge overruled the objections; whereupon the defendant alleged exceptions.

E. F. Pillsbury, for the defendant.

Unless the controversy submitted is one which may be the subject of a personal action between the parties, the submission was unauthorized.

The statute in Massachusetts, providing for the reference of disputes by consent of parties, provides for referring an additional class of cases, namely, such as may be the subject of suits in equity. R. S. Mass. c. 114, § 1.

"The power of arbitrators to make an award upon which a judgment of the court can be rendered, depends wholly on the statute. The jurisdiction of the arbitrators is a special jurisdiction, created entirely by statute, and can be sustained only when the proceedings are within the provisions of the statute." *Henderson* v. *Adams*, 5 Cush. 610.

Claims which can be enforced only by proceedings in equity, cannot be subjects of statute submission. *Butler* v. *Mace*, 47 Me. 423.

Partners can enforce demands against copartners originating on partnership account, only by bill in equity filed for an account. R. S. 1857, c. 77, § 8, clause 6th; Collyer on Partnership, 143-7, 153; *Fanning* v. *Chadwick*, 3 Pick. 423; *Holyoke* v. *Mayo*, 50 Me. 385.

The only exception to this rule is in regard to the recovery of balances due upon a full and final settlement, and balances upon special items admitted correct and payment promised.

Final balances agreed upon, the copartnership having been dissolved, its accounts and liabilities settled and discharged, and where the judgment will be an entire settlement of the partnership transactions, may be recovered by action in form of contract. *Fanning* v. *Chadwick*, 3 Pick. 423; *Haskell* v. *Adams*, 7 Pick. 59; *Williams* v. *Henshaw*, 11 Pick. 79; *Chase* v. *Garvin*, 19 Me. 211; *Holyoke* v. *Mayo*, 50 Me. 385.

When partners have separated one partnership transaction from the rest and adjusted it, and thereupon a sum be found due from one to the other, a promise to pay it will be binding, and an action will lie thereupon, although the rest of the affairs remain unadjusted; but "no promise is implied between partners to pay each

other in a partnership transaction," and "no action lies by either in such a case, unless the transaction has been settled and a promise of payment made." *Holyoke* v. *Mayo*, 50 Maine, 385; *Gibson* v. *Moore*, 6 N. H. 547; *Wright* v. *Cobleigh*, 1 Foster, 339.

When this submission was made there had been no final adjustment of the affairs of the copartnership; no dissolution of the copartnership, nor any "final balance" found due to any members of it. Nor had the members of the company made any separation of any one partnership transaction or item, and adjusted it and found a balance due to any member. Mitchell had apportioned and paid over to members, at different times, portions of the profits accrued, except Stanwood; but it was upon his own individual responsibility, and subject to revision and change by the company. Practically it was the same as if he had loaned certain amounts of money to some of the members of the company until a final adjustment of the company accounts. He was responsible to the company for every dollar he received of its funds, and not to individual members of it. Suppose he had made advance payment to but one or two of the members and claimed to hold all the remainder as his own; would that have authorized the other individual members to maintain personal actions against him for their shares? Retaining the funds of the company, and claiming it as his own, could not change the company's rights nor his liability to it. "No such division or apportionment of profits had been made by action of the company," and hence, no admission of its correctness, and no adjustment by the company.

Mitchell's action in withholding payments to Stanwood was equally the action of the company, and Stanwood's claim would be against the company still, and not Mitchell. But the company had not made any such division of profits. Again, Mitchell had never promised to pay any portion of the money in his hands to Stanwood, and as no promise can be implied between partners in a partnership transaction, Stanwood's claim at the time of submission could not have been the subject of a personal action. His only remedy was by bill in equity, not against Mitchell, but against the company.

He could not have maintained such an action against Mitchell if he and Mitchell had constituted the entire company. How much less the right to do so when he and Mitchell are but two members of a copartnership consisting of ten.

All moneys collected by Mitchell in the company operation belonged to the company. He was merely the pocket of the company, so far as holding the money was concerned. The company had a right to control the money, revise his action, and adjust all matters between the company and its individual members and outside persons or parties.

Two of the ten members of the copartnership could not refer such a question. Mitchell does not sign the submission as agent of the company, but as an individual. Stanwood claims to be a member of the copartnership, and, "as such," to be entitled to one-sixteenth of the "property and profits of said firm," and he and another individual member of the firm submit that question to referees. The company cannot be bound by any such action. The submission embraces and the award embraces "all the property" as well as profits of the firm, including, of course, the tools, lumber, materials, implements for cutting ice, etc. Mitchell had not appropriated or interfered with it in any manner other than to put it to its appropriate use for the company, as the company's agent.

An award to be valid must make a final disposition of the matters embraced in the submission. *Colcord* v. *Fletcher*, 50 Maine, 398; *Cornochan* v. *Christie*, 11 Wheat. 446; *Akely* v. *Akely*, 16 Vt. 450.

A judgment upon this award would not be a bar to a suit in equity, by any member of the company, upon all the matters embraced in this submission. The case shows that other members of the company claimed that if Stanwood had forfeited his interests in the copartnership, the forfeiture inured to the benefit of the company; and the case further shows that no final settlement of the affairs of the company has been made, no action of the company apportioning dividends, no company indorsement of Mitchell's apportionment, and no action of the company participating in this

submission. The company may be able to show that Stanwood's assessments were not advanced at all. If it should be determined in a court of equity that Stanwood had forfeited his interest, and that it inured to the benefit of the company, Mitchell would be obliged to pay over to the company, and payment of this award would be no protection to him.

It may turn out, upon final settlement of the affairs of the company, that there are outstanding debts unpaid, and that Mitchell's apportionment was more than the profits really were.

A judgment upon this award would not be a final disposition of the matters embraced in the submission. It would not even bar Stanwood himself from sustaining a bill in equity against his copartners, to adjust all the affairs of the copartnership, and to account to him for his legal interest in all its property and profits.

The company held a lease of real estate for ten years. The claim submitted was for one-sixteenth of "all the property," and the award determines that Stanwood "was and is the owner of one-sixteenth of all the property of the copartnership, as fully paid up." This embraces the interest in real estate. All the property of the company must include the whole. It does not name personal property any more than it does the real, and there is as much propriety in contending that the term "all the property of the copartnership" does not embrace the personal, as there is in contending that it does not embrace the real estate.

It is the settled construction of the statute under which this submission was made, that a submission under it cannot authorize a decision upon the title to real estate. *McNear* v. *Bailey*, 18 Maine, 251.

A. Libbey, for the plaintiff.

Appleton, C. J. The plaintiff claims to be a partner of the firm of Nathan O. Mitchell & Co., a firm composed of the parties to this suit and others, and engaged in the ice business; that his interest in the same is one-sixteenth; that dividends have been

made of the profits, and that the dividend belonging to him is in the hands of the defendant.

The parties agreed to submit the matters in controversy to two very intelligent referees, whose report determining the questions submitted was offered and accepted.

It has been argued by the learned counsel for the defendant, with great ingenuity as well as ability, that this submission involves the settlement of a partnership account; that partnership matters can only be settled by bill in equity; that the plaintiff's claim is not "the subject of a personal action," and, therefore, not a matter which can be referred under R. S. c. 108, § 1.

But the claim in this case is not by one partner against the other members of the firm. It does not involve the liquidation or adjustment of partnership affairs. The other members are no parties to this controversy. All the plaintiff seeks is to recover his proportional share of the profits which have been earned, "apportioned, and paid over" to all the members of the company, except himself, on the ground that he is a member of the same, and that the defendant wrongfully retains his share.

The claim is for funds of the plaintiff in the defendant's hands, and for which an action for money had and received would lie. It is a question between the plaintiff and defendant to whom a dividend belongs as between them. It is a dispute whether the plaintiff or defendant own a certain sixteenth which both claim. The dividends belonging to the company have long ago been made by the defendant, and if the plaintiff is, as between them, a partner, he has a right to recover.

The defendant, by assenting to the reference, has agreed that the questions in issue may be settled by referees. The claim is not against the company, but against him. The authorities, therefore, in reference to the law of partnership, must be regarded as inapplicable.

It is next objected that the referees had "no authority, under said submission, to determine what interests and right the said Stanwood had or has in or unto the copartnership property of the

said firm of N. O. Mitchell & Co." As against the firm the award of the referees is not binding, because they are not parties to the reference. If in the award matters not referred are embraced, it is not to that extent binding upon the parties, for it is familiar law that an award may be good in part and bad in part.

The objection that the award undertakes "to determine the title to real estate" cannot avail. It does not directly appear in their award that they did so. Incidentally they may have had the real property under consideration. But no conclusions to which they may have arrived can affect the members of the firm, who did not participate in the reference, nor, indeed, can they this defendant, if they related to matters not the proper subject of a submission, or if being the proper subject, they were not submitted.

An award may be good in part and bad in part, and if separable the good will be affirmed. *Orcutt* v. *Battle*, 41 Maine, 83; *Day* v. *Hooper*, 51 Maine, 178. In this case if the objections which we have considered were to be deemed valid, there is no difficulty in making the separation. It is obvious the referees found the defendant had money belonging to the plaintiff in his hands, not as a member of the firm of N. O. Mitchell & Co., but as its "agent and business manager." For the amount so found he is entitled to judgment. *Exceptions overruled.*

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

Hugh Forsyth *vs.* David I. Rowell.

Real action—certain parol evidence not admissible in pleading in. Equity of redemption—sale of.

The mortgager of a farm having subsequently married and died intestate, his widow caused her dower in the equity to be set out by metes and bounds, and thereafterwards conveyed her life-estate to the plaintiff. The administrator of the estate of the intestate, by virtue of a license from the probate court, sold and conveyed to the plaintiff all the interest which the intestate had in the premises at the time of his decease subject to the widow's life-estate in that portion set out as dower, and subsequently took back a mortgage to secure the purchase-money. The administrator returned his license setting forth therein the sale to the plaintiff, together with the sum received "deducting therefrom the balance due on" the original mortgage. In 1851, at a sheriff's sale on the execution, issued on the judgment recovered on the plaintiff's note given for the intestate's interest, the administrator purchased the plaintiff's right to redeem the original mortgage, and, in 1861, the sale not being redeemed, sold and conveyed the whole property to the defendant by deed of warranty. In a real action claiming a fee in the plaintiff, *Held*, (1) That the defendant being a *bona fide* purchaser for value, it is not competent for the plaintiff to prove by parol that the administrator, at the time of sale to the plaintiff, agreed to redeem the original mortgage out of what the plaintiff paid him. (2) That under a count claiming a fee-simple, the plaintiff cannot recover for a life-estate.

The holder of a junior mortgage of real estate may waive his mortgage lien and sell on the execution issued upon a judgment recovered on his mortgage debt the debtor's right to redeem a senior mortgage of the same property.

On exceptions.

Real action to recover possession of about one hundred and fifty acres of land in Madison, together with the rents and profits.

The writ was dated Oct. 29, 1869. The declaration alleged that the plaintiff was seized of the land with the appurtenances in his demesne as of fee, and that the defendant disseised him. Plea, general issue.

The remaining material facts sufficiently appear in the opinion.

J. H. Webster, in support of the exceptions, cited R. S. c. 90, § 6; *Atkins* v. *Sawyer*, 1 Pick. 351; *Washburn* v. *Goodwin*, 17 Pick. 137; *Smith* v. *Dow*, 51 Maine, 21; *Stone* v. *Bartlett*, 46 Maine,

439; *Fletcher* v. *Stone*, 3 Pick. 250; *Campbell* v. *Knight*, 24 Maine, 332; *White* v. *Loring*, 24 Pick. 319; *Jackson* v. *Ogden*, 4 Johns. 140; *Jackson* v. *Scissam*, 3 Johns. 499.

D. D. Stewart, for the defendant.

BARROWS, J. The demanded premises once belonged to John Hughes, who, before his marriage, mortgaged them June 7, 1836, to Littlefield & Kerswell to secure a note of $175.

March 31, 1849, Washington Rowell, as administrator on Hughes' estate, under license from the probate court, sold and conveyed to the plaintiff all the title and estate which Hughes had, at the time of his death, in and to the premises, subject, however, to the life-estate of Hughes' widow, in that part of the land and buildings which had been set out to her as dower. The plaintiff did not pay the administrator at the time of the purchase, but in August, 1849, gave Rowell a mortgage of the same estate which Rowell had conveyed to him, to secure the payment of a note for $1,117.32, dated April 1, 1849, and payable in July, 1850. He had bought the widow's dower in April, 1849, covering about twenty-nine acres, but it was not included in the mortgage to Rowell.

Rowell duly returned to the probate office his license to sell, setting forth the sale to the plaintiff "for the sum of $1,196, deducting therefrom the balance due on a note given by the deceased to Littlefield & Kerswell, dated June 7, 1836, for $175 and interest, upon which about $160 remains due and unpaid at the time of sale."

The plaintiff made only some partial payments on his mortgage note to Washington Rowell; and in the fall of 1851 Rowell recovered a judgment upon it for $809.16 debt, and $18.84 costs of suit; and, in December, 1851, purchased at a sheriff's sale on the execution issued upon this judgment, for $854.08, the plaintiff's right to redeem the whole estate from the mortgage to Littlefield & Kerswell given by John Hughes, and in 1861 sold and conveyed the whole property, by warranty deed, to the defendant.

At the trial which was had before the judge at *nisi prius* without the intervention of a jury, the plaintiff offered to prove by parol that at the time of the administrator's sale to him it was agreed between him and W. Rowell that Rowell was to redeem the Littlefield & Kerswell mortgage out of what the plaintiff was to pay for the farm. But the judge excluded this testimony and ruled that the sale of the equity of redemption to Washington Rowell by the sheriff conveyed a good title to all plaintiff's interest in the farm, and ordered judgment for the defendant. The plaintiff excepts, and claims that he should have been permitted to prove the parol agreement of Washington Rowell to take up the Littlefield & Kerswell mortgage; that nothing passed by the sale of his equity of redemption to Washington Rowell, and that their relation to each other and their respective interests in the property were not changed by the sale.

If this were so, there would still be insuperable difficulties in the plaintiff's way.

If there was no valid subsisting equity of redemption sold by the sheriff, the plaintiff's debt to Washington Rowell, and the mortgage which the plaintiff gave to secure it, must be regarded as still subsisting and unpaid. The defendant, in that view of the case, at all events acquired by Washington Rowell's warranty deed all the mortgagee's rights, so that as to all the property except the widow's life-estate, the defendant would occupy the position of mortgagee, and the plaintiff that of mortgager, and the remedy of the latter would be by bill in equity to redeem, and not by a suit at common law, in which the assignee of his mortgagee, holding the better title, must inevitably prevail. The exceptions do not show whether Hughes' widow is still living; but, if she is, the plaintiff had no proper count in his writ for the recovery of a life-estate.

Section 3 of c. 104, R. S. of 1857, requires the demandant to set out the nature of the estate which he claims in the premises, and he cannot recover unless he shows a title to such an estate as he has alleged. *Rawson* v. *Taylor*, 57 Maine, 343.

He made no motion to amend at *nisi prius*. It is too late to do so when the case is before us only on exceptions.

Upon this view of the case, the rulings complained of were, if not correct, simply immaterial, and the plaintiff could not be aggrieved thereby.

But we think the rulings were correct. The defendant appears to be a *bona fide* purchaser for value. This being the case, if his grantor had a clear record title, it would not avail the plaintiff if he could prove even positive fraud or bad faith on the part of that grantor towards the plaintiff, unless he could show the defendant conusant of the fraud, which he did not offer to do. He only proposed to show an agreement on the part of Washington Rowell to pay the Littlefield & Kerswell mortgage out of what he himself was to pay Rowell for the land,—an agreement the breach of which his own failure to pay his note to Rowell at maturity might well excuse. Certainly nothing like bad faith could be imputed to Rowell for not paying off the mortgage before the plaintiff had paid to him the stipulated sum which was his due.

Nor can we doubt that he acquired by the sheriff's sale all the plaintiff's interest in the farm, subject of course (as the ruling must have been understood) to the plaintiff's right of redeeming the equity sold within one year from the time of sale.

That a creditor may levy, on property mortgaged to secure the same debt, was settled in this State in *Porter* v. *King*, 1 Greenl. 297, and in *Crooker* v. *Frazier*, 52 Maine, 405. A mortgager has no just cause of complaint if, after breach of the mortgage, his creditor sees fit to waive it, and to proceed to collect his debt by due process of law. If the mortgaged property consists, as in this case, of an equity of redemption from a prior mortgage, it may be sold under the statute. This does not conflict with the doctrine of the Massachusetts cases cited for plaintiff. We do not hold that the mortgagee can sell the equity raised by the same mortgage, for the payment of the mortgage debt. He cannot waive his security by the mortgage and at the same time treat it as still subsisting and constituting the foundation of an equity which may be the subject of a sale. But the holder of a second mortgage may disregard his own mortgage, if he pleases, and sell his debtor's equity growing out

of the prior mortgage, as he might any other property of his debtor which he could reach by attachment.

And that was precisely what was done here. The second mortgage was waived, and the right to redeem from the first, alone, was seized and sold. The case shows no sale of two equities for a gross sum either in form or substance.

Exceptions overruled.

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

BENJAMIN LENTELL *vs.* ALBION K. P. GETCHELL.

Accommodation indorser—when he may sue maker.

An accommodation indorser of a negotiable promissory note cannot recover of the maker the amount of the note, on the ground of payment thereof by another note, unless it appear that the second note was given under such circumstances as to constitute it a payment by the plaintiff.

Thus the plaintiff, at the request and for the accommodation of the defendant, became second indorser of a promissory note made payable to the order of, and signed and indorsed by the defendant. At maturity the note was taken up by one of like tenor, signed and indorsed by one Thompson, and further indorsed by the plaintiff and one Sumner. When the second note matured, it was taken up by a note of like tenor, signed and indorsed by Sumner, and further indorsed by the plaintiff who paid it at maturity. While the second note was outstanding, and before its maturity, the plaintiff sued the defendant, claiming to recover for payment of the latter's note, and interest on the money paid; *Held*, that the action could not be maintained, in the absence of proof, that the second note was given as payment by the plaintiff.

ON EXCEPTIONS.

ASSUMPSIT to recover seventy-five dollars, and one dollar interest thereon, to pay defendant's note of seventy-five dollars at the National Bank of Wiscasset.

The facts sufficiently appear in the opinion.

R. K. Sewall, for the plaintiff.

H. Ingalls, for the defendant.

BARROWS, J. In August, 1868, the defendant signed and indorsed a note payable to his own order, in four months, at the bank in Wiscasset. The plaintiff, at the request and for the accommodation of the defendant, became the second indorser, and the note was also indorsed by one Sumner. When the note fell due in December, it was taken up by a note of similar tenor, signed and indorsed by one Thompson, and further indorsed by the plaintiff and Sumner. While this note was outstanding, on the 11th of March, 1869, the plaintiff brought this suit against the defendant, claiming for money paid on defendant's note to the bank, and for interest thereon. Subject to defendant's objection, the plaintiff proved that when the second note, above mentioned, fell due, April, 22, 1869, it was taken up by a note of like tenor with the first, but signed by Sumner as promisor, and indorsed by the plaintiff and one Emerson, and that this last note was paid by the plaintiff and taken up at maturity.

The suit was premature unless the plaintiff had, in fact, paid the defendant's note prior to the commencement of his action. Payment in cash was not necessary. If the plaintiff had given his own note to the bank, in December, 1868, and taken up that of the defendant, he might have maintained his suit. *Barclay* v. *Gooch*, 2 Esp. 571. Though Lord Kenyon's doctrine, in *Barclay* v. *Gooch*, was questioned a few years later in *Taylor* v. *Higgins*, 3 East, 169, it was afterwards reëxamined and its correctness affirmed by our own court in *McLellan* v. *Crofton*, 6 Greenl. 332, 333. It was reviewed and fully sustained in Massachusetts in *Cornwall* v. *Gould*, 4 Pick. 444; and in New York, *Witherby* v. *Mann*, 11 Johns. 516. But the plaintiff here does not show a giving of his own note, or of any note upon which he was to be ultimately responsible, in payment of the defendant's note. For aught that appears, the defendant himself may have procured the substitution of Thompson's

note upon which the plaintiff was only contingently liable, as he had been upon the defendant's note originally. Or Thompson may have volunteered a payment for the defendant. In either case, the plaintiff, at the time of the commencement of this action, had paid nothing. *Prima facie*, Thompson had paid the defendant's note, and the plaintiff remained in his original position as an accommodation indorser upon the new contract. As the case is stated, the plaintiff seems to have studiously avoided showing by whom or under what circumstances the defendant's note was taken up, or when it came into his possession. It does not appear that he was notified as indorser on either of the notes, or that he had sustained any damage by reason of his suretyship for the defendant.

Showing such a negotiation as he did, he should have gone further and shown that the Thompson note was given under such circumstances as to make it a payment by himself to the bank. Such is not the inference to be drawn from the face of the paper.

Exceptions overruled. Nonsuit confirmed.

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

STATE OF MAINE *vs.* DAVID H. CORSON.

Perjury—indictment for. Constitutional law.

The legislature did not exceed its constitutional power in prescribing in R. S. c. 122, § 4, the form of an indictment "for committing perjury before any court or tribunal."

An indictment drawn in accordance with the form prescribed is good; and it need not be distinctly alleged that the words set forth as the testimony given were false.

ON EXCEPTIONS.

The defendant was charged with committing perjury by an indictment of the following tenor, omitting the simply formal parts:

"The jurors for the State aforesaid, upon their oaths present,

that David H. Corson, of Athens, in the county of Somerset, and State of Maine, at Norridgewock, in the said county of Somerset, on the twenty-fourth day of September, in the year of our Lord, eighteen hundred and seventy, appeared as a witness in a proceeding in which Timothy Eaton and David H. Corson were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying as follows: I (meaning the said David H. Corson), gave the note on which this suit was brought (meaning the suit or proceeding in which the said David H. Corson was then testifying), to Caroline Noyes, for two hundred dollars, on Sunday. I (meaning the said David H. Corson), executed and delivered the note (meaning the note above described), and received said money on Sunday. The note (meaning the note above described), was not dated the day I (meaning the said David H. Corson), executed and delivered it (meaning said note), to Caroline Noyes. There was no person or persons in the room when I (meaning the said David H. Corson), gave Caroline Noyes the note, I (meaning the said David H. Corson), am testifying concerning excepting myself (meaning the said David H. Corson), Cyrus Corson my son, and Caroline Noyes; which said testimony was material to the issue then and there pending in said proceeding, against the peace of said State," etc.

The defendant having first obtained leave to plead anew, demurred to the indictment, and the demurrer was joined. The presiding judge overruled the demurrer and adjudged the indictment sufficient; whereupon the defendant alleged exceptions.

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

J. H. Webster, for the defendant, contended that the statute, on which the indictment was based, is in contravention of the common law, and should not be extended by construction.

By the common law every material fact which serves to constitute the offense charged should be alleged, with precision and certainty, as to time and place. *State* v. *Thurston*, 35 Maine, 205; *State* v. *Baker*, 34 Maine, 52; *State* v. *Hanson*, 39 Maine, 337; *State* v. *Plummer*, 50 Maine, 217.

"Alleged to be false" require that the testimony set out be alleged to be false. It was necessary at common law, and the statute does not do away with the necessity. Archb. Cr. Pl. 570, 571.

Every allegation may be true and no crime committed.

It is not alleged that any oath was administered. The form requires that there should be "set out the matter sworn to."

An allegation that the defendant "willfully and corruptly" swore falsely, R. S. c. 122, § 1; for although the testimony was on oath and false, yet, if not willful and corrupt, perjury was not committed. 1 Hawk. 669, § 2.

KENT, J. The respondent demurs to the indictment against him for perjury. It is very clear that the indictment is bad in many particulars, if considered under the old rules of the common law, or of our former practice and decisions. Indeed, the criminal pleader found great difficulty in so framing an indictment for perjury, that it could stand the searching examination and technical objections thereupon raised by astute counsel. And the records in all the States show that it had become extremely difficult to pursue a perjurer to final judgment and sentence, however clear his guilt, or however atrocious his crime.

In 1865, our legislature undertook to simplify the form of proceedings for this offense, and to give a form of an indictment "against persons for committing perjury before any court or tribunal," declaring that one "drawn substantially as therein set forth, shall be deemed sufficient in law." Then follows a form, which is adopted in the case at bar, in all particulars, except in the words included in brackets. It is in reference to one of the sentences in brackets that the question arises.

The form given declares that the accused appeared as a witness in a case between parties named, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying as follows. The form then contains in brackets these words ["here set out the matter sworn to and alleged to be false"], and concludes as follows,—which said testimony was ma-

terial to the issue then and there pending in said proceeding, against the peace, etc.

It is objected that there is no averment in this indictment that the words set forth as the testimony given were false; and it is urged that the falsity of the words is the essence of the offense. It is undoubtedly true that it is one essential element. The government reply to this, that the averment that he "committed perjury by testifying as follows,"—giving his language is, in fact, a sufficient averment that the words were not true. He could not commit the crime of perjury by testifying in those words, unless they were false.

The object, evidently, of the legislature was to simplify and reduce the essential allegations to the fewest possible particulars, retaining the charge of a distinct offense. This court, in *State* v. *Learned*, 47 Maine, 426, has recognized and admitted the right of the legislature "to modify or simplify the forms in criminal proceedings, provided the essential matters which clearly set forth an offense, and which, being proved, constitute the offense," are retained. But "the legislature cannot dispense with the requirement of a distinct presentation of an offense against law." That case simply declares that a man cannot, under the constitution, be compelled to answer to a complaint for acts not presented, either generally or specifically, in a written accusation. Otherwise, the absurd record would be presented of a case where a person is sentenced to punishment for matters which, on the face of the record, show no offense against the law." Such a record would be no defense against another indictment for any crime.

The question then is, whether this indictment charges distinctly the crime of perjury? It certainly does not contain the allegations of the several particulars which make up the offense as defined by the statute or by the common law. But the respondent is distinctly charged with having "committed the crime of perjury by testifying as follows,"—in a matter between two parties named, before competent tribunal, and that the testimony was material to the a issue.

The crime of perjury is thus defined in the statute, R. S. of 1857, c. 122, § 1: "Whosoever, when required to tell the truth on oath or affirmation lawfully administered, willfully and corruptly swears or affirms falsely to any material matter in a proceeding before any court . . . is guilty of perjury."

The insertion of the allegation alone, that the testimony was false, would not be sufficient to cover the whole definition. That embraces the essential point, that the testimony was given "willfully and corruptly." And the fact that an oath was administered lawfully must also be proved. So that it would not make this indictment sufficient, before this statute, if it had alleged that the words spoken were "false." They might be untrue, and yet it might not be perjury in a witness using them. He must use them, knowing them to be false, and willfully and corruptly.

The whole matter thus resolves itself into this question,—Does the allegation that the party charged has committed perjury, *ex vi termini*, import and charge all the particulars, which by law constitute that crime.

When a person is charged with having committed the crime of perjury, in testimony, as a witness, which is fully set out, given on the trial of a case, between parties named, on a particular day stated, before a competent tribunal, on matters material to the issue, he is thereby directly charged with all that goes to make up the offense. He could not be found guilty of the perjury charged until evidence is produced which proves him guilty of every particular embraced in the definition of perjury.

Such an indictment gives sufficient notice to the accused of "the nature and cause of the accusation against him" required by the constitution. It is also sufficiently distinct as to time, place, and language, to protect the respondent from being "twice put in jeopardy for the same offense."

It is objected further, that the form itself contains a requirement that there should be a distinct averment that the testimony was false. In the form, following the words "committed the crime of perjury, by testifying as follows," are these words included in

brackets, ["here set out the matter sworn to and alleged to be false"].

Words within brackets are not regarded as in themselves a part of the prescribed form. They are generally merely indicative of the place where certain matters, which are peculiar to the particular case in which the form is to be used, but not general or applicable to all cases, are to be inserted.

In this form the words within brackets, above quoted, do not necessarily require a new and distinct affirmation that the words were false, but may as well refer to the allegation of falsehood embodied and embraced in the word "perjury," before used. If the legislature had intended that the form should require a distinct allegation of falsehood, it would doubtless have inserted it in the body of the form, in the same manner as it has the allegation of materiality and other matters. But it is hardly to be presumed that it was their intention to insert simply an allegation of falsehood, which, as we have seen, would not, alone, have included the essential elements of perjury.

We have heretofore decided that an indictment charging that the respondent, at a time and place named, "did keep a drinking-house and tippling-shop," was sufficient. *State* v. *Casey*, 45 Maine, 435. The court in Massachusetts gave a similar decision in *Commonwealth* v. *Ashley*, 2 Gray, 356. In the latter case it is said that "We are of opinion that this is a case in which an indictment so framed is sufficient; because no allegation of anything more than those words import, *ex vi terminorum*, is necessary in order to show that the defendant has committed the statute offense."

We conclude that the legislature has not exceeded its constitutional power in prescribing this simpler form of an indictment; and that this indictment contains all that the form they established requires. *Exceptions overruled. Indictment adjudged good.*

Case, as by agreement, to stand for trial.

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

LUTHER S. WHITTIER *vs.* LORENZO MCINTYRE.

Fences — removal of by surveyor — trespass for.

An action of trespass cannot be maintained against a surveyor of highways for removing fences standing within the limits of the location of a highway in his district, when their continuance has been less than forty years next after the location of the highway.

It is not essential that the unlawful existence of such fences should be established on indictment and conviction under R. S. c. 18, § 76, prior to such removal.

ON REPORT.

TRESPASS for removing the plaintiff's fence on the east side of the road leading by the plaintiff's farm in Norridgewock.

It appeared from witnesses called by the plaintiff, that a road had been traveled on the spot, substantially where the location was made in 1832, more than fifty years; that a fence was standing along said road, opposite a portion of what is now the plaintiff's farm, for forty-five years; that the fence there was, substantially, in the place where the fence taken down by the defendant was located, excepting one or two crooks of the old fence were straightened by the new one; that the land in front of the plaintiff's house was cleared more than forty-five years ago; and the fence was made clear across the lot, on the east side, thirty-three years ago.

The records of the town of Norridgewock were put in showing a vote of the town passed at a legal meeting held March 7, 1814, accepting a road laid out by the selectmen. The vote described the first terminus as "beginning on the west side of the river, where the road leading from Somerset bridge intersects the river road," then recited the courses and distances of the contemplated road, without mentioning the width.

Also a vote passed at a legal meeting held Sept. 10, 1832, accepting a town road laid out, according to the report of the selectmen, as follows: Then followed a description of the terminus, and a recital of the several courses and distances, covering, substantially, the same land as that of 1814, "the road to be four rods wide, one-half on each side of the above courses, but so as not to exclude any part of the road as now traveled or made."

Isaac Winslow, called by the defendant, testified, substantially, that at the request of the selectmen of Norridgewock, he run out the road in accordance with the record of 1832, and had no difficulty in satisfying himself where the location was; that he run the center line, and the selectmen measured two rods each way from the line; that the fence removed was less than two rods from the center line; and that the two rods from the center line embraced all the road as now traveled.

It appeared that the plaintiff was notified to remove the fence before it was removed by the defendant.

The selectmen directed, in writing, the defendant to remove all obstacles, including fences, from the limits of the road, as established by Isaac Winslow in Dist. No. 25.

If the action could not be maintained, the plaintiff was to become nonsuit.

Hiram Knowlton, for the defendant.

TAPLEY, J. The attempted location of 1814 was void for uncertainty. No width of way was mentioned, and it may as well be assumed to be two rods wide as four, and *vice versa*.

The location of 1832 established a way by metes and bounds and by courses and distances. It then became, for the first time, a legally established way, the bounds of which could be made certain by records or monuments.

The continued use of the way, and the repairing of it from time to time after this location, was a sufficient acceptance of it as thus located and defined.

The fences having existed, as found at the time of their removal, for a period of less than forty years after location in 1832, are not to be deemed the true bounds thereof, and the length of time they had thus existed will not justify their continuance thereon if within the limits of the location. R. S. c. 18, § 72.

The evidence is sufficient to justify the conclusion that the fence removed was within the location. Taking the whole testimony of the surveyor into consideration, with no evidence offered by plain-

tiff to contradict it, we think that it establishes at least a *prima facie* case. Had the fences been, in fact, without the limits of the location, this fact could have been made apparent by as careful and particular running as the plaintiff contends should have been made.

At present we have the testimony of the surveyor that he "had no difficulty in satisfying himself where the location was," and that several men were on the ground and pointed out or stated where the starting-point was. This, as before remarked, with no testimony concerning it offered by plaintiff, we think authorizes the conclusion that the surveyor did start at the right point.

No question is made as to the regularity of the proceedings in making the location anterior to the acceptance of the return.

It is suggested that inasmuch as the statute provides that such fences may be removed "on indictment and conviction," no other mode could be resorted to for their removal. Undoubtedly the fact of their illegal existence may be established conclusively upon the party by proceeding by indictment, and a removal afterward take place; but we do not understand that towns must first establish that fact by such a proceeding. It may be the safer way so to do, as in no event can they then be made liable for their removal. It is not, however, the fact that a conviction has been had upon such proceedings that gives the right of removal, but it is the fact they are illegally existing there. The record of conviction is only the evidence of that which gives the right.

The town had a right, under the location, to have the whole road unincumbered with such matter. The plaintiff had no right of possession within the lines of the location which could be inconsistent with this right of the town. The removal by the town, therefore, of these incumbrances violated no right of possession held by the plaintiff, and trespass, therefore, cannot be maintained against them, or their servants acting under their authority. Under the agreement of the parties, the entry must be

Plaintiff nonsuit.

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

JOSEPH PRESCOTT, in error, *vs.* REBECCA E. PRESCOTT.

Libel for divorce — practice. Alimony. Costs. Error, when it will not lie.

After a decree of divorce *a vinculo* on a libel in behalf of the wife, the court may, on motion or petition, decree to her a specific sum instead of alimony, although such claim is not specifically set out in the libel.

And such a decree may be made during the pendency of the libel, at any term subsequent to the decree of divorce.

Error will not lie because of the allowance of costs in behalf of the wife to whom a divorce *a vinculo* has been decreed upon her libel.

Nor because no deduction from the libelant's costs, as taxed, was made of the sum paid by the libelee under the order of the court to enable her to prosecute her libel.

Nor because the specific sum allowed instead of alimony was united in the execution in one sum, with such amount of the unpaid monthly installments, ordered to be paid by the libelee, as accrued after commitment, for contempt in not paying those theretofore ordered.

Generally, error will not lie when the questions of law raised by the assignments might have been presented to the law court in some other form.

WRIT OF ERROR to reverse a decree of the court against the plaintiff in a libel for divorce *a vinculo*, wherein the defendant was libelant. The writ was dated Nov. 9, 1868. The errors assigned were

1. "In making a decree in and by which the said Joseph Prescott was ordered and required to pay to the said Rebecca E. Prescott the sum of six hundred dollars instead of alimony; and also in entering up of judgment against the said Joseph for said sum of six hundred dollars in pursuance of said decree, there being no prayer, claim, or demand for alimony, or for a specific sum of money in lieu thereof, set forth or contained in said libel, or in any other proper plaint, process, or proceeding upon which such decree and judgment could be founded or predicated.

2. "Because the court ordered that said libelant be allowed her taxable costs, under which order costs were taxed at one hundred and twenty-one dollars and seventy-five cents, for which sum judgment was entered up as costs, and for which a writ of execution issued.

3. "For that no deduction from the libelant's costs (as taxed) was made of the several sums, amounting in all to forty-five dollars, paid by said Joseph, under orders of court, on the application of said libelant, as suitable sums to defray her expenses in the prosecution of her said libel.

4. "And for that the court ordered also that execution issue for the amount of such monthly installments, ordered to be paid by said libelee, as have accrued since his commitment to jail, and that in pursuance of said order, judgment was rendered against him, for for the sum of eighty dollars in addition to the sum of six hundred dollars allowed in lieu of alimony as aforesaid, and execution for said sums amounting to six hundred and eighty dollars and costs as aforesaid, was issued and levied upon the real estate of said Joseph in full satisfaction of said execution and all fees that accrued thereon while the said Joseph was imprisoned for the non-payment of said sum of eighty dollars."

The defendant pleaded the general issue.

It appeared from the record that the plaintiff in error was, at the April term, 1868, committed to jail by virtue of a warrant of commitment for not complying with the order of court requiring him to pay to the clerk the sum of twenty dollars on the last day of each and every month for the use of the defendant in error, etc., and was confined in jail until discharged on *habeas corpus* at the following October term.

The concluding prayer of the libel was,—

"Your libelant prays that your honors will further decree that she may have the care and custody of her said children, with suitable provisions for their support; and that pending this, her libel, suitable decrees may be made that the said Joseph furnish a proper sum of money to enable her to prosecute the same, and for her separate support, and for the custody and support of the said children, and that such other orders and decrees may be made as to law and justice shall appertain."

The remaining essential facts as they appear by the record will be found in the opinion.

Wales Hubbard, for the plaintiff.

R. S. c. 60, § 6, does not contemplate a decree of "reasonable alimony out of his (husband's) estate, having regard to his ability" or "instead of alimony a specific sum" without its being claimed in the libel and due notice given to the husband, that he may be prepared to show what would be reasonable, etc. The statute gives the power on suitable process and notice.

By R. S. c. 104, § 11, "when a demandant recovers judgment in a writ of entry, he may therein recover damages for the rents and profits," and "for any destruction and waste." But "may" he do it without declaring for it? Or if he claim "rents and profits" in his writ, may testimony be received to prove "destruction and waste."

There is no claim in the libel for any alimony or specific sum instead of alimony.

Other orders and decrees are prayed for for support, etc., "pending the libel," under § 5.

All the orders "pending the trial" had been complied with. All matters which the respondent had been summoned to answer to had been fully adjudicated on and judgment rendered. The case was improperly continued thereafter. Judgment had been rendered and should have been recorded as of that term. The defendant was no longer in court by counsel, and himself in prison. The decree was made *ex-parte*.

A claim for alimony would not authorize the court to decree a specific sum instead of alimony. They are entirely different propositions.

The closing sentence in the prayer of the libel has reference to decrees incidental to the other decrees prayed for. "With other due damages" in a writ of entry would not authorize judgment for rents and profits.

The libelant should have filed a petition and had it served upon the libelee at least.

Formerly no costs were allowed or taxed in libels for divorce. Hence Pub. Laws of 1853, c. 30, conferred authority to order the

husband to pay a suitable sum to the wife, etc., "for her defense or prosecution."

Husband is not obliged to advance "suitable sum" for her defense and prosecution to pay her costs and then her costs to be taxed and paid by him again after suit is no longer pending. Otherwise the statute would have provided for a deduction of the money already paid.

F. Adams, for the defendant.

APPLETON, C. J. This is a writ of error in which the plaintiff seeks to reverse a decree rendered against him in a libel for a divorce, in which the defendant in error was libelant.

The proceedings for a divorce, in some of the States, are by a bill in equity. In others they are by libel or petition. In England they are in the ecclesiastical courts. Error only lies where the proceedings are according to the course of the common law. It may well be questioned if error can be maintained to reverse a decree of divorce. Waiving, however, that question, we will proceed to examine the errors assigned, as they involve matters of practice of importance and of frequent occurrence.

It appears from the record that, after service of the libel, the plaintiff in error, then libelee, entered an appearance and contested the granting of the divorce; that an issue was formed and joined, and a trial had before the jury, who were unable to agree; that at a subsequent term the cause was opened to a jury, and then, by agreement, taken from them and submitted to the presiding justice, who, after a full hearing, decreed a divorce; that, pending the libel, the court ordered the libelee to pay to the clerk, for the libelant, a certain sum of money for the prosecution of the libel, and make provision for her separate support in a specified amount, to be paid monthly, which not being complied with, the libelee was committed; that after the divorce was decreed, the cause was continued from term to term, until August term, 1868, when the court further decreed "That in addition to the dower in the libelee's real estate, to

which the libelant is by law entitled, and in addition to the sums heretofore ordered by the court to be paid by the said libelee, the said libelee pay to the said libelant, instead of alimony, the sum of six hundred dollars, and in default of payment of the sum with the costs in this libel, legally taxable within twenty days from the final adjournment of the court, that execution issue for the said sum of six hundred dollars and taxable costs, etc.; and also that execution issue for such of the amounts of the monthly installments, heretofore ordered to be paid by the libelee, as have accrued since his commitment to jail."

1. The first error assigned is that the court ordered the libelee to pay the sum of six hundred dollars instead of alimony, "there being no prayer, claim, or demand for alimony, or for a specific sum in lieu thereof, set forth or contained in the libelant's said libel, or in any proper plaint, process, or proceeding upon which such decree and judgment could be founded or predicated."

The decree of a specific sum, instead of alimony, to be paid by the husband to the wife, in case of a decree of divorce, is in accordance with R. S. 1857, c. 60, § 6. The error assigned is that the libel contained no prayer, claim, or demand for alimony, and, therefore, that the court had no authority to decree it or any sum in lieu thereof.

The claim for alimony can only arise after a decree of divorce. Alimony is or may be an incident to a decree. *Jones* v. *Jones*, 18 Maine, 311. It is, necessarily, subsequent thereto. "It may accompany the main proceedings. It may follow them in the final judgment; it cannot exist in judgment when the divorce, or proceedings for divorce, does not; and it is difficult to see on what principle this matter must be mentioned in the principal pleadings, any more than in a suit at common law, the costs which the party hopes to recover must be so mentioned." 2 Bishop on Marriage and Divorce, § 488. In England, the claim for alimony is never inserted in the libel. Brandt's Law of Divorce, 197.

In the English practice, the application for alimony is by petition, called an allegation of faculties which sets forth the faculties

or means of the husband, and prays that alimony may be allowed. It has been, in our practice, usual to insert the claim for alimony in the libel, and this we think the better course; but if this be not done, the libelant, by motion or petition, may, during the pendency of the libel, set forth her claim for alimony. The language of the statute implies that the question of alimony is to be presented for adjudication after the decree of divorce. By R. S. c. 60, § 6, "The court may also decree to her reasonable alimony out of his estate, having regard to his ability."

The complaint is made that alimony was allowed at a term subsequent to that in which the divorce was decreed. But to that there can be no valid objection. The motion for permanent alimony is not to be made until after a decree of judicial separation. Brown's Divorce Court Practice, 144. The proceedings were not necessarily concluded because the divorce was decreed. The cause was continued, and it is to be presumed that the continuance was rightfully ordered.

While the libel was pending, it was subject to the order of the court. The decree might be reversed and the divorce disallowed. As in a default or where a verdict has been rendered, for cause shown, the default may be taken off or a new trial be granted. No error exists, because the hearing of the parties, as to the amount of alimony, was had at a subsequent term, when judgment was finally entered up. Before that was done, the matter was subject to the order of the court.

As the libel was pending, the question of alimony might be presented to the court at any time before the final disposition of the cause. The plaintiff, in error, appeared by his counsel. Their appearance was never withdrawn. It is not to be presumed that a hearing was had as to alimony, except on motion duly made, nor that the hearing was *ex-parte*.

2. If the allowance of costs was a matter of discretion, the record shows they were allowed, and a writ of error cannot be brought to reverse a judgment purely discretionary. If the libelant was entitled to costs, as the prevailing party, no exception on this point can be taken to the judgment allowing her costs.

3. The third error assigned is that no deduction from the libelant's costs, as taxed, is made of the several sums, amounting in all to $45, paid by the libelee, under the orders of the court, to enable the libelant to defray her expenses in the prosecution of her libel. By R. S. 1857, c. 60, § 6, the court may order a certain sum to be paid the wife for the prosecution of the libel. The aid of counsel is required to enable the wife to prosecute. The fees of counsel are not taxable in the bill of cost. Yet they must be paid. There were two trials. The amounts paid are not unreasonable as a compensation to the counsel engaged in the prosecution. The libelee, if he claimed a reduction from the taxable bill of cost, should have moved to be heard in the taxation of costs. If he did, then the decision of the judge, without exception thereto, concludes the party. If he did not, it is his own negligence, of which he shall not be permitted to take advantage.

In *Kendall* v. *Kendall*, 1 Barb. Ch. 611, which was a bill in equity for a divorce, this question arose, and Mr. Chancellor Walworth says: "Nor was it intended that the allowance to her, for costs and expenses of the suit, should be confined to the mere taxable costs as between party and party. In litigated cases, where the wife is necessarily subjected to extra expenses and counsel fees, in addition to the taxable costs as between party and party, the whole amount which has been advanced to her, *pendente lite*, for costs and expenses, should not be deducted from the ordinary bill of costs, as between party and party, to which she is entitled under the decree. But the husband should only be allowed for the balance of his advances after deducting therefrom the necessary expenditures of the wife, for counsel fees, etc., which are not included in the ordinary taxed bill."

4. The order of the court was, that execution should issue for the sum allowed in lieu of alimony being $600 and the amount of such monthly installments heretofore ordered to be paid by the libelee as have accrued since his commitment to jail, and execution was issued for said sums, amounting to $680 and costs.

The libelee, by order of court, was liable for both sums. The court may enforce obedience to its order by appropriate processes.

§ 6. The issuing execution for the amount allowed as alimony is such process. *Orrok* v. *Orrok*, 1 Mass. 341. The plaintiff in error was not injured by uniting in one execution the sum of the unpaid monthly installments and the sum decreed in lieu of alimony. He was rather thereby benefited, as the costs would be less. It would be absurd to reverse a judgment, even if there was a question whether two executions should not have been issued instead of one, when the party seeking such reversal not merely has lost nothing, but, on the contrary, has made a slight gain.

In determining whether the proceedings were erroneous, we must look only to the record. The plaintiff in error must allege and prove by the record the errors therein to exist upon which he relies, when the errors are those of law. If it be a matter of doubt, the writ will not be granted. A judgment will not be reversed because it may be erroneous. *Flanders* v. *White Mountain Bank*, 43 N. H. 383. Error will not lie when the party alleging it might have appealed. *Savage* v. *Gulliver*, 4 Mass. 171. No judgment can be "reversed for any want of form which might have been amended." *Lord* v. *Pierce*, 33 Maine, 350. The plaintiff in error was present in court by his counsel, and if there was no valid motion for alimony or there was any illegality in the proceedings before the court, the questions of law thus arising might have been presented to the full court by exception or report. An exception will be deemed as waived when the party is present and has an opportunity to except and does not then avail himself of it. *Peebles* v. *Rand*, 43 N. H. 337. "We think," observes Bell, C. J., "it may well be considered that a party has waived any objection to an order or decision of the court, to which, being present and having an opportunity to object, he has, at the time, taken no exception." When a motion to dismiss for want of service is overruled in the court below, the action being appealable, the party making it withdraws his appearance and is defaulted, he cannot afterwards bring error. *Monk* v. *Guild*, 3 Met. 372. When a party appeared by his counsel, and, before judgment, withdrew his appearance, upon his own motion, he must be deemed to have had an opportunity to appeal, and having had this op-

portunity he cannot bring error. *Howard* v. *Hill*, 31 Maine, 420. These principles apply to the case at bar. The plaintiff in error appeared by his counsel. The questions of law raised in and by this writ of error might in some form have been presented to the law court for adjudication.

If the husband files no answer he has no *locus standi* at the hearing as to alimony. Brown's Divorce Court Practice, 152. So, if the counsel voluntarily withdrew before the question of alimony was presented to the court for adjudication, it has been seen that the plaintiff could not bring his writ of error. If being present, the counsel omitted or neglected to raise the questions now presented by report or exception, his client cannot be in a better condition, than if he had not withdrawn. So far as the proceedings in relation to alimony are mere matters of discretion on the part of the presiding judge, they cannot be revised either by exceptions or writ of error by the full court.

Judgment affirmed with costs for the defendant in error.

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

JOSEPH BRADSTREET, petitioner for review, *vs.* JAMES PARTRIDGE.

Petition for review. Writ of review. Practice.

A petition for the review of an action is to be served and entered as an independent proceeding.

If a writ of review be granted, the order is entered under the entry of the petition, and all further proceedings under the petition are ended.

No final judgment can be rendered under the petition so long as it is continued.

A writ of review cannot be sued out until final judgment on the petition.

A writ of review may be sued out at the next term after final judgment on the petition.

A writ of review must be made a new entry, and it cannot be entered, heard, or determined under the petition.

ON REPORT.

KENT, J. A petition for a review was entered at April term, 1869; granted at August term, 1869; writ of review sued out, and served and entered as a new entry, Dec. term, 1869, the former entry of the petition for review remaining on the docket by continuance. At the April term, 1870, by direction of the presiding judge, the entry of the writ of review was dismissed or made a misentry, he having directed that the case on review should proceed under the entry of the petition, and be tried and determined under that entry. At the next term, August, 1870, the defendant moved that the original petition be dismissed, as remaining on the docket by inadvertence or mistake. This motion was overruled, and exceptions filed and allowed. At the December term, 1870, the plaintiff, in review, moved for trial and offered testimony.

"The justice presiding, having doubts of the propriety of trying the action of review, under the entry of the petition for review, the facts are reported to the full court; they to direct such disposition of the case as the rights of the parties require."

In our practice a petition for a review is not, in itself, a review of the action named. A review, when granted, is not in the nature of a writ of error to reverse a judgment for errors in the record of law or fact. It assumes that the former judgment is to stand, but

allows the party to review the action, and to obtain, if he can, a new judgment in his favor, equal to the former judgment against him, or to some part of it. The statute points out the mode by which one judgment can be offset against the other, in whole or in part. If the first judgment has been paid, the new judgment stands in force and is to be collected as any original judgment may be. It being, then, a new and independent action, the writ of review is to be regarded as the foundation of the action, and the case is to be entered, heard, and determined on that writ, under the old pleadings, generally, as provided by the statute. It is not in court, by the bringing forward of the old action, to be tried anew. Nor is it, properly speaking, a new trial granted, as in a case before final judgment.

The legislature was aware that cases would arise where a writ of error would not enable the party to obtain right and justice, and also that after final judgment, with or without satisfaction, it would be too late to grant a new trial in that action or under that entry on the docket. The provision was, therefore, made for a review, in the discretion of the court, within a limited time. But this is not now a matter of right. A party cannot sue out a writ of review at his own motion, as he can an original writ.

He must first apply to the court, by petition, praying for liberty to sue out such writ of review. This petition is to be served and entered as an independent proceeding. If denied, it is dismissed from the docket. If granted, the order is made under the entry of the petition, and in either case the petition has answered its purpose, and all proceedings under the same are ended, and it should not be brought forward on the docket of the next term. If the prayer is sustained, the party sues out his writ of review, as before explained. This should be entered as a new action, and cannot properly be entered or heard or determined under the entry of the petition for review. There would be great difficulty in making up a judgment, after a trial of the new case, under the petition.

If this case, under the petition for review, had not been con-

tinued, the suing out and entering of the writ of review would have been regular. But the continuance of the case, after the entry of review granted, operated to prevent a final judgment at the term, and so long as it was kept on the docket by continuance. The writ of review could not be legally sued out, until final judgment was rendered and the case, under the petition, ended. The entry, therefore, of the writ of review was erroneous, as no final judgment of the court had authorized it. As long as the petition remained finally undisposed of, the entry might be changed or altered by the court. That case, under the petition, is yet on the docket, undisposed of. But no action can be had under it, by which an action, as under a writ of review, can be tried. But the petitioner can have that case, under the petition, determined by entry of final judgment. He may then sue out his writ of review at the next term after such judgment is entered upon the petition.

The case is remanded to the court at nisi prius, to be disposed of in accordance with this opinion.

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

Tallman & Larrabee, for the defendant.

JOSIAH F. BATES *vs.* CHARLES B. FOSTER.

Deed—construction of. Covenant—limitation of.

The covenants in a deed of warranty are limited in effect by the description of the grant.

In the defendant's deed of warranty immediately succeeding a description of the premises by metes and bounds, was the clause, "and meaning hereby to convey to the said" grantee "the same premises and title as conveyed to me by Daniel Witham, and no more." The title conveyed to the defendant was an equity of redeeming the land described from a mortgage, which the defendant's grantee was obliged to pay, and thereupon brought this action of covenant broken. *Held*, that the defendant's deed conveyed an equity of redemption only.

ON REPORT.

COVENANT BROKEN.

In support of the action, the plaintiff put into the case a deed of warranty, with the usual covenants from the defendant to the plaintiff, dated Nov. 21, 1853, duly acknowledged and recorded, of which the part material to an understanding of this case was as follows:

"Know all men by these presents. That I, C. B. Foster, of Richmond, in the county of Lincoln and State of Maine, in consideration of one thousand dollars, to me paid by Josiah Bates of the aforesaid Richmond (the receipt whereof I do hereby acknowledge), do hereby give, grant, sell, and convey unto the said Josiah Bates, a certain lot of land, together with the house thereon standing, and bounded as follows, viz.: beginning on the street leading from Levi E. Marble's to Rev. Mr. Barnard's, and on the south-easterly side of said street, and at the north-westerly corner of land occupied by Samuel Brown. Thence by land of said Brown southerly to the land of the Kennebec & Portland Railroad Company. Thence northerly by the line of said railroad company to within one rod of the line of land of Dexter Jack. Thence at right angles with the first-described line to the before-mentioned street. Thence south-westerly by said street to the place of beginning, and meaning hereby to convey to the said Bates the same premises and title as conveyed to me by Daniel Witham and no more."

It appeared that there was an outstanding mortgage on the land described, given by one Bryant prior to the defendant's title, which the plaintiff had been compelled to pay.

The defendant put in a sheriff's deed from Daniel Witham to himself, dated Oct. 28, 1853, purporting to convey the right of redeeming the mortgage.

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

1. The first part of the deed from defendant to plaintiff is a clear and unequivocal conveyance of the land described. It is free from all ambiguity; the clause, "meaning hereby to convey," etc., is repugnant, and must be rejected. *State* v. *Mayberry*, 48 Maine, 233; *Harlow* v. *Thomas*, 15 Pick. 66.

2. If there are two descriptions, the grantee will be entitled to hold under that which will be most beneficial to him. And this principle should be held to descriptions of title, as well as of boundaries. Deeds and covenants in deeds are to be construed most strongly against the grantor. *Esty* v. *Baker*, 50 Maine, 325; *Cutter* v. *Tufts*, 3 Pick. 272; *Melvin* v. *Pro. of Locks and Canals on Merrimack River*, 5 Met. 28–30, and cases there cited.

3. Though it has been held that in a mere quitclaim deed of one's title, the covenants must be restricted to the title conveyed; it is claimed that the covenants should not be so restricted in deeds containing a clear and unambiguous grant of the land, though followed by such a clause as is contained in the deed given to the plaintiff.

A. Libbey, for the defendant.

DANFORTH, J. This is an action for a breach of the usual covenants in a deed of warranty. Whether there has been any breach depends upon the construction to be given to the language used in describing the grant and the premises conveyed; for the covenants in a deed are limited in effect by the description of the grant. *Hoxie* v. *Finney*, 16 Gray, 332 and cases cited; *Freeman* v. *Foster*, 55 Maine, 508; *Coe* v. *Persons Unknown*, 43 Maine, 432.

The defendant's deed, after the usual words of conveyance "give, grant, sell, and convey," followed by a description of the premises, has these words, "And meaning hereby to convey to the said Bates the same premises and title as conveyed to me by Daniel Witham, and no more." It appears that Witham conveyed to the defendant only an equity of redemption from a certain mortgage; that the same mortgage was still outstanding at the date of the defendant's deed to the plaintiff, and that the plaintiff was subsequently obliged to pay it.

Did, then, the defendant, by his deed, convey to the plaintiff the interest which he received from Witham and no more, or did he convey the whole title to the land and thereby covenant against the subsisting mortgage?

The defendant, in his deed, says he intended to convey the same he received from Witham and "no more." But it is said that these words are repugnant to what goes before, and are, therefore, void. Such a construction is not admissible unless they are necessarily so inconsistent that both cannot stand together. Whatever may have formerly been the rules of construction in this respect, "in modern times, they have given way to the more sensible rule, which is, in all cases, to give effect to the intention of the parties if practicable, when no principle of law is thereby violated." *Pike* v. *Munroe*, 36 Maine, 315.

It was certainly competent for the grantor to convey just such an interest in the land as he chose to do, therefore no principle of law prevents the giving effect to his clearly expressed intention.

Nor is the latter clause in the description necessarily repugnant to or inconsistent with the former. It is undoubtedly true that what is expressly granted, cannot by subsequent clauses be restricted. But to have this effect, the grant must be express and specific, and not general. *Cutler* v. *Tufts*, 3 Pick. 272–277; 3 Washb. Real Prop. 3d ed. 370.

The words "give, grant, sell, and convey" do not, of themselves, imply a warranty. *Allen* v. *Sayward*, 5 Maine, 230.

Nor do they expressly and specifically convey the whole title, but are rather words of general description, susceptible of explanation or modification by other appropriate language. They are just as applicable to the conveyance of a right of redemption as to the grant of a fee.

If the words, "same title conveyed to me by Daniel Witham," had immediately followed the words, "give, grant," etc., no doubt could then have been raised as to the meaning of the language or the intention of the parties, and the use of the words would have been entirely appropriate. The right of redemption, and that alone, would have been conveyed.

It can make no difference that the qualifying phrase is further on in the sentence. It is still a part of the description of the title conveyed. The latter words explain the former, and are fit and

appropriate for that purpose. They do not destroy or take away the meaning and effect of the first, either in relation to the whole grant or any portion of it, but are simply an explanation.

Taking the whole description together, giving each word its proper signification, as modified by its connections, and the meaning is free from ambiguity; but leave out the latter part, and it is quite as clear that we fail in giving effect to the intention of the parties.

Adopting another test, and we are led to the same conclusion. For the words "meaning the same title conveyed to me by Witham, substitute "subject to the mortgage named," the meaning would be unchanged. The title conveyed would be the same as that obtained of Witham. This would bring it directly within the common practice of reservation, and exceptions made in deeds and within the principle settled in numerous cases. *Kinnear* v. *Lowell*, 34 Maine, 299; *Freeman* v. *Foster*, 55 Maine, 508; *Higgins* v. *Wasgatt*, 34 Maine, 305; *Cole* v. *Coburn*, 18 Pick. 397; *Chenery* v. *Stevens*, 97 Mass. 77.

We are, therefore, of the opinion, that, both upon principle and authority, the two clauses in the deed are not repugnant but may stand together, and the former, as explained by the latter, must be considered as the true meaning of the deed.

Plaintiff nonsuit.

Appleton, C. J.; Cutting, Kent, Barrows, and Tapley, JJ., concurred.

ARTEMAS BIGELOW, administrator, *vs.* WARREN FOSS and another.

Mortgage on real estate — action — declarations of beneficiary admissible. Estoppel.

If the only surviving beneficiary named in a mortgage of real estate actively aid and assist the mortgager in selling and conveying by deed of warranty the mortgaged premises to a third person without mentioning her own claim, and such third person, relying upon the joint representations of the mortgager and such beneficiary, and without suspecting that there was any incumbrance upon the premises, thereupon purchased the same for their full value, she is thereby estopped to set up any claim under the mortgage.

Nor can such estoppel be avoided by the fact, that the plaintiff of record is prosecuting the suit as the administrator of the estate of the mortgager, who stood in the relation of trustee of the other beneficiary.

The declarations of the real party in interest, though his name does not appear as the party of record, are competent evidence against him.

Thus, in the trial of a real action, brought for the sole purpose of enforcing a claim for the life-maintenance of the surviving widow of the mortgagee, in the name of the administrator of the mortgager, on a mortgage conditioned for the maintenance of the mortgagee and his wife, her acts and declarations tending to show, that, at the time of the mortgager's conveyance of the mortgaged premises by deed of warranty to the defendant's grantor since the death of her husband, she knew the sale was contemplated, and actively aided and assisted in bringing about the sale of the premises at their full value, and urged the mortgager's grantee to purchase without mentioning her claim, and relying upon the joint representations of the mortgager and the widow, he did purchase without suspecting there was any incumbrance upon the premises. *Held*, that the facts constitute a defense, and that they are admissible in evidence.

ON REPORT.

WRIT OF ENTRY brought by the plaintiff as administrator on the estate of Lemuel Fletcher, deceased, upon a mortgage given by Asher P. Fletcher to said Lemuel on March 5, 1857, and duly recorded.

The case is sufficiently stated in the opinion.

Hiram Knowlton, for the plaintiff.

D. D. Stewart, for the defendants.

BARROWS, J. The plaintiff, as administrator of Lemuel Fletcher, brings this action upon a mortgage given in 1857 by Asher Fletcher to said Lemuel, conditioned, among other things, for the maintenance of said Lemuel and his wife Betsey during their natural lives and the life of the survivor of them. It was conceded at *nisi prius* that all the conditions of the mortgage had been fulfilled with this exception; since the date of a certain warranty deed of the premises given by Asher Fletcher, after the death of Lemuel, to David Bowman under whom the defendant Foss claims, Betsey Fletcher, who is still living, has received no support from Asher's grantees. This suit is brought to enforce her claim for a life-maintenance, and for this purpose only. The defendant offered in testimony the acts and declarations of Betsey Fletcher at the time of the sale of the premises, by Asher to Bowman, tending to show that she knew that Bowman contemplated purchasing the place, and that she urged him to buy of Asher, saying nothing about any claim of her own upon it, but taking an active part in the negotiation, and that she aided Asher in making sale of the place to Bowman for its full value, being present when Asher told Bowman that there was no incumbrance on it, and giving as a reason why it should be sold, that "her son Asher was so much out of health that he could not carry on the farm." It is fairly inferable that Bowman (whose title transmitted by deeds of warranty the defendant Foss now holds) bought the place, relying upon the joint representations of Asher and his mother, and paying the full value to Asher without any suspicion that the mother, who was recommending the purchase to him, had any claim on the property.

In corroboration of the above, the defendant offered proof that Mrs. Fletcher had often since the sale said that she and Asher sold the property for its full value, and expressed her satisfaction with the affair, assigning her reasons why it was better for them to sell.

If the testimony thus offered by the defendant was admissible, and would constitute a good defense to the suit, the case is to stand for trial.

That such facts would constitute a good defense if the suit were for the recovery of personal property or its value, and were brought in the name of the person whose acts and declarations are offered to raise the estoppel, there can be no doubt.

The governing principle is well stated by Lord Denman in *Gregg* v. *Wells*, 10 Ad. & Ell. 90 (37 E. C. L. R. 54), and is supported by an unbroken series of decisions from the days of Vernon and of Salkeld to the present time.

It has been held in numerous cases in this State, and must be considered as settled law here, that the same doctrines and principles are applicable to sales of real as well as of personal property, and that the equitable estoppel is to be regarded as available in a suit at law for the land. *Hatch* v. *Kimball*, 16 Maine, 146; *Durham* v. *Alden*, 20 Maine, 231; *Rangeley* v. *Spring*, 21 Maine, 137; *Stearns* v. *McNamara*, 36 Maine, 178; *Stinchfield* v. *Emerson*, 52 Maine, 465.

Nor can the estoppel be avoided by the fact that the plaintiff of record is prosecuting the suit, in a representative capacity, as administrator of the original mortgagee, who stood in the position of trustee for the other beneficiaries named in the mortgage. The declarations, acts, and omissions relied on, as creating the estoppel, are those of the person towards whom the present plaintiff now stands in the relation of trustee, and for whose benefit he prosecutes the action. See R. S. of 1857, c. 65, § 22.

The party in interest cannot be permitted to assert, successfully, through the intervention of an agent and trustee, a claim which she would be estopped from asserting if the suit were brought in her own name.

And the declarations and admissions of the real party in interest, though his name does not appear as the party of record, are competent evidence against him, the law giving them the same rights as though he was a party to the record. 1 Greenl. Ev., § 180; 2 Starkie on Ev., 40, 41, Metcalf's ed.

This rule is recognized in *Richardson* v. *Field*, 6 Greenl. 305; *May & Cheeseman* v. *Taylor*, 6 Man. & Gr., 261 (46 E. C. L. R. 259); and *Kendall* v. *Lawrence*, 22 Pick. 540.

The mortgage given by Asher Fletcher to Lemuel, provides that the mortgager "is to have and keep possession of the premises so long as the said Asher shall observe and keep the conditions herein expressed," and implies, in another clause, that with the consent of said Lemuel and wife, or the survivor of them, the support which Asher was bound to give to them, might be furnished elsewhere. Whether the conditions of the mortgage have been fully performed does not appear by the case as reported. But it is not necessary at present to consider this branch of the defense.

According to the stipulations in the report, the entry must be

Case to stand for trial.

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

NATHANIEL BRYANT, JR., administrator, *vs.* SAMUEL W. JACKSON, executor, and others.

Equity—pleading.

In a bill in equity to redeem real estate from a mortgage conditioned for the support of the mortgagees and the survivor of them during life, brought by the assignee of the mortgager against the assignee of the mortgagees, a distinct allegation that the interest of the mortgager was assigned with the consent of the mortgagees is sufficient, although it is not alleged that such consent was in writing.

The assent, by the surviving mortgagee, that the administrator of the estate of the assignee of the mortgager may succeed and take the place of his intestate, may be given after as well as before the assignment by the mortgagees, but cannot affect the previously acquired rights of the assignees of the mortgagees.

BILL IN EQUITY brought by Nathaniel Bryant, jr., as administrator of the estate of Nathaniel Bryant, deceased, against Christopher Erskine, Joseph Erskine, Jason M. Carleton, and Jane Linscott, to redeem certain land therein described, from a mortgage given by Charles H. Linscott to Ephraim Linscott and his wife

Jane, for life maintenance, April 22, 1861. Since the commencement of the suit, Christopher Erskine has deceased, testate, and Samuel W. Jackson has been appointed his executor.

The bill alleged, substantially, that on April 22, 1861, Ephraim Linscott conveyed, by deed of warranty, the premises to Charles H. Linscott, who, on the same day, mortgaged them to Ephraim Linscott and Jane Linscott, for a life-maintenance, allowing "them to occupy the south part of the house," etc. (for the particulars of the condition see 55 Maine, 154), and that Charles occupied the premises for a certain period and supported them so long as he continued in possession.

That on Aug. 14, 1861, Charles mortgaged the premises to the plaintiff's intestate to secure the sum of three hundred dollars, and on Oct. 9, 1862, he released his interest to the plaintiff's intestate, wherefore he claimed the right in equity to redeem the mortgage to Ephraim and Jane, and have possession in order that he may fulfill the alternative condition to Jane, the surviving mortgagee (Ephraim having died March 13, 1863).

That on Sept. 9, 1862, Ephraim assigned Charles' mortgage to him and Jane to one Harris, and afterwards on Nov. 13, 1862, Ephraim and Jane joined in an assignment of the same to the said Harris, who, in April, 1863, assigned the same to Christopher Erskine, Joseph Erskine, and Jason M. Carleton.

That Charles elected, and it was always the determination of the plaintiff's intestate, and also of the plaintiff in his said capacity, to observe and fulfill the alternative part of the condition, and such was also the desire of the mortgagees; and that the mortgager and his assignees have always performed and tendered performance of said alternative condition, except when prevented by the defendants.

That on Dec. 9, 1862, the plaintiff's intestate demanded an account of Ephraim and Jane, and on Sept. 8, 1865, of the other defendants.

That Charles has resided out of the State since 1862, and is not within the jurisdiction.

All the defendants demurred except Jane Linscott, who answered.

The case was before the court in 1867, on demurrer, when all the objections then raised, with one exception, were overruled and the plaintiff had leave to amend, by alleging that the assignment by Charles H. Linscott to the plaintiff's intestate was made with the consent of the mortgagees. Accordingly, at the October term, 1868, the plaintiff filed his amendment, alleging,

That at the time of the execution and delivery of the mortgage from Charles to plaintiff's intestate, and of his assignment of the equity of redemption of Charles' mortgage to Ephraim and Jane, and ever afterwards, said Ephraim and Jane approved of and assented to said Charles' assignment to said Bryant, and consented and desired, in case of any default therein by said Charles, that said Bryant should support them and discharge the obligations imposed by the condition of the mortgage; that they never consented nor desired that Harris or his assignees should discharge said obligations, but were always averse thereto, and resisted as far as their infirmities and helplessness would enable them; that after the decease of said Bryant and Ephraim, the said Jane continued to have the same aversion to the condition of said first mortgage being performed by the assignees of Harris, but consented and agreed that the plaintiff, as the legal representative of said Bryant, deceased, should support her under the condition, etc.

To the bill and amendment the defendants demurred and the plaintiff joined.

J. Ruggles, for the plaintiff.

A. P. Gould, for the defendants.

The amended bill does not show that the present plaintiff has the right to redeem.

1. Any right or interest in or concerning a mortgage of land must be in writing. Plaintiff must show that he was, by written assignment or contract, substituted by the mortgagees, in the place of Charles, in the performance of the personal duties comprised in the conditions.

The condition was personal and unassignable. No one could be substituted without an enlargement of the condition made by the mortgagees, adding thereto the element of assignability and giving their consent to the substitution. Such enlargement would be a contract for the transfer of an interest in or concerning the lands and tenements mortgaged. It would be an addition to the condition of a mortgage of lands, which cannot be made by verbal contract.

A grant of authority by the mortgagees to the mortgager to assign the right of performing the condition would be an important addition to the condition and to the rights and powers of the mortgager. Such a grant must be of as high a nature as the mortgage.

Charles had no assignable interest while the condition remained unperformed, for he could invest no third person with the trust. His conveyance to Bryant was void as it respects the mortgagees. To give it validity, it must appear that the mortgagees, prior to entry for breach of condition and conveyance to Harris, granted to Charles the power of substitution by a competent instrument.

It is not alleged that the mortgagees executed any such instrument. The stating part must contain every necessary averment set forth distinctly and expressly. *Wright* v. *Dame*, 22 Pick. 55.

2. It is not alleged that the mortgagees consented to the substitution of Bryant's administrator.

It is not alleged that Jane executed any instrument in writing since the death of Bryant and her husband.

But the agreement which she is alleged to have made with the present plaintiff was made long after she and her husband had assigned their interest. She could not change the condition then.

Charles having abandoned the support and left the mortgagees in possession to themselves, they had a right to assign, and having assigned, their power to change the rights of parties ceased.

The agreement to substitute Bryant, sen., would not upon his death pass to his administrator. An agreement to substitute Bryant's administrator in case of death is not alleged.

Charles, under some circumstances, as in *Henry* v. *Tupper*, 29 Vt. 359, might redeem, but not Bryant's administrator.

DANFORTH, J. This bill has been before the court upon a previous demurrer. See 55 Maine, 153. All the objections there raised, with one exception, were overruled, and the plaintiff had leave to amend. It was there held, that as the plaintiff's intestate claimed under Charles H. Linscott, the mortgager, it must appear that the assignment to him was made with the consent of the mortgagees. The amendment introduces an allegation of assent, but the bill is again demurred to, on the ground that it should appear that the assent was in writing.

Whether the statute of frauds in such cases requires the assent to be in writing, need not now be determined. The consent of the mortgagees to the assignment, and the substitution of the plaintiff's intestate, is distinctly set out in the amendment. This allegation, in a legal process, can be true only on the ground that such a consent as the law requires was given, and can be substantiated only by legal and competent testimony, whether by a written instrument or otherwise. *Lovell* v. *Farrington*, 50 Maine, 239.

The amendment also alleges an assent on the part of the surviving mortgagee, that the plaintiff may succeed and take the place of his intestate. This assent may be given after as well as before the assignment, but in either case cannot affect the previously acquired rights of the defendants. This assent, too, if material, and their rights and their priority must depend upon such legal testimony as may be introduced by the parties. Under the former decision, in this case, the bill as amended appears to be sufficient to require the defendants to answer.

The exceptions to the ruling of the justice and the second amendment offered are waived. *Demurrer overruled.*

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

WILLIAM HUSSEY *vs.* NATHANIEL O. WINSLOW and trustee.

A negotiable promissory note — what is.

An instrument of the tenor following: "Nobleboro, October 4, 1869. Nathaniel O. Winslow Cr. By labor 16¾ days @ $4. per day $67.00. Good to barer. Wm. Vannah,"—is a negotiable promissory note for sixty-seven dollars, payable to Nathaniel O. Winslow, or bearer, on demand.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note, commenced by trustee process, in which William Vannah was summoned as trustee of the principal defendant.

The trustee disclosed that on the fourth day of October, 1869, and before the service of the writ in this action on him, he delivered to the said Winslow, to whom he was indebted on account, a writing, of which the following is a copy:

5 cent stamp.

"NOBLEBORO, Oct. 4, 1869.

Nathaniel O. Winslow Cr.

By labor 16¾ days @ $4. per day $67.00

Good to barer, WM. VANNAH."

and claimed that he should be discharged.

The presiding judge ruled that the instrument was a negotiable promissory note, and that the trustee be discharged. Thereupon the plaintiff alleged exceptions.

Wm. H. Hilton, for the plaintiff.

The simple acknowledgment of a debt does not raise such a promise as is comprehended in a promissory note. Byles on Bills (3d ed.), 84.

"Good to barer" import at most a general promise to bearer only. No payee is designated. 3 Kent's Com. 94 and cases cited; 1 Am. Lead. Cas., 315. *Carver* v. *Hayes*, 47 Maine, 257, is not applicable.

Something more than inferential promises is necessary to support a promissory note. *Horne* v. *Redfearne*, 6 Scott, 267.

The debt is not payable in money; otherwise it would have been "Good to N. O. Winslow, or bearer, for $67.00." Were the terms "Cr. in, or by cash," a different construction would be proper.

Farmers often exchange labor, ox-labor for personal labor.

Not being payable in money, it is not negotiable. *Marrett* v. *Eq. Ins. Co.*, 54 Maine, 537.

Henry Farrington, for the trustee.

DANFORTH, J. The only question here raised is, whether the written instrument disclosed by the trustee, is a negotiable promissory note. It was evidently so intended by the parties, and seems to possess all that is legally requisite to constitute it such. It is not a mere acknowledgment of a debt, as contended by the plaintiff. It is true that the words, "Cr. by labor 16¾ days @ $1 per day $67.00," may very properly be construed as an admission, that so much money is due Mr. Winslow for labor performed by him. But the remaining words, "Good to barer," are not inconsistent with what goes before and cannot therefore be rejected. They must have some meaning, and taken in connection with the words previously used, that meaning cannot be doubtful. In *Franklin* v. *March*, 6 N. H. 364, in a similar instrument the word "good" was held to imply a promise. In the paper under consideration, no other meaning can be attached to it than a promise to pay for the labor received. Nor is the promise to pay in labor. Labor is not mentioned except as the consideration for the promise. The sum due has prefixed to it the mark for dollars, and there is no intimation that it is to be paid in any other way than by money. In such cases the debt can only be discharged by lawful currency. The sum to be paid is definite and subject to no contingency. It is to be paid absolutely, and as no time is given, it is payable on demand. Nor can there be any doubt as to the payee, if any were necessary

in a note payable to bearer. Nathaniel O. Winslow is named as the person from whom the consideration proceeds, and if there were no other indication as to whom the promise is made, the law would deem this sufficient. Story on Notes, § 36.

It would seem that the only possible construction which can be given to this instrument is, substantially, this: In consideration of 16¾ days' labor, performed by Nathaniel O. Winslow, at $4 per day, amounting to $67.00, I promise to pay him, or bearer, that sum on demand. Signed, William Vannah.

Here we have every element of a negotiable promissory note; a maker, a payee, a promise or engagement to pay a certain sum of money at a specified time, absolutely and unconditionally, and the word bearer to make it negotiable. *Exceptions overruled.*

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

ISAAC F. STURDIVANT and another *vs.* JOHN T. HULL.

Promissory note — construction of — evidence in action on.

The liability of the defendant, as the maker of a negotiable promissory note, must be determined by the instrument alone.

A note of the tenor: "Portland, Dec. 20, 1869. Four months after date, I promise to pay to the order of Sturdivant & Co., two hundred and twenty-five dollars. Value received. John T. Hull, Treas. St. Paul's Parish," binds Hull, personally; and it cannot be shown, by parol, that the intention of both parties, at the time of giving the note, was that the parish and not Hull should be bound.

Neither R. S. c. 1, § 4, clause XXI., nor c. 73, § 15 is applicable to such note.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court for the county of Cumberland, at the November term, 1870.

Sturdivant *v.* Hull.

BARROWS, J. Assumpsit by the payees against the maker of a promissory note of the following tenor:

"$225.00 PORTLAND, Dec. 20, 1869.

U.S.I.R. Stamp. 25 cents.

Four months after date, I promise to pay to the order of Sturdivant & Co., two hundred and twenty-five dollars. Payable at either bank in Portland, with interest. Value received. JOHN T. HULL, *Treas. St. Paul's Parish.*"

The signature to the note was not denied, but the defendant offered to prove, and if evidence *dehors* the note is admissible for that purpose, we must consider it as proved, that at the time the note was made, defendant was treasurer of St. Paul's Parish, and made the note in suit, in behalf of said parish and for their sole benefit, in renewal of a former note given by his predecessor, Moody, for lumber used in building their parish church, and that defendant never received any personal consideration or any consideration for the note, other than the foregoing. And that these facts were known to the plaintiffs when the note was given, and that the understanding and intention of both parties, then, was that it was the note of the parish and not of the defendant.

As the suit is between the original parties to the note, it follows that if the proffered evidence showed that there was no valid consideration for the defendant's promise, it should have been admitted. But such is not the case. It is not necessary that the consideration should have enured to the personal benefit of the promisor, and the surrender of the previous note, or the extension of the term of credit originally given to the parish for the lumber would, either of them, be a sufficient consideration for the defendant's note.

The case presents but two questions:

1. Whether the defendant's liability must be determined solely by the written instrument which he has subscribed, excluding the evidence above offered to control its construction?

2. If so, does the true construction of it make it his note, or that of the parish?

I. Now, when parties are competent witnesses, and stand ready

to testify (if allowed) not only to their own intentions, but to those of the other party to the contract, the wisdom of the long-established rule, which requires all parties to written contracts, at their peril, to state what they mean to abide by in the writing itself, and prohibits them from resorting to oral testimony to contradict or vary its terms, grows more apparent every day.

One of the illustrations of this rule, given by Mr. Greenleaf in his Treatise on Evidence, vol. 1, p. 320, ed. of 1842 (citing *Stackpole* v. *Arnold*, 11 Mass. 27), runs thus: "where one signed a promissory note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff, at the owner's request."

When a man has deliberately said, in writing, "I promise to pay," and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract and to undertake to prove that he did not actually mean, "I promise," but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment.

It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony.

And upon this point the decisions (although, in cases of like type with this, they are somewhat conflicting, or, at least, distinguished with scarcely a shade of difference, upon the question of the construction of the instrument itself) will be found concurring. *Andrews* v. *Estes*, 11 Maine, 270; *Hancock* v. *Fairfield*, 30 Maine, 299; *Slawson* v. *Loring*, 5 Allen, 342; *Draper* v. *Mass. Steam Heating Co.* 5 Allen, 338; *Barlow* v. *Cong. Soc. in Lee*, 8 Allen, 460; *Tucker Manuf. Co.* v. *Fairbanks*, 98 Mass. 104 and cases there cited.

Nor is this wholesome rule abrogated by any of our statute provisions touching the responsibility of principals upon contracts made

and executed by their authorized agents. R. S. of 1857, c. 73, § 15; Id. c. 1, § 4, clause xxi. Even if those provisions should be held to apply to any contracts not purporting on their face to be made by the agent for or in behalf of the principal (a question which need not now be discussed or decided), it is one thing to extend a liability to a real party in interest, and afford a remedy against him, and quite a different thing to discharge the liability expressly assumed and incurred by him who has made himself a party to the written contract. This, it is safe to say, is a result the legislature did not intend, or they would not have left a matter of such importance to be inferred merely, but would have expressed it in unmistakable terms.

We are satisfied that these provisions are not to be considered as applying to negotiable paper in such a way as to make parol evidence of the understanding and intention of the parties admissible to relieve an agent who has, on the face of the paper, expressly assumed the liability himself.

The provisions are found among those designed to regulate conveyances, by deed and contracts, respecting real estate, and those relative to the construction of statutes. The statute of 1823, c. 220, from which R. S. c. 73, § 15 was derived, is expressly limited to "deeds, bonds, contracts, and agreements purporting to be made and executed by any agent, attorney, or committee for and in behalf of any other person or corporation," and "provided it appear by said deed, bond, contract, or agreement to have been the intention of the parties to bind the principal or constituent." Clause xxi, of § 4, c. 1, R. S. of 1857, is simply one of "the rules to be observed in the construction of statutes," and originally ran thus: "When a statute requires an act to be done which may, by law, be done as well by an agent as by the principal, such requisition shall be construed to include all such acts when done by an authorized agent." R. S. of 1841, c. 1, § 3, clause xx.

We do not think that the true intent, meaning, and application of these provisions, as originally enacted, have been changed in the subsequent revisions of 1857 and 1871. Obviously they are not

designed to change the established law with regard to negotiable paper. So far as those contracts are concerned, there are special reasons for adhering strictly to the old rule first adverted to. They are well assigned in *Williams* v. *Robbins*, 16 Gray, 77, and *Barlow* v. *Cong. Soc. in Lee, ubi supra.*

The defendant's liability must be ascertained by an examination of the note itself.

II. As has already been suggested, the cases involving the construction of similar instruments are more difficult to reconcile than those in which the point just disposed of has been considered. Apparently slight changes in the phraseology have affected the construction adopted by different courts, and by the same court in different cases. There is a necessity for a careful examination and comparison of the numerous decisions. This we have endeavored to make, and the result is, we are satisfied that the weight of reason and authority demonstrates that this is the personal contract of the defendant and not that of the parish of which he was treasurer.

There are no appropriate words in it to show that it was the contract of the parish, or that it was made by the defendant in its behalf. He does not say that he promises as treasurer, or use any language significative of an intention to bind his successors in office as in *Barlow* v. *Cong. Soc. in Lee;* in which case *Mann* v. *Chandler*, a *per curiam* opinion reported 9 Mass. 335, is disavowed as an authority, and it is said that "all the decisions of this court upon unsealed instruments, since the case of *Mann* v. *Chandler*, have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter." *Vide* 8 Allen, 461, 462, 463.

In *Haverhill M. F. Ins. Co.* v. *Newhall*, 1 Allen, 130, upon a note signed, "Cheever Newhall, president of the Dorchester Avenue Railroad Company," though it was agreed that the defendant, at the time of signing the note, was the president of said company; that it was given in consideration of a policy of insurance issued by the plaintiffs to that company, upon property owned by them, and that the defendant was duly authorized by the company to obtain

the insurance and sign the note, it was held that the form of the note only was to be looked at upon the question of charging the defendant; that he had fixed a personal liability upon himself by the use of the words, "I promise to pay," and that this liability was not affected by the descriptive addition to his signature.

In *Fiske* v. *Eldridge*, 12 Gray, 474, the note was signed, "John S. Eldridge, Trustee of Sullivan Railroad," and the defendant was held personally liable, though he proved that he was trustee of the railroad company, and as such had entire charge of its property and business, and gave the note in suit to take up a promissory note of the corporation, and delivered with it bonds of the corporation as collateral security for its payment.

The defendant's counsel relies upon certain *dicta* intimating that the case of *Mann* v. *Chandler* may be sustained, because the defendant there, as here, was treasurer of the corporation, and that the signature of that officer may be thought, of itself, to import a promise of the party whose treasurer he is.

But we should be unwilling to say that the treasurer of a religious corporation has any authority by virtue of his office to bind such corporation by the issue of negotiable promissory notes, or that the official signature of such treasurer could be considered as indicating the assertion of such authority, any more than the signature of a person describing himself as president or trustee of a business corporation asserts the requisite authority on the part of such president or trustee.

In *Mann* v. *Chandler*, relied on by the defendant, the special authority conferred by the directors upon the treasurer to give the note in suit was shown, and in the more recent cases above cited, from 12 Gray and 1 Allen, such authority was either admitted or proved without objection. But the tendency of the later decisions, manifestly, is to hold the man who says, "I promise to pay," (without stating in the writing itself that he promises for or in behalf of any other party) responsible personally. Why should it not be so? That is the plain and direct import of the language he uses. "I" is not the language of a corporation or an association. It is that of

an individual signer. If such signer appends to his signature a description of himself as agent, president, trustee, or treasurer of a corporation, it may import a declaration on his part, that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible for a debt of theirs.

And this *descriptio personæ* may aid him in the keeping and adjustment of his accounts with his different principals.

But without some words in the contract importing that he promises for or in behalf of his principal, he cannot avoid the personal liability he has thus assumed.

In *Seaver* v. *Coburn*, 10 Cush. 324, the contract signed by defendant as "Treasurer of the Eagle Lodge," etc., was held binding upon him personally. And the distinction which the defendant seeks to set up, between treasurers and other officers and agents of corporations, was ignored.

The fact that it has been suggested as a possible ground upon which the case of *Mann* v. *Chandler* (so often doubted, and so recently denied to be an authority in the court which pronounced it) might be sustained, can hardly be expected to avail the defendant here.

This subject has been elaborately discussed in *Tucker Manuf. Co.* v. *Fairbanks*, 98 Mass. 101, and in *Barlow* v. *Cong. Soc. in Lee*, 8 Allen 460, and what we have already said may seem superfluous.

It is a satisfaction, however, to know that the view of the law which we take comports well with justice also. In the agreed statement of facts which the parties have appended to the case, it appears that in May, 1870, the parish mortgaged their church edifice and other property to Henry A. Neely and the defendant and other members of the parish associated with them, to secure them for liabilities assumed by them for the parish, and that in the following month, before the commencement of this suit, the equity of redemption from this mortgage was sold on execution against the parish, and purchased in by the mortgagees, so that the appropriation of the materials furnished by the plaintiffs for the building of

the church, without compensation, would seem to be a sort of pious fraud which we should be slow to sanction so long as a legal reason for avoiding it could be found.

In the agreed statement it further appears, that there never was any vote of the parish authorizing defendant, as treasurer or otherwise, to sign any negotiable or other paper for the parish, but, that at a meeting of the parish in September, 1869, on defendant's motion, it was voted that the parish assume the payment of all liabilities thus contracted by said Neely, the defendant and others, by thus signing or indorsing any notes for the parish and that they would "save and hold harmless, from any loss or injury, all persons whatsoever, who may have or shall hereafter assume or become responsible for the payment of any debts of the parish." And on the 12th day of May, 1870, they voted to assume the payment of all notes signed by defendant as treasurer. This tardy assumption might not have availed the plaintiffs in a suit against the parish on this note; for it seems to have been held, that, when one signs as agent in such a case, his authority at the time must be shown, and that subsequent ratification will not make it good as the act of the principal.

Tabor v. *Cannon*, 8 Met. 461; *Rossiter* v. *Rossiter*, 8 Wendell, 499.

But the defendant, who is mortgagee of all the church property, and co-owner of the equity of redemption, fortified by such a vote may haply find means to make it available for his protection.

Exceptions overruled.
Judgment for plaintiffs.

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

T. T. Snow, for the plaintiffs.

A. A. Strout, for the defendant.

SARAH W. JONES *vs.* HENRY SIMPSON and another, administrators.

Witness—husband and wife—competency of.

Under the provisions of R. S. c. 82, in the trial of an action by a married woman against the administrator of the estate of a deceased person, the husband of the plaintiff cannot testify to facts happening before the death of the defendant's intestate, unless the latter had testified in the case, or the administrator offers his own testimony.

ON EXCEPTIONS.

ASSUMPSIT on account for $121.75, for medicines furnished defendants' intestate.

The plaintiff offered her husband, Henry Jones, as a witness, to matters happening before the decease of the defendants' intestate. She objected to the competency of the witness, and the judge sustained the objection, neither of the defendants having testified. And the plaintiff alleged exceptions.

The jury returned a verdict for $5, which the plaintiff moved to be set aside upon the ground that it was against the weight of evidence.

Bradbury & Bradbury, for the plaintiff.

E. Eastman (and *I. T. Drew* with him), for the defendants.

APPLETON, C. J. The defendants are sued as administrators. The plaintiff is not a witness as to facts previous to the death of their intestate.

As the plaintiff is not a witness, so neither is her husband, he being in the same condition as his wife. He was, therefore, properly excluded.

By the general provisions of R. S. 1871, c. 82, § 82, "the husband or wife of either party may be a witness, when either is called to testify, with the consent of the other." By § 87 this provision

is not applicable to suits in which executors, administrators, or heirs are parties, except in special cases, among which the present is not included.

There is nothing to show that the plaintiff was legally or equitably entitled to receive a larger sum than that for which the verdict was rendered. *Exceptions and motion overruled.*

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

FRANCINA A. BIBBER *vs.* HENRY SIMPSON and others, administrators.

Medical services—what are.

The professional services of a medical clairvoyant are "medical services" within the meaning of R. S. c. 13, § 3.

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

ASSUMPSIT on account annexed, for $51 for services rendered the defendants' intestate, at his special request, by the plaintiff as a clairvoyant.

It appeared from the plaintiff's testimony that she professed to be a clairvoyant; that when asked to examine the patient she saw the disease, and felt as the patient did; that sittings or seances were of different durations, from one-quarter to one-half of an hour each; that she did not pretend to understand medicine or anatomy; that she was requested by the intestate to visit him and render him professional services, and did so as by the account; that she helped him, but he died from taking cold; acquainted him with the prices, and he agreed to pay them, but never did.

The presiding judge ordered a nonsuit, and the plaintiff alleged exceptions.

Bradbury & Bradbury, for the plaintiff.

E. Eastman, for the defendants.

APPLETON, C. J. The services rendered were medical in their character. True, the plaintiff does not call herself a physician, but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her most appropriate. Whether the plaintiff calls herself a medical clairvoyant, or a clairvoyant physician, or a clear-seeing physician, matters little; assuredly, such services as the plaintiff claims to have rendered, purport to be and are to be deemed medical, and are within the clear and obvious meaning of R. S. 1871, c. 13, § 3, which provides that "no person, except a physician or surgeon, who commenced prior to Feb. 16, 1831, or has received a medical degree at a public medical institution in the United States, or a license from the Maine Medical Association, shall recover any compensation for medical or surgical services, unless previous to such services he had obtained a certificate of good moral character from the municipal officers of the town where he then resided." The plaintiff has not brought herself within the provisions of this section, and cannot maintain this action.

Nonsuit confirmed.

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

DENNIS TOBIN, *prochein amy*, *vs.* PORTLAND, SACO & PORTSMOUTH RAILROAD COMPANY.

Common Carrier—liability of for defective platform.

A railroad corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition.

And under such circumstances the liability is not changed by the fact that their platform was erected and maintained by them within the limits of the highway.

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

CASE for damages occasioned by an alleged defect in a plank sidewalk or platform outside the defendants' station in Portland.

The plaintiff was a hackman carrying passengers to the cars, and, driving up to the side of the defendants' depot in the day-time, and stepping from his carriage to the platform, and turning his ankle, fell and sprained it, so that he was confined to the house a week, and afterwards was obliged to use crutches or a cane for thirteen weeks.

There was evidence tending to show that in the platform the edges of two planks had decayed making a cavity or hollow, described by the plaintiff's witnesses as four to four and one-half inches wide and six inches long, and from an inch and a half to two and a half inches deep, and in the middle of the length of the planks, and running to a point at the ends. And by the defendants' witnesses as being at the end of the planks, and beginning at a point extending some sixteen or eighteen inches to the end of the plank, where it had increased to the width of two to two and a half inches, and the depth of an inch or an inch and a half in the deepest part, the edges being gouged out in a circular manner.

That the plaintiff in stepping off his hack stepped into the cavity, which caused him to fall.

That the platform was wholly in the limits of the street; that it was made and often repaired by the defendants; that the city never made any repairs on it; that a servant of the defendants, engaged in the baggage department and accustomed to sweep the ladies' room and the platform in question, had noticed the alleged defect four or five months before the accident complained of.

That the defendants had been notified, long ago, that their platform was in the highway, and to remove it.

The judge was requested to instruct the jury, that even if the cavity in the platform occasioned the accident, without contributory negligence on the part of the plaintiff, still the defendants were not liable to the plaintiff; and that the defendants were not responsible for the condition of the platform.

He declined to give the instructions prayed for, but instructed the jury,—

If they find that defendants, being common carriers of passengers, built and maintained the platform immediately adjoining their station solely for their own convenience, and that of their passengers, and other persons having business at their station, and not for the convenience of citizens passing along Commercial street, without the permission or direction of the city authorities, knowing said platform to be within the limits of the highway, then the defendants are responsible to persons induced to pass over said platform on business necessarily and immediately connected with their station, for the exercise of ordinary care and prudence in the repair of said platform, and for any damages solely, directly, and evidently incurred by any defect growing out of the want of such care on defendants' part, such person so injured being in exercise of ordinary care at the time.

The jury returned a verdict for plaintiff, with damages assessed at $650, and the defendants alleged exceptions.

Bradbury & Bradbury, for the plaintiffs, cited *Veazie* v. *Dwinel*, 50 Maine, 489, and cases cited; *Norcross* v. *Thomes*, 51 Maine,

503; *Gerrish* v. *Brown*, 51 Maine, 256; *Portland* v. *Richardson*, 54 Maine, 46; *Monmouth* v. *Gardiner*, 35 Maine, 247; *Thorn* v. *Watson*, 47 Maine, 161; *Lowell* v. *Boston & Lowell Railroad Company*, 23 Pick. 24; *Sweeney* v. *Old Colony & Newport Railroad Company*, 10 Allen, 373; *Watson* v. *Lisbon Bridge Company*, 14 Maine, 201.

N. Webb, for the defendants.

The plaintiff was not a passenger of the defendants.

He did not receive his injury while proceeding to the defendants' station as a passenger, or for the purpose of taking passage on the defendants' road. The defendants owed to him no such duty as they would owe to a passenger.

The plaintiff himself was a common carrier of passengers, and was so employed at the time he was injured. The place where he suffered injury was the common and public street or highway, and the defendant voluntarily adopted it as the landing-place for his own business.

The responsibilty of a railroad company for the condition of the approaches to its stations is limited to its passengers. And even as to its passengers, the obligation is to simply allow no traps or snares in the ways which invite or seem to invite the passenger to go and come therein.

No such duty towards this plaintiff rested on the defendants,—especially not while he was independently pursuing his own business as a carrier of passengers. He was traveling on the public street, and it was his own duty to select a safe place for alighting from his carriage. The street and its sidewalk were as much his as the company's

If he had opened his hack door for his passenger in front of a dangerous and defective place in the highway, and the passenger stepping from the carriage had been injured in consequence, the defendants, under the rules of law governing the business of passenger carriage, would have been responsible. It would not matter

whether the defect was near a private residence, a public office, a store, a hotel, or a railway station.

The instructions to the jury made the motive of the company, in improving the condition of the sidewalk, a test of its liability.

Though the motive was the comfort, safety, and convenience of passengers, the municipal corporation and all citizens had the full benefit of the improvement. No person could be denied the use of it as part of the street.

The railroad company did not assume responsibility for the condition of the platform, merely by building it originally, nor by making occasional repairs on it.

The duty of the company was neither enlarged nor diminished by the construction of the platform, unless when put down, and as put down it was a nuisance. When laid, the platform was dedicated to the public use. If improperly or unsafely constructed, or placed so as to be a nuisance, they might have been liable generally, both to the State on indictment, and to any private person suffering special damage. But if properly and safely constructed, and the city permitted it to remain, and by such permission accepted the use and benefit of it, then the city became bound to attend to its condition, and were responsible to everybody for defects. Whether the walk was gravel, brick, or plank would make no difference. Private parties do not make themselves forever responsible for defects in highways in front of their premises, by once or often stopping holes or filling sloughs.

The fault of the city would be no excuse to the defendants from responsibility for injuries to its passengers, in consequence of a dangerous place in the sidewalk in the immediate front of its depot door. If the city authorities should refuse to repair such defects, the railroad company, for its own protection, would be compelled, itself, and at its own cost, either to repair the defect, or to guard it in some way so that it could not produce injury to its passengers. The performance of its duty so forced on it by the fault and negligence of the city and by stringency of its legal obligations to its pas-

sengers, if the instructions to the jury are to be sustained, at once enlarges and multiplies its duties, risks, and obligations. It forthwith becomes responsible, not only to its passengers, but to everybody using that portion of the highway.

The law begets no such consequences. It never says to any party "You shall do thus and so, under penalties, and if you do obey this command of the law, your condition shall be still worse."

The instruction requested and refused was correct, and should have been given. It recognized the relations between the parties, and correctly stated the law springing out of and application to those relations.

The instructions given disregarded the relations of the parties to each other, and gave to the jury as their guide a rule of law applicable to entirely different relations, and also laid down a delusive and mistaken test of liability, and imposed on the defendants a duty not imposed by law.

APPLETON, C. J. The plaintiff, a hackman, carrying passengers to the defendants' depot, was injured in stepping from his carriage into a cavity in the platform built and occupied by them. The jury have found that the plaintiff was without fault, and that the injury he sustained was occasioned solely by the neglect and want of ordinary care of the defendants in having their platform in an unsafe and dangerous condition.

The defendant corporation is bound to make the approaches over their own premises to their depot safe and convenient for passengers. They are bound to keep their platforms and landing-places safe and convenient for all who make use of their cars as a means of conveyance. *Knight* v. *P. S. & P. R. R. Co.*, 56 Maine, 505. They would be liable in damages for any injury occasioned by their neglect to any passenger who, on his part, was without fault. This is conceded by the able counsel for the defendants.

But the railroad corporation is bound not merely to keep these platforms safe for their passengers, but for all who have rightful

occasion to use them. This obligation, arising from their public character and the duties resulting from their acceptance of a charter from the State, exists as to all rightfully upon their premises.

The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of his business; but it is a business important to and for the convenience and profit of the defendants. The general principle is well settled, that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting and being in fault for the defect. *Barrell* v. *Black*, 56 Maine, 498; *Carleton* v. *Franconia Iron & Steel Company*, 99 Mass. 216.

It is objected that the defendants built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have trespassed upon the rights of the public. They have built the platform and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation, and they are responsible for its condition.

It may be that the city of Portland might be liable for a nuisance within the limits of their public highways, erected and maintained by the defendant corporation. But if so, the city would have the right of reclamation against those creating the nuisance. *Portland* v. *Richardson*, 54 Maine, 46. Much more, then, could the party injured maintain his action directly against the corporation causing the injury. *Exceptions overruled.*

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

STATE OF MAINE *vs.* GRAND TRUNK RAILWAY OF CANADA.

Way—for unreasonably obstructing by engines, indictment will lie.

By virtue of R. S. c. 131, § 13, an indictment will lie to recover the forfeiture provided for in R. S. c. 51, § 40, for "unreasonably and negligently obstructing by engines, tenders, and cars," "any way."

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

On an indictment alleging: "That the Grand Trunk Railway Company of Canada, a corporation established by law, and whose office and place of business is in Portland, in the county of Cumberland, on the first day of September, in the year of our Lord one thousand eight hundred and sixty-nine, at Falmouth, in said county of Cumberland, and on divers other days and times between that day and the day of finding this indictment, at said Falmouth, in a certain common highway leading from Falmouth post-office to the foreside road, so called, then and there used by all the good people of the said State, with their horses, teams, and carriages, to go and return, pass and repass at their free will and pleasure freely, without obstruction or hindrance, unlawfully did put and place locomotive engines and a great number of empty cars, to wit, five empty cars and railroad trains, and did then and there, and on said divers other days and times there, unlawfully and injuriously permit and suffer the said locomotive engines, empty cars, and railroad trains, respectively to be and remain in, upon, and across the common highway aforesaid, for a long space of time, to wit, for the space of one hour on each of said days and times, whereby the common highway, aforesaid, then and on said divers other days and times there, for and during all the times aforesaid on each of the said days, respectively, was unreasonably and negligently obstructed, straitened, and closed, so that the good people of the said State could not then, and on said divers

other days and times there, go and return, pass and repass, drive with their horses, teams, and carriages in, through, and along said highway, as they ought and were accustomed so to do, to the great damage and common nuisance of all the citizens of said State, going, returning, passing, and repassing, in, through, along, and upon said highway, 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.

Thereupon the defendants moved in arrest of judgment, because

1. There is no offense alleged in the indictment.

2. The indictment is bad in law, and no valid judgment or sentence can be rendered thereon.

3. An indictment will not lie for the acts and doings therein set forth.

4. The remedy, if any, is by an action of debt to recover the penalty prescribed by R. S. c. 51, § 40.

The presiding judge overruled the motion, and the defendants alleged exceptions.

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

Bradbury & Bradbury, for the defendants.

APPLETON, C. J. By R. S. 1857, c. 51, § 46, "no engine or train is to be run across a highway near the compact part of a town, at a greater speed than six miles an hour. Nor is any way to be unreasonably and negligently obstructed by engines, tenders, or cars. The corporation forfeits not exceeding one hundred dollars for every offense."

The defendant corporation has been indicted for and found guilty of unreasonably and negligently obstructing a certain highway in the town of Falmouth.

The main objection taken in arrest of judgment is that an indictment does not lie, and that the only mode of redress or punishment is by an action of debt for the penalty given by the statute.

The unreasonably and negligently obstructing a highway by

engines, tender, or cars is created an offense, and a forfeiture is prescribed for its commission. By R. S. 1857, c. 131, § 13, "All fines and forfeitures, imposed as a punishment for any offense, or for a violation or neglect of any statute duty, when no other mode is expressly provided, may be recovered by indictment; and when no other appropriation is expressly made by law, shall enure to the State." The defendant corporation is, therefore, by the terms of the statute liable to indictment as "no other mode is expressly provided." It is unnecessary to consider whether debt could or could not be maintained to recover the prescribed penalty.

Exceptions overruled.

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

JOSEPH SYMONDS *vs.* CHARLES F. BARNES.

Bankruptcy—discharge in—when not avoided.

In order to avoid a defendant's discharge under the United States bankrupt Act of 1867, on the ground that the schedule verified by oath did not contain a statement of his debt to the plaintiff, and that the latter had no notice of the proceedings in bankruptcy, and did not prove his claim, it must appear that the omission was fraudulent and the affidavit willfully false.

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

ASSUMPSIT on a promissory note, dated April 21, 1853, given by the defendant to the plaintiff.

The defendant pleaded his discharge in bankruptcy, dated June 5, 1869.

The plaintiff replied that he ought not to be barred, because, that at the time of filing his petition in bankruptcy the defendant's schedule of debts, annexed to his petition or any amendment thereto, did not contain a statement of the debt in controversy as re-

quired by § 11 of the United States bankrupt act; that the defendant, at the time of filing his petition, or at any time afterwards, did not give to the marshal of the district, as messenger, the name of the plaintiff as one of the defendant's creditors; that the marshal did not serve written or printed notice by mail or personally upon the plaintiff; that the plaintiff has never received notice of the pendency of the proceedings in bankruptcy set forth in the plea; and that he never proved his said debt against the estate of the defendant in bankruptcy,

To this replication there was a demurrer and joinder.

The judge sustained the demurrer and adjudged the replication bad; whereupon the plaintiff alleged exceptions.

Symonds & Libby, for the plaintiff.

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

APPLETON, C. J. By the bankrupt act of 1841 the discharge of a bankrupt might be impeached for fraud in any court in which it was pleaded in bar to a pending suit.

By the bankrupt act of 1867, § 34, it is enacted, "that a discharge duly granted under this act, shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy," unless his creditors should "see fit to contest the validity of said discharge on the ground that it was fraudulently obtained." This must be done in the court in which it was granted within two years, for some of the fraudulent acts of omission or commission particularly set forth in § 29. Such was the construction given by this court to the act in *Corey* v. *Ripley*, 57 Maine, 69, and upon examining the debates, when the bill was under discussion, it will be seen that the effect there given to the discharge, unless set aside and annulled by the federal court granting it, was in strict conformity with the intention of congress.

The defendant pleads a discharge. It is in due form of law. "An order of discharge will be sufficient evidence of bankruptcy and

of the validity of the proceedings thereon." Robson, Law of Bankruptcy, 458. The order proves itself. 1 Deacon on Bankruptcy, 800.

The plaintiff replies that his claim was omitted in the schedule of debts sworn to by the defendant. If the bankrupt "has willfully sworn falsely in his affidavit annexed to his . . . schedule or inventory," the court, granting the discharge, may, upon proceedings duly had before it, "set aside and annul the same."

But the plea contains no allegation of fraudulent conduct or willful false swearing. The court granting the discharge would not be authorized by the act "to set aside or annul the same." Much less would any other court.

Under the act of 1841 it was held, that a plaintiff could not avoid a discharge of his bankrupt debtor by merely showing that the defendant, in his petition in bankruptcy, omitted to insert the plaintiff's name, etc., to the sworn list of creditors, and that by reason of such omission, the plaintiff had no notice of the proceedings in bankruptcy, and could neither prove his claims against the defendant nor oppose his discharge. To avoid the discharge, by reason of such omission, it must be shown to be willful and fraudulent. *Burnside* v. *Brigham*, 8 Met. 75; *Mitchell* v. *Singletary*, 19 Ohio, 210.

The accidental omission of a creditor's name in the schedule of indebtedness is not made a ground for annulling and setting aside a discharge. The omission, to have that effect, must be fraudulent. The affidavit annexed to the schedule must be willfully false. Indeed, the act assumes that the schedule of debts may not be complete, for by § 11, the marshal is directed to serve "written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor." *Exceptions overruled.*

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

TAPLEY, J., concurred in the result.

MEHITABLE FOLSOM, administratrix, *vs.* MOSES CHAPMAN.

Evidence. Witness.

Under R. S. c. 82, § 87, the defendant cannot introduce the testimony of the plaintiff's intestate, as given at a previous trial of the action, and then put himself upon the stand as a witness to contradict it.

A paper containing the items of a portion of the account annexed to the writ, placed in the hands of a witness on the stand, called by the "legal representative of a deceased" party plaintiff for the sole purpose of refreshing the witness' memory, is not so "used as evidence," within the meaning of R. S. c. 82, § 87, clause 4, as to authorize "the other party to testify in relation thereto."

ON EXCEPTIONS.

ASSUMPSIT on account annexed, the last five items of which were for milk, delivered in quantities varying from sixty-two to one hundred and ten gallons per month, in the months of May, June, July, and August, 1864.

The action was tried at the October term, 1866, and again at the October term, 1867, at both of which trials the plaintiff's intestate was a witness and testified in his own behalf.

At the October term, 1871, the original plaintiff having deceased, and the present plaintiff having been duly appointed administratrix of his estate, appeared to prosecute. At the trial the plaintiff called Lewis Folsom and Annie R. Thompson, children of Ephraim Folsom, as witnesses, the latter of whom testified substantially that she was living at her father's in May, 1864, and had charge of the house in consequence of her mother's sickness; that defendant contracted for her father's milk at twenty cents per gallon; that she put it up for him and kept account of it, and he called for it mornings on his way to Portland; that the account (account shown to witness) is the one and is in her handwriting; and that the price was raised by mutual agreement the latter part of August to twenty-four cents.

During the cross-examination of the witness the counsel for the defendant took the memorandum of account, which had been shown

to the witness for the purpose of refreshing her memory, exhibited to the jury and passed it into her hands.

The plaintiff rested his case; and though requested by defendant, declined to put in the testimony of Ephraim Folsom given at a previous trial. Thereupon the defendant read it to the jury and then offered to read his own testimony given at the same time, but the presiding judge declined to receive it. The counsel for the defendant then offered him as a witness, and proposed to contradict by him the testimony of Ephraim Folsom which had been read by him to the jury; but the presiding judge ruled it inadmissible. Subsequently the defendant's counsel offered him as a witness to contradict the testimony of Annie R. Thompson, in regard to the paper or account kept by her and placed in her hands to refresh her memory, but the presiding judge excluded it. Whereupon the defendant alleged exceptions.

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

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

Appleton, C. J. At a former trial of this cause, Ephraim Folsom, the plaintiff's intestate, was a witness. The counsel for the defendant introduced his testimony as then given. Having introduced it, he offered the defendant as a witness to contradict it, but the court ruled his testimony inadmissible.

This was correct. The testimony of Folsom at a former trial was offered by the defendant. Having offered it, he did not thereby acquire the right to contradict it. It is sufficient, that the evidence was not in the form of a deposition. If it were, it may well be doubted whether the adverse party could, within R. S. 1871, c. 82, § 87, offer the deposition of his deceased opponent for the purpose of rendering his own testimony admissible when otherwise it would not be.

The defendant does not bring himself within any of the exceptions in § 87. *Kelton* v. *Hill*, 59 Maine.

The paper containing the charges of milk, the case specially

finds, was placed in the witness' hands to refresh her memory. It was not offered as evidence to the jury by the plaintiff's counsel, nor used as such. The evidence of the defendant was not, therefore, admissible under fourth case under § 87, which is as follows: "In an action by an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto." The mere handing a paper to refresh the memory of a witness is not using it "as evidence on either side" so as to authorize the other party to testify in relation thereto. The books or memoranda must be used as specific pieces of evidence, and must be submitted to the court or jury as and for evidence. *Exceptions overruled.*

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

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ERASTUS C. SIMPSON and another *vs.* CHARLES BIBBER, and WILLIAM L. FITCH, trustee.

Trustee process—practice—exceptions to ruling of judge of superior court charging trustee. Account—verbal assignment of valid.

By virtue of Public Laws of 1868, c. 151, § 7, and R. S. c. 86, § 79, when exceptions are taken to the ruling and decision of the judge of the superior court, as to the liability of the trustee to be charged, the whole case may be re-examined by the law court.

A verbal assignment, made *bona fide*, before service on the trustee, for a valuable and adequate consideration, will transfer such an interest in an account as may be protected in a trustee process.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court for this county, in charging the trustee for forty-seven dollars and eighty cents.

The action was assumpsit on account annexed. The action was tried by the judge, without the intervention of the jury, and he

rendered judgment for the plaintiff for the sum of sixty-eight dollars and twelve cents, debt or damage.

The trustee disclosed, substantially, that at the time of the service of the plaintiff's writ upon him, to wit, March 21, 1870, he was indebted to Charles & H. A. Bibber, $47.80, on account.

That after service of the writ, to wit, March 23, 1870, he received written notice from H. A. Bibber, that $44.56 of the account belonged to and was due to him alone; and that he held the sum of $48.70 to be paid as the court should direct.

By leave of the court, H. A. Bibber, claimant of the goods, effects, and credits in the hands of the alleged trustee, came and alleged that he was the owner of one-fourth part, in common and undivided, of the vessel sold by Charles and H. A. Bibber to the alleged trustee for $600; that there was due him at the time of the service of the trustee writ in this case, $150; that before the sale of the vessel he expended upon her, in repairs, $19.88, and $24.68 for money advanced for him, which Charles Bibber agreed to pay him, and before the service of the writ in this case had verbally assigned to him (the claimant) so much of the account due from the alleged trustee, and should pay that amount.

The allegations were, substantially, proved by the depositions of Charles Bibber and the claimant.

The judge of the superior court charged the trustee in the sum of $47.80, and the trustee alleged exceptions.

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

H. Orr, for the plaintiff, cited R. S. c. 86, § 30; *Fletcher* v. *Clark*, 29 Maine, 485; *Treat* v. *Gilmore*, 49 Maine, 34; *McCarthy* v. *Mansfield*, 56 Maine, 538; *Curtis* v. *Downs*, 56 Maine, 24; *Berry* v. *Johnson*, 53 Maine, 401; *McKeen* v. *Jordan*, 53 Maine, 144.

TAPLEY, J. In this case, Henry A. Bibber appeared in the superior court, as claimant of the funds in the hands of the trustee, and was duly made a party under the statute. Upon the disclosure and the proofs introduced by the claimant, the judge of the superior

court charged the trustee, and to this decree he excepted, and the court below allowed the exceptions.

The plaintiff now claims that the decree of the court below, being founded on matters of fact, must be conclusive upon the parties. That while the decisions of that court, in matters of law, are open to revision here, those of fact are not.

By the seventh section of the act establishing the superior court for the county of Cumberland, it is provided that "exceptions may be alleged as in the supreme judicial court," etc. Acts of 1868, c. 151, § 7.

When exceptions are taken to the ruling of a judge of the supreme judicial court, "the whole case may be reëxamined and determined by the law court, and remanded for further disclosures or other proceedings as the court thinks justice may require." R. S. c. 86, § 79.

We think it was the design of the legislature to give, in this class of cases, the same effect to exceptions from the superior court, as is given to those taken to the rulings of a judge of the supreme judicial court.

Looking at the disclosure, and the proofs adduced, it would seem that a verbal assignment of the claim in dispute had been made to the claimant before the service was made upon the trustee, and that due notice was given the trustee of this fact before disclosure, and that this fact was disclosed by the trustee. There is no conflict of evidence in the case, and nothing to contradict the testimony of the principal defendant and the claimant upon this matter. In the absence of any evidence in conflict with it, and not even a suggestion of counsel now that it is untrue, we think the proof sufficient to establish the claim of the claimant.

The ground upon which the trustee was charged in the court below does not appear. The particular point now argued by counsel is the only intimation we have of what it might have been, and that is, that the assignment, being a verbal one, did not operate to transfer an interest which could be protected in a proceeding of this kind.

We hold that a *bona fide* verbal assignment, made upon valuable and adequate consideration, will transfer such an interest in a chose in action as may be protected to the assignee in this kind of action.

It would be clearly inequitable to allow the assignor to disregard his contract, and we can perceive no reason why a creditor should not also be bound by an assignment thus made. Courts have in various ways recognized the force of unwritten assignments, and always have held that such a transfer carries with it the right in the purchaser to use the name of the assignor in prosecuting such choses in action to judgment and execution. The statutes recognize this class of transfers by requiring the assignee in such actions to indorse his name and place of residence upon the back of the writ, and in making him liable for costs. R. S. c. 82, § 115.

We perceive no reason why greater force and efficiency should be attached to an assignment which has been reduced to writing, than one which was made and exists without this species of evidence of its existence. It is the assignment which transfers the interest in the claim, and not the means the parties have used or adopted to preserve evidence that it has been made. The contract is one thing and the evidence of it another. Written evidence may be more reliable than oral evidence delivered by witnesses; but the assignment, when once established, is equally effectual whether reduced to writing or not, unless some positive provision of law requires otherwise.

We think the trustee in this case should have been charged for the sum of three dollars and twenty-four cents ($3.24), less his costs, and the entry, therefore, in the case will be,

Trustee charged for the sum of three dollars and twenty-four cents, less his costs.

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

CEPHAS H. DOUGLASS *vs.* LUCINDA LIBBEY.

Real action.

In a real action, under the general issue, the defendant in possession of demanded premises, cannot be disturbed until the plaintiff show a better title.

Thus, the plaintiff put in evidence a copy of his writ against one Charles Moulton, with the return and record thereof of the attachment of the latter's real estate, dated Aug. 17, 1867, a copy of the judgment recovered Feb. 4, 1868, and of a seasonable extent duly recorded of the execution on the demanded premises. The defendant proved his possession at the time, and ever since the plaintiff's attachment, and offered in evidence a mortgage of the premises to herself, from C. Moulton, dated July 20, 1867, and recorded Aug. 19, 1867, and a deed from C. Moulton to J. Moulton, dated and recorded July 23, 1867, with a quitclaim back, dated Oct. 27, 1868. *Held*, that the defendant had the better title.

ON REPORT.

WRIT OF ENTRY dated Oct. 4, 1869. Plea, general issue.

The plaintiff read in evidence an attested copy of a writ in his favor, against Charles H. Moulton, dated Aug. 15, 1867, with the officer's return thereon and record thereof of an attachment of the said Moulton's real estate, dated Aug. 17, 1867; of the judgment, dated Feb. 4, 1868; of the execution, dated Feb. 17, 1868; and of the officer's return thereon and record thereof of the levy of the execution on said premises, dated March, 2, 1868.

It appeared that the defendant was in possession at the time of the plaintiff's attachment and had continued in possession ever since.

The defendant offered in evidence a deed of mortgage of the demanded premises, from Charles Moulton to herself, dated July 20, 1867, and recorded Aug. 19, 1867; an attested copy of a deed of warranty of the same premises, from Charles H. Moulton to James L. Moulton, dated July 23, 1867, and recorded same day; and an attested copy of a quitclaim deed, dated Oct. 27, 1868, from James L. Moulton to Charles H. Moulton.

The court to enter such judgment as the law and evidence required.

J. & E. M. Rand & A. P. Moore, for the plaintiff.

A. A. Strout, for the defendant.

APPLETON, C. J. This is a writ of entry. The plaintiff claims title by virtue of a levy made on the demanded premises, as the estate of Charles H. Moulton. The attachment in the suit was made and recorded 17th August, 1867. The levy bears date March 2, 1868.

The defendant was in possession at the date of the alleged attachment in the suit against Moulton, and has so remained to the present time. She further justifies her possession under a mortgage from said Charles H. Moulton, dated 20th July, 1867, but not recorded until 19th August, 1867

The plaintiff, before he can disturb the possession of the defendant, must show a better title.

The plaintiff has not produced any deed from the tenant nor from any one else, of the premises to Charles H. Moulton. Nor has he offered the record of any, or shown that Moulton had ever been in possession of the same prior to the attachment, or that at that time he had any attachable interest therein.

If, previously to the attachment, Charles H. Moulton had acquired any title to the demanded premises (of which there is no proof), then the evidence offered shows that previous thereto he had conveyed his interest in the same to James L. Moulton, by deed of warranty, bearing date, July 23, 1867, and recorded the same day.

The levy was made March 2, 1868. But from the evidence received and from that offered, it is manifest that at the time of the attachment and of the levy, the judgment debtor had neither possession nor title of record nor in fact. So far as is shown by the case, the levy might as well have been made upon the estate of any other man in the county, and it would have been equally as effective to convey a title as the one which was made.

Further, long prior to the date of the levy the defendant's mortgage had been duly recorded, so that it took precedence of the levy, there having been no valid attachment of the premises.

There are other questions raised, but in the present aspect of the case it is not necessary to consider them.

Judgment for defendant.

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

MUNROE A. BLANCHARD *vs.* FIRST ASSOCIATION OF SPIRITUALISTS OF PORTLAND.

Corporation — a member of cannot make himself a creditor of, without authority.

A member of a corporation, who is not its financial officer, cannot, without authority, make himself its creditor by the voluntary payment of its debts.

The plaintiff, a member thereof, sued the corporation known as the "First Association of Spiritualists," for a balance of an account wherein was charged various sums paid for rent, carpets, furniture, gas, and oil bills for their hall of worship, and credited sums subscribed and contributed by different members and received from other persons for the use of the hall. The by-laws provided for the election of a treasurer, who thereby had charge of the funds, collections, and debts, and was required to pay the bills of the association, ordered by "the government." The plaintiff, with others, having been appointed a "committee on the hall," without any specific duties assigned, or powers conferred, purchased the carpets, etc., for the association, and on its credit, considering themselves personally bound to pay therefor, provided the association did not. *Held*, (1) That the plaintiff had no authority thus to make himself creditor of the association; and (2) That the bare vote of the association to accept the report of the committee could not be construed such a ratification as would authorize one of the committee to maintain the suit.

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

ASSUMPSIT on an account annexed, wherein are charged various items, from Nov. 30, 1868, to Jan. 1, 1871, comprising bills for rent, furniture, carpets, gas, and fuel, and credited various sub-

scriptions and contributions from several of the members of the association, and sums of money for use of the hall by several persons other than members, leaving a balance due of $300.30.

It appeared that the plaintiff and six others were appointed "a committee on opening the new hall;" that at the time of the appointment of the committee there was no furniture, carpets, settees, or heating apparatus in the hall; that the committee purchased them and submitted the report to the officers of the association, who constituted the "government;" that these purchases were kept separate from the treasurer's account; that the purchases were made on the credit of the association; if the association did not pay, the committee expected to, and became responsible; the directors made the arrangement that the committee were to own the property purchased, until paid for by the association; and the bills, in some instances, were made to the association.

The plaintiff testified, substantially, that the account, as sued, was presented to the whole committee, who examined it and said it was satisfactory; that it was afterwards submitted to the association at a meeting thereof; that he did not know as he was one of the committee, as such, but that his connection with the committee, so far as the bill in suit was concerned, was as treasurer of the committee.

That the association was unable to furnish the hall, and it was agreed that contributions and advances should be made, and that the money so raised should be held first to pay the rent, and next any expenses that might grow out of furnishing the hall; that until the association was able to pay for it, all the property upon which advances were made should be held and owned by the parties who made the advances; and that the plaintiff made all the disbursements stated in the bill.

On cross-examination, he testified that he sold the settees after they were taken from the hall.

The following extracts from the constitution of the association were put in.

"ART. 6. The officers of this association shall consist of a presi-

dent, vice-president, corresponding secretary, recording secretary, treasurer, and a committee of four, all of whom shall constitute a board of government for the association, and shall be chosen by ballot, if it is requested by any member. Vacancies in the government shall be filled at the next business meeting of the association.

"ART. 10. The treasurer shall have charge of the property and funds of the association, and shall have charge of the collection of subscriptions, and of any other debts due the corporation, and shall pay such bills of the association as may be ordered by the government, and shall make a full report at the annual meetings, and exhibit his accounts when required by the government of the association.

"He shall give a bond with sureties when required by the government."

At a regular meeting of the association held Jan. 9, 1870, "the corresponding secretary, treasurer, and hall committee made their reports, which reports were accepted."

N. Webb, for the plaintiff.

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

BARROWS, J. The case must be decided according to the legal rights of the parties, and not upon the purely equitable considerations, which might perhaps be expected to influence those who are associated for religious improvement, in their dealings with each other.

The plaintiff brings suit against the corporation, of which he is a member, to recover the balance of an account, in which he charges the defendants with various sums paid for rent, carpets, furniture, gas, and coal bills, for the hall occupied by them as a place of meeting, and credits them with sums subscribed and contributed by different members, and received from other parties for the use of the hall, and for a portion of the furniture which he seems to have sold.

Being a member of the corporation, he is to be deemed cognizant of its by-laws, and bound by them, where they are not inconsistent with the laws of the State, unless he shows some action of the corporation by which he is exempted from their operation. The by-laws provide for the election of a treasurer, who is to have charge of the property and funds of the association, and of the collection of subscriptions; and it is made his duty to pay the bills under the direction of "the government." The office was duly filled by the election of N. M. Woodman. The plaintiff was not the treasurer. He was elected a member of the "committee on the hall." This committee had no specific duties assigned to, or powers conferred on them, by any action of the corporation. The plaintiff says he does not think he was ever a member of this committee, but that he acted as its treasurer. What shadow of authority, then, had he to make himself the creditor of the corporation, by the payment of its debts?

The committee seem to have assumed to make purchases of carpets, furniture, etc., for the association and on its credit. Apparently, not finding the credit of the corporation very good, they pledged their own, or, at all events, considered themselves bound, and the plaintiff has paid these bills. But in all this he and the other members of the committee were simply volunteers. They do not appear to have been authorized by any vote of the corporation to contract in its behalf, or to have been requested to become its sureties, or to collect or apply its funds to the payment of its debts. According to the by-laws this was the duty of the treasurer. No member of the committee could thus make himself the creditor of the corporation.

Nor can the bare vote of the corporation to accept the report of the committee, be construed into such a ratification as would authorize one of its members to maintain such a suit as this. The plaintiff testifies that by an arrangement with the directors the articles purchased were to be, and remain, the property of those who advanced the money for them until the association was able to pay for them. Another member of the committee, called as a wit-

ness by the plaintiff, declares that they did not become creditors by buying these articles and selling them to the corporation. The plaintiff's right to dispose of the property seems never to have been questioned. He himself asserts that right by selling a part and appropriating the proceeds to the partial payment of his claim since the report of the committee was presented.

The letter of Joseph B. Hall was objected to and is not admissible.

The ruling in the court below was correct.

Exceptions overruled.

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

CUMBERLAND & OXFORD CANAL CORPORATION *vs.* GEORGE F. HITCHINGS.

Statute—construction of.

Section 7,* c. 74, of the Special Laws of 1821, did not take away from the plaintiffs the common-law remedy of trespass *quare clausum.*

ON EXCEPTIONS to the ruling of *Lane*, J., of the superior court for this county, at the February term, 1872.

TRESPASS for that the defendant, at said Portland, on the twenty-first day of August, A. D. 1867, and on divers other days before

**Special Laws of* 1821, c. 74, § 7. If any person or persons shall willfully, maliciously, or contrary to law, take up, remove, break down, dig under, or otherwise injure any part of said canal, or any work connected with or appertaining to the same or any part therof, such person, for every such offense, shall forfeit and pay to such corporation a sum not less than fifty dollars, nor more than five thousand dollars. And such offender shall further be liable to indictment for such trespass, and on conviction thereof, shall be sentenced to pay a fine to the use of the State, not more than one hundred dollars nor less than twenty-five dollars.

said time, and between said times and the day of the purchase of this writ, with force and arms, broke and entered the plaintiffs' close, at a part thereof situated in said Portland, to wit, at a place near Vaughan's bridge, so called, and then and there did fill with dirt, gravel, stones, and other material, the whole width of the canal, as legally existing and constructed between the exterior banks thereof, and for a distance of seventy-five yards wide and two hundred yards long between said canal banks, so as to completely and absolutely exclude all water, boats, and other uses of said canal, within the limits and for the distance aforesaid, and absolutely destroy, for the present time, said canal within the limits and for the distance aforesaid, and utterly defeat, hinder, and prevent the use of the same as aforesaid, and prevent and hinder the construction of a lock by the plaintiffs, for connecting said canal at its terminal point, in said Portland, to and with the navigation of the harbor of said Portland below said Vaughan's bridge, as was and still is contemplated by the plaintiffs.

Also for that the defendant, at said Portland, on the twenty-first day of August, A. D. 1867, and on divers other days before said time and between said times and the day of the purchase of this writ, with force and arms broke and entered the plaintiffs' close, at a part thereof situated in said Portland, to wit, at a place near Vaughan's bridge, so called, and then and there did fill with dirt, gravel, and stones, and other material, the whole width of said canal, as legally existing and constructed between the exterior banks thereof, and for a distance of seventy-five yards wide and two hundred yards long between said canal banks, so as to completely and absolutely exclude all water, boats, and other uses of said canal, within the limits and for the distance aforesaid, and kept and continued said dirt, gravel, and stones, and other material, so placed in said canal, as aforesaid, without the leave or license, against the will of the plaintiffs for a long space of time, to wit, and from said first day of August, A. D. 1867, hitherto, to wit, until the date of this writ, and thereby and therewith, during all the time aforesaid, wholly encumbered the said close, and prevent-

ed and deprived the plaintiffs from having the use thereof, as they otherwise would have had, at said point of said canal near said Vaughan's bridge as aforesaid.

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

Mattocks & Fox, for the plaintiffs.

Symonds & Libby, for the defendant,

Contended that the remedy provided in § 7 of the charter is exclusive and not cumulative, and cited *Bath* v. *Miller*, 51 Maine, 347; *Knowlton* v. *Ackley*, 8 Cush. 97; Potter's Dwarris on Stat. (1871), 275, note 5; *Bassett* v. *Carleton*, 32 Maine, 553.

An invasion of the statute right is the gravamen of the complaint, a right not existing at common law, but created by the charter which provides the remedy.

The remedies in § 7 are ample. If not, six sections, §§ 15–20 in Special Laws of 1830, c. 86, will supply any deficiency. The care with which the legislature sought to cover every possible contingency is a sure indication that the remedies herein provided were intended to be exclusive.

In §§ 14, 16, and 18, the common-law remedy is expressly retained, while it is otherwise in the original charter.

APPLETON, C. J. This is an action of trespass *quare clausum*.

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

By § 7, "if any person or persons shall willfully, maliciously, or contrary to law," commit certain trespasses therein specified, "such person or persons shall forfeit and pay" a sum not less than fifty dollars, nor more than five thousand dollars, and be further liable to indictment for such trespass or trespasses, etc.

It is insisted that the only remedy for the plaintiffs is under this section, and that the action for trespass *quare clausum* is not maintainable.

But such, we think, cannot have been the intention of the legislature. The penalty is imposed for certain trespasses committed "willfully, maliciously, and contrary to law." The action for such penalty must be commenced "within one year after the offense was committed." R. S. 1871, c. 81, § 90.

This is an action for a trespass in breaking and entering the plaintiffs' close and committing certain trespasses therein. There is a manifest difference between a mere trespass and a trespass committed "willfully, maliciously, and contrary to law." A trespass may be committed without malice and under color of right. According to the construction of the statute, by the defendant's counsel, the plaintiff can only recover for trespasses committed "willfully, maliciously, or contrary to law" and are without remedy for all other trespasses.

Statutes are not to be construed as taking away a common-law right, unless the intention is manifest. Nothing here indicates such an intention. The seventh section was for the increased protection of the plaintiffs' rights for their diminution or destruction. Nothing indicates that the legislature intended to deprive the plaintiffs of all remedy for trespasses committed on their premises except for those which are willful and malicious and contrary to law, and that all right of action should be barred by a limitation of one year.

Demurrer overruled.

Declaration good.

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

ADONIRAM J. DEARBORN *vs.* MARY A. MORSE.

Covenant. Deed—additional consideration provable by parol. Evidence.

In the trial of an action of covenant broken by the grantee against the grantor of real estate, to recover the amount of an outstanding tax which the former was compelled to pay to prevent a sale of the premises, it is competent for the grantor to prove that prior to and at the time of the conveyance, the grantee verbally agreed to pay the tax.

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

COVENANT broken to recover the amount which was paid by the plaintiff to discharge the taxes for 1868, assessed on land conveyed by the defendant to the plaintiff by her deed of warranty, dated April 7, 1868.

It appeared that the defendant refused to pay the tax on demand by the tax-gatherer, and that the plaintiff was compelled to pay the same in order to prevent the premises from being sold therefor.

The defendant offered to prove that prior to and at the time of the execution of the deed of the premises by the defendant, the plaintiff verbally agreed to pay the taxes in question; but the testimony was excluded by the presiding justice, who ruled, as matter of law, that the plaintiff was entitled to recover the amount under the covenants of the defendant's deed. And thereupon the plaintiff alleged exceptions.

M. P. Frank, for the plaintiff.

S. L. Carleton, for the defendant.

APPLETON, C. J. The defendant, by deed of warranty, conveyed to the plaintiff a tract of land incumbered by an outstanding tax. The plaintiff, being compelled to pay the same for his own protection, has brought an action on the covenants of warranty in the deed to him.

The defendant offered to show that before and at the time of the making the deed, the plaintiff agreed to pay the taxes in question.

The offer was, in effect, to prove an additional consideration to that expressed in the deed. An agreement made by the grantee, at the time of the sale and conveyance of land, to pay a sum additional to that expressed in the deed is valid and binding. *Tyler* v. *Carleton*, 7 Greenl. 175; *Nickerson* v. *Saunders*, 36 Maine, 413. So where the purchaser of real estate, at the time of the conveyance, promised the seller to pay the taxes assessed thereon for the current year, and on being notified of the assessment, neglected to pay the same, and the seller, thereupon, himself paid the taxes; the latter was held to be entitled to recover the amount so paid without a previous demand. *Brackett* v. *Evans*, 1 Cush. 79. As is well said by Metcalf, J., "a party who receives a grant of land, on his promise to pay for it, cannot avoid payment by showing that his promise was not in writing." It matters not whether this promise relates to a part or the whole of the consideration.

The amount of the taxes were a part of the consideration of the conveyance remaining in the plaintiff's hands to be specifically appropriated. They were so appropriated. Whether the defendant had paid the taxes with the money therefor received from the plaintiff, or the plaintiff paid them in pursuance of his contract, can make no difference. In either case, they were a part of the price of the land conveyed, and were, in fact, paid by the defendant.

The evidence offered should have been received.

Exceptions sustained.

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

ROBERT POTTER *vs.* THOMAS LUCAS.

Amendment.

In an action of covenant broken upon the covenants in a lease for not keeping "in proper repair the outside of the" house described in the lease, but suffering "the blinds of said house to remain in a shattered state," the plaintiff introduced evidence, without objection, relating to the damage to the window-glass, and the defendant showed that the glass was put in proper state of repair soon after the execution of the lease. When the plaintiff had nearly concluded his closing argument, the presiding justice allowed him to amend by adding after the word "state" the words, "by reason whereof the window-glass was broken and destroyed." *Held*, (1) That the amendment introduced no new cause of action, but simply a specification under the general allegation of want of repair of the outside; and (2) That if the defendant had objected at the time the evidence was offered, the amendment might then have been made.

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

COVENANT BROKEN on the covenants of a lease of the "Portland House," from the defendant to the plaintiff, for the term of three years from May 6, 1865.

The declaration alleged, among other things,

"That the said Lucas did not keep the outside of said Portland House in proper repair during the term aforesaid, and while the plaintiff was so possessed as aforesaid, but suffered the same to remain unpainted, the blinds of said house to remain in a shattered and disordered state," etc.

Among other testimony in regard to matters which the defendant, in his closing argument, claimed were not covered by the declaration, certain testimony, introduced by the plaintiff without objection, tended to show that glass in the windows of the leased house had been broken, from time to time during the whole term, by the blinds, by reason of their being in a shattered state; and testimony was introduced by the defendant showing that soon after the lease was made, the window-glass was put in a proper state of repair.

After the close of the testimony in the case, and the final argument of defendant, and when the plaintiff had nearly finished his closing argument, he moved for leave to amend his writ by inserting after the words, "the blinds of said house to remain in a shattered and disordered state," the words, "by reason of which the window-glass was broken and destroyed in said house;" which amendment, although objected to by the defendant, was allowed by the judge.

The jury returned a verdict for plaintiff for the sum of three hundred seventy-four dollars and thirty-one cents, and, in answer to the question, "If the jury finds that the blinds remained in a shattered and disordered state, what damage, if any, does the jury find that plaintiff suffered thereby by the breaking of the windows?" found specially that the amount of said damage was forty-five dollars and fifty cents; and thereupon the defendant alleged exceptions.

Howard & Cleaves, for the plaintiff.

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

KENT, J. The declaration contained the general allegation that the defendant "did not keep the outside" of the house "in proper repair during the term aforesaid, and while the plaintiff was so possessed as aforesaid, but suffered the same to remain unpainted, and the blinds of said house to remain in a shattered and disordered state," etc. The glass in the windows was part of the outside of the house. The case went to trial without any answer to the general replication. No specifications of the particular damage was called for. Evidence was introduced by the plaintiff as to the damage to glass, without objection, and some bearing on the condition of the glass in the windows by the defendant.

These facts seem to answer the objection that the amendment was made at so late a stage of the trial. If an objection had been made when the evidence was offered, the amendment might have been then moved. The amendment does not introduce any new

cause of action; but it is simply a specification of one item covered by the general allegation of want of repair on the outside.

Exceptions overruled.

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

ISAIAH P. SMITH and another *vs.* HENRY SMITH.
Same *vs.* RUTH SMITH and others.

Advancement—what is.

In 1833, a father, by deed of warranty, conveyed to his son certain land of the full value of five hundred dollars, receiving back a writing therein acknowledging the receipt from his father of five hundred dollars as the full share of all his father's estate, and relinquishing all his right, title, and interest in and under his father's estate at the latter's decease, which he should otherwise have had. The father in April and the son in the following November died intestate. In a real action, brought by the children and sole heirs of the son, to recover their distributive share of their grandfather's estate, *Held*, that the conveyance was an advancement in full to the son, and that the grandchildren were barred.

ON REPORT.

WRIT OF ENTRY wherein the plaintiffs demand one-sixth part of the premises referred to in the writ.

The premises were owned by one Isaiah Smith at the time of his death, intestate, April 14, 1846. The defendant is one of six children left by said Isaiah, and was in possession of the premises, claiming title to so much as he had not disclaimed.

Perley D. Smith, another of the children of Isaiah, died intestate in November, 1846, leaving the plaintiffs as his sole heirs, who were entitled to recover so much of the premises as had been disclaimed subject to betterments, unless the following facts, the proof of which was offered by the defendants, are admissible and constitute a good defense.

That on June 19, 1833, Isaiah Smith, the father of Perley D. Smith, conveyed, by deed of warranty to Perley, certain real estate therein described; that at the time of the conveyance, the consideration of which was seven hundred dollars, the parties verbally agreed that the full share of Perley D. Smith in the estate of his father, Isaiah, was and would be five hundred dollars; that Perley should receive the land named in the deed as an advancement in full of the right, title, and interest of Perley in the estate of his father at the time of the latter's decease; that the land was worth seven hundred dollars; that it was verbally agreed between the parties at the time of the execution and delivery of the deed, that Perley should pay his father the sum of two hundred dollars, and in consideration of the balance of five hundred dollars, Perley should execute a relinquishment of all claim to the estate of his father, he having received his full share thereof; that in furtherance of this agreement, on Dec. 20, 1833, Perley executed and delivered to his father a writing of the following tenor: "Know all men by these presents, that I, Perley D. Smith, have received of my father, Isaiah Smith, five hundred dollars, being my full share of all his estate,—meaning and intending to relinquish all my right, title, and interest in and under his estate at his decease, which I should otherwise have had;" that the sum of five hundred dollars was the full value of the share Perley would have received out of his father's estate, had no advancement been made to him, and was the full share of Perley in his father's estate at the time of his father's decease; that the said sum was knowingly and with the full consent of Perley received by him as an advancement out of his father's estate, and intended by him and his father to be in full of his share in his father's estate; and that the five hundred dollars mentioned in the foregoing paper were real estate conveyed as aforesaid.

If the testimony offered was admissible and would constitute a defense, the case to stand for trial.

Davis & Drummond, for the plaintiffs.

A. A. Strout, for the defendants, cited Public Laws of 1821, c. 51, § 40; *Bulkeley* v. *Noble*, 2 Pick. 337; *Hall* v. *Davis*, 3 Pick. 450; *Hartwell* v. *Rice*, 1 Gray, 587; *Quarles* v. *Quarles*, 4 Mass. 679; *Keney* v. *Tucker*, 8 Mass. 143.

APPLETON, C. J. The facts offered to be proved would constitute a perfect defense. *Quarles* v. *Quarles*, 4 Mass. 680. The ancestor of the demandants, in 1833, received his "full share" of all his father's estate, and acknowledged the same in writing, and relinquished all his "right, title, and interest in and under his estate at his decease, which he (I) should otherwise have had." The sum thus received was his share of his father's estate, both at the date of its reception as well as at that of his death. He had received all he could in any way be entitled legally or equitably to receive from the paternal estate.

By stat. 1821, c. 51, § 40, advancements may be made of real or personal estate, and they may be proved by the acknowledgment, in writing, of the child to whom made, as in the case under consideration.

The contract was one the parties were competent to make, and when made it was as binding on them as any other. *Nesmith* v. *Dinsmoor*, 17 N. H. 515. By it the ancestor of the demandants received his full share of all his father's estate. About thirty-eight years have passed since the advance was made and was received in full of the recipient's share. Twenty-five years have elapsed since the death of the demandants' father. The estates of the father and grandfather of the demandants have long ago been settled. The parties interested and their heirs have acquiesced in this arrangement during the long period which has elapsed since it was made. No legal or equitable reason is perceived for disturbing it.

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

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

George M. Melcher *vs.* Ocean Insurance Company.

Marine policy—construction of. Latent ambiguity.

Where the property insured in a policy of marine insurance was described as "Sixty-five hundred and fifty dollars on charter, twenty-six hundred and fifty dollars on primage, and also fifteen hundred dollars on property on board ship 'Charles S. Pennell,' at and from New York to San Francisco," *Held*, that the phrase "at and from New York to San Francisco," is not descriptive of any portion of the property insured, but simply of the voyage during which the risk was to continue.

And where it appeared that the vessel was sailing under two charters, either of which answered the call in the policy, parol evidence is admissible to prove which of the charters was insured.

Assumpsit on a policy of marine insurance.

The plaintiff, owner of one-eighth part of the ship "Chas. S. Pennell," entered into a charter-party to make a voyage from New York to San Francisco; thence homeward via the Chincha Islands and Europe, whereby he agreed to carry a cargo of guano from the Chinchas to Rotterdam or Hamburg, at the rate of four pounds sterling per ton. The vessel would carry seventeen hundred and fifty tons of guano, the value of the charter at the time it was effected being worth in currency about fifty-six thousand dollars.

After effecting this charter, the plaintiff obtained a cargo of coal and general merchandise for the outward voyage to San Francisco, the freight upon which amounted to twenty-six hundred and fifty dollars.

On March 20, 1864, the plaintiff wrote his agent as follows:

"The ship 'C. S. Pennell' is now nearly loaded, and will sail in all of this week. . . . I want you to insure on my part of the ship as follows: . . .

Charter to San Francisco,	$26,500, ⅛	$3,300
Primage on same,		1,325

Homeward charter from Chinchas, insure out, say 1,750 tons, at £4, £7,000 at current rates of exchange, $52,400, my ⅛	6,550
Primage on same,	2,650
Chronometers, Dent. 1,883, Negos 1,261.	500
And on our effects, clothing, etc.	1,000

On March 23, 1864, the plaintiff's agent effected, in the Washington Insurance Company, an insurance upon the San Francisco charter of $3,300 on freight and primage from New York to San Francisco; and in the defendant company a marine risk of $3,000 on the plaintiff's interest in the ship, at and from New York, etc. As the agent was about leaving the defendant company's office, the president of the defendant company asked the plaintiff's agent if he could give him any other insurance, whereupon the agent handed to the president plaintiff's letter above mentioned. After some discussion in relation to the guano charter, upon which insurance was sought, and the agent had explained to the president that for the reason that it would be cheaper to effect insurance, and especially a war risk, from San Francisco, and thence to Europe after the arrival of the vessel at San Francisco, the agent applied for insurance upon the guano charter for so much of the round voyage as lay between New York and San Francisco. This the president of the company understood. In accordance with these facts the defendant company issued a policy to the plaintiff, the material part of which was of the following tenor:

"This policy of insurance witnesseth, that the president and directors of the Ocean Insurance Company, do by these presents cause George M. Melcher, for account of whom it concerns, loss if any, payable to ———, to be insured, lost or not lost, $6,500 on charter, $2,650 on primage, and $1500 on property on board ship 'Charles S. Pennell,' at and from New York to San Francisco."

When the policy was delivered to the agent of the plaintiff, he inquired of the secretary whether he had not left out the word "guano" before the word "charter;" to which the secretary replied, "that don't make any difference, the insurance you effected in the

other office was freight, this is charter." Thereupon the agent asked the secretary if he had not rather have charter than freight; he replied, "No, if I get freight and the vessel is wrecked, the freight helps forward itself, whereas charter is a total loss."

April 1, 1864, plaintiff sailed for San Francisco. On May 25th following, his vessel was stranded upon a coral reef, not known to the plaintiff, and not laid down on any chart, the same being in longitude 38° 42′ west, latitude 17° 18′ south, or about twenty miles off the Itacolomi bank on the coast of Brazil. Soon after the vessel was taken to Rio de Janeiro, where, after due preliminary proceedings, she was sold at auction.

All the parol evidence, tending to prove that the insurance was upon the guano, was seasonably objected to by the defendants, but admitted by the presiding judge.

The defendant introduced the plaintiff's agent's application, dated March 23, 1864, of the following tenor, which was written by the secretary of the company and signed by the agent:

"I wish, for Geo. M. Melcher, $6,550 on charter, and $2,650 on primage, and $1,500 on property on board ship 'Chas. S. Pennell,' at and from New York to San Francisco, including war risk."

The case was withdrawn from the jury and reported to the full court, for their opinion upon the admissibility of so much of the evidence as was objected to by the defendants; and after the determination of this question the cause to stand for trial, if either party so desired.

A. A. Strout, for the plaintiff.

I. The words "at and from New York to San Francisco," have no reference to the charter insured, but simply describe the voyage for which the charter was insured. There is nothing in the policy that renders it imperative to give such a construction to this language, as would defeat the intention of the parties. The punctuation confirms the position.

If the words may be applied to both charter and voyage, they

would constitute such a latent ambiguity as would admit explanatory parol testimony.

II. If it be doubtful what construction should be given, then parol evidence of all facts connected with the issuing of the policy is admissible, that the court may be placed in the position of the parties, and thus be enabled to understand the intention of the parties. 1 Greenl. on Ev. (12th ed.), §§ 286, 287; *Lancey* v. *Phœnix Ins. Co.*, 56 Maine, 562.

When words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in contemplation by the parties, parol evidence is admissible to show the circumstances under which the contract was made, and the subject-matter to which the parties referred. *Peisch* v. *Dixon*, 1 Mason, 11.

III. The evidence objected to is offered simply to explain what the subject-matter of the insurance was, and not to vary or enlarge the contract. 1 Greenl. on Ev., §§ 287, 288, 290; 1 Pars. on Mar. Ins. 112, 113 *et seq.*; *Foster* v. *U. S. Ins. Co.*, 11 Mass. 392; *Bradley* v. *Steam P. Co.*, 13 Peters, 98; *Salmon Falls* v. *Goddard*, 14 How. 446; *Hart* v. *Shaw*, 1 Clifford, C. C. Rep. 358.

IV. The insuring of a charter-party for a part of the round voyage is lawful, and an ordinary transaction. 1 Pars. on Mar. Ins., 169, 170, and cases there cited.

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

The charter described in the writ and offered in evidence was not covered by the policy, and all the plaintiff's testimony, except the policy, is inadmissible.

The face of the policy alone, independent of other testimony, does not cover the charter-party from Chinchas to Hamburg or Rotterdam.

There is no latent ambiguity warranting the admission of parol testimony in explanation.

The policy insures for a voyage "at and from New York to San

Francisco," a charter for that voyage. The words describe the voyage and also the charter insured. The plaintiff's testimony tends to vary and not explain.

WALTON, J. This is an action on a marine insurance policy. The property insured is described in the policy as follows:

"Sixty-five hundred and fifty dollars on charter, twenty-six hundred and fifty dollars on primage, and also fifteen hundred dollars on property on board ship 'Charles S. Pennell,' at and from New York to San Francisco."

It will be noticed that the defendants insured among other things a charter, meaning, undoubtedly, the freight to be earned under a charter. At the time the vessel was lost she was sailing under two charters, one requiring her to carry coal and other merchandise from New York to San Francisco, and the other to carry a cargo of guano from the Chincha Islands to Hamburg or Rotterdam. The vessel was lost on her outward voyage. The question is, whether extrinsic evidence is admissible to show which of the two charters was the one insured by these defendants. The plaintiff offers to prove that it was the guano charter; and the defendants resist upon the ground that the words "at and from New York to San Francisco," which occur in the policy, are descriptive of the charter insured, and that extrinsic evidence to show that any other was intended is not admissible, as its effect would be to vary and not explain the policy.

We think the words "at and from New York to San Francisco," do not describe any portion of the property insured, but simply the voyage during which the risk was to continue.

It will be noticed that these words do not immediately follow the mention of the charter; that the primage and the amount insured upon it, and the other property on board the ship and the amount insured upon it, intervene between the mention of the charter and the words which the defendants claim are a description of it. It seems to us highly improbable that words descriptive of a thing should be allowed to be thus separated from the mention of the thing de-

scribed. Besides, they are not, in our judgment, such words as would be likely to be selected to describe the charter, while they are precisely such as were necessary to describe the voyage. It seems to us that a charter, if described at all, would be more likely to be described by the character of the merchandise to be carried, while the voyage, during which the insurance was to run, would almost invariably be described by the mention of the ports from which and to which the vessel was to sail. Nor can we believe that the words in question were used to describe both the voyage and the charter. The property insured, and the voyage during which the risk is to run, are very different matters; and we cannot believe that any writer would employ the same words to describe both. It is difficult to conceive how he could have a description of each in his mind at the same moment,—how he could intentionally pen a single sentence that should answer two such distinct purposes. We cannot believe that the words in question were written for two such distinct objects.

We have, then, a policy in which a charter is insured. Two charters are shown to exist, either of which will answer the call in the policy. Which of these charters did the defendants insure? Upon this point the parties are at issue. How shall it be determined? Why is not this the precise case of a latent ambiguity, to remove which extrinsic evidence may be resorted to? We think it is. Our conclusion, therefore, is that the plaintiff's evidence was admissible for that purpose. *Storer* v. *Ins. Co.*, 45 Maine, 175; 1 Greenl. Ev. §§ 287, 288, and authorities there cited.

Plaintiff's evidence admissible.

Action to stand for trial.

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

Samuel Baker *vs.* Charles Mitchell.

Mutual account. Statute of limitations.

Where the two items on the debit side of an account annexed to a writ as proved, were dated October, 1860, and Nov. 20, 1867, respectively, while upon the credit side there was a single item of a certain number of cords of wood, proved by the plaintiff to have been delivered by the defendant in the fall of 1862, *Held*, that under c. 117 of the Pub. Laws of 1867 (R. S. c. 81, § 84), the cause of action accrued at the date of the last item proved.

On exceptions to the ruling of *Goddard*, J., of the superior court for this county.

Assumpsit on account annexed to the writ, the items were as follows:

1860, Oct.	To one white mare, sold and delivered to him, to be paid for in wood, in 1861,	$85.00
1867, Nov. 20.	To 4 feet of wood,	4.00
		$89.00
	CONTRA, CR.	
1862.	By 12½ cords of wood,	$43.75
	Balance due,	$45.25

It was proved that the wood credited was delivered by the defendant to the plaintiff in the fall of 1862; that the plaintiff's charges were correct, and that there had been no settlement between the parties.

The presiding justice ruled, *pro forma*, that all the items except the last were barred by the statute of limitations, as amended by c. 117 of the Public Laws of 1867 (R. S. c. 81, § 84). And thereupon the plaintiff alleged exceptions.

B. Freeman, for the plaintiff.

W. H. Vinton, for the defendant.

APPLETON, C. J. It was decided in *Theobald* v. *Stinson*, 38 Maine, 139, and in *Dyer* v. *Walker*, 51 Maine, 104, that mutual accounts within the meaning of R. S. 1857, c. 81, § 99, are those where each party makes charges against the other for property sold, services rendered, money advanced, etc. If the account is kept by one party alone, there is no mutuality.

In 1867, by an act approved February 28th, c. 117, an amendment was made to R. S. c. 81, § 99, so that the section with the amendment now reads as follows: "In all actions of debt or assumpsit to recover the balance due upon a mutual and open account, the cause of action shall be deemed to accrue at the time of the last item proved in such account; and it shall be deemed a mutual and open account current, when there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both."

It was held in *Davis* v. *Smith*, 4 Greenl. 337, that where there are mutual dealings between the parties, if there be items on both sides within six years, the statute of limitations does not attach to those of an earlier date. "Where mutual promises are relied upon to repel the operation of the statute, it is," remarks Weston, J., "upon the principle of a new promise, of which the acknowledgment of an unsettled account, implied from new items of credit within six years, is evidence."

According to the evidence, as stated in the exceptions, the wood credited on the plaintiff's account was delivered in 1862. There is no interval of six years between the debts and credits of the parties. The statute makes it immaterial whether the items of debt and credit are "kept or proved by one party or the other."

Exceptions sustained.

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

Francis O. J. Bodge *vs.* John T. Hull and others.

Submission. Award. Pleading.

The claim to be investigated by arbitrators need not be stated and annexed to a submission at common law.

A count in common form upon a submission and award is not vitiated by allegations in the same count setting up a lien claim; but the lien claim being waived, the allegations relating thereto may be rejected as surplusage.

The delivery to the parties by the arbitrators of a paper, not as their award but as a detailed statement of their conclusions, does not terminate the powers of the arbitrators; but a formal award subsequently made and published, wherein the same net balance is found, is binding.

On report.

Assumpsit on an award made and published Aug. 9, 1870. The second count in the writ was as follows:

"Also, for that the defendants, on the second day of July, A. D. 1870, being indebted to the plaintiff in a large sum for labor and materials furnished for erecting the dwelling-house upon the real estate aforesaid, and a controversy having arisen between him and the defendants, it was then and there agreed to appoint, and they did appoint Charles H. Stuart and Daniel A. Booker to determine for them the amount due the plaintiff from the defendants, and they mutually promised each other to stand to and abide by the award of the said Stuart and Booker thereon; and the said Stuart and Booker afterwards, to wit, on the ninth day of August, A. D. 1870, heard the plaintiff and defendants, and adjudged upon the premises, and awarded that the defendants should pay the plaintiff three thousand and sixty dollars and eight cents on demand, and notified the plaintiff and defendants thereof, and thereafterwards, on the same day, the plaintiff demanded payment of said sum, which the defendants then and there refused; and the plaintiff avers that said sum was due for labor and materials furnished for erecting said dwelling-house, by virtue of a contract with the owners thereof, whereby and by force of the statute in such case made and provided,

the plaintiff has a lien upon the interest of the defendants in said real estate, on the first day of June last past, and he brings this action to enforce the same."

It appeared that on Aug. 15, 1870, the referees went to the office of the counsel for the plaintiff and showed them a paper, dated Aug. 9, 1870, containing a detailed statement of an account, in which the mutual claims of the parties litigant were set down with the referees' finding on each, with a net balance of $3060.08, and asked if it was in the usual form of an award. Upon being answered in the negative, they requested the counsel to give them a form. But upon the counsel's suggesting that the parties would probably settle without a formal award when they knew the result, they signed the paper, handed it, with a duplicate thereof, enclosed in an envelope addressed to the defendant, to the counsel, who agreed to and did hand the envelope to the defendant. The arbitrators at the same time stated that the paper showed the result to which they had arrived; but if the parties desired a formal award, they would make one, and did so a few days afterwards, as follows:

"Pursuant to a submission made to us, dated the second day of July, A. D. 1870, to which reference is made by Francis O. J. Bodge, of Westbrook, of the first part, and John T. Hull, of Portland, in behalf of himself and the Hull heirs, of the second part, we have met the said parties, heard their allegations and proofs in the premises, and this is our final determination and award in the premises, that there is due from the said John T. Hull, in behalf of himself and the Hull heirs, the sum of three thousand and sixty dollars and eight cents, to be paid to said Francis O. J. Bodge by said Hull and the Hull heirs, on demand, which is in full of matters submitted to us by the parties, a memorandum of which, of even date herewith, we have already given to said parties.

PORTLAND, Aug. 9, 1870."

The remaining facts appear in the opinion.

Davis & Drummond, for the plaintiff.

A. A. Strout, for the defendants.

BARROWS, J. Assumpsit upon an award of arbitrators, mutually agreed upon.

The plaintiff having built a block of two houses for the defendants, under certain contracts, and a controversy having arisen between them in regard to the same, they agreed in a writing, the due execution and validity of which are conceded, "to submit all matters between them, relating thereto, to the determination of" (two persons named in the writing) "who shall notify said parties and hear all their allegations and proofs thereupon . . . and whatever sums they shall award to be due to said Bodge from said Hull heirs, and at whatever times," the defendants agreed to pay, and the plaintiff "to receive the same in full discharge and payment of all claims for building said houses."

The submission is not a statute submission, and the parties are not bound to observe the formalities required by the statute in stating and annexing the claim to be investigated.

The second count sufficiently sets forth this agreement and award, and also a claim for a lien upon the houses, which is waived, and all relating thereto may be rejected as surplusage. The arbitrators met and heard the parties and made an award which, with the agreement for arbitration maintains the claim in this count, it being proved that the plaintiff presented the award to John T. Hull, one of the defendants, and agent in this behalf for all the others, and demanded a payment which was refused.

Besides the objections to the form of the declaration above adverted to, the defendants claim that the award is void by reason of the previous communication to the parties of another paper, which is offered in evidence by the defendants, and seems to be signed by the referees and to embrace, apparently, a detailed statement of their conclusions upon the several points in controversy between the parties, which paper the defendants assert is to be deemed the final award. It is not in the form of an award, but is rather a simple statement of an account, in which the mutual claims of the parties litigant are set down with the referees' finding upon each; and the "net balance" agrees with the sum finally awarded. The

evidence shows conclusively that it was not put forth by the arbitrators as and for their "final award and determination in the premises," but was made known to the parties upon the suggestion and expectation that it would probably induce an adjustment without the necessity of making a formal award. An abortive attempt of that description will not affect the power of the referees to make a final award; and this does not conflict with the doctrine, which we recognize as sound, that there can be no second award when one has been made and published, as set forth in *Thompson* v. *Mitchell*, 35 Maine, 286. The question is not here what might be held to constitute a sufficient award and publication "if the acts and doings of the referees were so intended." The paper presented by the defendants was not designedly issued by the referees as an award, but as a statement of their deliberations, from which the parties might, if they pleased, anticipate the probable conclusion and adjust accordingly.

Nor does it appear that the referees in any respect exceeded their powers or acted corruptly or partially in the execution of them.

The $832 to be paid to G. M. Chase was part of the $5,900 for which the plaintiff agreed to build the houses, and the stipulation that it should be paid to Chase whenever called for, related only to the time and manner of payment, and did not affect plaintiff's right to recover it in case of non-payment.

Nor can the conditional deduction, set forth in the paper offered by the defendants, affect the right of the plaintiff to recover. Unless certain work was completed to the satisfaction of the arbitrators or of C. H. Howe, a certain amount was to be deducted. The making up of the final award for the sum first named seems to indicate that it was done to the satisfaction of the arbitrators, and this is not rebutted by the naked statement of one of the defendants that the condition was not performed "so far as his knowledge extends." *Judgment for plaintiff for the amount of the award and interest from Aug. 9, 1870.*

APPLETON, C. J.; KENT, DICKERSON, and TAPLEY, concurred.

WILLIAM W. THOMAS, JR., *vs.* EVERETT W. STETSON.

Surety — discharge of.

A procured for his own accommodation the acceptance of B, by giving the latter his promissory note, with the defendant as surety, as collateral security; a month before the acceptance became due, A procured another acceptance of B, which he had discounted, and with the avails thereof and other money paid the former acceptance. *Held*, that the surety was thereby discharged.

It seems, that a renewal of the acceptance in such a case, without the consent of the surety, is such an extension of time of payment as releases the surety.

ON REPORT.

ASSUMPSIT upon a promissory note of the following tenor:

"$1,500. DAMARISCOTTA, Jan. 5, 1866.

For value received, we jointly and severally promise to pay Edward S. Tobey, or order, fifteen hundred dollars in three months from date. Signed, JOSEPH DAY,

E. W. STETSON."

The action was brought in the name of the plaintiff for the benefit of Tobey.

The facts sufficiently appear in the opinion.

W. W. Thomas, jr. (and with him *Haskell*), for the plaintiff.

Davis & Drummond, for the defendant.

KENT, J. It is agreed that this action is to be determined, as if it had been brought in the name of the payee, Edward S. Tobey. It is not pretended that it was given or signed by this defendant in payment of any debt due from Stetson to Tobey, or for any consideration directly moving between them. The facts, as we find them in the evidence, are substantially these: Joseph Day, the other signer of this note, was desirous of obtaining the name of Mr. Tobey as acceptor of a draft for $1,500, for his accommodation. Mr. Tobey agreed thus to lend his name, on condition that

Day should give him security for the payment of the accepted draft. He applied to Mr. Stetson, the defendant, and explained to him his wishes, and Mr. Stetson thereupon, for Day's accommodation, signed the note in suit, and delivered it to him, to "use in any way he could by which to raise the amount of money." It was used by depositing it with the plaintiff, in interest, as collateral for his acceptance of Day's draft on three months, for fifteen hundred dollars. This is shown by the minute made at the time by the plaintiff.

It is clear that if the acceptance had been paid in money, by Day, when it fell due, the note would have been, so far as these parties are concerned, *functus officio*. The plaintiff could not have maintained an action on the note against the defendant, although in terms made payable to himself, because it had been, in effect, paid, or its real obligation discharged, as to him.

It appears that Day obtained the acceptance of Tobey to another draft of like amount, dated Feb. 18, 1866, a month before the first draft became due, and more than a month before this note in suit became due. Mr. Day says he had this last acceptance discounted and remitted the proceeds and made up the balance of the fifteen hundred dollars to Tobey. And this course of procedure continued, until seven acceptances had thus been made, the last four having been for $1,000 each, instead of $1,500. This note remained in the hands of Tobey.

Day failed before the last acceptance became due, and the plaintiff claims a balance due to him of $1,312.85 from Day, and insists that he has a legal claim on this note for that sum, on the ground that it had remained as collateral security for all these drafts.

There can be no doubt that Mr. Tobey understood that the defendant was a surety in fact for Day. The note was not given to Day as payee and by him indorsed, but is payable to Tobey, or order. Tobey had no dealings with defendant and no consideration moved between them. He took the note merely as collateral security for Day's liability to him, and had the promise of the defendant as surety for Day.

Stetson, the defendant, lent his name to be used by Day, to obtain the sum named in the note. He was willing to stand as surety for Day, in any form, for that sum and that length of time, but he did not agree to thus stand for an indefinite time, and as collateral for an indefinite number of successive acceptances. The note was received as collateral security for the acceptance of Dec. 18th as appears by the memorandum. Nothing is said of any other draft, or of renewals. No notice was given to defendant of non-payment. The second draft was not properly a renewal of the first. It was, as before stated, accepted a month before the first became due. During that time Tobey had two acceptances outstanding. Day, when the time came, raised the money by discounting the second draft, and adding to the proceeds other money, he sent the whole to Tobey, and thus the first draft was paid.

But if the second and succeeding drafts could be regarded as renewals of the first, yet if the defendant was but a surety, and known to be such by the payee of the note, those extensions by renewals, without the assent of the surety, would seem to bring the case within the established doctrines, which exonerate a surety in such a case. The right to sue the parties to the note would be suspended, if holden only as collateral for the payment of a draft, until there had been a breach of the condition by non-payment or non-protection of the draft. This would operate as such giving of time to the principal as would release the surety.

Upon the case, as presented to us, we do not think that the defendant can be held liable to the plaintiff on this note.

Judgment for the defendant.

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

AMMON PLATT and another, surviving partner, *vs.* RETIAH D. JONES.

Case—knowingly aiding a debtor in securing his property from creditors. Pleading. Demurrer.

In an action on the case under R. S. c. 113, § 51, for knowingly aiding a debtor in a fraudulent transfer of his property after averring that the plaintiffs had, prior to Jan. 23, 1869, sold and delivered to a certain vendee named, divers goods, wares, and merchandise, in payment of which the vendee drew two orders, of the dates, on the persons, and for the several amounts respectively named payable to the order of himself at the several times named, and by him indorsed to the plaintiffs,—the declaration then alleged that on the 23d day of January, 1869, "said sums of money, as mentioned in said orders, were due the plaintiffs, and unpaid from the said" vendee, "which said sums and interest still remain justly due and unpaid to the said plaintiffs," *Held,* to be a sufficiently distinct affirmative averment of the existence of the relation of creditor and debtor between the plaintiffs and their vendee.

In such case it is not necessary to allege in addition the facts necessary to fix the liability of the drawer on the orders to the plaintiffs.

The declaration must allege with certainty the time when the fraudulent transfer was made; an allegation that it was done "on or about" a day certain, is not sufficient.

In such an action a count setting out the fraudulent transfer of several pieces of property, and at various times, but all pertaining to one demand, is not bad for duplicity.

When the kind of property alleged to have been fraudulently transferred is stated, so that it may be seen whether or not it is liable to seizure on execution, and it is alleged to be the property of the debtor, the allegation is sufficient in this respect and will be sustained by proof that it was liable to be taken for his debts by the proper process.

Thus, an allegation that the defendant knowingly aided the debtor in a fraudulent sale to the former, of certain property then belonging to the debtor, to secure it from his creditors and prevent its attachment, or seizure on execution, by receiving from the said debtor and his wife a conveyance of certain real estate described, of a certain value; or of certain other property then belonging to the said debtor, by receiving from his wife a conveyance of a certain brick-mill building, situated on land bonded to the debtor's wife by a third person named, of the value named; or of certain other property, then belonging to the said debtor, by receiving from a third person named a conveyance of certain real estate, described, is a sufficient allegation of title in the debtor so that the same may be seized by the proper process.

Platt *v.* Jones.

In case, by surviving partners, for aiding a debtor in a fraudulent conveyance of his property, the objection that the declaration does not allege that the plaintiffs have given the bond provided by R. S. c. 69, §§ 1 and 2, cannot be raised by demurrer.

In such an action the representative of the deceased copartner need not be joined.

ON EXCEPTIONS

CASE by Ammon Platt and Peter O. Strong, surviving partners of the late firm of George W. Ryley & Co., the said George W. Ryley being deceased.

"For that the said plaintiffs aver that they the said plaintiffs, and the said George W. Ryley, who was then alive, but since deceased, and whom the plaintiffs have survived, had prior to the twenty-third day of January, in the year of our Lord one thousand eight hundred and sixty-nine, sold and delivered to one James F. Hirst, of said Webster, at his request, divers goods, wares, and merchandise, of them the said plaintiffs, and the said George W. Ryley since deceased as aforesaid, in payment of which the said Hirst drew two certain orders of the following purport, viz., one as follows: "Boston, Feb. 9, 1865. Sixty days after date, pay to the order of myself, nineteen hundred and forty and $\frac{77}{100}$ dollars, value received, and charge the same to account of James F. Hirst. To Messrs. H. J. Libby & Co., Portland, Maine." The other as follows: "Boston, Feb. 9, 1865. Four months after date, pay to the order of myself, nine thousand eight hundred eighty-six and $\frac{77}{100}$ dollars, value received, and charge the same to the account of James F. Hirst. To Messrs. H. J. Libby & Co., Portland, Maine." And thereafterwards, on the same day, said Hirst indorsed and delivered said orders to the said plaintiffs and said Ryley. And the plaintiffs aver that on the said twenty-third day of January, A. D. 1869, said sums of money, as mentioned in said orders, were due the said plaintiffs and unpaid, in all amounting to the sum of eleven thousand eight hundred and twenty-seven dollars and fifty-five cents, with interest on said sums, respectively, from April 13, A. D. 1865, and June 12, A. D. 1865, from the said James F. Hirst, which said

sums and interest still remain justly due and unpaid to the said plaintiff surviving partners as aforesaid.

"And the said plaintiffs aver that the said Retiah D. Jones, contriving to wrong and defraud the creditors of the said Hirst, and especially the said plaintiff surviving partners as aforesaid, did, on or about the twenty-third day of January, A. D. 1869, at said Webster, to wit, at said Auburn, knowingly aid and assist said James F. Hirst, in a fraudulent sale and transfer to him, the said Retiah D. Jones, of certain property then belonging to said James F. Hirst, to secure the same from the creditors of said James F. Hirst, and prevent its attachment or seizure on execution by receiving from said James F. Hirst, a sale, conveyance, and transfer of said property so belonging to said James F. Hirst, to wit, two pairs of steers, four years old, one white cow, one red cow, with star in face, one red and white cow, one red cow with white face, one dark red cow, two heifers, two years old, one yearling, one red three year old heifer, with star in face, ten sheep, all of which property was of great value, to wit, the sum of five hundred eight-five dollars.

"And the plaintiffs further aver, that on or about the sixteenth day of February, A. D. 1869, at said Webster, to wit, at said Auburn, the said Retiah D. Jones contriving to wrong and defraud the creditors of said Hirst, and especially the said plaintiff surviving partners as aforesaid, did knowingly aid and assist said James F. Hirst in a fraudulent sale and transfer to him, the said Retiah D. Jones, of certain property then belonging to said James F. Hirst, to secure the same from the creditors of said Hirst, and prevent its attachment or seizure on execution, by receiving from said James F. Hirst and Ruth E. Hirst, wife of said James F. Hirst, a certain sale, conveyance, and transfer to said property so belonging to said James F. Hirst, being a certain piece or parcel of land situated in said Webster, and the same then and now occupied by said James F. Hirst, and the same described in a certain deed from said James F. Hirst and Ruth E. Hirst, to said Retiah D. Jones, dated Feb. 16, 1869, and recorded in the Androscoggin Registry of Deeds,

book 57, p. 228, all of which real estate was of great value, to wit, the sum of twenty-five hundred dollars.

"And the plaintiffs further aver, that the said Retiah D. Jones, contriving to wrong and defraud the creditors of said James F. Hirst, and especially the said plaintiff surviving partners as aforesaid, did, on or about the second day of August, A. D. 1869, at said Webster, to wit, at said Auburn, knowingly aid and assist said James F. Hirst in a fraudulent sale and transfer to him, the said Jones, of certain property then belonging to said James F. Hirst, to secure the same from the creditors of said James F. Hirst, and prevent its attachment or seizure on execution, by receiving from said Ruth E. Hirst, a sale, conveyance, and transfer of said property so belonging to said James F. Hirst, to wit, a certain brick mill building, situated in said Webster, on land bonded to said Ruth E. Hirst, by John Lombard, Thomas J. Foss, and S. L. Hill, Feb. 15, A. D. 1869, which said bond is recorded in the Androscoggin Registry of Deeds, book 56, p. 343, all of which property was of great value, to wit, the sum of six thousand dollars.

"And the plaintiffs further aver, that the said Retiah D. Jones, contriving to wrong and defraud the creditors of the said James F. Hirst, and especially the said plaintiff surviving partners as aforesaid, did, on or about the fourteenth day of April, A. D. 1869, at said Webster, to wit, at said Auburn, knowingly aid and assist said James F. Hirst in a fraudulent sale and transfer to him, the said Retiah D. Jones, of certain property then belonging to said James F. Hirst, to secure the same from the creditors of said James F. Hirst, and prevent its attachment or seizure on execution, by receiving from one Stetson L. Hill, a sale conveyance, and transfer of certain real estate then belonging to said James F. Hirst, to wit, a certain parcel of real estate situated in said Webster, and known as the Tobias Weymouth farm, all of which property was of great value, to wit, the sum of two thousand dollars.

"And the plaintiffs aver, that the said several parcels of property, so fraudulently conveyed, sold, and transferred were in the whole of great value, to wit, the sum of eleven thousand and eighty-five

dollars; and the plaintiffs further aver, that the said defendant thereupon fraudulently took said property into his possession and control, claiming the same by virtue of said several fraudulent sales, conveyances, and transfers, whereby the said plaintiffs were prevented from attaching said several parcels of property or seizing the same on execution.

"So that the said defendant defrauded the said plaintiffs contrary to the form of the statute in such cases made and provided; whereby and by force of the said statute an action hath accrued to the said plaintiffs to have and recover of the said defendants double the amount of the said property so fraudulently sold, conveyed, and transferred, not exceeding double the amount of said plaintiffs' claim."

To the foregoing declaration the defendant filed a special demurrer showing the following causes:

1. Because the declaration does not set out affirmatively that said James F. Hirst was indebted to the plaintiffs upon the bills of exchange therein referred to or otherwise, at the dates of the alleged fraudulent sales, and transfers therein mentioned.

2. Because said declaration does not allege that said bills of exchange, or either of them, were presented to the drawers for acceptance or payment, or that said bills of exchange or either of them were duly presented for non-acceptance or non-payment, or that the same were not paid by the drawees, or that, if not paid by the drawers, any proper steps were taken by the holders thereof to have the said James F. Hirst charged either as drawer or indorser thereof.

3. Because said declaration contains but one count, and the said count embraces allegations or averments of several distinct, independent causes of action, to wit, the first, second, third, and fourth alleged fraudulent sales, conveyances, and transfers therein named, each being entirely separate from, and disconnected with either of the other alleged causes of action, and said declaration is, therefore, bad for duplicity.

4. Because the second alleged fraudulent sale, conveyance, and

transfer named in said declaration is not alleged to have been from James F. Hirst alone, but from James F. Hirst and Ruth E. Hirst, jointly, to said Jones, and because it is not alleged that James F. Hirst and Ruth E. Hirst were jointly indebted to the plaintiffs at the date thereof; and that said Jones knowingly aided and assisted them in said sale, conveyance, and transfer of their joint property, to secure it from their joint creditors and prevent its attachment and seizure on the execution of their joint creditors.

5. Because the third and fourth alleged fraudulent sales, conveyances, and transfers named in said declaration, are not of property of which said James F. Hirst is alleged to have had the legal title at the dates of said sales, conveyances, and transfers; but, on the contrary are of property of which other parties than James F. Hirst are alleged to have had the legal title at the dates of said conveyances, so that the same could not then, at the time of said last-named sales, conveyances, and transfers have been attached, seized, or taken on the execution of the creditors of James F. Hirst, as his property.

6. Because said declaration is otherwise bad in substance and bad in form.

The demurrer after joinder was overruled, *pro forma*, and the declaration adjudged good; whereupon the defendant alleged exceptions.

W. P. Frye & John W. Cotton, for the plaintiffs.

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

I. The declaration does not set out in proper form that the plaintiffs were the creditors of Hirst. No promise on the part of Hirst to the plaintiffs is alleged. The ground of the indebtedness is not set out. It is not enough to aver that a sum of money is due and unpaid. The particular transaction or promise out of which the indebtedness arose should be set out in order that the court may determine whether the facts thus alleged would establish the relation of creditor and debtor.

If the action were assumpsit, and the declaration simply averred

that certain sums of money were due from the debtor to the plaintiffs, without stating for what, it would be clearly bad. *Brown* v. *Webber*, 6 Cush. 560.

Although it is alleged that the money, "as mentioned in said orders," was due the plaintiffs, and unpaid from Hirst, on Jan. 23, 1869, and the first alleged fraudulent sale and transfer is laid "on or about" that day, the declaration does not aver that the plaintiffs were creditors of Hirst at the time of the first alleged fraudulent transfer, or either of them, and is therein defective. *Herrick* v. *Osborne*, 39 Maine, 231.

II. It does not appear that the bills of exchange drawn by Hirst on Libby, payable to his own order and indorsed and delivered by Hirst to the plaintiffs, were ever presented for acceptance or payment; whether accepted or paid; whether ever protested for non-acceptance on non-payment; or whether Hirst was notified that they looked to him for payment. No cause of action by plaintiffs against Hirst is set out, and hence no allegation that the plaintiffs were his creditors. *Rushton* v. *Aspinwall*, Douglass, 680; Chit. on Bills, 373.

The cause of action, plaintiffs against Hirst, should be as distinctly set out in this declaration as if they were prosecuting a suit directly against him thereon. *Herrick* v. *Osborne*, *ubi sup.*; *Thacher* v. *Jones*, 31 Maine, 528.

III. The declaration contains but one count, but embraces allegations of four several independent causes of action against Jones. If the several grounds were separately set out, the defendant might plead to some and demur to others. Now such right is taken away. Such defects are bad on special demurrer. Gould's Pl. c. 9, § 16. If the several alleged fraudulent conveyances would each, independent of the others, be sufficient to sustain the action, the declaration must be bad for duplicity. Gould's Pl. c. 4, § 99; *Patterson* v. *Wilkinson*, 55 Maine, 42.

IV. Hirst could have made no fraudulent sale and conveyance as against his creditors, of any land the legal title to which did not vest in him at the time. In *Spaulding* v. *Fisher*, 57 Maine, 411,

the declaration traced the debtor's interest in the house conveyed to Fisher. In case at bar there is nothing to show that Hirst ever invested anything in the Weymouth farm or brick mill, or that it could be attached or seized on execution as Hirst's. *Quimby* v. *Carter*, 20 Maine, 219; *Herrick* v. *Osborne*, *ubi sup.*; *Skowhegan Bank* v. *Cutler*, 49 Maine, 315.

A debtor who joins in a conveyance of land the legal title of which is vested in himself and another, cannot be charged with committing a fraud upon his creditors. But if otherwise, nothing beyond the debtor's interest could be held.

V. Involves same law substantially. Neither the third or fourth parcels of property, alleged as fraudulent conveyances, is alleged to be the property of which Hirst was ever seized or possessed, or which was ever liable to be attached and taken on execution at the suit of his creditor for satisfaction of his debts. *Herrick* v. *Osborne*, *supra.*

All objections to matters of substance are open whether assigned or not. Gould's Pl. c. 9, part I. § 20.

VI. Surviving partners cannot meddle with partnership property until they have filed the bond prescribed in R. S. c. 69, §§ 1 and 2.

Their power to sue in their capacity of surviving partners extends to nothing but assets of the firm. 1 Pars. on Cont. 173, note b.

Their qualification must affirmatively appear in the declaration. *Flower* v. *O'Conner*, 7 La. 194; *Connelly* v. *Cheevers*, 16 Curry (La.), 30.

When one describes himself as executor or administrator, he virtually says he has filed his bond. He would not be executor or administrator without this. Not so of a plaintiff who describes himself as surviving partner. The objection is open under demurrer; abatement to the disability of the plaintiffs not being necessary until they first allege and show themselves persons of ability to sue.

Similar statute in Louisiana. La. Code, Art. 1131 and 1132; *Crozier* v. *Hodge*, 3 La. 358.

The indebtedness to the firm was to them jointly. And the injury must be to the plaintiffs jointly, with the deceased partner's heirs or representatives, and they all must join in the action. 1 Chit. on Pl. 54 and 572.

The right of action does not accrue to surviving partners, as such, when the indebtedness is alleged to be to the firm, and the injury complained of is alleged to have been done after the dissolution to the surviving partners. Surviving partners' right of recovery is limited to assets of the firm. Here the tort occurred after the dissolution, and which, if done at all, must have been done jointly to all the joint owners of the alleged debt.

DANFORTH, J. This is an action upon § 47, c. 113, of R. S. of 1857, and comes before us upon special demurrer to the declaration.

The first objection is that it does not affirmatively appear that the plaintiffs were creditors of the alleged fraudulent grantor at the date of the several sales and conveyances complained of. This, if true, is a defect in the declaration. *Herrick* v. *Osborne*, 39 Maine, 231. The allegation is that "on the twenty-third day of January, 1869, said sums of money, as mentioned in said orders, were due said plaintiffs and unpaid . . . from the said James F. Hirst, which said sums and interest still remain justly due and unpaid to the said plaintiff surviving partners as aforesaid."

This seems to be a sufficiently distinct averment of the existence of the relation of debtor and creditor between the plaintiffs and said Hirst, on the twenty-third day of January, 1869, and that it continued from that time up to the date of the writ. But the first sale complained of is stated to have taken place "on or about" the twenty-third day of January. This averment would be proved by showing that the sale took place on the twenty-second, in which case it is very clear, the allegation of indebtedness does not cover that of the sale. But the declaration is further defective in this respect, in not setting out definitely when the several transfers did take place. One of the fundamental rules of pleading is that there

must be certainty as to time. "The day, month, and year when each traversable fact occurred" must appear. Stephen on Pl. 292; 1 Chit. on Pl. 257.

This must be done even where it is not material to prove the time as laid. The words "or about" take all certainty from the allegation and virtually leaves the declaration without any time. *State* v. *Baker*, 34 Maine, 52. Leaving out these words and the time of the conveyance would be definite, and correspond to the allegation of indebtedness.

As this defect may be amendable, it will be necessary to examine the other objections raised.

The second objection is, that it does not appear that the necessary steps were taken to fix the legal liability of Hirst upon the orders referred to.

Were this necessary, we see no objection to such an amendment as would supply the deficiency in this respect. Enough is set out to show the nature and ground of the debt. The orders given by Hirst are not only described in full, but the original transaction out of which they grew is set out. It is further alleged, "that said sums of money, as mentioned in said orders, are still due," etc. The addition of the necessary facts to render the drawee liable would in no respect change the nature or extent of the debt. But we think the claim against Hirst is sufficiently set out. This action is not against the party to the orders. It does not rest upon them or upon the merchandise sold as its basis, but upon the statute. The debt is a fact to be proved, and not the foundation of the action. If the orders were not a discharge of the original debt, then it is fully set out. If they were, then we have enough to show the origin, nature, and extent of the demand. In *Herrick* v. *Osborne*, 39 Maine, 231, there seems to have been only a simple declaration of indebtedness with the amount, and though a demurrer was filed, no objection appears to have been raised on that account. The statute gives the remedy to any creditor, and to render it available the plaintiff must prove the relationship of debtor and creditor, and so much he must allege, as in *Herrick* v. *Osborne*, but more than this we see no necessity for.

The third ground of demurrer is, that the declaration is bad for duplicity.

It is not quite accurate to say that two causes of action in one count render it double. Several items of account may be very properly embraced in one count, and yet each one of those items might be a good cause of action. So in the case of several trespasses upon the same lot of land. Stephen, in his work on Pleading, says the meaning of duplicity is, "that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported." Stephen on Pl. 242. See also, 1 Chit. on Pl. 226; *Dunning* v. *Owen*, 14 Mass. 163, 164; *Lord* v. *Tyler*, 14 Pick. 164; *Hooper* v. *Jellison*, 22 Pick. 250.

There can be but one demand to each cause of action, but as many matters or facts as are necessary to support that demand, not only may, but must be set out in one count.

In the case of an account annexed, or of trespass, but one demand is made. A demand, however, which can be fully supported only by the proof of each item or each trespass set out. A claim might be sustained by proof of a single item or a single trespass, but it would not be the same as that supported by the many. In the case at bar the demand is one. The plaintiffs ask redress for an injury to a single interest, their interest as the creditors of James F. Hirst. The amount demanded is double the value of, not one piece of property merely, not of property conveyed at any one time, but of all the property which the defendant has wrongfully aided the debtor in concealing or transferring to secure it from his creditors. To support this demand of the plaintiffs, they must prove all the conveyances they have alleged. Any one of them might support a different and less demand, but that which is claimed can be sustained only by proof of all. All these different conveyances are but different facts or matters which are the necessary elements of the demand claimed in the writ.

The fourth and fifth causes of demurrer are similar, and rest upon the fact that it does not appear that the legal title to the

property conveyed was in Hirst and liable to be taken on execution against him. The kind of property is stated so that it may be seen whether it is liable to seizure on execution, and it is also alleged to be the property of Hirst. This is sufficient and will be sustained by proof that it was liable to be taken for his debts by the proper legal process. Upon this point the case of *Spaulding* v. *Fisher*, 57 Maine, 411, is decisive.

This disposes of all the special causes of demurrer. But it is claimed that these plaintiffs, as surviving partners, cannot sustain this action, and the first objection is, that it does not appear that they have given the bond required by the R. S. c. 69, §§ 1 and 2. They have adopted the usual mode of declaring in such cases, and it is believed the only mode in which the action can be sustained. By the common law surviving partners are entitled to the possession of the partnership property, and must in their own names bring all actions necessary to its protection, and especially for the collection of debts due the firm.

Collyer on Partnership, 117, and cases cited. The statute referred to, R. S. c. 69, makes no change in the form of the action or the name in which it shall be brought. It may change the possession and control of the property, giving it to the representative of the deceased partner. But even then the action must, or certainly may be brought in the name of the survivor. Same c. § 4. The rights of the parties are the same whether the suit is prosecuted by the survivors or the representative. Therefore as the form of the declaration is the same whether they have or have not given bond, this question is not raised by the demurrer.

It is further claimed that the plaintiffs are but joint-owners of the debt against Hirst, with the representative of the deceased partner, and that in relation to it an action of tort cannot be sustained without joining all the owners. The principle of law invoked may be a correct one, but is not applicable to this case. The parties are but joint-owners of what property may be left after a settlement of the partnership affairs. But until that settlement is accomplished, it cannot be known whether there will be anything

left or whether all the property may not belong to the survivors. In any event, by the authorities already cited, it abundantly appears that the survivors are owners in trust or otherwise until the settlement, and whatever the law allows to be done for the purpose of settlement must be done by them as owners, or in their names, and for this they are legally the owners and entitled to all the rights and remedies of owners.

The final objection is, that the statute upon which this action is based does not afford a remedy in a case like the present. This objection is attempted to be sustained by reasoning similar to that on which the last is founded, and like that must fall. It must be remembered that this statute is a remedial one, to enable creditors to recover their debts. *Quimby* v. *Carter*, 20 Maine, 218.

The plaintiffs are seeking to recover a debt of which they are equitably if not legally the owners and sole representatives. They are the creditors, and it is to creditors that the remedy is given.

They come, therefore, within the letter as well as the spirit of the statute, and we can see no reason for giving a constrained construction of so wholesome a statute, for the purpose of relieving any one who may be amenable to such provisions as may arise from a fair interpretation of its language.

The result is, we find, no defect in the declaration except its indefinite allegations of time, and for this, the exceptions and demurrer must be sustained.

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

First Baptist Society in Leeds *vs.* Perry Grant.

Meeting-house. Pew-owners—rights of. Division of time of occupying a meeting-house—under what conditions.

A meeting-house erected by a contract with a religious society, duly organized under an act of incorporation, upon land owned by the corporation, is owned by the corporation and not by its members.

The owners of pews in a meeting-house owned by a corporation, have only an easement in and not a title to the freehold.

The pew-owners have only a qualified property in the pews of a meeting-house owned by a corporation.

Two conditions must co-exist before there can be any legal action under the provisions of R. S. c. 12, § 35, for obtaining a division of the time of occupying a meeting-house; (1) there must be a "house of public worship owned by persons of different denominations;" and (2) in such house, so owned, "an organized society or its members must own at least five pews."

On report.

Trespass for breaking and entering the plaintiff's close and breaking and opening their meeting-house, in Leeds, on Aug. 14, 1870.

Plea, general issue, with a brief statement, that, at the time of the supposed trespasses, the defendant was a pew-owner in the meeting-house described in the writ, and had lawful authority by virtue of such ownership to enter the meeting-house and occupy his pew; that he only entered at the time alleged for the purpose of religious worship and other lawful purposes; that the defendant and fourteen others named with the First Universalist Society in Leeds, were owners of pews in said meeting-house and members of the First Universalist Society in Leeds; that prior to the supposed trespasses, the time for occupying said meeting-house had been alloted to the defendant and the other said pew-owners, pursuant to the statute, and that he only entered said house at the times designated in the allotment.

It appeared, *inter alia*, that Thomas Francis and others, on Aug. 17, 1804, were duly organized as the First Baptist Society of Leeds,

under a charter dated June 23, 1804; that in August, 1804, the society voted to purchase land on which to build a meeting-house, of Giddings Lane, who subsequently conveyed by deed of warranty to the First Baptist Society the land therein described; that Samuel Lane in December, 1804, contracted with the corporation to erect a meeting-house upon the land, and have "for the money which may accrue from the sale of pews;" that the house was built, and accepted by the committee in 1806; that the organization has been kept up until the present time.

The acts constituting the alleged trespass were admitted as set out in the brief statement.

It also appeared that on March 13, 1830, John Francis and fifty-nine others, were organized as the First Universalist Society in Leeds; that in 1837 it was reorganized; that in 1837 the meeting-house having become considerably dilapidated and unfit for a place of worship, the First Universalist Society was invited to aid in repairing and remodeling the house; that accordingly the house was lowered some four feet, twelve feet added on the south end, and carried up for a belfry, the old windows taken out and new larger ones substituted, and really the inside of the house thoroughly remodeled; that in 1837, Thomas Francis and thirty-four others entered into the following contract:

"Know all men by these presents, that whereas the two religious denominations in the town of Leeds known by the names and titles of the First Baptist Society and the First Universalist Society, having taken into consideration the high importance of a preached gospel, and being destitute of a suitable house for the worship of God, did, on this second day of July, A.D. 1836, by mutual consent, agree to alter and repair the Baptist meeting-house (so called). And whereas the societies aforesaid have in good faith made the necessary alterations and repairs on said house, they do hereby further agree that the said Universalist Society shall have the right of occupying said house on the last Sabbath in each month, for the full time of five years from the second day of February, one thousand eight hundred and thirty-seven, and the said Baptist Society

are to have the right of occupying said house all of the remaining Sabbaths during that time; and at the end of five years from the said second day of February, 1837, the said societies are to apportion the time that each society are to occupy said house, in proportion to the amount of property each society may then have in said house for another term of five years. And the like apportionment is to be made every five years afterwards,— reference being had at each apportionment to the amount of property that each society may have in said house. And the said societies do hereby further agree, that whereas it may be necessary to raise a sum or sums of money to defray the expenses of repairs already made on said house, or which may hereafter be necessary to keep the same in repair, it shall in all cases be raised by a tax on the pews, reference being had to the value of the same; but no tax is to be assessed on the pews for the support of the ministry, and this agreement shall be entered on, and become a part of the records of the societies aforesaid, provided, nevertheless, that nothing in this agreement shall prevent either of the societies from purchasing of, or selling to the other society all the right they may have in said house.

"Now, therefore, we the undersigned, being pew-owners in said house, do hereby covenant and agree, each with the other and the societies aforesaid, that to the extent of our influence and abilities, we will cause the above agreement to be carried into full effect and execution. In testimony whereof, we have hereunto set our hands, this eleventh day of March, one thousand eight hundred and thirty-seven;" and the agreement was adopted by the First Universalist Society and entered upon their records.

It also appeared that on April 14, 1849, the First Universalist Society, at a meeting duly called, "voted to accept the agreement entered into with the Baptist Society, relative to the occupancy of the meeting-house, it being the same as certified by their clerk, was accepted by the First Baptist Society on March 1, 1849; and that the prudential committee be instructed to carry out and perfect the agreement," which was as follows:

"To all whom it may concern: The First Baptist Society and

the First Universalist Society in the town of Leeds, do hereby mutually agree to the following arrangement for the occupancy of the meeting-house in Leeds Center, to wit, the Universalists are to have the right to occupy said house every fourth Sabbath in rotation, for the full term of ten years from the last Sabbath in April, 1849, except when the said fourth Sabbath shall come on the days set apart by the First Baptist Church in said Leeds for their communion service, which invariably occurs on the first Sabbath in the month; and the said Universalist Society are to have the right to occupy said house as many Sabbaths in each year for the time aforesaid, as they may be deprived of by the above exception, to be agreed upon by the respective societies before the time of occupying; and it is further agreed the said Baptist church and society may occupy said house the last Saturday before the first Sabbath in each month, and the said Universalist Society have right to as many Saturdays in proportion to the time they are to occupy said house. The above agreement is to settle all disputes by and between the said societies in relation to the occupancy of said house for the full term of ten years from the date above, and nothing in this agreement is to disturb or vary the legal title, claim, or privilege that either of the societies have or may have in the property of said house."

The record of the First Universalist Society contained the following:

"March 2, 1844.

I hereby certify that the above-named Baptist Society, at their annual meeting on the first day of March, 1849, voted to accept the above agreement, and that it be recorded in records of the society, provided the said Universalist society do, within a reasonable time, accept of it, make it a part of their records, and certify the clerk of the said Baptist Society that they have done so.

Attest: THOMAS FRANCIS,
Clerk of the First Baptist Society in Leeds.

A true copy. Attest: ISRAEL HERRICK, *Clerk.*"

On May 2, 1870, the defendant and several others alleging themselves to be "members of an organized society, called the First Universalist Society of Leeds," addressed a petition to Job Prince, a justice of the peace and quorum for the county of Androscoggin, making the necessary averments and praying for due proceedings under R. S. c. 12, § 35 *et seq.*, for an allotment. After due proceedings had, a formal allotment was made to the minority of "fourteen weeks in each year, as their part of the time that they may occupy said house, the same being in proportion to the amount they own therein, and do designate the week commencing Sunday, the seventeenth day of July next, and every fourth week thereafter, and one additional week, being the week next succeeding the week to which they are entitled in October as above, to be the weeks in each year which the minority may, if they please, occupy said house."

The remaining essential facts appear in the opinion.

The full court were to enter such judgment as the law required.

W. P. Frye & J. W. Cotton, for the plaintiffs, cited *Lord* v. *Chamberlain*, 2 Greenl. 67; *Minot* v. *Curtis*, 7 Mass. 441; *First Parish in Sutton* v. *Cole*, 8 Mass. 96; New Am. Cyclop. "Parish"; Washb. on Easements, 604; R. S. of 1857, c. 12, § 30; 3 Kent's Com. 532; *Gay* v. *Baker*, 17 Mass. 403; *Bates* v. *Sparrel*, 10 Mass. 323; *Revere* v. *Gannett*, 1 Pick. 169; *Jackson* v. *Rounsville*, 5 Met. 130; *Kimball* v. *Second Parish in Rowley*, 24 Pick. 347; *First Cong. Soc. in N. Bridgewater* v. *Waring*, 24 Pick. 304; *Daniel* v. *Wood*, 1 Pick. 102; 12 Mod. 420; *Fisher* v. *Glenn*, 4 N. H. 180.

Nahum Morrill & George C. Wing, for the defendant, cited R. S. of 1857, c. 12, §§ 27–32; Public Laws of 1870, c. 137; Public Laws of 1867, c. 71; *Second Cong. Soc. in N. Bridgewater* v. *Waring*, 24 Pick. 304; *Revere* v. *Gannett*, 1 Pick. 169; *Kimball* v. *Rowley*, 24 Pick. 347.

APPLETON, C. J. The plaintiffs were incorporated by an act of the legislature of Massachusetts, approved June 23, 1804. Under this act the incorporators were duly organized. This organization has been legally kept up to the present time. The land upon which their house of worship was erected was conveyed to them by their corporate name on 24th October, 1806. Their house was erected on the land thus conveyed to them, the same year, under a contract with the plaintiff corporation. The land purchased and the house erected thereon were owned by the plaintiff corporation and not by the members of the same.

The several pew-holders had an easement in and not a title to the freehold. Each pew-holder had a property in his pew and the right to its exclusive possession. But this right was subject to the paramount rights of the parish. The parish was the legal owner of the house and the land on which it stood. It had the control of the house; the right to determine at what hours on the Sabbath and at other times it should be open for public worship; to select the pastor, to contract with him as to the terms of his settlement, to determine who should be admitted to the pulpit in his absence, and to see that the house should be kept in a proper condition for its public use. The pew-holder has certain privileges by reason of his ownership,—such as passing through the aisles, being addressed from the pulpit, etc. His property is not absolute but qualified. He may own a pew and yet not be a member of the parish corporation. The corporation may own the land and building thereon, while the pew-holder has only a qualified property in his pew. *Gay* v. *Baker*, 17 Mass. 169; *Jackson* v. *Rounsville*, 5 Met. 130; *Revere* v. *Gannett*, 1 Pick. 169; *Daniel* v. *Wood*, 1 Pick. 102.

The plaintiffs occupied and controlled their house, making repairs on the same until March 1, 1837, when (the First Universalist Society in Leeds having been previously organized) the pew-holders in the same, being in part members of the First Baptist Society and in part of the First Universalist Society, entered into an agreement as to the occupation of the house for five years, from

Feb. 2, 1837, with an agreement as to the further occupation at the expiration of said term. The conclusion of the agreement is in these words: "Now, therefore, we the undersigned, being pew-owners in said house, do hereby covenant and agree, each with the other and the societies aforesaid, that to the extent of our influence and abilities, we will cause the above agreement to be carried into full effect and execution," etc. This contract, it will be perceived, was a contract between individuals and binding on them, and not on the two parishes of which they were members.

On the first of March, 1849, the plaintiffs and the First Universalist Society made an agreement as to the occupation of the plaintiffs' house by them respectively, for the full term of ten years, in which is the following clause: "The above agreement is to settle all disputes by and between the said societies in relation to the occupancy of said house for the full term of ten years from the date above, and nothing in this agreement is to disturb or vary the title, claim, or privilege that either of the societies has or may have in the property of said house."

After the year 1850 the records of the Universalist Society do not show any meetings of its members for the choice of officers.

Upon the petition of B. Davis and others (of whom the defendant was one), a warrant was duly issued calling a meeting of the petitioners, at the Leeds Centre meeting-house, on the 18th of January, 1869, to organize a religious society to be known as the First Universalist Society in Leeds. The petitioners met at the time and place appointed and organized said society in due form of law, and admitted certain persons as members.

It will be perceived that the society, organized in 1869, is a new one, and has no connection with, nor rights derived from, the preceding society, which bore the same name; and that the plaintiffs have not parted with their interest in and title to the land purchased by them in 1806 and the building erected by them thereon. The plaintiffs, therefore, are entitled to maintain an action for any trespass upon their estate.

The acts complained of are not denied, but the defendant justi-

fies as a pew-holder, and under certain proceedings had by virtue of R. S. 1857, c. 12, §§ 30, 31, 32.

As a pew-holder, the defense fails, for the acts done were not in pursuance of his rights as such.

Nor can the defense be sustained under any of the provisions of the statute upon which it is based.

By R. S. 1857, c. 12, § 30, "when a house of public worship is owned by persons of different denominations, and when an organized society, or its members, own five pews therein, one or more of the minority, owning not less than five pews, may apply to a justice of the peace and quorum, to obtain a division of the time of occupying the house; and he shall call a meeting of the owners, by posting up a notice in a public place, in or about the house, thirty days at least before the meeting, stating the time, place, and object of the meeting."

Two conditions must co-exist before there can be any legal action under the provisions of this and the following sections: (1) there must be a house of public worship owned by persons of different denominations; (2) in such house, so owned, an organized society or its members must own at least five pews.

Now, in fact, neither of these conditions exists. (1) The house is not owned "by persons of different denominations." It was built and is owned by the plaintiff corporation. The interests of the parish and of the pew-holders are different and distinct. The pew-holder may own his pew and thereby have an easement in the house, but he in no way can be regarded as owning the house in which his pew is.

(1) Neither does any organized society, or its members, own five pews or more therein; that is, "in a house of worship owned by persons of different denominations;" for it will be observed, it is only to a case of ownership of pews in a house so owned that this section applies. It does not apply where the title is in the corporation, for when one has been organized in pursuance of the previous sections of c. 12, "such corporation by a major vote of its members may use and control the meeting-house or building for

public worship, partly or wholly owned by them, as they please," etc., § 29. *Defendant defaulted.*

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

WALTON, and BARROWS, JJ., did not concur.

REUBEN WILLEY *vs.* MARGERY NICHOLS.

Pleading. Description of land in writ of entry—what is sufficient.

The declaration in a writ of entry should describe the demanded premises clearly, and without reference to papers or records, *dehors* the writ; but such a reference will not vitiate the declaration if the description is complete without it.

A description of the demanded premises in a writ of entry is sufficient if it gives the number of the lot, when the lot has been actually run out and numbered, the number of the lot in such case becoming, for the purpose of identification its name.

"So much of the Hunnewell farm, so called," in a town and county named, "as is contained in lots two, three, and four, according to the division of said farm made by commissioners of partition, appointed by the supreme judicial court, on the petition of B. P. Hunnewell; said lots are adjoining each other, and containing in all eighty acres, more or less; said lot two being the same set off by said commissioners to Jonas Hunnewell; said lot three the same set off to Eliza Willey; and said lot four the same set off to Bethana Bruce," is a sufficient description of the premises demanded in a writ of entry.

ON EXCEPTIONS.

WRIT OF ENTRY to recover possession of land under mortgage to the plaintiff.

The defendant demurred specially to the declaration assigning for a cause that the premises were not sufficiently described in the declaration.

The description will be seen in the opinion.

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

C. Record, for the defendant.

The premises must be clearly described, *Wyman* v. *Brown*, 50 Maine, 139.

The description in a writ of entry must be so certain that seisin may be delivered by the sheriff without reference to any description *dehors* the writ. *Atwood* v. *Atwood*, 22, Pick. 283; *Flagg* v. *Bean*, 5 Foster (N. H.), 49; *Riley* v. *Smith*, 9 Allen, 370; *Munson* v. *Munson*, 30 Conn. 425.

S. & J. W. May, for the plaintiff, cited *Propr's of Ken. Pur.* v. *Lovell*, 2 Maine, 149; *Elliott* v. *Heath*, 6 N. H. 426; Jackson on Real Actions, 57; *Seward* v. *Jackson*, 8 Cow. 427; *Bean* v. *Snyder*, 11 Wend. 593; *Chase* v. *McLellan*, 49 Maine, 375.

WALTON, J. It is undoubtedly true, that in a writ of entry the premises demanded should be clearly described; and that the description ought to be complete without reference to any papers or records *dehors* the writ. But it is well settled that if the description in the writ is of itself sufficiently complete, the addition of a reference to a record or deed, or other document (although a very bungling way of pleading) will do no harm. And it is also well settled that when land has been run out and lotted, and the lots numbered, a description of one of these lots may be by reference to its number. In such cases the number of the lot, for the purpose of identification, becomes its name; and may, upon inquiry, be as readily found, as any one of the numerous streets, which, in many cities, are known only by their number.

But it is said that the description should be so certain as to enable the officer to deliver seisin without reference to any description outside of his precept. This is true only in a limited sense. Neither a parcel of land, nor a person, can be so described as to preclude inquiry. An officer, for instance, is required to arrest some one who is a stranger to him. His name, and residence, and occupation, will not alone enable the officer to find and identify him. These may be sufficient to enable him, on inquiry, to find him. So, in a writ requiring an officer to deliver seisin of a parcel of real estate. Neither the range, nor the number of the lot, nor any

other name by which it may be known, will enable the officer to do so, without inquiry. But when a parcel of land has been run out and its boundaries marked upon the face of the earth, it can as readily be found and identified by its number, as by any other name or description. Hence such a description has always been held sufficient.

The description in this case is as follows: "A certain piece or parcel of land, situate in Durham in the county of Androscoggin, and being a part of the Andrew Hunnewell farm, so called, and including so much of said farm as is contained in lots two, three, and four, according to the division of said farm made by commissioners of partition, appointed by the supreme judicial court, on petition of Byron P. Hunnewell; said lots all adjoining each other, and lying in one parcel, and containing in all eighty-two acres, more or less; said lot two being the same set off by said commissioners to Jonas Hunnewell; said lot three the same set off to Eliza Willey; and said lot four the same set off to Bethana Bruce; judgment having been entered on the report of said commissioners at the January term of said court, 1868, in said county of Androscoggin; and the said report and judgment are referred to for metes and bounds and more particular description of said premises."

If there was no other description of the premises than the reference to the records of this court, we should hold it insufficient. But such is not the case. The town, the farm, the fact that the farm had been partitioned and lotted, and the lots numbered, and the persons to whom the lots had been severally assigned, and approximately the number of acres, are all mentioned and described without any such reference.

We cannot doubt that the description is sufficient, and that a reasonably intelligent officer would be able to find and deliver seisin of the premises, without going to the county records for aid.

Exceptions overruled.

Declaration adjudged good.

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

THEODORE RUSSELL, complainant, *vs.* ROBINSON TURNER.

New trial. Practice.

A new trial will not be granted upon the ground that an erroneous instruction was given, unless it also appear that it might have been prejudicial to the excepting party.

Thus where, in the trial of a complaint for flowage, the parties traced their respective titles to one Dailey, in whose deed to one Fuller, one of the complainant's predecessors in title, the grantor "reserved the liberty for repairing dams and flowing, as much as said Dailey requires for use of the mill;" and the presiding judge instructed the jury that the reservation would not pass to Dailey's grantees; and the controversy between the parties was not whether the defendant could flow to the extent that Dailey did when he delivered the deed containing the reservation, but whether the dam had not since been raised so as to flow more of the complainant's land than would have been flowed by a dam of no greater efficient height than the one in existence when the reservation was made, *Held*, that the instruction was purely immaterial.

ON EXCEPTIONS.

COMPLAINT FOR FLOWAGE.

BARROWS, J. This is a complaint for flowage tried before the jury at the January term, 1870; the respondent not denying the complainant's title in the lands or that they were flowed, but asserting by his plea "a right to flow without compensation, also a right to flow acquired by prescription." The verdict being against him, he presents exceptions from which we learn that the parties traced their respective titles to Nezar Dailey, in whose deed of the meadow land, dated August 26, 1809, to Samuel Fuller (under whom, through certain *mesne* conveyances the complainant holds), is found the following clause: "reserving liberty for roads, also for repairing dams, and flowing as much as said Dailey requires for use of the mill."

The respondent owns the mill privilege and pond dam causing the flowage, through a series of conveyances under William H. Brettun, to whom Nezar Dailey conveyed them by deed dated June 20, 1814, couched in the terms following: "Also, the saw

and grist-mill situated upon lot 93, together with the mill-yards, dams, ponds, and pondage, together with all the rights and privileges secured to me by the several deeds of Samuel Atwood and others, or reserved by me in any deeds to Samuel Boothby, or any others;" "and it is agreed that if the reservation in the deed from Nezar Dailey to Samuel Fuller, gave to Dailey the legal right to convey the same, then the defendant Turner, now enjoys that reservation." The presiding judge, among other things, in respect to the reservation in the deed from Dailey to Samuel Fuller, instructed the jury, that as there were no "words of limitation or inheritance by which that reservation would descend to the grantee of Dailey . . . Dailey's grantee, and the subsequent grantees, acquired no right whatever to flow the lands in question, so that this branch of the defense will be entirely disregarded by you." To this the defendant excepts. Now, if upon looking at the case as presented at *nisi prius* and examining the positions taken by the parties respectively, as to the questions which they were litigating before the jury, it had appeared to be possible that any rights of the respondent could have been injuriously affected by this instruction, it would be necessary to scrutinize it carefully, and determine whether it is absolutely sound and correct. But the exceptions further show that it was "admitted that the pond dam of the defendant is the dam originally supplying the mills referred to in the deed from Nezar Dailey to Samuel Fuller, the complainant claiming that it has been rebuilt several times and raised, and is now higher than when that deed was given.

The whole charge of the presiding judge is made part of the exceptions, and taken in connection with the pleadings, and the statement of the case in the exceptions, makes it plain that the controversy between these parties was not whether this defendant had the right to flow this land to the extent that Nezar Dailey did in 1809, when he made his deed to Fuller, but whether the dam had not been raised since that time so as to flow more of the complainant's land than would have been flowed by a dam of no greater efficient height than the one which was in existence when

Nezar Dailey reserved to himself "liberty . . . for repairing dams and flowing as much as said Dailey requires for the use of the mill."

If the defendant claimed that by the conveyances from Dailey he had acquired a right to flow to any greater extent than would be flowed by a dam of the same height as that which Dailey was using when he sold the meadow-land to Fuller, his claim could not be sustained.

It is apparent that his right to flow so much, however it might have been acquired, was not in dispute. He and his predecessors and grantors had exercised for more than fifty years the right to flow so much, and it was admitted that defendant's dam is the dam originally supplying the mills referred to in the Fuller deed, "the complainant claiming that it has been rebuilt several times and raised, and is now higher than when that deed was given." Manifestly, it was upon proof of this allegation that the complainant based his claim to a verdict, and not upon a denial of the defendant's right to flow to the extent mentioned in the reservation, a right which he and his grantors had enjoyed for more than fifty years, and were entitled to maintain by prescription, whether it had originally been so excepted and reserved by Dailey as to be capable of passing by deed to his grantees or not.

Under these circumstances we do not see how the defendant could have been injured in the least by the instruction of which he complains, if it was erroneous. It was purely immaterial.

There are numerous cases in which it has been held, that, even if instructions are erroneous, unless it appears also that they might have been prejudicial to the excepting party, a new trial will not be granted. *Neal* v. *Paine*, 35 Maine, 158; *Beeman* v. *Lawton*, 37 Maine, 543; *Whidden* v. *Seelye*, 40 Maine, 247; *Barrett* v. *Salisbury Manuf. Co.*, 28 N. H. 438; *Moulton* v. *Witherell*, 52 Maine, 237.

We need not inquire whether the clause in Nezar Dailey's deed to Samuel Fuller would be most correctly described as a reservation or an exception, or whether for want of words of limitation or

inheritance, Nezar Dailey's assigns failed to get a good title, by deed, to the premises, reserved or excepted in his conveyance to Fuller. For more than fifty years, as the case shows, the tenant and his grantors had exercised all the rights which Nezar Dailey can be supposed to have attempted to reserve or except, and defendant's title thus acquired, as the judge instructed the jury, was as good as if he had had a deed of a right to flow from the owner of the land. It is not for "flowing as much as said Dailey requires for use of the mill" that this complaint is instituted or maintained; but because, as the jury seem to have found, within twenty years previous to the commencement of this process the respondent or his predecessor, has by increasing the height of the dam, flowed beyond his right and beyond what Nezar Dailey and his immediate successors had been accustomed to flow.

Exceptions overruled.

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

M. T. Ludden, for the complainant.

Wm. P. Frye & J. B. Cotton, for the defendant.

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

Witness—competency of.

Under the provisions of R. S. 1871, c. 82, in cases where an administrator is a party and his intestate has never testified in the case, the adverse party cannot be a witness unless the administrator offers his own testimony.

ON EXCEPTIONS.

ASSUMPSIT to recover for service rendered by Joseph Thompson, since deceased, the plaintiff's intestate. The writ is dated May 14, 1867, and the suit was instituted by the present plaintiff as administrator of the estate of Joseph Thompson.

At the trial the plaintiff did not offer to testify, and neither was he called or sworn as a witness. But, against the seasonable objection of the plaintiff, the three defendants were called and sworn as witnesses in their own behalf, and they were permitted to testify to material facts which occurred after, but not before the death of the plaintiff's intestate.

The plaintiff seasonably objected to all such testimony before the questions eliciting it were answered; but the presiding judge overruled the objections and received the testimony, and the plaintiff alleged exceptions.

E. B. Smith, in support of the exceptions.

I. T. Drew, for the defendants.

BARROWS, J. The single question presented by the exceptions is whether, under the provisions of the Revised Statutes of 1871, in cases where an executor or administrator is a party, the adverse party can be permitted to testify in relation to facts occurring subsequent to the decease of the testator or intestate, unless the executor or administrator offers his own testimony at the trial, the deceased never having testified in the case.

Chapter 82, section 82, abrogates the common-law rule, excluding parties to civil suits from giving testimony therein, "except as hereinafter provided."

Section 87 declares that the provisions of the five preceding sections shall not be applied to any cases where, at the time of taking testimony, or the time of trial, either party is "an executor or administrator or made a party as heir of a deceased party, except in the following cases." One of these exceptions runs thus: "In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts legally admissible upon the general rules of evidence happening before or after the death of such person; and when such person so testifies, the adverse party shall neither be excluded nor excused from testifying in reference to such facts."

Taken together, these provisions seem to make the right of the adverse party to testify at all in such cases, to depend upon the course pursued by the executor, administrator, or other legal representative of the deceased.

If there was anything ambiguous about these provisions we should be disposed to construe them by a reference to the history of the legislation upon this topic, and to hold that no change was intended by the legislature in the revision; but the language is of that distinct and positive character which seems to admit but one construction. For the same reason we have found ourselves compelled to hold that the husband or wife of either party, though called to testify with the consent of his or her partner in the marriage contract, is no longer a witness in this class of cases. *Jones* v. *Simpson*, 59 Maine. "When a statute is revised, and a provision contained in it is omitted in the new statute, the inference to be drawn from such a course of legislation would be that a change in the law was intended to be made. If the omission was by accident, it belongs to the legislature to supply it." *Buck* v. *Spofford*, 31 Maine, 36.

A statute authorizing a man to be a witness in his own case is in derogation of the common law, and must be construed strictly. *Warner* v. *Fowler*, 8 Md. 25.

Exceptions sustained. New trial granted.

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

CHARLES E. CLIFFORD and others, appellants from the decision of the County Commissioners of York County.

Statute—construction of. "Disinterested person"—who is not.

In the absence of the "written consent of the parties," a brother of the mother of one of the petitioners for the location of a highway cannot be appointed one of a "committee of three disinterested persons," on appeal, by the petitioners from the decision of the county commissioners in refusing to lay out the way.

ON EXCEPTIONS.

APPEAL from the decision of the county commissioners of this county, whereby they refused to locate a highway in Newfield, Limerick, and Waterborough, on the petition of the appellants.

The appeal was entered at January term, 1871, of this court, in the absence of the counsel for the town of Limerick, respondent, and at the suggestion of petitioners' counsel, who was one of the petitioners, a committee was appointed.

On the return of the notice and before the view, counsel for the respondent town of Limerick appeared before the committee and filed written objections to further proceedings, on the ground that one member of the committee was brother of the mother of Charles E. Clifford, one of the petitioners and appellants, and moved that further proceedings be discontinued, which motion was overruled by the committee and made part of their return. Thereupon the town of Limerick contested at length before the committee upon the merits of the petition.

The report of the committee, reversing the judgment of the commissioners in the whole, was made and filed at the May term of this court, 1871. The respondent town of Limerick, alone, appeared and moved the rejection of the report of the committee, because one of them was not disinterested, and no written consent given.

The presiding judge ruled that the relationship did not operate

as a disqualification, overruled the objection, and accepted the report, and the respondent alleged exceptions.

L. S. Moore & H. H. Burbank, for Limerick.

Clifford, for the appellants,

Contended that the exceptions should be dismissed for non-compliance with Rules of Court XVI. and XXI. *Maberry* v. *Morse*, 43 Maine, 176.

On the question of the disqualification, counsel cited *Groton* v. *Hurlburt*, 22 Conn. 178; *People* v. *Wheeler*, 21 N. Y. 82; *Clapp* v. *Foster*, 34 Vt. 580; *Bard* v. *Wood*, 30 Maine, 155; *Harkness* v. *Waldo Co. Com.* 26 Maine, 356; *Wilbraham* v. *Hampden*, 11 Pick. 322.

Petitioners are not parties litigant, but agents of the public. They have no private interest, distinct from the remainder of the public in same county, and if objection is good the appointment must be made of persons having no relatives in the county.

Costs are matters of discretion with the court in matters of appeal from decision of county commissioners, R. S. c. 18, § 39; and do not constitute a legal interest.

APPLETON, C. J. The petitioners are interested in the result of their petition, else they would never have petitioned. It is only because they are parties interested that they have the right to appeal. As petitioners, they may be held responsible for costs, which liability constitutes an interest.

It is for the appellants to see that no one should be appointed on the committee, to whom there can be any legal objection, particularly when no other parties are present at the appointment. *Friend* v. *Abbott*, 56 Maine, 262.

In cases of appeal from decision of county commissioners on petitions for laying, altering, or discontinuing any highway, the court may appoint a committee of three disinterested persons, etc. R. S. 1857, c. 18, § 35; *Friend*, appellant, 53 Maine, 387. The statute requires a disinterested committee. In such case a relationship to

the party interested by consanguinity or affinity within the sixth degree, according to the rules of the civil law, or within the degree of second cousins inclusive, except by the written consent of the parties, will disqualify. R. S. c. 1, § 3, rule XXII. There was no written consent. Mr. Ayer was disqualified to act within the rule.

The objection to Mr. Ayer was made before the committee on the return of notice, by a written motion, which they overruled. In their return they refer to the motion and make it a part of the same. The objection taken is, therefore, apparent on the record. The presiding justice overruled it on the ground that the relationship in question did not operate as a disqualification, and accepted the report. In this there was error. *Exceptions sustained.*

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

EDMUND WARREN *vs.* INCREASE S. KIMBALL.

Real action — evidence of fraudulent ante-dating writ on which defendant's title depends admissible under certain circumstances.

In the trial of a real action where the plaintiff's title depends upon a deed of warranty from his grantor, acknowledged September 16th, and recorded Sept. 19, 1865; and the defendants, upon an attachment bearing date the 15th and recorded the 19th September, 1865, made on a writ in favor of the defendant against the plaintiff's grantor, bearing same date as the attachment,—it is competent for the plaintiff to show that the defendant's writ was not made on the 15th, but that the defendant having seen and examined the deed to the plaintiff, in the registry of deeds, on the 19th September, and thereby ascertained that the plaintiff's grantor had conveyed the demanded premises, thereafterwards, on the evening of the same day, made the writ and antedated it.

ON REPORT.

WRIT OF ENTRY to recover a parcel of land in Shapleigh, in this county.

The plaintiff put in, as evidence of his title, a deed of warranty

of the demanded premises, from Greenleaf Webber, of Shapleigh, to him, not dated, but acknowledged September 16th, and recorded September 18, 1865.

The defendant put in, as evidence of his title, copy of a writ in his favor against said Webber, bearing date, Sept. 15, 1865, returnable to the January term, 1866, of this court.

On this writ was the return of Joseph G. Harmon as deputy-sheriff, bearing date Sept. 15, 1865, an attachment of all the real estate in the county, of Greenleaf Webber, and also that the officer left a summons, at the last and usual place of abode of the said Webber, on the 18th of same September.

That action was duly entered and continued until September term, 1866, when judgment was recovered thereon and execution issued and levied, in due form of law, upon the premises in controversy, within thirty days after judgment, and the same duly recorded.

The plaintiff offered evidence tending to prove that the writ in *Kimball* v. *Webber* was not made on the day it bore date, to wit, on Sept. 15, 1865, but that the defendant examined the plaintiff's deed in the registry of deeds, on Tuesday the 19th day of said September, and after thereby ascertaining that Webber had conveyed the demanded premises to the plaintiff, on the evening of the same 19th of September made the writ and ante-dated it to September 15th.

The presiding judge ruled that the officer's return on the writ was conclusive as to the date of the attachment, and excluded the evidence for the purpose of presenting the case to the full court. If the evidence offered and excluded was admissible, the case to stand for trial.

Ira T. Drew, for the plaintiff.

I. S. Kimball, pro se.

Between parties and privies the return of an officer of matters material to be returned, is so far conclusive that it cannot be controverted for the purpose of invalidating the officer's proceedings

or defeating any right acquired under them. *Bott* v. *Burnham*, 11 Mass. 165; *Stevens* v. *Snow*, 10 Maine, 263; *Allen* v. *Portl. Stage Co.*, 18 Greenl. 211; *Agry* v. *Betts*, 12 Maine, 417; *Clough* v. *Munroe*, 34 N. H. 381; *Brown* v. *Davis*, 9 N. H. 76.

As to who is privy. *Dickinson* v. *Lovell*, 35 N. H. 9; *Ladd* v. *Wiggin*, 35 N. H. 421.

APPLETON, C. J. This is a writ of entry, in which the plaintiff claims title by deed. The defendant derives his title under a levy in due form of law. The execution upon which the levy was made issued upon a judgment, where the attachment in the original suit appears to be of a date prior to that of the plaintiff's deed. As both parties claim under one Webber, and as the defendant's levy, being seasonably made, relates back to the date of the attachment, and thus is prior to the plaintiff's deed, the defense upon the facts as thus stated must prevail.

But the plaintiff offers to show that the writ in the suit, *Kimball* v. *Webber*, was made on the 19th September, 1865, and not on the 15th; that the defendant, after examining the plaintiff's deed and ascertaining that said Webber had conveyed the demanded premises to the plaintiff, made said writ on the evening of the 19th September, and ante-dated the same. These facts, if proved, would show fraud on the part of the defendant, and that his apparently legal title was obtained solely by and through such fraud.

The plaintiff is no party to the suit of *Kimball* v. *Webber*. Neither is he privy in estate. It seems to be settled that as between the parties to a suit, and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, as bail, and indorsers the return of the sheriff of matters material to be returned, is so far conclusive evidence that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings or defeating rights acquired under them. But such evidence is not conclusive as to third persons. Fraud vitiates all contracts into which it enters, whether verbal or written, under seal or of record, and the principle applies equally to the records and judgments of

courts. "That judgments, as well as other transactions, are vitiated by fraud," observes Bellows, J., in *Great Falls Manufacturing Co.* v. *Worster*, 45 N. H. 111, "is not open to controversy; Fermor's case, 3 Co. Rep. 77*a*; *Hoitt* v. *Holcomb*, 23 N. H. 554; but it is sometimes made a question in what manner it shall be taken advantage of. There is, however, no doubt that a judgment may be collaterally impeached by a third person not a party or privy to it, upon the ground that it was obtained by collusion with intent to defraud him." If a judgment be taken in a way to hinder, delay, or defraud other creditors of the debtor, the law pronounces such judgment fraudulent and void, as against such creditors. *Robinson* v. *Holt*, 39 N. H. 557; *Page* v. *Jewett*, 46 N. H. 441. When a judgment, fraudulently rendered between the parties, is brought collaterally before the court, it may be shown to be void for want of notice or for fraud. *Downs* v. *Fuller*, 2 Met. 138; *Leonard* v. *Bryant*, 11 Met. 370.

The plaintiff offers to show what, if proved, in a case in which he was no party and to which he was not a privy, would be a gross fraud on the part of the defendant. It is no sufficient answer for the fraudulent party to say, that the party whom he would have defrauded, may have a remedy against the officer, a partaker of his crime, and without whose coöperation it could not have been effected. There is no reason why his fraud should be successful, which does not apply to all frauds. The objection to the admission of the evidence offered is purely technical. But fraud is not to be suffered to remain safely and securely intrenched behind the mere technicalities of the law.

The true date of a writ may be shown, as between the parties to it. The apparent date is only *prima facie* evidence of the time when it was sued out. *Gardner* v. *Webber*, 17 Pick. 412; *Bunker* v. *Shed*, 8 Met. 153; *Sargent* v. *Hampden*, 38 Maine, 581; *Trafton* v. *Rogers*, 13 Maine, 315. The *teste* of a writ is *prima facie* evidence of the time when it was sued, but it is not conclusive; and the actual time when it was sued out and delivered to the officer, may be proved by parol evidence. *Parkman* v. *Crosby*, 16

Pick. 297. If the defendant has been guilty of fraud in procuring the title under which he claims, the plaintiff has the same right to show his fraudulent misconduct, whether it relates to the inception of the suit or the rendition of judgment. He can set up no estoppel to prevent the truth from being known and his fraud from being defeated.

The evidence offered shows that the defendant had full knowledge of the plaintiff's title before suing out his writ against Webber. The taking a second deed with a full knowledge of a prior unrecorded one is a fraud, which postpones the deed, as between the fraudulent grantee and the first grantee, though the second deed be first placed on record. So an attachment of land previously deeded by one having actual knowledge of an elder deed of the same land, will not avail the attaching creditor to defeat the prior right of the first grantee. *Porter* v. *Cole*, 4 Greenl. 20; *Priest* v. *Rice*, 1 Pick. 164; *Coffin* v. *Ray*, 1 Met. 212. But the grantee of real estate having notice of a prior unregistered deed, or other claim thereto, may, nevertheless, convey a perfect title to a *bona fide* purchaser having no notice of such deed or claim. *Pierce* v. *Faunce*, 47 Maine, 507.

The question here presented is whether evidence of knowledge of a previous deed, on the part of an attaching creditor, of the same land, and of a fraudulent antedating by him of the writ on which the attachment is made is admissible in a case by the party to be defrauded against the party by whom the alleged fraud is said to have been perpetrated,—and we think it is. It would be a very different matter if the fraudulently attaching creditor had conveyed the land levied upon to a *bona fide* grantee, who should make his purchase relying upon the title disclosed by the record.

The case to stand for trial.

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

CHRISTOPHER HUSSEY *vs.* JAMES P. ALLEN.

Waiver.

Upon cross-examination of the defendant it appeared, that he, being in attendance upon the court as a juror as well as a party, conversed with several of his associates in relation to his case, prior to its coming on for trial. The plaintiff did not then choose to insist upon the objection, but went on and closed the trial, when a verdict was found against him. *Held*, that the objection was waived.

ON MOTION.

WALTON, J. All attempts to influence jurors by private conversation with them are so reprehensible, that we should unhesitatingly grant a new trial in this case if we were not obliged to consider the objection as waived.

It seems that the defendant, who was in attendance upon the court, not only as a party, but also as a juror, took occasion to talk with several of his associates in relation to his case in advance of the trial; but this fact came out during the trial, on cross-examination of the defendant himself. As the plaintiff did not then choose to insist upon the objection, and to have those jurors set aside, and a new jury impanneled to try the case; but on the contrary went on and closed the trial, and took his chance of obtaining a verdict in his favor, we think the objection must be regarded as waived, and that it now comes too late.

But the plaintiff also insists that the verdict is so clearly wrong, that we ought to set it aside and grant him a new trial for that reason. We think not. The question (involving as it did a right of way over the plaintiff's land by adverse user) was a very diffi-

cult one to try; and we are by no means satisfied that the verdict is so clearly wrong, as to justify the court in setting it aside.

Motion overruled.

Judgment on the verdict.

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

Asa Low, for the plaintiff.

I. S. Kimball, for the defendant.

JOHN A. POOR *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Pleading. Demurrer. Practice.

When pleadings end in a demurrer, judgment must be rendered against the party which committed the first fault.

A declaration alleging that the plaintiff at the request of the defendants, a railroad corporation, had conveyed his stock therein to a third person, to be held in trust for certain purposes, and that the defendants in consideration thereof agreed with such trustee not to issue any additional stock without the consent of the contractors, who were constructing their railroad; but that the defendants, without such consent, had issued other stock whereby the value of that conveyed in trust by the plaintiff had been materially diminished,—discloses no ground of an action either *ex-contractu* or *ex-delicto*.

ON EXCEPTIONS.

ACTION.

"In a plea of the case for that the defendant company, before the 14th day of March, 1866, had entered into a contract with one George H. Pierce and one Albert Blaisdell for the construction of the railway of said company, to be paid for in cash, to the said Pierce and Blaisdell, at certain rates therein stipulated, under which contract payments were then due and in arrears from said

company to said contractors, and the said company was not able to pay the same, and the said contractors were not bound to proceed in said work, and had suspended the same, and, therefore, the said contractors, on the 11th day of March, 1866, proposed to said company, to continue their work under said contract, upon that part of the line, extending from the city of Bangor to the town of Winn, in this State, notwithstanding such arrears, upon the condition, amongst other things, that a major part of the stock of said company should be put into the hands of said contractors and their associates, as security for the money which they should advance in doing said continued work, and afterwards, on the 21st day of the same month, the company accepted said proposition, in the terms thereof, upon the condition that stockholders of the company should make such disposition of the stock as was required by the terms of said proposition, and such as would place in the hands of the said contractors and their associates a majority of the stock of the company. And the plaintiff avers that he was then a stockholder in said company, owning four hundred and sixty-six shares of the paid-up capital stock of the same, and for the purpose of carrying into effect the said proposition of the contractors and the acceptance thereof, under the conditions aforesaid, the said company then and there requested the plaintiff and other stockholders, severally, to transfer to the said contractors such number of shares belonging to them respectively, as should be a majority of all the paid up capital stock of the company, and voted that any further issue of stock for the payment of land damages, or other needful expenses of the company or for the completion of the line to the town of Winn, should be authorized only on the written consent of the said contractors. And, therefore, the plaintiff, in pursuance of said request, and confiding in the vote so passed, on the day following transferred to the said Pierce and Blaisdell 373 shares in the said capital stock; and other stockholders at the same time, in pursuance of said request, and confiding in said vote, also transferred other and further shares in said capital stock, to said Pierce and Blaisdell in such number, to wit, 574 shares, as made and consti-

tuted a majority of all the paid-up capital stock of said company, and the said transfers were received by the said Pierce and Blaisdell in fulfillment of the terms of their proposition aforesaid,—and the said company had the benefit of the same for the purpose of carrying the said proposition and the acceptance thereof into effect. And the said Pierce and Blaisdell, at the request of said company, and for the purpose of effecting the object of said transfer and securing the rights of the plaintiff, and said other stockholders in the stock so transferred, then and there gave to the plaintiff and said other stockholders severally, accountable receipts for the same, engaging and assuring that when they should have completed the said railway from Bangor to Winn aforesaid in pursuance of their contract aforesaid, and the same should have been paid for according to the terms of said contract, as modified by the proposition hereinbefore recited, and the acceptance thereof, they would transfer and return the said stock to the plaintiff and said other stockholders, or to their order, and not otherwise. And the plaintiff avers that by all the several acts, requests, and votes of the said company herein recited and set forth as aforesaid, and the compliance of the plaintiff with such request to transfer his stock as aforesaid, the said company was bound and obliged in good faith to observe the trust so created in respect to the plaintiff's stock and his rights therein, and was bound to do no act which should impair the value of the plaintiff's interest in the stock so transferred by him, or the other stock belonging to him, and was bound and obliged not to make any further issue of stock of the company by the transferring for the completion of the line to Winn, without the written consent of the said contractors. And the plaintiff further avers that no such consent was ever given by said contractors at any time after said 21st day of March, 1866, before the time of the acts and votes of said company hereinafter recited. Yet the said company, unmindful of its said obligations, and contriving and intending to injure and defraud the plaintiff and to violate the trust which the said company had entered into and undertaken in respect to the plaintiff's said shares, and contriving and intending

to destroy the value of the same and all the plaintiff's rights therein; afterwards, on the 23d day of December, 1867, at Bangor aforesaid, by the action and vote of the directors of said company, voted to issue other and further stock of said company, and other and further certificates of shares in the same, on paid-up stock, to a large amount, namely, twelve hundred and fifty shares of the par value of $125,000, to a certain person or persons who claimed to have performed work under said construction contract, in the construction of a small part of said railway from Bangor to Winn, and to issue the same in payment for such work claimed to be of that value, and afterwards, within one month thereafter, actually issued and delivered such further certificates of stock to the person or persons aforesaid, although the said contractors did not give their consent thereto, and although the said work from Bangor to Winn was not completed, but remained to a large extent unfinished and incomplete, and although no provision whatever was made in said construction contract or otherwise for payment for any such work in stock of the company.

"Whereby and by reason of this said wrongful and fraudulent acts, contrivances, and intents of said company, the plaintiff has been greatly damnified, and his interests in the stock so placed by him in trust as aforesaid, and the value thereof has been greatly impaired, diminished, and destroyed. And by the same wrongful, fraudulent acts, contrivances, and intents, the value of plaintiff's other stock in said company has also been greatly impaired, diminished, and destroyed. To the damage of said plaintiff (as he says), the sum of forty thousand dollars."

PLEA.

"And the said defendant corporation comes, etc., when, etc., and prays judgment if the plaintiff, his action aforesaid thereof against it, ought to have or maintain because it says that after the making of the contract for the construction of its railroad as alleged in the declaration, and after the making and acceptance of the proposition recited in the declaration as therein alleged on the twenty-first day

of March, A. D. 1866, and before the issue of capital stock in the declaration complained of, to wit, on the eighth day of May, A. D. 1866, the said Pierce and Blaisdell made an agreement in writing between themselves of the first part, and John H. Wiggins, Philander C. Brink, J. Edgar Thompson, John H. Bradley, Benj. E. Smith, and Thomas W. Pierce, and such other persons as should be selected by said Wiggins, Brink, Thompson, Bradley, Smith, and Thomas W. Pierce, and should sign said agreement, provided that the whole number should not exceed ten, equally interested, of the second part; by which agreement the said Pierce and Blaisdell for a valuable consideration therein expressed, did sell, assign, and transfer so much of said contract for the construction of the defendants' railroad to the parties of the second part as gave and secured to each of them, the following interests, to wit, to said Wiggins, Pierce, Blaisdell, Brink, Thompson, Bradley, Smith, and Thomas W. Pierce, each one-tenth, and to such persons as should thereafter be selected and sign said agreement as aforesaid, two-tenths; and thereafterwards, to wit, on the tenth day of said May, William G. Case and William Dennison were selected as aforesaid, and did sign said agreement, and thereby became parties thereto, and owners of one-tenth each of said contract, and the signing of said agreement by said Case and Dennison, was on the same day ratified and confirmed by all the other parties thereto; and it was further stipulated in said agreement that the assignment of said contract should include and carry with it the said supplemental contract of March 21, 1866, for the control of said company; and it was further provided, by said agreement, that said parties of the first and second part should together constitute a board of control, and should manage all the affairs of said company, and might act by committee, agent, or proxies, and might compose or select the board of directors of the defendant corporation; that afterwards, to wit, on the first day of June, A. D. 1866, with the consent of all the parties to said agreement, said Thomas W. Pierce sold and assigned all his interest in said contracts and agreement, to said Pierce and Blaisdell; that afterwards, to wit, on the eighth day of

October, A. D. 1867, with the consent of all the parties to said agreement, said Blaisdell sold and assigned to said Case all his interests in said contracts and agreements, that by virtue of said agreements, transfers, and assignments, the interest in all the contracts in plaintiff's declaration mentioned before the issuing of said stock, to wit, on the ninth day of October, A. D. 1867, the right of control of the construction of said railroad under said contracts in the declaration mentioned, became and was vested in the said Pierce, Wiggins, Brink, Thompson, Dennison, Smith, Bradley, and Case, as a board of control; that the defendant, from and after the said eighth day of October, till the date of the plaintiff's writ, recognized the said board of control as the contractors under the contracts in the declaration mentioned, and treated and dealt with them as such, thereby consenting to and ratifying the transfers and assignments as aforesaid; that by virtue of the premises the right under the contracts in the declaration mentioned became, long prior to the issue of said stock, vested in said Wiggins, Pierce, Brink, Case, Thompson, Bradley, Smith, and Dennison, in the same manner and to the same extent as it was originally vested in said Pierce and Blaisdell; that the said board of control, to wit, said Wiggins, Pierce, Brink, Case, Thompson, Bradley, Smith, and Dennison, before the issue of the stock complained of in the declaration, to wit, on the twentieth day of December, A. D. 1867, did consent in writing to said issue of said stock by said defendants; and that it is ready to verify.

"Wherefore it prays judgment, if said plaintiff his action aforesaid against it ought to have or maintain, and for his costs."

To this plea the plaintiff filed a general demurrer, which was joined.

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

P. Barnes, for the plaintiff.

Davis & Drummond, for the defendants.

WALTON, J. This case is before the court on demurrer. The plaintiff says the defendants' plea is insufficient, and the defendant replies by saying that the plaintiff's declaration is bad. We are inclined to think both are right. But as judgment must be given against the party who committed the first error, and as we are satisfied judgment must be against the plaintiff, upon this ground, we have not found it necessary to scrutinize the defendants' plea very closely.

That the plaintiff's declaration is bad we cannot doubt. We are unable to discover in its recitals any cause of action, *ex contractu.* It contains in general terms an allegation of bad faith and an intent to violate a trust which the plaintiff says the defendant company entered into respecting his shares; but it fails to disclose any contract, or trust, the breach of which would give the plaintiff a right of action.

Nor can we discover in the recitals any recognized cause of action, *ex delicto.* The act complained of is the issuing of certificates of stock without the consent of these contractors. But it is not averred that the plaintiff was one of those contractors. How his interests were thereby injuriously affected, how he was thereby defrauded, the declaration fails to disclose. In fact, we are at a loss to determine whether the pleader intended to set out a cause of action, *ex contractu*, or a cause of action, *ex delicto.* A declaration so vague and uncertain is clearly bad.

Exceptions sustained.

Plaintiff's declaration adjudged defective.

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

EUROPEAN & NORTH AMERICAN RAILWAY COMPANY, in equity, *vs.* JOHN A. POOR.

Contract — interest of parties to, incompatible.

The interests of the parties to a contract, whether of purchase or sale, or for work or labor, are adverse and inconsistent with each other.

If a director of a railroad corporation enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract.

BILL IN EQUITY, heard on demurrer to a portion of the bill.

The case is sufficiently stated in the opinion.

APPLETON, C. J. A trustee is one in whom property is vested in trust for others. Every person is to be deemed a trustee to whom the business and interests of others are confided, and to whom the management of their affairs is intrusted. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property embraced within the trust save with the consent of all parties interested. The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. The agent to sell cannot become a purchaser of that which he is the agent to sell, for his position as selling agent is adverse to and inconsistent with that of a purchaser. So, the agent to purchase cannot at the same time occupy the position of a seller. It is not that in particular instances the sale or the purchase may not be reasonable. But to avoid temptation the agent to sell is disqualified from purchasing and the agent to purchase from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmance or disaffirmance rests with him and the trustee when buying trust property from or selling it to himself, must assume the risk of hav-

ing his contracts set aside, if the *cestui que trust* is dissatisfied with his action.

The rule of equity is liberal, embracing within its purview all fiduciary relations, as those of principal and agent, attorney and client, solicitors, executors, guardians, etc.

The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders for and in behalf of whom they act. "The relation between the directors of a corporation and its stockholders," observes Johnson, J., in *Butts* v. *Wood*, 38 Barb. 188, "is that of trustee and *cestui que trust*." "The directors," remarks Romilly, M. R., in the *York & Midland Railway Co.* v. *Hudson*, 19 Eng. L. & Eq. 365, "are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust, which if they undertake it is their duty to perform fully and entirely." Persons, who become directors and managers of a corporation, place themselves in the situation of trustees; and the relation of trustees and *cestuis que trust*, is thereby created between them and the stockholders. *Scott* v. *Depeyster*, 1 Edw. Ch. 513; *Verplanck* v. *Mercantile Ins. Co.*, 1 Edw. Ch. 85. All acts done by the directors officially should be for the interests of the *cestuis que trust*. Holding a fiduciary relation they cannot be permitted to acquire interests adverse to such relation.

The bill alleges that "at a meeting of the directors of said company (the E. & N. A. Railway Co.) holden on the 25th day of August, 1865, a contract previously made between said company and a certain firm under the name of Pierce & Blaisdell, and signed by said defendant, as president of said company, and by said Pierce & Blaisdell, for the construction of said railroad, was approved, adopted, and confirmed. That said Pierce & Blaisdell did proceed under said contract in the construction of said railroad and received large sums of money under the same contract," and "that there was an agreement between said defendant while he was president and director as aforesaid, and said firm of Pierce & Blaisdell, or one of the members of said firm, that said defendant should receive a large sum of money for or on account of said con-

tract, or a part of the profits which might be received by said Pierce & Blaisdell under and by their performance of said contract, for the construction of said railroad."

To this portion of the bill the defendant has demurred, thereby admitting, for the purposes of the present argument, his interest in the contract of Pierce & Blaisdell with the corporation of which he was president and a director, made when he was acting as such and in the profits of which he was a participant while holding those positions.

As the agent to sell cannot purchase what he is to sell, nor the agent to purchase buy of himself, so the agent to contract cannot as agent contract with himself as principal. The interest of the parties to a contract, whether of purchase, a sale, or for work or labor, are adverse and inconsistent with each other. It is the duty of the directors of a corporation to act for the best interests of such corporation. If a director be a party to a contract entered into with himself, his duty as an officer is in conflict with his interests as an individual. This is equally so, whether he enters into the contract in its inception or subsequently acquires an interest in it. If he enters originally into the contract as director with himself as a party, it is not difficult to perceive who would have an advantage in the bargain. If he subsequently becomes a partner he place shimself in a position, in which, when any questions arise as to its performance his interest as a party to the contract conflicts with his duty as an officer. The general rule is, that directors cannot legitimately acquire an interest adverse to the corporation, and that if they purchase any claim against the company it is in trust for the company.

In the *Great Luxemburgh Railway Co.* v. *Magenay*, 25 Beavan, 586, the Master of the Rolls says, "I have, upon various occasions, stated what I considered to be the duties and functions of a director of a joint stock company. He is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore there attaches to a director,

for the benefit of the shareholders, all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enters into a contract for the company, he cannot personally derive any benefit from it. I accordingly held, in the case of the *Midland Railway Co.* v. *Hudson*, that the defendant as director and trustee was bound to give to the company the benefit of a large contract, entered into by him for iron, which had been used on the railroad, and to render to them the pecuniary advantage which he had derived from it. . . . If, as in the case of the *North Midland Railway Co.* v. *Hudson*, a director of a railway company enter into a contract for the purchase of a large quantity of iron in the shape of rails, but before it is wanted and before it has been actually delivered (for it took some time in that case to perform the contract with the iron-master) the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered and that at which it was purchased. He cannot sell it again to the company as if it were his own property. The whole benefit must go to the shareholders and not to the director."

In *Benson* v. *Heathern*, 1 Y. & Coll. 326, the defendant being director of a joint stock company, established for the building, purchasing, hiring, and employment of steam vessels, purchases a vessel for £1340, and after sells it to the company, as from a stranger, for £1500, charging the company with commission at £1 per cent, the broker's earnest-money and the expenses of a bill of sale to himself, there being but one bill of sale. It was held that such a transaction could not stand in equity. In *Flint & R. R. Co.* v. *Dewey*, 14 Mich. 477, it appeared that the defendant, the secretary, and another director had been appointed a committee by the company for building and equipping the road. The committee entered into a preliminary contract with a certain party and on the same day that party assigned to the defendant secretary three-eighths of said agreement and four-tenths of a contract to be thereafter entered into; also, providing that they should be at three-eighths the expense of negotiating the bonds of the company which were to be

received by the contractor. In a suit by the complainant to compel the delivery of said bonds, it was held, that the transaction under which the defendant claimed was clearly fraudulent and void as against the complainant; that it was his duty (with the other members of the committee) in letting the contract to use his best efforts and judgment to secure the best terms he could for the company; but in joining with the contractor in taking this very contract, which they were employed to let, it became his interest to let the contract at the highest price. "It is impossible," observes Chisstiancy, J., "that there may have been no actual fraud, and that the contract would not have been let on better terms; but the principle of law applicable to such a contract renders it immaterial, under the circumstances of the case, whether there has been any fraud in fact, or any injury to the company. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. And if such contracts were to stand until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption." "The general rule of law," observes Wayne, J., in *Michaud* v. *Girod*, 4 How. 555, "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private." To give effect to these views, in England it is provided by the Companies Clause Consolidation Act, 8 and 9 Vict. c. 16, that no person interested in a contract with the company shall be a director; and if any director, subsequent to his election, shall become concerned in any contract, the office of director shall become vacant, and he shall cease to act as such.

The demurrer admits every fact not answered to which is set forth in the bill.

It is, then, for the defendant to show that the general principles applicable to persons holding fiduciary relations are not to control in this particular case.

The demurrer, as the case stands, must be overruled, and the defendant must answer to that portion of the bill to which the demurrer relates. When this is done and the proof is taken, the case will be ready for hearing on bill, answer, and proof.

Demurrer overruled.

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

J. W. Emery & Chas. P. Stetson, for the plaintiffs.

P. Barnes, for the defendant.

EDWARD HICKEY and others *vs.* JOHN W. VEAZIE.

Submission. Report of referees—when it may be made.

While it is the duty of referees to make their report in the first instance within the time specified in the submission, they may, even against the written protest of one of the parties, give them a new hearing and make a new report after the specified time, when authorized so to do by a recommitment of the former report.

ON EXCEPTIONS.

SUBMISSION of all claims between the parties, under R. S. c. 108.

The submission, dated May 19, 1870, stipulated that judgment rendered on the report of a majority of the referees, "made to the supreme judicial court for said county, at the October term of said court, next to be holden at Bangor, shall be final."

The entry of the case was made on the 22d day of the October term, 1871, when a report annexed to the submission was offered, and its acceptance moved by the plaintiffs, but resisted by the defendant. Thereupon the defendant moved a recommitment of the report to allow the referees to report such of the facts as would raise questions of law to be decided by the court; and the following entry was made upon the docket:

"Oct. T., 1870. 26. Recommitted. Report to be made during next term, or this report to be offered."

At the January term, 1871, the original report was again returned with the following indorsement:

"The foregoing award having, at the October term of the supreme judicial court, been recommitted to the undersigned, we notified all parties to the foregoing submission to appear at the office of one of the undersigned at Bangor, on the 27th day of December, 1870, and, at the time and place aforesaid, the parties appeared before us and were heard, and the said Veazie, there and then by his counsel, moved the referees to report a state of facts with their award, upon which said Veazie might raise, before the supreme judicial court, certain questions of law, to which motion the said Hickey & Co. objected; whereupon the undersigned refused so to report, and we, therefore, return to this court our former award as the conclusions of said referees, with the cost of this last hearing taxed at twenty dollars."

And the doings at that term appear in the following docket entry:

"Jan. T. 15. Original report offered and recommitted for referees to rehear the parties and award on all matters submitted, and to report specially, for determination of the court, any question of law arising on facts found by them which they may think it proper and important should be decided by the court, in determining the legal rights of the parties; the said Veazie objecting to this order of recommitment, denying the power of the court to make the foregoing order, and insisting and moving that all the reports should be rejected, which motion was denied by the court."

On the 32d day of the April term, 1871, to wit, on the 19th of June, 1871, the referees returned a new report annexed to the original submission, and the plaintiffs moved its acceptance. To the acceptance of the report, the defendant seasonably filed in writing the following objections:

1. The want of authority in referees to make the award; and
2. Want of authority in the court to accept the same.

It appeared that there was no appearance on the part of the defendant, after the January term, 1871, except under protest that the referees had no authority to proceed further with the case.

The report was accepted and the defendant alleged exceptions.

A. W. Paine & J. S. Rowe, for the defendant, cited *Colcord* v. *Fletcher*, 50 Maine, 401; *Wyman* v. *Hammond*, 55 Maine, 534; *Rawson* v. *Hall*, 56 Maine, 142; *Randall* v. *Lewiston W. P. Co.*, 36 Maine, 19; *Kingsbury* v. *Bell*, 9 Mass. 200; *Sargent* v. *Hampden*, 29 Maine, 70; s. c. 32 Maine, 78; *Deerfield* v. *Ames*, 20 Pick. 480; *King* v. *Dedham Bank*, 15 Mass. 447; *Swift* v. *Luce*, 27 Maine, 285; *Freeman* v. *Adams*, 9 Johns. 115; *Franklin Min. Co.* v. *Pratt*, 101 Mass. 359; *Burghardt* v. *Owen*, 13 Gray, 300; *Sperry* v. *Ricker*, 4 Allen, 17; *Heath* v. *Tenney*, 3 Gray, 380; *Hicks* v. *McDonnell*, 99 Mass. 459; *Rundell* v. *LeFleur*, 6 Allen, 480.

Sewall & Blanchard, and with them *J. A. Peters & F. A. Wilson*, cited *Sperry* v. *Ricker*, 4 Allen, 17; *Whitney* v. *Cook*, 5 Mass. 142; *Boardman* v. *England*, 6 Mass. 70; R. S. c. 108, §§ 4 and 5.

WALTON, J. It is undoubtedly true that it is the duty of referees to make a report within the time specified in the submission; but it is equally certain that it is competent for the court to recommit the report, and the power to recommit necessarily implies a power on the part of the referees to make a new report, and a power on the part of the court to accept it; and as the statute authorizing the court to recommit does not limit the time within which it may be done, we have no doubt it may properly be done after the time specified in the submission. The agreement of the parties does not wholly and exclusively control the proceedings in such cases. The statute authorizing such submissions must also be consulted. The submission does not authorize the referees to award costs; and but for the provisions of the statute expressly conferring this power, no such award could legally be made. In this particular the statute, and not the agreement of the parties,

controls. The submission gives no power to the court to reject a report of referees, but the statute does; and in this respect also the statute, and not the agreement of the parties, controls. The statute authorizes the parties to agree within what time the report shall be made; but this was not intended to deprive the court of the power to recommit the report and to authorize a new hearing after that time. The terms of the agreement and the terms of the statute must be read and construed together; and when this is done there is no difficulty in harmonizing their provisions. We therefore repeat that while it is undoubtedly true that it is the duty of referees to report in the first instance within the time specified in the submission, this does not deprive them of the power to give the parties a new hearing and to make a new report, after that time, when authorized so to do by a recommitment of the report first made. To hold otherwise would render several important provisions of the statute absolutely null and of no practical effect whatever.

In this case the referees did report in the first instance within the time specified in the submission; but their report was twice recommitted, and the report which was finally accepted was not made till after that time. We have no doubt of the power of the referees to make this last report, nor of the power of the court to accept it. R. S. c. 108, §§ 4 and 5.

Exceptions overruled.

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

DAVIS R. STOCKWELL *vs.* INHABITANTS OF BREWER.

Wharf—occupation of. Partnership property—where taxable.

The piling of sawed lumber upon a wharf to season, and the payment of wharfage therefor, do not constitute such an occupation of the wharf as is contemplated in R. S. c. 6, § 14, clause 1.

For the purpose of taxation, the firm, and not an individual member of it, is the owner of the partnership property.

Hence, where the plaintiff was a member of a firm, residing and carrying on a lumber business in Bangor, and also of another firm owning a wharf in Brewer,—he cannot be taxed in Brewer for his portion of the former firm's lumber piled on the wharf of the latter firm to season, and for which the former firm pays wharfage to the latter.

FACTS AGREED.

ASSUMPSIT for money had and received, to recover twenty dollars and seventeen cents.

The writ was dated Nov. 17, 1870.

The plaintiff is a resident of Bangor, in this county, and senior member of the firm of D. R. Stockwell & Co., lumber dealers, having their counting-room and only place of business in Bangor. The firm consists of two other persons, residents of Bangor, where the firm was assessed for the sum of eighteen thousand dollars for stock in trade in 1869, and the tax thereon duly paid. The plaintiff's share of the business is four-tenths.

In 1868, the plaintiff and E. H. & H. Rollins owned in common a wharf in Brewer, in this county, near the boundary line between Brewer and Bangor, and near the counting-room of D. R. Stockwell & Co; and at that time, D. R. Stockwell & Co. owned and piled upon Stockwell & Rollins' wharf, a quantity of sawed lumber to season. The lumber remained there upon the sticks till the summer of 1869, when it was shipped by D. R. Stockwell & Co., who paid wharfage by the thousand feet on all of the lumber to Stockwell & Rollins.

In April, 1869, the assessors of Brewer assessed a tax of $18.85 upon the plaintiff, as a non-resident, for his undivided interest in the said lumber of D. R. Stockwell & Co.; and the tax being unpaid on the 21st day of October, 1870, the treasurer and collector of Brewer issued his notice, directed to the plaintiff, informing him that he was taxed for State, county, and town taxes, by the assessors of Brewer for 1869, in the sum of $18.85, which sum he was required to pay in ten days, together with twenty cents for the summons, or the goods and chattels of the plaintiff, and for want thereof the body of the plaintiff would be distrained to satisfy the same. On Nov. 5, 1870, the sheriff of this county arrested the plaintiff, whereupon the proceedings were had as stated in the following receipt:

"$20.17. BANGOR, Nov. 5th, 1870.

Received of D. R. Stockwell, Esq., twenty dollars and seventeen cents, in full discharge of a warrant issued against said Stockwell, by D. B. Doane, treasurer and collector of the town of Brewer, for the year 1869, said Stockwell having been arrested on said warrant, and pays the same under protest in order to be released from said arrest. J. H. WILSON, *Sheriff*."

The sheriff paid the sum of $20.17, less his fees ($1.32), into the defendants' treasury.

If the assessment was without authority of law, a default was to be entered for such sum as the court might direct.

W. C. Crosby, for the plaintiff.

The assessment was illegal, because,

1. "Goods, chattels, moneys, and effects" are the only general terms used in the statute, neither of which includes an undivided interest in goods. R. S. of 1857, c. 6, § 5.

2. The assessment not defining what fractional part of the whole property was assessed, is void for uncertainty. A partner's real interest in the property of the firm may be more or less dependent upon the settlement of the partnership affairs.

3. The lumber assessed belonged to D. R. Stockwell & Co., and not to the plaintiff. R. S. of 1857, c. 6, §§ 10, 11 and 21; *Lee* v. *Templeton*, 6 Gray, 579; *Field* v. *Boston*, 10 Cush. 65.

4. The occupancy of the wharf must be exclusive. *Campbell* v. *Machias*, 33 Maine, 419.

5. The defendants are liable for the whole amount paid by the plaintiff. It was paid to their agent. The item of $1.32 is important on the question of costs. The technical point, that this item was not paid into the town treasury, should not prevail. The action for money had and received has always been favored as an equitable procedure, and the actual payment of money has not been vital to its support; money's worth or money constructively received is sufficient. *Floyd* v. *Day*, 3 Mass. 403; *Emerson* v. *Baylies*, 19 Pick. 55; *Perry* v. *Swasey*, 12 Cush. 36; *Appleton* v. *Bancroft*, 10 Met. 237.

J. A. Peters & F. A. Wilson, for the defendants.

The plaintiff's four-tenths was a taxable interest. It was on a wharf occupied by him as owner.

When the firm paid the owner's wharfage, the plaintiff paid himself, he owning one-half the wharf. He was lessor and lessee.

The case is within the letter and spirit of the law. *Desmond* v. *Machiasport*, 48 Maine, 478.

If the plaintiff were taxable the proportion is immaterial, since his remedy to correct it is by appeal. *Stickney* v. *Bangor*, 30 Maine, 404.

The lumber was not employed in their business as under R. S. of 1857, c. 6, § 21.

The amount paid as officer's fees not recoverable, since town never received them. *Briggs* v. *Lewiston*, 29 Maine, 472.

DANFORTH, J. The case finds that the plaintiff is a member of the firm of D. R. Stockwell & Co., all of whose members reside, and whose only place of business is in Bangor. It also appears that the property taxed by the defendants was the property of the

firm and was used in their partnership business. Such property can only be taxed to the firm "in the town where their business is carried on." R. S. 1857, c. 6, § 21 (R. S. c. 6, § 27).

It does not come within the exception provided for in c. 53, of the Public Laws of 1869. For the purpose of taxation, the firm, and not an individual member of the firm, is the owner, as seen by the statute above referred to.

The firm did not "occupy" a wharf in Brewer as contemplated by the statute. Paying wharfage is not sufficient. *Campbell* v. *Machias*, 33 Maine, 419; *Lee* v. *Templeton*, 6 Gray, 579.

Nor would it change the result could we consider the plaintiff as owner of the portion taxed to him. In relation to this lumber, he does not occupy the wharf in Brewer either as owner or lessee. His ownership of the lumber is as a member of the firm; as a member of the firm he pays wharfage; and it is by virtue of this membership and payment, and this alone, that he deposits this lumber upon the wharf. As the firm does not "occupy" the wharf as contemplated by the statute, it follows that he does not. Therefore, in any view we can take of the case, the plaintiff was not taxable in Brewer.

But in this action he can only recover the amount of the tax and interest. *Briggs* v. *Lewiston*, 29 Maine, 472.

Judgment for plaintiff for $18.85
and interest from Nov. 5, 1870.

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

ASA TURNER *vs.* ROBERT A. FRIEND.

Writ — service of. Writ — amendment of.

A writ against the master of a vessel to recover the penalty provided in Public Laws of 1869, c. 36, for the unlawful use of a seine for the taking of menhaden or porgies, directing an attachment of the vessel and seine, may, after the attachment of such vessel and seine, be served upon the defendant by a separate summons.

Such a writ is a writ of attachment, and it may be amended upon such terms as the presiding judge deems proper, by adding a direction that the "goods or estate of" the defendant be attached.

ON REPORT.

DEBT, brought under Public Laws of 1869, c. 36, §§ 3 and 4, to recover the penalty provided in § 1, of the same chapter.

The writ, dated July 22, 1869, directed the officer "to attach schooner 'Union' of Brooklin, whereof Robert A. Friend is now master, with her tackle, apparel, and furniture, and two seine-boats, and two carry-away boats, so called, and one porgy seine used with said schooner 'Union' in taking porgies, . . . and summon Robert A. Friend," etc.

The officer's return, dated July 26, 1869, recited that he, that day, "attached one schooner, called the 'Union,' of Brooklin, with her tackle, apparel, and furniture, and two seine-boats and one carry-away boat and one porgie seine," and that on the same day he "gave in hand to R. A. Friend, master of schooner 'Union', a summons for his appearance at court."

On the second day of the return term, the defendant filed a motion to quash the writ for defective service.

The plaintiff filed a motion for leave to amend his writ by adding in the direction thereof, after the word "attach," the following words: "the goods or estate of Robert A. Friend, and."

If the service were insufficient, and by amendments, if granted, it could not be made sufficient, a nonsuit to be entered; otherwise the case to stand for trial.

C. J. Abbott, for the plaintiff, upon the sufficiency of the original form of the writ and service, cited *Cleaves* v. *Jordan*, 34 Maine, 9; R. S. of 1857, c. 81, § 13; Public Laws of 1869, c. 36, § 1. On the allowance of the amendment. *Mitchell* v. *Tibbetts*, 17 Pick. 298; *Thornton* v. *Townsend*, 39 Maine, 181; *Harvey* v. *Cutts*, 51 Maine, 604; *Solon* v. *Perry*, 54 Maine, 493; *McIniffe* v. *Wheelock*, 1 Gray, 600; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Ames* v. *Weston*, 16 Maine, 266; *Convers* v. *Damariscotta Bank* 15 Maine, 431.

E. Hale & L. A. Emery, for the defendant.

The writ is an original summons, without any order to attach the property of Friend; and should be served by reading or copy. R. S. of 1857, c. 81 § 16; *Matthews* v. *Blossom*, 15 Maine, 400.

The property attached was under the process *in rem*.

The proposed amendment would not cure the whole deficiency. While it may change the form of the writ, so that a service by attaching the property of the defendant and leaving a separate summons would be legal, yet no such service has been made. The return shows no attachment of the defendant's property. An attachment is necessary. *Blanchard* v. *Day*, 31 Maine, 494. The officer's return being conclusive, the statute is satisfied.

The court cannot amend an officer's return. The officer alone can amend his return. But in this case he has not asked for leave. His service was according to the direction. He could not make a nominal attachment, even, without the proper direction.

The amendment can be allowed only on terms. *Matthews* v. *Blossom*, *sup.*

DANFORTH, J. Motion to abate the writ for want of service. The action is against the defendant, and the officer, by direction of the writ, has attached the property upon which the plaintiff claims, by virtue of the act of 1869, c. 36, § 3, to have a lien to secure his judgment, and gave the defendant a summons. R. S. 1857, c. 81, § 15, provides that, "When goods or estate are attached on

either of said writs, a separate summons . . . shall be delivered to the defendant," etc. A fair construction of this language does not require that the property attached should belong to the defendant. It is sufficient if the property is such as the law makes liable to be levied upon to satisfy any judgment that may be recovered.

This brings the service in this case directly within the terms of the statute. It is not unlike the common case of a suit to enforce a mechanic's lien, when by direction of the writ the special property upon which the lien exists is attached, though it may not belong to the defendant, and which has always been held sufficient to authorize notice by a separate summons.

But if this were not so the writ is clearly amendable as proposed in plaintiff's motion. *Matthews* v. *Blossom*, 15 Maine, 400. Such an amendment would not even change the form of the writ. It is now a writ of attachment, and the case finds that a portion of the property attached belonged to the defendant. The insertion of the words proposed, will make the writ of the usual form, and it will then appear that the property of the defendant is attached without any change in the officer's return. The amendment can be allowed on such terms as the presiding justice at *nisi prius* may deem proper. *Action to stand for trial.*

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

Inhabitants of Belfast *vs.* Inhabitants of Lee.

Pauper. Notice—by whom to be signed. What does not constitute a waiver of defective notice.

A written notice, signed by the city clerk "for the overseers of the poor," is not a sufficient compliance with R. S. c. 24, § 27, although done under the instructions of the overseers.

And such defect is not waived by a reply signed by the overseers and sent to the clerk, inquiring concerning the age of the alleged pauper, the amount of expenses already incurred on his account, and the probable future expenses.

On report.

Action founded on R. S. c. 24, § 24, for the recovery of supplies alleged to have been furnished by the plaintiffs to a pauper whose legal settlement was in the town of Lee.

On the bill of particulars were found, among others, the following items:

1869.	To paid P. W. Danforth, for boarding West girl from Jan. 4, to April 19, 1869, at $2.50 per week,	$37.50
Apr. 23.	8½ yards print, $1.36; 1 yd. cambric, .13,	1.49
	1 yd. selicia,	.20

All the other items bore date prior to March 9, 1869.

The writ was dated Sept. 4, 1869.

It appeared that the pauper was found destitute in Belfast, Nov. 23, 1868, and continued to need and receive relief from that date to April 23, 1869.

Written notices, dated Dec. 12, 1868, March 20, and May 20, 1869, respectively, and signed by "John H. Quimby, city clerk, for the overseers of the poor of Belfast," were forwarded at the time of their respective dates to the overseers of the poor of Lee, and duly received by the latter by due course of mail.

On June 9, 1869, there was sent to and received by the overseers of the poor of Lee, a written notice of the following tenor:

"CITY OF BELFAST, MAINE, June 9, 1869.

Overseers of the poor of the town of Lee:

Gentlemen,—On the 12th day of December last, we notified you that Mary Potter, *alias* West, a pauper having her legal settlement in your town had fallen into distress in this city, and that we were providing for her maintenance, etc., etc. She continued to be in need of relief, and we continued to provide for her until the 23d day of April last.

We look to your town for repayment of the amount expended in her support, as advised in our notice of May 20th, '69.

Yours, &c.

OVERSEERS OF POOR OF CITY OF BELFAST,

By A. HAYFORD, *their Chairman*."

On Dec. 26, 1868, the overseers of the poor of Lee addressed and sent to John H. Quimby, city clerk of the city of Belfast, a letter of the following tenor:

"SIR,—In answer to yours of the 12th we would like to be informed of the age of Mary Potter, *alias* West; also the expense incurred on her account, and what the prospect is in regard to further expenses.

If you will give us the desired information we would be much obliged."

This letter was duly received, and the desired information given by letter of Dec. 31, 1868. No other reply ever made.

The case was withdrawn from the jury and the court were to render judgment for so much of the amount claimed as plaintiffs were entitled to.

W. G. Crosby, for the plaintiffs, contended that

The defendants are estopped by their conduct from objecting to defectiveness of the first three notices signed by the clerk, and

cited *Unity* v. *Thorndike*, 15 Maine, 182; *Northfield* v. *Taunton*, 4 Met. 436. Counsel also cited *York* v. *Penobscot*, 2 Maine, 5; *Shutesbury* v. *Oxford*, 16 Mass. 104; *Embden* v. *Augusta*, 12 Mass. 308.

A. Sanborn, for the defendants.

APPLETON, C. J. By R. S. c. 24, § 27, the overseers of the poor are required "to send a written notice, signed by one or more of them, stating the facts respecting a person chargeable in their town, to overseers of the town where his settlement is alleged to be, requesting them to remove him," etc. The first three notices were signed by the city clerk, who had no more authority to give them than any other inhabitant. The notices were not in accordance with the statute. *Cooper* v. *Alexander*, 33 Maine, 453.

Nor has there been a waiver. In the cases cited by the counsel for the plaintiffs, the notices were given by those who were the overseers of the poor. Not so in the case at bar.

The plaintiffs are entitled to recover the amount of $16.69, for expenses incurred prior to June 9, 1869, which is the date of the notice signed by A. Hayford, chairman of the overseers of the poor of Belfast.

Judgment for $16.69, *and interest from date of writ.*

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

ASA CARTER *vs.* GEORGE W. ALLEN.

Collector of taxes—liability of.

A collector of taxes who, after selling a distress, fails to restore the balance to the former owner, after deducting the unpaid taxes and legal expenses of sale, is a trespasser *ab initio.*

Thus, where a collector of taxes for three successive years applied a portion of the proceeds of a distress sold according to law to a tax of the second year already paid, and another portion to illegal charges, and made a written account thereof accordingly, which, with the balance as therein appearing, he tendered to the owner, *Held,* that the collector was a trespasser *ab initio.*

ON REPORT.

TRESPASS for taking a colt from the plaintiff.

The defendant justified as collector of taxes of the town of Surry.

It appeared that the defendant was collector of Surry for the years 1865, 1866, and 1867; that he seized the colt for the plaintiff's taxes for those years; that his proceedings in taking, advertising, and selling the distress were regular.

It was contended that the collector did not comply with the requirements of R. S. c. 6, § 105, by "restoring the balance to the former owner; with a written account of the sale and charges."

It appeared that he did furnish a written statement and tendered to the plaintiff the surplus according to the statement; that the statement was incorrect, in that it contained items of charges which were illegal, and of the tax of 1866 which had been previously paid by sale of real estate.

If the action could be maintained, the defendant was to be defaulted and damages assessed by the court at *nisi prius.*

A. Wiswell, for the plaintiff.

E. Hale & L. A. Emery, for the defendant.

The purpose of the "written account" required by the statute, is to inform the owner of the result of the sale and of the disposition

of the proceeds, whereby he learns what taxes and charges the proceeds are applied to, so that if any are illegal and the proceeds have been wrongly applied, the owner may demand and recover them back.

In this case the statute was substantially complied with, the account being full and circumstantial. The account was true; no falsehood or fraud can be imputed.

If trespass is maintainable, then the plaintiff will recover the full value of the distress, and will have paid his taxes for 1865 and 1867, at the collector's expense.

By assumpsit the money applied to taxes already paid and illegal charges could be recovered back and leave that property applied undisturbed.

WALTON, J. It was held in the celebrated case of *The Six Carpenters*, 8 Coke, 146, and in a large number of cases since, that if a man abuses an authority given him by the law, he becomes a trespasser *ab initio*.

The rule is founded in public policy. It was observed that persons clothed with official power were exceedingly apt to become careless and oppressive in the use of it. To counteract this tendency they are required to act at their peril. If they do not exceed their authority, nor in any way abuse it, the law protects them; if they do, then their protection is gone. Security against official carelessness and oppression is the reason of the rule; and this protection being as necessary now as at any former time, there ought to be no relaxation of the rule.

Assuming that in this case the defendant, as collector of taxes, had a right to seize and sell the plaintiff's property to pay the taxes that were then due and unpaid; it was clearly his duty, after deducting the tax and expense of sale, to restore the balance to the plaintiff. R. S. c. 6, § 105. This he did not do. On the contrary, he applied a portion of the money to pay a tax that had already been paid; and another portion of it to pay charges which he had no right to make. This is admitted. We cannot doubt

that such a misappropriation of the proceeds of the sale was, in contemplation of law, such an abuse of his authority as made him a trespasser *ab initio.*

The statute, above cited, provides that the officer, after deducting the tax and expense of sale, shall restore the balance to the former owner, with a written account of the sale and charges. It was held in *Blanchard* v. *Dow*, 32 Maine, 557, that a failure to deliver the written account made the collector a trespasser *ab initio.* Can a failure to deliver the balance of the money actually due have a less effect? The statute, in the same sentence, requires both the money and the account to be delivered. If a failure to deliver the one makes the officer a trespasser *ab initio*, how can a failure to deliver the other have a less effect? Is not the money quite as important to the former owner as the written account; and if a failure to deliver the latter makes the officer a trespasser *ab initio*, *a fortiori*, will not a neglect to deliver the former have the same effect? We cannot doubt that it will.

Defendant to be defaulted.

Damayes to be assessed by the court at nisi prius.

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

STATE OF MAINE *vs.* ELIZABETH H. CLEAVES.

The fact that the defendant in criminal prosecution did not testify may be considered by the jury. Husband's coercion—presumption of. Instruction.

In the trial of a married woman on an indictment for being a common seller of intoxicating liquor, the fact that she did not testify in her own behalf is proper to be considered by the jury in determining the question of her guilt or innocence.

If a married woman sell intoxicating liquor contrary to law in the presence of her husband, the law presumes that she acts under the coercion of her husband; but this presumption may be rebutted.

State *v.* Cleaves.

Hence, in the trial of a married woman on an indictment for being a common-seller of intoxicating liquor, where it appeared that at some of the sales her husband was present, the presiding judge properly declined to instruct the jury, that if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under his coercion, compulsion, or direction, and would not be liable for such sales.

On exceptions.

Indictment against the defendant, a married woman, for being a common-seller of intoxicating liquors.

The evidence tended to show several sales, at some of which her husband, Joseph Cleaves, was present when the liquor was called for by the purchaser, and brought forward by the defendant; and on one occasion the husband drank some of it with the purchaser.

Defendant's counsel, in writing, requested the presiding judge to instruct the jury that if any of the sales were made by the wife, in the presence of her husband, she would be presumed to act under the coercion, compulsion, or direction of her husband, and would not be liable for such sales. But the judge declined to give the requested instruction.

The judge instructed the jury that the fact that the defendant did not go upon the stand to testify was a proper matter to be taken into consideration by them, in determining the question of her guilt or innocence.

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

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

H. L. Whitcomb, for the defendant.

Appleton, C. J. The defendant, a married woman, was indicted for being a common seller of intoxicating liquors.

The presiding justice instructed the jury "that the fact that the defendant did not go upon the stand to testify was a proper matter to be taken into consideration by them in determining the question

of her guilt or innocence." To this instruction exceptions were seasonably taken.

The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence.

The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance.

Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offense incurred.

But the defendant, having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? All the analogies of the law are in favor of their regarding this as an evidentiary fact. All the acts of a party accused, whatever explains or throws light upon those acts, all the acts of others, relative to the crime charged, that come to his knowledge and which may influence him; his loves and his hates, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretenses, and explanations; his looks, his speech, his silence when called upon to speak; everything which tends to establish the connection between the accused and the crime with which he is charged; every circumstance preceding, accompanying, or following may become articles of circumstantial evidence of no slight importance. "A statement is made either to a man or within his hearing, that he was concerned in the commission of a given crime, to which he returns no reply; the natural inference is, that the

imputation is well founded or he would have repelled it,—"silence is tantamount to confession." Best on Presumptions, § 241. Extrajudicial non-responsion, when a charge is made, is always regarded as an article of circumstantial evidence, the probative effect of which may be weakened by various infirmative considerations, which it is not now necessary to discuss, but which are to be considered and weighed by the jury.

When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? Is his silence of any the less probative force, when thus in court called upon to contradict or explain, by the pressure of criminative facts, fully proved, than his extrajudicial silence when a charge is made to him or in his presence? The silence of the accused,—the omission to explain or contradict, when the evidence tends to establish guilt is a fact,—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur,—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye.

It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered.

The instruction given was correct and in entire accordance with the conclusions to which, after mature deliberation, we have arrived. *State* v. *Bartlett*, 55 Maine, 200; *State* v. *Lawrence*, 57 Maine, 575,

It appeared that at some of the sales, the husband of the defendant was present, when the liquor was called for by the purchaser and delivered by the defendant.

The presiding judge was requested to instruct the jury, "that if any of the sales were made by the wife, in the presence of her husband, she would be presumed to act under the coercion, compulsion, or direction of her husband, and would not be liable for such sales." This instruction he declined to give.

It is a general rule of the common law, that if a married woman commit an offense in the presence of her husband (with certain exceptions, of which the unlawful sale of intoxicating liquors is not one), his coercion will be presumed, and, unless rebutted, the wife will be entitled to an acquittal. Such is the law of England, and such has always been regarded the law in this country. *Commonwealth* v. *Neal*, 10 Mass. 152. A married woman cannot be punished for a sale of intoxicating liquors, either as principal or as agent of her husband, if he is near enough for her to be under his influence and control even if he is not in the same room with her. *Commonwealth* v. *Burk*, 11 Gray, 437. "The law, observes Thomas, J., "regards her as not in the exercise of her own discretion and will, and, therefore, as incapable of committing an offense." In *Commonwealth* v. *Egan*, 103 Mass. 71, the complaint was for an assault. Morton, J., in delivering the opinion, says: "The assault of which the defendant was convicted was committed in the immediate presence of her husband, and the presumption of law is that she acted under his coercion." *Commonwealth* v. *Garrison*, 97 Mass. 547.

When the wife sells intoxicating liquors in the absence of her husband, she may be indicted as a common seller. *Commonwealth* v. *Murphy*, 2 Gray, 210. When the wife offends alone, she is responsible for her offense equally as if sole. *State* v. *Nelson*, 29 Maine, 329.

But the presumption of law, that the wife committed an offense by the coercion of the husband when he was present, is very slight, and may be rebutted by very slight circumstances. The

presumption is in no respect conclusive. While, therefore, the first portion of the request was legally correct, the conclusion contained in the last clause, that she "would not be liable for such sales," is incorrect. She might be liable notwithstanding the presence of her husband, for the attendant circumstances might entirely negative influence or coercion on his part. The request did not recognize the distinction between a *prima facie* presumption which might be, and a conclusive presumption which could not be contradicted, but was so framed as to give to the former the force and effect of a presumption of law, to which it was in no respect entitled. *Marshall* v. *Oakes*, 51 Maine, 308.

Now when a request is made it must, in its totality, be sound law, else it is properly withheld. It is for the party making a request to see to its correctness at his peril. It is for the court to take care that the instructions given are in accordance with the law. It is no part of its duty to eliminate the errors in an instruction which they are requested to give,—to select a portion and to refuse the residue of the request. *Exceptions overruled.*

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

STATE OF MAINE *vs.* PARMENAS DYER and another.

Wife—competency of, as witness against her husband.

A wife is a competent witness against her husband, or against him and another person jointly, in the trial of an indictment for using an instrument with intent to procure her miscarriage while pregnant with child.

ON REPORT.

INDICTMENT against Parmenas Dyer and Benjamin F. Morrill, under R. S. c. 124, § 8, for maliciously and without lawful justification using an instrument by forcing, thrusting, and inserting it

into the body and womb of the wife of Morrill, with intent thereby to procure her miscarriage, she being pregnant with child. There was another count alleging that the use of the instrument was not necessary for the preservation of the life of the woman.

The presiding judge, in accordance with R. S. c. 134, § 26, reserved for the determination of the full court the following questions:

1. Is the wife of said Benjamin F. Morrill a competent witness against both respondents, on a joint trial of said respondents?

2. Is she a competent witness against said Parmenas Dyer, on a separate trial of said Dyer, with or without the entry of a *nol. pros.* as to said Morrill.

Thos. B. Reed, attorney-general, and *P. H. Stubbs*, county-attorney for the State. R. S. c. 134, § 19, does not change the common law so far as it is applicable to this case.

When the offense charged touched the person of the wife, she can be a witness. Lord Audley's case, 3 How. St. Trials, 402; *Rex* v. *Azire*, 1 Strange, 633; *State* v. *Boyd*, 2 Hill, S. C. 288; *People* v. *Northrup*, 50 Barb. 148; Whitehouse's case, 3 Russ. on Cr. 633; *Rex* v. *Jagger*, 3 Russ. on Cr. 633; *State* v. *Davis*, 3 Brev. 3; *State* v. *Soule*, 5 Greenl. 407.

The reason is that there are cases where she may be the only witness capable of testifying. Wakefield's case, 2 Lewin, 279; *Rex* v. *Smith*, Leigh, 662; *Herman* v. *Drinkwater*, 1 Greenl. 67. Suppletory oath, admission of complainant in bastardy, and dying declarations sustained on same ground.

H. L. Whitcomb, for Dyer.

R. S. c. 134, § 19, implies that the wife cannot be a witness against the husband without his consent. *Commonwealth* v. *Easland*, 1 Mass. 15.

In case of assault and battery, she is made a witness *ex necessitate*. 1 Arch. 496 (7th ed.).

No assault is alleged, or attempt to do personal injury. It is not charged that the wife did not consent. It is presumed that she

procured her husband to assist. Public policy claims that the confidence subsisting between husband and wife shall be sacredly protected, even after the marriage relation ceases. 1 Greenl. on Ev. § 337.

The testimony of the wife must affect both respondents. 2 Russ. on Cr. 983; *Puller* v. *People*, 1 Doug. (Mich.), 48; 2 Russ. on Cr. 981, note (7th Am. ed.); 1 Phil. on Ev. 78.

KENT, J. The first question presented, under the certificate of the presiding judge, made in pursuance of c. 134, § 26, R. S. 1871, is this: "Is the wife of said Benjamin F. Morrill a competent witness against both respondents, on a joint trial of said respondents?"

The charge in the indictment is, in substance, that the respondents jointly intending thereby to procure the miscarriage of the wife, did use a certain instrument in the hand of Dyer, by forcing, thrusting, and inserting the said instrument into the body and womb of said Hannah, who is the wife of said Morrill.

There is no change in the rules of the common law, in relation to the competency of husband and wife as witnesses, for or against each other, except that they may be witnesses by the consent of the other party.

We assume in this case that no assent was given.

But by the common law a wife, in certain cases, may be a witness against her husband, without and against his consent or wishes. It was found, by sad experience, that the rule in its rigor and absoluteness failed to protect the wife from the assaults and cruelties of the husband committed in secret, or when no other person was a witness of the outrage. The rule was modified to give her protection against actual or threatened personal violence and injuries. The object and purpose of the exception measures the extent of it. In a given case the inquiry must be, what is the nature of the offense charged, and is it one implying personal violence to the wife. If so, she may be a witness, not only to obtain security for herself, but also when he is charged, by indictment, with an assault

upon her. This was early settled in this State, in Soule's case, 5 Greenl. 407.

That case turned upon this point, and it was held, in the opinion given by Chief Justice Mellen, that the wife might be a witness to prove the guilt of her husband, although she was no party to the proceedings, and the charge was under an indictment for a breach of the public peace alone.

The rule of exclusion, it is well known, is based upon the unity in view of the law of husband and wife, and "the idea that her testimony would tend to destroy domestic peace, and introduce discord, animosity, and confusion." The exceptions which necessity soon forced upon the courts are based primarily on the idea that the protection of the person of the wife from actual violence and assault or cruel treatment by the husband, is of more practical importance than the legal assumption of unity, or the theoretical fears of domestic discord.

The indictment in the case before us distinctly charges gross personal violence on the person of the wife, "by forcing, thrusting, and inserting a certain instrument into the body and womb" of the wife, by the two defendants jointly.

The intent charged was to procure the miscarriage of the woman.

The case on these allegations, as they stand, is clearly one of gross violence to the person of the wife, and no one can doubt that it stands within the exception. But it is argued that the consent of the wife would take away the foundation on which the exception rests, and that if established the wife cannot be examined.

The case, as presented in the indictment and in the question propounded, is silent on this point of assent on the part of the wife. It is urged, that from the nature of the charge her assent must be implied. But this is clearly not an inference of law, nor is it one that necessarily must be drawn from the nature of the injury to the person. It may have been done by actual violence, by confining the limbs, and preventing any outcry, and against the protestations and refusals of the woman. Or it may have been effected by less

violent means, and yet without the assent of the female, either express or implied.

And beyond this we may say, that the crime charged is one committed by the husband in the presence of the wife. Although this fact, in itself, would not render the testimony of the wife admissible, yet it may have an important bearing on the question of assent or consent.

The *prima facie* presumption is, that the wife acted under the coercion of the husband, if he was actually present, when the crime was committed. *Marshall* v. *Oakes*, 51 Maine, 308.

Although the wife may have, in fact, submitted to the operation, if that submission was obtained by and through the power, influence, commands, or even the persuasions of the husband, acting in his marital relation, and the offense was consummated on the person of the wife in the presence of the husband, both the legal presumption before stated and the actual facts justify us in applying the benefit of the exception to her case. The offense is clearly one that includes the element of personal violence to the wife, and whenever that appears the wife may as well be admitted to testify, as where the charge is by the State of a breach of the public peace.

One of the reasons for her admission in the latter case, given in the case of Soule, before cited, is that "other proof can be seldom presumed to exist or be attainable." The crime of abortion or an attempt to commit it is peculiarly one in its nature secret. Ordinarily no witnesses beyond the participants are present at the act, and darkness and secresy are almost always concomitants of the wicked transaction. It is also a crime which is alarmingly increasing in the community, and we have no hesitation in extending the exception before alluded to for the protection of the person of the wife.

The first question proposed, which is, "Is the wife of said Benjamin F. Morrill a competent witness against both respondents?" we answer in the affirmative.

It is unnecessary to give an answer to the second question, which is, "Is the wife of said Benjamin F. Morrill a competent witness

against said Parmenas Dyer, on a separate trial of said Dyer, with or without the entry of a *nol. pros.* as to said Morrill?" We, however, answer it in the affirmative.

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

JOHN F. GODFREY, administrator, *vs.* MATTHIAS E. RICE.

Promissory note. Action—indorser against maker for money paid—when cause of action accrues.

When the first indorser of a negotiable promissory note has been compelled to pay it, by a judgment in a suit commenced prior to the intervention of the statute of limitations, he may recover the amount of the note of the maker in an action for money paid.

The cause of action, in such case, accrues when the payment is made.

Thus, in May 1859, the defendant gave his negotiable promissory note payable on time, to the plaintiff's intestate, who indorsed it to a third person who indorsed it and got it discounted. The note went to protest, and the indorsers were seasonably notified. The latter indorser sued the former, and recovered judgment in October, 1870, for the amount of the note. After paying the judgment, the former indorser brought this action for money paid. *Held*, that the action was maintainable; and that the cause of action accrued when the payment was made.

ON REPORT.

ASSUMPSIT,—one count for money had and received, and one for $2,712.91 laid out and expended for the use of the defendant. The writ was dated Nov. 1, 1870.

Butler & Co., Bartlett's indorsees, paid the note to the holder, and on March 17, 1863, commenced an action against Bartlett as their indorser on the note. The action was entered at the April term, 1863. At the October term, 1870 (Bartlett having deceased and the present plaintiff having appeared as his administrator),

judgment was rendered against the present plaintiff for $2,712.91, which was satisfied by the plaintiff out of his intestate's estate.

The remaining facts sufficiently appear in the opinion.

John F. Godfrey, pro se.

L. Barker, for the defendant.

APPLETON, C. J. On 2d May, 1859, Woodbury & Grover gave their note payable in a year from its date for $1,500 to Joseph Bartlett, or order, by whom it was indorsed to James H. Butler & Co, The note was discounted for the benefit of Butler & Co. upon their indorsement; but before its maturity, Woodbury & Grover having failed, it was protested and the indorsers seasonably notified.

On 17th March, 1863, Butler & Co. having been compelled to take up the note, commenced a suit against Joseph Bartlett, the plaintiff's intestate, as indorser, in which after a long and tedious litigation, they recovered judgment at the October term, 1870, in Penobscot county, for the amount of debt and the accruing costs, which this plaintiff, Bartlett having deceased, paid out of the estate of his intestate.

Assuming, in the discussion of the question presented, that the defendant was a member of the firm of Woodbury & Grover, which the plaintiff offers to prove, is this action maintainable against him?

It is obvious that Butler & Co., if the present holders of the note, could not recover upon it, inasmuch as the statute of limitations, if pleaded, would be a bar to the maintenance of the suit. For the same reason the plaintiff, as the present holder, must fail in a suit on the note.

As the payment was made by plaintiff, long after the statute of limitations would constitute a bar to the note, if it had been voluntary, it would not have entitled him to recover. *Wheatfield* v. *Brush Valley Township*, 25 Penn. 112.

But it was not voluntary. It was by compulsion of legal pro-

cess. When the suit was commenced, the note was in force, though when the payment was made in satisfaction of the judgment recovered, it had long been barred by the statute.

It is very clear that the indorser had no right of action against the maker for money paid until payment, and the question now presented is whether he had then.

In the case of co-sureties, it is well settled that one surety, when his payment is compulsory, may recover the amount paid of his co-surety, notwithstanding the statute of limitations would have been a bar at the time of such payment. In *Crosby* v. *Wyatt*, 23 Maine, 156, the suit was commenced against the surety before the statute of limitations attached, but the judgment and payment thereon were subsequent thereto. The plaintiff's right of action was held to arise, when the payment was made by him on such execution. "It is no sufficient defense, therefore," observes Shepley, J., "for the defendant to show that he could not have been compelled by law to pay any part of that note, when it was paid by the plaintiff; for that would not show that he had not broken his implied contract with the plaintiff to save him from loss, by his being compelled to pay that half of the note, which he ought himself to have paid." In *Norton* v. *Hall*, 41 Vt. 471, the payment was made more than six years after the maturity of the note by the surety, and the principal was held liable. In that case, when the note became due, the surety being unable to pay it, the bank holding it demanded additional security, which he gave and which the bank held until the note was paid by such security which was more than six years after its maturity. It was held, that the maker having failed to pay the note when due the surety had a right to make this arrangement with the bank, and that the maker could not avail himself of the statute of limitations in a suit brought within six years from the payment of the note, the payment not being voluntary. "It was the duty," remarks Wilson, J., "of the defendant, at all times, so long as the plaintiff remained surety, by force of the liability incurred by signing or indorsing the note, to indemnify the plaintiff by paying the note. The neglect of the defend-

ant to pay the note when it became due, compelled the plaintiff to give the bank additional security, and to request further time of payment. All this was done while both plaintiff and defendant were liable to pay the note."

Where the last indorser in part pays the note indorsed, he can recover of his indorser, in an action for money paid, laid out, and expended, the amount so by him paid, notwithstanding the note remained in the hands of the indorsee not fully paid. *Butler* v. *Wright*, 20 Johns. 367. So, a second action will lie against the first indorser for money paid on account of the note after a former action and recovery for money previously paid. *Butler* v. *Wright*, 6 Wend. 284. And such action may be maintained before the final payment of the note, and while it remains in the hands of a third person as the legal holder thereof. "The moment the surety has been compelled to pay anything on account of the suretyship, he may bring," says Walworth, Ch., "an action for money paid, and the law raises a promise to repay the amount; but it does not raise a promise to repay any amount until he has been compelled to pay more, as it cannot then be known that the principal himself will not prevent the necessity of further payment." To the same effect is the decision in *Rushworth* v. *Moore*, 36 N. H. 189.

But the present is the case of an indorser against the maker. It was held in *Cole* v. *Cushing*, 8 Pick. 48, that the maker of a note, who has been committed to jail on a judgment in favor of the holder, is liable to be sued by an indorser, who pays the note to the holder, and that the indorser may bring his suit while the maker is in jail on the prior suit. The action for money paid, laid out, and expended will lie. *Wild* v. *Fisher*, 4 Pick. 421. In *Pownal* v. *Ferrand*, 6 B. & C. 439, the plaintiff, the indorser of a bill of exchange, having been sued by the holder and compelled to pay a part of it, sought to recover the money so paid of the acceptor. Lord Tenterden, C. J., said: "I am of opinion that the plaintiff is entitled to recover, upon the general principle that one man, who is compelled to pay money which another is bound by law to pay,

is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is bound to pay it." "If I pay your debt," says Bayley, J., "because I am forced to do so, then I may recover the same, for the law raises a promise on the part of the person, whose debt I pay, to reimburse me." In *Hubbly* v. *Brown*, 16 Johns. 71, Spencer, J., says, "we have regarded the indorser in the nature of a surety, and the maker of the note as the principal debtor."

Nor does it matter that the holder could not maintain an action on the note. When one of two makers of a note is discharged by the statute of limitations, and the other remains liable and pays the note, he is entitled to recover contribution of the former. *Peaslee* v. *Breed*, 10 N. H. 489. The rule of law seems to be that when one of two or more co-promisors, without assuming any new ground of liability, continues liable upon his original contract, and is compelled, by virtue of such contract, to pay the debt of his co-promisors, in such case the equitable liability of the other co-promisors, for contribution, will still remain, notwithstanding such other co-promisors may be discharged by the operation of the statute of limitations from liability to the original promisee. *Boardman* v. *Page*, 11 N. H. 432. So an action for money paid, laid out, and expended will lie at the suit of the last indorser against his prior indorser, for money paid the holder of the note. Though such payment is but in part satisfaction of the same. *Butler* v. *Wright*, 2 Wend. 369. In that case, it was held the cause of action accrued when the payment was made. The cause of action was not upon the note but for the part-payment.

The maker of a note, payable to order, authorizes its indorsement and subjects himself to all the liabilities arising therefrom. It has been seen that the indorsee, making payments on an over-due note on account of his liability as such, may sue for the amount so paid, though the note is in judgment or in the hands of the indorsee, unpaid, and that his right of action accrues when the payment is made, when made before the statute of limitations con-

stitute a bar. The right of action arising upon such payment, it follows that the statute of limitations, as between the indorser thus paying and the maker for whose use the payment is made, commences running at the time of the payment. It is apparent, therefore, that though the statute would be a bar if a suit were brought upon the note, it would not be if for money paid for the use of the maker, which it was his duty to have paid. If the payment is by legal compulsion, as upon a judgment in a suit commenced before the intervention of the statute, the same result would follow.

If the holder of the note of Woodbury & Grover had recovered judgment against the makers and the several indorsers, the last indorser, paying in whole or in part, could have recovered the amount by him paid, of his prior indorser or the makers. If he collected it of an indorser his right of action would not arise until payment. It would arise when he paid it, if the payment was by legal compulsion in a suit commenced before the statute attached. In this case, Bartlett, the plaintiff's intestate, could not have pleaded the statute bar in Butler's suit against him, for the suit was seasonably commenced. He could not avoid his liability. He could not sue the maker until he paid, and only for what he paid. If judgment had been recovered against him during the life of the note, but it had not been collected until within more than six years, from inability to find property, and it was then paid, the delay would not have prevented his recovery of the makers. So here the delay cannot defeat the plaintiff's equitable rights. He has been compelled to pay money for the use of the defendant. He could not avoid such payment. His right of action accrued in consequence of his payment and when it was made. The defendant's liability to him then first arose, and not before. He is not sued as the maker of the note, for that may be in the indorsee's hands, but for money paid to his use and for his benefit, which the plaintiff's intestate has been compelled to pay and which it was the duty of the defendant to have paid. The statute commences running from the date of the payment and not the date of the note.

The counsel for the defendant, in his able argument, relies upon

the case of *Luce* v. *McLoon*, 58 Maine, 325. It seems that on 28th April, 1855, A. G. Luce, the plaintiff's intestate, N. A. Farwell, and the defendant signed a note as surety for one Jackson, who on the same day gave a mortgage of certain goods to the defendant and I. K. Kimball, to secure this and other notes. This mortgage they discharged Oct. 1, 1855.

On the 29th December, 1858, N. A. Farwell, one of the sureties, took up the note, and on 24th December, 1864, the plaintiff, as administratrix, paid him one-third of the amount, and on the same day commenced a suit against the defendant. It is obvious that she had no claim on the money counts against the defendant as she had only paid her just contributory proportion.

The suit, if sustainable at all, could only be sustained because of the wrongful or fraudulent discharge of the mortgage, for the doing which the writ contained a special count. But the wrong for which redress was sought was done Oct. 1, 1855. The right of action then accrued. But the suit was not commenced until 24th December, 1864, and it was then held to be barred by the statute of limitations. It will be perceived, therefore, that the decision does not affect the questions here presented. The plaintiff failed on the money counts because she was not entitled to recover anything. She had only paid her third. If the defendant owed a third to anybody it was to Farwell by whom the note had been paid. No suit could be maintained upon the note, because that had long been barred by the statute of limitations, and could not be offered to support the money counts, if the plaintiff then had it, which was not shown to be the case.

Whether the defendant, if liable, is to be held for the costs accruing in the litigation between the plaintiff's intestate and his indorsee,—a litigation in which it does not appear that he had any interest, is a question which has not been presented for our consideration.

The result is that the indorser of a note may recover of the maker for any payment made upon the note after its dishonor, before the statute of limitation attaches.

He may recover for any payment made subsequent to the intervening of the statute, if made by legal compulsion and upon a suit commenced before such intervention.

The statute of limitations commences running against the maker from the time of such payment or payments made by the indorser.

The case to stand for trial.

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

ROBERT PERKINS *vs.* INHABITANTS OF MILFORD.

Statute — construction of. Towns — power of, to raise money.

Neither c. 170 of the Public laws of 1863, c. 226 of 1864, nor c. 298 of 1865, authorizes a town to refund money voluntarily contributed by an individual in 1864, to aid the town in procuring soldiers to fill its quota.

Nor does the constitution authorize a town to raise money to refund money given to it without expectation of repayment.

ON REPORT.

ASSUMPSIT upon a town order payable to A. F. Gerrish or bearer, for $50, dated March 22, 1865, given to refund to the payee his subscription, voluntarily made without expectation of repayment, to aid in procuring soldiers for the war of the rebellion.

It appeared that the money was not borrowed, nor obtained by any officer of the town, but was subscribed and paid to aid the town in procuring men to fill the quota of troops under the call of the president.

It appeared by the records of the town, that, under a proper article, the town voted, Aug. 15, 1864, to raise $200 per man, provided private individuals raised a fund of $600, the town to issue scrip, payable in one year, as soon as the whole amount of the subscription shall be raised, to be paid to volunteers, drafted men, or any person who furnishes a substitute to fill the town's quota. And in January, 1865, the town, at a legal meeting, called for the pur-

pose, voted that town orders be drawn in favor of those individuals who subscribed and paid the amount as bounties to soldiers in 1864. It appeared that the payee of the order in suit was one of the subscribers in 1864, and actually paid the sum of $50, and the order in suit was drawn to refund the amount thus paid.

If the action could not be maintained, plaintiff to be nonsuit.

N. Wilson, for the plaintiff.

Sewall & Blanchard, for the defendants.

APPLETON, C. J. This is an action upon a town order, dated March 22, 1865, for fifty dollars, payable to A. F. Gerrish or bearer, and by him indorsed to the plaintiff.

The order in the hands of the plaintiff is subject to the same defense as if in the hands of the payee. *Emery* v. *Mariaville*, 56 Maine, 314.

The evidence shows that Gerrish, the payee of the order, subscribed with others to raise a sum of money to aid in procuring soldiers for the late war. The subscription was voluntary and without expectation of repayment. The money was not borrowed nor obtained by any officer of the defendant town, but was subscribed and paid to aid the town in procuring men to fill its quota. In other words the money was a gift and not a loan.

The order was given to refund Gerrish for the amount subscribed and paid by him, in 1864, upon the subscription paper signed by him.

The order was given in pursuance of a vote of the town, and the inquiry arises whether the town had any authority to pass such vote. That it had not, will be conceded, unless some special act authorizing or confirming its doings, can be found.

The counsel for the plaintiff relies on an act approved Feb. 21, 1863, c. 170. But this act is entirely retrospective, and purports only to make valid certain doings of cities, towns, and plantations, in raising bounties, etc., which without its passage would have been illegal. It is no guide or authority for the future. It is in no re-

spect prospective. It cannot touch this case because there were no "doings" of the defendant town to be thereby made valid. It had done nothing, and no authority is given for future action.

Neither does the act of Feb. 20, 1864, c. 226, though referred to, have any bearing on the question. That act made valid the contracts made by municipal officers or by third persons in behalf of any city, town, or plantation, but without previous authority, to pay bounties to volunteers, etc., or to raise money to pay such bounties. But this case shows no contract whatever. No individual had become bound for the town. No municipal officer had contracted with any volunteers or others, or with any third person to raise money to pay bounties to volunteers, etc.

Neither is any authority to be found in the act of Feb. 17, 1865, c. 298, to sustain this claim. This is entitled "an act to make valid the acts and doings of cities, towns, or plantations, in voting and making provision for the payment of bounties to volunteers, drafted men, and substitutes of drafted and enrolled men, and other purposes." By § 6, "authority is conferred upon cities, towns, and plantations" . . . "to assume and pay to persons or associations, when they have advanced the bounty, or have, by private subscription, given a bounty to such volunteer, drafted man, or substitute," etc. Here there has been no bounty advanced by any association or given by private subscription "to such volunteer, drafted man, or substitute." The case shows no such person as having received his bounty in whole or part from Gerrish. But unless this be shown, the plaintiff does not bring himself within this act, which only provides for repayment where one or more has advanced or given the money to a particular individual of the classes named, and cannot be extended to a case like this, where nothing of the kind is pretended to have been done.

The money paid was voluntarily contributed. It constitutes no consideration for a vote of the town to refund it. There can be no implied promise to repay what was, and was intended to be, a gift. *Estey* v. *Westminster*, 97 Mass. 324; *Cole* v. *Bedford*, 97 Mass. 325. "The vote of the town," observes Bigelow, C. J., in

Shepard v. *Turner*, 13 Allen, 92, "to raise money for the purpose of refunding to individuals the amount contributed by them for the purpose of raising recruits for the army was not passed in fulfillment of any legal obligation which rested on the town, nor did it constitute a valid agreement, by virtue of which the town was liable to pay a specific sum to any particular person."

But even if the plaintiff's case, by a forced construction, could be brought within the purview of some of the acts confirming and rendering valid what without their passage would be invalid, still there remains another objection to the claim which we cannot but regard as insuperable.

The money was voluntarily paid and without expectation of repayment. It was a gift,—so understood, so intended by all the parties subscribing. It was no advance or loan to the town, with the expectation of repayment. Whether the gift was to the soldiers enlisting or to the town makes no difference.

The naked question recurs, can the town raise money to give to individuals. This is not a gift for any public purpose. It is a gift as a recompense for past generosity. If a town can give to A, it can give to B. If it can give little, it can give much. If it can give, then every man holds his estate subject to the will of the majority, who can give away as much or as little as they please.

Taxation is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxation is imposed by the State to meet its exigencies. But taxes to meet the plaintiff's claims would be taxes for a private purpose,—for a gift to an individual.

The constitution gives no authority to raise money to give away. 58 Maine, 591. If it did, all protection to property would cease.

Plaintiff nonsuit.

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

KENT, J., concurred in the view that the case did not come within either of the enabling statutes.

SETH PERKINS *vs.* DANIEL W. EMERSON.

Vessel—mortgage of, where to be recorded.

Before a vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the State.

After it is registered or enrolled, a mortgage of it will not be valid against any person other than the mortgager, his heirs and devisees, and persons having actual notice thereof, unless recorded as required by the laws of the United States.

ON REPORT.

REPLEVIN of Sloop Emma, of Bangor, built during the year 1869.

Plea, general issue, with brief statement alleging that the property belonged to the defendant.

The plaintiff relied upon a mortgage to him from one Perkins, her builder, dated July 6, 1869 (the sloop being then incomplete and on the stocks), and recorded in the city clerk's office at Bangor, Aug. 11, 1869.

The sloop was launched in August 1869, and licensed Aug. 6, 1869, in the name of Joseph H. Perkins, as owner; and nothing appeared in the custom-house showing any incumbrance against her at the time of purchase by the defendant.

The sloop was sold to the defendant for a full consideration Aug. 15, 1870, by said Perkins, and no evidence was produced showing or tending to show that the defendant had notice of said mortgage except the record of the city clerk's office.

If the action can be maintained the case to stand for trial.

Hersey, for the plaintiff.

Andrews, for the defendant.

WALTON, J. This is an action of replevin for a sloop, and the question is whether the plaintiff or the defendant has the better title.

The plaintiff claims title by virtue of a mortgage, dated July 6, 1869; and the defendant by purchase, Aug. 15, 1870. The question is whether the plaintiff's mortgage was duly recorded.

By the laws of this State a mortgage of personal property may be recorded in the office of the town or city clerk where the mortgager resides. By an act of congress passed July 29, 1850, mortgages of vessels are to be recorded in the office of the collector of customs where the vessel is registered or enrolled; and if not so recorded they will not be valid against any person other than the mortgager, his heirs and devisees, and persons having actual notice thereof.

It was held, however, in *Foster* v. *Perkins*, 42 Maine, 168, that the act of congress does not apply to vessels in process of construction not yet entered for registry or enrollment; that mortgages on vessels thus situated are valid if recorded agreeably to the laws of the State. Of the correctness of that decision there can be no doubt. In that case the controversy was between the mortgagee and one who had attached the vessel; both the mortgage and the attachment being made while the vessel lay upon the stocks, and before she had been entered for registry or enrollment. Not so in this case. Here the controversy is between the mortgagee and one who, for a full consideration, purchased the vessel after she had been enrolled. The question is not, therefore, whether a mortgage recorded agreeably to the laws of the State is valid before the vessel is enrolled, but whether it will continue to be valid after such enrollment. Upon this point, in the case above cited, the court expressly declined to express an opinion. (See close of paragraph near top of page 175.)

We think it will not. Before registry or enrollment a vessel, like any other article of personal property, is subject to the laws of the State. After registry or enrollment it comes under the operation of the laws of the United States. Before the vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the State. After it is registered or enrolled, a mortgage of it will not be valid unless recorded as required by the

laws of the United States. To hold otherwise would go far to defeat the very object which the registry laws of the United States were intended to secure.

In this case, the plaintiff's mortgage, though made a few days before, was not recorded till after the vessel was enrolled. It was then recorded in the office of the clerk of the city of Bangor. It should have been recorded in the office of the collector of the customs where the vessel was enrolled. Not being thus recorded, it was not valid against the defendant, unless he had actual notice of it. This the case fails to show. On the contrary, the report states that "no evidence was produced showing or tending to show that the defendant had notice of said mortgage except said record at the city clerk's office." If the mortgage had been legally recorded there, the record would have been what is called constructive notice to every one; but such constructive notice is not actual notice; nor is it in contemplation of law equivalent to actual notice.

The plaintiff's mortgage not having been duly recorded, and the defendant being a *bona fide* purchaser without actual notice of its existence, our conclusion is that the defendant has the better title, and is entitled to judgment, and an order for a return of the vessel replevied, the damages, if any, to be assessed by a judge at *nisi prius.*

Judgment for defendant, and a return of the vessel replevied.

Damages to be assessed at nisi prius.

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

NATHAN LAMB *vs.* WALDO DANFORTH.

Covenant broken — tenants in common need not join in. Covenant — breach of.

Tenants in common, holding under the same deed as grantees, have several freeholds, and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed.

In 1865, the defendant conveyed to the plaintiff, by deed of warranty, certain lands, a portion of which lay on the shore of a certain stream. In 1849, the defendant's predecessor in title had conveyed to a third person, who thereupon took and kept possession of a portion of the same premises, together with certain easements in the other portion, such as a right of way, to maintain a dam, and to use the shores for certain specified purposes. In an action of covenant broken, *Held*, That the covenant of seisin in the latter deed, so far as the previously conveyed premises were concerned, was broken at the date of the deed; and that the outstanding easements constituted a breach of the covenants of warranty.

ON REPORT.

COVENANT BROKEN. Writ dated March 11, 1870.

On the 12th December, A. D. 1865, the defendant, by his deed of warranty with the usual covenants, conveyed to the plaintiff and one John Lamb certain real estate therein described, situate in the town of Argyle, in this county.

On the 11th October, A. D. 1849, Stephen Danforth, jr., father of the defendant and from whom the defendant derives title, by his deed of warranty of that date, duly executed, delivered, acknowledged, and recorded, conveyed to one Dow and others, certain land situate in said Argyle, comprising mills, dams, etc., and being a portion of the premises included in the deed from the defendant to the plaintiff and Lamb of 12th December. The deed of 11th October contained the following clause:

"Also the right to use a strip of land three rods in width on the westerly side of said stream, extending back from the line of high-water along the whole length of said lot hereby conveyed, for any and all purposes connected with said mills or any other saw-mills that may be erected on said privilege, with the right to build and

maintain any dam or dams of any desired height across said stream, for the use and accommodation of said mills so far as I am interested in any lands affected thereby. Also the right to use said brook and the shores thereof between the lines of high-water on the sides of said stream, so far as my land extends above and below said mills to the mouth of the stream, for the purpose of stopping, running, or landing logs, masts, spars, or lumber, and passing to and fro for the purpose of driving or otherwise removing or securing the same, together with the right to pile bark on the banks of said stream, on the north side thereof, and of using the bank of the river south of said stream, except the part now used as garden in front of and north of the house, for the purpose of landing goods, piling lumber, loading, or rafting lumber, and for any other purposes connected with said mills and the carrying on the business thereof. Also the right of way over a strip of land two rods in width, extending from said mills to the river where the way is now located and used, with a convenient right of way to haul bark, lumber, and other articles to the place already designated for depositing or piling the same."

Immediately after this conveyance to Dow and others, they went into possession of the mills and other property conveyed to them, and have ever since, by themselves and those claiming under them, owned and occupied and improved the same, together with the easements described in the deed to them. When the defendant conveyed to the plaintiff and Lamb, he had no title, interest, or possession of the mills, etc., conveyed to Dow and others, nor was any consideration paid for the mills and privilege.

At the time of the commencement of this action, Lamb was and is now living with the plaintiff, undisturbed, on the premises conveyed to them by the defendant, excepting the premises conveyed to Dow and others.

If maintainable, the action to stand for trial.

Sewall & Blanchard, for the plaintiff.

J. H. Hilliard, for the defendant.

APPLETON, C. J. On the 12th December, 1865, the defendant, by his deed of warranty conveyed to the plaintiff and one John Lamb certain real estate in Argyle. To a portion of the premises the grantor had neither title nor possession. The premises conveyed were subject to certain easements, such as a right of way, the right to maintain a dam, to use the shores, etc.

The deed to the plaintiff and John Lamb was to them as tenants in common. But tenants in common have several freeholds and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed. *Swett* v. *Patrick*, 11 Maine, 179; Hammond on Parties, 29; R. S. c. 104, § 9.

A public road is an easement the existence of which, over a lot of land conveyed by deed, with covenants of warranty, is a breach of those covenants. *Haynes* v. *Young*, 36 Maine, 557. So is a private right of way. *Harlow* v. *Thomas*, 15 Pick. 66. In *Giles* v. *Dugro*, 1 Duer, 334, the defendant assigned a lease, covenanting therein that it was free and clear of all former grants, bargains, and incumbrances whatsoever. A prior grant of a privilege of the use of a wall on the premises, as a party-wall, was held a breach of the covenant. The former grant created a paramount right to the extent of the interest granted. So here, as to the easements previously granted by deed upon the plaintiff's land.

The plaintiff is in possession of the land over which easements had been previously granted. The exercise of those rights by a stranger having a paramount title is a disturbance, or interruption of the plaintiff's quiet enjoyment of the premises conveyed. *Sprague* v. *Baker*, 17 Mass. 586. The defendant conveyed the plaintiff a tract of and having a spring thereon with covenants of seizure and warranty. Prior to this he had conveyed to another the right to the water of the spring and of drawing it away by an aqueduct to his premises. It was held that here was a breach of the covenant of warranty. *Clark* v. *Conroe*, 38 Vt. 469. So in this case the outstanding easements prevent the plaintiffs having a clear title to the land deeded. The covenant of seisin, so far as relates to the land

previously conveyed to Wm. H. Dow, was likewise broken at the date of the deed.

There is a breach of the covenants of the defendant's deed, and by the agreement of parties the case is to stand for trial.

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

CHARLES C. EVERETT and others, in equity, *vs.* JOSEPH CARR.

Will—construction of.

A bequest commencing—"First of all, I give," etc., followed by others commencing successively with the word "next," does not take precedence of the succeeding ones.

A testator bequeathed to Emmeline Thomas, "during her natural life, the sum of $5,000 to purchase a homestead, house, or place, where she with her sisters, father and mother, if she so elects to live, may reside during her natural life;" and concluded the item as follows: "Having assigned to Emmeline, Mary, and Anna Thomas, or one of them, a policy of insurance on my life, the money collected therefrom will constitute a fund for the purchase of homestead, etc., and must be so considered as so much in payment of bequest to Emmeline, Mary, and Anna." After the testator's decease, Emmeline and her sisters received $7,500 on the policy. *Held*, That the sum received must be deducted from the legacies to them.

A bequest—"I also give and order paid to" a legatee named, "the sum of $1,000 per annum so long as she may live, for her use for charitable objects and purposes," is valid; and when once paid by the executors, their responsibility in relation thereto has ceased.

When the amount of a legacy is left blank in the will, the bequest is void.

The clause—"to my present attendant physician, to aid in the education of his children," can apply to the physician only who was attendant at the date of the will.

After making a bequest to a man and his wife specifically named, the will continued,—"This, together with the sale of the dwelling-house, will yield support, nothing more; but I give and bequeath to him and her a further sum of $2,500 for them to use for charitable purposes, not debarring them from its use, or such part as they choose to use, should they actually need it for their own comfort,—to be left by will for charitable purposes, at their decease, if not used for charitable purposes while living," *Held*, That the bequest of the $2,500 was valid, and that the disposition of it was entirely subject to their control.

A bequest to certain masonic lodges named of a specific sum "for charitable purposes," is valid, when such lodges are incorporated and authorized by their charter to take and hold for charitable and benevolent uses real and personal estate to an amount exceeding that of the legacy.

A bequest of certain specific sums to several persons named "in trust, to be used purely and solely for charitable purposes,—for the greatest relief of human suffering, human wants, and for the good of the greatest number," is a valid bequest for charitable uses.

After giving certain specific sums to three masonic lodges "for charitable purposes," and certain other specific sums to certain individuals named, "to be used purely and solely for charitable purposes," the will continued,—"but no part of these sums donated for charitable purposes to be given till provision be made for such as I had previously made," *Held*, That "these sums donated for charitable purposes," refer to those bequests immediately preceding.

BILL IN EQUITY brought under R. S. c. 77, § 5, clause VII, to determine the construction of the last will and testament of Rufus Dwinel, late of Bangor, deceased.

The bill is in the name of all the persons who can be interested in the provisions of the will or in the estate of the deceased, as executors, trustees, legatees, annuitants, and other beneficiaries, or as next of kin, except the respondent, who is named as legatee therein.

The bill alleges that the controversies which have arisen are involved in the following propositions:

"1. Do the bequests to Emmeline Thomas and her sisters (outside of the life-insurance policy and specific bequests of property) take precedence of the other bequests in the order in which they are named?

"2. After the said testate's decease, the said Emmeline and sisters received upon the policy of insurance described in said will as 'assigned to one or all of them,' the sum of seventy-five hundred dollars. Can they hold the same and be also entitled to full allowance of all provisions and bequests without credit or deduction for said proceeds from said policy.

"3. Is the bequest to Emmeline Thomas to be used for charitable purposes valid or void? If valid, have the executors any duty to perform as to the mode of expending the same, or are they excused from responsibility by payment to the legatee.

"4. Can any sums be paid to Charles Brown and Rufus D. Wadleigh, no sums having been inserted in said will for them, but a book of said deceased coming to the possession of said executors, in which a schedule of his will appears in the handwriting of the deceased, in which is carried out one thousand dollars as given to Wadleigh, and five hundred dollars to Brown?

"5. Is the clause, "to my present attendant physician, to aid in the education of his children," to be construed to apply to the physician who attended at the date of the will, who then had children, or to the physician who attended during the last sickness and some time before, who had only one child?

"6. Is the bequest to Bradburn and wife for charitable purposes valid or void? If void, where does it go? It is admitted that the said Bradburns are in circumstances where they are likely to need the amount of such bequest for their own comfort, in order to live in the style to which they have been ordinarily accustomed.

"7. Are the bequests to the masonic societies valid or void? And your orators crave the privilege of referring, at the hearing, to a copy of the rules and regulations which appertain to the system of expending charities by said societies. If void, where will such bequests go?

"8. Are the bequests to Everett and others to be expended individually, and the balance to them, to be expended collectively in charity, respectively valid or void, and if void, where will any assets reached under said clauses, if any, go?

"9. What bequests are included in the words "but no part of these sums donated for charitable purposes to be given till provision has been made for such as I had previously made?" Are the charitable bequests to Emmeline and the Bradburns and the masonic societies, any or all of them, postponed? or does the postponement apply only to the charitable bequests to the executors?

"10. Are or not the postponed charitable bequests made subject to the payment first of all the other bequests in the will excepting the residuary bequest?

"11. If any charitable bequests are void, and do not fall into

the mass of the estate, what percentage of them passes elsewhere, in case of a deficiency in the estate?"

The bill alleged that the estate was probably insufficient to presently pay the bequests, even if the charitable bequests should be declared void, and in such case there must be a new apportionment when an annuitant deceases and any of the estates in remainder fall in; that the estate could be more expeditiously and satisfactorily settled, if the annuities could be purchased at their apparently present value, for a gross sum; that the complainants and respondent have given written authority to the executors to buy in such of the annuities as can be purchased at reasonable rates; wherefore the complainants ask authority for the executors to make the purchases.

So much of the will as is material is as follows:

"After the payment or provision being made for the entire amount of all my just debts and charges against my estate, I give, devise, and bequeath to the trustees hereinafter to be appointed, all the estate, both real, personal, and mixed, of which I may die seized and possessed, to have and to hold in trust for the following objects and purposes, to wit:

First of all, I give and bequeath to my most faithful housekeeper and servant for more than twenty years, the sum of twelve hundred and fifty dollars per annum, to be paid her by my trustees, in quarterly annual payments, during her natural life. I also give to her, during her natural life, the sum of five thousand dollars, to purchase a homestead, house, or place, where she, with her sisters, father and mother, if she so elects to live, may reside during her natural life, after which said estate to be subject to provisions hereinafter made. I further give to her the sum of one thousand dollars in money, and fifteen hundred dollars' worth of furniture, to be selected from any I have or may have in the house at the time of my decease. I also give her books and pictures to the value of three hundred dollars; and with a view to as little change as may be in her household affairs, I direct that my silver service and silver ware may remain in her possession during her natural life, and

then be disposed of as may be the real estate or homestead, as may be hereinafter provided. I also give and order paid to her (Emmeline Thomas) the sum of one thousand dollars per annum so long as she may live, for her use for charitable objects or purposes. My horse "Billy," carriage, sleigh, harness, etc., etc., already given. Also, diamond pin, which last I may revoke hereafter. Having assigned to Emmeline, Mary, and Anna Thomas, or one of them, a policy of insurance on my life, the money collected therefrom will constitute a fund for the purchase of homestead, etc., and must be so considered as so much in payment of bequest to Emmeline, Mary, and Anna Thomas.

"Next, I give and bequeath to Anna and Mary, sisters to Emmeline Thomas, the sum of one thousand dollars each, and each six hundred dollars per annum during the life of one or both of them, to be paid by my trustees in quarterly annual payments.

"To Mrs. Geo. Bradburn, of Melrose, Mass., I give the sum of five hundred dollars, and one thousand dollars per annum to her and Mr. Geo. Bradburn, during the life of both of them; and should one survive the other, to the survivor five hundred dollars per annum. This, together with the sale of the dwelling-house, will yield support, nothing more; but I give and bequeath to him and her a further sum of twenty-five hundred dollars for them to use for charitable purposes, not debarring them from its use, or such part as they choose to use, should they actually need it for their own comfort,—to be left by will for charitable purposes, at their decease, if not used for charitable puposes while living." . . .

"To Charles Brown, through Charles H. Dennett as trustee, to be paid as Mr. Dennett may deem best for said Brown. . . . To my present attendant physician, to aid in the education of his children, one thousand dollars; to my namesake, Rufus D. Wadleigh ——."

"I give and bequeath to the "Rising Virtue Lodge," to the "St. Andrew's Lodge," and to the "Mount Moriah R. A. Chapter," for charitable purposes, each the sum of five thousand dollars. I give in trust, to be used purely and solely for charitable puposes, for the greatest relief of human suffering, human wants, and for

the good of the greatest number, the following sums to the following persons, viz.: To Rev. C. C. Everett, and my niece, his wife, the sum of thirty-five thousand dollars; to Hon. John A. Peters, twenty thousand dollars; to Elias Merrill, Esq., the sum of fifteen thousand dollars; and to C. H. Dennett, the sum of ten thousand dollars, each, to make known to the others, semi-annually, through the chairman of the trustees, the amount of his charities, and to whom given; but no part of these sums donated for charitable purposes to be given till provision has been made for such as I had previously made."

J. A. Peters and *F. A. Wilson*, in support of the will.

Rowe, for the Misses Thomas.

McCrillis, for Calvin Dwinel and next of kin.

Davis & Drummond, for the masonic institutions.

Carr, pro se.

APPLETON, C. J. This is a bill in equity, brought under R. S. c. 77, § 5, by the executors of, and all persons except the respondents, interested under the will of Rufus Dwinel, and his heirs at law, to ask this court to determine the construction to be given to the various clauses in the same.

1. There are numerous legacies to different individuals. There is no language giving any priority to one legatee over another. It was undoubtedly the intention of the testator that all his legacies should be paid, but not that one should be paid at the expense of the others. "If a testator expressed himself in the following manner: "Imprimis" or "in the first place" I give such a legacy to A, and "in the second place" or "afterwards" I give such a sum of money to B; these words or variety of expression (considering the inattention and incorrectness with which wills are frequently drawn, as also the little regard paid to nicety of expression) will neither give A a preference to B, nor either of them a priority to

the other legatees, so as to exempt them from abating with such other legatees." 1 Roper on Legacies, 426; *Swazey* v. *American Bible Society*, 57 Maine, 523.

It follows that the bequests to Emmeline Thomas and her sisters, do not take precedence of the other bequests.

2. The testator, among other gifts, gave to Emmeline Thomas "during her natural life, the sum of five thousand dollars, to purchase a homestead, house, or place, where she with her sisters, father and mother, if she so elects to live, may reside during her natural life," etc. In the latter part of the clause by which the above is given he adds: "Having assigned to Emmeline, Mary, and Anna Thomas, or one of them, a policy of insurance on my life, the money collected therefrom will constitute a fund for the purchase of homestead, etc., and must be so considered as so much in payment of bequest to Emmeline, Mary, and Anna Thomas."

After the testator's decease, Emmeline Thomas and her sisters received the sum of seven thousand five hundred dollars upon the policy referred to in said will as assigned to them or one of them.

This sum must go to reduce the legacies to them. It fully satisfies the legacy for the purchase of the homestead, and after satisfying that, the balance remaining must be charged against them, to be deducted from what they would otherwise be entitled to receive.

In case there should be a deficiency of assets to meet all the legacies to individuals, the abatement would be upon the amount due the Thomas sisters after the deduction is made of the amount received by them from the proceeds of the insurance policy.

3. The bequest to Emmeline Thomas for charitable purposes, as will be seen upon subsequent examination, is valid. Being valid, when once paid by the executors, they must be regarded as released from all further responsibility.

4. No sums can be paid to Charles Brown and Rufus D. Wadleigh, none having been inserted in the will for them. When the entire name of a legatee is omitted parol evidence cannot be admitted to supply the blank, for that would amount to a bequest by oral testimony. In *Winne* v. *Littleton*, 2 Ch. Ca 51, A bequeathed

all his estate to his executor, leaving a blank, and died without naming any person executor. The legacy was adjudged void. Similar decisions were had in *Baylis* v. *Attorney-general*, 2 Atk. 239, and in *Hunt* v. *Hart*, 3 B. C. C. 311.

The same principle applies with equal force when the amount of the legacy is left blank. The blank was never filled by the testator. It is not for the court to supply what the testator omitted or what with a change of purpose he may have intended to do.

5. The clause "to my *present* attendant physician to aid in the education of his children" can only apply to the physician who attended at the date of the will. To one called in at a subsequent date, the word present would not be applicable. "Whenever," observes Ellsworth, J., in *Gold* v. *Jordan*, 21 Conn. 16, "a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event." A future physician, thereafter to be called, could not be the then "present attendant," to whom the legacy is given.

6. After making a bequest to Mr. and Mrs. George Bradburn, the testator adds: "This, together with the sale of the dwelling-house, will yield support, nothing more; but I give and bequeath to him and her a further sum of $2,500 for them to use for charitable purposes, not debarring them from its use, or such part as they choose to use, should they actually need it for their own comfort, to be left by will, for charitable purposes, at their decease, if not used for charitable purposes whilst living."

In all cases the intention of the testator should control. The particular intention should govern, rather than the general intention. It is apparent that the testator doubted as to the sufficiency of his bequest "to yield support." At any rate it would accomplish "nothing more." He, therefore, bequeaths them a further sum, which they may use in whole or in part, for their own comfort, as they may choose. They are to determine what their own comfort requires. Now they are the objects of the testator's bounty. He preferred, or must be regarded as preferring, them to

any unknown object of their bounty. He gave it to them primarily if they needed it, or chose to say they needed it. It was a "further sum" for their support, if they chose to so consider it. It is conceded that they will require it to enable them to live in the style to which they are accustomed. The very contingency exists in which they would choose to use it and in which they are expected and wished to use it.

The whole or the portion unexpended they were "to will for charitable purposes at their decease." But unless it was theirs, they could not will it. It could be disposed of by will, only because it belonged to them. They had, then, the entire ownership of this sum, to use for their own support and to dispose of by will.

The intention of the testator was, that the full ownership should be in his legatees. Primarily, they were to use it for their own support. Secondarily, they might use it for charitable purposes. They were to do as they chose, without being liable to account to any one.

The result is this, it is a legacy to them, and subject to their control in regard to its disposition.

7. The masonic lodges to which legacies are given are incorporations created for specific purposes, "with power to sue and be sued, to have a common seal and to change the same, to make any by-laws for the management of their affairs, not repugnant to the laws of this State, nor ancient masonic usages; to take and hold for charitable and benevolent uses," real and personal estate, to a certain value exceeding the legacies in this will, "and to give and grant, or bargain and sell the same, with all the privileges usually granted to other societies, instituted for purposes of charity and benevolence."

Being existent corporations, competent to take, a legacy may be given to them equally as to individuals. If made to them, it would be in aid of the object of their creation. If the legacies had been to them by name and nothing more, no objection could be taken to their validity. The allegation in the will, "for charitable purposes," is merely a reiteration of the alleged purposes of their cor-

porate existence. Merely stating the object of the donor to be coincident with the purposes for which the donee exists, cannot defeat the gift. Accordingly, legacies to masonic lodges have been upheld by repeated decisions of courts of the highest respectability. *Drake* v. *Fuller*, 9 N. H. 536; *Indianapolis* v. *The Grand Master etc.*, 25 Ind. 518.

8. The bequests to Everett and others are "in trust, to be used purely and solely for charitable purposes,— for the greatest relief of human suffering, human wants, and for the good of the greatest number." It cannot be doubted that this is a valid bequest for charitable uses. In *Saltonstall* v. *Saunders*, 11 Allen, 446, the bequest was to trustees to hold and invest the same, and the income thereof, and appropriate so much or the whole of the principal and income as they might think proper "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence and charity, public and private or temperance, or for the education of deserving youths." This was held a good, charitable bequest. In *Johnston* v. *Swann*, 3 Madd. 457, Sir John Leach held a bequest to trustees "for the benefit of such public and private charities, as they in their discretion might think fit," to be a valid charitable donation. In *Drew* v. *Wakefield*, 54 Maine, 291, a bequest to executors or trustees, upon trust, to distribute among testator's deserving relations, and such indigent persons as they may think proper, was upheld. So in *Swazey* v. *American Bible Society*, 57 Maine, 523, a bequest "for the benefit of needy single women and widows" was held valid. A devise or bequest in remainder to such charities as shall be deemed most useful by the executor or administrator of one to whom the property is given for life is valid. *Wells* v. *Doane*, 3 Gray, 201. "We have no doubt," remarks Metcalf, J., in delivering the opinion of the court, "that the bequest to charities is valid. In *Chapman* v. *Brown*, Sir William Grant said, 'a bequest to such charitable purposes as the executors shall think proper is a good bequest.' And there are also adjudications of this court which are decisive of this point. *Going* v. *Emery*, 16 Pick. 107; *Brown* v. *Kelsey*, 2

Cush. 243." In *Baker* v. *Sutton*, 1 Keene, 226, a bequest of personal estate, for such religious and charitable purposes, within the kingdom of England, as, in the opinion of the testator's trustees, should be deemed fit and proper, was held to be a good charitable bequest. In *Whicher* v. *Hume*, 14 Beavan, 509, a bequest to trustees, to be appropriated in their absolute and uncontrolled discretion for the advancement and propagation of learning in every part of the world, as far as circumstances will permit, was pronounced valid. In *Horde* v. *The Earl of Suffolk*, 2 Mylne & Keene, 59, where annual sums were bequeathed to persons, to be distributed in charity, at the discretion of the legatees, either to private individuals or public institutions, the court declared that the legacies did not fail, but that a scheme was unnecessary. "A charity," observes Gray, J., in *Jackson* v. *Phillips*, 14 Allen, 556, "in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

It will be perceived that these principles are alike applicable to the bequest to Emmeline Thomas as to the bequests to the executors, individually or collectively, for charitable purposes.

In *Waldo* v. *Caley*, 16 Ves. 206, the trust was to pay to the testator's wife the income for life, and directing her, with the advice and assistance of the trustees, to lay out half in promoting charitable purposes as well of a public as a private nature, and more especially in relieving such distressed persons, etc., as his wife shall judge. most worthy and deserving objects, always giving a preference to poor relations. In relation to the bequest under consideration, the advice and assistance of the trustees are not invoked. In delivering his opinion Sir William Grant, M. R., says: "Upon the whole, however, the intention seems to be to vest in her a discretionary power of distributing to such charitable purposes as she shall

think fit; and, therefore, though the trustees are to advise and assist, yet in case of a difference of opinion it is hers that must prevail. Into her hands the whole money is to be paid; by her the distribution is to be made; and by her judgment the fitness of the object is to be determined." Upon appeal, the decision of the master of the Rolls was affirmed by Lord Eldon.

If this were not to be deemed a charitable bequest, then it must be regarded as a bequest to her. It is to "be paid to her" "as long as she may live, for her use for charitable objects or purposes," etc. In *Gibbs* v. *Rumsey*, 2 Ves & Beame, 294, the bequest was "unto my said trustees and executors, to be disposed of unto such person and persons, and in such manner as they in their discretion shall think proper and expedient," and this was held an absolute interest to them beneficially, or an absolute power of appointment, excluding the next of kin and the heir as to the produce of real estate.

9. The testator, after giving fifteen thousand dollars to three masonic lodges, "for charitable purposes," and eighty thousand dollars to Everett and others, in different sums, for the same purposes, adds, "but no part of these sums, donated for charitable purposes, to be given till provision be made for such as I had previously made."

The will is olographic. The careful accuracy or the technical language of a professional draftsman is not to be expected. We think, however, the meaning is sufficiently clear. "These sums, donated for charitable purposes," must refer to the bequests immediately preceding,—those to the masonic lodges and to Everett and others. These were not to interfere with bequests previously made. All the bequests "previously made" were to have precedence, including those to Emmeline Thomas and to the Bradburns.

10. It has been seen that the postponed charitable bequests are made subject to the prior payment of all the other bequests in the will excepting the residuary bequest.

The executors have no authority, under the will, to purchase annuities for the several annuitants named therein. If an annuity

were purchased for one who died short of the average expectation of life, the loss must fall on the executors. But all parties who can be interested in the provision of this will, or in the estate of the deceased, as executors, trustees, legatees, annuitants, and other beneficiaries, or as next of kin, with the exception of the respondent, have expressed the desire that annuities should be purchased for the several annuitants, at their present apparent value, for a gross sum. To do so would conduce to the speedy settlement of the estate. If the assent of all but the respondent has been had, his being obtained, there seems no objection to this course. No one would thereby be injured, and all having consented, the executors would be fully protected in so doing.

The estate is large. The executors are under no obligation to assume responsibility. It is important to all parties that the estate be settled as speedily as may be. The questions proposed in relation to the construction of the will and the distribution of the property of the testator are of importance, and are better determined now than at any other time. Reasonable costs and charges are to be allowed out of the estate to the parties litigant. *Drew* v. *Wakefield*, 54 Maine, 292.

According to the true construction of the will of Rufus Dwinel it is declared:

1. That the bequests to Emmeline Thomas and her sisters (outside of the life insurance policy and specific bequests of property) do not take precedence of the other bequests.

2. That the said Emmeline and her sisters, having received seventy-five hundred dollars upon the policy of insurance described in said will, as "assigned to one or all of them," cannot hold the same, and be also entitled to full allowance of all other provisions and bequests, without credit or deduction for said proceeds of said insurance policy.

3. The bequest to Emmeline Thomas is valid.

4. No sums can be paid to Charles Brown and Rufus D. Wadleigh, no sums having been inserted in the will as legacies to them.

5. The clause, "to my present attendant physician to aid in the

education of his children," applies to the physician in attendance at the date of the will.

6. The bequest to Bradburn and wife, of $2,500, is valid.

7. The bequests to the masonic lodges are valid.

8. The bequests to Everett and others, individually and in trust, are valid.

9. The bequests included in the words "but no part of these sums donated for charitable purposes to be given till provision has been made for such as I had previously made," are those to the masonic lodges and to Everett and the other executors.

10. The postponed charitable bequests are subject to the prior payment of all the other bequests in the will, except the residuary bequest.

And it is further ordered, that a master be appointed to report the reasonable costs and charges, which are to be a charge to the estate.

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

CUTTING, J., being interested, did not sit.

SALLY P. RANDALL *vs.* ALONZO RANDALL.

Deed—construction of. Exception—what is.

In a deed conveying the west half of a farm, the clause, "Excepting the reserve of the four rows of apple-trees on the north side of the orchard, . . . and the land on which they stand; also, so much of the second growth of ash timber, as I shall need for my own personal use," constitutes an exception.

ON REPORT.

TRESPASS QUARE CLAUSUM for breaking and entering the plaintiff's close in Dixmont, and cutting and carrying away the grass, and carrying away the apples growing in said close. Plea, general issue.

On September 17, 1844, Nathaniel Randall conveyed by deed of quit claim to John J. Bickford, the west half of his farm described by metes and bounds. In this deed is the following clause:

"Excepting, however, the reserve of the four rows of apple-trees on the north side of the orchard, with a suitable passway to and from the same, and the land on which they stand. Also, so much of the second growth of ash timber as I shall want for my own personal use."

The metes and bounds given in this deed included the land on which the four rows of apple trees stand. The premises thus conveyed to Bickford came through several *mesne* conveyances to the defendant.

On Feb. 13, 1861, Nathaniel Randall, by deed of warranty conveyed to the plaintiff the east half of said farm, together with the land excepted in his deed to Bickford describing the whole premises by metes and bounds, describing the west line as follows: "thence north to the centre between the fourth and fifth rows of apple-trees in the orchard; thence west the length of the orchard; thence north to the north side of the fourth row of apple-trees from that point; thence east to the east line of the Bickford lot; thence north," etc. The trespass complained of was committed by cutting and carrying away the grass which grew upon the land thus described, and the apples growing upon the trees upon the same land.

If the action was maintainable, a default was to be entered for ten dollars damages.

Geo. W. Whitney, for the plaintiff.

H. H. Andrews, for the defendant.

Appleton, C. J. Both parties claim title under Nathaniel Randall, who on Sept. 17, 1844, conveyed by deed of quitclaim the west half of his farm to one Bickford, "excepting, however, the reserve of the four rows of apple-trees on the north side of the orchard, with a suitable passway to and from the same, and the land on which they stand. Also, so much of the second growth of ash timber as I shall want for my own personal use."

On February 13, 1861, Nathaniel Randall conveyed by deed of warranty to the plaintiff the east half of said farm, together with the land excepted or reserved in his deed to Bickford. The land is described by metes and bounds including the parcel so excepted or reserved. The plaintiff entered under this deed and has remained in the exclusive possession and occupation of the whole land included in his deed.

The question presented is whether the words in the deed from Randall to Bickford, "excepting, however, the reserve of the four rows of apple-trees, etc., and the land on which they stand," and of "so much of the growth of ash timber as I shall want for my own personal use," constitute an exception or a reservation.

"A reservation is a clause in a deed, whereby the grantee reserves some new thing to himself out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant." 4 Kent's Com. 468. In all deeds the intention is to govern. The land upon which the four rows of apple-trees stand is part of the thing granted,and is excepted from the grant. The ash trees were part of the thing granted. Neither the land nor ash trees are new things and not *in esse* before. In *The Earl of Cardigan* v. *Armitage*, 9 E. C. L. 60, says Bailey J., "the language of this feoffment is, "except and always reserved," out of the said feoffment unto Sir Thomas Danby and his heirs all the coals. The coals were part of the thing granted and *in esse* at the time. The consequence, therefore, according to *Co. Litt.* is that if this, which in words was an exception, operated in point of law as an exception, the coal *semper cum Sir T. D. fuerunt.* They were never out of him, and without the words of inheritance, "and his heirs," would have remained as before in Sir Thomas Danby and his heirs. Shepp. Touch. 100." There are cases reported where the word reserve is treated as an exception, as in Dyer 19 a. *Smith* v. *Ladd*, 41 Maine, 314. When a reservation is to be construed as an exception, no words of inheritance are necessary, in order that rights reserved or excepted may go to the heirs or assigns of the grantor. *Winthrop* v. *Fairbanks*, 41 Maine 307.

This result is in accordance with the acts as well as the obvious intention of the parties. Nathaniel Randall intended to except half of the orchard, and, excepting it, he conveyed it by deed of warranty to the plaintiff. The grantees of the west half acquiesced in this construction until the trespass, which constitutes the subject-matter of this suit. According to all the authorities here was no reservation, but an exception. *Judgment for plaintiff for ten dollars.*

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

JAMES TREAT and others *vs.* RUFUS DWINEL and others.

Statute—construction of. Trespass—against several defendants when one dies.

By Pub. Laws of 1870, c. 128, when either of several plaintiffs or defendants in an action that survives, dies, the action may be further prosecuted or defended by the survivors and the executor or administrator of such deceased party jointly.

By Pub. Laws of 1870, c. 109, actions pending at the time of the passage or repeal of an act, shall not be affected thereby.

Hence, an action of trespass against several defendants brought to recover treble damages for the destruction of personal property, pending when c. 128 took effect, cannot be prosecuted against the representative of one of the deceased defendants jointly with the survivors.

But in such case, the plaintiff may, under R. S. c. 82 § 11, discontinue against the survivors, and proceed against the representative of the deceased defendant, or proceed against any or all of the survivors upon discontinuing against the representative party, and such of the survivors as the plaintiff may elect not to proceed against, subject to the provision relating to cost.

ON REPORT.

TRESPASS for treble damages for an alleged injury to and destruction of personal property.

The writ was dated Aug. 8, 1865, and returnable Octber term, 1865. The defendants pleaded severally. Since the pleadings were filed, to wit, on the 29th Sept., 1869, Rufus Dwinel, one of the defendants, deceased.

The defendants claimed that after the decease of Dwinel, it was the duty of the plaintiffs to elect whether they will proceed against the surviving defendants, and discontinue as to the estate of Dwinel, or proceed against the estate of Dwinel, and discontinue as to the surviving defendants, paying their costs.

The plaintiffs claimed that they could proceed against the estate of Dwinel and the surviving defendants jointly, and were not obliged to make any election.

The case was reserved for full court.

McCrillis, for the plaintiffs.

J. A. Peters & F. A. Wilson, for the defendants.

APPLETON, C. J. At common law, if a sole plaintiff or one of several plaintiffs died before final judgment, the suit was abated. So, too, the death of a single defendant or of one of several defendants before final judgment abated the suit, if *ex contractu*, though it was otherwise, if *ex delicto*.

But the common law has been materially modified in this respect, both in England and in this country.

By R. S. 1857, c. 87, § 8, "In addition to those surviving by the common law, the following actions survive: replevin, trover, assault and battery, trespass, trespass on the case, and petitions for and actions of review; and these actions may be commenced by or against an executor or administrator, or when the deceased was a party to them, may be prosecuted or defended by them."

By § 7, "when the only plaintiff or defendant dies, while an action that survives is pending, or after its commencement and before its entry, his executor or administrator may prosecute or defend as follows: the action, or an appeal, if made, may be entered, the death of the party suggested on the record, and the executor or administrator may appear voluntarily; if he does not appear at the second term after such death, or after his appointment, he may be cited to appear, and after due notice thereof, judgment may be entered against him by nonsuit or default."

By § 10, "when one of several plaintiffs or defendants, in an action that survives, dies, his death may be suggested on the record, and the action may be further prosecuted or defended by the survivors; and when all the plaintiffs or defendants die, the action may be prosecuted or defended by the executor or defendant of the last surviving plaintiff or defendant."

It is thus seen, that the statute, c. 87, defines clearly and distinctly by § 7 the course of procedure in case of the death of "the only plaintiff or defendant;" and by § 10, in that of the death of one or more or of all of many plaintiffs or defendants in actions which survive. In no conceivable case is the executor or administrator of a deceased party (there being several plaintiffs or defendants), joined with the survivor or survivors in the prosecution or the defense, by the provisions of the revision of 1857.

Nor are the provisions of R. S. c. 82, § 30, at variance with these views. By that section, "when a party in a pending suit dies, and his death is suggested on the record, and the cause of action survives, his executor or administrator may become a party, or, at the request of the other party, be summoned to appear and become a party. . . . If he neglects to appear, judgment may be entered by nonsuit or default, according to the provisions of chapter eighty-seven." But those provisions, where there are numerous plaintiffs or defendants, negative the joinder of the executor or administrator of a deceased party with the survivors; but, on the contrary, require the further prosecution or defense of the suit to be made by the survivors. Where the only plaintiff or defendant dies, in such case his executor or administrator becomes a party by § 7, and not otherwise.

By an act approved March 11, 1870, c. 128, the tenth section of R. S. c. 87, was amended so as to read as follows: "When either of several plaintiffs or defendants, in an action that survives, dies, the death may be suggested on the record, and the executor or administrator of the deceased may appear, or be cited to appear, as provided in section seven; and the action may be further prosecuted or defended by the survivors and such executor or adminis-

trator jointly, or by either of them," etc. But by c. 109, of the same session, "actions pending at the time of the passage or repeal of an act, shall not be affected thereby." The present action was pending at the time of the passage of c. 128, and was not affected thereby.

It follows that this action cannot be jointly prosecuted against the executors under the will of Rufus Dwinel and the surviving defendants.

By R. S. 1857, c. 82, § 12, "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." The plaintiff may strike out the names of as many of the survivors or of all as he may deem expedient. If the names of all the survivors are stricken out, it will then be a writ against Rufus Dwinel alone, and in such case, by the express provision R. S. c. 87, § 7, his executors may be summoned in, and the cause proceed against them to final judgment. The right to amend by § 12 exists irrespective of the death of a party, and its extent is to be determined by the party moving it, subject to the terms of the statute.

The action cannot be jointly prosecuted against the executors of Rufus Dwinel and the surviving defendants. The plaintiffs may discontinue against the survivors, and proceed against the executors of said Dwinel, in accordance with R. S. c. 82, § 12, or they may proceed against the survivors, or any number of them, upon discontinuing against the executors of Dwinel and such survivors as they may elect not to proceed against, subject to the statutory provisions as to costs.

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

WALTON, J., did not concur.

NELSON SAVAGE *vs.* CALEB HOLYOKE and others.

Trespass quare clausum—what title will enable plaintiff to sustain. Tax title.

As the law in this State was in 1835, in order to sustain a title under the tax-deed from a county treasurer, it must affirmatively appear that the provisions of law preparatory to and authorizing a sale of land for taxes had been strictly complied with.

To sustain an action of *trespass quare clausum* against one having no right to be upon the premises, the plaintiff put in evidence a deed of quitclaim to himself from one who never had either title or possession. The deed was never recorded until after the trespass complained of, and it did not appear that the plaintiff ever had possession under it. *Held*, insufficient.

In Nov., 1845, neither the common law nor the statutes of this State authorized a married woman to take a conveyance of real estate, and give back a mortgage to secure the purchase-money; but such a mortgage and deed were void.

A certified copy of a certificate of the entry by the mortgagee of such a mortgage, on June 4, 1847, for the purpose of foreclosing it, in the absence of any evidence that such possession was continued, would not be sufficient evidence of possession to enable him to maintain trespass for acts happening twenty years thereafter.

DICKERSON, J. TRESPASS QUARE CLAUSUM. Plea, general issue, with a brief statement, denying title and possession in the plaintiff, and setting forth title and possession in the defendants.

The gist of this action is the disturbance of the plaintiff's possession, and if this fact does not appear, it cannot be maintained. It is not, however, indispensable to the maintenance of this action, that the title to the premises should be in the plaintiff. Actual possession without title, or constructive possession with, is sufficient to support the action against one who has no right to be upon the property. As against a wrong-doer it is sufficient, if the possession is for a less term than twenty years. *Moore* v. *Moore*, 21 Me. 354; *Chandler* v. *Walker*, 1 Fost. 286; 1 Chit. Pl. 196 and 199.

The trespasses complained of are alleged to have been committed in the years 1867, 1868, and 1869, upon certain lands of the plaintiff, situated in township No. 9, in the ninth range of lots, formerly the town of Wilson in the county of Piscataquis.

The "Chadwick" lots where the principal trespasses are alleged to have been committed, were the north half of lot No. 6, and the south half of lot No. 7, in the seventh range, and the north half of lot No. 6, and the south half of lot No. 7, in the eighth range. The *locus* of the other trespass, is the south half of lot No. 5, in the eighth range.

1. The plaintiff's title. To establish his title, generally, to the "Chadwick" lots, the plaintiff relies upon what purports to be the tax-deed of Joseph Philbrick, treasurer of the county of Somerset, of township No. 9, in the ninth range of townships, in said county, dated, Dec. 10, 1835, and recorded Dec. 14, 1835. No evidence was offered to show that Philbrick was treasurer when the deed was given, or that the emergency had arisen for the assessment of the tax, or that the tax was legally assessed, or that the warrant for its collection had been duly issued to the treasurer, or that the requirements of law had been complied with in respect to advertising and selling the land, making the proper returns, and recording the proceedings.

Great strictness is required to make out a title under a tax-deed, and it must appear, as the law stood, when this tax was assessed, that the provisions of law preparatory to, and authorizing such sales, have been strictly complied with. The case, as presented by the plaintiff under the Philbrick deed, does not furnish *prima facie* evidence of title in him. *Brown* v. *Veazie*, 25 Me. 362; 2 Washb. Real. Prop. 522.

In further support of his title to the two "Chadwick" lots, described in his writ, as the north half of lot No. 6, and the south half of lot No. 7, in the eighth range, the plaintiff introduces the quitclaim deed of David Spratt, jr., to him, dated July 7, 1845, and recorded Feb. 15, 1870. It does not appear that Spratt ever had any possession or deed of the premises released. The deed, moreover, was not recorded until after the trespasses complained of are alleged and have been committed; nor is there any evidence that the plaintiff took possession under this deed. This deed must, therefore, be regarded as the mere unrecorded release of a party

having neither title nor possession. As such, it is insufficient, upon the principles before stated, to enable the plaintiff to maintain an action of *trespass quare clausum*, against one who has no right to be upon the premises. *Estes* v. *Cook*, 22 Pick. 296. *Tebbetts* v. *Estes*, 52 Maine, 566.

The mortgage deed of Rufus G. Curtis and Sally Ann Curtis, his wife, dated Nov. 4, 1845, and recorded Jan. 30, 1846, and the certified copy of a certificate of the plaintiff's entry to foreclose the same for conditions broken, dated June 4, 1857, are relied upon to show the title of the plaintiff to the south half of lot No. 5, in the eighth range. It appears by a deed introduced by the defendants, that the plaintiff conveyed the same parcel of land to the said Sally Ann Curtis, on the same day the mortgage was given to him. The mortgage was undoubtedly given to secure the payment of the purchase-money. The deed and mortgage constitute one and the same transaction, and must stand or fall together. When these deeds were given (1845), neither the common law nor the statutes of this State authorized a married woman to take a conveyance of real estate and give back a mortgage to secure the purchase-money. The mortgage given for such purpose, and the deed, together with the notes, were void. *Newbegin* v. *Langley*, 39 Maine, 200.

It follows that the plaintiff acquired no title to the south half of lot No. 5, in the eighth range, under the Curtis mortgage, and he has introduced no other record evidence of title thereto, except the Philbrick deed, which, as has been seen, cannot avail him. Besides, if the mortgage had been free from any infirmity and had been foreclosed by the plaintiff, he acquired no better title to the land by this transaction than he had when he gave the deed, which was no title at all. It follows that the plaintiff has failed to make out a valid title, by deed, to this parcel of land, and, also, to any of the other parcels described in his writ.

2. The plaintiff's possession. The only evidence of the plaintiff's possession of the south half of lot No. 5, range eight, is a certified copy of the certificate of his entry therein, dated June 4, 1847, to foreclose the Curtis mortgage, which was twenty years

before the trespass is alleged to have been committed upon it. There is no evidence that his possession continued for a single day after that entry, and, as he had no title, it is obvious that that single act would not be a sufficient possession to enable him to maintain this action.

The evidence to show the plaintiff's possession of the "Chadwick" lots, previous to the commission of the alleged trespass thereon, is derived exclusively from himself. He testifies that he moved on to lot No. 3, range eight, in 1825, and built his house in 1826, which was nearly three miles from the "Chadwick" lots. He further testifies that he come into possession of the "Chadwick" lots in 1835; by what authority, for what purpose, or in what manner he does not say. As his home-lot was three miles from these lots, it is hardly probable that he would visit them very frequently. Indeed, he does not testify that he was ever personally present on either of these lots, though he does speak of "letting" two persons cut and haul timber from them, and three other persons use them as a pasture. Upon what terms and conditions, or during what years he "let" those persons do these things does not appear. This is the extent of the plaintiff's possession, if such it may be termed, according to his own testimony. No other witness corroborates him.

Uncertain and transient as the plaintiff's possession of these lots seems to have been, if any he had, it did not continue more than thirteen years, as he "came into possession" of them in 1835, and moved out of the township in 1848. Though he returned to his home place after an absence of several years, there is no evidence that he was in possession of the "Chadwick" lots after his return. He acquired no title, therefore, to these lots by possession, and whatever possession he had of them, if any, was relinquished and abandoned at least nineteen years before the trespasses thereon are alleged to have been committed. He had neither title with actual or constructive possession, nor actual possession without title, and is a stranger to both the title and possession of the lots in question. The defendants did not disturb his possession, and he is not in a

situation to require them to show their right to be upon the premises. *Plaintiff nonsuit, and judgment for the defendants.*

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

Plaisted & Clark, for the plaintiff.

Hudson & Merrill, for the defendants.

MONROE YOUNG, appelant, *vs.* CARLTON MCGOWN.

Levy — construction of.

Where a levy describes land as "commencing at the south-west corner of Peter McGown's lot," such point is to be found at the south-west corner of land owned by Peter McGown, and not at the south-west corner of land occupied by him, under a contract of purchase, although the latter lot is generally known as and called the Peter McGown lot.

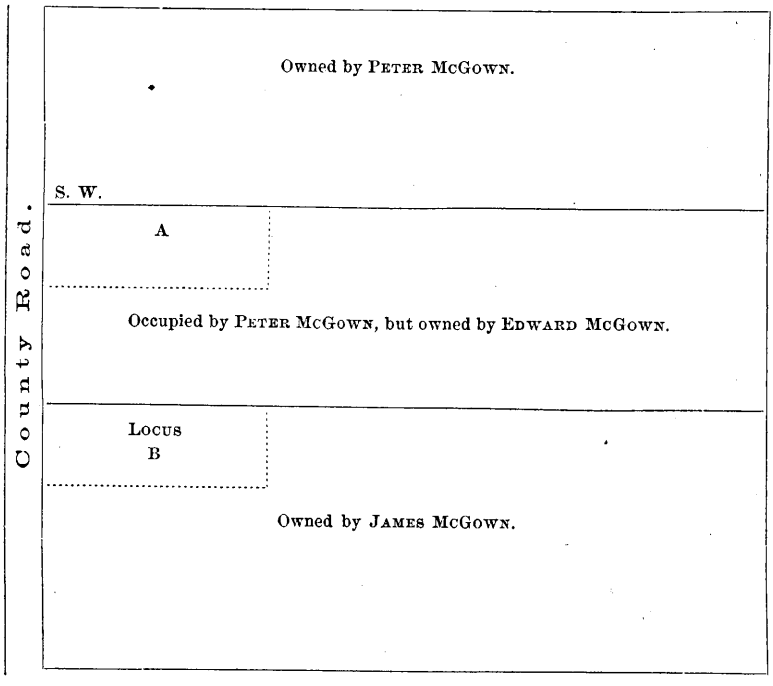
ON REPORT.

TRESPASS for entering and cutting and carrying away grass from a certain close described in the writ as follows: "Bounded on the north by land of Edward McGown; on the east by land of the defendant; on the south by land of the defendant; on the west by county road leading to Bangor; and being the same premises set off on execution to one V. D. Pinkham, from land of James McGown."

The entering and cutting were admitted.

The plaintiff claimed title through *mesne* conveyances from a levy of an execution against James McGown. The land in the levy was described as follows; "Beginning at the eastern side of the county road leading from Ellsworth to Bangor, at the south-west corner of Peter McGown's lot; thence running easterly along the line of said McGown's lot, fifty rods; thence southerly, at right angles with the aforesaid line, twenty-one rods, to a stake and

stones; thence westerly on a line parallel with the first-mentioned line to the county road; thence northerly on said road to the place of beginning."



The validity of the levy was admitted.

The lot next north of the alleged *locus* was, at the time of the levy and alleged trespass, owned by Edward McGown, the legal and record title thereto being in him. The adjoining lot on the north of the Edward McGown lot was then owned by Peter McGown, the legal, record title thereto being in him.

The diagram shows the situation of the lots.

The plaintiff contended that the levy covered the *locus* marked "B;" while the defendant contended that it covered the parcel marked "A,"—part of Edward McGown's lot.

The defendant claimed title by deed from James McGown, which included the *locus* "B;" and the defendant's title thereto was admitted to be good unless the levy covered it.

The plaintiff offered to prove by parol, against the seasonable objection of the defendant.

1. That, at the time of the levy, Peter McGown was occupying the Edward McGown lot, under a contract to purchase the same;

2. That the Edward McGown lot, at the time of the levy, was generally known as and called the Peter McGown lot; and

3. That the officer, in making the levy, actually did levy upon the *locus* "B," beginning at the south-west corner of the Edward McGown lot, and that the defendant had knowledge of the fact when he took his deed.

If the offered evidence was not admissible, or, when admitted, would not sustain the action, the plaintiff was to be nonsuited.

A. Wiswell, for the plaintiff, cited,

As to rules of construction, *Waterhouse* v. *Gibson*, 4 Greenl. 230; *Pride* v. *Lunt*, 19 Maine, 115.

As to the admissibility of parol evidence, 1 Greenl. on Ev. §§ 285, 288; *Pride* v. *Lunt*, *supra*; *Gerrish* v. *Towne*, 3 Gray, 82–88; *Woods* v. *Sawin*, 4 Gray, 322; *Sargent* v. *Adams*, 3 Gray, 78.

E. Hale & L. A. Emery, for the defendant.

Dickerson, J. Trespass for entering the plaintiff's close and cutting and carrying away the grass. The cutting and carrying off are admitted. The plaintiff claims title to the *locus* through *mesne* conveyances from the levy of an execution against James McGown. The validity of the levy is admitted, but there is a variance between the description of the premises in the levy, and that in the plaintiff's deed. Indeed, it is admitted that the description in the levy, unexplained, does not cover the *locus*.

The northern line of the premises, in the levy, is described as "beginning at the south-west corner of Peter McGown's lot, thence running easterly, along the side of said McGown's lot." The *locus* is described as "bounded on the north, by land of Edward McGown." The case finds that when the levy was made, Peter

McGown owned the land lying north of the land levied upon, Edward McGown that lying south of it, and James McGown, the judgment debtor, the land lying south of Edward McGown's lot; so that the land levied upon, according to the description in the levy, was land of Edward McGown, and not land of James McGown, the judgment debtor.

The plaintiff seeks to answer this objection by introducing parol evidence that when the levy was made, Peter McGown occupied the Edward McGown lot under a contract to purchase the same; that that lot was known and called the Peter McGown lot, and that the officer actually made the levy upon the *locus*. In other words, the plaintiff claims, that when a party owns one piece of land and occupies another piece owned by another person, and land passed by levy or conveyed by deed is described as bounded on his "lot," parol evidence is receivable to show that the land he occupied was intended, and not the land he owned, and that the instrument of conveyance is to receive this construction.

Levies upon real estate are to be construed by the same rules as conveyances by deed. As the proceeding is *in invitum*, the language of the levy is to be construed most strongly against the creditor and his grantees. The words used are the language of the creditor whose duty it is to ascertain the title and boundaries of the land before he causes the levy to be made. The court will give to the language of a deed or levy its usual signification and meaning, and not a forced or unusual construction in order to relieve a party from the effects of its obvious and ordinary import. Provision is made by law for recording deeds and levies, as a guide for purchasers and creditors. Such record shows the ownership, and not the occupation. Parties upon examining the record, regulate their action accordingly, and have a right to rely upon the accuracy and permanency of the description of the premises as it appears of record. The insecurity resulting to titles to real estate, from giving to the language describing the premises in a deed or levy an exceptional meaning, or allowing it to be changed and contradicted by parol evidence, is too apparent to need illustration or argument.

The description in the levy under consideration is by monuments, courses, and distances, and is easily traceable on the face of the earth. The use of the word "lot," as applied to a division or parcel of land is quite common in this country, if, indeed, it was not thus first used in America. The expression, A's corner, or A's lot, means the corner of A's land, or the lot owned by him. If a more restricted meaning is intended, appropriate, qualifying words are used, as the corner of land in the occupation of A, or the lot rented to him. The call in the levy is for "the south-west corner of Peter McGown's lot," and "the line of said McGown's lot." The corner is described as being at the eastern side of the county road, leading from Ellsworth to Bangor. The record of Peter McGown's deed shows that he owns land at the corner and on the line indicated in the levy. Can the judgment creditor under such a levy, maintain his title to other land than that described in the levy, upon introducing parol evidence that the call in the levy was for a "lot" occupied, but not owned by Peter McGown, and that the levy was actually made on such lot? We think not. To allow this, would be to admit parol evidence to control written evidence, and to deprive parties, in many cases, of the security afforded them by the law requiring levies to be recorded. The creditor, in making his levy, called for Peter McGown's corner and lot, meaning the corner to which his land came, and the lot he owned; neither he nor his grantee can hold title to other land under this levy, upon proof that it was intended to bound the land levied upon by land, owned by Edward McGown, but occupied by Peter. Both the judgment creditor and his grantees are concluded from maintaining such claim by the calls in the levy. *Crosby* v. *Parker*, 4 Mass. 113; *Wellfleet* v. *Truro*, 9 Allen, 137; *Wiswell* v. *Martin*, 54 Me. 270.

Plaintiff nonsuit.

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

WINSLOW BATES, administrator, *vs.* LEMUEL T. AVERY.

Insolvency of estate—what is proper evidence of. Practice.

The only proper evidence of the insolvency of the estate of a deceased person is the documentary evidence from the probate office.

But where the report of the evidence shows that the administrator testified without objection, that "the estate was represented insolvent, Aug. 4, 1868;" that "a license from the judge of probate to sell the real estate was issued" on the same day; and the report stipulates that if upon the foregoing facts and evidence, the action is maintainable, a new trial is to be granted, then for the purpose of determining whether or not the action is maintainable, the court will regard the insolvency as an admitted fact.

ON REPORT.

TRESPASS QUARE CLAUSUM, and DE BONIS, and WASTE, set forth in four counts, alleging the trespass on Dec. 2, 1867, and divers other succeeding days. Writ dated Aug. 13, 1868. Plea, general issue and brief statement.

1. The defendant says that the plaintiff ought not to have or maintain his action aforesaid, because the alleged trespass was to real estate *quare clausum fregit*, and subsequent to the death of the plaintiff's intestate, as appears by his writ and declaration.

2. The defendant further says, he and those under whom he claims have been in notorious, exclusive, and adverse possession for a period more than twenty years previous to the trespass alleged in plaintiff's writ, and have occupied the same as a wood-lot.

3. The defendant says that he has been in actual possession of the premises, described in the plaintiff's writ and declaration, for the term of six years, before the commencement of this action, and that therefore he is entitled to betterments.

4. That the plaintiff, previous to the commencement of this action, made no demand of the defendant, or those under whom he claims, for the possession of the property described, or gave any notice to the defendant or those under whom he claims.

5. The defendant denies that the plaintiff was duly and legally

appointed administrator, and that he was not a public administrator at the time of commencement of this action.

6. That there was no representation of insolvency, nor commissioners of insolvency appointed, and that there were no debts due from the estate of the said deceased, mentioned in the plaintiff's writ.

7. He denies that plaintiff's intestate ever had any title to said real estate, as described in the plaintiff's declaration.

8. That if any damage or trespass was committed, it was subsequent to the decease of the plaintiff's intestate, and at a time when there was no administrator on said intestate's estate.

The plaintiff put in the title of his intestate, being a deed, dated Nov. 5, 1832, duly acknowledged and recorded.

The plaintiff testified that he was appointed administrator of the estate of Michael Donovan, Jan. 6, 1868. He also testified, without objection, to the acts of tresspass; that "the estate was represented insolvent, Aug. 4, 1868," and that "a license from the judge of probate, to sell the real estate, was issued Aug. 4, 1868."

After the evidence was all in, the case was taken from the jury, to be reported to the full court, to settle the law, with the stipulation that "if upon the foregoing facts and evidence the action is maintainable, a new trial is to be granted; otherwise, a nonsuit to be entered."

J. & G. F. Granger, for the plaintiff.

A. M. Nichol, for the defendant, cited *Drinkwater* v. *Drinkwater*, 4 Mass. 353; *Taylor* v. *Townsend*, 8 Mass. 414; R. S. c. 66, § 21; *Thompson* v. *Dyer*, 55 Maine, 103; *Dean* v. *Dean*, 3 Mass. 258.

WALTON, J. An administrator may recover damages, in an action of trespass, of a person committing waste or trespass on the lands of the deceased, when the estate is insolvent. R. S. c. 66, § 20.

But in this case, the defendant denies that there is any evidence that the estate of the deceased is insolvent; he says that the only

proper evidence of insolvency is the documentary evidence from the probate office.

Such is undoubtedly the law; but in this case the administrator was allowed to state without objection, that "the estate was represented insolvent Aug. 4, 1868;" and that "a license from the judge of probate to sell the real estate was issued Aug. 4, 1868;" and the conclusion of the report is, that "if, upon the foregoing facts and evidence, the action is maintainable, a new trial is to be granted; otherwise a nonsuit is to be entered."

In this state of the case, it seems to us that, for the purpose of determining whether or not the action is maintainable, we are to regard it as an admitted fact, that the estate is insolvent.

We see no difficulty in maintaining the action if the estate is, in fact, insolvent. *Action to stand for trial.*

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

MASON G. WEBB and others *vs.* DONALD M. STUART.

Contract—consideration—mutuality. Statute—construction of.

In the trial of an action of assumpsit, on an account annexed, the defendant offered in evidence an unsealed, written agreement, signed by the plaintiffs and five other creditors of the defendant, therein stipulating to "take fifty per cent of the amount due us in full, for account against" him; and oral evidence that the defendant, prior to the commencement of this suit, presented to the plaintiffs the draft of a third person, of an amount equal to fifty per per cent of the account in suit, and claimed a receipt in full; but that the plaintiffs refused to accept the draft and give the receipt; *Held*, (1) That the evidence disclosed no consideration for or a mutuality in the written agreement; and (2) That the defense was not within R. S. c. 82, § 38.

ON REPORT.

ASSUMPSIT on an account annexed for merchandise, sold and delivered Nov. 18, 1868. The sale and delivery admitted.

In defense, the defendant offered an unsealed, written agreement, executed on Feb. 15, 1869, by the plaintiffs and five other creditors of the defendant. The tenor of the agreement was as follows: "We, the undersigned, agree to take fifty per cent of the amount due us in full, for account against D. M. Stuart."

It appeared that a few days before the date of the writ, a draft of M. Young for fifty per cent of the account in suit, was presented to the plaintiffs, and a receipt in full claimed; but that the plaintiffs refused to accept the draft and give such receipt, on the ground that the defendant had agreed to pay the other fifty per cent to their attorney.

If the agreement was not a defense, the defendant to be defaulted.

Geo. S. Peters, for the plaintiffs.

A. Wiswell, for the defendant.

KENT, J. It is admitted that the goods sued for, were sold and delivered to the defendant by the plaintiffs, at the price named. In defense the defendant offers a paper, not under seal, signed by the plaintiffs and five other creditors of defendant, of which the following is a copy: "We the undersigned agree to take fifty per cent of the amount due us in full, for account against D. M. Stuart, Ellsworth." It is agreed that this paper was signed by the plaintiffs, before the commencement of this suit. The defendant is willing to be defaulted for fifty per cent of the debt. The plaintiffs claim judgment for the whole.

This agreement is not technically a release. It is not under seal. It does not purport to be a release, but at most, it is an agreement to release upon payment. There is no consideration expressed or proved, moving from defendant. No mutuality. The defendant does not promise on his part. Nothing has been paid.

At common law, which has been recognized often in this State, before the enactment of the statute of 1851, it is well settled, that a payment of a part of a debt, made in money, does not operate to

extinguish the whole debt, although it be received as a payment in full, and a full discharge be given. *Bailey* v. *Day*, 26 Me. 88; *White* v. *Jordan*, 27 Me. 370.

The only change from this doctrine, by the statute of this State (R. S. 1857, c. 82, § 44; R. S. 1871, c. 82, § 38), is that "no action shall be maintained on a demand, settled by a creditor or his attorney, intrusted to collect it, in full discharge of it, by the receipt of money or other valuable consideration, however small."

In this case there has been no money received, or any valuable consideration.

The draft of a third party for fifty per cent of the debt was no payment, as the plaintiffs declined to receive it. It was no tender, not being money, and because a receipt in full was claimed.

We cannot find in the case any evidence, which brings the defense within the language of the statute. That requires that the demand should be settled, and fully discharged, by the actual receipt of money or some valuable consideration.

According to the agreement of the parties, the entry must be

Defendant defaulted for the whole amount claimed in the bill annexed to the writ.

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

SAMPSON REED and others *vs.* JOSEPH P. FISH.

Guaranty — construction of.

Upon the defendant's written guaranty of the following tenor,—"Oct. 14, 1860. Let the bearer buy merchandise to the amount of two or three hundred dollars, on six months, and I will see you paid,"—the plaintiffs sent to the bearer merchandise to the amount of two hundred and thirty dollars and thirty cents, and in November and December following, one hundred and ten dollars' worth more, *Held*, That the defendant's liability was limited to the first bill of goods.

ON FACTS AGREED.

ASSUMPSIT on the following writing, signed by the defendant.

"Boston, Oct. 14, 1860. Messrs. Reed, Cutler & Co. Please let the bearer, Mr. W. P. Mansfield, buy merchandise to the amount of two or three hundred dollars, on six months, and I will see that you have your pay."

The writ was dated Sept. 25, 1861. Plea, general issue.

The plaintiffs' account against Mansfield consisted of merchandise, 6 months, Oct. 16, 1860, $230.30; Nov. 8, 1860, do. $24.16; Nov. 24, 1860, do. $14.25; Dec. 2, 1860, do. $68.99; Dec. 21, 1860, do. $2.30, making in all, $340.

It appeared that the merchandise charged in the account was sent to Mansfield upon the guaranty, that it was all received by him and never paid for.

Several letters passed between the parties, which it is unnecessary to report.

The court were to draw inferences as a jury might, and render legal judgment in the case.

Joseph Williamson, for the plaintiffs.

W. G. Crosby, for the defendant.

WALTON, J. The first question is whether the guaranty declared on is to be regarded as continuous or confined to a single bill of goods. We are inclined to think that the parties must have understood that it was limited to a single purchase. The credit to be given is precise,—six months; the amount of merchandise is not so specific,—"to the amount of two or three hundred dollars," is the language used. Carefully considering the language of the whole instrument, it seems to us that it must have been intended for a single transaction; to the purchase of a single bill of goods; the amount of which had been approximately, but not precisely, estimated; but the term of credit for which had been precisely agreed upon. The defendant's liability, therefore, if liable at all,

is limited to the first bill of goods purchased, which amounted to $230.30.

The next question is one of fact. The defendant says he is not liable for any sum, as he had no notice, within a reasonable time, of the amount of merchandise sold on his guaranty. It is unnecessary to determine whether, in a case like this, where the guaranty is limited to a single transaction, and the amount of the bill is limited, and the term of credit to be given precise,—notice of the amount is necessary; for the evidence satisfies us, as matter of fact, that the defendant was present when the order for the goods was given, that he saw a written memorandum of the articles before they were ordered, and knew all about the amount, except, perhaps, that the price of each article had not been carried out and footed up; and on the very day that the six months expired, the plaintiffs wrote the defendant and stated to him the precise amount, namely, $230.30; and informed him that they should look to him for their pay. This objection, therefore, is not well founded in fact. We are satisfied that the defendant had notice that his guaranty was accepted and relied upon at the time it was given. We are also satisfied that he then had notice, sufficiently accurate for all practical purposes, of the amount of the bill. We are also satisfied that he was notified on the very day that the credit expired, that the principal debtor had not paid the bill, and that they should look to him for their pay. Very clearly, therefore, no defense can be made founded on the want of notice.

Judgment for plaintiffs for $230.30, *and interest from April* 16, 1861.

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

THEODORE CARY and others, in equity, *vs.* NELSON HERRIN.

Witness—competency of before a master in chancery. Statute—construction of.

In a bill in equity brought by the heirs of a deceased mortgager to redeem his mortgage, the defendant is not a competent witness to testify, before a master, for what, and under what circumstances, his receipt to the deceased offered in evidence, by the plaintiffs, was given.

In c. 132 Pub. Laws of 1870 (R. S. c. 82, § 87, clause IV.), providing, that in an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto,—the phrase, "other memoranda," means memoranda made by the deceased only; and it does not include receipts given by the adverse party to the deceased in his life-time.

ON EXCEPTIONS.

BILL IN EQUITY by the plaintiffs, as heirs at law of Shepard Cary, late of Houlton, in this county, deceased, to redeem a mortgage of certain lands dated Nov. 22, 1854, and given by Shepard Cary to the defendant.

The case was given to C. P. Stetson, Esq., master, who, after hearing the parties, made his report to the court at the February term, 1871.

It appeared from the report, that among other evidence introduced before the master, the plaintiffs put in two receipts signed by the defendant, one dated March 13, 1858, and the other Nov. 1, 1858, of the following tenor:

"$400. Received four hundred dollars from S. Cary on account of interest."

"$700. Received of S. Cary, seven hundred dollars on note Lock to Sumner Whitney."

That the defendant, a witness in his own behalf, was asked by his counsel the following questions:

1. Please state the circumstances under which the seven hundred dollar receipt was given; and for what it was given; and what

was the agreement between the witness and the deceased at the time the receipt was given, respecting its appropriation ?

That the question was seasonably objected to by the plaintiffs, but the objection was overruled by the master, and the witness answered :

"Shepard Cary gave me a note signed by Sumner Whitney for $1,000. I collected it. I had the money, and he wanted I should let him have $300, and give him a receipt for the balance, the $700 was to go for extra interest. I went to Bangor with Mr. Lock and received payment there. Whitney note was collected three or four weeks before date of receipt. I let him have the $300. It was first agreed that the whole $1,000 should go that way."

2. "Please state the circumstances under which the receipt for $400 of March 13, 1858, was given. What was the agreement between yourself and Mr. Cary at the time, with reference to the appropriation of the amount, for what was it paid ?"

The plaintiffs also seasonably objected to this question, but the objection was overruled, and the witness answered :

"I called upon Mr. Cary to pay me some interest, and he gave me this, to be applied for extra interest."

Before the examination of Herrin, as a witness, the plaintiffs and other witnesses in their behalf had testified to facts and statements of the defendant, which occurred since the death of the plaintiffs' ancestor, Shepard Cary, who deceased Aug. 9, 1866 ; but they did not testify to facts which happened prior to his death. And the plaintiffs had put in evidence, also, the notes mentioned and claimed that they and the receipt should be allowed on the mortgage note before Herrin had testified.

Upon the presentation of the master's report, the plaintiffs moved that it be set aside ; that further proceedings be stayed thereon, until the further order of the court ; and that it be recommitted for the reason that the defendant was permitted to testify in answer to the questions above mentioned.

The presiding judge, *pro forma*, overruled the motions, and the plaintiffs alleged exceptions.

Madigan & Donworth, and *Powers*, for the plaintiffs.

A. W. Paine, for the defendant.

DICKERSON, J. The plaintiffs bring this bill as heirs of the late Shepard Cary, deceased, to redeem a mortgate given by him to the defendant. The case was committed to a master whose report was presented for acceptance at the February term of the supreme judicial court for the county of Aroostook, A. D. 1871. The plaintiffs made a motion to set aside the report and have it recommitted, but the presiding justice overruled the motion, *pro forma*, and ordered the report to be accepted, and the plaintiffs excepted.

The principal question reserved is, whether the master properly allowed the defendant to testify to facts that transpired prior to the death of the plaintiffs' ancestor, against their objection.

The correctness of this ruling is attempted to be maintained on two grounds:

I. Because it is in accordance with the rules of evidence in equity proceedings. The rules of evidence are, in general, the same in equity as they are at law, both as to the competency of witnesses and other evidence. It is true, that when the parties to a bill in equity are merely nominal or fiduciary, or the facts depend solely upon the knowledge of the parties, and oath is so balanced against oath that it becomes necessary to determine the degree of credit to be given to the parties, it is competent to examine both parties, not as witnesses for themselves or each other, but to enlighten the conscience of the court. In other cases, too, parties may be examined by mutual consent, under the discretion of the court. But it is never competent for a master in chancery to examine a party against the objection of the adverse party, when, from the position of the parties, such examination would give that party an undue advantage over the other. 3 Greenl. Ev. § 338.

The plaintiffs are parties in interest, and might be greatly prejudiced by the testimony of the defendant, not only as to facts that took place prior to the death of their ancestor, but which, also, were peculiarly within his knowledge. The ruling of the master

in admitting the defendant to testify against the objection of the plaintiffs was not in accordance with the rules of evidence in equity proceedings. Nor is it allowable under the R. S. of 1857, c. 82, § 83.

II. It is also claimed, that the ruling is authorized by the statute of 1870, c. 132. That act is as follows: "In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the party may testify in relation thereto."

The question naturally arises; what "memoranda" are intended by the statute? Is it the memoranda of the deceased person only, or the memoranda of either party? Or is the language "other memoranda," broad enough to include any memoranda, that are used in evidence by either party? If the statute means memoranda of the deceased person only, is it limited to memoranda made by such person, or does it extend, also, to memoranda made by the other party, which was the property of the deceased person, or in his possession? It is clear, that when the memoranda, contemplated by the statute, whatever it is, is used in evidence by one party, the other party is a competent witness "in relation thereto." In this respect the right of the parties to testify is correlative. It is obvious from this provision, that it is not the purpose of the statute to give one party an undue advantage over the other, which would be the case, if the memoranda, mentioned in the statute, include memoranda made by one other than the deceased person, since to allow such party to testify to his own writing, when introduced by the representative party, would, in effect, be to give him the exclusive right of explaining such writing, the right of the representative party to testify in relation to a writing that he is a stranger to being wholly nugatory.

By the law as it stood before the act of 1870, when the books or other memoranda of a deceased person were used in evidence in an action by or against his legal representative, the adverse party was excluded from being a witness. The object of that statute

was to remove this disability in such cases, so that the living as well as the dead may be heard upon a subject in which both were originally alike interested. The "memoranda" mentioned in the statute means the memoranda made by the deceased person. The collection of the words of the statute, as well as the reason for such provision, warrant this construction. If we insert "his" before "other" the meaning of the statute will not be changed, but rendered more obvious; that qualifying word was undoubtedly omitted in the statute to avoid its repetition. The omission of the comma after "books" in the punctuation indicates this construction. If other memoranda than those made by the deceased person had been intended, the language would have been, "or any other memoranda." The meaning of the statute is the same as though it read "his books or his other memoranda."

To apply the provisions of this statute to memoranda made by the surviving party interested in it, would be to subject his administrator, to the same disadvantage practically, that the adverse party was under, in such cases, before the statute was passed. It was not the purpose of this statute to transfer an existing burden from one party to the other, but to remove it entirely. Nor if we supply the word "his," would the phrase, "his other memoranda," include the memoranda made by the adverse party, which might be the property of the deceased person at the time of his death, any more than the words "his books," include books made by the other party, but owned by the person deceased. Whether we consider the language of the statute, the difficulty to be remedied, or the purpose to be accomplished, the only rational conclusion is that the words "other memoranda" are intended to apply only to memoranda made by the person deceased. The statute of 1870 affords no warrant for admitting the testimony of the defendant.

As the other doings of the master complained of related to the evidence improperly admitted, it is unnecessary to consider that branch of the exceptions. *Exceptions sustained.*

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

STATE OF MAINE *vs.* JOHN G. BUNKER.

Town way—existence of, how proved. Instruction.

The existence of a town way, may be established by evidence other than the record of the laying out of the same by the municipal officers.

In the trial of a complaint for a nuisance, by obstructing a town way by a fence, the instruction, That if the jury found there was at the time of the acts charged, and had been for more than twenty years before, a road or way open to the whole public without limitation or restriction; and it was in fact so used by travelers on foot or with horses and carriages during all that time; and was recognized as such public way by the town, by expending money on it for repairs during all those years,—then it was such a highway, public road, or way, as the law would regard as sufficiently proved to sustain the complaint on this point, is unexceptionable.

ON EXCEPTIONS.

COMPLAINT under R. S. of 1857, c. 17, § 1 (R. S. c. 17, § 5), for erecting and continuing a certain fence upon "a certain public highway and traveled road" (or, as it is expressed in the second count, a "certain street") in Cranberry Isles, in this county, whereby it was obstructed and incumbered, to the common nuisance of all the citizens of this State passing thereon.

The complaint came up by appeal from the police court of Ellsworth.

It appeared that the way in question was on the Great Cranberry Island, in the town of Cranberry Isles, extending across the entire length of the island, but not connected by a bridge or otherwise with any other road or way in that or any other town.

There was no evidence of any laying out of the way; but the government offered evidence tending to show that the way had for thirty to forty years, been an open road or way, with well-defined limits, and used by the citizens and the public as a public way, in the same manner and to the same extent as town ways and highways are used. Also, evidence tending to prove that the defendant had obstructed the same as charged.

The defendant contended that no legal way had been shown, and that therefore he was not liable under the complaint, even if he did do the acts complained of. Upon this point, the presiding judge instructed the jury,—

That if they found there was at the time of the acts complained of and charged, and had been for more than twenty years before, a road or way open to the whole public without limitation or restriction; and it was, in fact, so used by travelers on foot or with horses and carriages during all that time; and was recognized as such public way by the town, by expending money on it for repairs, during all those years,—then it was such highway or public road or way, as the law would regard as sufficiently proved to sustain the complaint on this point.

The verdict was guilty; and the respondent alleged exceptions.

A. Wiswell, for the respondent.

T. B. Reed, attorney-general, and *L. A. Emery*, county-attorney, for the State.

Appleton, C. J. By R. S. 1857, c. 17, § 1, "the obstructing or incumbering by fences, buildings, or otherwise the highways, private ways, streets, alleys, commons, common landing-places, or burying-grounds, shall be deemed nuisances, within the limitations and exceptions hereafter mentioned." The limitations and exceptions do not, however, affect the questions presented for adjudication.

The complaint, on the trial of which the defendant was found guilty, alleges the obstructing and incumbering "a public highway and traveled road" and "a certain street" in the town of Cranberry Isle.

There was no proof of the laying out of the road, but the government offered to show that this road or way had, for thirty or forty years, been an open way or road, with well-defined limits, and used by the citizens and the public in the same manner and to the same extent as town ways and highways are used.

The presiding judge instructed the jury that if they found there

was at the time of the acts complained of and charged and had been for more than twenty years before, a road or way open to the whole public without limitation or restriction, and it was, in fact, so used by travelers on foot or with horses and carriages during all that time, and was recognized as such public way by the town, by expending money on it for repairs during all those years, then it was such a highway or public road or way as the law would regard as sufficiently proved to sustain the complaint on this point.

To this ruling exceptions were duly alleged, and the only question presented is as to their correctness, in not requiring record evidence of the laying out.

By R. S. c. 1, rule VI, "The word highway may include a county bridge, county road, or county way."

Highways extend from one town into another, and are laid out by the county commissioners. R. S. c. 18, § 1.

Town and private ways are wholly within the limits of the town, and are laid out by the municipal authorities. R. S. c. 18, § 18.

The road in question, being wholly within the limits of an island, is a town way.

In *Commonwealth* v. *Newbury*, 2 Pick. 51, it was decided that the user of a way by the inhabitants of the town where it lies and of the adjacent towns, was not sufficient to establish it as a town way on the presumption of an ancient laying out or grant. But on this the court were divided. In *Commonwealth* v. *Law*, 3 Pick. 409, it was held, that the establishment of a public town way could not be presumed from an user of any length of time. In *Stedman* v. *Southbridge*, 17 Pick. 162, a suit was brought against the defendant town for a defect in a town way. The plaintiff offered evidence, subject to the defendant's objection, that it was an ancient road used by the town and public, and kept in repair by the public, having first failed in his attempt to prove any location by the town officers. The exceptions to the admission of evidence were overruled. "It is, perhaps, too much to say," observes Shaw, C. J., "that such a way (or town way) or any other kind of easement, cannot be thus proved; but it would be manifestly difficult, because,

in general, the facts which would tend to prove the existence of such a way would prove the larger easement of a public highway. . . . As a town way may have a lawful origin, it would be difficult to say that no possible combination of circumstances would raise a presumption of regular laying out." In the case of *Commonwealth* v. *Newbury*, 2 Pick. 51, it was decided only, that, in general, from mere use and enjoyment, a public highway and not a town way would be presumed, and in that case, upon the effect of the evidence, the court were not unanimous." In *Commonwealth* v. *Belding*, 13 Met. 10, Dewey, J., in delivering the opinion of court, says, "It may require more evidence, and evidence of a different character; but with the proper evidence, it would seem reasonable that a town way might be shown as well as a public highway, without in all cases producing a record of its establishment as a town way."

In this State, in *State* v. *Sturdivant*, 18 Maine, 67, it was held, that to maintain an indictment for the obstruction of a "town and private way" it must be shown, that such way was laid out and established pursuant to the statute provisions, proof of a user for twenty years or more not being sufficient. This decision is based upon the law as laid down in *Commonwealth* v. *Law*, 3 Pick. 408. In *State* v. *Berry*, 21 Maine, 169, the case of *State* v. *Sturdivant*, was reaffirmed. In *State* v. *Bigelow*, 34 Maine, 245, the defendant was indicted for obstructing an highway in the town of Livermore. In defense it was contended that the way was a town way. In delivering the opinion of the court, Shepley, C. J., uses the following language: "The supreme court of Massachusetts, having expressed an opinion in the case of *Commonwealth* v. *Law*, 3 Pick. 408, 'that a town way can be established only in the mode prescribed by statute of 1786, c. 67,' this court yielded its assent to that decision not without some reluctance.

"In the case of *Commonwealth* v. *Belding*, 13 Met. 10, that court reëxamined the question, and came to the conclusion that with 'the proper evidence it would seem reasonable that a town way might be shown, as well as a public highway, without in all cases producing a record of its establishment as a town way.' The instructions

were held correct, which had authorized a jury to infer from testimony introduced, that a way was laid out as a town road." After referring to the case of *Avery* v. *Stewart*, 1 Cush. 496, which is in corroboration of *Commonwealth* v. *Belding*, Shepley, C. J., in delivering the opinion in *State* v. *Bigelow*, 34 Maine, 245, says: "The later decisions are more satisfactory, being more in accordance with established principles and with the law as applied in analogous cases." In *Bigelow* v. *Hillman*, 37 Maine, 52. Rice, J., says: "Our statutes recognize three distinct classes of ways, to wit, public highways, town ways, and private ways, and prescribe the mode by which each may be established. The existence of either is, ordinarily, proved by the record of the proceedings, by which such ways are established. The existence of either class may also be established by proof of dedication, or such long-continued use as will raise the presumption that they were, originally, legally established, but at a period so remote that the record evidence thereof has been lost by lapse of time."

The result of this examination is that the existence of a town-way may be established by evidence other than the record of the laying out of the same by the municipal officers.

In *Maine* v. *Strong*, 25 Maine, 296, it was decided that an indictment charging a town with neglecting to keep in repair a public highway within its limits is not sustained by proof of the existence of a town or private way. So it was held in *Cleaves* v. *Jordan*, 34 Maine, 9, that the word highway, when used in a statute, is restricted to county roads or county ways, unless its connection should require a different construction. These decisions only recognize the distinction between county and town ways, and that the existence of one is not proved by evidence of the legal establishment of the other.

A way may be proved by prescription. It is immaterial whether the origin of the way be by grant or dedication and an acceptance by the town, or whether a legal laying out is to be inferred from the long-continued use and repair of the same by the public. Whether the road thus proved to exist is an highway or a town way

may not always be so easy of ascertainment, but that does not affect the question. Either class of ways may be shown to exist by prescription.

By recurring to the instruction given, it will be perceived that it was full, clear, distinct, and very carefully worded, and in entire accord with the law upon the subject.

In *Todd* v. *Rome*, 2 Greenl. 55, it seems to be decided that a town is liable for defects in a town way which has been used by the public for twenty years. In *Rowell* v. *Montville*, 4 Greenl, 270, it was held, that no adverse appropriation or use of land for a road, for a period short of twenty years, is sufficient to raise the presumption of a grant. The road in that case was a town way, and the inference is, that a continued user for that period would be sufficient to raise such presumption. In *Estes* v. *Troy*, 5 Greenl. 368, Mellen, C. J., says: "After a road has been opened, continued, and traveled for twenty years, without interruption or incumbrances, it may be considered and treated as a public way; for such a user for that term takes away the right of entry of the owners of the land and gives the town a right to enter upon and repair it."

In *State* v. *Bradbury*, 40 Maine, 154, it was held, that in the absence of any vote of the town, the acceptance of a way by dedication would not be inferred from a user short of twenty years. A road may be established by user, and the rights of the public will be in accordance with such user. *Hinks* v. *Hinks*, 46 Maine, 423. The existence of highways may be established by proof of location, prescription, and acceptance, and the proof of a continued user, for over twenty years, of a way is evidence of the existence of a highway where the user was adverse. *Mayberry* v. *Standish*, 56 Maine, 342. In the present case the user was continuous and unrestricted for more than that period by the public. This user, by the very terms of the instruction, was obviously adverse. The fact that for more than twenty years, during all those years the town had made repairs upon it, was evidence, which, not rebutted, was sufficient to establish an acceptance, if the way was by dedication or grant.

In *Hill* v. *Crosby*, 2 Pick. 466, it was decided that a grant of a right of way might be presumed from an uninterrupted adverse user of more than twenty years unexplained. In *Commonwealth* v. *Law*, 3 Pick. 408, it was held that a town might acquire a right of way by grant, and that exclusive, uninterrupted user by the inhabitants twenty years, unexplained, was evidence of a grant; but that such way would be a private way, and that a nuisance on it would not be indictable. But in the case at bar, the way is called a street and is within the express words of the statute. In *Hobbs* v. *Lowell*, 19 Pick. 405, it was held that a highway might be established by dedication and an assent on the part of the town. In *Jennings* v. *Tisbury*, 5 Gray, 73, evidence of general, uninterrupted public use as a highway for twenty years was held sufficient to charge a town with liability to keep it in repair.

The instruction given is in accordance with the weight of judicial authority. The exceptions, therefore, must be overruled.

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

WARREN BROWN *vs.* JAMES THOMPSON.

Chattel mortgage with sealed writing on back — construction of. Unstamped instrument — when not invalid.

In January, 1869, McNeill and Swett gave the plaintiff their note secured by a mortgage of all the stock in trade, in the store occupied by the mortgagers on Point street, in Calais; "also, any and all additions that may, from time to time, be made to said stock by" the mortgagers. In May, 1869, the unsold original stock, together with additions therètofore made and remaining unsold, was removed to another store by the mortgagers, who executed under their hands and seals on the back of the mortgage a writing duly recorded, therein agreeing that the "mortgage, with this indorsement thereon, shall cover the portion of said stock removed, the same as though it had remained in the former store, and that it shall hold and cover any and all additions that have been or may be made to the same, as though the stock had remained

and been put into the former store." In trespass by the mortgagee, against an officer for attaching the goods in July, 1869, as the property of the mortgagers, *Held*, that the mortgage, with the indorsement thereon, gave to the plaintiff a title to the stock in the second store at the time of the indorsement.

To authorize the court to declare an unstamped recorded indorsement on a chattel mortgage to be "invalid and of no effect," it must affirmatively appear that the omission of the stamp was the result of an attempt to evade the statute.

ON REPORT.

TRESPASS DE BONIS against an officer who attached the goods in question, as the property of Edward NcNeil and Charles N. Swett, July 5, 1869.

In support of his title, the plaintiff put in evidence a chattel mortgage, dated Jan. 23, 1869, and duly recorded, given by McNeil and Swett, to the plaintiff, to secure three thousand, three hundred and seventy-four dollars. The description of the goods was,—"all the stock in trade in the store now occupied by Edward McNeil, in Calais, on Point street; said stock consisting of cloths and ready-made clothing, dry goods, furnishing goods, hats, and caps, and such other articles as are usually kept in a clothing store; also, any and all additions that may from time to time be made to the said stock by the said McNeil and Swett," etc.

The plaintiff put in also a writing on the back of the mortgage, dated May 10, 1869, and duly recorded, signed and sealed by Edward McNeil and Charles N. Swett, of the following tenor:

"Whereas, a portion of the stock of goods which is embraced in the within mortgage, and covered by the same, has been removed from the store of William Brown, on Point street, in Calais, to the store of Frank Williams, on Union street, in said Calais. It is hereby agreed by the within-named parties, Edward McNeil and Charles N. Swett, and Warren Brown, that this mortgage with this indorsement thereon, shall cover the portion of said stock of goods that has been removed to said Williams' store, the same as though said goods had remained in the store of said William Brown, and also agree, that it shall hold and cover any and all additions that have been or may be made to the same, to hold precisely the same as though the stock had remained and put into the store of said Brown on Point street."

The defendant contended, among other things, that the writing was inoperative for the want of a revenue stamp, and should not have been recorded.

The presiding judge ruled, "That the mortgage, with the writing on the back, gave to the plaintiff a title to the stock in trade in the Williams' store, May 10, 1869." If the ruling was correct, the defendant to be defaulted, and damages assessed by the judge at *nisi prius*.

John H. French, for the plaintiff.

Granger & Whidden, for the defendant, cited *Pratt* v. *Chase*, 40 Maine, 269; *Chapin* v. *Cram*, 40 Maine, 560; *Morrill* v. *Noyes*, 56 Maine, 458; *Jones* v. *Richardson*, 10 Met. 493; *Henshaw* v. *Bank of Bellow's Falls*, 10 Gray, 568.

Tapley, J. In this case a mortgage, with an instrument executed upon the back of it, was introduced as evidence of title. Upon the legal effect of the two instruments, the presiding judge was requested to rule and did rule, "that the mortgage, with the writing on the back, gives to the plaintiff a title to the stock in trade in the Williams' store, May 10, 1869." The only question here presented is the correctness of this ruling. The mortgage, and all indorsements and certificates thereon, make a part of the case.

By recurring to the mortgage it will be found to be a mortgage of all the stock in trade in the store now occupied by Edward McNeil in said Calais, on Point street, consisting of cloths, etc., etc.; also, any and all additions that may from time to time be made to said stock, etc., etc. This mortgage was made January 23, 1869, and was made to secure the payment of thirty-three hundred and seventy-four dollars. On the 10th of May, 1869, such of the goods as remained unsold, and such additions to the stock as had in the *interim* been made were removed from the store on Point street to another store on Union street. Thereupon the writing found upon the back of the mortgage was made and recorded the next day in the city registry.

No one reading the original mortgage and instrument written on the back thereof, can doubt that its purpose was to create a lien upon all the goods thus moved as a security for the mortgage debt.

No question is made that the mortgage when made (Jan. 23, 1869) created such a lien upon the goods then in the Point street store, nor is it assumed that their removal to the Union street store in anywise affected this lien. The controversy arises as to the additions which had been made since the making of the mortgage, and prior to the making of the new writing on May 10, 1869.

As to these goods, the original mortgage provided that they should be held as a security for the mortgage debt as they were from time to time added to the stock. Without determining at this time whether this of itself did create a lien upon the goods which would be valid against an attaching creditor, we direct attention to the instrument of May 10, 1869, upon the back of the mortgage, and there we find, in reference to these goods, an agreement of all the parties then interested, that this mortgage "shall hold and cover any and all additions that have been made to the same." Here is a clear and unequivocal extension of the descriptive part of the mortgage, sufficient to cover in terms the goods in question. It is then provided that the same are to be held "precisely the same as though the stock had remained and put into the store of the said Brown on Point street." We think it quite apparent this provision relates to the conditions under which the goods were held, viz., as a security for the mortgage debt due upon the terms mentioned in the mortgage.

The writing has two elements in it noticeable, and indicative of an intention to fix a lien upon these additions. First, it extends the mortgage so that it shall hold and cover the goods in question. Secondly, having done this it provides they shall be held subject to the same defeasance as the other goods. Then, the instrument is executed and recorded with all the formalities of a mortgage of personal property.

Now if it should be held that the original mortgage was ineffectual as to the after-acquired goods, we find here an instrument con-

taining all the essentials of a conditional transfer, made upon good consideration and duly recorded some seventy-five days before the attachment relied upon as a justification.

It is suggested, however, that this instrument is invalid for the want of a revenue stamp. Under the decisions of this court referred to by both counsel, we think it sufficient to say that there is no evidence in this case to warrant that conclusion. We hold that the ruling of the presiding judge was right, and that under the agreement of the parties the entry must be,

Defendant defaulted.

Damages to be assessed by the judge at nisi prius.

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

CHARLES P. STETSON and another *vs.* CHARLES C. EVERETT and others, executors.

Mortgage—foreclosure of—what will open.

Where a mortgage of real estate has been lawfully foreclosed by the mortagee, and the most that can be alleged as the result of his acts and agreements in relation thereto is, that he was willing and had agreed to sell his foreclosure title on receipt, within a specified time, of a sum equal to the amount of the notes secured by the mortgage, the foreclosure cannot be considered as thereby opened.

Thus, a written agreement by the mortagee, with the assignee of the mortgager, after foreclosure, that upon the receipt, within a specified time, of a fixed sum equal to the amount secured by the mortgage, he will release his title acquired "by virtue of the foreclosure of my mortgage," adding, "it is the foreclosure title only, which I hereby agree to convey;" or, a bond, given by the mortgagee to the assignee of the mortgager, conditioned to release all the obligor's title "being only a foreclosure or mortgage title, on payment of the balance due on the mortgage notes, the balance being" a specified sum, with a further proviso that the obligee shall pay the obligor all the sums of money which the obligee owes him,—is not sufficient evidence of an intention on the part of the obligor to keep open the foreclosure.

Stetson *v.* Everett.

The mortgager of timber land, having reserved in his mortgage, the right to cut and carry off timber from the mortgaged premises, the mortgagee, retaining title thereto, to secure the stumpage on the notes secured, conveyed his interest in different proportions to various persons, to one of whom the morgagee, after foreclosure was perfected, gave a bond to release to the obligee the mortgagee's foreclosure title upon the receipt, within a specified time, of a sum equal to the amount due on the mortgage, with interest annually. The interest was paid annually from the stumpage and indorsed upon the mortgage notes, and the whole sum was paid within the time specified. *Held*, that the payment and indorsements of the interest did not open the foreclosure; and that the assignee of the mortgager, in obtaining the mortgagee's title, did not act as the trustee of the other assignees of the mortager.

On Report.

Assumpsit on a written agreement on the part of the defendants as executors of the last will and testament of Rufus Dwinel, late deceased. The said executors, being desirous of selling a tract of land called Gordon Brook, of which the plaintiffs claimed to own one-eighth, the defendants took the plaintiffs' quitclaim deed and entered into a written agreement with the plaintiffs to sell the land, and account to them for so much of the proceeds as they proved themselves entitled to. The tract contained sixty-six hundred acres, and was sold at three dollars and sixty cents per acre.

It appears that on Sept. 20, 1854, S. H. Blake conveyed the premises to G. M. Weston, subject to a mortgage from one Swett, to one Warren, taking back a mortgage of the same premises to secure the mortgager's two notes of $2,211 each, payable in one and two years. This latter mortgage reserved the right to cut and carry off the lumber from the tract, the mortgagee retaining title to secure the stumpage on the notes.

On the same day, G. M. Weston quitclaimed one-half of the premises to Pearson & Trickey; one-eighth to Brastow; three-eighths to N. Weston,—all subject to the same respective proportions of the G. M. Weston and the Swett mortgages.

On July 10, 1857, Blake foreclosed the Weston mortgage by publication.

In the winter of 1859–'60, Weston, Pearson, and Trickey, lumbered off of the premises, and the stumpage was received by

Blake and indorsed on the Weston notes, July 17, 1860. The same was done in winter of 1860–61, and indorsed July 17, 1861. The indorsements on the note, payable in two years, were as follows:

"July 17, 1860. Received interest to date by stumpage." "July 17, 1861. Received one year's interest in stumpage."

On the note payable in one year as follows:

"July 17, 1860. Received interest to date by way of stumpage." "July 17, 1860. Received balance of stumpage on account, $144.05." "July 17, 1861. Received one year's interest in stumpage." "Nov. 26, 1861. Received $1,579.63 in stumpage."

On Feb. 16, 1860, Pearson conveyed his interest to Trickey, who on July 17, 1860, conveyed the premises conveyed to himself and Trickey, to Rufus Dwinel.

On March 19, 1860, Brastow conveyed his interest (one-eighth) to Gilman Cram, who on June 14, 1864, released the same to F. A. Wilson (one of the plaintiffs), who on the same day released one-half of the one-eighth to C. P. Stetson (the other plaintiff), both of whom released to the defendants for the purpose before mentioned.

On July 16, 1860, Blake gave a written obligation to N. Weston to convey to him or his assigns "the title acquired by me by the foreclosure of my said mortgage to one-half of the Gordon Brook tract, on payment of one-half of $4,277.95, being the amount of the mortgage on the Gordon Brook tract, and interest annually, within three years, adding—"it is the foreclosure title only, which I hereby agree to convey." "Payment to be made out of stumpage, but to be completed at any rate, within three years."

On July 17, 1860, Blake gave a similar obligation to Trickey to convey the other half.

On Oct. 1, 1860, N. Weston, in consideration of $1,367 assigned Blake's obligation to Calvin Dwinel, who assigned the same to Rufus Dwinel.

On Feb. 20, 1864, Blake gave a bond to Rufus Dwinel to release "all my right, title, and interest in and to an undivided half

of the Gordon Brook tract, same I gave obligation for to N. Weston July 16, 1860, and by him assigned to C. Dwinel, and by him to Rufus Dwinel;

"Provided, said Dwinel shall pay me the balance due on G. M. Weston's notes secured on said tract on or before the 20th May, 1864,—said balance is $2,698.32.

"And provided further, that said Dwinel shall pay all sums of money which he may have hired of me or of the Merchants bank, Bangor, or which he may hereafter hire or borrow of me or said bank, and shall pay all paper he has heretofore, or may hereafter negotiate to me or said Bank, and shall pay all taxes assessed or that may be assessed upon said parcels of land. If said indebtedness to me or bank is not so paid, I am to have privilege of selling so much of said premises at public auction, after three days' notice, as will pay such indebtedness or liability; all stamps, required for the conveyance, to be paid for by said Dwinel."

On April 19, 1864, N. Weston released three-eighths to Blake.

On June 15, 1864, Brastow, in behalf of Wilson, left with Blake $20, with a request to have it indorsed on the notes, which was declined.

The executors of Rufus Dwinel, he having died, paid Blake in accordance with the agreement, and Blake conveyed to them, as per agreement with Dwinel.

Upon the back of the notes are indorsements of interest to date as often as semi-annually, from December, 1862, to July, 1869, all paid by Rufus Dwinel by way of stumpage.

If the action is not maintainable, a non-suit to be entered.

C. P. Stetson, for the plaintiffs, cited, upon the point of opening the foreclosure, *Denning* v. *Comings*, 11 N. H. 474; *Batchelder* v. *Robinson*, 6 N. H. 12; *McNeil* v. *Call*, 19 N. H. 403; *Moore* v. *Besom*, 44 N. H. 219; *Fisher* v. *Shaw*, 42 Maine, 39; *Winchester* v. *Ball*, 54 Maine, 560; *Lawrence* v. *Fletcher*, 8 Met. 153; *Dexter* v. *Arnold*, 1 Sumner, 119.

That Rufus Dwinel acted as trustee. 1 Washb. on Real Est., 430; 4 Kent's Com. 391; *Administrators of Downer* v. *Smith*, 38 Vt. 464;

Thornton v. *York Bank*, 45 Maine, 158; *Dyer* v. *Wilbur*, 48 Maine, 287.

J. A. Peters, for the defendants.

Blake had an indefeasible title by foreclosure, July 9, 1860.

Receiving stumpage in 1860 was no waiver, being Blake's own property received from the land. Same with the stumpage of 1860, 1861. Blake's agreement gave three years to pay (out of the stumpages) for the foreclosed title.

There was in Blake's agreement no extension of his mortgage, only an agreement to sell, and to allow cuttings and stumpages. Dwinel bought a new title.

The payment to Blake of $20 was a "dead duck," Blake having declined to appropriate it.

KENT, J. The mortgage was foreclosed by publication, unless it has been prevented, and the right of redemption kept open by acts or admissions of the parties interested. It may be admitted that a mortgage, in such a case, may be kept open by the express agreement of the parties, or by facts and circumstances, clearly proved, from which an agreement to that effect may be satisfactorily inferred. *Fisher* v. *Shaw*, 42 Maine, 39; *Winchester* v. *Ball*, 54 Maine, 560; *Lawrence* v. *Fletcher*, 8 Met. 153.

But the *prima facie* conclusion, when a legal foreclosure is shown, is that it was so intended, and that it must so operate, until proof is adduced which overcomes this presumption. It must be shown that the holder of the mortgage has either expressly agreed to waive, for a time or indefinitely, the attempted foreclosure, or has so conducted in reference to it, with other parties interested, that the law will infer such agreement, or hold him to have abandoned his attempt.

We cannot find, in the evidence reported, sufficient proof of an intention on the part of Mr. Blake to yield his title by foreclosure; or to keep open the mortgage as a mortgage, unforeclosed. He, it is true, gave to Trickey after foreclosure an obligation that upon pay-

ment of one-half of $4,277.95 (a fixed sum), being amount of the mortgage upon this whole tract, and interest annually within three years, he would release such title as he had to one-half of the tract, "by virtue of the foreclosure of my mortgage." He gave a like agreement to Nathan Weston for the other half, in which he agrees to convey to him "the title acquired by me by the foreclosure of my said mortgage." And to make it more explicit, he adds: "it is the foreclosure title only which I hereby agree to convey."

Subsequently Mr. Blake, having obtained a release from Nathan Weston, gave a bond to Rufus Dwinel, whose estate is here represented by his executors, conditioned to release to him all his title to one-half of the tract, "my title being only a foreclosure or mortgage title, on payment of balance due on the mortgage notes, said balance being $2,698.32," with a further proviso, that Dwinel shall also pay all sums of money, that he may be owing to said Blake or to the Merchants bank.

In all these agreements in writing, Mr. Blake refers to his title as one acquired by the foreclosure. He does not allude to the mortgage as still open for redemption, but sedulously guards against any such inference from his acts. The most that can be alleged as the result of his acts and agreements is, that he was willing to sell his foreclosed title, for a sum equal to the amount of the notes which he held, which were secured by the mortgage. It seems to us that a man may do that, without thereby relinquishing his title by foreclosure. He may be willing to sell this title to the mortgager, for a less sum than he would to others, from motives of friendship or from some parol understanding, honorary in its character, provided the payments be promptly made at the day fixed, and yet not be willing to keep the legal right of redemption open indefinitely on the mortgage. *Holmes* v. *Gerry*, 55 Maine, 355.

It is true that Mr. Blake, in his statement (made evidence in the case) says he felt sure of his pay, and that "he never intended as against Trickey, Weston, or Dwinel, or any other party interested in the right of redemption, to take advantage of the foreclosure to claim a forfeiture of the land to me. I only intended

to claim the amount due me on the mortgage and agreed interest, and this was the amount paid to me by the executors of Dwinel, and I released to them as I had agreed with Dwinel."

But he adds, "Nor have I ever intended to impair the force of my obligation to Dwinel to release the foreclosure title, by any act in which he was not a party, or the expression of any intention of which he was not cognizant; I only state what I did and what I should not have done, upon the happening of an imaginary contingency."

Taken together these statements seem to leave the matter as it stands in the written agreements, and to amount simply to a restatement of the fact that he was willing to release his title by foreclosure for the sum named, to those interested in the mortgage. This right he finally gave to Mr. Dwinel alone. This view is confirmed by the refusal of Mr. Blake to accept the $20 left with him by Brastow, to go toward one-eighth of Gordon Brook tract. Mr. Blake says: "I told Brastow I should not indorse it on notes, or otherwise appropriate it. I told him I could not indorse anything he paid me on the mortgage notes, as I had given Mr. Dwinel an obligation to release my foreclosure title, better or worse, to him, upon payment of the notes by him. I could not therefore indorse it without Dwinel's consent." The payments of interest indorsed on the notes appear to have been made by Dwinel alone, and are simply a mode for easily determining the amount due under the bond, whenever Dwinel was ready to pay the sum named.

Dwinel had a bond for a conveyance of this foreclosed title, not a right to redeem the mortgage. In the transaction he was acting for himself, and not as trustee or agent of others, who had been interested in the mortgage, before foreclosure.

It is not the case of the redemption of a mortgage by one co-tenant, or one of several joint mortgagers. It is simply the case of one of several distinct parties, who had been interested as mortgagers, under different interests, obtaining for himself a new and independent title to the premises, which had become vested in the mortgagee by foreclosure. This he might lawfully do, without

becoming the trustee of the other parties, or being in any way accountable to them.

We do not see how, upon the case presented, the plaintiffs can maintain this action. According to the agreement of the parties, therefore, the entry must be *Plaintiffs nonsuit.*

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

STATE OF MAINE *vs.* OWEN MCCANN.

Intoxicating liquors — seizure of without a warrant — form of complaint. Evidence.

Where an officer on the 30th of April, in accordance with R. S. c. 27, § 34, seized intoxicating liquors without a warrant, and kept them until May 2, following, and then made a complaint therein alleging that, on the 30th April, the liquors were unlawfully deposited and kept, etc. *Held*, that the complaint was for a past offense which was consummated on the 30th of April and was rightly described; and that the complaint should not allege that the liquors were still kept and deposited, etc.

At the trial of the respondent on such complaint, it is competent to ask the officer who made it, on what day he made the seizure, notwithstanding the constable had returned on the warrant that he made the seizure on the 2d of May.

ON EXCEPTIONS.

COMPLAINT for search and seizure, coming to this court by appeal from judgment of police court of Bangor.

So much of the complaint as is essential is of the following tenor:

"William P. Wingate, of Bangor, in said county, and competent to be a witness in civil suits, on the 2d day of May, A. D. 1870, in behalf of said State, on oath complains that he believes that on the 30th day of April, in said year, at said Bangor, intoxicating liquors were unlawfully deposited and kept by one Owen McCann, of Bangor," etc.

The constable's return on the warrant was dated May 2, 1870, and it recited that "by virtue of the within warrant I have entered the within-named premises, therein searched for intoxicating liquors, and found and seized," etc.

It appeared that the liquors were seized, without a warrant, on the 30th of April, 1870; and that the complaint and warrant were made May 2, following.

The complainant, called by the government, was asked by the county-attorney on what day he made the seizure. The defendant objected to the witness answering that they were seized on any other day than the one specified in the officer's return, viz., May 2. The presiding judge overruled the objection, and admitted the answer of the witness, which was that he seized them on April 30, 1870; and the defendant alleged exceptions.

J. F. Rawson, for the defendant, contended that the officer may, by leave of court, amend his return, but that the witness ought not to be allowed to contradict it. And that the complaint should state that the liquors were seized on April 30, and that at the date of the complaint, they were in the possession of the officer.

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

APPLETON, C. J. By c. 33, § 12, approved March 25, 1858, "no person shall deposit or have in his possession any intoxicating liquors, with intent to sell the same in this State, in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale thereof."

By § 14, provision is made for the issuing warrants for the search and seizure of intoxicating liquors, unlawfully kept and deposited, and for the arrest "of the person so, as aforesaid, keeping said liquors," upon whom a prescribed penalty is imposed if found guilty.

By § 15, provision is made for enforcing a forfeiture of the liquors seized.

By c. 48, approved March 27, 1858, forms are given "which

shall be deemed sufficient in law, for all cases arising under the aforesaid act," c. 33. It does not negative other forms, which may be appropriate and which set forth all the necessary facts to constitute the offense charged.

By c. 125, § 1, approved 11th March, 1870, only one person is necessary to make the complaint for a warrant of search and seizure instead of three as was required by c. 33, § 14, of the acts of 1858.

By § 2, "In all cases where now, by any of the provisions of said chapter (c. 33) or any acts additional thereto, or amendatory thereof, an officer is authorized to seize intoxicating liquors, or the vessels containing them, by virtue of a warrant therefor, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant."

By this statute, no new or additional authority is given to search. It is only to seize. It is to seize what the officer may be enabled to seize, without the unreasonable searches prohibited by the constitution. The act, to this extent, is constitutional. *Jones* v. *Root*, 6 Gray, 435; *Mason* v. *Lothrop*, 7 Gray, 355.

The change of law created by the statute of 1870, c. 125, requires a corresponding change in the forms of the processes to be issued by virtue of its provisions and in connection with those of preceding statutes. Thus the complaint may be made by one instead of three. So, as the statute provides for a seizure without and before the issuing of a warrant, the statement in accordance with the facts is proper. The offense prohibited by the statute was consummated, if intoxicating liquors were unlawfully kept and deposited by the respondent on the 30th April. The allegation of the unlawful keeping on that day was in accordance with the fact. The complaint on 2d May was for a past offense consummated on 30th April and should not have alleged that the liquors were "still kept" and deposited on May 2d, when they had been previously seized and were then in the custody of an officer and not in that of the defendant. The words "and still are," were properly omitted in the complaint.

As the complaint alleged a past offense committed on 30th April, 1870, so the question proposed related to the time of its commission, and was proper. Neither the validity or the correctness of the return were then under consideration. The evidence was not offered to contradict the return, but to sustain the complaint on which the defendant was being tried.

The evidence does not show any unlawful search, nor indeed any search. It simply proves a seizure, which we are not to presume illegal, without evidence.

These are the only questions raised by the exceptions, and as to these, the rulings of the presiding justice were correct.

Exceptions overruled.

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

NATHANIEL HAYNES and another *vs.* MOSES JACKSON.

Deed—exception in, how construed. Boundary—authority of person to establish.

The owner of a tract of land, consisting of highland and meadow, conveyed the whole tract, "excepting from said tract the meadow land on the westerly end of said tract, extending to the highland on said tract, containing from two to three hundred acres, more or less; said boundary by 'highland' to be located and monuments fixed by" the grantee and another person named, both of whom, within six days thereafterwards, placed a hub on the north line of the tract, and commenced following the line of the highland which was plainly distinguishable; but finding it would contain numerous angles, they sighted a straight line between the hub and a lone pine standing near the south line of the tract, and established the line from the hub to the south line in the direction of the pine and placed stakes thereon, ten or twelve rods apart. Subsequently the original grantor conveyed to the defendant "the meadow land on the west end of the tract, extending to the highlands,— said meadow containing two to three hundred acres,—the easterly part of said tract having been previously deeded; and the intention of this deed is to release all my title and interest in the remaining portion of said tract, the boundary line between the former and present grantees to be established if not already done, as provided for, in" the former deed. When the defendants purchased, they were informed of and shown the line established between the hub and pine. *Held*, that the former deed conveyed all the highland and the latter all the meadow; and that the distinguishing line between the highland and meadow and not the straight line between the hub and pine was the true line.

ON REPORT.

TRESPASS, QUARE CLAUSUM.

KENT, J. Samuel H. Blake was the owner of a large tract of land containing about one thousand acres, called the Southgate tract, consisting of upland and meadow. On the 9th of June, 1862, he conveyed the upland to Ritchie. This deed covered the whole tract in the description, but excepted and reserved from the tract described "the meadow land on the westerly end of said tract, extending to the highland on said tract, said excepted parcel and not hereby conveyed, containing two or three hundred acres, more or less." Then follows the provision, which has led to this controversy, in these words: "Said boundary by the 'highland' to be located and monuments fixed by said Ritchie and W. Lord."

On the 25th of April, 1864, Blake conveyed, by deed, to the defendants, "the meadow land on the west end of the Southgate tract, so called, extending to the highland on said tract. Said meadow land containing two or three hundred acres, more or less. The easterly part of said Southgate tract, was deeded to E. C. Ritchie, 9th June, 1862, and the intention of this deed is to release all my title and interest in the remaining portion of said tract. The boundary line between Ritchie and the present grantees to be established, if not already done, as provided for in Ritchie's deed."

It is undisputed that by the deeds, irrespective of the provision for locating the boundary by the highland by Ritchie and Lord, that the *locus in quo* is within the deed to the defendants, *i. e.* is a part of the meadow land. It is clear that Blake intended to convey all the meadow to the defendants and all the highland—as distinguished from meadow land—to the plaintiffs' grantors. The case finds that "there was no trouble in distinguishing the line between the highland land and the meadow." That, therefore, is the line intended, and must govern, unless by some deed or proceeding a part of the meadow, within that well-defined line, has become the property of the plaintiffs.

It appears from the report of the case, according to the testimony of W. Lord, that he and Ritchie, the grantee in the first deed, went

on to the land, and placed a hub at Birch Point and commenced following the line of the highland; that finding the line along the highland would have a dozen angles to run, they went back to the hub, began at and sighted a lone pine tree, near (not on) the south line of the Southgate tract, and established the line from the hub to the Southgate line in the direction of the pine tree. They then placed ten or twelve stakes, about ten rods apart, in the line thus established, adopting the pine tree as the other end of the line. This line is manifestly a forced one, not corresponding in any particular with a boundary by the highlands, but a substitute for it. Had the two persons designated by Mr. Blake and his grantee a legal right to extend or limit the grant, in this manner disregarding intentionally and confessedly the line of the deed?

This is not a case like those cited by the plaintiffs' counsel, where it is held that when a deed refers to a monument, not actually existing at the time the deed is made, and the parties afterwards fairly erect such monument, intending to conform to the deed, it will control, although not wholly agreeing with the terms of the deed. Nor does it present the question how far the grantor and grantee can by agreement fix arbitrarily and by mutual assent a line which, except in the starting point, varies in every particular from the clearly defined line of the deed, thus, in fact, conveying land by parol agreement, and leaving the recorded deed to stand as a false description.

In this case Blake was the owner of the whole tract. He deeds to Ritchie, by a description before stated, reserving all the meadow land extending to the highland. But as this boundary by the highlands, although, as the case expressly finds it was plain, and that there was no trouble in distinguishing the line, between the highland and the meadow, had never been run and located by monuments, it is specified that one W. Lord and Ritchie the grantee should locate it and fix monuments. What was the authority thus given to bind Blake the owner? It was to locate the line of boundary by the highland and to place monuments along that line and at its *termini*. If they had performed this duty fairly, and intending to locate the line, in its whole course, at the dividing point,

where the meadow ceased, and where the highland began, it would have been binding, although at some places there might be a doubt as to the exact point of division. They did, in fact, commence by following the line of the highland, but simply because they found that there would be an unusual number of angles in that line they abandoned the attempt to locate and fix the monuments by the highland, but adopted a single straight line, for the whole distance, in the direction of a lone pine tree, and established that as the line. The distance of this line is not stated in the report, but from the extent of the whole tract it must have been from one to two miles in length. The counsel states that it gives to the plaintiffs from sixty to one hundred acres of clearly defined meadow land. The exact quantity is not essential in determining the question before us.

There is no evidence that Blake ever assented to this substitution of this adopted line, or that he knew that the persons named had undertaken to act. On the contrary, it appears that in 1864, nearly two years afterwards, Blake conveyed to the defendants all this meadow land, extending to the highland of said tract, and declaring in his deed that it was his intention thereby to release all the title and interest in the remaining portion of the Southgate tract not deeded to Ritchie, and also declaring that the boundary line between Ritchie and the present grantees, is to be established, if not already done, as provided for in Ritchie's deed. He does not adopt any line made by these two men, or make that the dividing line. He does not know, apparently, what they have done, or whether they have acted at all. He simply guards himself from any claim or complaint if the line has been legally established, in a manner binding upon him by these arbitrators, or if it shall be so established hereafter by these men, acting within the scope of their authority.

There is no recognition of their doings beyond this.

The case also finds that when the defendants purchased they were told of the line as established from the hub to the pine tree, and were informed where the hub was, and of the pine tree and of the line between. But it does not appear that they acted on this

information, or purchased the tract, as bounded by that line, or that they made any admissions or acted at all upon this information. They took the deed from the owner, before recited, which provided for the locating this line, as provided in Ritchie's deed. We have considered the extent of that authority, and to that extent only are the defendants bound by the terms of the deed to them.

The case of *Wyman* v. *Hammond*, 55 Maine, 534, is in principle much like the one before us. It was there held, that upon a submission to a surveyor, with an agreement that he was to run the line in dispute, agreeably to the decision and line of one Bliss in a former year, the arbitrator could only ascertain what that decision was, and fix the line according to Bliss' survey. The authorities are very numerous which establish the general doctrine that an award must follow the agreement of submission, and that the party thus clothed with specific powers, limited by the agreement of the parties, cannot go beyond or disregard those limitations, or substitute his own views of what would be best for the parties. We repeat what was said in the case cited, that "it is unnecessary to cite authorities on this point."

To compare small things with great, this case reminds us of the decision of the royal umpire, in the matter of our north-eastern boundary forty years ago, when he fixed the "highlands," named in the treaty as the dividing line, in the bed of the St. John River. It was admitted on all hands that he exceeded his delegated power.

The report provides that if the line, as agreed upon by Lord and Ritchie, is binding upon the parties, a default is to be entered, if not a nonsuit. We think it is not. *Plaintiff nonsuit.*

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

Charles N. Hersey, for the plaintiffs.

A. Knowles, for the defendant.

Inhabitants of Monticello *vs.* County Commissioners of Aroostook County.

Statute — construction of. County Commissioners — report of — to what term it may be continued.

Where the return of county commissioners, on a petition to lay out, alter, or discontinue a highway, was made at the January term and placed on file, and the petition was continued over their next regular June term to the succeeding July term, when all proceedings therein were closed and recorded. *Held*, such a proceeding was in direct violation of R. S. c. 18, § 5.

Petition for *certiorari* to quash proceedings of the county commissioners of this county in laying out and establishing a highway in the town of Monticello.

The case is sufficiently stated in the opinion.

C. M. Herrin, for the petitioners.

L. Powers, for the respondents.

Appleton, C. J. By R. S. 1857, c. 18, county commissioners, after giving notice to all persons interested of the pendency of a petition for the location, alteration, or discontinuance of a highway, and of the time and place of meeting to view the way and hear the parties, and after viewing the way and hearing the parties, are required, if they determine the way to be of common convenience and necessity, or that an existing way shall be altered or discontinued, to "make a correct return of their doings, signed by them, accompanied by an accurate plan of the way," etc.

By § 5, "Their return, made at their next regular session after the hearing, is to be placed on file, and to remain in the custody of their clerk, for inspection without record. The case is then to be continued to their next regular term; when, or before then, all persons aggrieved by their estimate of damages shall present their petition for redress. If no such petition is then presented or pending, the proceedings shall be closed, recorded, and become effectual," etc.

Now the report of the commissioners was made at the January term, 1867, and then placed on file. The "petition was thence continued to the July term, 1867, of said court, when all proceedings therein were closed and recorded. But this was in direct violation of the statute. The next regular term of the court of county commissioners was required by law to be holden on the first Tuesday of June, 1867, at which term the proceedings should have been closed and recorded, unless persons aggrieved by their estimate of damages should present petitions for redress. But nothing was done at that time, nor could these petitioners or any others aggrieved have then presented their petitions for redress or been heard in relation thereto, for no June term was holden.

The county commissioners could not lawfully, and without any assignable cause, neglect or omit to hold the next regular term and act upon the matter and continue all proceedings over the regular term to the one subsequent thereto. If they could act at a term other than the next regular term, they might do it at any term held, however long thereafter. Parties interested cannot be required or expected to look for the presentation of the return of the commissioners at any other term than the one specially designated for that purpose by statute. The error is one of substance, not of form. *Parsonsfield* v. *Lord*, 23 Maine, 511; *Windham, petitioner*, 32 Maine, 452; *City of Belfast, appellant*, 53 Maine, 431.

Nor is it any sufficient answer that the county commissioners neglected to hold the next regular term as established by statute. No reason is assigned for not doing it. Their neglect of duty, in this respect, cannot render valid their violation of the law in making their return at a wrong time. If they could, without reason, omit to hold one term, they might any number. This would leave it to their discretion to hold a term or not.

There are other objections to these proceedings, but it is not necessary to examine them as we deem the one we have considered fatal to their validity. *The writ of certiorari to issue.*

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

JERRY DREW *vs.* HARRISON T. SMITH.

Lex loci contractus.

In 1869, the plaintiff being then and still a citizen of Brighton, Vt., then and there delivered to one Philbrick, then and still a citizen of Maine, four horses, six stage harnesses, and a covered two-horse wagon, receiving from the latter his promissory note, of that date, together with a writing signed by him, dated at Brighton, reciting what the note was given for, and stipulating that the "said horses, harnesses, and wagon are to remain the property of the said" plaintiff "until said note is paid, the said" plaintiff "to have and apply toward the payment of the said note the sums paid by the U. S. Government for transportation of the mails from East Machias (Maine) to Lubec (Maine) as the same shall become due." The statute of Vermont does not require such a contract to be recorded. *Held*, that the law of Vermont governed the contract, and that R. S. c. 111, § 5 does not affect it.

ON FACTS AGREED.

REPLEVIN of two horses, two stage-harnesses, and a covered two-horse wagon. Writ dated July 30, 1870.

The defendant, being a deputy-sheriff, attached the property on a writ dated May 10, 1870, in favor of one Corthell against Edward L. Philbrick, and justified the taking upon the ground that the horses, harnesses, and wagon were, at the time of the attachment, liable to be attached as the property of Philbrick, and pleaded accordingly.

The sole question raised was the liability of this property to be attached as the property of Philbrick.

The plaintiff was and is a citizen of the State of Vermont. On the 24th of June, 1869, being the undisputed owner of the property hereafter mentioned, he delivered it to Edward L. Philbrick, at Brighton, Vermont, and received from him, at the same time, paper signed by Philbrick and of the following tenor:

"1470. On demand, for value received, I promise to pay Jerry Drew or bearer fourteen hundred seventy dollars, with interest annually. (Signature.)

BRIGHTON, Vt., June 24, 1869."

"The above note is given for two black horses, one chestnut horse, one brown mare, six stage harnesses, one covered two-horse wagon, which said horses, harnesses, and wagon are to be and remain the property of the said Jerry Drew until said note is paid, the said Jerry Drew to have and apply toward the payment of the said note, the sums paid by the United States government for transportation of the mails from East Machias (Maine) to Lubec (Maine) as the same shall become due from government.

BRIGHTON, Vt., June 24, 1869." (Signature.)

The note and stipulation were never recorded in either State.

By the laws of Vermont the contract was valid between the parties to it, and did not pass the title to the property to Philbrick until the note was paid; and the law of Vermont did not require it to be recorded.

The property was delivered in Vermont to Philbrick, and by him taken to Maine, where it was used by him in the transportation of mails from East Machias to Lubec until the time of the attachment.

Bradbury & Bradbury, for the plaintiff.

Walker & Lynch, for the defendant.

DANFORTH, J. It is admitted that up to June 24, 1869, the title to the property in question was in the plaintiff. If the contract made on that day, between him and Philbrick, was "invalid," the case shows no evidence whatever of any change of ownership, and the plaintiff must have judgment in his favor.

But the contract was entered into in the State of Vermont, the property was delivered, and the note is payable there, and the party to whom the obligation is due, then was and still is a resident of that State. By the *lex loci* the contract, as the case finds, is valid and binding upon the parties. By our statute, as it now stands, R. S. 1871, c. 111, § 5, such a contract is invalid between the parties, as well as others, unless recorded. This statute was passed subsequent to the date of the contract, and does not in terms apply

to it; nor can it by well-settled principles affect contracts made in other States, the validity, force, and effect of such depending upon the laws of the place where made. In this case no question arises as to the remedy but only as to the legality of the contract. If that is valid, Philbrick had no attachable interest in the property replevied, but the title and right of possession remain in the plaintiff. *Judgment for plaintiff.*

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

ASA THURLOUGH (*Judge of Probate*) *vs.* ELISHA CHICK and others.

Decree of probate court—evidence in action on executor's bond.

The surviving partner of a firm having been duly appointed executor of the will of his deceased partner and given bond in common form as executor, included in his inventory "the whole of the partnership" property and charged himself, in his executor's accounts with "one-half amount of personal estate of" the firm, "except notes and accounts, at the value mentioned in the inventory," together with "one-half of rents collected on the real estate of the firm," all of which the judge of probate allowed against the objections of the sureties on the executor's bond, and thereupon made a decree charging the executor with a balance against him. In an action upon the executor's bond, the question of the sureties' liability came before the law court on facts agreed, wherein it was stipulated that "if the court should be of the opinion that the sureties were liable for one-half of the partnership property, the damages should be assessed by the jury;" and the court decided that the sureties were so liable. *Held*, that the record of the decree of the probate court in the settlement of the executor's account, charging him with a balance against him, was conclusive upon the parties, they having been present and contested the account and taken no appeal from such decree.

ON REPORT.

DEBT on a probate bond given by Henry A. Arey, executor of the last will and testament of James Arey, as principal, and the defendants as sureties. The principal died before the suit was

brought. The action was brought in the name of Joseph W. Knowlton, Judge of Probate, and now in the name of Asa Thurlow, his successor.

The case came before the full court (vol. 56 Maine, 228) on facts agreed, which were also made a part of this case.

James and Henry A. Arey were, at the time of the decease of the former, copartners in trade under firm name of James Arey & Son.

At the decease of James, Henry A. was appointed executor of the will of his father, and gave the bond in suit in common form. In his inventory he included the personal property, notes, and accounts belonging to the firm, one-half of the appraised value thereof being set down as the property of the estate; and certain real estate of the firm was inventoried in the same manner. The executor settled two accounts in the probate court. In one he charged himself with "one-half amount of personal estate of James Arey & Son, except notes and accounts," at the value set down in the inventory; also with "one-half collected on notes and accounts of said firm." In his second account, he charged himself with "balance due on first account;" with one-half further collection on debts due the firm, and with rents collected on real estate owned by the firm. At the hearing before the judge of probate, on the settlement of the second account, the defendant appeared, resisted the allowance of the same, and claimed that they were not holden on the executor's bond for any part of the partnership property, but only for James Arey's private estate; but the judge of probate found a balance due from the executor.

Henry A. Arey never gave any bond as surviving partner.

The question presented was whether the defendants, as sureties on the bond of the executor, were holden for one-half of the amount of the partnership property; and if they were, "the damages to be assessed by the jury."

In this trial the plaintiff claimed the amount due from Henry A. Arey, executor, as by his last account settled in the probate court, viz.: $5,637.25, less $1,255,77, amount to which said executor was

entitled as heir of his testator, and interest thereon from date of writ; and in support of his claim introduced, subject to objection, the record of the probate court of the amount above stated, its settlement, allowance, and approval by the judge. The defendants put in the agreed statement.

If the evidence from the probate court was conclusive of the amount of damages, judgment to be rendered for the penalty of the bond, and execution issue for the balance stated and interest from the date of the writ.

W. G. Crosby, for the plaintiff.

Hubbard & Vose, for the defendant.

KENT, J. This case was formerly before the court, and is reported in 56 Maine, 228, and the agreed facts in that case are put in as part of this case. It was decided, on the former hearing, that the defendants were liable on their bond for their one-half of copartnership property. The only question remaining is the amount of damages. It was agreed, by the conclusion of the case formerly before the court, that "if the court should be of opinion that defendants are liable for one-half of the copartnership property, the damages are to be assessed by the jury, otherwise the plaintiff to become nonsuit."

When the case came up for a hearing on the question of damages, the plaintiff put in as evidence the records of the court of probate, showing a settlement and decree of that court, charging the executor with a balance of $\$4{,}318\frac{48}{100}$ due from him. This was the only evidence offered by either party. The defendants contend that, although this evidence of the amount due is legally admissible, yet that under the agreement in the former report, it is not conclusive, and that they have a right to have the amount determined by a jury.

We do not understand that agreement to mean anything more than that the case is to stand for trial in the usual manner, subject to the same rules of evidence as other cases. When the case came

on for trial, the plaintiff put in what he considered legal and sufficient evidence, viz., the records of the probate court. The defendants had a right to offer any evidence they thought pertinent. Or they might have had a verdict of the jury, under the direction of the court, and have taken exceptions to any ruling. But they offered no evidence, except "the agreed facts at the former hearing."

The counsel, however, goes further and contends that the agreement that "the damages are to be assessed by the jury," means that all the questions determined by the probate court, respecting the settlement of the account, are to be opened and passed upon by the jury, as if no such decree had been made.

As before stated, we do not see any reason for giving such extended meaning to these words. We think the case comes within the well-established doctrine in this State, that the decree of the court of probate, allowing the account of an executor and decreeing its payment is conclusive upon him, unless appealed from to the supreme court of probate. *Pierce* v. *Irish*, 31 Maine, 254; *Parcher* v. *Bussel*, 11 Cush. 107.

Judgment for plaintiff for the penalty of the bond, and execution to issue for $4,381\frac{48}{100}$, *and interest from date of the writ and costs.*

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

INHABITANTS OF PARKMAN *vs.* JESSE NUTTING.

Amendment—what is new cause of action.

Where the earliest item in the account annexed bears the date of January 15, 1864, and the specification in the writ is, that under the count for money had and received, the plaintiffs claim to prove and recover of the defendant the sum of sixteen thousand dollars delivered him on and since the 15th of January, 1864, according to the account annexed,— an amendment so as to enable the plaintiffs to recover sums received since January 1, 1863, is a new cause of action and inadmissible against the objection of the defendant.

In such case, all evidence relating to such an amendment is inadmissible.

ON EXCEPTIONS.

ASSUMPSIT on account annexed, for money had and received and money paid out for defendant's use.

The account was items of cash beginning January 15, 1864, and ending April 29 following. In the specification in the writ, under the count for money had and received, the plaintiffs claim "to prove and recover of said defendant the sum of sixteen thousand dollars, that amount of money delivered him on the 15th of January, A. D. 1864, and since according to account annexed."

The plaintiffs offered to amend by adding:

"Also, for that the said defendant having, from time to time, on and since the first day of January, 1863, to the 15th day of March, 1869, acting in the capacity of agent for the inhabitants of Parkman, as aforesaid, to hire and procure for them soldiers to fill and make up the several quotas of the said town, under the several calls of the President of the United States, to suppress the late rebellion, received into his hands the money and property, orders and scrip of the said inhabitants in their corporate capacity to a large amount, to wit, to the amount of thirty thousand dollars, with which to hire and procure soldiers for the purpose aforesaid. The said defendant then and there promised the plaintiffs, that he would faithfully, diligently, and properly discharge said duty, and expend the funds aforesaid, or so much thereof as might be necessary for the purpose aforesaid, under the laws and regulations of the United States and of the State of Maine, and under the several votes of the town of Parkman in relation thereto, and return the balance thereof, if any, to the said inhabitants,—yet regardless of his said several promises and undertakings, as aforesaid,

"The plaintiffs aver that said defendant has appropriated to his own use large sums of said money, to wit, the sum of five thousand dollars, without the order and direction of the plaintiffs, and without authority of law, and against such authority and direction.

"And plaintiffs further aver that said defendant has misappropriated other large sums of money and property aforesaid, to wit, the sum of three thousand dollars, without the order and direction

of said plaintiffs, and against said orders and directions, and against such authority.

"And plaintiffs further aver that said defendant, during said times, paid out, without authority of plaintiffs, and without authority of law, other large sums of said money and property, to wit, the sum of three thousand dollars, to parties not entitled to the same by any vote of said town or by authority of law; whereby and in consideration thereof the defendant becomes liable, and promised the plaintiffs to pay them the aforesaid sums on demand."

The plaintiffs offered to prove that the defendant from time to time, since the first day of Jauuary, A. D. 1863, up to the 15th day of March, A. D. 1869, acting for the plaintiff town, to hire and procure for them soldiers to fill and make up the several quotas of the said town, under the several calls of the President of the United States to suppress the late rebellion, received into his hands the money orders and scrip and property, all being the property of said plaintiff town, to a large amount, to wit, to the amount of thirty thousand dollars, with which to hire and procure soldiers for the purpose aforesaid. And that the said defendant, in consideration thereof, impliedly promised the plaintiffs that he would faithfully and diligently and properly discharge his duty in relation thereto, and expend the funds aforesaid, or so much thereof as might be necessary for the purposes aforesaid, under the laws and regulations of the United States and of the State of Maine, and under the several votes of the plaintiff town in relation thereto,—and would return the balance thereof, if any, to the plaintiffs, upon demand.

That said defendant, having received the funds as aforesaid, appropriated to his own use large sums of said money and funds, to wit, the sum of five thousand dollars, without the authority of the law, and without the consent of said inhabitants, and against their consent, and against their recorded votes and in violation of the same.

That defendant, during said time, misappropriated other large sums of said money and property, to wit, the sum of three thousand dollars, without the order and direction of said plaintiffs, and

against such order and direction and without the authority of law, and against the authority of law.

That during said times, the defendant, without the authority of plaintiffs and without authority of law, paid out other large sums of said money and property, to parties not entitled thereto by any vote of said town, or by law, and against law.

That E. F. Harvey, town agent of said plaintiff town, duly authorized by the inhabitants of plaintiff town in their corporate capacity,

1. As town agent as aforesaid, and as auditor;

2. By any votes of the town,—copies of which either party may annex;

3. By the authority of the selectmen, and by the acts of the town;

4. By bringing this suit;

5. By subsequent vote of ratification of the bringing of the suit since the date of the writ, on the 1st day of July, 1870, and before the date of this writ made due demand on the said defendant to pay over to him, as agent aforesaid, all said money, property, and balance in his hands and belonging to said town, growing out of the transactions aforesaid. And made the further demand that he, at the same time, should account to him as agent as aforesaid, for misappropriations and unauthorized payments as aforesaid, and that defendant refused to account or pay over any sum whatever.

It was admitted that defendant was one of the selectmen of said town, from March, A. D. 1859, to March, A. D. 1869, and was chairman of the board of selectmen during all that time.

The presiding judge declined to allow the amendment, on the ground that it contained a new cause of action, and was not legally allowable, and excluded the offered evidence; whereupon the plaintiffs alleged exceptions.

A. G. Lebroke, for the plaintiffs.

Under the liberal rules adopted by the courts, guided by the liberal statutes requiring only that the person and case may be understood, the amendment is legal.

It is for no new cause of action, but only a more formal way of setting out the same claim. *Brewer* v. *East Machias*, 27 Maine, 489; *Selden* v. *Beale*, 3 Greenl. 178; *Ball* v. *Claflin*, 5 Pick. 303; *Jenney* v. *Pierce*, 4 Pick. 385; *Penobscot Boom Corp.* v. *Baker*, 16 Maine, 439; *Young* v. *Garland*, 18 Maine, 409; *Russell* v. *Small*, 30 Maine, 30; *Knapp* v. *Clark*, 30 Maine, 244.

Every one of the three counts in the writ, as well as the specification in the writ annexed to the counts, claims $16,000, while, although the amendment alleges that defendant, in the course of the business of hiring soldiers, received $30,000, yet it charges him with only $11,000 in the aggregate, and really only $8,000 as the total of his liability, $5,000 of which he appropriated to his own use, and $3,000 he paid away in an unauthorized manner. This lacks $5,000 or $8,000, of being equal to the sum named in each count of plaintiffs' writ. So instead of enlarging plaintiffs' claim, the amendment really would limit and curtail it. The third count in the writ is for $16,000, without any specification or limitation.

The special count proposed, only covers a claim of $8,000, while the several counts in the writ each cover twice that sum, and the items in the account annexed amount to some $3,000 more than the $8,000, while the count itself covers $16,000. This count is for the same cause of action. Is there any difficulty in "understanding the person and case?"

A declaration so defective, that it would exhibit no sufficient cause of action, may be amended without introducing any new cause of action. *Pullen* v. *Hutchinson*, 25 Maine, 249.

A declaration, upon an agreement to insure, may be amended so as to declare upon a policy of insurance. *Loring* v. *Proctor*, 26 Maine, 18.

When a count in a writ names any sum, items not to exceed that sum may be supplied. *Butler* v. *Millett*, 47 Maine, 492.

This amendment is clearly within the discretion of the court. *Brewer* v. *East Machias*, 27 Maine, 489. This court has repeatedly declared, that amendments may be allowed at the discretion of the court, when the cause of action can be perceived and under-

stood, although the declaration is defectively and inartificially drawn. *State* v. *Burnham*, 44 Maine, 278; *Simpson* v. *Norton*, 45 Maine, 381; *Page* v. *Danforth*, 53 Maine, 493.

Courts are liberal in allowing amendments when the person and case can be rightly understood. *Solon* v. *Perry*, 54 Maine, 493; *Harvey* v. *Cutts*, 51 Maine, 604.

In a case like this, where there can be no possible doubt, or misunderstanding of the parties, as to what plaintiffs claim to recover, and after so much expense as has already been incurred, why should not the court exercise their discretion in favor of the amendments, if they think them necessary, rather than to drive the parties out of court to commence anew to litigate the same matters, which would, in a new suit, be no better understood than they now are? "*Interest Republicæ ut sit finis litium.*"

I. Crosby, for the defendant.

APPLETON, C. J. The writ in this case contains counts for money had and received, and on an account annexed.

The earliest item, in the account annexed, bears the date of Jan. 15, 1864. The specification in the writ is that under the counts for money had and received, the plaintiffs claimed "to prove and recover of said defendant the sum of sixteen thousand dollars, that amount of money delivered him on the 15th Jan., 1864, and since according to the account annexed."

The plaintiffs propose to amend so as to enable them to recover amounts received since Jan. 1, 1863. This is manifestly introducing a new cause of action. Under the writ as originally drawn, the defendant could not be held to account for sums received between Jan. 1, 1863, and Jan. 15, 1864. By the amendment he would be liable to account for all such sums. While the utmost liberality is allowed in the matter of amendments, the authorities are uniform that no new cause of action shall be introduced against the protestations of the defendant. The cause of action, as originally stated, was clearly and distinctly set forth. There was no

defect to be amended. The proposed amendment is not the correction of a defect in pleading, but the addition of a cause of action not set forth in the original declaration.

The ruling, denying the amendment, was in accordance with the well-settled rules of law.

So far as the evidence offered relates to the proposed amendment, it was properly excluded.

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

CLARA C. PACKARD *vs.* HIRAM C. BREWSTER and others.

Bond. Pleading. Bail-bond.

The principal defendant having been arrested on a special writ, in favor of this plaintiff, gave a bond with the other defendants, sureties, therein acknowledging themselves bound to the sheriff by name who made the arrest in a specific sum named, "to be paid unto" the plaintiff, "her heirs and assigns," with the condition annexed in the usual form of a bail-bond. In debt on the bond brought in the name of the plaintiff, *Held*, (1) that if the instrument declared on be a bail-bond, *scire facias* and not debt is the remedy; and (2) if it be deemed a common-law bond, the action must be in the name of the sheriff to whom it was given, and not in the name of the plaintiff.

ON REPORT.

DEBT on a bond, dated Sept. 22, 1868, wherein Hiram C. Brewster, as principal, and the defendants, as sureties, "are holden and stand firmly bound and obliged unto Hanson Andrews, deputy-sheriff of the county of Knox, in the full and just sum of five thousand dollars to be paid unto Clara C. Packard, her heirs or assigns, to which payment," etc.

The condition of the obligation is,

"That whereas the above-bounden Hiram C. Brewster has been arrested at the suit of Clara C. Packard, in the county of Knox, on a plea of the case by the said Clara C. Packard, commenced to

be heard and tried before the supreme judicial court to be holden at Rockland, in and for the county of Knox, on the second Tuesday of March, 1869, as by the original writ or process bearing date the eighteenth day of September (reference thereunto being had), more fully appears. If, therefore, the above-bounden Hiram C. Brewster shall appear and answer unto said writ or process, and shall abide, do, and perform the judgment of the said court, or the judgment of any other court before whom the said process shall, in due course of law, be finally determined, and shall not depart without license, then the above-written obligation to be void; otherwise to remain in full force and virtue."

It appeared that on Sept. 18, 1868, the plaintiff sued out a special writ against Brewster, founded upon an alleged contract of marriage. An affidavit required by R. S. c. 113, § 2, authorizing the arrest of a debtor about to leave the State, was made and properly certified upon the writ on which also the plaintiff's attorney indorsed the order to the sheriff, "Mr. Laughton, arrest the defendant forthwith." On the next day the officer, having the writ for service, made the return:

"By virtue of this writ, I arrested the body of the within-named, Hiram C. Brewster, who rendered to me the bond which is herewith returned," etc. The bond mentioned in the return was the one in suit.

Judgment was recovered on the original action of *Packard* v. *Brewster*, at September term, 1869, and execution issued thereon, Oct. 16, 1869, on which an officer made return, Jan. 16, 1870, of diligent search for the body of Brewster, inability to find him and a demand on the sheriff who made the arrest, and his refusal.

Plea, *non est factum*.

The action was reported to full court with a stipulation, that, if the action was not maintainable, the plaintiff to be nonsuit.

Gould & Moore, for the plaintiff.

This is a good bond to the plaintiff. 2 Pars. on Cont. (1st Ed.) 24. Such a construction as will make it valid and not void will be given if possible. *Glezen* v. *Rood*, 2 Met. 494. If it be construed

as a bond to the sheriff, it is void. *Conant* v. *Sheldon*, 4 Gray, 300; *Smith* v. *Adams*, 12 Met. 564.

If construed to be a bond to the plaintiff, it is good at common law. *Hoxie* v. *Weston*, 19 Maine, 322; *Athens* v. *Ware*, 39 Maine, 345; *Morse* v. *Hodsdon*, 5 Mass. 314; *Freeman* v. *Davis*, 7 Mass. 200; *Arnold* v. *Allen*, 8 Mass. 147; *Clap* v. *Cofran*, 7 Mass. 98; *Call* v. *Foster*, 49 Maine, 452.

It was voluntarily entered into for the benefit of the principal, for his relaxation from lawful arrest. Accepted by the obligee, who is now entitled to judgment. *Winthrop* v. *Dockendorf*, 3 Maine, 156–164. *Burroughs* v. *Lowder*, 8 Mass. 373, 381; *Clark* v. *Metcalf*, 38 Maine, 125, 126; *Howard* v. *Brown*, 21 Maine, 388.

The promise is directly to the plaintiff. Privity of contract. The defendants acknowledge the indebtedness of $5,000, to be "paid to the plaintiff," "to which payment" they "bind" themselves and representatives.

B may maintain an action on a promise to A to pay money to B. *Felton* v. *Dickerson*, 10 Mass. 290; *Cabot* v. *Haskins*, 3 Pick. 92.

Hanson Andrews' name was put in the bond by mistake. *Glezen* v. *Rood*, *supra*. If not, it is void. The presumption is in favor of sustaining the bond.

His name may be struck out as surplusage, and then a good bond be left. 2 Pars. on Cont. 26 and 27.

Clara C. Packard is the obligee.

A. S. Rice, for the defendants.

1. The bond does not run to the sheriff, and is, therefore, void as a statute bond. R. S. c. 85, § 1; *Smith* v. *Adams*, 12 Met. 564; *Conant* v. *Sheldon*, 4 Gray, 300; R. S. of Mass., c. 91, § 1. The insertion of the name of the plaintiff, as the person to whom the penalty is to be paid, is a clerical error, and does not affect the bond. *Glezen* v. *Rood*, 2 Met. 490; 2 Pars. on Cont. 26; Shep. Touch. 368.

2. Debt cannot be maintained upon a bail-bond. *Crane* v. *Keating*, 13 Pick. 339; *Niles* v. *Drake*, 17 Pick. 516; *Glezen* v. *Rood*, 2 Met. 494; *Hale* v. *Russ*, 1 Greenl. 336.

3. The statute duties of the officer holding the execution, not having been performed, the action must fail. R. S. c. 85, §§ 6, 8, 9; *Kidder* v. *Parlin*, 7 Greenl. 81; *Holmes* v. *Chadbourne*, 4 Maine, 13.

4. The bond is void at common law. The rule is, if the obligee has authority to take the bond, it is good at common law, although the condition varies from the requirements of the statute. *Purple* v. *Purple*, 5 Pick. 226. The following cases exhibit the application of this principle; *Clap* v. *Cofran*, 7 Mass. 78; *Freeman* v. *Davis*, 7 Mass. 200; *Burroughs* v. *Lowder*, 8 Mass. 373; *Morse* v. *Hodsdon*, 5 Mass. 314; *Winthrop* v. *Dockendorf*, 3 Greenl. 156; *Kavanagh* v. *Saunders*, 8 Greenl. 430; *Huntress* v. *Wheeler*, 16 Maine, 290; *Wallace* v. *Carlisle*, 20 Maine, 374; *Barrows* v. *Bridge*, 21 Maine, 398; *Ware* v. *Jackson*, 24 Maine, 166; *Fales* v. *Dow*, 24 Maine 211; *Hovey* v. *Hamilton*, 24 Maine, 251; *Clark* v. *Metcalf*, 38 Maine, 122; *Baker* v. *Healey*, 5 Greenl. 240; *Pease* v. *Norton*, 6 Greenl. 229; *Wilson* v. *Gillis*, 15 Maine, 55. The case of *Hoxie* v. *Weston*, 19 Maine, 322 cited in *Athens* v. *Ware*, 29 Maine, 345, which conflicts with this rule, cannot be sustained by authority, or by the principles of the common law. *Purple* v. *Purple*, 5 Pick. 226; *Baker* v. *Haley*, 5 Greenl. 240; *Anderson* v. *Longden*, 1 Wheat. 85; 2 Pars. on Cont. 86, 89; *Crane* v. *Keating*, 13 Pick. 339; *Niles* v. *Drake*, 17 Pick. 516. But, if sustained, is not analogous to, and cannot control this case, which is *sui generis*, and governed by the provisions of the Statute 23 Henry VI, c. 10; *Bean* v. *Parker*, 17 Mass. 591; *Howard* v. *Brown*, 21 Maine, 388; *Conant* v. *Sheldon*, 4 Gray, 300; 2 Pars. on Cont. 22, *c*; *Champion* v. *Noyes*, 2 Mass. 481; *Kavanagh* v. *Saunders*, 8 Greenl. 429; *Long* v. *Billings*, 9 Mass. 481; *Crane* v. *Keating*, 13 Pick. 340; Shep. Touch. 373, 374.

Appleton, C. J. This is an action of debt upon a bond in and by which the defendants "are holden, and stand firmly bound. and obliged unto Hanson Andrews, deputy-sheriff of the county of Knox, in the full and just sum of five thousand dollars, to be paid unto Clara C. Packard, her heirs or assigns," etc.

The condition of the bond, after reciting an arrest of the principal defendant at the suit of this plaintiff, and describing the suit, is that if "the above-bounden Hiram C. Brewster shall appear and answer unto said writ or process, and shall abide, do, and perform the judgment of the said court or the judgment of any other court before whom the said process shall, in due course of law, be finally determined, and shall not depart without license, then the above-written obligation to be void, otherwise to remain in full force and virtue."

The bond in suit was undoubtedly returned as and for a bail-bond, for the officer on the original writ returns that he had arrested the defendant, Brewster, who gave him the bond returned with the writ, and thereupon he permitted him to go at large.

If the bond in question is to be deemed a bail-bond, this suit is not maintainable. In such case, the remedy of the party is by *scire facias*.

But the learned counsel for the plaintiff contends, that this is a good bond at common law, and that the action may be maintained in the name, not of the obligee, but of the person for whose benefit the obligation was taken.

But if the bond is to be regarded as valid, which, to say the least, is extremely doubtful, yet such is not the law. The bond is given to Hanson Andrews. He is the person with whom the contract is made, and in whose name alone its performance can be enforced. Such, in the case of instruments under seal, has been the law from the earliest times. The obligation is to one person for the benefit of another. "If an obligation be made to J. D. to use of I. S., this is a good obligation for I. S. in equity; and some have said he may release it; but this is much to be doubted; for it is certain I. S. cannot sue the obligor in his own name; but when he hath cause of suit, he may compel J. D. in chancery to sue the obligor." Shep. Touch. 369. An action on a bond made to A. for the support of B. cannot be maintained in the name of B. *Sanders* v. *Filley*, 12 Pick. 554. On a promise under seal made to A. for the benefit of C., the latter cannot sue. *Millard* v. *Bald-*

win, 3 Gray, 484. On a bond made to the Commonwealth, for the use of the town of Northampton, no action lies for the town, though the forfeitures belong to the town. *Northampton* v. *Elwell*, 4 Gray, 81. A. covenanted with B. that he would maintain C., the wife of B., in case she survived him; held, after the death of B. that C. could not maintain an action on the bond. *How* v. *How*, 1 N. H. 49. "The covenant not being with her" observes Richardson, C. J., "but with another for her use, it is clear the action cannot be supported." "If one, by deed, covenants or promises to pay a sum of money to A. to the use of B. or for the benefit of B., B. cannot maintain an action upon the instrument. Neither, if a covenant be made to three persons to pay money to them, to the use of a fourth, can the fourth person sue upon the deed." Addison on Contracts, 242. When a bond is made to A. and B. and others "to be paid to the said A. and B.," it was held in *Richardson* v. *Jones*, 1 Iredell, 296, that an action for the breach of the bond could not be brought in the names of A. and B, alone, without joining the other obligees unless it was shown that A. and B. were the surviving obligees. The party for whose benefit the contract is made has a remedy in equity against the party with whom it is made. The one has the legal, the other has the equitable interest in the contract.

The law on this subject is very clearly and accurately thus stated by Mr. Justice Shepley, in *Hinckley* v. *Fowler*, 15 Maine, 289: "When one promises another, for the benefit of a third person, such person may maintain assumpsit in his own name. When one covenants with another to do any act for the benefit of a third person, the rule differs from that on assumpsit, and the action cannot be maintained upon such covenant in the name of the third person for whose benefit it was made."

Whether this bond is a bail-bond, or a bond at common law, it matters not. In either event the action is not maintainable.

Plaintiff nonsuit.

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

BARROWS, J. concurred in the result.

STATE OF MAINE *vs.* ISAAC HATCH.

Recognizance in criminal case.

By virtue of R. S. c. 133, § 22, no action on a recognizance in a criminal case will be defeated, nor judgment arrested, for any defect in the form of the recognizance, if it can be sufficiently understood from its tenor, at what court the party was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same.

Thus, a recognizance after alleging that the principal therein was brought before the municipal court of Portland by virtue of a warrant duly issued upon the complaint, on oath, of a person named, then recited the allegations in the complaint which technically set out a compound larceny by the principal in this county, and concluded with the condition, "that if the said respondent shall personally appear at the court aforesaid, and answer to such matters and things as may be objected against him, and more especially to the charge contained in said complaint, and shall abide the order and judgment of said court and not depart without license; then, etc.; *Held,* (1) That the recognizance contains the requirements specified in the statute; and (2) That the clause "to answer to such matters and things as may be objected against him," not being authorized, may be rejected as surplusage.

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

DEBT on a recognizance, the material part of which was of the following tenor:

"The condition of this recognizance is such, that whereas the said Eaton S. Hatch has been brought before said Court, by virtue of a warrant duly issued upon the complaint, on oath, of Moses Sargent, charging him, the said Eaton S. Hatch, with having on the thirtieth day of May, A. D. 1866, at Brunswick, broke and entered, in the night time, the building occupied by the Medical School of Maine, situated in Brunswick, in the county of Cumberland, and committed a larceny therein, to wit, one binocular microscope of the value of five hundred dollars, of the goods, chattels, and property of Prof. Cyrus F. Brackett, in the possession of said Brackett being found; with force and arms feloniously did steal, take, and

carry away against the peace of the State and contrary to the form of the statute in such case made and provided. And the said principal defendant is brought before the recorder, the judge being absent, and is required to recognize with sureties for his personal appearance before the municipal court on Tuesday, June 29th, 1869, at nine o'clock A. M.

"Now, therefore, if the said respondent shall personally appear at the court aforesaid, and answer to such matters and things as may be objected against him, and more especially to the charge contained in said complaint, and shall abide the order and judgment of said court, and not depart without license; then this recognizance shall be void, otherwise remain in full force and virtue.

"Witness, Llewellyn Kidder, recorder of said municipal court, the judge being absent."

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

The State offered the record of the municipal court of Portland, also the recognizance, to the latter of which the defendant objected upon the grounds of variance and illegality.

The presiding judge admitted it, and ruled it valid; whereupon, the defendant alleged exceptions.

Thos. B. Reed, Attorney-general for the State.

W. L. Putnam, for the defendant.

It is settled that everything requisite to show the magistrate's jurisdiction must appear from the recognizance: *State* v. *McGrath*, 31 Maine, 469; *State* v. *Smith*, 2 Maine, 63; *State* v. *Brown*, 41 Maine, 536; *State* v. *Lane*, 33 Maine, 538; *Dodge* v. *Kellogg*, 13 Maine, 440. And the last four cases cited, all indicate that nothing extrinsic can be introduced to supply deficiencies in the recognizances.

There is nothing in this recognizance to show for what purpose Eaton S. Hatch was brought before the municipal court. It does not appear that he was brought there for examination, or that he was brought there for any purpose whatever except to recognize.

If it had appeared when he was first brought there, or on warrant from what court, the purpose of bringing him there might possibly be presumed. The recognizance says he has "been brought" and "is brought;" but the preterit is marked by no time.

It also says, "by virtue of a warrant duly issued;" but whether duly issued by a judge of the supreme or superior court, or by a magistrate in another county in accordance with R. S. c. 133, § 6, does not appear.

Neither the time when first brought, nor the character of the warrant appearing, it is impossible to determine from the recognizance why Hatch was brought before the court. And it can hardly be claimed, that a recognizance not showing the purpose for which the parties are before the court can be valid.

Again, the recognizance does not show why Hatch was required to recognize for his appearance on June 29th. The statute provides that in case of an adjournment of the examination, a recognizance may be taken; but this recognizance shows no adjournment of any examination or any other proceeding.

It is settled that recognizances, embracing conditions beyond those fixed by law, are void, however it may be with ordinary statute bonds. In this case the terms of the statute provide for a recognizance, simply for the "appearance" of the accused; which is explained by reference to R. S. of 1841, c. 171, § 8, as an "appearance for the purpose" of the examination. So far as any recognizance authorized by statute is concerned, a respondent cannot be required to attend to answer to other charges, if the specific charge named is abandoned; and, therefore, as this recognizance assumes to require more than that, it is void.

R. S. c. 133, § 20, does not apply, as it does not appear that the "magistrate was authorized to take" the recognizance. *State* v. *McGrath*, 31 Maine, 469.

All these points are open on these exceptions, particularly as the court expressly adjudged the recognizance valid. *Com.* v. *Field*, 9 Allen, 584.

APPLETON, C. J. By R. S. 1857, c. 133, § 20, no action on a recognizance "shall be defeated, nor judgment arrested . . . for any defect in the form of the recognizance, if it can be sufficiently understood, from its tenor at what court the party was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same." This section, it will be perceived, is applicable only to recognizances in criminal, and not in civil proceedings. Hence the decisions in the latter class of cases are inapplicable.

The recognizance shows at what court the party was to appear. The description of the offense shows that the magistrate was authorized to take the recognizance,—that is, that the offense was within his jurisdiction.

This provision in regard to recognizances in criminal cases first appears in the revised statutes of 1841. The authorities of an earlier date are, therefore, so far as this section is of any avail, inapplicable.

The cases relied on by respondent do not sustain the defense. In *State* v. *Brown*, 41 Maine, 534, the recognizance was "to answer to such matters and things as shall be objected against him," but it referred to no specific charge. Tenney, C. J., in delivering the opinion of the court, says, "The writ refers to no charge against the defendant whatever, and contains no reference to any charge in any complaint or indictment. . . . A party cannot be required to come into court, actually in session, to answer to such matters and things as shall be objected against him, without any other charge being mentioned, more than to come into court at a future term."

But here there is a specific charge, duly set forth, to which the defendant was bound to answer. The insertion of the words, "to answer to such matters and things as may be objected against him," are to be deemed mere surplusage and void, they being unauthorized. The statute makes all recognizances valid, which contain its specific requirements.

In *State* v. *Magrath*, 31 Maine, 469, the recognizance was held defective because it did not appear in what county, city, or town

the supposed offense was committed. In the recognizance under consideration, the larceny is alleged to have been committed in Brunswick, in the county of Cumberland.

The recognizance sets forth that the principal therein was charged under oath with breaking and entering a building occupied by the Medical School of Maine, situated in Brunswick, in the county of Cumberland, and one binocular microscope, of the value of five hundred dollars, of the goods and chattels and property of Cyrus F. Brackett, in the possession of said Brackett being found, did feloniously steal, take, and carry away, etc. This clearly sets forth an offense within the jurisdiction of the municipal court of Portland. But in *State* v. *Lane*, 33 Maine, 536, cited by the counsel for the defendant, the recognizance was held fatally defective, because it did not charge the doing of any illegal act, while in the one before us the act charged is clearly illegal.

The recognizance in *Dodge* v. *Kelloch*, 13 Maine, was not taken in any criminal process. It was before the act of 1841, c. 171, § 30. The case does not apply.

"Upon the whole case," to use the language of May, J., in *State* v. *Baker*, 50 Maine, 45, "and especially in view of the provision in R. S. c. 133, § 20, by which the strictness of the common law has been so modified that no action on such recognizance can be defeated for any defect in the form of the recognizance, if it can be sufficiently understood from its tenor at what court the party was to appear, and, from the description of the offense charged, that the magistrate was authorized and required to take the same, we cannot come to any other conclusion than that the declaration is sufficient, and this action is maintained." *Exception overruled.*

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

WALTON, DANFORTH, and TAPLEY, JJ., dissented upon the grounds of the following opinion by

TAPLEY, J. It was held in *State* v. *Brown*, 41 Maine, 535, that "a party cannot be required to come into court actually in session to answer to such matters and things as shall be objected

against him, without any other charge being mentioned, more than to come into court at a future time."

The condition of this recognizance is, that "if the said Respondent shall personally appear at the court aforesaid, and answer to such matters and things as may be objected against him, and more especially to the charge contained in said complaint, and shall abide," etc.

The difference between the case of Brown and the case at bar is simply that with the unauthorized matter is also that which is authorized.

The recognizance in this case is an entirety, and it provides only for its being void, upon the appearance of the party to answer to all such matters and things as may be objected against him. Whatever became of the original complaint, whether sustained or not, if other new independent matters were objected against him, and he did not also answer to this and abide the order of court thereon, it was to "remain in full force and virtue." The special matter charged was larceny. The recognizance, however, covered every crime known to the law beside it. A neglect to answer any of these matters, whether in existence at the time of the taking of the recognizance or not, and to abide the order of court thereon, would be as much a breach of the condition as a neglect to answer the special matter. The court was not authorized to require such a recognizance, and it is invalid.

Being invalid it was error in the judge to hold it valid, and rule that the state was entitled to judgment on it.

CHARLES S. WELD *vs.* CITY OF BANGOR.

Bank stock—collection of taxes on.

The plaintiff, a non-resident of Bangor, was duly assessed therein, upon his shares of stock in the First National Bank. After legal demand, the plaintiff refusing to pay the tax upon the warrant of the collector of the city, issued April, 1870, was duly arrested by the sheriff of the county in the following May, for the tax, which the plaintiff then paid under protest, together with costs to the officer and he to the city treasurer. In assumpsit to recover the money thus paid, *Held*, (1) That the collection of such tax is to be enforced in accordance with the general law; and (2) that c. 209 of the Pub. Laws of 1868 related exclusively to the assessment, and in nowise affected the collection of taxes duly assessed under previously existing laws.

ON REPORT.

ASSUMPSIT for money had and received. Writ dated May 31, 1870.

The plaintiff, during no part of the last twenty years, has been a resident of Bangor or had any property taxed there, except in 1867, when, without his consent, he was in due and legal form, assessed there upon his shares of stock in the First National Bank, a banking institution established under the laws of the United States, located in Bangor.

After legal demand upon him, the plaintiff, refusing to pay the tax upon the warrant of the collector of the city issued in April, 1870, was duly arrested by the sheriff of Penobscot county on May 26, 1870, for the tax, when he paid it, under protest, together with costs of arrest to the sheriff who paid it to the city treasurer. The action is to recover the money thus paid, and if not maintainable, the plaintiff to be nonsuit.

J. A. Peters & F. A. Wilson, for the plaintiff.

Chapter 126, Pub. Laws of 1867, made the tax assessable. *Packard* v. *Lewiston*, 55 Maine, 456.

Chapter 209, Pub. Laws of 1868, repealed c. 126 and "all acts and parts of acts inconsistent therewith."

If the plaintiff had paid before the repeal he could not recover back. *Abbott* v. *Bangor*, 56 Maine, 310.

When the tax was enforced there was no law to proceed on, and it was as if no law had been passed on the subject.

Such is the spirit of the decisions. *Plantation No. 9* v. *Bean*, 36 Maine, 359; s. c. 36 Maine, 365; *Williams* v. *Co. Commissioners*, 35 Maine, 345; *Coffin* v. *Rich*, 45 Maine, 507.

No vested right in Bangor, none in contract, for there was no contract; none in property, for there was no property; merely a legislative power granted to get property, and the power lost before the property was obtained. A statute obligation dissolved by statute.

The repeal had same effect as if it occurred before the assessment. *E. Hartford* v. *Hartford Bridge Co.* 10 How. 511.

H. C. Goodenow, city solicitor, for the defendants.

APPLETON, C. J. The tax in question was duly and legally assessed under the provisions of the act of 1867, c. 126. *Packard* v. *Lewiston*, 55 Maine, 456; *Abbott* v. *Bangor*, 56 Maine, 310.

The collection of this tax, like that of all other taxes duly assessed, is to be enforced in accordance with the general laws of the State on that subject.

The act of March 6, 1868, c. 209, relates exclusively to the assessment of taxes. The rules prescribed vary from those of the act of 1867, c. 126. The act is prospective in its operation. It looks only to the future. "All acts and parts of acts inconsistent with this act are hereby repealed." That is, a new rule as to the future assessment of taxes is established, nothing more.

The act in no way affects the collection of taxes, which have been duly assessed under previously existing law. It does not prohibit the enforcement of a tax as in *Augusta* v. *North*, 57 Maine, 392. It in no way alludes to the collection of taxes.

Had the tax been paid as in *Abbott* v. *Bangor*, 56 Maine, 310, its repayment could not have been enforced. The tax being duly

assessed, and constituting a portion of what the plaintiff was equitably bound to pay toward the public burdens, it can hardly be supposed that the legislature intended to relieve him from a just liability. By a long neglect to pay his taxes, the plaintiff is not to be in a better condition than if he had promptly done his duty.

Plaintiff nonsuit.

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

DICKERSON, J., did not concur.

CHARLES ELLIOTT *vs.* ISRAEL R. GRANT.

Verdict—when it will not be set aside as against evidence.

The law imposes the duty of determining the facts upon a jury, who see and hear the witnesses, and not upon the court who have not those means of ascertaining the truth.

It is not a sufficient cause for setting aside a verdict that the court might, upon the same evidence, have come to a different result.

But the preponderance of evidence against the verdict must be such as to show that the jury must have acted under a mistake, or been influenced by improper motives.

ON MOTION to set aside the verdict as being against law and evidence.

APPLETON, C. J. The plaintiff, claiming title to certain goods purchased by him of one Chandler, has brought his action of trespass against the defendant, the sheriff of Waldo county, for attaching the same goods on writs, in favor of the creditors of said Chandler as his property.

The question in issue was not whether Chandler obtained these goods by means of fraud and false representations, for the plaintiff by his purchase, and the creditors by their attachment assume the title to them to be in their debtor, as whose they were attached.

The real controversy was whether the plaintiff made his purchase in good faith, or for the purpose of hindering, delaying, or defrauding the creditors of his vendor. On this there was a conflict of evidence. The case has been tried three times, and with a disagreement at each trial. On the fourth trial, the plaintiff obtained a verdict. It is not sufficient cause for a new trial that we might, upon the same evidence, have come to a different result. The law does not impose upon us the duty of determining the facts. It does impose that duty upon the jury. There is no such preponderance of evidence as shows that the jury must have acted under a mistake, or have been influenced by improper motives. The jury saw and heard the witnesses, and they had better means of determining the truth than we have. If on four successive trials, the arguments of the able counsel for the defense failed to satisfy the jury that the sale to the plaintiff was fraudulent, it will not be denied there was a conflict of testimony, nor will it be hardly worth the while to grant a new trial to give him a fifth opportunity. There must, at some time, be an end of litigation, and this seems to be the fitting time. *Motion overruled.*

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

CUTTING, J., dissented.

N. Abbott, for the plaintiff.

A. G. Jewett & J. Williamson, for the defendants.

CYRUS B. TRASK *vs.* WILLIAM L. PENNELL.

Chattel mortgage—when it may be redeemed.

Since April 12, 1861, the sixty days after which the right to redeem mortgages of personal property to secure the payment of more than thirty dollars will be forfeited, commence to run when the notice provided in R. S. c. 91, § 4, is given and recorded.

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

WALTON, J. This is an action of trespass against an officer for attaching the plaintiff's goods, on a writ against a third person. The goods were mortgaged to secure more than thirty dollars before the plaintiff bought them. His title, therefore, was that of a mortgager. The judge ruled, as matter of law, that the action could not be maintained. His ruling seems to have been based on the idea that a mortgage of personal property is foreclosed, in sixty days from the breach of its conditions, by operation of law. He says:

"I rule, as matter of law, *pro forma*, that plaintiff, according to his own testimony and the admitted facts hereinbefore set forth, cannot maintain this action, the assignee of the mortgage holding a mortgage on the whole of the property in question, the conditions whereof had been broken for more than sixty days, and a balance of the note secured thereby being at the time of the alleged trespass and of the commencement of this suit and still being overdue and unpaid."

This was erroneous. As the law now is, and as it has been since 1861, the sixty days do not commence to run till written notice of an intention to foreclose the mortgage has been given and recorded. Act of 1861, c. 23; R. S. c. 91.

Exceptions sustained.

New trial granted.

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

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

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

Andrew M. Hall *vs.* Inhabitants of Falmouth.

Commutation order — action on — what must be shown.

By Public Laws of 1869, c. 55, § 1, all notes and town orders given by the municipal officers of any city, town, or plantation, in pursuance of a previous vote at a meeting regularly called and held, for the benefit of drafted men, were made valid.

The defendant town, at a legal meeting regularly called and held in July, 1863, voted to raise three hundred dollars, and issue town orders therefor, payable from three to five years, for every man that is conscripted, after he has been examined by the surgeon appointed by the United States and pronounced an able-bodied man, to go himself, or furnish a substitute, or pay his commutation fee. In an action upon a town order given by the municipal officers of the defendant town, Sept. 7, 1863, for three hundred dollars, payable in three years to the plaintiff who was then drafted on the quota of the defendants, *Held*, that in the absence of evidence that the plaintiff had been duly examined and pronounced an able-bodied man, the action could not be maintained.

On exceptions to the ruling of *Goddard*, J., of the superior court for this county.

Assumpsit on an order dated Sept. 7, 1863, addressed to the treasurer of the town of Falmouth, signed by the municipal officers and accepted by the treasurer of the town, of the following tenor:

"Please pay to Andrew M. Hall, or order, out of the money voted to pay drafted men under the conscript act, the sum of three hundred dollars, and charge the same in your account with the town, in three years from date, with interest annually."

It appeared that the plaintiff was a resident of Falmouth in 1863, when he was drafted on the quota of the town; that he received the order from the selectmen of the town.

It also appeared from the records of the town that a meeting of the town was duly called and notified on July 20, 1863, and held on July 28, 1863; that under proper articles in the warrant for the meeting, the town passed the following votes:

"Voted to raise three hundred dollars for every man that is conscripted under the act passed in the 37th congress, after he has

been examined by the surgeon appointed by the United States, and pronounced an able-bodied man, to go himself, or furnish a substitute, or pay his commutation fee.

"Voted, that the town raise three hundred dollars to pay each man that is conscripted and examined by the surgeon and accepted; to hire the money if they can, if not, issue town-orders, payable from three to five years, pay the interest annually."

The presiding judge ruled, *pro forma*, that the plaintiff be nonsuit; and the plaintiff alleged exceptions.

W. H. Clifford, for the plaintiff.

Howard & Cleaves, for the defendants.

WALTON, J. We think the plaintiff's evidence was fatally defective. The burden of proof was upon him to show, not only that he was drafted, but also that he was examined by the surgeon appointed by the United States, and pronounced an able-bodied man.

Such are the very terms of the vote under which he claims to recover. And it was not only competent for the town to annex this condition to their vote, but it was highly proper and important for them to do so. For if a man drafted was not able-bodied, he would not be required to serve himself or furnish a substitute or pay commutation. And if he was under no obligation to do either of these, there would be no reason in voting him three hundred dollars. A draft, which, by reason of physical inability, created no liability, would furnish no ground for claiming aid from the town.

The plaintiff's evidence was, therefore, fatally defective in not showing that he was duly examined and pronounced an able-bodied man; and the nonsuit was properly ordered.

The failure to show a compliance with this important condition of the vote under which the plaintiff claims, may have been an oversight. But if so, it is one which we have no power to rectify. The case was tried in the superior court and is before us on exceptions. We can only judge of the correctness of the ruling by what

appears in the record. Looking at the record, the nonsuit appears to have been properly ordered, and the exceptions must, therefore, be overruled. *Exceptions overruled.*

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

BARROWS, J., concurred in the result.

SAMUEL P. BURNELL *vs.* DE FOREST WELD and others, and Trustees.

Attorney at law—money in his hands may be trusteed. One having money belonging to one firm held as trustee of another comprising some of the same persons.

Where an attorney at law has received money in satisfaction of a demand in favor of his clients, it may be attached in his hands by trustee process.

A person having money in his hands, belonging to a late firm of three persons, may be held as trustee of a new firm comprising two members of the old firm and another person, unless some interposing claim be made by the creditors of the old firm.

When it appears by the disclosure, that the property disclosed is claimed by a third person by virtue of an assignment by the principal debtor purporting to have been made prior to the commencement of the trustee process, the plaintiff, before he can claim to have the trustee charged, must, unless the claimant voluntarily appear, have written notice issued and served upon the claimant as prescribed in R. S. c. 86, § 32.

ON EXCEPTIONS.

ASSUMPSIT by trustee process against De Forest Weld, Sylvester H. Kneeland and Wesley R. Andrews, copartners under the firm name of Weld, Kneeland & Andrew, as principal defendants, and A. M. Pulsifer & Clarence C. Frost, a law firm, as trustees.

The alleged trustees disclosed that at the time of the service of this writ upon them, they were indebted to Charles A. Bulkley, De Forest Weld, and Wesley R. Andrews, late copartners under the firm name of Bulkley, Weld & Andrews, in the sum of $72.75,

for moneys collected in their favor of one Clark, but were not indebted to the firm of Weld, Kneeland & Andrews, in any sum; and that the firm of Weld, Kneeland & Andrews is composed of De Forest Weld & Wesley R. Andrews, both of whom were members of the firm of Bulkley, Weld & Andrews, with Charles A. Bulkley, who was also a member of said firm of Bulkley, Weld & Andrews, as special partner, with the addition of Sylvester H. Kneeland.

The presiding judge charged the trustees upon their disclosure, and they alleged exceptions.

Pulsifer & Frost, for the principal defendants.

1. All the debts due from the firm of Bulkley, Weld & Andrews must first be paid before any part of a debt due said firm can be applied in payment of the private debts of any one or more of the partners of the firm. *Pierce* v. *Jackson*, 6 Mass. 243, 271; *Upham* v. *Naylor*, 9 Mass. 490; *Rice* v. *Austin*, 17 Mass. 206; *Lord* v. *Baldwin*, 6 Pick. 350. And until the affairs of the copartnership are wound up and settled, the claims of a partner are merely equitable. *Williams* v. *Henshaw*, 11 Pick. 79; s. c. 12 Pick. 378; *Commercial Bank* v. *Wilkins*, 9 Greenl. 34.

There is a distinction between the liability of partnership property in the hands of trustees to be holden for private debts, as in case at bar, and the liability of separate property of each member to be taken on execution by any creditor of the firm. *Allen* v. *Wells*, 22 Pick. 455; *Hawes* v. *Waltham*, 18 Pick. 454.

2. Before trustee can be charged, the plaintiff must show that the partnership whose debt he seeks to hold is solvent, and that the principal has an interest in such debt after the debts of the partnership are paid. *Fisk* v. *Herrick*, 6 Mass. 272.

3. The principal defendants have no cause of action against said trustees, and hence the latter cannot be charged. *Richard* v. *Mer. & Conn. R. R.* 44 N. H. 139; *Greenleaf* v. *Perrin*, 8 N. H. 273; *Maine F. & M. Ins. Co.* v. *Weeks*, 7 Mass. 439.

A. K. P. Knowlton & A. D. Cornish, for the plaintiff.

BARROWS, J. The trustees except to the ruling at *nisi prius* charging them upon their disclosure, and present their disclosure. The matters upon which they rely in argument have all been determined in this State against them. As to those points a reference to the following decisions is all that we deem necessary. *Whitney* v. *Monroe*, 19 Maine, 42; *Thompson* v. *Lewis*, 34 Maine, 167; *Smith* v. *Cahoon*, 37 Maine, 281; *Staples* v. *Staples*, 4 Maine, 532.

Yet the trustees were improperly charged, and the exceptions must be sustained. The disclosure shows notice to the trustees from one Chester Bullock of an assignment to him, purporting to have been made prior to the commencement of this process. Under such circumstances, before the plaintiff can claim to have the trustee charged, unless the claimant appears voluntarily, the plaintiff must have notice issued and served on him, under the provisions of R. S. § 32, c. 86.

The rights of such claimant cannot be cut off by a process to which he is not a party and of which he has no notice. It is necessary to the protection of the trustee that there should be such proceedings as will settle the question, whether the fund belongs to the principal defendant or to the claimant; and the plaintiff, if he would perfect his attachment, must give the claimant such notice as the court may order, before they will proceed to adjudicate upon a question affecting his rights. The ruling that the trustee was chargeable before these proceedings were had, was erroneous. See *Dalton* v. *Dalton*, 48 Maine, 42; *Bunker* v. *Gilmore*, 40 Maine, 91; *Wheeler* v. *Evans*, 26 Maine, 135; *Emery* v. *Davis*, 17 Maine, 252; *Legro* v. *Staples*, 16 Maine, 252; *Fiske* v. *Weston* 5 Maine, 410.

The reading of voluminous trustee disclosures, is practically impossible at *nisi prius*, and the presiding judge must, of necessity, rely upon counsel to present all the points necessary to a correct adjudication. In the present case, he ruled correctly upon the points which were presented; but these exceptions bring up the whole disclosure, and it does not appear that the vital question raised by the disclosure, in its nature preliminary to the charging

of the trustee, had been determined, or that the case was in such a position that we can make a decision that would be binding on all the parties interested upon that question.

Exceptions sustained.

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

TAPLEY, J., concurred in the result.

CONTINENTAL MILLS *vs.* OLIVER DOW.

Trustee process—costs in.

Previous to the return day of a trustee writ, the person summoned therein as trustee was notified in writing, signed by the plaintiff's attorney, that the suit had been withdrawn, and the trustee thereby discharged from all responsibility; but on the return day, the alleged trustee filed his disclosure and properly notified the plaintiff's attorney of his readiness to submit to examination on oath. On complaint for costs, *Held*, that the original plaintiff was liable to the alleged trustee for costs.

ON EXCEPTIONS by the defendant.

COMPLAINT for costs.

The written notice signed by the attorneys of the original plaintiff (present defendant) and served upon the alleged trustees (present plaintiffs) was dated Jan. 2, 1870, and was of the following tenor:

"You are hereby notified that the suit Oliver Dow *v.* E. B. Seavey, and Continental Mills, trustees, returnable at the supreme judicial court, Androscoggin county, January term, 1871, has been withdrawn, and you are, therefore, hereby discharged from all responsibility by reason of having been summoned as trustees in said suit."

The remaining facts appear in the opinion.

Wm. P. Frye & John B. Cotton, for the plaintiffs, cited Colby's Pr. 152, 153; *Gilbreth* v. *Brown*, 15 Mass. 178; *Coburn* v. *Whitely*, 8 Met. 272.

Pulsifer & Frost, for the defendant.

DICKERSON, J. Complaint for costs for non-entry of an action brought by the defendant, in which the complainants were summoned as trustees.

Previous to the return day of the writ the plaintiff's attorney notified the trustees, in writing, that the suit had been withdrawn, but they, nevertheless, seasonably filed their disclosure on the first day of the return term of the writ, and notified the plaintiff's attorney of their readiness to submit to examination on oath. The presiding justice dismissed the complaint, and the complainants excepted.

Parties summoned as trustees are entitled to costs when they appear at the first term and disclose. This right is not contingent upon the will or action of the plaintiff, or any other conditions than those prescribed in the statute. R. S. 1857, c. 86, § 13. The complainants complied with the requirements of the statute, and yet it is contended that they are barred of their right to recover their costs, because the plaintiff notified them that the suit had been withdrawn. The statute certainly does not in terms, and we think it does not by implication, recognize the right of the plaintiff thus to defeat the trustee's claim for costs. Such right is given by statute, and can be defeated only by a failure of the trustee to conform to the statute or a voluntary relinquishment of his claim.

If the plaintiff had failed to enter his action without notifying the trustees that the suit had been withdrawn, there can be no doubt but the trustees, under the facts stated, would have been entitled to costs. So if there had been a valid agreement between the plaintiff and the trustees that they should not claim costs, if the action was not entered. How does the notice given change the rights and liabilities of the parties in this respect? The trustees had no agency in suing out the writ; that was the voluntary act of

the plaintiff. In the absence of such notice, the trustees would be liable to pay the debt on default or be subject to pay the costs in *scire facias*, if they did not appear. Such notice imposed no legal obligation upon the plaintiff not to enter the action; it is not founded upon any consideration, and affords the trustees no guarantee against any loss or damage they might sustain if they should heed its monitions. In answer to the command of the writ to appear and disclose, the trustees have the naked, verbal assurance of the plaintiff that they need not do so. Notwithstanding such notice the plaintiff may enter his action; he may change his mind, or the defendant may insist upon contesting his claim. The object in giving such notice is to save the plaintiff from a liability he voluntarily, and without the privity or fault of the trustees, incurred. It rests upon no legal authority or sanction, is supported by no consideration, is inoperative and void, and affords the plaintiff no defense to the trustees' claim for costs.

Exceptions sustained.

Judgment for complainant.

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

JOSEPH G. HARMON *vs.* MARTHA J. MOORE, administratrix.

Mail—wilful obstruction of. Mail-team—not attachable when in actual use. Receiptor's liability.

An attachment, knowingly, of a team consisting of two horses harnessed to a wagon, standing in front of a post-office, on a mail route, in charge of the mail-carrier waiting for the mail, is a wilful obstruction and retarding of the passage of the mail, within the meaning of the Act of Congress, of March 3, 1825, § 9, and therefore void.

And a receiptor for such property, thus attached, is not liable therefor on his receipt, stipulating to pay one hundred dollars, or redeliver the property.

On report.

Assumpsit upon a receipt signed by Joseph Moore, promising to "pay Joseph G. Harmon, deputy-sheriff, on his order, one hundred dollars, on demand, or to re-deliver the goods and chattels following, viz.; one mail-wagon, and two dark-brown horses," etc.

It appeared that the plaintiff, as deputy-sheriff in and for this county, on the 25th Aug., 1866, having a writ in favor of one Rogers, against one Marston, attached the property mentioned in the receipt, standing in front of the post-office at N. Wakefield, on a regular mail-route in charge of Marston, who was the mail-carrier then waiting for the mail. The possession of the team was obtained by Marston after the attachment, by obtaining the receipt of Moore for the plaintiff, having been detained one-half hour.

The writ, return thereon of the attachment, judgment, execution and return thereon of demand, etc., were put into the case. And the court to render judgment on nonsuit or default.

L. S. Moore, for the plaintiff.

William J. Copeland, for the defendant.

Appleton, C. J. The plaintiff as a deputy-sheriff attached a mail-wagon and two horses, which were then in use upon the mail route in carrying the mail. The question raised is whether such attachment is valid. The law on this subject is clearly thus stated by Bell, J., in *B. & C. & M. R. R. Co.* v. *Gilmore*, 37 N. H. 410. "The property of individuals, who owe duties to the public, is not for that reason exempted from liability to the ordinary process of law, except so long as it is in actual use in discharge of that duty. Such is the case of the contractor to carry the mail. It has never been held, that the steamboat, or coach and horses, used in the conveyance of the mail, were exempt when not in use. *Briggs* v. *Strange*, 17 Mass. 409; *Potter* v. *Hall*, 3 Pick. 368."

By the statutes of the United States of March 3, 1825, § 9, "if any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or

carriage carrying the same, he shall, upon conviction for every such offense, pay a fine not exceeding one hundred dollars," etc. Brightly's Digest, 218. The attachment, knowingly, of the mail-coach and horses, while carrying the mail, must be deemed a willful obstruction and retarding the passage of the mail.

The receipt is in the alternative, to pay one hundred dollars on demand, or to redeliver the articles attached. The attachment in such case is dissolved. *Treat* v. *Waterman*, 49 Maine, 309.

The attachment being illegal, the officer is not liable to the creditor. As the liability of the receiptor is only co-extensive with that of the officer, and as the officer is not liable, the receiptor must be discharged. *Plaisted* v. *Hoar*, 45 Maine, 380.

Plaintiff nonsuit.

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

BYRON CAMPBELL *vs.* MONMOUTH MUT. FIRE INS. CO.

Insurance. Notice. Valuation by agent—conclusiveness of on company. Instruction.

In an action on a fire policy, if the plaintiff proves that he has seasonably given the notice called for by the contract of insurance, he is under no obligation to show that he has given the statutory notice also.

Thus, where the only stipulation in the policy of a domestic mutual fire insurance company was that the member should, "within sixty days next after the loss, give notice thereof in writing to the directors, or some one of them, or the secretary of the company;" and within three days after the loss, the policy holder notified the secretary, by a writing of that date, signed by him, of the following tenor: "I hereby notify you that my house, in Bath, was consumed by fire March 3d, at 9 o'clock P. M. Daniel Spinney's family occupied it last; they moved out February 4." *Held*, That in the absence of evidence, that he had any other house in Bath, insured by defendants, the notice was sufficient.

Section 2, c. 115, of Public Laws of 1862 (R. S. c. 49, § 18) makes the valuation of the agent only, "whose name is borne on the policy," conclusive upon the company.

Campbell *v.* Monmouth Mutual Fire Insurance Company.

In the trial of an action against a mutual company, on a fire policy conditioned that in case of gross negligence, on the part of the insured, the policy should be absolutely void, there was conflicting testimony as to the actual condition and situation of the stove, from which the fire was communicated to the building insured. The jury were instructed that gross negligence was the "utter disregard of those precautionary measures which men of ordinary prudence adopt in such a case." *Held*, That while there might be positive acts of gross negligence, which would not come within the instruction, it also impliedly required a higher degree of diligence on the part of the plaintiff than he was bound to exercise; and as this branch of the case evidently turned upon the finding as to the actual condition and situation of the stove, and not upon any nice definition of gross negligence, the exception would be overruled.

ON EXCEPTIONS, and MOTION to set aside the verdict as being against law and the weight of evidence.

ASSUMPSIT on a fire policy, the principal parts of which may be found in the opinion.

The policy bore the name of no one as agent of the company, but was simply signed by the president and countersigned by the secretary. But the application was signed by the plaintiff and written and countersigned by one Cunningham, agent of the company, resident of Bath, and authorized to collect bills, and receive applications for the company. In the application, the property insured was valued at $800, and insured for $400.

The defendants, against the seasonable objection of the plaintiff, were allowed to introduce evidence, tending to show that the value of the property insured was less than that stated in the application; and the jury were instructed that the valuation named in the application was not conclusive upon the company; but that they should ascertain the value from the evidence in the case, and, in case of a verdict for the plaintiff, give in damages an amount not exceeding two-thirds of the actual value of the property in question.

The jury returned a verdict for the plaintiff for $358.50, and the plaintiff alleged exceptions.

The defendants' exceptions, together with the other material facts, sufficiently appear in the opinion.

Francis Adams, for the plaintiff.

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

BARROWS, J. In May, 1864, the defendants issued a policy wherein they undertook to insure the plaintiff "against loss or damage by fire . . . to the amount of four hundred dollars upon his property situate in Bath, viz., $400 on the north half of dwelling-house, as the same is more particularly described in his application, dated," etc., for the term of four years, "not exceeding in any case, or under any circumstances, the sum of four hundred dollars, nor more than two-thirds of the actual destructible value of the building at the time the loss may happen." It appears by uncontradicted testimony that the house was built in 1855, in the name of the plaintiff, upon a lot which he had purchased, at a cost of about twelve hundred dollars, but that his sister, Mrs. Chadbourne and her husband "turned in" labor and cash towards the erection, to the amount of $584.11, and the plaintiff considered her at that time the owner of half the house, though it does not appear that he ever made any conveyance to her of her half. Plaintiff had mortgaged the lot, and this claim, amounting with costs to about $100, Mrs. Chadbourne had acquired, prior to Oct. 10, 1859, when she gave a quitclaim deed of the whole premises to the plaintiff. But still the plaintiff says that this deed was only intended to reinstate himself and his sister, according to the original understanding, as owners each of half the house. The plaintiff appears to have occupied or rented the north half, and his sister to have had the possession of the other until February, 1866 (nearly two years after the issuing of this policy), when the plaintiff received from his sister a warranty deed of an undivided half of the whole premises, and, at the time of the fire, had the undisputed ownership and possession of the whole of the house and the lot.

It does not appear that he had any other insurance upon the house; but upon the state of facts here disclosed, the defendants claim that, if entitled to recover on the policy, he can only recover two-thirds of the actual destructible value of an undivided half of the north half, or, in other words, one-sixth instead of one-third of

his actual loss; and this is the first position taken in support of defendants' motion for a new trial.

We do not think it can be maintained. Apparently, the legal title to the whole vested in the plaintiff by Mrs. Chadbourne's quitclaim deed to him, Oct. 10, 1859. As between himself and this insurance company, the insurable interest in the whole was in him, whoever might have been equitably entitled to the money when recovered. The insurance company could have a valid lien on the property which they insured, for the record title to the whole was in the plaintiff, even while he considered his sister as the owner of one-half. And even had they held the legal title as tenants in common, it was competent for them to make a parol division, as they seem to have done, and it is not perceived that the insurance company would have any cause of complaint, or that such a merely technical misrepresentation of the title could be material or fraudulent, or contribute to the loss or materially affect the risk. We see nothing in the condition of the title to debar the plaintiff from recovering two-thirds of the value of the north half of the house, not exceeding $400,—nor anything in the amount of the verdict which would justify the inference that the jury erred in estimating it.

The plaintiff complains that the insurance company were not held to the "insurance value, $400," stated in the application drawn by their agent. But the statute makes only the doings of an agent "whose name shall be borne on the policy" conclusive upon the company as to such matters, and, in the present case, the agent's name nowhere appears upon the policy.

The ruling of the presiding judge, upon the point raised in plaintiff's exceptions, was correct, and the plaintiff must be satisfied, if upon this policy he can recover two-thirds of the destructible value of the north half of his house, as estimated by the jury.

The defendants resist his claim for even this partial indemnity, because they say:

1. He gave us no sufficient notice of the loss.

2. He forfeited his policy by a failure to pay an assessment within sixty days after notice thereof.

3. His own gross negligence was the cause of the fire.

(1) As to the notice. The plaintiff must show either such notice as has been stipulated for by the insurance company in their contract of insurance, or such as the statutes of our State declare shall be sufficient notice, whatever the stipulations in that respect may be. If he gives the notice which is called for by the contract, he is under no obligation to go further and show that he has given the statute notice also. The statute of 1861, c. 34, § 5, was not designed to lay any additional stumbling-blocks in the way of the policy holder before his case could be heard upon its merits, and it should not be so construed as to give it that effect. It does not apply to a case where, by the terms of the policy, the insurance company undertakes, upon the reception of a simple notice of the loss, to ascertain the amount by a view or in such other mode as they think proper, and, after such notice, makes no attempt to perform its part of the contract.

Looking now at the policy to ascertain the stipulations of the parties with regard to notice, we find no special provision relating to it, but a declaration that it is mutually agreed, "that said company shall be liable and holden to pay all losses in the manner provided by the act incorporating said company," . . . "and also that this policy is made . . . with reference to the provisions of the act of incorporation, and to the votes and by-laws of the company, which may be resorted to in explanation of the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for." Resorting, then, to the documents referred to, we find that the only stipulation with regard to notice of loss is contained in § 7 of the act, as follows: "when any member shall sustain any loss by fire of the property so insured, the said member shall, within sixty days next after such loss, give notice thereof in writing to the directors or some one of them, or the secretary of said company, and the directors, upon a view of the same, or in such other way as they may deem proper, shall ascertain and determine the amount of said loss," etc. Two or three days after the fire this plaintiff mailed the following letter, directed to "J. G.

Blossom, secretary of the Monmouth Mutual Fire Ins. Co., Monmouth."

"SMALL POINT, March 6, 1868.

JAMES G. BLOSSOM, ESQ.,—I hereby notify you that my house in Bath was consumed by fire March the 3d, at 9 o'clock P. M. Mr. Daniel Spinney's family was the last family that occupied it; they moved out February the 4th.

Yours, truly, BYRON CAMPBELL."

This letter seems to have been duly received by the secretary of the insurance company. The presiding judge ruled, that it was "a sufficient notice to the defendants of the plaintiff's loss, and a sufficient compliance with the statute." If it was "a sufficient notice" under § 7 of the act of incorporation, it was all that was required by the contract of the parties, and the last clause in the ruling just recited, and the various rulings and instructions on the subject of waiver of notice and preliminary proof are immaterial, and the alleged want of notice fails altogether as a ground of defense. No particular form of written notice is required by § 7. The insurance company does not require any detailed account of the circumstances of the loss, or any specific statement of the claim. They undertake upon the giving of written notice of the loss by the insured within sixty days next after such loss to the secretary or one of the directors, to ascertain and determine the amount of said loss themselves, "upon a view of the same, or in such other way as they may deem proper." The formal proofs which are made preliminary to the commencement of an action in so many policies are dispensed with,—waived in the outset in the contract itself,—and there is no occasion to resort to the statute of 1861 to prevent justice from being thwarted by burdensome and unreasonable stipulations.

The defendants' counsel say there was no notice, because the plaintiff did not say, in his letter to the secretary, whereabouts in Bath his house was located, nor give the number of his policy, nor its date, nor its amount, nor tell what particular part of his house

was consumed, nor that it was the only house he had in Bath, nor that he claimed damages of the insurance company.

But it is impossible to suppose that the secretary of the insurance company, upon the reception of this letter, could have mistaken its purport or misunderstood its design. He had in his own records and files that which would explain everything in it that could by any possibility need explanation. There is nothing to indicate that the plaintiff had more than one house in Bath. His house at Small Point was insured by the defendants. But, he says, "I hereby notify you that my house in Bath was consumed by fire," etc. If the house was consumed, the north half did not escape. To consume is "to destroy," "to bring to utter ruin." Web. Dic. It is idle to pretend that the secretary of the insurance company could have received this notification as a mere piece of general intelligence which called for no action on the part of his company. The notice is as definite and as intelligible, certainly, as that which was more tardily given in the case of *Stimpson* v. *Monmouth M. F. Ins. Co.* (this same company), 47 Maine, 379, where the court say, that a letter communicating information of the burning of the plaintiff's property "on the night of the 22d ult.," written by an agent of the company, at the request of the plaintiff (though that fact was not stated in the letter), was "all the notice necessary to enable the defendants seasonably to look after their rights, and to ascertain their duties and obligations in the premises."

The letter of the plaintiff here, would furnish all the information called for by § 7, to any one who was not predetermined to misapprehend and cavil,—all that was necessary to put the directors upon the performance of their part of the contract, to ascertain and settle the loss. The ruling of the presiding judge that it was a sufficient notice, seems to us correct; and this being settled, all questions, both of law and fact, in connection with the supposed waiver are seen to be immaterial.

(2) As to the non-payment of the assessment and consequent forfeiture, the defendants make no complaint of the instructions on this point. They were concise and explicit, and made the plain-

tiff's right to recover, to depend upon the simple fact. The testimony of the plaintiff, and of the agent of the insurance company, was contradictory. The jury believed the former, and we cannot say that they erred in so doing.

(3) With regard, also, to the gross negligence of which the plaintiff is alleged to have been guilty, the facts were in dispute, and a careful examination of the testimony fails to demonstrate that the conclusion reached by the jury was erroneous. But the defendants complain of the definition of gross negligence given by the presiding judge. He told the jury that "it is the utter disregard of those precautionary measures which men of ordinary prudence would adopt in such case." It may be that this definition was neither so full nor so accurate as might have been desirable; but we think the plaintiff was more likely to be injured by it than the defendant. The entire omission of those precautionary measures which men of ordinary prudence would adopt in such case, might not constitute gross negligence. Gross negligence is the want of that diligence which even careless men (*dissoluti homines*) are wont to exercise. Hein. Elem. Jur. Lib. 3, Tit. 14, § 787. "For he who is only less diligent than very careful men, cannot be said to be more than slightly inattentive: he who omits ordinary care is a little more negligent than ordinarily men are; and he who omits even slight diligence, fails in the lowest degree of prudence, and is grossly negligent."

It is true, the definition was imperfect; but so far as it went it was calculated to convey the idea that a want of ordinary care would constitute gross negligence, and in that view it required a higher degree of diligence on the part of the plaintiff than he was bound to exercise.

It is possible, also, that there might be positive acts of gross negligence without "an utter disregard of the precautionary measures which men of ordinary prudence would adopt in such case;" and if the testimony relied upon by the defense on this point indicated that the defendants might probably have suffered for want of more explicit instructions in this behalf, we should feel bound to sustain

the exceptions. But it is quite apparent that the case must have turned here upon the finding as to the actual condition and situation of the stove in which the fire was lighted, about which the evidence was conflicting, and not upon any nice definition of what would or would not constitute gross negligence.

Defendants' motion and exceptions overruled.

Plaintiff's exceptions overruled.

Judgment on the verdict.

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

JOHN E. CARLETON *vs.* NATHAN P. RYERSON.

59 438
d94 440

Real estate — attachment of — officer's return must show filing attested copy of return.

To constitute a valid attachment of real estate under R. S. of 1841, c. 114, § 32 (R. S. c. 81, § 56), the officer's return on the writ must show that the "attested copy," required to be filed in the office of the register of deeds, was in fact filed.

ON REPORT.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*, involving the title to the premises described in the plaintiff's writ. The parties respectively claim title under John Frost,—the plaintiff by deed from said Frost to Josiah Smith, and from Josiah Smith to him,—the defendant by an attachment and levy in favor of R. A. Chapman *v.* John Frost, and by deed from Chapman to him. The attachment preceded the deed under which the plaintiff claims title. The rights of the parties depend, therefore, upon the validity of the attachment and the proceedings under it.

The attachment is in these words: "Oxford, ss. Jan. 31, 1849. At eight o'clock in the afternoon, by virtue of the writ, I attached all the right, title, interest, estate, claim, and demand of every name and nature, of the within-named John Frost, in and to any real estate in said county of Oxford, and afterwards, on the twenty-fourth day of February, I gave the within-named John Frost a summons in hand for his appearance at court.

GILMAN CHAPMAN, *Deputy-sheriff.*"

By R. S. of 1841, c. 114, § 30, all real estate, liable to be taken in execution, may be attached on *mesne process.* But by § 32 "no attachment of real estate on *mesne process* shall be deemed and considered as creating any lien on such estate, unless the officer making such attachment, within five days thereafter, shall file in the office of the register of deeds, in the county or district in which all or any part of said lands are situated, an attested copy of so much of the return, made by him on the writ, as relates to the attachment, together with the names of the parties, the sums sued for, the date of the writ, and the court to which it is returnable," etc.

The officer must return such an attachment as will create a lien. But a return, which does not show a compliance with the essential requirements of the statute, creates none. The officer should not merely comply with the statute, but his return should show that he has so complied. The writ commands the officer to return his doings thereon. The return on the writ does not state that the "attested copy," required by the statute to be left in the office of the register of deed, has been so left. It shows no valid attachment as against third persons. "The officer's return should be indorsed upon the writ and be signed by him, and should set forth the whole of his doings." Howe's Practice, 113.

The return should set forth that the "attested copy" was left as the statute prescribes. The attachment is not fully completed until that is done. *Bank* v. *Burnham*, 5 N. H. 275. The return should show when the attested copy was left, and if it fails to show that specifically, the court will allow an amendment. *Kittredge* v. *Bel-*

lows, 4 N. H. 30. In a case like the present in principle, *Angier* v. *Ash*, 6 Foster, 107, Bell, J., uses the following language: "Though an attachment of such property may still be mae a nd the property kept as before, yet the means of preserving the lien of the attachment by this new mode of service was important, both to the creditor and to the officer. Being material and proper to be done in the due and legal service of the process, it was proper to be returned, and consequently the return becomes evidence of those facts stated in it."

In an extent of an execution upon land, every fact essential by the statute to a good title ought to be expressly stated, or necessarily implied in what is stated in the return. *Mead* v. *Harvey*, 2 N. H. 498. "Nothing," observes Richardson, C. J., in *Cogswell* v. *Mason*, 9 N. H. 48, "is to be left to conjecture. Nothing is to be presumed in favor of the extent." The same rules apply to the attachment which precedes the levy, and to the date of which, if seasonably made, it relates.

Whether the officer would not be permitted to amend his return in accordance with the facts, is a question not now before us, as no motion to that effect has been made.

Judgment for the plaintiff.
Damages, $1.

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

WALTON and BARROWS, JJ., did not concur.

S. F. Gibson, for the plaintiff.

Enoch Foster, jr., for the defendant.

HIRAM YOUNG *vs.* AUGUSTA M. ESTES.

Statute—construction of. Widow—quarantine of.

The phrase "house of her husband," in R. S. c. 103, § 14, providing that a widow may remain in the house of her husband ninety days next after his death, without being chargeable with rent therefor, means the house in which her husband owned the fee at the time of his decease.

Hence, the widow of a mortgager of a house is not entitled to remain in the house ninety days next after her husband's death, as against the assignee of the mortgagee.

ON EXCEPTIONS.

WRIT OF ENTRY. Writ dated Feb. 21, 1870.

The demanded premises, consisting of a small lot and dwelling-house thereon, were owned by one Ephraim A. Estes, husband of the defendant, on Jan. 9, 1867, when he mortgaged them to one W. L. Chapman, who, on March 1, 1867, assigned the mortgage to Robert C. Kimball, who, on Jan. 19, 1870, assigned the same to plaintiff.

Ephraim A. Estes died Dec. 19, 1869, in possession of the premises, and the defendant continued in possession to the date of the writ, and was still in possession at the time of the trial.

The case was submitted to the presiding judge, with right to except, who ordered judgment for the plaintiff; whereupon, the defendant alleged exceptions.

S. F. Gibson, for the plaintiff.

D. Hammons, for the defendant.

APPLETON, C. J. By R. S. c. 103, § 14, "a widow may remain in the house of her husband ninety days after his death, without being chargeable with rent therefor."

The house must be the house of her husband, not the house of another. The rights of the wife are derived from and through the husband. The right of the widow to quarantine, relates only to

lands in which the widow has a right or claim to dower. *Voelckner* v. *Hudson*, 1 Sandf. (S. C.) 215. "The provision for quarantine relates only to the claim of the widow against the heirs or those claiming the estate under her deceased husband, and does not apply to strangers or persons claiming by an adverse title. She is in no better condition to defend her property against an adverse or paramount title, than her husband would have been." 2 Scribner on Dower, 57. So if the husband was tenant in common of the house he occupied, the widow has no right to hold possession of the entire house to the exclusion of the co-tenant of her deceased husband. *Collins* v. *Warren*, 29 Miss. 23. "The law," say the court, "was only designed for the cases when the husband died the sole owner of the mansion-house. It must be his and his exclusively. It was never intended that the widow should have her quarantine at the expense of those who are in no ways connected with her."

These principles are applicable to a mortgagee, whose rights, as in the present case, are prior and paramount to those of the wife, who is entitled only to dower in the equity of redemption. As between the husband of the defendant, and the mortgagee or his assignee, the fee was in the latter. *Blaney* v. *Bearce*, 2 Greenl. 132.

Exceptions overruled.

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

WILLIAM HAPGOOD *vs.* FRANK E. NEEDHAM and another.

Intoxicating liquors—promissory note given therefor—what is not a defense to. Burden of proof.

It is no defense to an action on a negotiable promissory note, that it was given in whole or in part for intoxicating liquors sold in violation of law, when the action is brought by an indorsee, who is the holder of the note for a valuable consideration, and without notice of the illegality of the contract.

Hapgood *v.* Needham.

If in the trial of an action on a negotiable promissory note, brought by an indorsee against the maker, the defendant avers that the note was given in whole or in part for intoxicating liquors sold in violation of law, the burden of proof is upon him.

If the plaintiff replies that he is a holder for a valuable consideration, the burden is upon him.

If the defendant would avail himself of the fact that the plaintiff had notice of the illegality of the consideration when he took it, the defendant must prove it.

On exceptions.

Assumpsit on a promissory note given by the defendants and dated at North Stratford, in the State of New Hampshire, on the 16th day of July, A. D. 1868, for the sum of $85.50, payable to one J. O. Severy or bearer, on demand and interest, and by Severy sold and indorsed to the plaintiff.

At the trial the plaintiff introduced and read the note, and proved that it was negotiated to him on the 4th day of October, A. D. 1868, and that he was the lawful holder thereof for value. The defendants then proved that the note was given principally for intoxicating liquors, sold to them contrary to law, at North Stratford, in the State of New Hampshire.

The presiding judge ruled that unless the defendants proved that the plaintiff had actual knowledge of the illegality of the consideration of the note, the plaintiff, upon the facts proved, would be entitled to recover. The verdict was for the plaintiff, and the defendants alleged exceptions.

R. A. Frye, for the plaintiff.

Enoch Foster, jr., for the defendants.

Walton, J. It is no defense to an action on a negotiable promissory note that it was given in whole or in part for intoxicating liquors sold in violation of law, when the action is brought by an indorsee, who is the holder of the note for a valuable consideration and without notice of the illegality of the contract. R. S. c. 27, § 50; *Field* v. *Tibbetts*, 57 Maine, 358; *Baxter* v. *Ellis*, 57 Maine, 178.

The burden of proof, with respect to these several propositions, is on the party who holds the affirmative. Thus: If the defendant avers that the note was given in whole or in part for intoxicating liquors, sold in violation of law, the burden of proof is upon him. If the plaintiff replies that he is a holder for a valuable consideration, and without notice of the illegality, the burden of proof with respect to the first branch of the proposition, namely, that he is a holder for value, is upon him; but the burden is not upon him to prove the latter branch of the proposition, namely, that he did not have notice of the illegality of the contract; for that would be to require him to prove a negative, which, with a few exceptions, of which this is not one, the rules of evidence forbid. If the defendant would avail himself of the fact that the plaintiff had notice of the illegality of the consideration of the note when he took it, he (the defendant) must prove it. These principles are too familiar to the profession to require the citation of authorities in support of them.

The ruling in this case was in accordance with these principles, and was, therefore, correct. At least such are the rules of law applicable to notes given in this State. And if, in New Hampshire, where the note on which this action is brought, was executed, the rules of law are more favorable to such a defense than they are in this State, the defendant should have proved to the court what those rules were; otherwise they would not avail him.

Exceptions overruled.

Judgment for plaintiff.

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

KENT, J., concurred in the result.

Charles B. Kneeland *vs.* Horace M. Willard.

Smuggled property.

In August, 1866, the owner of a horse in Canaan, Vermont, took him one and one-half miles into Canada, to a race, where he kept him six weeks, when he returned with the horse to Canaan without having entered him at the custom-house, either in going or returning. In the following November, the owner, without informing him that he was a Canadian horse, sold him to the defend ant, who, in the following June, sold him in good faith, without knowing he was smuggled or claimed as a smuggled horse, to the plaintiff. In August, 1867, the horse was seized and taken from the plaintiff by a U. S. revenue officer, and, after due proceedings, sold in September. In assumpsit brought Aug. 31, 1867, *Held*, (1) That the horse having been brought into the U. S. in violation of the revenue laws, became forfeited by that act; and (2) that the plaintiff is entitled to recover of the defendant the value of the horse at the time of the seizure.

Action for the value of a horse sold by the defendant to the plaintiff.

One Nichols, of Hereford, Canada, in the fall of 1865, bought the horse in Canada, where the same was raised, and kept him there until the following October, when he sold him to one Blodgitt, who duly entered him at U. S. custom-house in January, 1866, and took him to Canaan, in the State of Vermont. Soon afterwards; Nichols repurchased the horse in Canaan, of Blodgett, and after entering him at the custom-house, took him to Hereford where Nichols kept him, until June, 1866, when he entered him at the U. S. custom-house, and took him to the U. States, where in August, 1866, one Hibbard bought him and took him into Hereford, about one and one-half miles over the Canada line to a race, without having entered him, where he kept him about six weeks, and then, without entering him, took him back to Vermont, where in November, 1866, he sold him to the defendant, without giving him any notice of its being a Canadian horse.

The defendant kept the horse until June, 1867, when he exchanged the horse with the plaintiff for two other horses, and a

promissory note signed by one Ayer; that the defendant purchased the horse in good faith of Hibbard without notice that the horse was smuggled, or claimed to be smuggled, and sold him in good faith without any knowledge that the horse was smuggled or claimed to be, and never heard of any defect in the title to the horse, until he was sold in Portland, Sept. 11, 1867, by U. S. revenue officer; that the defendant never had any notice or knowledge of any defect in the title of the horse, until the commencement of this suit, he having been absent from home at the time of the service of the writ, and remained absent until after the sale of the horse by the revenue officer.

It appeared that the horse was seized and taken from the plaintiff, at Poland, Maine, on Aug. 29, 1867, by an U. S. Inspector of customs for an alleged violation of the U. S. revenue laws, and after due and legal proceedings, condemned and sold on Sept. 11, 1867, for $170.

If the plaintiff was entitled to recover, damages were to be assessed by the clerk.

A. Black & A. S. Kimball, for the plaintiff.

E. Foster, jr., for the defendant.

DICKERSON, J. By the various acts of congress, passed to provide a revenue, and to guard against frauds upon the same, it is made unlawful, fradulently or knowingly to import or bring into the United States goods, wares, or merchandise, without entering them at the custom-house, and complying with the laws and regulations respecting the same. This requirement obtains both with respect to free and dutiable articles, and also to those that having been once within the United States, and removed therefrom, are brought back for use therein. The entries and doings at the custom-house furnish the revenue officers with the evidence by which, aside from proof of identity, they may determine whether goods, wares, or merchandise, found to have come into the United States from a foreign country, are liable to seizure and forfeiture. Hence when

the owner of any goods, wares, or merchandise, which have been duly removed from the United States, wishes to bring them back thereto, he must signify such purpose at the custom-house, and take the necessary steps to justify their return; so, also, if he would remove goods from the United States for a temporary purpose, intending to bring them back. Otherwise such articles being found in the United States will be liable to seizure and forfeiture. A remedy for any hardship that may result from such stringent enactments is provided in the authority given to the secretary of the treasury to remit any fine, penalty, or forfeiture thus incurred, when, in his opinion, there has been no willful negligence, or intention to defraud the government. Act of March 2, 1799, 1 Statutes at Large, 677; Act of July 18, 1866, "to prevent smuggling and further purposes;" Act of June 27, 1864, § 8, c. 164; Act of May 16, 1866, c. 82.

In general, when goods, wares, or merchandise have been brought into the United States in violation of the revenue laws, they are absolutely forfeited to the United States, and the forfeiture takes place at the time the offense was committed. Nor is an innocent purchaser of such property protected in his title. *United States* v. *1960 bags of coffee*, 8 Cranch, 398; *Gibson* v. *Hoyt*, 3 Wheat. 246; *Caldwell* v. *United States*, 8 How. 381.

The horse in controversy was raised in Canada. He was brought into the United States, returned to Canada, and again brought back to the United States. On these three occasions he was duly entered at the custom-house. The purchaser of the horse took him over the line a short distance into Canada, to a race; kept him there six weeks, and brought him back to the United States without entering him at the custom-house, either when he took him into Canada or brought him back to the United States. He sold him to defendant Nov. 10, 1866, without telling him that he was a Canadian horse. The defendant kept the horse till June, 1867, when he sold him to the plaintiff in good faith, without knowing that he was smuggled, or claimed to be smuggled. The horse was sold by the United States revenue officers in September, 1867.

The vender in possession of personal property impliedly warrants his title to the thing sold, and is bound to compensate the purchaser for the loss resulting from the want of a good title. The horse, having been brought into the United States in violation of the revenue laws, became liable to forfeiture to the United States by that act. The defendant had no title to the horse when he sold him to the plaintiff; and the plaintiff is entitled to recover the value of the horse of the defendant at the time of the seizure by the revenue officers.

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

SALOME MITCHELL and another, petitioners for partition, *vs.* PERSONS UNKNOWN.

Disseisin.

In August, 1836, the petitioners, together with their sister, entertaining the mistaken hypothesis that their father, instead of their mother, owned the land in question, by their deed of quitclaim duly recorded, released their interest therein to the respondents, who entered under the deed, claiming to own the land, and in December, 1848, divided the premises by mutual deeds of release, and subsequently thereto their occupation was in severalty and was open, notorious, adverse, and known to the petitioners. On petition for partition, commenced in September, 1868, *Held*, that in the absence of any actual entry by either of the petitioners within twenty years, their right of entry was gone.

ON REPORT.

PETITION FOR PARTITION.

APPLETON, C. J. This is a petition for partition of certain real estate in Mexico. The petitioners are two daughters of Zebediah Mitchell. The respondents are his son, Darius Mitchell, and his grandchildren, the heirs of his son, Jonathan Mitchell, deceased.

It is in evidence that Zebediah Mitchell died prior to Nov. 25, 1828, at which date the land in controversy was conveyed to his widow, Molly Mitchell. The proof in the case tends to show that the payment for the land thus conveyed was made by the widow, with funds derived from the estate of her deceased husband.

On the second day of August, 1836, the petitioners, with Nancy Mitchell, by their deed of that date, remised, released, bargained, sold, and conveyed and forever quitclaimed "all right, title, and interest in and to" certain lots, "being land that belonged to Zebediah Mitchell, deceased," to their brothers, Darius and Jonathan Mitchell. The petitioners each received one hundred and twenty-five dollars as the consideration for this conveyance. It is obvious that the parties to this deed must have supposed that it conveyed three-fifths of the land therein specified, otherwise there would be no perceivable consideration for the conveyance. There is no reason given why the grantees should pay the grantors three hundred and seventy-five dollars, when the latter had nothing to convey. The deed was undoubtedly made upon the mistaken hypothesis that the title to the land conveyed had been in Zebediah Mitchell.

This deed was recorded 26th September, 1836. The grantees entered under it, and they or those claiming under them have remained in possession from that date to the present time, occupying the land as their own, receiving exclusively the rents and profits and paying the taxes thereon.

This would seem to be a sufficient title. But the objection is made that the legal title was in Molly Mitchell, who died in 1845, and that, therefore, nothing passed by the deed of the petitioners of Aug. 2, 1836. Still the grantees therein named were in possession, occupying the lands in question, claiming title thereto, and holding adversely to all others. On 8th December, 1848, they divided these lands by deeds of release, and subsequently thereto, their occupation was in severalty in accordance with the terms of said deeds, and was open, notorious, adverse, and exclusive, and known to the petitioners.

There is no proof of any actual entry upon the land in dispute

by either of the petitioners within twenty years. *Peabody* v. *Hewett*, 52 Maine, 33. It is true, an action may be maintained by one having a right of entry, by R. S. 1851, c. 104, § 4. But here the right of entry is gone, for twenty-three years have elapsed since the respondents, or those under whom they claim, have been in the exclusive and open, notorious, and adverse possession of the several tracts as conveyed by the deeds of release of Dec. 8, 1848, to which reference has been had. *Judgment for the respondents.*

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

WALTON, J., having formerly been consulted, did not sit.

L. H. Ludden, for the petitioners.

Bolster & Wright, for the respondents.

INHABITANTS OF WATERFORD, petitioners for *certiorari*, *vs.* COUNTY COMMISSIONERS OF OXFORD COUNTY.

Highway and town way—not substantially the same thing.

A town way is not "substantially the same thing" as a highway, within the meaning of R. S. c. 18, § 39.

Hence, the reversal on appeal of a judgment of county commissioners in laying out on appeal, a town-way, cannot bar them from entertaining, within two years after such reversal, a petition praying for the laying out of a highway over the identical place.

PETITION FOR CERTIORARI.

The case is sufficiently stated in the opinion.

A. S. Kimball, for the petitioners.

Enoch Foster, jr., for the respondents.

APPLETON, C. J. Henry A. Jewett and others, inhabitants of Waterford, petitioned the selectmen to lay out and establish a town way, describing the same in their petition. The selectmen, due and legal proceedings being had, reported that the wants of the traveling public did not require the location of the town way, as prayed for. Afterwards, and within the time required by law, the petitioners presented their petition to the county commissioners of this county, alleging they were aggrieved by the decision of said selectmen. The county commissioners, upon due and legal proceedings, reversed the decision of the selectmen, and adjudged that common convenience and necessity required the location as prayed for, and that the selectmen had unreasonably refused to lay out and establish said town way, and proceeded to lay out and establish the same.

The inhabitants of Waterford, appealed from the decision of the county commissioners to this court. A committee was appointed, who proceeded in conformity with the statute and made a report reversing the decision of the county commissioners, which was accepted and duly certified to them.

After the decision of the committee, and before it was certified to the county commissioners, the same petitioners presented another petition directly to the county commissioners, for a highway over the same ground as described in their petition for a town way, but embracing requests for alterations in a connecting highway. The county commissioners entertained this petition, proceeded and viewed the route and located a county road where they had before located a town way, being the location which has been reversed by the committee, so far as the same is included in the limits of the petitioning town.

The only question is whether the county commissioners had authority to entertain the last petition and grant the prayer thereof.

The petitioners rely on R. S. c. 18, § 39, which provides that "in all cases when the judgment of the commissioners shall be reversed on appeal, no petition, praying for substantially the same thing, shall be entertained by them for two years thereafter." Is,

then, a town way "substantially the same thing" as county way? We think, within the true meaning of the statutes, that it is not.

By the rules of construction established by R. S. c. 1, § 4, rule 6, "the word 'highway' may include a county bridge, county road, or county way." The meaning of this provision is that when this word is used, its import is to be taken as thus defined, unless the obvious sense of the statute should require a different construction. An highway does not include a town way unless by express enactment. *Cleaves* v. *Jordan*, 34 Maine, 9. When it does, the language of the statute levaes no doubt on the subject, as in R. S. c. 18, § 68, where in indictments "for neglect to open ways or keep them in repair," it is provided that "the word highway, used therein will include town ways, causeways, and bridges."

By R. S. c. 18, § 1, "county commissioners have power to lay out, alter, or discontinue highways leading from town to town."

By § 18, "the municipal officers of towns may personally or by agency lay out, alter, or widen town ways or private ways, for one or more of its inhabitants," etc.

Highways or county ways lead from one town to another. Town ways are within the territorial limits of a particular town. The officers of the town have original jurisdiction over town ways. The jurisdiction of the county commissioners is appellate. The land damages in town ways are to be paid by the town, for the use and benefit of whose inhabitants it is laid out. The land damages in county roads is to be paid by the inhabitants of the county, the highway being adjudged of "common convenience and necessity." The expenses of a way may be such that the burden should not be borne by the inhabitants of a town, and should be by those of the county. Its "convenience and necessity" may be such, that when a part of a county way, the expense of building it should equitably be imposed upon the inhabitants of a county. Town officers have no jurisdiction over a highway. County commissioners have such jurisdiction.

It is manifest that a town way is not "substantially the same thing" as a county road, and that a judgment denying the former

cannot be a bar to one establishing the latter. The county commissioners had original jurisdiction in the road in question, for it was a county road. The road in its whole length might properly be established as a county road, while a portion of it might, with equal propriety, be denied as a town road.

By the agreement of the parties the petition is to be dismissed.

Petition dismissed.

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

MERRILL W. MOSHER *vs.* GEORGE H. JEWETT.

Distraining beasts. Lien by trespass. Estray.

A person injured in his lands by neat-cattle, may distrain and impound the animals doing the mischief; or he may have an action of trespass.

The lien given by R. S. c. 23, § 4, in the action of trespass is not one that gives the right of possession to the party injured; but it can only be enforced by attachment.

A person taking up an estray forfeits all claim for keeping the same unless he commits it to the pound-keeper within ten days.

Thus the plaintiff's bull broke and entered the barn of the defendant, who immediately posted notices thereof in three public places, and advertised the same in a daily paper. Within ten days the plaintiff called and saw the bull, but was doubtful of the bull's identity. After ten days, the defendant offered to deliver the bull to the plaintiff on proof of property and payment of five dollars for keeping, and indemnity against the claim of any other owner, but the plaintiff did not comply with the conditions. In thirty days the plaintiff demanded the bull and offered the defendant ten dollars for keeping, but the defendant refused to deliver him, whereupon the plaintiff replevied him. *Held*, that the defendant had no right to possession of the bull, nor any lien upon him which would authorize a judgment in his favor for the expense of keeping or for his damage.

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

REPLEVIN of a bull.

PLEA general issue, with a brief statement of title in some person unknown, and not in the plaintiff; that the bull was trespassing and damaging the defendant's close in Gorham, in this county, and that the defendant withheld him rightfully from the plaintiff by reason of a lien for said damages, and the defendant's necessary charges for keeping, etc.

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

The justice found that the bull was the plaintiff's property; that without the fault of the defendant, the bull broke and entered the defendant's close, to wit, his barn, Oct. 25, 1870, and was on that evening found by the defendant in his barn, without the defendant's license or consent; that the bull was there unlawfully and was damaging the defendant's hay and harness; that the defendant immediately posted notices in three public places in Gorham, and advertised the same in the Portland Press.

That within ten days the plaintiff called and saw the bull, but was doubtful of his identity; that after ten days, to wit, on Nov. 4, 1870, the defendant offered to deliver him to the plaintiff on proof of property, payment of $5 for keeping, and indemnity against the claim of any other owner, but the plaintiff declined to take him; that no demand was made on the defendant until Dec. 1, 1870, when he refused to deliver him up until he was remunerated for his expenses and care in keeping the bull; that the plaintiff offered, without tendering, $10, and replevied the bull Dec. 12, 1870.

That the defendant suitably kept the bull for forty-eight days, and that his keeping was worth $24; that the defendant paid $2 for advertising, and that the damage done by the bull was $4.

The justice ruled, as matter of law,

That the plaintiff was not, at the time of the demand, entitled to immediate possession of the bull, in that the defendant had a lien on the beast for his keeping, and that the plaintiff was not entitled to the bull until he had paid or tendered to the defendant payment therefor; and adjudged,

That the defendant, at the time the said bull was replevied, had a lien thereon for his keeping, and was entitled to the possession until the lien was discharged, and awarded damages in the sum of $30 for the defendant.

The plaintiff alleged exceptions.

Howard & Cleaves, for the plaintiff.

J. A. Waterman, for the defendant, contended, among other things, that the defendant had a lien on the animal replevied by virtue of R. S. c. 23, §§ 4 and 11; c. 96, § 4, and upon general principles.

The animal might be considered an estray. R. S. c. 23, § 11.

The owner called for the beast "within ten days."

The plaintiff was thereby a party to any delay in committing to the pound and cannot take advantage of it.

The defendant had a lien under R. S. c. 23, § 4.

There was technically and actually damage, injury to land of the defendant.

The defendant had his choice of remedies,—to impound or sue in trespass, and had the statute lien on the beast as security.

It is not the enforcement but the existence of the lien that is fatal to the plaintiff's case. He must show right to immediate possession.

There is no time prescribed in which the action of trespass, under this section, shall be commenced. By R. S. c. 23, § 22, ninety days are given in which to commence actions for forfeitures.

The defendant was not in fault for not commencing his action against the plaintiff whose doubts as to the identity of the animal, unwillingness to pay the moderate charge, or give any indemnity against other claims, contributed to the defendant's delay.

The beast was not out of defendant's possession from the time he was "lawfully taken and distrained," until replevied, and hence the lien was not interrupted. Ch. 23, § 4.

DANFORTH, J. By R. S. c. 23, § 4, a party injured in his lands by neat-cattle has two remedies. He may distrain the animals doing the mischief, and proceed as thereinafter directed, or he may have an action of trespass. In the former case, the remedy is not by distraint alone, but by that and such subsequent proceedings as are provided in the same chapter. These provisions require that the animal should have been committed to pound, and the damages ascertained by an appraisal as there specified. Instead of doing what the law requires, without the authority of and against the directions of the statute, the defendant kept the animal in his own possession. By such an unlawful proceeding he certainly could not obtain a lien upon the beast replevied for his keeping, nor could he retain one if such had existed for any purpose.

Nor is the lien given in the action of trespass, one that gives the right of possession to the party injured. It can only be enforced by attachment by the proper officer, and under a legal process. This process was not sued out, and this remedy affords the defendant no protection in this suit.

Nor does the attempted justification that the animal was taken up as an estray, avail the defendant. By § 11, c. 23, of R. S., a party taking up an estray forfeits all claim for keeping, and a penalty in addition unless he shall commit such estray to the pound-keeper within ten days. This provision of the statute was not complied with, and hence the defendant acquired no rights under it.

It follows that neither of the grounds of defense to this action set out in the pleadings can give the defendant any rights to the possession of the animal in question, nor any lien upon him which would authorize a judgment in his favor for the expense of keeping or for his damage. No ground is presented on which he can have any claim for keeping, and his damages, if recoverable, must be sought in a different process. *Exceptions sustained.*

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

MASON D. VIGOREAUX *vs.* LIME ROCK INS. COMPANY.

Time policy of insurance.

In the case of a time policy of marine insurance, it is immaterial where the vessel may be at the inception or termination of the risk, especially if no mention thereof is made in the policy.

Thus, where the agent of the insurance company, for receiving and forwarding applications, in his letter to the company requesting an insurance on a vessel "for a year from March 14, 1866, at noon," added, "she was at Gibraltar on that date." *Held*, That the representation of her whereabouts was not material.

ON REPORT.

ASSUMPSIT on a marine policy effected April 9, 1866, "for one year from March 14, 1866, at noon." Alleged injury occurred March 15th, 16th, 17th, 18th, and 19th, 1866.

The facts are sufficiently stated in the opinion.

Tallman & Larrabee, for the plaintiff.

A. P. Gould, for the defendants, contended that the representation was equivalent to a statement, that the vessel was safe in the port of Gibraltar. It was material. It was immaterial whether incorporated into the policy or not; or whether treated as a warranty or representation; whether made in good faith or not. In the absence of proof, the positive representation is presumed to have materially influenced the judgment of the underwriter, and will avoid the policy. 1 Arnould on Ins. 521.

A misrepresentation from mistake, ignorance, or accident, of any material fact, however innocently made, will avoid the policy. 1 Arnould on Ins. 498, 499, § 187 note *m*; *Fiske* v. *N. E. Mar. Ins. Co.*, 15 Pick. 310; *Hazard* v. *Same*, 1 Sumner, 211; *N. Y. Bowery Ins. Co.* v. *N. Y. Ins. Co.*, 17 Wend. 359; *Kohne* v. *Ins. Co. of N. A.*, 1 Wash. C. C. 93; s. c. 158; *Carpenter* v. *Am. Ins. Co.*, 1 Story, C. C. 57; *Bryant* v. *Ocean Ins. Co.*, 22 Pick.

200, 203; *Dennison* v. *Thomaston Mar. Ins. Co.*, 20 Maine, 135; 1 Arnould on Ins. 499 note *m*, 500; *Baxter* v. *N. E. Ins. Co.*, 3 Mason, 97; 1 Arnould on Ins. 515.

Gibraltar was not one of the termini of the risk, and it was not absolutely essential that the ship should have been in that port March 14, at noon, but in a place of safety. *Dennistoun* v. *Lillie*, 3 Bligh, cited approvingly in *Rice* v. *N. E. Mar. Ins. Co.*, 4 Pick. 442; *Manly* v. *U. S. M. & F. Ins. Co.*, 9 Mass. 85. The last case is different from the case at bar. There the vessel was pursuing her voyage in safety.

Counsel also cited *Bell* v. *Mar. Ins. Co.*, 8 Serg. & R. 98.

APPLETON, C. J. On 10th April, 1866, the defendants insured the plaintiff, and whom it might concern, "lost or not lost, twenty two hundred dollars on the ship Thomas Lord for one year from March 14, 1866, at noon." Shortly after March 14th, the vessel was damaged and an injury sustained, for which the defendants are responsible, if the policy attached. The policy is what is termed a time policy, and in such case it is immaterial where the vessel may be at the inception or termination of the risk. It is not pretended that there was any fraudulent conduct on the part of the plaintiff.

The insurance was effected through the procurement of Edwin Reed, who was an agent of the defendants, receiving applications for insurance, and forwarding the same to them, for which service he was allowed a commission. In his letter to them of April 9, 1866, requesting an insurance "for a year from March 14, 1866, noon," he writes, "she was at Gibraltar on that date."

The defense is that this statement was a material representation, and not being strictly accurate, the policy never attached.

But the representation cannot be regarded as material. That the defendants did not so regard it, is evidenced by the fact that no mention is made of it in the policy. In *Manly* v. *United M. & F. Ins. Co.*, 9 Mass. 85, the policy was "for one year, commencing the risk at Barbadoes on 7th Dec. 1810, at 12 o'clock at noon of said day." In fact, the vessel had left Barbadoes the preceding day

The objection was taken that the policy never attached, but the court held otherwise. "When the insurance," observes Sewall, J., "is for a term of time, the *termini* of the risk are the day and hour when the insurance commences and when it terminates, which last may be expressed by the term of its continuance; and to state the place where the risk shall be understood to have commenced, or where the vessel shall be when it terminates, is unusual, and, considering the uncertainty incident to the subject, would be inconvenient and render the existence of the contract uncertain, if the parties were thereby authorized to insist upon an exact coincidence of time and place." In *Martin* v. *The Fishing Insurance Co.*, 20 Pick. 389, a vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at, and from all ports and places to which she may proceed in the coasting business for six months." It was held, that the policy attached, though there was no evidence that the vessel was prosecuting her voyage from Calais, on the day named, neither party knowing where the vessel was then, and it being their intention to insure on time, without regard to where the vessel might then be. Much more, in the case at bar should the policy be deemed to attach, as there is no reference whatever to place, but the risk commences and terminates at definite periods of time.

But if the law were otherwise, it is difficult to perceive what grounds of complaint the defendants can have. It does not appear that the plaintiff made any statements to the broker as to the locality of the vessel, or authorized him to make any to the defendants, or that he knew anything as to where the vessel was on the 14th March. Reed was a part-owner of the Thomas Lord, and made the statement on his own account from aught that appears. It is not pretended that his conduct was in the slightest degree dishonest. He was the agent of the defendants in procuring the insurance, and if without authority from the plaintiff, he made a representation which was not strictly true, the plaintiff, who neither directed nor desired it, should not suffer therefor.

But it is not that there was any misrepresentation. It is conceded that the vessel at the time from which the policy begins, was

in the bay of Gibraltar, and within the general anchoring ground. Indeed, the plaintiff's witnesses testify that it is considered rather an open bay than a proper harbor.

The plaintiff is entitled to recover. The damages have been agreed upon at $512.45. From this sum is to be deducted the premium note of $232 and interest, and a default is to be entered for the balance with interest from the date of the writ.

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

JAMES M. HAGAR *vs.* NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

Peril of the sea—what is. Master—carelessness of, no defense. For what injury underwriters are liable.

The liability of vessels moored in tide harbors, as the tide ebbs, to take the ground in a mal-position, or to strike their bottoms against some hard substance, and to be thereby injured, is one of the perils of the sea for which underwriters are responsible.

The fact that the ship was brought into such a peril through the negligence of the master, and thereby injured, will not deprive the plaintiff of the benefit of his insurance, if he himself were not guilty of carelessness.

Where a marine policy on a vessel stipulates that the underwriter shall not be liable for any partial loss, unless it amount to five per cent, exclusive of all charges for ascertaining and proving the loss, two or more distinct losses cannot be added together to make up that amount.

But the plaintiff's right to recover is not limited to the amount actually expended for repairs, after deducting one-third new for old; for where by the perils insured against a vessel receives a strain which so alters her shape that she cannot be perfectly repaired without rebuilding her, and her value is thereby diminished, the underwriters are liable for such diminished value in addition to the expense of repairs, although the vessel is made seaworthy by the repairs, and is afterwards insured at the same premium and the same valuation as before.

ON REPORT.

ASSUMPSIT on a policy issued to the plaintiff, by the defendants, on ship "Ida Lilly," for one year from January 5, 1866, for the

sum of eight thousand dollars, the insurers not to be "liable for any partial loss on the vessel unless it amount to five per cent, exclusive of all charges and expenses incurred for the purpose of ascertaining and proving the loss."

There was evidence tending to show that the "Ida Lilly," then in good condition, tight and strong, arrived at Charleston, S. C., in August, 1866, from Liverpool, with a full cargo, where at the end of the wharf she was delivered over to a new master by her former one; that the mate, under the directions of the master, hauled her from the end of the wharf around and alongside into the slip of the dock; that she was then tight; that she was hauled up as far as she could go at high water; that as the tide fell off she seemed to lay aground from forward along rather abaft midships, water deep enough to float her any time from midships aft; that she lay so for several days before being discharged of her cargo; that she began to leak before she was half discharged; that some repairs were made, but the leak was not found; that she sailed November, 1866, with cotton to Liverpool, arriving December, common passage; that she lay afloat in a good dock forty days, thence sailed February, 1867, with coal to Havana, thence to Greenock, where she was taken out and found to be hogged, and thence to New York; that she had never touched bottom since she left Charleston; that along next the wharf in Charleston, where she lay, were some old logs from the wharf worked out and her bilge seemed to lay against them, a little abaft midships; that her copper wrinkled diagonally, indicating that she had laid on a hard substance.

It appeared the plaintiff left the bills with the president of the defendant company, amounting to $227 at Charleston, $67 at Liverpool, $50.58 at Havana, $910 at Greenock, $2,600 at New York.

The vessel registered 750 tons and was insured for $45,000. If the action was maintainable on so much of the evidence as was admissible, it was to stand for trial.

Tallman & Larrabee, for the plaintiff.

A. Libbey, for the defendants.

The hogging of the ship by taking the ground in her berth by the ordinary ebb of the tide is not a peril of the sea.

The phrase, perils of the sea, covers all losses or damage that arise from the extraordinary action of the wind and sea. 1 Pars. on Mar. Ins. 544; *Bullard* v. *Roger Williams Ins. Co.*, 1 Curtis C. C. 148.

When a vessel, moored in a tide-harbor, takes the ground when the tide falls, and by reason thereof is hogged or strained all over, this is not a peril of the sea, and the underwriters are not liable. *Magnus* v. *Butterner*, 9 Eng. L. & Eq. 461. See also, *Thompson* v. *Whitmore*, 3 Taunt. 227; *Bancroft* v. *Dinsmore*, cited in the last-named; *Phillips* v. *Barber*, 5 B. & Ald. 161.

But if taking ground by the ordinary action of the tide is a peril of the sea, the damage was caused by the negligence of the master in hauling the ship as far as he could at high-water, and keeping her there heavily laden. The peril was not the sole proximate cause. *United States* v. *Hall*, 6 Cranch, 171; *Dyer* v. *Piscataqua Ins. Co.*, 53 Maine, 118.

"The very object of insurance is to indemnify against losses which may occur to men who conduct themselves with honesty and ordinary prudence." *Thompson* v. *Hopper*, 88 E. C. L. 950; 38 L. & Eq. 45.

The loss chargeable to the insurers in this case does not amount to five per cent. In partial loss the damage by one peril of the sea must amount to five per cent. Damage by two or more perils cannot be aggregated to make up the five per cent. *Brooks* v. *Oriental Ins. Co.*, 7 Pick. 258.

WALTON, J. Action on a marine insurance policy. The plaintiff's right to recover is resisted on several grounds. First, it is said that the plaintiff's ship was not injured by a peril of the sea. Second, that it would not have been injured but for the carelessness of the master. Third, that no one of the losses alone amounted to five per cent of the valuation of the ship, and that two or more losses by separate and distinct perils cannot be added together to make up that amount.

1. All ships moored in tide-harbors are liable, as the tide ebbs, to take the ground in a mal-position, or to strike their bottoms against some hard substance, and to be thereby injured. This danger constitutes one of the perils of the sea for which underwriters are responsible. *Potter* v. *Ins. Co.*, 2 Sum. 197.

2. It is no defense to an action for such an injury that the ship was brought into peril through the carelessness of the master. If the plaintiff himself was not guilty of carelessness, the negligence of his servants will not deprive him of the benefit of his insurance. So settled both in England and in this country. The question is thoroughly examined in *Copeland* v. *Ins. Co.*, 2 Met. 432, and *Mathews* v. *Ins. Co.*, 1 Kernan (11 New York), 9.

3. It is true the plaintiff cannot recover unless his loss amounts to five per cent of the valuation of the ship, exclusive of all charges for ascertaining and proving the loss; for such is the express language of the policy. It is also true, that two or more distinct losses cannot be added together to make up that amount. *Paddock* v. *Ins. Co.*, 104 Mass. 521; *Brooks* v. *Ins. Co.*, 7 Pick. 258.

But the plaintiff's right to recover is not limited to the amount actually expended for repairs, after deducting one-third new for old. Where, by the perils insured against, a vessel receives a strain which alters her shape so that she cannot be perfectly repaired without rebuilding her, and her value is thereby diminished, the underwriters are liable to the extent of such diminished value, in addition to the expense of repairs, although the vessel is made seaworthy by the repairs, and is afterward insured at the same premium and at the same valuation as before the injury. So held in *Giles* v. *Ins. Co.*, 2 Met. 140.

Whether the plaintiff will be able to bring his case within these principles is a question in relation to which we express no opinion. We think the evidence is sufficient to entitle him to have it submitted to a jury. *Action to stand for trial.*

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

CHARLES HOLT *vs.* PLEAMAN HOLT.

Bounty money—to whom it belongs. Desertion—conviction of essential before being subject to its disabilities.

The plaintiff, when a minor, enlisted into the military service of the U. S., with the consent of his father, to whom he gave his bounty-money, and, subsequently, deserted from the service. When he became of age, he demanded the money of his father, who refused to refund it. In assumpsit for money had and received, *Held*, (1) That the action was maintainable; (2) That a person must be lawfully convicted of desertion before "he shall be deemed and taken to have voluntarily relinquished and forfeited his rights of citizenship;" (3) That interest is recoverable from the time it was received by the father.

ON EXCEPTIONS.

ASSUMPSIT to recover the sum of five hundred and ninety-four dollars given by the plaintiff to his father, the defendant, Aug. 23, 1864. This money was received by the plaintiff as a bounty for enlistment, with the written consent of his father, into the U. S. military service for three years, he being then a minor seventeen years of age.

The case was submitted to the presiding judge, with the right of exceptions, who found, as matters of fact,

That the plaintiff enlisted into the military service of the U. S. in August, 1864, when a minor; that his father gave his written consent to the enlistment; that the plaintiff received $600 as bounty, $594 of which he sent to his father, who received it; that the plaintiff deserted; that when of age, he demanded the money of his father who refused to refund it; and that the demand was before this suit was commenced.

The presiding judge ruled that the action was maintained for the amount demanded and interest; and thereupon the defendant alleged exceptions.

W. W. Virgin, for the plaintiff.

J. J. Perry, for the defendant, contended, *inter alia*, that the plaintiff having deserted had forfeited his right to sue by virtue of act of congress of March 3, 1865, c. 79, § 21.

Holt *v.* Holt.

DICKERSON, J. Assumpsit to recover certain money of the defendant, which the plaintiff received as bounty, and delivered to the defendant, when he enlisted into the military service of the United States.

The case was tried by the presiding justice with the right to except in matters of law. The justice found, as matter of fact, that the plaintiff enlisted, when a minor, with his father's consent, and sent $594 of his bounty to the defendant, who is his father, and received the money; that the plaintiff deserted; that when of age, and before action brought, he demanded the money of the defendant, who refused to refund the same. This finding of the justice is conclusive upon the parties.

The justice ruled, as matter of law, that the action can be maintained for the amount demanded and interest, and the defendant excepted.

Bounty-money, received by a minor upon his enlistment into the military service of the United States, is a gift to him, and not wages, and an agreement by him to give such bounty to his father or master for permitting him to enlist is voidable by such minor on the ground of infancy. The demand of the money, and the bringing of this action show an election by the plaintiff to treat such agreement, if any there was, as void. *Mears* v. *Bickford*, 55 Maine, 528; *Kelley* v. *Sprout*, 97 Mass. 169.

The crime of deserting the army of the United States is exclusively an offense against the government of the United States, and is punishable only through the courts of the United States having jurisdiction thereof. Courts-martial of the United States have exclusive jurisdiction of this offense, and must find the party charged with being a deserter guilty thereof, before "he shall be deemed and taken to have voluntarily relinquished and forfeited his rights of citizenship," under the act of congress, c. 79, § 21, approved March 3, 1865.

Both desertion and conviction for that offense are necessary to render a person liable to suffer the penalty imposed by that statute. The justice found the desertion only; the other material fact is

wanting. The statute, therefore, becomes inapplicable, and the ruling of the justice was correct. *State* v. *Symonds*, 57 Maine, 151. From the view we have taken of this case, it is unnecessary for us to determine the effect that forfeiture of the rights of citizenship, under the act of congress cited, would have upon the right of a party subject to that disability, to maintain an action in the courts of this State. It will be time enough to settle that question when it properly arises. *Exceptions overruled. Judgment for plaintiff for five hundred and ninety-four dollars ($594) and interest from Aug. 23, 1864.*

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

ALFRED C. TUXBURY *vs.* WILLIAM F. ABBOTT and another.

Usurious note—judgment on.

In an action on a promissory note, given in 1869, payable on time, with interest at seven and one-half per cent, the plaintiff may, under R. S. of 1857, c. 45, recover judgment for the amount of the note at simple interest.

ON REPORT.

ASSUMPSIT on a promissory note, given Feb. 26, 1869, by the defendants to the plaintiff payable in two months, "with interest at the rate of seven and one-half per cent."

The writ contained one count on the note as payable with interest; and the other with a literal description of the note. The defendant pleaded to the former and demurred to the latter which were joined.

If the plaintiff could maintain the action for the amount of the note and legal interest on either of the counts, the defendants were to be defaulted for the amount and costs.

Edward Eastman, for the plaintiff, on the question of severance, cited Met. on Cont. 246, 247; *Chamberlain* v. *Goldsmith*, 2 Brownl. 282; *Norton* v. *Syms*, Moore, 856; *Wood* v. *Benson*, 2 Tyrw. & G. 93.

Edwin B. Smith, for the defendants, contended, among other things, that the contract is an entirety and not separable, and cited Story on Cont. §§ 21, 22; 1 Pars. on Cont. (2d ed.), *30; 1 Bouv. Dict. 269, § 694. After an enforcement of the principal, the interest cannot be collected. *Tillotson* v. *Preston*, 3 Johns. 229.

A promise to pay a sum certain, and also "all fines according to rule;" or "also all other sums that may be due;" or with "the current rate of exchange to be added," cannot be enforced as a note for the sum certain, because it is an entire contract. *Arey* v. *Fearnside*, 4 M. & W. 168; *Smith* v. *Nightingale*, 2 Stark. 375; *Bolton* v. *Dugdale*, 4 B. & A. 619.

If the promise to pay interest be in the note and not in the count which declares upon it, the note cannot be read in evidence. *Gragg* v. *Frye*, 32 Maine, 283. The same must be true as to the statement of the rate.

So where there was a promise to pay interest alleged and none proved, the court deemed it a variance. *Tappan* v. *Austin*, 1 Mass. 31.

A promise to pay interest independently of the rate is inconceivable. If the rate be not expressed, the legal rate is conclusively presumed; if expressed, it may or not conform to the statute rate; but in either case it is a part and qualification of the promise to pay interest. So that if any part of the contract be rejected, it must be the whole promise to pay interest, and hence the note would no longer correspond with the declaration.

When part of note has been for liquors unlawfully sold, although the amount charged for liquors was well known, definite, and easily ascertainable, the courts have declared the note wholly void. *Ladd* v. *Dillingham*, 34 Maine, 316; *Hay* v. *Parker*, 55 Maine, 355; *Carlton* v. *Bailey*, 7 Foster, 230; *Roby* v. *West*, 4 N. H. 285. So

of other contracts on similar considerations. *Shaw* v. *Spooner*, 9 N. H. 197; *Clark* v. *Ricker*, 14 N. H. 44; *Perkins* v. *Cummings*, 2 Gray, 258. And this independent of any statute making such notes void. *Deering* v. *Chapman*, 22 Maine, 488.

The plaintiff can recover upon nothing but the contract declared on. And if any part of the contract proved should vary materially from that stated in the pleadings, it will prove fatal; for a contract is indivisible. "The entire consideration must be stated, and the entire act to be done in virtue of such consideration, together with the time, manner, and circumstances; and with all parts of the proposition, as thus stated, the proof must agree." 1 Greenl. on Ev. § 66; *Robbins* v. *Otis*, 1 Pick. 368; *Goulding* v. *Skinner*, 1 Pick. 162; *Baylies* v. *Fettyplace*, 7 Mass. 325; *Bridge* v. *Austin*, 4 Mass. 116; *Fouquet* v. *Headley*, 3 Conn. 534; *Miles* v. *Roberts*, 34 N. H. 245; *Kidder* v. *Flagg*, 28 Maine, 477; *Grant* v. *Naylor*, 4 Cranch, 224.

"A note payable at sixty days cannot be given in evidence to support a count which does not state when the note is payable. The variance is fatal. Nor can plaintiff prove this was his attorney's mistake, and that the note produced is that intended by the declaration." *Sheehy* v. *Mandeville*, 7 Cranch, 208.

In the cause at bar there is no "mistake" on anybody's part. The difficulty arises from the plaintiff's deliberate disregard and defiance of the law; and he cannot complain if he suffer from it.

A variance similar to that in *Sheehy* v. *Mandeville* was again declared fatal by the United States supreme court in *Page* v. *Bank of Alexandria*, 7 Wheat. 35. So in *Morris* v. *Fort*, 2 McCord, 397; *Coller* v. *Boykin*, Minor, 206.

So is a misstatement of date. *Carlisle* v. *Trears*, Cowp. 672; *Stephens* v. *Graham*, 7 S. & R. 405; *Bank* v. *Allen*, 11 Vt. 302; *Fallis* v. *Howarth*, Wright, 303.

Or even statement of a date when the note has none. *Atlantic, &c., Co.* v. *Sanders*, 36 N. H. 252.

The words "for value received" are descriptive and cannot be rejected, nor can note not containing them be read under a decla-

ration which contains them. *Saxton* v. *Johnson*, 10 Johns. 418; *Rossiter* v. *Marsh*, 4 Conn. 196.

Note was declared upon as payable at the house of B. & Co.; proved that that was a mere memorandum at foot of note. Held a variance. *Ezron* v. *Russell*, 4 Maule & Selw. 505.

If payable at any place, that must be truly stated. *Puckett* v. *King*, 2 Ala. 570; *Murphee* v. *State Bank*, 4 Pike, 448.

That the whole note should have been set out in effect; see *Whitaker* v. *Smith*, 4 Pick. 83; *Stanwood* v. *Scovil*, Ib. 422; *Hart* v. *Tyler*, 15 Pick. 171; *Leach* v. *Blow*, 8 S. & M. 221; *Woodstock Bank* v. *Downer*, 1 Wms. Vt. 482; *Boylston* v. *Sherran*, 31 Ala. 538; *Shaw* v. *Noble*, 15 La. An. 305.

So where a promise "to give a note for $24" is alleged, and one proved to give a note for that sum "payable in plank and a gun," the variance is fatal. *Gowry* v. *Ward*, 25 Vt. 217; *Titus* v. *Ash*, 4 Foster, 319.

So is the omission of a stipulation for "interest from date." *Sawyer* v. *Patterson*, 11 Ala. 523; *Gragg* v. *Frye*, 32 Maine, 283.

Or of the words "or discount." *Addio* v. *Vanbuskirk*, 4 Zab. (N. J.), 218.

It is of no consequence that the proof is of a larger sum or quantity than alleged; it is yet a variance. *Foster* v. *Pennington*, 32 Maine, 178; *Crawford* v. *Morrell*, 8 Johns. 253.

A complaint upon a promissory note is not sufficient unless it contain averments by which identity of paper filed with that sued is made apparent upon the record. *Bennett* v. *Wainwright*, 16 Ind. 211.

Where an instrument is not truly described in its material parts, it cannot be read in evidence under a special count upon it. *Higgins* v. *Lea*, 16 Ill. 495; *Cunningham* v. *Hobart*, 7 Gray, 423; *Chittenden* v. *Stevenson*, 26 Conn. 442; *Scott* v. *Ham*, 9 Barr. (Pa.), 407.

And the law of variance is the same even as to contracts not in writing. *Leery* v. *Goodson*, 4 D. & E. 687; *Robertson* v. *Lynch*, 18 Johns. 451; *Bending* v. *Manning*, 2 N. H. 289.

The general principle, in short, is that the omission or misstatement of any limitation, qualification, or term of the contract, whether it be written or verbal, is fatal. If the full promise be not stated there is a variance. *Penny* v. *Porter*, 2 East, 2; *Wheelwright* v. *Moore*, 1 Hall, N. Y. Sup. Ct. 20; *Snell* v. *Moses*, 1 Johns. 105; *Stone* v. *Knowlton*, 3 Wend. 374; *Pope* v. *Barrett*, 1 Mason, 123; *Hilt* v. *Campbell*, 6 Greenl. 109; *Symonds* v. *Carr*, 1 Campb. 361; *Thomas* v. *Williams*, 10 B. & C. 664; *Snow* v. *Winters*, 7 Cowen, 263; *Close* v. *Miller*, 10 Johns. 90.

Suppose two notes, both bearing the date and for the amount mentioned in plaintiff's first count, and payable to the person, and at the time and place there stated, were produced and were found to differ only in regard to interest; one reading, simply, "with interest," and the other having the additional clause, "at the rate of 7½ per cent;" which would the court receive as conforming to the declaration? the former or the latter? Could it be, then, said that the latter corresponded with the declaration? If not, does the mere fact that the plaintiff has not offered any such note make the one he does produce to correspond with the declaration?

The declaration omits to state the rate of interest upon which the loan was effected and credit given, while it is stated in the note; was the rate a material portion?

The rate was the inducement for the plaintiff to enter into the contract.

If the contract be illegal, will the court frame for them one which they did not make, and then adjudge damages for breach of it.

Where there is an entire contract, or even a severable one, and the whole contract is set out and sought to be recovered upon, if any part of the contract be against the law the plaintiff must fail entirely. *Lord Lexington* v. *Clarke*, 2 Vent. 223; *Thomas* v. *Williams*, 10 B. & C. 664, cited *ante*; *Chater* v. *Beckett*, 7 T. R. 201.

See Bailey, B., opinion in *Wood* v. *Benson*, 2 Tyr. & G. 99; 6 Cush. 508–513; *Lea* v. *Barber*, 2 Anst. 425, note.

The trouble is that in the written, express contract, illegality was stipulated for in, and so pervaded and was interwoven with the

whole agreement, that when that is removed the whole is destroyed. *Irvine* v. *Stone*, 6 Cush. 512.

"The end accomplished is not the test by which we are to judge of the validity of the contract, but rather the end aimed at by the parties. That this end was a violation of the spirit [and letter] of the law . . . would seem to be too clear to admit of a doubt. . . . By all the authorities, as well as upon sound principle, such a contract cannot be sustained." *Weld* v. *Lancaster*, 56 Maine, 458.

KENT, J. This case has been very elaborately and ably argued; but after a careful examination, it appears to us quite too free from doubt to require any extended opinion.

The defendant objects that the plaintiff cannot recover on his first count, because it does not set out the whole contract; nor upon his second, because it does.

The single question is whether, under the usury laws of 1857, c. 45, a plaintiff can have judgment for his debt and legal costs, when it appears by the contract itself or by evidence *aliunde* that more than six per cent is reserved. It makes no difference whether the extra interest is taken or reserved directly or indirectly,—whether this fact appears on the face of the written contract or by proof *aliunde*. It is the fact, and not the mode of proof, that is material.

By the statute, since the old law (making entirely void any usurious contract) was changed, the only effect of taking or reserving more than six per cent is that it cannot be recovered, and the damages are reduced; and when it has been paid, recovered back. The courts have even allowed a party to indorse the extra interest before trial to save costs. *Cummings* v. *Blake*, 29 Maine, 105; *Hankerson* v. *Emery*, 37 Maine, 16; *Lumberman's Bank* v. *Bearce*, 41 Maine, 505; *Knight* v. *Frank*, 48 Maine, 320; *Whitten* v. *Palmer*, 50 Maine, 125. The only thing, then, in the nature of a penalty is loss and payment of costs. No one has questioned the right to recover the debt and legal interest. It is every day's practice.

The objection that there can be no severance between the debt

and interest and illegal interest is unsupported by authority. It is clearly within the rule of severance; because the consideration being good, the portion of the contract which is invalid and not recoverable can be ascertained and fixed without mistake. There is nothing that vitiates the whole. By the terms of the report

Defendants defaulted. Judgment for amount of note and costs, as stated in the report.

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

HENRY S. STANLEY *vs.* JOSEPH S. KEMPTON and another.

Mortgage of lands—assignment of. Writ of entry.

The interest of the mortgagee in a mortgage of land, can be assigned by deed only.

To a writ of entry brought on an unassigned mortgage of land by the mortgagee against the mortgager, the fact that the mortgage and notes, secured thereby, were the property of a third person who forbade the suit, constitutes no defense.

ON EXCEPTIONS.

DICKERSON, J. Writ of entry on a mortgage. The mortgage was given to the plaintiff, and the mortgage notes were made payable to him or order. Both the mortgage and notes were brought into court by one George W. Stanley, a brother of the plaintiff, on a subpœna *duces tecum* served on him by the plaintiff.

The plaintiff testified that the mortgage declared on, and the notes therein named, were delivered to him, and were his property; that they had been taken from his possession without his consent, and that all the notes were due and unpaid.

The defendants offered to prove by said Stanley that the notes and mortgage were delivered to him by the plaintiff, and that they were his property.

The case was withdrawn from the jury and submitted to the presiding justice, with the right to except to his rulings in matters of law. The justice ruled that the testimony offered constituted no defense to the action, and rendered judgment for the plaintiff. To this the defendant excepted.

The interest of the mortgagee being in the nature of an interest in land can only be assigned by deed. Even the assignment of the mortgage debt does not operate at law as an assignment of the mortgagee's interest in the land. *Vose* v. *Handy*, 2 Greenl. 333; *Gould* v. *Newman*, 6 Mass. 239; *Dwinel* v. *Perley*, 32 Maine, 197; *Young* v. *Miller*, 6 Gray, 152; *Smith* v. *Kelley*, 27 Maine, 237.

Never having parted with his interest as mortgagee of the land by deed, the plaintiff is entitled to maintain this action to recover possession of the mortgaged premises. The evidence offered by the defendant, if admitted, would not have constituted a legal defense to this action at law, and the justice so ruled. The remedy (if any) of G. W. Stanley is against plaintiff in equity.

Exceptions overruled.

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

H. L. Whitcomb, for the plaintiff.

S. Belcher, for the defendant.

Patrick Driscoll *vs.* Lewiston Equitable Co-operative Society.

Corporation—withdrawal of stock therefrom.

In 1863, a voluntary association was established by the name of the "Lewiston Equitable Co-operative Society" for the buying and selling to shareholders and others groceries, etc., and its constitution provided that members might "withdraw their funds by giving" certain notices, and its by-laws that when a notice to withdraw is given, his "membership ceases." In January, 1867, a corporation by the same name and for the same purpose, was organized under an act of the legislature. In September following, the agent and salesman of the corporation handed to the plaintiff a printed copy of the "constitution and by-laws of the Lewiston Equitable Co-operative Society, established December, 1863," informing him it was the constitution and by-laws of the defendant corporation, and thereupon the plaintiff purchased fifty shares of the stock, became a member, attended its meetings, had opportunity at all times to examine its constitution, by-laws, and records, and purchased goods of its agents, and received one dividend. By the by-laws of the corporation, members might, by giving notice, surrender their certificates of stock, and receive therefor its fair and equitable value, to be determined by the managers,—"provided that the assets shall be in excess of its liabilities, and not otherwise." The corporation became insolvent in December, 1868, and has continued so. In January, 1869, the plaintiff gave notice, as by the constitution and by-laws of the voluntary association, of his withdrawal of funds and membership, and brought this action to recover back his money. *Held*, (1) That the defendants were not bound by the rules of the association by estoppel; and (2) That this corporation is subject to R. S. c. 46, § 33.

Kent, J. This case is referred to the court, upon an agreed statement as to most of the facts, and the report of the evidence given as to the remainder.

The action is assumpsit to recover back the sum of two hundred and fifty dollars, paid in by the plaintiff for fifty shares of the capital stock of the company. The plaintiff avers in his declaration, that "thereby he became a shareholder, and entitled to all the rights and privileges of the society, and also, that by the rules of the same, he was entitled to interest and dividends arising from the business of the company, and upon compliance with certain rules established by the company, he had a right to withdraw his money so invested

with the accrued interest and dividends thereon. And he further avers that he has complied with all the rules of the corporation for such withdrawal, by giving such notice as is prescribed by the constitution and by-laws of said society,—in consideration whereof, the defendants then and there became liable, and promised, etc. The defendants are described in the writ as a corporation duly established by law, doing business at Lewiston.

It appears that the corporation was created by act of January, 1867; that the plaintiff became a shareholder and member in September, 1867; that after he became a shareholder he was duly notified of all meetings, and personally attended many of them; that he received one dividend; that the constitution, by-laws, and records of the society have been open to the plaintiff's inspection since his connection with the society, and, during this time, he has been accustomed to purchase goods at the society's store.

It further appears, satisfactorily, that the society or corporation became insolvent, and without assets or property sufficient to pay its liabilities before December, 1868, and has continued insolvent to this time. The plaintiff gave written notices in January and March, 1869, to the corporation. In the first, of his intention to withdraw his two hundred and fifty dollars, according to Art. 9 of the constitution of the society; and, in the second notice, that he withdrew his membership, in accordance with Art. 25 of the by-laws.

But the defendants say that they had no such articles in their charter or by-laws. As we understand the facts and the arguments, the plaintiff does not contend that there are any such rules adopted by the corporation, but he says that these were the rules of a voluntary, unorganized association, having the same name and existing for a like purpose. The plaintiff does not appear to have been a member of this voluntary association, nor is there any connection shown between the two organizations. The corporation was a new and independent creation, and proceeded to organize and to adopt a constitution and rules as to stockholders and their rights and duties; and by article 9 provided that stockholders may sur-

render their certificates of stock to the society and receive therefor its fair and equitable value to be determined by the managers, by giving notice beforehand, provided that the assets of the society shall be in excess of its liabilities, and not otherwise.

The plaintiff, not contending that these facts would sustain his action, says further, that one Burke, the defendants' agent, gave him a printed copy of the regulations of the former voluntary association, at or about the time he paid his first money, and told him it was the regulation and by-law book, and that he gave it to him on his asking for it. In this book are found the rules as to withdrawing, and which the plaintiff says he has complied with by the notices required; and he now contends, that the corporation was bound by those rules by estoppel, if by no other mode.

But it does not appear that Burke was an officer, or even a member of the corporation, or that he had any authority to deliver this book, or to make any representations, as to what by-laws the corporation had adopted.

Nor does it appear that he made any representations, or even that he knew that the plaintiff had an intention of becoming a member. Burke was the keeper of the store, the salesman of the corporation. It would be strange indeed if his mere act of handing this book, which on its face showed that it was one issued years before by an unchartered, voluntary company, without any evidence of prior authority to do so, on any subsequent ratification, could create or impose upon a corporation, which was in all respects independent, a code of laws and regulations touching vitally its interests and very existence.

The plaintiff was a member, attended meetings, had an opportunity to know what rules had been adopted, and it is too late now for him to invoke his ignorance of what had been done, and to claim to be governed by the rules of another association, never adopted or recognized by the corporation now defending.

We have before stated the substance of the declaration in this case. It does not proceed upon the ground of fraud or mistake, or false representations by defendants or their agents. It is based

on a contract, pure and simple. It lays the foundation for a promise in the fact that the plaintiff paid this money to this corporation, which undertook to act and be governed by certain rules by which at any time, on giving the required notice, he might withdraw his money and his membership, and on the allegation that he had complied with these rules.

He shows no such rules by this corporation, but attempts to show that he was induced to take these shares by the delivery and the reading of the book handed to him by Burke. If these acts were fraudulent or deceitful, then the remedy should be in some action in the nature of an action for a tort. This declaration cannot be sustained by anything short of evidence of such rules as are stated, existing as the rules of this corporation.

But there is another view, perhaps more conclusive than any other.

This corporation was subject to the general provision, embracing all corporations (except for literary, benevolent, or banking purposes), contained in R. S. c. 46, § 33. No such corporation is allowed to divide any of their corporate property, so as to reduce their stock below its par value, until all debts are paid, and then for purpose of closing its concerns.

It seems that this corporation was bankrupt before any notice of intended withdrawal by the plaintiff. A by-law of such corporation, which would allow the withdrawal of the whole capital by the members on demand or notice, when it was, in fact, insolvent, would be in direct contravention of the spirit and letter of this section. The grossest frauds might thus be perpetrated under such a rule. It would allow the corporators, when they discovered an impending insolvency, to divide the property, by notice, and leave the creditors remediless.

This may have been the reason why there was such a marked difference between the rules of the two associations as to withdrawal. The voluntary co-partnership was not a corporation under this law, and could make its own private agreements. But under the provisions of this section, no rule or by-law, by which capital

stock or any property could be divided in any manner, could be legal or binding. If, then, there had been any such by-law existing, and apparently binding on this corporation, it would be held null, and of no effect, because in contravention of the policy and the express enactments of the law of the State.

We see no ground on which this action can be sustained.

Plaintiff nonsuit.

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

W. P. Frye & J. B. Cotton, for the plaintiff.

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

JOHN LEE *vs.* JANE LANAHAN.

Married Women—promise of prior to act of 1866.

In September, 1863, the plaintiff deposited one hundred dollars, for safe-keeping, with the defendant, who was at the time and still is a married woman; and in August, 1870, demanded the same of her, who refused to deliver it. In assumpsit for money had and received, *Held*, (1) That at the time of the deposit no action could be maintained against a married woman on her contracts; (2) That the act of 1866, c. 52, making her contracts valid, was prospective and not applicable; and (3) That the action was not maintainable.

ON EXCEPTIONS.

ASSUMPSIT for money had and received. The writ was dated Aug. 13, 1870.

It appeared that on the 3d of September, 1863, the plaintiff deposited with his daughter, the defendant, who then was and still is a married woman, for safe keeping, the sum of one hundred dollars, and on 17th September, the further sum of twenty dollars; that on Aug. 12, 1870, having received none of the deposits, the plaintiff demanded the several sums of the defendant, who refused

to deliver the same or any part thereof, whereupon this action was brought.

The presiding judge ruled that the action was not maintainable on the foregoing facts, and the plaintiff alleged exceptions.

W. P. Frye & J. B. Cotton, for the plaintiff.

When a bailee refuses to redeliver the subject of the bailment, he so far converts it, as to be liable in tort.

And it may be stated in general terms, that where one man wrongfully takes another's money or money's worth, the latter, although having a clear right to maintain an action as for a tort, may waive the tort and sue in assumpsit for money had and received. 2 Greenl. Ev., § 120; *Mason* v. *Waite*, 17 Mass. 560.

The basis of such an action is not of a contract between the parties, but legal obligation. 2 Greenl. Ev., § 118, and cases cited; *Hall* v. *Marston*, 17 Mass. 579; 2 Greenl. Ev., § 119; Metcalf on Cont. 5.

Suppose a minor embezzles money and refuses to restore it, a case entirely devoid of the elements of a contract; yet, notwithstanding his minority, it is held that the money may be recovered under a count for "money had and received." Oliver's Precedents, assumpsit.

Is there a legal obligation upon a married woman to restore money which she has no "right conscientiously to retain?"

If a married woman is made a depositary, she has no right to detain the deposit, and the husband is bound to restore it if within his power. Story on Bailments, § 50.

In that case the specified article is to be returned.

Why was the husband liable? Because, then, on marrying the woman she became a legal nonentity. All her personal property either became his or might be made so, while her real estate was effectually under his control. The wife had nothing out of which to satisfy a claim for damages for retention of the deposit. 2 Kent's Com. 144 (10th ed.).

But this general rule is subject to certain exceptions,—when the

principle of the rule could not be applied, and when reason and justice dictate a departure from it. 2 Kent's Com. 144 (10th ed.).

The action of *Fuller* v. *Bartlett*, 41 Maine, 241, is unlike the present. That was an action sought to be sustained on a contract.

Neither is the action barred by the statute of limitations.

It is a statute of strict right, and must be pleaded. Angel on Limitations.

No right of action accrued till after demand made by plaintiff.

If one place money or goods in the hands of another upon an agreement that the bailee shall keep them safely and return them when demanded by the bailor, it is a direct trust to which the statute will not apply. Angel on Limitations, 170; Ballentine on Limitations, 309; Blanchard on Limitations, 40.

M. T. Ludden, for the defendant.

APPLETON, C. J. Where money is loaned to be repaid upon demand, the statute of limitations instantly attaches. *Ware* v. *Hewey*, 57 Maine 391.

But where it is deposited for safe-keeping, no action lies until after a demand. *Hosmer* v. *Clarke*, 2 Greenl. 308.

As more than six years elapsed between the deposit and the demand, it may be questionable whether the demand was made within a reasonable time, which would seem to be within the time required by the statute for bringing an action. *Codman* v. *Rogers*, 10 Pick. 112.

But however that may be, at the time of the deposit in 1863, no action was maintainable against a married woman, upon contracts entered into by her. *Fuller* v. *Bartlett*, 41 Maine, 241; *Ayer* v. *Warren*, 47 Maine, 217.

This is an action of assumpsit, and upon a contract express or implied. The contract to return the deposit was made when the money was deposited. The defendant was not then liable on her contracts. No contract has since been made. The act of 1866, c. 52, providing that "the contracts of any married woman,

made for any lawful purpose, shall be valid and binding," is prospective, and has no application to past contracts. If the wife is not liable upon her note of hand, she cannot be liable where there is no written promise. An oral promise of a married woman is not more binding than one in writing. *Bryant* v. *Merrill*, 55 Maine, 515.

Plaintiff nonsuit.

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

TAPLEY, J., dissented.

MERRITT C. BALDWIN, administrator in equity, *vs.* CHARLOTTE W. BEAN and others.

Will—construction of—court's opinion—when a party is entitled to.

R. S. c. 77, § 5, authorizing this court, as a court of equity, to determine the construction of wills, secures to the parties in interest the right, in all cases of doubt, to have the opinion of the court as to the legal effect of a will, whether any actual controversy in relation thereto has arisen or not.

The only item in the testator's will was of the following tenor: "First and final, I give and bequeath to my beloved wife," naming her, "all the real and personal estate of which I may die seized and possessed, after payment of all my just debts." *Held*, that there being nothing in the will indicating that the testator intended to devise a less estate, his wife, by virtue of R. S. c. 74, § 16, took an estate in fee-simple.

WALTON, J. This is a bill in equity in which the court is asked to determine whether Charles W. Richardson, by his last will and testament, devised to his wife an estate in fee-simple, or an estate for life only.

The defendants say they have never in any way interfered with the lands devised, and they deny the authority of the court to determine the rights of the parties in advance of any actual controversy.

We have had grave doubts whether this objection is not well taken. But the statutes of the State (R. S. c. 77, § 5) provide

that this court shall have jurisdiction as a court of equity, to determine the construction of wills; and we are inclined to think it was the intention of the legislature to secure to the parties in interest the right, in all cases of doubt, to have the opinion of the court as to the legal effect of a will, even in advance of any actual controversy.

It is an old maxim, that an ounce of prevention is worth a pound of cure; and this is as true in law as in medicine. To prevent litigation is better than to end it. If by a bill in equity the parties in interest can all be brought before the court at one time, not only may a multiplicity of suits be avoided, but a just result much more certainly obtained. And by removing any cloud that may rest upon their titles, the owners will be enabled to deal with the property more understandingly; and if need be, sell it for its true value; for purchasers will not then be deterred from buying it for fear they may buy a lawsuit with it. Influenced by these considerations, we think the statute, conferring upon this court jurisdiction in equity to determine the construction of wills, ought to be liberally interpreted; and that in all cases of doubt, the parties should be allowed to have the opinion of the court, whether any actual controversies have arisen or not.

Coming, then, to the consideration of the will, we repeat that the question is whether it gives to the devisee an estate in fee-simple, or an estate for life only. The devising clause is as follows:

"First and final, I give and bequeath to my beloved wife, Abby W. Richardson, all the real and personal estate of which I may die seized and possessed, after payment of all my just debts."

It will be noticed that the devise contains no words of inheritance; that the words, "her heirs and assigns," are omitted. The question is whether such a devise is sufficient to pass an estate in fee-simple.

We think it is. A statute of this State provides that "a devise of land must be construed to convey all the estate of the devisor therein, unless it appears by his will that he intended to convey a less estate. R. S. c. 74, § 16.

There is nothing in the will before us to indicate that the testator intended to convey a less estate. We cannot doubt, therefore, that his wife took an estate in fee-simple, and a decree will be entered to that effect.

No costs for either party.

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

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

R. Washburn, for the respondents.

WILLIAM CURTIS and another *vs.* CITY OF PORTLAND. 59 483 / 94 231

Practice. Authority — delegation of.

When a report of referees itself presents a question of law, upon the determination of which the result is made to depend, and judgment is to be entered up for one party or the other, according to the decision of the legal point involved, the XXIst rule of court requiring parties, objecting to the acceptance of a report, to file their objections in writing, does not apply.

To make a written contract between contractors and the committee on streets binding on the city, it must be signed by at least a majority of the committee; and they cannot give their chairman authority to execute it without this.

Thus, under an order of the common council of the city of Portland, the committee on streets, having advertised for bids for grading a certain street, accepted the plaintiffs' bid, which was the lowest, and thereupon the chairman of the committee, acting for them and with their consent in behalf of the city, and the plaintiffs in their own behalf, executed a written contract embodying therein the details of the agreements of the respective parties in relation to the premises. In an action on the contract, *Held*, that the city was not thereby bound.

ON EXCEPTIONS.

COVENANT BROKEN.

BARROWS, J. When a report of referees itself presents a question of law, upon the determination of which the result is made to depend, and judgment is to be entered up for one party or the other, according to the decision of the legal point involved, by the court to whom the report is returned, the XXIST rule of court, requiring all parties objecting to the acceptance of a report to file their objections in writing, does not apply. The defendants do not, in fact, object to the acceptance of the report, but to the ruling which made it adverse to them and to the ordering of judgment upon it for the plaintiffs, when they claim that, upon a correct decision of the legal question presented by the report, the judgment should be for the defendants.

Neither can it be maintained that this report presents no question of law and is not in the alternative, but is designed merely to state the grounds of the decision. The last words of the report are: "But if he had not" (authority to execute the contract) "the plaintiffs are not entitled to recover." This, taken in connection with what precedes it, shows clearly that it was the design of the referees to submit to the court, upon the facts detailed in the report, the question of the authority of the chairman of the committee on streets to execute the contract, and to have judgment entered for the defendants if the court should be of opinion that the chairman had not the requisite legal authority.

The defendants cannot be deprived of their exceptions upon either of the grounds above referred to. We must proceed to examine the question raised by the report.

The action is one of covenant broken, based upon articles of agreement under seal, purporting throughout to have been "made and entered into, on, etc., by and between the city of Portland, acting by their committee on streets, sidewalks, and bridges, on the one part, and W. and A. Curtis" (the plaintiffs) "of said city, contractors, on the other part."

This instrument contains the details of an agreement between the contracting parties wherein the plaintiffs undertook to grade a certain portion of a street in the city, in a mode and time specified, and the city to pay them therefor in a manner stipulated, and it is closed and subscribed as follows:

"In witness whereof we have hereunto set our hands and affixed our seals this," etc.

"CHAS. A. GILSON,
Chairman Com. on Streets, etc." [SEAL.]
"W. and A. CURTIS." [SEAL.]

The referees report the plaintiffs entitled to a certain sum as damages for breach of this agreement, "upon the supposition" that it is valid and binding on the defendants. And they proceed to set forth certain facts found by them, in view of which this question of validity is to be determined as follows: they annex to their report a copy of an order (regularly passed in both boards of the city government, and approved by the mayor prior to this execution of this contract), wherein "the committee on streets, sidewalks, and bridges are authorized and directed to contract for the grading of so much of" (the street in question) "as they may deem expedient." They find that, by virtue of this order, the committee advertised for bids for grading the street therein named; that the bid of the plaintiffs was the lowest and was accepted by the committee; "and that thereupon the chairman of said committee, acting for them with their consent, and the plaintiffs executed the contracts aforesaid." They do not stop here, but add, "we find that said contract was valid and binding upon the city aforesaid, if the chairman of said committee had authority to execute it without its being signed by a majority of said committee, and we have made an award on the supposition that he had such authority. But if he had not, the plaintiffs are not entitled to recover."

As to all questions, either of law or fact, which have been settled by the referees, their decision being that of the tribunal selected by

the parties, and not being impeached for prejudice or bad faith, must be deemed conclusive.

It is with this single point which they have referred to us that we have to deal. This question is not the one long ago mooted, whether a contract subscribed and sealed, as this is, may be counted on as the act and deed of the corporation in whose behalf it was intended to be made, and as subjecting the corporation to an action on its covenants, as if executed under the corporate seal.

The referees probably considered that matter settled in this State by R. S. c. 73, § 15, provided the chairman of the committee could, under all the circumstances, be deemed the authorized agent of the city. However that may be, they find (and this finding is conclusive) "that the said contract was valid and binding upon the city aforesaid, if the chairman of said committee had authority to execute it without its being signed by a majority of said committee."

Nor is it an open question in this case, whether parol evidence ought to have been received to show that the chairman of the committee executes the contract, "acting for them with their consent." The report establishes this fact, and also that the committee accepted the plaintiffs' bid. The question is not whether if this action were on trial before the court, we would admit the testimony of members of the committee, or any evidence outside the contract itself, to show that they all joined in the execution of the power conferred upon them by the order of the city council, so far as anything but the mere formal execution of the written contract was concerned. That question is foreclosed by the action of the referees, whose report seems designed to present the naked inquiry, whether it was competent for the committee to authorize their chairman to bind the city by a written contract, under seal, to which they all agreed, but which a majority of them did not in fact sign. If the case were a new one, we might, upon such a state of facts as is here presented, think it somewhat difficult to give any very substantial reasons for holding that the power delegated to the committee was not well executed.

There would seem to be some ground for saying that as they all

exercised their judgment upon the subject-matter of the contract, and assented to its execution by their chairman in their behalf, they should be considered as adopting his signature and seal, and that thus the contract should be held valid as against their principal, the city.

But it is impossible to distinguish the case in principle from that of the *Female Orphan Asylum* v. *Johnson*, 43 Maine, 180. There the corporation were empowered by statute to apprentice children under their care and control by writing "to be interchanged by and between the said Female Orphan Asylum by their managers and said master or mistress." The case showed a vote of the managers to bind Jane Lenham (the child whose indentures were in question) to the defendant, and another vote authorizing Mary B. Storer, their secretary, to execute "indentures for and in behalf of the board of managers;" and the indentures were signed by the defendant and "Mary B. Storer, in behalf of the managers of the Female Orphan Asylum of Portland;" and to these signatures were affixed the customary seals. Yet the court held the indentures invalid, upon the ground that the power delegated to the managers could not be conferred by them upon the secretary; and the assent of the managers to all that was done, as shown by their recorded votes, was deemed insufficient to impart validity to the contract.

The doctrine seems to be that the agent to whom the power is originally committed, in order to bind his principal by a written contract, must execute it personally, and cannot authorize any one else to do it in his behalf.

At present, when public trusts and duties are so often perverted, and so carelessly performed, we do not feel disposed to encourage greater looseness, or to open new doors for the evasion of personal responsibility, by neglecting to apply the maxim, *delegata potestas non potest delegari*, to any and all cases to which it has heretofore been applied by this court.

To make the contract binding upon the city, it should have been signed by at least a majority of the committee, and they could not give their chairman authority to execute it without this.

It follows, according to the report of the referees, that the plaintiffs are not entitled to recover, and the presiding judge should have ordered judgment for the defendants. The *pro forma* ruling was erroneous. *Exceptions sustained.*

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

A. A. Strout, for the plaintiffs.

Symonds & Libby, for the defendants,

PETER RUNNELLS *vs.* DANIEL WEBBER.

Incumbrance—right of dower. Before assignment of dower—nominal damages only recoverable.

The right of a divorced wife to have dower assigned in the real estate of him from whom she has been divorced, is an incumbrance; but before assignment, although after demand, nominal damages only are recoverable therefor in an action of covenant broken.

ON REPORT.

COVENANT BROKEN to recover damages for a breach of a covenant against incumbrances.

The defendant executed and delivered his deed of warranty to the plaintiff, Nov. 18, 1865, when one Mary A. Webber was the lawful wife of the defendant, but did not release her right of dower in the premises conveyed by the deed.

At the October term, A. D. 1868, of the supreme judicial court, in and for this county, Mrs. Webber, on her petition and for his fault, obtained a decree of divorce from the bonds of matrimony which existed between her and the defendant. Subsequently, but before the commencement of this action, Mrs. Webber duly demanded of the plaintiff her dower in the premises conveyed to him by the defendant.

The only question raised was whether the plaintiff was entitled to more than nominal damages; if not, judgment to be so rendered.

W. P. Whitehouse, for the plaintiff, contended,

The plaintiff cannot compel an assignment or procure a release of the dower. The interest is a freehold estate,—an incumbrance which the plaintiff has no power to discharge.

Whether Mrs. Webber elects to become tenant in dower, or otherwise, the real injury resulting to the estate in its market value is the same.

Outstanding mortgages the covenantee may always discharge by payment.

The ordinary rule that nominal damages only can be recovered, unless the incumbrance has been discharged, or the covenantee ousted, does not apply to easements, servitudes, and unexpired terms; such being continuous and not removable by the covenantee. *Porter* v. *Bradley*, 7 R. I. 538.

Counsel cited *Wetherbee* v. *Bennett*, 2 Allen, 428; *Spurr* v. *Andrews*, 6 Allen, 420; *Harlow* v. *Thomas*, 15 Pick. 66; *Bachelder* v. *Sturgis*, 3 Cush. 205; 3 Pars. on Cont. 228; *Grose* v. *Hennessey*, 13 Allen, 389.

The rule of damages in such cases, where the incumbrance cannot be removed, should be present worth of an annuity equal to the interest on one-third of the consideration-money received by the defendant, for the term that Mrs. Webber has a probable expectation of life. *Wager* v. *Schuyler*, 1 Wend. 553.

S. Lancaster, for the defendant.

KENT, J. This is an action to recover damages for a breach of a covenant against incumbrances. The incumbrance is a right to have dower assigned, existing in the divorced wife of the covenantor. It is admitted that she has such right. It is also admitted that the grantee, the plaintiff, entered into possession under his deed, and that he has not been disturbed by the wife, who has demanded dower, but has taken no other steps to enforce her right.

It is not denied that this right is an incumbrance, and that the plaintiff is entitled to recover nominal damages. The only question submitted to us is, whether he is entitled to recover any more than nominal damages, under the state of facts above recited. There is a class of cases where, in an action for breach of the covenant of warranty against incumbrances, the whole injury, past, present, and future may be recovered. There is another class where nominal damages only can be recovered. What are the grounds on which the distinction rests?

The first class of cases includes those where there is a right or interest which actually exists in or upon the estate granted, and is in fact and operation a part of it, detracting from the use or value of the possession of the estate. As an easement of a right of way over the land or a life-estate or for a term of years. These are as much an incumbrance when the deed is made as they ever are, and the amount which they actually diminish the value of the estate can be determined at once. An estate in dower for life, after assignment, would come within this class of cases.

There are other cases where the outstanding incumbrance may or may not become an incumbrance which impairs the value, by being incorporated into it, and taking away a portion of the entire estate. Such as an outstanding mortgage, or an existing right of dower unenforced. The holder of the mortgage may never enforce it, or his debt may be paid by the grantor. The widow may die before her dower is set out to her in the estate. Great injustice might be done if the grantee should recover the whole amount of the mortgage debt, and it should afterwards be collected of the grantor, or if the whole value of the life-estate of the widow should be allowed, and she should die before assignment of such estate.

There is another distinction. When the incumbrance is of such a nature that it can be computed, and the grantee can compel a release or restoration of the estate, free from the incumbrance, he cannot recover beyond nominal damages, until he has paid the debt or performed the condition. An outstanding mortgage is a good

illustration of this class of cases, where payment or removal of the incumbrance must precede recovery of more than nominal damages.

Now the right to dower in the wife may be considered as an incumbrance before the death of the husband; but only nominal damages can be recovered. *Porter* v. *Noyes*, 2 Greenl. 22.

After the death of the husband it is a mere chose in action. 1 Washb. Real Prop. 251.

The widow has no estate in the land until it is assigned. Ib. *Sheafe* v. *O'Neil*, 9 Mass. 13.

It follows that only nominal damages can be recovered in this suit. The authorities are clear and distinct on this point. Many of them are cited in the argument of the defendant's counsel. See also *Donnell* v. *Thompson*, 10 Maine, 170.

Judgment for the plaintiff for one dollar damages.

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

CHARLES B. GILMAN *vs.* INHABITANTS OF WATERVILLE.

59 491
94 495

Taxes—recovery of money paid for. Money raised for illegal object. Ticonic Bridge. Soldiers' monument.

Under R. S. c. 6, § 114, a tax-payer cannot in an action for money had and received, recover "any damages he has sustained, by reason of the mistakes, errors, or omissions," of the assessors, collector, or treasurer.

An action under c. 6, § 114, to recover such damages cannot be sustained, when it does not appear that the plaintiff has paid more than his tax; or more than he would have paid, if the mistakes, errors, or omissions had not occurred; or that he has in his person or property suffered injury on that account.

Sums paid for extra interest as well as those paid to a "prosecuting committee," but not raised for those purposes by a vote of the town, cannot be deemed to be included in a tax and be recovered back as being "raised for an illegal purpose."

Special Laws of 1864, c. 389, which took effect after a vote of the defendant town to raise money for the purpose of purchasing Ticonic bridge and making it free, made the raising of the money valid.

The raising of two thousand dollars in 1869, for the purpose of erecting a soldiers' monument, was authorized by Pub. Laws of 1866, c. 19, incorporated into R. S. c. 3, § 36.

On Report.

Assumpsit for money had and received to recover twenty-six hundred and eighty-three dollars and sixty-four cents, "being money collected of the plaintiff by the defendants under duress, and paid by him under protest, for taxes illegally assessed or collected during the years 1864–1869."

At the annual meeting of the town in March, 1864, the town

"Voted, to raise the sum of four thousand dollars, and that the same be appropriated for the purpose of making that part of Ticonic bridge free that is within the town of Waterville, provided that a sufficient sum be raised from other sources to make the whole of said bridge free within one year."

"Voted, that the selectmen be instructed to pay the prosecuting committee of 1862."

At the annual meeting in March, 1869,

"Voted, to raise the sum of two thousand dollars, to be equally divided between the two associations, provided that the names of all the Waterville soldiers who died in the service or by reason of disease contracted or wounds received in the United States, be inscribed on each monument."

There was evidence that the selectmen paid extra interest for the loan of money, but none that the town ever raised any for that purpose.

The remaining facts appear in the opinion.

The full court to order such judgment as the law and evidence required.

E. F. Webb, for the plaintiff.

J. Baker, for the defendants.

DANFORTH, J. This is an action against the defendant town, for the purpose as alleged in the declaration, of recovering back money illegally assessed and collected.

From the testimony as reported, we learn that the illegality relied upon, arises from certain alleged errors in the warrants and commitments to the collector. Assuming the existence of these errors, they affect the authority of the collector rather than the legality of the assessment. For such errors no action can be sustained against the town except as provided in R. S. c. 6, § 114. Under that provision, if the plaintiff has suffered damage by reason of the mistakes, errors, or omissions of the assessors, collector, or treasurer, the tax is not void, but he may recover such damages in an appropriate action against the town. Upon this ground as a basis for the plaintiff's action, the only question which can arise is that of damages. It is not the tax or any portion of it as such, which he recovers, but only "damages he has sustained by reason of the mistakes, errors, or omissions of such officers." To the plaintiff's success in this action, upon this branch of his case, there appears to be two insuperable objections,—1st, an action for money had and received is not an appropriate action in which to settle a question of unliquidated damages; and 2d, we are unable from the testimony to ascertain that he has suffered any such, or any damages whatever. It appears that he has paid his tax. It does not appear that he has paid any more than his tax, or any more than he would have done, if such mistakes, errors, or omissions had not occurred, or that he has in his person or property suffered any injury on that account.

The plaintiff claims, also, to recover on the ground that certain sums, included in his tax, were raised for an illegal object. If this were so, under the statute before cited, he might, undoubtedly, recover in this form of action. But this nowhere appears. The sums paid for extra interest, and to the prosecuting committee, were not voted by the town for that purpose. The town did, by vote, raise a sum for interest. But the sum was indefinite, and no mention is made of extra interest, nothing in the vote to indicate

that it was to be appropriated for other than legal interest, and illegality of purpose is not to be presumed.

An illegal voting of money to be assessed is one thing. An illegal payment of money after it is assessed is quite another thing.

For the former, if actually assessed and collected, an action will lie; for the latter, another and different remedy seems to have been provided.

The four thousand dollars raised for the purpose of making Ticonic bridge free, was authorized by special act of the legislature, approved March, 22, 1864, passed after the vote, but before the assessment. The sum of two thousand dollars, voted for a soldiers' monument, was raised in 1869, and authorized by an act of 1866, c. 19, incorporated into the R. S. c. 3, § 36. The plaintiff fails to sustain his action upon either ground, and in accordance with the provision in the report there must be

Judgment for the defendants.

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

JAMES W. BRADBURY and others *vs.* GEORGE CONY.

Estoppel.

The parties owned adjoining lots. The defendant building first, constructed an entire wall next the plaintiffs' lot. Subsequently the plaintiffs built; and instead of constructing another wall availed themselves of the defendant's, and thereupon the parties submitted in writing the defendant's claim "for pay for building a part of the brick partition wall, the center line of which is the dividing line between said blocks," to referees, who made an award which the plaintiffs paid. In a real action to recover possession of the land lying between the center and that portion of the wall next the plaintiffs' land, *Held*, that the recital in the submission did not estop the defendant from showing where the true line is.

ON REPORT.

WRIT OF ENTRY claiming to the center of the partition or dividing wall between the plaintiffs' block and the Cony House, owned by the defendant. The defendant claimed the dividing line to be the south side of the wall, and disclaimed all of the demanded premises, except that portion between the center of the wall and the south side of the same.

The plaintiffs, after introducing their title-deeds, with evidence tending to show that the demanded premises are the same as described in their deeds, put in an agreement, award, and receipt of the following tenor respectively, omitting the signatures:

"It is agreed between George Cony on the one part, and James W. Bradbury, jr., in behalf of himself and the other owners of the Bradbury & Smith block on the other part, to submit the claim made by said Cony against said Bradbury and other owners of said Bradbury & Smith block, for pay for building a part of the brick partition wall, the center line of which is the dividing line between said blocks, to the determination of Artemas Libbey, of Augusta, and Walson F. Hallett, of Augusta, whose decision shall be final in the case, and each party binds itself to abide thereby."

"We, the undersigned, referees appointed by the agreement of the parties as above, having given the parties due notice of the time and place of a hearing, met them at the office of A. Libbey, in Augusta, on the 8th day of November, 1867, and after hearing their proofs and arguments touching the claims submitted to us, and fully considering the same, award and determine, and this is our final award and determination in the premises, that the said Bradbury and others, owners, pay to said Coney the sum of two hundred and twenty-five dollars and nine cents in full for the claim submitted to us."

"Received of James W. Bradbury, jr., two hundred and twenty-five and nine one-hundredths dollars in full payment of the within award."

There was annexed to the agreement an account comprising the items of the expense of constructing the wall, amounting to $622.78, one-half of which the defendant claimed of the plaintiffs.

The defendant offered evidence tending to show that the south line of the wall was the true line between the lots; but the presiding judge intimated that the agreement and the action of the parties under it estopped the defendant from showing that the center of the wall was not the true line; and thereupon this case was taken from the jury and reported to the full court.

If the defendant was not estopped from showing that the center of the wall was not the true line, the case to stand for trial.

J. W. Bradbury, jr., for the plaintiffs.

On the nature of estoppel. 2 Pars. on Cont. 787, 793; *Piper* v. *Gilman*, 49 Maine, 149; 1 Greenl. on Ev., § 207; *Kinney* v. *Farnsworth*, 17 Conn. 356; *Wallis* v. *Truesdale*, 6 Pick. 455; *Freeman* v. *Cooke*, 21 H. & G. 653; *Piper* v. *Gilman*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52; *Stanwood* v. *McLellan*, 48 Maine, 275; 2 Smith's Lead. Cas. 531, 532; *Hatch* v. *Kimball*, 16 Maine, 146; *Colby* v. *Norton*, 29 Maine, 412; *Copeland* v. *Copeland*, 28 Maine, 539; *Rangely* v. *Spring*, 28 Maine, 135.

It applies to real estate. *Brown* v. *Wheeler*, 17 Conn. 345; *Lindsey* v. *Springer*, 4 Han. 547; 2 Pars. on Cont. 796 *n.*

The written agreement fixed the division line. It is certain, definite. The parties acted on the agreement. Plaintiffs paid, defendant received the amount awarded.

The items of the account, exclude all idea of the defendant's claim of the whole wall or of land under it. They are a clear recognition of the plaintiffs' right to the center of the wall.

J. Baker, for the defendant, contended *inter alia*,

That it was solely the brick wall that was submitted, and the referees' award relates to that only. No element of land was in contemplation. By the reference, award, payment, and receipt, the plaintiffs purchased half the brick wall, and the defendant is estopped to deny it. Thus far his acts and admission go and no further. As incident to the wall, the plaintiffs also acquired an irrevocable license for the wall to rest on the defendant's cellar wall and land, so long as the wall shall stand, and may be protected

by injunction. 2 Pars. on Cont. 796, note *q*; 1 Story's Eq. Jur. § 388; *Miller* v. *Platt*, 5 Duer, 272; *Batchelder* v. *Sanborn*, 4 Foster, 480; *E. J. Co.* v. *Vincent*, 2 Atk. 83.

The recital was not in a deed. Nor was the land the subject-matter of the reference, and could have had no influence on the plaintiffs. It is but a parol admission, open to explanation on the question of title.

It is no estoppel, as both parties had some means of knowing the true line.

To constitute an estoppel there must be some secret knowledge on the part of the defendant, not known to the plaintiffs, and not open to them with reasonable diligence, willfully withheld by the defendant, so as to amount to a deception and fraud on his part. *Gray* v. *Bartlett*, 20 Pick. 186, 193; 2 Washb. on Real Prop. 460, 461; *Wilton* v. *Harwood*, 23 Maine, 131; *Titus* v. *Morse*, 40 Maine, 348, 353, 354, 355; *Angel* v. *Martin*, 7 Barb. 409.

Nor is there any evidence from the papers that the defendant knew that his land extended beyond the centre of the wall. If he understood the meaning of the language in the submission, he supposed the center was his line. If the defendant acted under a misapprehension, and has inadvertently and innocently made an admission prejudicial to his rights, he shall not be estopped thereby. *Tolman* v. *Sparhawk*, 5 Met. 475, 476, 477; *Brewer* v. *B. & W. R. R. Co.*, 5 Met. 478, 483; 1 Story's Eq. Jur. §§ 386, 388.

But if the papers and proceedings constitute an estoppel, the plaintiffs are not entitled to judgment, but the case must be remitted for trial.

For by an estoppel, the legal title does not pass from the original owner to the party claiming the estoppel, but it remains in the former.

The legal title is not lost, but a court of equity will not permit the owner to prejudice an innocent party by asserting it. 2 Pars. on Cont. 796, note *q*; *Miller* v. *Platt*, 5 Duer, 272; *Batchelder* v. *Sanborn*, *sup.*; *E. J. Co.* v. *Vincent*, *sup.*

TAPLEY, J. A controversy having arisen concerning the payment of the expense incurred in the construction of a wall standing between a block of the plaintiffs and the Cony House, the plaintiffs and defendant, in writing agree to submit the claim made to the determination of two persons named. The persons named decided the claim, awarded that which, in their judgment, was due. In the writing, submitting this claim to arbitration, is a statement, that the center line of the wall is the dividing line between said blocks. For the purposes of the hearing upon that claim, the fact thus recited must be taken as true.

Beyond this it was not conclusive evidence of the fact. In any other controversy, arising between the parties, when relevant to the issue raised, this recitation would be evidence for the consideration of the tribunal investigating, of greater or less weight, according to other circumstances proved. It is not an instrument of conveyance, and of itself is inoperative by way of transfer. It is but an admission of a party made in a particular case, and does not affect the ownership of the fee in the land. The result in this particular would be the same whether we limit the word "block," to the structure raised upon the earth, or extend its significance so as to embrace the building and the land under it.

The action of the parties under this agreement to refer, was to determine the joint contribution in the payment of the cost of the construction of it. This could have no effect to pass the fee. That must be accomplished by deed, or levy, or devise duly made and executed. The joint ownership of the wall, or joint contribution in its construction, is nowise inconsistent with the idea, that the fee in the land under it, rests solely in either of the part-owners of the wall. It may be resting upon the land by license of some kind from the owner of the soil.

The report presents for our consideration only the agreement to refer, and the acts of the parties under it. With the anterior acts of the parties we now have no concern. Whether all or any of them may, or may not, have created an easement in favor of the owners of the wall for some length of time, is not necessary to decide. The

fee remains unaffected by these acts, and the estoppel, by way of recitation in the agreement, does not extend beyond the case in which it was made.

The existence of an easement on the land, if found, would constitute no bar to the right of the owner of the fee to recover on a writ of entry. *Blake* v. *Ham*, 53 Maine, 430.

Under the agreement of the parties, the entry must be,

Case to stand for trial.

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

APPLETON, C. J., signified his concurrence as follows:

APPLETON, C. J. I concur in the views of Mr. Justice Tapley. The agreement to refer conveys no title to thefee. It does not purport so to do directly. Neither does it by estoppel. The defendant, notwithstanding the reference and award, may show where the true line is. If the plaintiffs fail to recover, it is not perceived that it can affect their rights to the use and enjoyment of the wall between their store and that of the defendant. If the title should be found to be in the defendant, he would hold the fee subject to the plaintiff's easement, and a court of equity would enjoin him from interfering with the rights to the use of the wall, for which the plaintiffs have paid a full consideration.

SAMUEL H. SAWYER *vs.* ANN H. FERNALD and trustee.

Promissory note.

The defendant's husband borrowed fourteen hundred dollars of the plaintiff, for which he then gave his promissory note, and, at the same time agreed, to procure a good additional signer the next day. Eighteen months afterwards, in the sick-room of the husband where he was confined to his bed in his last sickness, and four days prior to his death, the defendant, without receiving any consideration therefor, in the absence of the plaintiff, in ignorance of her husband's agreement, but at his request, placed her name upon the back of the note. In an action on the note against her, *Held*, That she was not liable.

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

The case was reported by Justice Goddard as follows:

"ASSUMPSIT, commenced June 26, 1869, entered at the September term, and tried by the justice, without the intervention of a jury, at the November term, subject to exceptions in matters of law. *Ad damnum* $3,000. Plea, the general issue.

"Suit on a note for $1,400, dated September 3, 1867, signed by defendant's husband on that day, with defendant's name written on the back, March 23, 1869, four days before the death of defendant's husband.

"I find, as matter of fact, that defendant so wrote her name in plaintiff's absence, at her husband's request, in his sick-room, where he was confined to his bed in his last sickness; that she received no consideration from plaintiff or her husband, or other person, then, or at any time; that she had no knowledge of any consideration received by her husband, at that time or at any time, for her signature, or of any agreement or understanding between her husband and plaintiff, at the time the note was made, that her name or any name was to be furnished plaintiff on said note. I also find as fact that the note was delivered by defendant's husband to plaintiff on the day of its date, and that the $1,400 was then delivered by plaintiff to defendant's husband, and that plaintiff and

defendant's husband continued to live in Portland until the death of the latter.

"In addition to the foregoing findings of fact, plaintiff's attorney contended that the evidence of plaintiff showed, that at the time defendant's husband applied for the money and afterwards when the note was made, and the money delivered to him, he agreed and promised to obtain some good name in addition to his own, that the note being made late at night, he then agreed to procure the name the next day; that plaintiff did not accept the note as complete without such additional name, and never so received it or waived his claim, but applied repeatedly during the ensuing eighteen months, to defendant's husband for such name, and that defendant's name was finally obtained by her husband in fulfillment of said original agreement between her husband and plaintiff, and by plaintiff accepted as such.

"Without, at this time, determining this last question of fact contended for by plaintiff, I rule, as matter of law, that it is immaterial, because

"I. That a person other than a payee, writing her name on the back of a note eighteen months after the time of the making and delivery thereof, is not liable to pay it, in the absence of proof of any consideration moving between the parties within the knowledge of such person so writing her name.

"II. That even if there had been an agreement between the maker and the payee before and at the time of the making and delivery of the note to the payee, and the receipt of its amount in money by the maker, that a name should be by the maker obtained the next day, and although the payee might aver that he did not accept the note as complete without such name, but insisted thereon for eighteen months, and at the end thereof the maker obtained a name in fulfillment of his original promise (so far as it could be fulfilled after that lapse of time), and the payee accepted the name in fulfillment thereof, yet, if all these facts were unknown to the person so writing her name, at the end of the eighteen months, without consideration, she is not liable to pay said note.

"III. In other words, the ground on which I hold that defendant is in no event liable is, that at the time she wrote her name on the back of the note, there was no consideration, either of benefit to her or to her husband, or of injury to plaintiff, the full consideration for which the note was given having been fully executed by the delivery of the money by the plaintiff to her husband eighteen months previous."

The justice found the defendant did not promise; and the plaintiff alleged exceptions.

A. J. Swasey & Son, for the plaintiff.

McCobb & Kingsbury, for the defendant.

APPLETON, C. J. On the 3d September, 1867, the husband of the defendant borrowed of the plaintiff fourteen hundred dollars, for which he then gave his promissory note. The note and the money were delivered on that day. The maker of the note at the same time agreed to procure an additional signer the next day.

On 23d March, 1869, four days prior to the death of her husband, the defendant, at his request and in the absence of the plaintiff and without receiving any consideration therefor from any one, and in ignorance of her husband's agreement, placed her name upon the back of the note.

The defendant was no party to the note in its inception. She has received no consideration whatever for her signature. Where one indorses his name in blank on a promissory note several weeks after it is given, he is not liable as an original promisor. *Mecorney* v. *Stanley*, 8 Cush. 85. One who signs as original promisor, a note which has already been delivered and accepted, is not liable thereon without independent proof of a new consideration. *Green* v. *Shepherd*, 5 Allen, 588. A guaranty of the payment of a preëxisting note, when the only consideration is a past benefit or favor conferred, and withoutanyd esign or expectation of remuneration, is without valuable consideration, and cannot be enforced. *Ware* v. *Adams*, 24 Maine, 177. A guaranty of a note made more than a

year after its date, and without consideration was held void in *White* v. *Field*, 30 Vt. 338.

A person not a party to a promissory note is liable, who after its delivery to the payee places his name upon it in pursuance of an agreement made by him with such payee before the making of the note. *Leonard* v. *Wilkes*, 36 Maine, 265; *Klein* v. *Currier*, 14 Ill. 237. But in such case he is held, because his signature is only in fulfillment of his previous agreement, upon the faith of which the loan was made for which the note was given. But in the present case, the defendant had made no previous promise.

Nor does the alleged agreement on the part of the maker, if binding, to procure an additional signer the next day, alter the legal rights of the defendant. She was ignorant of the existence of such agreement. It was already broken. The plaintiff was not present and did not discharge the husband from his liability for a breach of this agreement, nor could it be known that he would. The agreement being broken, and the liability of the husband for its breach remaining undischarged when her signature was affixed to his note, the plaintiff parting with nothing and the defendant receiving nothing, it requires keen vision to see in what the consideration was in the way of loss to the plaintiff or gain to the defendant, for her placing her name on the back of the note. If there was no consideration whatever, she must be discharged.

The judge finds, as matter of fact, that the note was delivered, and the money paid at its date. His intimation that it was immaterial whether the plaintiff had accepted the note or not, was upon a state of facts found by him not to exist, and is of no importance. The delivery of the note, and the payment of it, was not, upon any condition, to be void, if such condition was not performed.

Exceptions overruled.

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

CUTTING, J., concurred solely on the ground that the wife could not be surety for her husband.

MONMOUTH MUTUAL FIRE INS. CO. *vs.* J. HENRY LOWELL.

Mutual insurance company—assessment of.

The charter of a mutual fire insurance company provided that the directors shall settle and determine losses or damages to be paid by the several members of the company, as their respective proportions thereof. A majority of the directors voted to assess "a sum not exceeding $18,000, to meet the losses and expenses incurred from Oct. 14, 1867, to Oct. 14, 1869," and appointed a minority thereof a committee to make the assessment, who thereupon made it in a less sum. *Held*, That the sum of the assessment, not having been fixed by a majority of the directors, was illegal.

ON REPORT.

The case is sufficiently stated in the opinion.

E. O. Bean, for the plaintiffs.

A. Libbey, for the defendant.

APPLETON, C. J. This is an action of assumpsit upon the defendant's note, given for the premium on a policy issued by the plaintiff corporation to him upon his application therefor.

The plaintiffs' right to recover depends upon the validity of certain assessments which they claim to have been legally made.

By the eighth section of their charter, the directors of the company "shall, after receiving notice of any loss or damage by fire, sustained by any member, and ascertaining the same, settle and determine the same to be paid by the several members thereof, as their respective proportions of such loss, and publish the same in such manner as they shall see fit, or as the by-law shall have prescribed," etc.

The amount of a loss or of losses is to be a fixed and definite sum. That sum is to be determined by the directors. It must obviously be a sum certain, else it will be impossible to ascertain the "respective proportions" of the loss or losses which the other members of the company are to pay.

At a meeting of the board of directors, holden on 10th Sept., 1869, at which a majority of the board were present, it was "voted, to make the fifteenth assessment upon the premium notes of the members of the first class, in a sum not exceeding eighteen thousand dollars, to meet the losses and expenses incurred by said class from Oct. 14, 1867, to October 14, 1869."

At the same meeting two of the directors, the board consisting of five, were appointed a committee "to make the fifteenth assessment upon the premium notes of the first class." This committee, consisting of John May and Augustus Sprague, proceeded to make an assessment to the amount of $15,047.49 "upon the premium notes of the members of said company, each one his respective proportion thereof set down" in the record of assessment, which was signed by them as assessing committee.

The sum to be assessed must be fixed by the directors, or a majority of their number. This was never done. A minority had no right to determine the sum. This they undertook to do. Their charter gave no such authority to a minority, and the directors could not legally delegate such authority to them. The directors having never settled and determined the sum to be assessed to meet losses, the assessment was without authority and void.

Plaintiff nonsuit.

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

JOSHUA G. WING, administrator, *vs.* JOSHUA G. ANDREWS.

Nominal party — who is not. Witness — defaulted co-defendant not competent at common law.

When a promissory note belongs to and is sued for the benefit of an intestate estate in the name of the administrator, the plaintiff cannot be deemed a nominal party within the third clause of R. S. c. 82, § 87, whether the proceeds finally go to pay the debts of the estate or to the plaintiff as heir at law of the intestate.

Wing *v.* Andrews.

In an action on a joint and several promissory note, against a principal and surety, the defaulted principal is not a competent witness, at common law, for the surety to prove that after the note became due, the payee for a valuable consideration paid by the principal, extended its time of payment, without the knowledge or consent of the surety.

ON REPORT.

ASSUMPSIT on a promissory note, signed by Joshua G. Andrews and Marcellus Steward, surety, of the following tenor:

"$300.00. NORTH ANSON, Maine, Aug. 10, 1863.

For value received, I promised to pay Jabez Wing, or order, three hundred dollars, in one year from date, and interest."

The note bore the following indorsement:

"Joshua Wing, administrator of estate of Jabez Wing."

Joshua Wing was administrator on the estate of Jabez Wing, and was his father.

The principal was defaulted. The surety pleaded the general issue and brief statement "that the plaintiff's intestate does not own the note in suit, but long since sold and indorsed over said note to one Simon Wing, who now owns the same; and that said deceased, in his life-time, after said note became due, without the knowledge or consent of said Marcellus Steward, who was surety therein, for a valuable consideration paid by Joshua G. Andrews, the principal in said note, extended the time of payment thereof; and that at the time the note became due said principal had sufficient property to pay the same, if payment thereof had then been enforced, but since that time he has become worthless."

It appeared that an action was commenced on this note in the name of Simon Wing, brother of the deceased and son of the plaintiff, and returnable in this county, at the September term, 1869; that it was tried at the September term, 1870, when the jury disagreed; that the present plaintiff and the said Simon were both witnesses for the plaintiff in that action; that after the trial, the plaintiff in that action became nonsuit.

Simon Wing, called by the plaintiff, testified substantially, That

the indorsement is his handwriting, placed there at the time it was left with an attorney for collection, at his suggestion, without any authority of his father; that witness never had any interest in the note; that his father owned it so far as witness knew, he being administrator of brother's estate; that witness' father saw the indorsement at the other trial and did not object to it, but suffered the suit to go on; and that the note was handed to witness for collection.

The defendant introduced the indorsement, through which a pencil mark was drawn by the plaintiff's counsel, in the presence of the defendant's counsel, after the commencement of the trial.

J. S. Abbott, for the plaintiff.

J. Baker & J. J. Parlin, for the defendant.

"For value received I promise to pay," makes a joint and several note, so that judgment can go against the defaulted principal, though the surety should be discharged. *Woodman* v. *Ware*, 37 Maine, 563; *Chaffee* v. *Jones*, 19 Pick. 260–264; *Coburn* v. *Ware*, 25 Maine, 350. Bradlee, the defaulted principal, would not, therefore, be swearing himself out of court at the same time with the surety.

Nor could his testimony affect the amount of damages against himself.

The defaulted principal's interest is balanced, and hence cannot be excluded on account of interest.

The defaulted principal is not offered to prove facts showing the note void at its inception; but simply to prove that by subsequent facts the surety had been released.

Nor is he incompetent merely because he was originally a party to the suit. He is no longer in fact or in substance a party. The case is fully ended as to him, he raises no issue and files no plea. The surety files a plea on his own several promise, and that issue alone is joined.

Defaulted defendants in torts are now competent witnesses.

In an action on a joint and several note against principal and surety, the defaulted principal is a competent witness for the con-

testing surety to prove that by transactions subsequent to the inception of the note, the surety has been released. 1 Greenl. on Ev., §§ 355, 356, 357, 360; *Chaffee* v. *Jones*, 19 Pick. 260; *Bradlee* v. *Neal*, 16 Pick. 501.

APPLETON, C. J. The note in suit is payable to Jabez Wing, or order. Upon his decease, the plaintiff, his father, was appointed administrator.

The question presented for determination is whether the plaintiff is a nominal party within the third clause of R. S. 1871, c. 82, § 87.

If the note belonged to the estate of the son, the plaintiff cannot be regarded as a nominal party, unless we hold all administrators nominal parties, and it is not pretended that such is the law. The money, when collected, would belong to the estate which the plaintiff is administering. It would be a part of its assets to be administered according to law. It may be needed for the payment of debts. If it constitutes the whole estate, a part of it would be required to meet the charges of administration and funeral expenses. Upon the settlement of the estate, it may, in part or in whole, by the final order of distribution, become the father's as heir at law. But until such order, the plaintiff holds the note or the money received therefrom in his representative capacity, and not as heir at law. Unless, therefore, we hold all administrators as nominal parties, the present plaintiff is not one, if the note in question was part of the estate of the son.

It is argued that the title to the note was in the father before the death of the son. But such is not shown to be the case. It was not indorsed by the son. It is not proved to have been delivered by him to the father. Simon Wing, in his testimony, speaking of the father's ownership, manifestly refers to him as holding the property as administrator. "He is administrator of my brother's estate. He owns the property left by my brother." There is no evidence tending to show that the father had in any way acquired a title to the note before the death of the son. Nor does the de-

fendant, in his plea, allege any such fact. It asserts title to have been in Simon Wing, a fact which the entire evidence disproves.

It seems that Simon Wing, having received the note for collection, indorsed the name of the plaintiff thereon, and commenced a suit in his own name. If the indorsement was unauthorized, it would be of no avail. If sanctioned by the father, the legal title would be in the indorsee, but the equitable title would be in the plaintiff, for whose benefit the indorser undertook its collection. If the money had been collected by Simon Wing, it would have belonged to the father as administrator, and must have been accounted for by him as part of the assets of the estate.

Instead of collecting it, Simon Wing struck out the indorsement and delivered the plaintiff his own note, thus reinvesting him with the legal title, the equitable having remained in him. The note is, therefore, as much a part of the estate as it ever was, and the plaintiff, in his representative capacity, is bound to account for it as such.

The testimony upon which the defense rests is that the plaintiff's intestate, without the knowledge or consent of Steward, the surety for a valuable consideration, extended the time of payment of the note. The evidence proposed is the testimony of the defendant as to a contract to which the deceased was a party and as to which his statements cannot be had. To guard against this, the legislature specially enacted that where one of the parties sues as executor or administrator, the adverse party is not a witness, except when the party suing in a representative capacity is a nominal party, that is, when the funds derivable from the suit do not belong to the estate, but do belong to some individual to whom the demand in suit had been assigned, and who is compelled, by the rules of law, to prosecute in the name of the administrator. But this plaintiff is not a nominal one, for he prosecutes for the benefit of the estate, and it matters not whether the funds collected belong to the estate for the payment of its debts or to him as the heir at law of his son.

The defaulted principal is not a witness at common law. By its

rules his position as party to the record precludes his testifying, notwithstanding he may be without interest. *Gilman* v. *Bowden*, 12 Maine, 412; *Kennedy* v. *Niles*, 14 Maine, 54.

Judgment for plaintiff.

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

TIMOTHY EATON *vs.* DAVID H. CORSON.

Equitable owner of promissory note—declaration of admissible.

The payee of the negotiable promissory note in suit, indorsed and delivered it nearly three years after its maturity to her son, who sold and delivered it to the plaintiff. The money for which the defendant gave the note was sent by the son to his mother. The plaintiff offered evidence tending to prove that the money was the son's, and loaned as his to the defendant, the mother taking the note in her name, simply as his trustee, which the defendant denied, and offered evidence tending to prove that the son sent the money to his mother in part-payment for a place owned by her, which she was to convey to him when paid for; that the money was delivered to the defendant by her, to be allowed in redemption of the place on which she and her husband lived, but the title to which was in the defendant; that the note was to be given up when the defendant delivered the deed to her, which was subsequently done; that the note was duly reckoned and surrendered in the settlement, but accidentally or otherwise carried away among other papers. The son was not called as a witness; but the defendant offered to prove his declarations made prior to his delivery of the note to the plaintiff that the note had been paid. *Held*, that the evidence was admissible.

ON EXCEPTIONS.

The case is stated in the opinion.

J. S. Abbott, for the plaintiff.

J. H. Webster, for the defendant.

BARROWS, J. The plaintiff sues upon a note, dated Nov. 25, 1864, made payable on demand to Caroline Noyes, or order, and indorsed by the payee. It was proved that the note was sold and delivered to the plaintiff by Alonzo Noyes, a son of the payee, November 10, 1867. It appeared that the mother indorsed and delivered the note to Alonzo some time within three months next preceding the sale to the plaintiff. It appeared also, that the money, for which the note was given, was sent by Alonzo to his mother, and the plaintiff offered evidence, tending to prove that the money was Alonzo's when the defendant received it, and that it was lent to him as Alonzo's money. This the defendant denied, and offered evidence tending to show that Alonzo sent the money to his mother in part-payment for a place owned by the mother which she was to convey to him, when the agreed price should be fully paid; and that it was delivered to the defendant by her, to be allowed in the redemption of the farm on which she and her husband lived, the title to which was held by the defendant; and that defendant's note was to be given up when he delivered a deed of said farm to her, which was subsequently done; that this note was duly reckoned and surrendered in that settlement, but that George Noyes, the husband of the payee, by accident or design carried it away with certain notes of his own, which the defendant had held against him and then surrendered. Much conflicting evidence was offered by the parties upon this point. Alonzo Noyes was not called as a witness in the case, but the defendant offered to prove his declarations in 1866, and in June, 1867, that the note had been paid. The note was not indorsed by the payee to Alonzo, until after June, 1867, and the presiding judge excluded the evidence of their declarations.

In so doing he must have overlooked the fact that the plaintiff was proceeding upon the theory, that the money belonged to Alonzo Noyes, and was lent to the defendant as the money of Alonzo, and that the plaintiff had offered evidence to that effect. If such was the fact, Alonzo was the equitable owner of the note from its inception till he sold it to the plaintiff. He was the party, and ap-

parently the sole party, who had a beneficial interest in it,—that of the payee being merely nominal as his trustee. This being the case, his admissions with regard to the fact of payment, made during the time when he had such subsisting interest, would be competent evidence. The plaintiff having taken this note nearly three years after it was due, took it subject to any and all defenses which the maker might then have set up against any prior holder. The plaintiff could acquire by his purchase of this dishonored note, Nov. 10, 1867, no claim which his vendor could not then enforce. The verbal admission of Alonzo Noyes, that the note had been paid, would be competent evidence in defense of any suit brought by him or by the original payee, if in fact (as the plaintiff asserts) she was throughout only the trustee of Alonzo. It is the fact, that the admission was against the interest of the party making it which constitutes the true test of its admissibility in such cases.

If the plaintiff's position, that the money was lent to the defendant as Alonzo's money, was correct, then Alonzo's interest in the note accrued when it was first given, and any receipt which he might give, or any verbal admission of payment which he might make, prior to the time of his transfer to the plaintiff, would be competent evidence in a suit against the maker by his vendee.

Nor does the defendant's denial of Alonzo's interest preclude him from presenting this testimony.

He may rightfully meet the case which the plaintiff makes against him, by any testimony which would be competent if the plaintiff's view of the controverted fact be adopted, and may lawfully rely upon such testimony if his own position fails.

Exceptions sustained.

New trial granted.

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

GEORGE IRVING and another, petitioner, *vs.* COUNTY COMMISSIONERS OF SAGADAHOC COUNTY.

Committee of appeal—Duty of.

When the committee of appeal reverse the decision of county commissioners, it is no part of the duty of the committee to lay out the way or assess the land damages.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion.

J. S. Baker, for the petitioners.

Tallman & Larrabee, for the respondents.

APPLETON, C. J. The petitioners, inhabitants of Phipsburgh, applied to the selectmen of their town, to lay out a town way as described in their petition, bearing date, Oct. 12, 1868.

The selectmen refusing to grant the prayer of their petition, they seasonably petitioned the county commissioners, alleging that they had "unreasonably neglected and refused to lay out the way" prayed for in their petition, and praying that the county commissioners, after giving legal notice, would proceed to lay out the way as originally prayed for.

The county commissioners, after having given notice to all parties interested, at their July term, 1869, after a full hearing of all the facts, testimony, and arguments, and having maturely considered the same, adjudged and determined, that "common convenience and necessity" did not require the location and establishing the road prayed for in the petition of these petitioners.

From this adjudication, an appeal was duly taken and entered in this court, and a committee appointed, who made a report, adjudging "that the judgment of the county commissioners made on 6th June, 1869, be in whole reversed," and then proceeded to lay out the road prayed for by metes and bounds, and to assess

land damages for the owners of land over which the road was located.

To the acceptance of this report, the inhabitants of Phipsburgh object, "because the said committee had no authority to locate said road."

The only question presented for adjudication, relates to the authority and duty of the committee appointed by this court.

By R. S. 1857, c. 18, § 22, "when the municipal officers unreasonably neglect or refuse to lay out or alter a town way, or private way, on petition of an inhabitant, or of an owner of land therein . . . the petitioner thereof may, within one year thereafter, present a petition stating the facts to the commissioners of the county at a regular meeting who are to give notice," etc.

By the act of 1862, c. 123, the same right to appeal to the supreme judicial court is given, as is provided in R. S. c. 18, respecting highways.

An appeal being taken from the decision of the county commissioners and entered in the supreme judicial court, the appellate court "may appoint a committee of three disinterested persons, who shall be sworn . . . and they shall give such notice as the court has ordered, view the route, hear the parties, and make their report at the next or second term after their appointment, whether the judgment of the commissioners shall be in whole or in part affirmed or reversed; which being accepted, shall forthwith be certified to the clerk of the commissioners." § 35.

The doings of the committee are limited to viewing the route, hearing the parties and reporting seasonably, whether the judgment of commissioners shall be in whole or in part affirmed or reversed. It does not appear to be any part of their duty to lay out the road or to assess damages to be paid to those who may be injured by the location of the road over their land.

By the act of 1862, c. 87, "If the judgment of the commissioners in favor of laying out the highway prayed for is wholly reversed on the appeal, they shall proceed no further; and no petition praying for substantially the same thing, shall be entertained by them for two years thereafter. If their judgment is affirmed

in whole or in part, they shall carry into effect the judgment of the appellate court; and in all cases, they shall carry into full effect the judgment of the appellate court in the same manner as if made by themselves," etc.

Now the judgment of the appellate court is that the judgment of the county commissioners that "common convenience and necessity" do not require the location and establishing of the road in question is reversed. In other words, the judgment of the appellate court is that public convenience and necessity do require the road as prayed for by these petitioners.

But "the judgment of the appellate court" is to be carried into full effect by the county commissioners "in the same manner as if made by themselves." If this judgment had been the same as that of the committee, they would at once have proceeded to lay out the way and assess damages. They are, upon receiving the certificate from the supreme court to proceed to act as if their judgment had been originally that of the appellate court. The committee had discharged their full duty, when they had acted upon the affirmation or reversal of the judgment of the county commissioners. It was no part of their duty to lay out the road or to assess land damages.

In *Winslow* v. *Co. Commissioners*, 31 Maine, 444, the county commissioners, upon a petition had adjudged that the easterly portion of the route was of common convenience and necessity, and should be established, but said nothing of the westerly. Upon appeal, the committee reported that the easterly portion, as located by the county commissioners, should be established as a public highway, and also the westerly portion. The report was accepted. "The third section provides that the committee appointed by the district court," says Shepley, C. J., "shall proceed to view the route named in the original petition. The committee are to hear the parties and their evidence evidently respecting the route viewed. When they are required to report, whether, in their opinion, the judgment of the county commissioners should be in whole or part affirmed, such judgment must be intended as would operate upon the whole route. In a certain event, after a

decision upon appeal the county commissioners are to proceed to lay out, alter, or discontinue such highway, in whole or in part, having reference to the way described in the petition."

In *Smith* v. *Co. Commissioners*, 42 Maine, 401, the doctrine that the county commissioners are to carry into effect the judgment of the appellate court, and in conformity with its decision, "to lay out, alter, or discontinue such highway, in whole or in part, as such judgment may be." In *Harriman* v. *Co. Commissioners*, 53 Maine, 83, it was held that when county commissioners refuse to carry into effect a judgment of the supreme judicial court, rendered upon the report of a committee, appointed in case of appeal from their decision, refusing to lay out and establish a highway, the court may issue a writ of mandamus, requiring them to carry into effect the judgment of this court.

These decisions are upon the statutory law, as it was before the act of 1862, c. 87 and c. 123. Their correctness remains unaffected by those acts.

It does not appear that there has been an adjudication by the county commissioners or by the committee appointed by this court, that the selectmen did "unreasonably neglect or refuse" to lay out the road in controversy. The committee adjudged that "common convenience and necessity" did require the location and establishing the road prayed for. No question, however, is presented for our consideration, in relation to this, all objections to the sufficiency of prior proceedings being waived.

But upon the exceptions before us, it is only necessary to determine whether the committee had authority to locate the road in question and assess land damages, and we think they had not.

Exceptions sustained so far as relates to the acceptance of so much of the report as locates the way upon the face of the earth. Report accepted so far as it reverses the decision of the county commissioners, and the case is remanded to them, with orders to locate the road as prayed for.

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

JAMES D. WILLIAMS and another, petitioners for increase of damages on a town way in Richmond.

Petition for increase of damages—notice on.

The town in which a town way has been located and accepted is entitled to notice of the pendency of a petition to the county commissioners for an increase of damages.

When such a petition has been entered, no order for the summoning of a jury can be issued until there has been a failure to agree upon a committee.

A verdict, returned by a jury summoned on a petition without notice to the town was set aside on motion of the town.

ON EXCEPTIONS.

On the petition of George W. Parks and others, the selectmen of Richmond widened a town way in their town which was duly accepted by the town, and the selectmen assessed damages in behalf of the owners of the land taken.

At the March term, 1870, of the county commissioners for this county, held by adjournment on April 28th following, the petitioners presented their petition to have their damages assessed in the manner provided respecting highways, when it was

"Ordered, That a jury be ordered, and that Francis Adams, Esq., be, and he is hereby appointed to preside at the view and hearing."

In pursuance of the order, a warrant dated May 6, 1870, was issued to the sheriff of the county, reciting the order, commanding him to give notice to the petitioners and municipal officers of Richmond, of the time and place of hearing to be appointed by him, and to summon a jury, etc.

On May 25th, the sheriff notified the municipal officers of Richmond, that he had a warrant for the draft of a jury to assess damages on a road in their town, and that June 1, at 10 o'clock A. M., and the house of a person named, in Richmond, were the time and place for impanelling the jury to inquire into the matter.

At the time and place mentioned, the town of Richmond, by their attorney, appeared and objected to any proceedings under the warrant: because they had no notice of the filing of the petition before the county commissioners, and therefore had no opportunity to be heard or to agree to the appointment of a committee, etc. Mr. Adams overruled the objection, and thereupon the jury was impaneled, and the other proceedings had which were duly reported to this court at the next term thereof.

At the August term, 1870, the respondents moved that the verdict be set aside for the reasons mentioned in their motion before the jury, which was in writing, and returned by Mr. Adams with the papers in the case. And they also moved that the verdict be set aside for the further reasons that it was contrary to law, and manifestly against the weight of evidence.

The presiding judge overruled the motions, and the respondents alleged exceptions.

W. T. Hall, for the petitioners.

J. W. Spaulding, for the respondents.

Appleton, C. J. By R. S. 1857, c. 18, § 18, "the municipal officers of towns may personally or by agency lay out, alter, or widen town ways, and private ways . . . on petition therefor."

It is their duty in case of town ways to estimate damages which, by § 21, are "to be paid by the town."

The town way is not established until "accepted in a town meeting legally called afterwards, and by a warrant containing an article for the purpose." Sect. 19.

When the town way has been duly accepted, the action of the town or its officers terminates. No appeal as such can be taken. By § 22, "any person aggrieved by the estimate of damage, on petition to the commissioners may have them assessed in the manner provided respecting highways."

The petition is a new proceeding, of which neither the town nor its officers can know anything until notified. The town is inter-

ested, for it is to pay the damages to those over whose land the road is laid.

After entry of the petition, notice should be given the inhabitants of its pendency, that they may appear and protect their rights. The petitioner may not have a legal title to the land over which the way passes. The town may, for various reasons, contest the right of the petitioners to prosecute. And if they have a right to prosecute, they should be heard as to the appointment of the person to preside at the hearing before the jury, for if he should be interested, and the objection taken, it might vacate the proceedings. *Clifford* v. *Co. Commissioners*, 59 Maine, 262. Indeed, it is against the first principles of justice that a court should adjudicate upon the rights of parties in their absence and without giving them notice to appear.

By R. S. c. 18, § 8, "when a petition is presented for an increase of damages, an agreement may be made and entered of record to submit the matter to a committee, who shall notify and hear the parties, and make return of their decision which, being accepted, shall be conclusive. Where no such agreement is made, a jury is to be summoned, whose verdict, returned, accepted, and recorded, is conclusive." This section clearly presupposes that the parties who are to have an opportunity to agree upon a committee to assess damages, before a jury is to be ordered, are in court or are to be notified to be there. There is to be no order to summon a jury until there has been a failure to agree, and before there is such failure, the parties, between whom the agreement is to be made, must be in court.

The more expensive mode of determining the damages by a jury is not to be resorted to in the first instance.

Before the act of 1866, c. 39, § 2 (R. S. c. 18, § 13), the remedy of the party aggrieved was by *certiorari*. But by that act, provision is made to except or move to set aside a verdict "for the same causes that a verdict in court may be set aside."

As the warrant for a jury was improvidently issued, the verdict must be set aside and the opportunity given to the parties to ascer-

tain whether they will not agree "to submit the matter to a committee." If they do not, it will then be in season to summon a jury, and not before. *Exceptions sustained.*

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

CHARLES H. EATON and others *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Respondeat superior. Location of railroad—filing of. R. S. of 1857, c. 51, § 25 —construction of. Charter—renewal of. Damages.

A railroad corporation engaged a contractor to construct "under the general supervision of the chief engineer of the company" a specific portion of its railroad, located across the plaintiffs' timber tract; and the sub-contractor and his employees cut a tote road through the plaintiffs' premises, outside of the location, and set fires which, through their negligence, spread and burnt the plaintiffs' timber. *Held*, that the company, not having directed the acts complained of, and having no such control over the persons who committed them as to direct or remove them, was not liable for the damages occasioned thereby.

If the company's engineer direct the sub-contractor to do an unauthorized act, such as grading outside of the limits of the true location, the company is liable therefor.

A railroad corporation is not liable under R. S. of 1857, c. 51, § 25 (R. S. § 22) for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road committed by contractors or the servants of contractors.

Where the charter authorized the taking of land "not to exceed six rods in width," and by an act of the legislature the time for completion was extended two years, and "all rights, privileges, and grants theretofore appertaining to said company" were thereby continued, *Held*, that the charter was thereby renewed in its entirety, and the company retained the right to take land six rods in width, although the general statute allowed but four.

Where the time for filing the location with the county commissioners was fixed by a statute to be on February 8th, a depositing of it at their office, with their clerk, on February 6th is seasonable, although a term of the commissioners' court did not occur until the following April.

So where by an act of the legislature, approved Jan. 17, 1869, "one year from and after the approval" was given to alter and amend the location between certain termini, and the amended location was adopted on Jan. 15, 1870, and received and filed by their clerk in the county commissioners' office, on Jan. 17, 1870, the filing was seasonable, although there was no session of the commissioners' court until the following April.

Where a railroad corporation had seasonably filed a petition in the nature of an appeal, on the question of damages, which was dismissed at the October term, 1870, and the plaintiffs applied to the county commissioners for the security required by R. S. of 1857, c. 51, § 51 (R. S. § 6), for the payment of damages awarded, and the corporation gave no security, but in December following paid the amount of damages awarded and costs. *Held*, that in the absence of evidence to the contrary, this may well be presumed to be in satisfaction of the damages awarded by the commissioners for the land taken to which the assessment refers.

Veazie v. *Penob. R. R. Co.*, 49 Maine, 119, examined and modified.

On report.

Trespass to recover damages for breaking and entering township number ten, range three, in this county, owned by the plaintiffs and others, across which the defendants' railroad was located.

There was also a count in case for kindling fires on the township, and negligently permitting them to spread and burn and destroy the plaintiffs' timber.

Also a count under R. S. of 1857, c. 51, § 25.

Plea, general issue, with brief statement alleging that whatever acts were done on said township, by the defendants, or their servants, agents, or employees, were rightfully done under the authority given by the laws of the State and their charter, in locating and building their road.

There was evidence tending to show that the sub-contractors and their employees cut and appropriated timber, on township number ten, for building hovels and camps, without the consent of the plaintiffs; and that a part of the road was graded and built outside of the location.

There was also evidence tending to show that it was usual in May and June to have mosquito smokes in the woods, for the purpose of driving away mosquitoes and black flies; that the laborers cannot sleep without such smokes; that Riley & Bunston and

their employees built such fires on township ten, through those months, without any direction from the defendants, and through the negligence of those setting them, the fires spread and burnt over three thousand acres of the plaintiffs' township; that the railroad was cut out six rods in width; and that a tote road was cut through several miles of township ten, by the employees of Brooks & Ryan, and by their direction, but not by the direction of the railroad company.

It was admitted that there was a piece of new location or cutting under the amended location, for which no damages had been assessed or paid, and an offer to pay the same was made.

It appeared that the plaintiffs caused to be served on the defendants an order of the county commissioners for this county, issued on application of the plaintiffs, for the security required by R. S. of 1857, c. 51, and served on the defendants Feb, 8, 1870, and no security was given, and the requirement not waived unless the acceptance of the damages paid by the company has that effect in law.

On the original location were two endorsements; the former signed by the clerk of the county commissioners, and the latter by the commissioners themselves, and dated respectively, as follows: "Clerk's office, Court of County Commissioners. Received February 6, 1868.

"Court of County Commissioners, April term, 1868.

The within report of location is hereby approved, and ordered to be filed and recorded."

On the amended location were three indorsements: one of the adoption of the location by the directors, dated January 15, 1870; another by the clerk of the county commissioners, that the location was "received and filed January 17, 1870;" and the third by the county commissioners, dated "April term, 1870," approving and ordering it to be filed and recorded.

The remaining facts appear in the opinion. If the action was maintainable, it was to stand for trial.

J. & G. F. Granger and *Madigan & Donworth*, for the plaintiffs.

The defendant corporation, in constructing its railroad, was fulfilling a public trust, as well as executing a private enterprise, and the corporation is liable for all the acts of the persons employed in the work carried on under the power and authority of its charter, however remotely connected with the corporation; for public policy as well as the law forbade the shifting of the responsibility upon irresponsible persons. *Stone* v. *Codman*, 15 Pick. 297; *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24; *Bush* v. *Steinman*, 1 B. & P. 404.

The following cases are cited and commented upon by Thomas, J., in *Hilliard* v. *Richardson*, 3 Gray, 349; *Sly* v. *Edgerly*, 6 Esp. 6.

Counsel also cited *Bailey* v. *Mayor, &c., of New York*, 3 Hill, 531; *Ellis* v. *Sheffield Gas Consuming Co.*, 2 El. & Bl. 767; *Bangor* v. *Oldtown & Milford R. R. Co.*, 47 Maine, 35.

The defendants were guilty of trespass in cutting their track six rods in width. Although the right to take six rods was given in original charter, it was withdrawn when they applied for extension in 1864 (c. 321, § 6) providing that the corporation shall be at all times subject to such general laws in relation to railroads as have been or may be hereafter enacted by the legislature.

The cutting out and using a tote road was a tresspass. *Sabin* v. *Vt. Central R. R. Co.*, 25 Vt. 363.

The defendants have a right to enter upon the plaintiffs' land to make surveys, but nothing further until the damages were paid or secured. R. S. of 1857, c. 51, § 5; 1 Redfield on Railways, 242; *Hazen* v. *B. & M. Railway*, 2 Gray, 574; *Stone* v. *Cambridge*, 7 Cush. 270.

Railroad corporations are held with greater strictness for the acts of their agents and employees than private individuals. *Hilliard* v. *Richardson*, 3 Gray, 382; *Veazie* v. *Penob. R. R. Co.*, 49 Maine, 122, 123, 124.

The defendants are liable for the fires occasioned by the negli-

gence and want of care of their employees, and the servants and hired men of their employees. *Bailey* v. *Mayor, &c., of New York, supra*; *Ellis* v. *Sheffield Gas Consumers' Co.; supra;* 1 Redfield on Railways, 369.

The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist. *Chapman* v. *New York Central R. R. Co.*, 33 N. Y. 369; 1 Redfield on Railways, 383; *Standish* v. *Mayor of Liverpool*, 15 Eng. L. & Eq. 255.

The defendants' road was not located in accordance with the first location filed. The second location was not filed with the county commissioners in season, and was void. *Hinks* v. *Hinks*, 46 Maine, 423; *Fuller* v. *Walker*, 46 Maine, 280; *Davis* v. *Russell*, 47 Maine, 343; *Charles River Branch R. R. Co.* v. *County Commissioners of Norfolk*, 7 Gray, 390.

In *Cushman* v. *Smith*, 34 Maine, 247, an action of trespass was maintained for continuing a railroad track across defendants' land, built without making compensation for the land damages. Shepley, J., says in the opinion: "An action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation (of the land taken for the road), unless compensation or a tender of it be made within a reasonable time after the commencement of it."

This case was decided in 1852. The next session of the legislature passed the act prohibiting railroad companies from entering on the land of others for any other purpose than to make surveys, until compensation was made or tendered for the land damages. The legislature thought the power a dangerous one and liable to great abuse, which the court, in *Cushman* v. *Smith*, held that they could exercise before compensation was paid or secured.

Receipt of damages inadmissible, as they are subsequent to commencement of this action.

The corporation is also liable for the trespass under R. S. of 1857, c. 51, § 25. And also under c. 26, § 21.

The party setting the fire is accountable for negligence and want of reasonable care. Time and manner must be prudent,—immaterial whether proof shows gross negligence or want of ordinary care on the part of the defendant. *Henry* v. *Nourse*, 54 Maine, 256, and cases there cited. See also, *Pratt* v. *Atlantic & St. Lawrence R. R. Co.*, 42 Maine, 579.

The great maxim, "*sic utere tuo ut alienam non laedas*," adopted by this court in citation from *Shaw* v. *Worcester R. R.*, 8 Gray, 66, applies to corporations as well as to individuals.

J. W. Emery & C. P. Stetson, for the defendants.

APPLETON, C. J. In 1850, the defendant corporation obtained a charter to build a railroad from Bangor to Mattawamkeag, and thence to the boundary line of New Brunswick. The charter expired several times, but was revived from time to time, and, ultimately, Dec. 31, 1872, was fixed for the final completion of the road.

On 7th August, 1865, the defendant corporation entered into a contract with Pierce & Blaisdell for the construction of a railroad from Bangor to St. John, in New Brunswick. It was specified therein that the work should "be constructed under the general supervision and direction of the chief engineer of said company, as required by the contract and specification;" and that the railroad was "to be built on the line as located, or to be located, and marked out by the engineers of the company."

This contract, by the consent of the defendant, was assigned by Pierce & Blaisdell to the International Railway Construction and Transportation Company. On 24th May, 1869, this company contracted with Brooks & Ryan, "to construct, build, complete, and finish in a good, substantial, and workmanlike manner, under the superintendence of the chief engineer of the E. & N. A. R. Co., for the time being," all the work within certain limits defined in said contract, at a certain sum per mile. Brooks & Ryan were to make good any damages to the adjoining lands caused by blasting and removing fences, etc.

On Nov. 1st, 1869, Brooks & Ryan contracted with Riley & Bunston for all the grading, etc., of the portion of the railway between stations No. 650 and No. 746, the work to be done in accordance with the contract of May 24, 1869, between said International Railway Construction and Transportation Company and said Brooks & Ryan. There was likewise a similar contract between Brooks & Ryan and Wiseman for the grading between stations No. 800 and No. 854.

The acts of which complaint is made and for which damages are sought to be recovered are those of Riley & Bunston and of Wiseman, or of those in their employ. The relation of master and servant did not exist between them and the defendants. They were not under the direction and control of the defendants. They were not employed and could not be dismissed by the defendants. They were sub-contractors or the servants of sub-contractors. The sub-contractors were responsible to those with whom they had contracted, and their servants to those in whose service they were laboring.

When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible. *Butler* v. *Hunter*, 7 H. & N. 826. In *Reedie* v. *The London & N. W. R. Co.*, 4 Exch. 244, a company empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors or workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the bridge, by allowing a stone to fall upon him. It was held, in a suit by the administratrix, that the company was not liable. In

Overton v. *Freeman*, 73 E. C. L. 866, A. contracted with parish officers to pave a certain district, and entered into a sub-contract with B. under which the latter was to do the paving of the street, the materials being supplied by A. and brought to the spot in carts. Preparatory to paving, the stones were laid by laborers, in the employ of B., on the pathway, and there left unguarded during the night, so as to obstruct the same. The plaintiff fell over them and was injured. It was held that B. was responsible for the negligence and not A. "I think," says Maule, J., "the present case falls within the principle of those authorities which have decided that the sub-contractor, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for." In *Peachey* v. *Rowland*, 76 E. C. L. 181, the defendants contracted with certain individuals to construct a drain in a public highway, who employed one C. to fill in the earth over the brick work, and to carry away the surplus. C. left the earth so much raised above the level of the road, that the plaintiff, driving by in the dark, was thereby upset and injured. It was held that the defendants were not responsible for the negligence of C. The defendants employed somebody to do what might be done in a proper and safe manner. It was done negligently and improperly and the plaintiff was injured, but it was not thus done by the defendants nor at their instance, and they were not held responsible. So in the case at bar, the negligent or tortious acts of the sub-contractors or of their servants were not the acts of the defendant, and if not their acts nor done by their procurement, the sub-contractors, or the servants committing them alone, are liable.

In conformity with these views are the decisions in this country. In *Blake* v. *Ferris*, 1 Selden, 48, it was held that the defendants who had a license from the city of New York, to construct at their own expense a sewer in a public street, and who had engaged another person to do it by contract, to construct it at a stipulated price for the whole work, were not liable to third persons for any injury resulting from the negligent manner in which the sewer was

left at night by the workmen engaged in its construction. The doctrine there held was that the immediate employer of the servant, whose negligence occasions the injury, is alone responsible for the negligence of such servant. These views were affirmed in *Park* v. *Mayor, &c., of New York*, 4 Selden, 222. In *Kelley* v. *Mayor, &c., of New York*, 1 Kernan, 432, the corporation of the City of New York had ordered a street to be graded, and contracted with a person to do the grading. It was held that they were not liable for damages occasioned by the negligence of the person who had contracted to do this work, or of the laborers in his employ. In *Clark* v. *Vermont & Canada R. R. Co.*, 28 Vt. 103, and in *Pawlet* v. *The Rutland & Washington R. R. Co.*, 28 Vt. 297, it was held that the defendants were not liable for the negligent or tortious acts of the servants of those who had contracted to do certain work for these corporations; that no privity existed between such servants and the corporations. "Though it may be assumed in the case before us," remarks Bennet, J., in the last-named case, "that a public nuisance had been committed by the servants of the sub-contractor, and a particular injury has resulted therefrom to Phelps, and for which the town (of Pawlet) had been compelled to make satisfaction, yet we cannot discover any privity existing between the defendants and the employees of the sub-contractor. The contract made for the building of the abutments to the bridge was for a lawful purpose, and in no way involved the commission of a wrong, and the employees of the sub-contractor were not the servants of the defendants nor under their control." In *Cuff* v. *The Newark & New York Railroad Company*, 9 American Law Register, 540, the question under discussion was very carefully considered and examined by the supreme court of New Jersey, and with like conclusions. "The rule is now firmly established," remarked Depue, J., "that when the owner of lands undertakes to do a work, which in the ordinary mode of doing it is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. But

when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an improper and unskillful person as the contractor."

In *Callahan* v. *Burlington & Missouri River R. R. Co.*, 23 Iowa, 562, the plaintiff sought to recover compensation for damage done to his timber, and by a fire negligently set by the employee of a sub-contractor with the defendant corporation, for the purpose of clearing the way of trees, logs, brush, and rubbish. The contract provided that the way should be cleared of all trees, etc., by removal or burning, as the engineer should direct, before the grading should be commenced. The engineer ordered the burning, which, by the negligence of the person who set the fire, escaped in the plaintiff's land doing there much injury, and the question presented was whether the railroad corporation was responsible for the negligence of a servant of a sub-contractor. In delivering the opinion of the court, Beck, J., says, "If the person sought to be charged under the rule as employer did not contract with the party committing the wrongful act for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employee to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant. In order to create the liability, it is especially necessary that the control of the employee over the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the acts intended."

The same views have received the sanction of the highest judicial tribunals in Ireland. In *Gilbert* v. *Halpin*, 3 Irish Jurist, N. S. 300, the plaintiff, as owner of the schooner Paddy, brought an action against the defendant as secretary to the commissioners empowered to improve the harbor of Wicklaw, to recover damages for its loss by reason of the negligence of commissioners, who had caused

to be placed certain piles, etc., and neglected to place, or caused to be placed, any light, or to use any other reasonable precaution to guard vessels from being driven thereon.

The defendants pleaded, among other pleas, that they committed the execution of the work to their contractor, John Killien, and that at the time, etc., the said piles were still in the possession and under the control of the said Killien.

Green, B., in delivering his opinion, says, "I think the case falls within the rule that the contractor, and not the employee, ought to be liable."

"There is a plain difference," remarks Richards, B., "between the case of master and servant, and that of employee and contractor. The employee was authorized to perform the work, and he authorized the contractor. No man would drive down piles in a navigable river, without being authorized. Therefore, I think it was the contractor's duty to have apprised his employer that this work had come to such a stage, that it was necessary to get lights to prevent accidents. It was not to be expected that the commissioners would be on the ground on all occasions to see what might be required to guard against danger. The contractor failed in performing his duty, and I think he ought to be liable." "The question," says Pennefather, B., "is who is liable. If the contractor, the commissioners are not liable, for it is clear from all the cases, that if the contractor is liable, the employee is not. It appears to me, that if it was the duty of the contractor to put these lights, his employees were not bound." "The principle of law is clear," remarks Pigot, C. B., "that when a person is engagedby contract to do a certain work, the contract or and not the employee is liable for this."

Such, too, is held to be the law in Scotland. In *McLean* v. *Russell, McNee & Co.*, 9th March, 1850, 22 Jur. 394, it was decided that when a person contracts with one man to do a piece of work, and the latter sub-contracts with another, the sub-contractor alone is liable for any damage committed in the course of the work by him." This view of the law was again sustained

by the same court in *Shield* v. *Edinburgh & Glasgow Railway Co.*, 28 Jurist, 539.

The plaintiff, in support of this suit, relies upon the case of *Bush* v. *Steinman*, 1 B. & P., 400. the case was this: A. having a house by the roadside, contracted with B. to repair for a stipulated sum; B. contracted with C. to do the work; C. with D. to furnish the materials; the servant of D. brought a quantity of lime to the house, and placed in the road, by which the plaintiff's carriage was overturned. Held, that A. was answerable for the damage sustained. Without particularly examining the reasoning of the court, it is sufficient to say that it has been long since overruled in England and in this country, as will abundantly appear by the cases cited. It is true, the case is cited with approbation in *Lowell* v. *Boston & Maine Railroad*, 23 Pick. 24, but subsequently, upon an elaborate and careful review of the authorities, it was overruled in *Hilliard* v. *Richardson*, 3 Gray, 349. It can no longer be deemed an authority on the other side of the Atlantic.

The next case cited in support of this claim is *Lowell* v. *B. & M. R. R.* 23 Pick. 24, but so far as that rests upon *Bush* v. *Steinman*, as has been already seen, it has been overruled. "The accident" in that case, observes Thomas, J., in *Hilliard* v. *Richardson* "occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell* v. *Boston & Lowell Railroad*, stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say, that the fact of Noonan being a contractor for this section, did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders." The defendants in the present case, would be liable for any and all wrongful acts done by their "immediate servant, acting under their orders." They should not be held responsible for the torts of a contractor engaged to do a specified work, lawful in itself, which might be performed without interfering with rights of others, nor for the torts

of his servants, whom they never employed, over whom they had no control, and whom they could not discharge.

In *Wyman* v. *Penobscot & Kennebec R. R. Co.*, 46 Maine, 162, the train, by which the injury was caused, was "run under the direction of the company, and under their control," and it was consequenty held liable. In *Veazie* v. *Penobscot R. R.*, 49 Maine, 119, the plaintiff town sought to recover of the defendant corporation, the amount it had been compelled to pay in consequence of a defect in an highway occasioned by their neglect. The injury, it is stated in *Phillips* v. *Veazie*, 40 Maine, 98, was occasioned "by the acts of the Penobscot railroad Co., in constructing their road over that of the defendants." The decision in *Veazie* v. *Penobscot Railroad Co.*, is placed on the ground that the work causing the injury was done "according to the plans and directions of the chief engineer of said company." It is undoubtedly true, that when the contractor is to follow the directions of an engineer of the contracting corporation, and he is directed by such engineer to do an unauthorized and illegal act, the corporation, thus acting by its agent, would be held liable. But if the engineer gives no such directions, and the tortious acts of the contractor or of his servants are of his or their mere motion, and without such direction or authority, it is difficult to perceive why a railroad corporation in such case should be held any more liable for such torts of a contractor, than an individual, or a city, or any corporation. If the contract is a legal one, the acts contracted to be done are legal, the wrongful acts of the contractor are his own, and not those of the party with whom the contract is made. It is different when the relation of master and servant exists.

The case, therefore, of *Veazie* v. *Penobscot Rail Road Co.*, is in accordance with all the authorities if these wrongful or negligent acts were done by the specific direction of their engineer.

The other ground upon which the decision is placed, that "the company must be responsible, whatever contracts they may make" for the torts of those with whom they contract, can hardly be sustained to such an extent. The authorities already cited abund-

antly show that for the neglects and torts of contractors or their servants, railroad corporations are not to be governed by other or different rules than those applicable to other corporations or to individuals.

The fact that it is specified in the original contract with Pierce & Blaisdell that "the work shall be constructed under the general supervision of the chief engineer of said company, as required by this contract and specifications" does not necessarily render the defendant corporation liable for whatever the contractor or their servants may wrongfully do. The corporation is not to be held for an illegal act not contracted to be done, nor directed by their engineer, and in no way sanctioned by corporate action. In *Steele* v. *The South Eastern Railway Co.*, 81 E. C. L. 550, the work was to be done by the contractor according to plans prepared by and under the superintendence of the company's surveyor, yet the railway company was held not responsible for an injury resulting to a third person, from the negligent manner in which the work was done by such contractor. It was not caused by the company or by any servant in their employ. In *Kelley* v. *Mayor, &c., of New York*, 1 Kernan, 435, the work was to be done "under the direction and to the entire satisfaction of the commissioner of repairs and supplies, and the surveyor having charge of the work," yet the city was held not responsible for damages caused by the negligences of workmen in the employ of the city. "The clause in question," observes Selden, J., "clearly gave the corporation no power to control the contractor in the choice of his servant. That he might make his own selection will not be denied. The right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent." To the same effect was the cases of *Park* v. *Mayor, &c., of New York*, 4 Selden, 222; *Cuff* v. *N. & N. Y. R. R. Co.*, 9 Am. Law Register, 541. In *Hobbett* v. *The London & N. W. Railway, Co.*, 4 Exch. 253, the company by their contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. "Our attention" observes Rolfe, B., "was directed, during the argument, to the pro-

visions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But the power of removal does not seem to vary the case. The workman is still the servant of the contractor only, and the fact that the defendant might have insisted on his removal if they thought him careless or unskillful, did not make him their servant."

Though a person employing a contractor is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet if the act is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons for damages sustained by such wrongdoing. *Elis* v. *Sheffield Gas Consumer Co.*, 75 E. C. L. 767. So if, in the present case, the contract was to do a wrongful act, the defendants must be held liable for damages occasioned thereby. Or, if the defendants' engineer directed the contractors to do what was illegal and unauthorized, as by working outside of the limits of the true location, the defendants must be held liable for any trespasses thus committed.

By R. S. 1857, c. 51, § 23, "Legal and sufficient fences are to be made on each side of land taken for a railroad, when it passes through inclosed or improved land or wood-lots belonging to a farm before the construction of the road is commenced, and they are to be maintained and kept in repair by the corporation. For any neglect of it during the construction of the road, and for injuries thereby occasioned by its servants, agents, or contractors, the directors are, jointly and severally, personally liable."

By § 25, "The corporation is liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ, or occasioned by its order, when the party injured has within sixty days thereafter given notice of it to the corporation; but its liability does not extend to acts of willful and malicious trespass.

An individual in the employ of the company is not a person con-

tracting with the company to do and perform a certain contract. The difference between the contractor and servant, or employee of the company, is recognized by the statute. The provisions of § 25, apply only to those in the employ of the corporation, or those acting under its orders.

The provisions of § 23, embrace contractors. As contractors are included in one section, and omitted in the other, we must deem it to have been for some purpose,—and that when they are omitted, it was not the intention of the legislature that they should be included.

We think, therefore, that the corporation is not to be held responsible under this section for the torts of contractors or the servants of contractors.

The defendants obtained their charter in 1850. By the general railroad law, then in force, a railroad corporation was authorized to take and hold real estate necessary for the location, construction, and convenient use of its road . . . not to exceed four rods in width, unless necessary for excavation, embankment, or to procure materials." R. S. 1841, c. 81, § 2. But the defendants, by their charter, Pub. Laws of 1852, c. 378, § 1, were authorized to take land not "to exceed six rods in width." The defendants' charter was extended by an act approved Feb. 20, 1856, and again by an act approved March 25, 1863, and by an act approved Feb. 21, 1866, a further extension of two years "in addition to the time now limited by law" was allowed for the completion of the defendants' railway, and "all rights, privileges, and grants, heretofore appertaining to said company, are hereby continued for the extended times aforesaid."

By the charter, as granted originally, six rods might be taken for the railroad. The charter was renewed from time to time. No restrictions were made upon its width, and there is no intimation that any of the rights and privileges granted were modified or withdrawn. On the contrary, the charter is renewed, as granted, in its entirety. The corporation, with a right to six rods in width, is to be subject to the general laws of the State in relation to railroads.

The first location was filed in the office of the clerk of the court of commissioners of Washington county, on 6th February, 1868. This was within the extended time given by statute.

By the act approved Jan. 17, 1869, c. 106, one year from and after the approval is given to alter and amend the location between Lincoln and the eastern boundary of the State. The amended location was adopted by the direction of the defendant corporation, Jan. 15, 1870, and "received and filed" in the office of the county commissioners of Washington county on 17th January, 1870. This was within the time allowed by the State.

The next term of the county commissioners after the location was filed, was held on the first Wednesday next after the fourth Tuesday of April, 1870, at which time the amended location was approved and ordered to be recorded.

Both the original and the amended location were completed within the time allowed by the statutes, extending the time in which the location might be made. The defendants were entitled to the whole of the extended time. Their locations were made and filed within that time. The acts granting extensions of time, do not require that any action should be had by the county commissioners within the extended time. Their action was necessarily to be after that had expired. It was had as soon as by the law of the State it could be had,—that is, at the next regular session after the expiration of the time as extended.

By R. S. 1857, c. 51, § 3, "the railroad is to be located within the time, and, substantially, according to its description in the charter. Its location is to be filed with the county commissioners, approved by them, and recorded." The statute, it will be perceived, has been followed. The time for the location is not to be reduced. The defendants located and filed their location within the time granted them, and are, therefore, entitled to the rights thereby acquired.

It appears in evidence that the plaintiffs made an application for an assessment of damages, and that an hearing was had, and damages assessed at thirteen hundred dollars; that the defendants sea-

sonably filed a petition in the nature of an appeal, which, at the October term, 1870, of this court, was dismissed; that after the defendants filed their petition, the plaintiffs applied to the county commissioners to obtain the security required to be given by R. S. 1857, c. 51, for the payment of the damages awarded them; that the defendants did not give any security, but on 21st December, 1870, paid them the amount of damages awarded by the commissioners, and the costs. In the absence of any evidence to the contrary, this may well be presumed to be in satisfaction of the damages awarded by the commissioners for the land taken by the location, to which the assessment of the county commissioners refers.

The plaintiffs are entitled to their legal rights. The opinion ion or remarks of Thompson, in his conversation with Eaton, cannot enlarge those rights.

But it appears that the railroad passes over land of the plaintiffs not included in the original or amended location. For this, no justification is made out. If the defendant corporation, disregarding the locations, have built their railroad upon the plaintiffs' land, they are trespassers in so doing, whether the act was done by the order of their chief engineer, under whose supervision the work was constructed, by their express direction, or they have subsequently ratified it. If the trespass has been settled,—it will be for the defendants to show it. *The case to stand for trial.*

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

STATE OF MAINE *vs.* INHABITANTS OF MADISON.

Franchise—who can interpose. Chartered rights—waiver of—evidence of. Location—errors in—no defense to indictment for bad road. Special findings of a jury conclusive.

In the trial of a town on an indictment for not keeping in repair a highway extending from the end of a toll-bridge at the side of an island, thence across the island and the lesser channel of the river to the main shore, the objection that the location by the commissioners is within the chartered limits of the toll-bridge corporation is not open to the town.

When a corporation is chartered to erect a toll-bridge across a river, and they erect one across the main channel to an island, they may waive whatever rights they have for erecting a bridge across the lesser channel. And evidence that the treasurer of the corporation procured the location of a highway from the end of the toll-bridge, across the island and the small channel to a way on the main shore, and caused the town to be indicted for not keeping such way in repair, is sufficient evidence of such waiver.

The opening of a specific part of a highway, within six years from the time allowed therefor, prevents the discontinuance of that part, notwithstanding another portion of the same location has not been seasonably opened, and has thereby been discontinued.

The fact, that the record of the county commissioners shows that the return of their doings was not recorded when it should have been, is fatal to their proceedings when presented by *certiorari*; but it cannot be taken advantage of by the town in defense of an indictment for not keeping the way in repair.

The special finding of a jury is conclusive on the parties in the absence of any motion to set it aside, and of exceptions to the rulings in relation thereto.

ON REPORT.

The case is stated in the opinion.

J. S. Abbott, for the State, contended

1. By the charter, the bridge corporation had no authority to build their bridge, except "across the Kennebec river between Madison and Anson."

2. The island and the site of the small bridge are within the town of Madison, and wholly outside of their chartered limits; and the corporation had no authority under their charter, to build a small bridge, or exact toll for crossing it.

3. Neither the road across the island nor the small bridge was ever regarded as part of the toll-bridge.

4. They were built and kept in repair for a time, not as part of the toll-bridge, but for the purpose of opening communication between the east end of the toll-bridge proper, and the traveled way.

5. The location of a town way in 1844, by the county commissioners, was valid. The corporation joined in the petition. The town acquiesced, and from that time till the bridge was carried away in October, 1869, the road across the island and the small bridge were kept in repair by the town and included in surveyors' limits.

6. Commissioners had jurisdiction in making the location of highway in 1847. The town acquiesced and had exclusive care of the way until October, 1869.

7. The alleged omission by the county commissioners to have the location recorded at the proper time, cannot be objected to now.

8. This road has not been discontinued, because not opened by Cornville and Skowhegan.

D. D. Stewart, for the defendant.

1. The bridge was to extend "across the Kennebec river."

2. The finding of the jury settles the fact that the channel in controversy was a part of that river.

3. The corporators so understood it, and acted accordingly in extending their bridge "across the river."

4. They, in accordance with their charter, elected to build their bridge over an island for convenience and economy, the island thus becoming a pier, both structures constituting a "toll-bridge across the Kennebec river."

5. Having elected thus to build their bridge, they are bound to maintain it. *Webster* v. *Larned*, 6 Met. 529; *Commonwealth* v. *Hancock Bridge*, 2 Gray, 58.

6. They are liable to indictment if they refuse. *Commonwealth* v. *Central Bridge*, 12 Cush. 244.

7. The location of highway never had any validity. The county commissioners had no authority to lay out a highway over a toll-bridge, without a special act of the legislature. *Central Bridge* v. *Lowell*, 4 Gray, 474.

8. The return of the commissioners was not recorded at the first term after made, and the pretended highway was, therefore, never legally established. R. S. of 1857, c. 18, § 37.

9. The location has been quashed by this court.

10. And it was discontinued by operation of law. *State* v. *Cornville*, 43 Maine, 427.

DANFORTH, J. This is an indictment for not repairing a highway therein described. It appears that in 1827, the legislature granted a charter for a toll-bridge "across the Kennebec river, between Anson and Madison," and in 1828 and 1829 the bridge was built, in pursuance of said charter, from the Anson shore to an island. On the easterly side of this island is a channel of water claimed by defendants to be a part of the Kennebec river; but this is denied by the government. This question was submitted to the jury, and by a special verdict they have found that this easterly channel, at the time the charter was granted, was, and ever since has been, a part of the Kennebec river. No motion to set aside this verdict has been filed, no exceptions to the ruling of the presiding judge, or requests for further or different instructions. Therefore the verdict, as far as it goes, is conclusive. Its effect upon the result is an open question. We are also satisfied from the report of the case that the island is within the town of Madison. When the bridge was built under the charter, there was no way across the island and no bridge across the eastern channel sufficient to accommodate the public travel. The proprietors of the toll-bridge, claiming that they had fulfilled the obligations of their charter in building to the island, continued a way across the island, and built a better bridge over the eastern channel for the sole purpose, as they allege, of opening their bridge to the public travel and thereby making it effectual. In 1844, the treasurer of the bridge corporation, and others, petitioned for a town way across the island and channel, which, on appeal to the county commissioners, was established as a town road in 1845. In 1846, on petition therefor, the county commissioners located a highway over the town way

and corresponding thereto, and to the way originally built by the bridge proprietors, and continued the same "through Madison and a part of Cornville and Skowhegan, as prayed for." That part of the road thus located, which extends from the end of the larger bridge across the island and eastern channel, is the highway described in the indictment. The insufficiency of the bridge is admitted but the way is denied. The legal existence of this highway is the only question involved. Several objections are made in defense.

A want of authority on the part of the county commissioners is the first objection relied upon. This objection rests upon the allegation that it is an interference with the chartered rights of the bridge company. It may admit, perhaps, of a serious question whether this way is located within the limits of the bridge charter. Whether the language of the charter, authorizing a bridge "across the Kennebec river, between the towns of Anson and Madison," is not fully complied with, when the bridge is built from the Anson to the Madison shore, across that part of the Kennebec lying between the two towns. But it is unnecessary to decide this question. If the bridge company have rights under their charter they may waive them. That they have waived any such rights is sufficiently proved, if proof were necessary, from the facts found in the report, that the first way was located, in part at least, through the instrumentality of the treasurer of the corporation, and the same corporation caused this indictment and are now doing what they can to secure its prosecution to final judgment.

Another equally valid answer to this objection to the jurisdiction of the commissioners is, that it is not open to the defendant town. None can interpose a franchise except those who have rights under it. If the corporation does not choose to set it up, no others can. In this case it is not in a position to do so, as it is not legally a party, nor does it have any occasion to do so, as no party is claiming any rights belonging to the company. But it is said the charter imposes burdens as well as confers rights, and that these burdens cannot be waived or surrendered to the town. This may be and

undoubtedly is so. But it is a question of jurisdiction we are discussing, and it is the rights of other parties that interfere with jurisdiction, and not their liabilities. If relieving parties from burdens, or changing them to others, prevented the exercise of legal authority, it is difficult to perceive how the commissioners could be sure of a right to act in any case. Perhaps in every location of a way, some one is relieved of a burden, and certain it is, liabilities are imposed which did not before exist. When a private way is made public, the burden of repairs is changed, and no reason is perceived why a toll-bridge, either in part or in whole, may not by the commissioners be converted into a highway, where the rights of those interested under the charter are not interposed, and the only objection made is that it throws the burden of repairs upon other persons or bodies. But in this case we cannot adjudicate upon the liabilities of the bridge corporation. They are not a party in any such sense as will make a judgment binding upon them. If the town or any other party claims that the bridge corporation are liable to repair, when that claim is presented, in the proper form, it can be adjudicated upon. But the only question now before the court is as to the liability of the town. If there is a legally established highway there, the public have a right to have it in such a state of repair as to be "safe and convenient for travelers." It may be that both the town and the bridge corporation are liable to repair; if so, the town may have a remedy in some other process. We are only to ascertain its liability under this, and we see no objection to it on the ground of a want of authority on the part of the commissioners to lay out the road. *Commonwealth* v. *Petersham*, 4 Pick. 119.

Another objection urged is, that the highway in question was discontinued by operation of law, not having been opened within six years from the time allowed. By a decision of this court this objection was held valid so far as it relates to that part of the location which lies in Cornville. *State* v. *Inhabitants of Cornville*, 43 Maine, 427.

This decision, however, does not refer to any part of the way outside of that town. The case finds that the highway in Madison,

including that part described in the indictment, "was laid out chiefly over town roads, that had long been traveled as such." The road in question was included in the limits of one of the highway surveyors of Madison, as early as the spring of 1840, and was then opened and traveled. This presents the question whether the opening of a specific part of a highway, within six years from the time allowed, prevents the discontinuance of that part, when another portion of the same location has not been opened and is discontinued.

In *Baker* v. *Runnels*, 12 Maine, 237, Weston, C. J., says, "It may be presumed that this long neglect on the part of the town, without complaint, is full evidence that such road was not required by the public convenience, notwithstanding the adjudication of the court." In *Harkness* v. *Waldo County Commissioners*, 26 Maine, 353, it was held that "the county commissioners by adjudging that the way prayed for is of common convenience and necessity, adjudge each portion of it to be so."

It follows that so much of the road as has been opened has been adjudged to be of common convenience and necessity. This is confirmed by its being opened and traveled, and is not disproved by the fact that another part of the same location has not been opened. The way in question, then, is not within the reason and spirit of the statute. Nor does it necessarily come within a fair construction of its language.

By R. S. 1841, c. 25, § 42, in force when this way was located, "Any highway . . . laid out by the county commissioners, and not opened within six years from the time allowed . . . shall be deemed discontinued." This language has not been materially changed in the subsequent revisions. The commissioners are authorized to lay out a highway within the limits of one town. They may locate a portion of a road petitioned for, and when so located, it is as much a road and a whole road as though all the prayer of the petition had been granted. So the way in question, when located and opened, was a road and not a part of one, and there would seem to be as much propriety, if the parts cannot be separated, in say-

ing that the whole was opened and not discontinued, as in saying that the whole road was not opened and was discontinued. A fair construction of the statute requires that such parts of a location as have been opened and traveled so as to be properly called a road or highway, should not be deemed discontinued. This view is confirmed by the fact that the statute does not make void the location. That is still valid, and this provision is only one form of discontinuing a way no longer needed. Why may not a portion of the location be discontinued in this manner as well as in other prescribed modes.

Another objection raised is an error in the records of the commissioners. It does appear that the return of the doings of the commissioners was not recorded as early as it should have been. In *Cornville* v. *County Commissioners*, 33 Maine, 237, this was held to be a fatal error when presented by a proper process. But it has become well settled that the records of the county commissioners cannot be impeached collaterally, and must be considered binding until quashed by *certiorari*. It is, however, claimed that this record has been quashed, and for proof certified copies of the records of this court from Somerset county have been annexed to the argument of the counsel for defendant. This is not properly a part of the case, but no objection is made to its admission by opposing counsel, while it is contended that it does not show that the record has been quashed. On examination, it appears that the court granted a writ of *certiorari*, while it does not appear that the writ did or did not issue. This would seem to be necessary before the defective record could be legally quashed. Still the counsel asserts, unqualifiedly, that the record has been quashed. We are not willing to believe that any counsellor of this court would make such an assertion without at least good grounds for believing it true. We therefore think, as it may be vital to his case, he should have an opportunity to show it.

On the other hand, the counsel for the prosecution claims that the town having repaired the way in question for more than twenty years, under this record, it is now bound by prescription to repair,

and hence is liable to this indictment. This point was not only not raised at the trial, but the report shows that it was disclaimed by counsel. This, too, may be vital to the case, but we cannot consider this point certainly until the other side has an opportunity to be heard upon it. The report should, therefore, be discharged, and the case stand for trial upon these last two points.

Report discharged.

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

DANIEL A. THOMPSON *vs.* INHABITANTS OF PITTSTON.

Commutation—statute ratifying acts of towns in voting money for—unconstitutional. Exceptions—questions raised under.

So much of c. 55,* of Pub. Laws of 1869, as attempts to ratify the action of towns in voting money for the payment of the commutation fees of individuals drafted into the public service, is beyond the sphere of constitutional legislation.

The defendant town voted to pay each drafted citizen who paid the commutation fee, three hundred dollars; and the vote was ratified by an act of the legislature. In an action to recover the sum voted, the presiding judge instructed the jury—"that the only question they were to determine was whether the moderator and clerk were qualified, and if they should find that those officers were duly sworn, their verdict should be for the plaintiff;" and the verdict being for the plaintiff, the defendant alleged exceptions; *Held*, That the exceptions raised the validity of the ratifying act.

**Pub. Laws of* 1869, *c.* 55. Sect. 1. The past acts and doings, regular in form of cities, towns, and plantations, in offering, paying, agreeing to pay, and in raising and providing the means to pay commutations to drafted men, and all notes and town orders, given by the municipal officers of any city, town, or plantation in pursuance of a previous vote at a meeting regularly called and held, for the benefit of drafted men, are hereby made valid.

Sect. 2. All contracts heretofore made by the municipal officers of any city, town, or plantation, that has voted at meetings called and held to raise money to pay commutations thus voted, and all contracts heretofore made by said officers, or their duly authorized agents, with third persons, corporations, or associations, for the purpose of raising means to pay such commutations so voted are hereby made valid.

ON EXCEPTIONS.

ASSUMPSIT to recover of the defendant town three hundred dollars, alleged to be due to the plaintiff by virtue of votes passed at a meeting held on July 20, 1863, of the following tenor:

"*Voted*, that every man drafted in the town of Pittston on the sixteenth day of July (inst.), as the quota of said town, and held to serve in the service of the United States and considered liable to go and serve, shall be paid and receive three hundred dollars rom said town of Pittston. Each drafted man to have the privilege to go and serve, send a substitute, or pay his three hundred dollars commutation. But if found liable to do either, he is to have and receive three hundred dollars from said town of Pittston.

"*Voted*, that the selectmen be hereby authorized and instructed to hire or otherwise obtain said three hundred dollars to each drafted man from or belonging to said town of Pittston, found to be liable and obliged to go and serve, send a substitute, or pay commutation under said draft forthwith, and pay it, $300, over to such drafted men, and every man drafted and found to be liable, and obliged to go and serve, etc., as above."

The defendants raised questions in regard to the legality of the town meeting, because the record did not show that moderator and clerk were sworn, and requested certain instructions thereon, which the presiding judge declined to give.

The presiding judge instructed the jury

That the warrant, as amended, was sufficient; that the only question they were called upon to determine, was whether the

Sect. 3. All contracts heretofore made by such municipal officers, or by third persons in behalf of any city, town, or plantation, but without previous authority therefor, to pay commutations to such drafted men, or to raise money to pay such commutations, may be ratified or confirmed by said city, town, or plantation.

Sect. 4. The doings of any city, town, or plantation, in voting to pay, or in raising money to pay commutations, may be ratified and confirmed by said city, town, or plantation.

Sect. 5. All taxes that have been assessed to raise funds to pay commutations or to fulfill contracts for the objects named in this act, are hereby made valid.

Sect. 6. Nothing in this act shall affect, in any way, the equalization of municipal war debts.

moderator and clerk were sworn; and that if they should find that those officers were duly sworn before entering upon the discharge of their duties, their verdict should be for the plaintiff.

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

J. Baker, for the plaintiff.

1. The validity of the act (Pub. Laws of 1869, c. 55) is not raised in the exceptions, or involved in the rulings or instructions of the court; and so is not now open to the defendants.

2. But, if it is, there is no well-grounded objection to its validity. The draft was made under the act of congress, passed March 3, 1863, c. 75, and § 13, is as follows:

"Any person drafted and notified to appear as aforesaid may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the secretary of war may authorize to receive it, such sum, not exceeding $300, as the secretary may determine, for the procuration of such substitute; which sum shall be fixed at a uniform rate by a general order, made at the time of ordering a draft for any State or territory; and thereupon such person, so furnishing a substitute, or paying the money, shall be discharged from further liability under the draft."

When a person is drafted and accepted, he may do either of three things:

1. He may go into the service himself.

2. He may send a substitute.

3. He may pay commutation money, with which the United States themselves undertake to procure a substitute.

Congress is the sole representative of the United States in relation to the war-making powers, the embodiment of its sovereignty, and has exclusive jurisdiction of that subject under the constitution. United States Constitution, § 8, Art. 11 to 16; Opinion of Judges, 52 Me. 596.

And congress, by this statute, gave the election to every drafted man which of the three courses he would adopt, declaring that the

payment of the money was just as legal, acceptable, patriotic, and valuable in carrying on the war and crushing the rebellion, as either of the others. Of this, congress was the exclusive judges. The question, therefore, was *res adjudicata;* and no other tribunal or power, whether individuals, branches of the government, courts or States, has any right, authority, or power to declare otherwise.

The various statutes ratifying the votes of towns to pay bounties to drafted men who entered the service themselves, or sent substitutes, have been repeatedly sanctioned by this court, and fully commits it to sustaining the act of 1869. *Barbour* v. *Camden*, 51 Maine, 608; Opinion of Judges, 52 Maine, 596; *Barker* v. *Dixmont*, 53 Maine, 575, 576; *Winchester* v. *Corinna*, 55 Maine, 9; *Hart* v. *Holden*, 55 Maine, 572.

L. Clay, for the defendants.

BARROWS, J. The foundation of the plaintiff's claim fails utterly, if c. 55, of the Laws of 1869, entitled, "An act to render valid certain doings of towns, in voting commutations," is found to be clearly beyond the limits of constitutional legislation. The presumption being that it was not so, the judge at *nisi prius* proceeded in accordance with the usual practice, upon the assumption that the act was valid and binding, and instructed the jury, among other things, "that the only question they were called upon to determine, was whether the moderator and clerk were duly sworn," and "that if they should find that those officers were duly sworn before entering upon the discharge of their duties, their verdict should be for the plaintiff." To this the defendants except.

It is manifest that the positions now taken by the plaintiff's counsel that the validity of the act is not involved in the rulings or instructions of the court, and that no question of its validity is raised by the exceptions, cannot be maintained. The instructions complained of did not involve the validity of the act, for unless the act was valid, the verdict could, in no event, be for the plaintiff.

We come, then, directly to the question of the validity of the act.

It has been for some time past under consideration in other cases. It must be met and decided, with the care and caution which its importance demands.

The limits of the constitutional power of the legislature to raise money by taxation, or to authorize towns to make grants of money which must be raised by taxation, have been recently discussed by this court. See Opinions of the Judges, 58 Maine.

We start, then, with the proposition which we think no one will gainsay, that if the grant made by vote of the town is purely a gratuity to an individual, and it is impossible to believe or imagine that the public can gain anything thereby, or that the public welfare can be thereby in any manner subserved, the grant is not lawful, and no legislation can make it so. We think it susceptible of positive demonstration, that the public, or the general government, which in this matter represented the public, could by no possibility gain anything by the action of certain towns in voting to drafted men sums required to pay commutation, or to reimburse the drafted man for moneys paid for that purpose.

In the emergency then existing, the country, the public, the government which represented both, had a right to the services of as many able-bodied men, within certain ages, as were necessary to protect us all against the machinations of treason,—had the right to draft from the whole number of those fit for military duty, so many as were required for that purpose. In the law regulating the draft, a certain sum was fixed and designated, the payment of which, by the drafted man, should be deemed an equivalent to the rendering of personal service or the sending of a substitute. The payment of three hundred dollars constituted that equivalent.

But when an able-bodied man was drafted and accepted, the government held him for the performance of one of the three alternatives. He must either go himself, or send a substitute, or pay the three hundred dollars. To do one of these three things was a duty which he, as an individual, owed to the country, and his own proper person was pledged for the performance of one of them. If he declined to go, or send a substitute, before he could be relieved,

he must pay the three hundred dollars. It was his individual debt. By the draft and acceptance the public had secured the performance by him of one of the three alternatives. It is as plain as anything in arithmetic, that by no possibility could the public gain anything by having his town take his place in the payment of the money.

There was room to suppose that the grant of a bounty to him, or to his substitute, actually entering the service, might benefit the public by showing the sympathy of his fellow citizens, and thereby encouraging the soldiers to render better service. But three hundred dollars can be no more than three hundred dollars, let who will pay it. The only possible effect of the vote of the town is to substitute the money of the town for that of the drafted man.

Without such action the public would have either the service or its equivalent in money.

With it the public can have only the money equivalent. We cannot imagine a case which would be more clearly and simply the assumption and discharge of a single citizen's liability, without the remotest possibility of any benefit to the public accruing therefrom. It can wear no other aspect until it can be shown, either that the money was better than the service for which the law of the United States declared it to be simply an equivalent, or that three hundred dollars of the town's money would go further in the purchase of such service, than three hundred dollars from the drafted man.

The able counsel for the plaintiff makes no futile attempt to show how it could be possible that some benefit to the public could be derived from such a grant of public money. The only suggestion he has to offer, in support of the validity of the statute, is that this court is committed to that doctrine by reason of having recognized the constitutional authority of the legislature to pass laws making valid the acts and doings of towns in voting the payment of bounties to volunteers, drafted men, and substitutes, who actually entered the service. Thus far this court has gone and no further.

But this falls very far short of the proposition which we are now called upon to entertain.

The difference between that class of cases and the present is radical and essential. Test them by the statement of principles with which we started. The difference is this. In the case of the payment of bounties to those actually entering the service, the public had the benefit of both the service and the money granted, so far as the latter might be supposed to operate as a stimulus to greater exertion on the part of the soldier. But in the case of money voted for commutation, the town's money only goes instead of an equal sum which the drafted man must pay, if he would avoid rendering either personally or by substitute the service for which the law deems the money simply an equivalent. The public does not get from any quarter both the service and the money as it does in the case of money paid for bounties to those actually entering the service.

As we have just seen, the drafted man alone can, by any possibility, derive any benefit from the payment. What is given to the public in money is but an equivalent for the service, of which the country is by the same act deprived, and no remainder of benefit to the public is left. Now, in the case of the payment of bounties, it was not difficult to believe that the soldier, cheered by such substantial manifestation of the patriotic sympathy of his neighbors, and of their willingness to coöperate with him for the common defense, and freed from anxiety as to the maintenance of those who might be dependent on him, and relieved to a certain extent from the annoying sense of personal pecuniary loss, might, and would render more efficient service to the country than he would be able to do, if he went forth to his work bearing the whole burden of his private cares with him. There ~~were~~ was at least, a possibility of a common benefit growing out of the grant, which is not found here.

And herein is the fundamental difference between grants for bounties to soldiers who took the field, and grants to individuals to enable them to avoid taking it. No case can be found, in which this court has sanctioned the imposition of a public burden for purely private benefit and advantage.

We have never yet gone so far as to sustain an individual's claim

to reimbursement for furnishing a substitute, where the vote of the town has taken that form. No such case has ever come before us.

That case was fully considered in Massachusetts, and an elaborate opinion, adverse to the claim rendered in *Freeland* v. *Hastings*, 10 Allen, 570, in which (page 588) we find the following emphatic language. "But the other and more decisive objection to the repayment by the town of money paid for substitutes is, that if the language of the statute would warrant the raising of money for such purpose, the legislature have no power to confer such authority on the town."

This is followed on page 589 by a train of reasoning, which it would be found very difficult, if not impossible, to refute. And that reasoning applies even more forcibly and directly to such a claim as this.

In *Barbour* v. *Camden*, 51 Maine, 608, that portion of the vote of the town, the ratification of which was sanctioned by the court, was as follows: ". . . to pay to each such citizen so drafted the sum of three hundred dollars when mustered into the service of the United States, or to his substitute, when so mustered," and the case finds that "the plaintiff paid the substitute the town bounty of three hundred dollars and took said substitute's order on the town of Camden for that amount," in exchange for which the selectmen gave the plaintiff the order on which the suit was brought. So that the case was neither more nor less than a claim for the payment of a bounty to a soldier in the field. It is not easy to perceive how anything in the other authorities cited can be perverted to the support of the present plaintiff's claim.

We are fully sensible that the duty imposed upon this court by the constitution and laws of this State of passing upon the acts and doings of the legislature, where they affect the rights of parties litigant before us, and of declaring such acts void of legal force and effect if they shall be found to be in contravention of the fundamental law of the State, ought always to be discharged with the utmost circumspection; that never, except when the bounds of constitutional authority have been clearly passed, should the power

vested in us be exercised; that due force is to be given to the presumption that the constitutional limits have not been transgressed, and only when this presumption is fully overcome should the act be pronounced void.

But while we bear these things in mind we feel bound to declare our conviction that a law imposing a public burden, for purely private benefit, without the possibility of any corresponding public advantage, is a clear violation of the constitutional guaranties of the right of private property; that the action of towns in voting money for the payment of the commutation fees of individuals drafted into the public service is justly liable to this objection, and that, as a consequence, any attempt on the part of the legislature to authorize or ratify such action on the part of the towns is beyond the sphere of constitutional legislation.

Accordingly we hold the attempted ratification of these acts and doings in c. 55 of the Laws of 1869, to be devoid of legal and binding force. *Exceptions sustained.*

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

DICKERSON, J., concurred in the result, and presented his views as follows:

DICKERSON, J. It seems to me to be erroneous to regard the act of congress as placing the payment of money upon the same footing with rendering military service. While such construction is not required by the terms of the act, it is contrary to its spirit, to reason and public policy, and to the contemporaneous judgment of the country.

The government needed men rather than money, personal service rather than pecuniary aid. The object of the act was to raise men, as appears from its title and other provisions. The difference between rendering military service and the payment of money is obvious; if every drafted man had rendered military service, the integrity of the republic would have been assured, while if every

such man had paid $300 dollars, instead of rendering such service, rebellion would have triumphed. It is the difference between the man who performed his duty to his country, in the hour of her greatest peril, and the man who paid a fine for not doing such duty. The ranks of the army were decimated to an extent substantially corresponding in numbers to the number of drafted men who were prevented from joining it by the payment of this fine. For every soldier disabled by sickness or wounds, exempted from further immediate service by the expiration of his term of enlistment, killed in battle, or suffering death from wounds or disease, the government needed and had a right to a fresh recruit. To this call of the country every drafted man who would neither render personal service nor furnish a substitute responded, "I will pay my fine." The effect of such responses upon the soldiers in the field and the recruiting service was so disastrous, that congress was soon impelled to repeal the odious provision of the act under consideration. The intelligent judgment of the country at the time made a broad discrimination in its estimate of these two classes of drafted men.

It is a misinterpretation of the true intent and meaning of the act of congress, as well as a misconception of the exigencies of the country, and a perversion of contemporaneous history, to hold that the payment of $300 under that act was equivalent to the performance of military service. The meaning of the act is the same as though it had read, "Every drafted man who does not enter the military service of the country, or furnish a substitute, shall pay a fine of $300." So far from being equivalent to personal service, the payment of the money was imposed as a military fine for not rendering such service. Worcester defines the word "fine" to mean, "a sum of money paid for obtaining a benefit, favor, or privilege." This is precisely what the defendant did when he paid the $300 for which he now claims to be reimbursed. It was not paid to promote the public advantage or welfare, but to purchase his own exemption from the performance of a personal duty, to enable him to enjoy his ease and pleasure, advance his private interests, and escape the privations, sufferings, and perils of war. When a

drafted man elected to pay $300 in lieu of entering the service or furnishing a substitute, such payment stands upon the same footing as the payment of a fine imposed by law for not attending a military training under a State law, or by judgment of a court-martial for other neglect or violation of military duty. Indeed, the motives for payment of the fine are more urgent and the duress under which it is paid is more formidable in the former than they would be in the latter class of cases.

The intimation in the act of congress that the money thus paid was "for the procuration of a substitute," was obviously designed to render the provision under consideration as little odious as possible, a sort of plea of justification for accepting money instead of men, whenever motives of fear, private pleasure or interest, or hostility to the war should induce the drafted man to adopt that alternative. For like reasons of public policy the act in question does not in terms designate the provision for the payment of money as a fine in terms, though it partakes of the nature of a fine, was obviously designed as such, and may properly be thus regarded.

The provision for the payment of money cannot be regarded as a tax levied upon the drafted man, since congress has no authority to discriminate against them by imposing upon them an undue proportion of the expenses of the war, though it may impose a fine upon them for not rendering military service.

There was no element of public advantage, benefit, or welfare blended with the payment made by the defendant. On the contrary, such payment, as we have seen, tended to weaken and demoralize the army, and bring the government into disrepute and peril. The defendant paid the $300 in controversy as a fine imposed for non-performance of a personal obligation to the government, exclusively for his own individual benefit and as his individual debt. He might have entered the army and avoided this expenditure; but rather than do so, he chose to pay the fine imposed for such neglect. He has enjoyed the benefit secured by the sum he paid, and cannot rightfully compel others to reimburse him for such payment. To do so would be to require the inhabi-

tants of the defendant town to pay a tax to indemnify him against loss for neglecting to perform a personal public duty,—to tax the drafted men of that town, who entered the military service or paid a substitute, in order to reimburse him the fine he paid for the privilege of staying at home.

A tax levied for such a purpose is not only a tax on A. for the private benefit of B., but it is also a tax on A. to reimburse B. the amount of the penalty he paid for not performing a personal public duty. A statute authorizing the imposition of such a tax lacks the distinguishing characteristic of all constitutional enactments that involve the necessity of taxation, a public purpose, and is, therefore, unauthorized by the constitution. Opinions of Justices, 58 Maine, 601 and 604.

The previous adjudications of this court in respect to the constitutionality of statutes authorizing towns to pay bounties, etc., afford no sanction for the statute under consideration. Those cases are clearly distinguishable from the one at bar, as the public welfare was intimately blended with the private interest of the individuals sought to be benefited by the reimbursement. The present plaintiff's case has no such association.

While the legislature may rightfully authorize the imposition of a tax to encourage and aid drafted men in rendering military service to the government, it has no constitutional power to authorize a tax to prevent them from performing such service.

Inhabitants of Hampden *vs.* Inhabitants of Levant.

Pauper. Residence—when it ceases.

If, while absent from his place of residence, a person form an intention to abandon it, his residence then as effectually ceases, as if he had intended not to return when he left it.

To prevent his gaining a settlement, it is not absolutely essential that the pauper should make the application for aid.

Application of *Corinth* v. *Lincoln*, 34 Maine, 310, in relation to supplies received indirectly.

On Facts found by a referee.

The case is stated in the opinion.

S. W. Matthews, for the plaintiffs.

A. W. Paine, for the defendants, contended *inter alia.*

That if during his stay in the army, the alleged pauper formed an intention of going to Winterport to live after his return, this would not affect his settlement in Hampden, until that intention was carried into effect. So long as the idea was in intention alone, no effect could be produced upon his rights in any respect,—his rights of suffrage, school, or settlement, or the duties of taxation, draft, or other public charge. *Hallowell* v. *Saco*, 5 Greenl. 143; *Wayne* v. *Green*, 21 Maine, 357; *Worcester* v. *Wilbraham*, 13 Gray, 586.

Corinth v. *Lincoln*, 34 Maine, 310, does not sustain the conclusion, that a boarder is affected by the supplies furnished by his landlord, of which the boarder partakes; but the careful language of the opinion excludes it. No hint is therein given that any interference is intended with the principles settled in *Hallowell* v. *Saco*, *sup.*; *Green* v. *Buckgeld*, 3 Greenl. 136; *Raymond* v. *Harrison*, 11 Maine, 190; *Bangor* v. *Readfield*, 32 Maine, 60; *Garland* v. *Dover*, 19 Maine, 441; and *Sanford* v. *Lebanon*, 31 Maine, 124.

In *Corinth* v. *Lincoln*, the parties were father and daughter, the latter of whom, though of age, had returned to her father's house, "to find a home in his family," to be "an inmate of his family." And the court say it was necessary to appear "that she had her home at her father's," "a home which must be the place where she has the design and the right for the time being to abide," etc. See also, the remainder of the opinion.

Counsel also cited *Oakham* v. *Warwick*, 13 Allen, 90; *Taunton* v. *Middleboro'*, 12 Met. 38.

APPLETON, C. J. The settlement of the pauper was originally in the defendant town. In middle of December, 1857, and a few days before he became of age, he left Levant and went to Hampden to reside. His settlement, however, would remain in the defendant town, until he should gain a new one elsewhere in some of the modes prescribed by statute, and the burden is on the defendant to show that a new one has thus been gained.

The pauper, in December, 1857, went to Hampden with the expressed intention of getting work there, and not intending to return to Levant. He had two married sisters residing in Hampden, with whom he spent most of the time. In 1860, he voted there, and in 1861, he enlisted in the 12th Maine regiment and served until the expiration of his enlistment, when he reënlisted and was allowed on the quota of Hampden. He came to Hampden on a furlough in 1864, and spent most of the time at his sister's Mrs. Knowles, paying there his board in part. The mother of the pauper had re-married, and was living in Winterport. About the middle of July, 1865, while in the service he formed the resolution of abandoning Hampden, and making his home in Winterport; sent his mother $160, and requested her to purchase land in that town adjacent to that on which she lived; sent her $160 on leaving the army, went to his mother's, worked on the land some time, became dissatisfied with his trade, sold the land to the person with whom the bargain was made, and then went to Carmel, where he has since resided.

The question presented is whether there are five continuous years of residence in Hampden, in which there have been no supplies furnished the pauper.

The pauper ceased in July, 1865, to reside in Hampden. He was not there bodily at that time. He has not resided there since. He then formed the resolution of abandoning his residence in Hampden and to reside in Winterport. The intention and the absence bodily from the plaintiff town ended his residence there. It was not necessary that he should return to Hampden, and instantly leave with the intention of abandoning his residence. Absence from Hampden and the intention not to return, and to go elsewhere to live, and their coexistence sufficed to effect a change of residence. The facts of sending the money, of requesting his mother to purchase land in Winterport, and his going there, after leaving the army, together with his absence from Hampden and his intention to abandon that as his plan of residence, and to establish a new one in Winterport, show that he then ceased to have any residence or home in Hampden.

The residence is broken up when one leaves with the intention not to return. But being absent, if the intention not to return is formed while thus absent, is the residence any the less broken up? Is it necessary, when one leaves, having no formed intention of abandoning his then residence, and while absent, forms the intention of not returning, that he should return and start anew with an intention of not returning, before his residence can be regarded as legally abandoned. When one leaves his place of residence, and while absent forms the intention of not returning, his residence as much ceases as if at that date he had left such residence with the intention of not returning.

Were there five years of continuous residence by the pauper in the town of Hampden, between the middle of December, 1857, when he moved into Hampden, and July, 1865, when he ceased to reside there, without his "receiving, directly or indirectly, supplies as a pauper?"

The families of both his sisters were poor and received supplies

from the plaintiff town every year, from 1859 to 1867. The pauper spent his time, while in Hampden, in the families of his sisters,—and most of it with Mrs. Knowles, and agreed to pay for his board, and did pay it in part. It does not appear that he paid anything while residing with his other sister. While living in the family of Mr. Knowles, the latter called twice on the plaintiff town for assistance for the pauper, and they agreed to pay him for the board the pauper had agreed to pay but had not. The plaintiff town, on June 5, 1860, paid $4.50 for three weeks' board, and on December 9th, $7.50 for five weeks' board. These amounts were repaid by the town of Levant. The pauper, however, did not call on the town, nor did he know that Knowles, whose family was receiving aid, in whose family he was boarding, had called on the town for aid for him, etc.

The two families, in which the pauper boarded, were receiving supplies during the time he lived in Hampden. It could hardly be otherwise, than that the fact was known to him. These supplies must be regarded as supplies furnished indirectly within the case of *Corinth* v. *Lincoln*, 34 Maine, 310. In addition to those supplies the town of Hampden paid for his board at two several times in 1860, and the sums so paid were repaid by the defendant town. These supplies break up the continuity of time required by the statute. They were furnished prior to five years from the middle of December, 1857, when the pauper came into Hampden, and after that date, five years did not elapse before he abandoned his residence there in July, 1865. It was not necessary that the pauper should make the application for aid to prevent his gaining a settlement, for in *Corinna* v. *Exeter*, 13 Maine, 321, the aid was furnished without appplication on the part of the pauper and against his earnest protestations. *Defendants defaulted.*

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

ALLEN B. FARRAR and another *vs.* URIAH T. PEARSON.

Account—action of—when not maintainable.

In the absence of any adjustment of the matters of a partnership, two members thereof cannot maintain a joint action of account against the third, to recover their share of the net profits.

Thus, in the trial of a joint action of account by the plaintiffs against the defendant, it appeared, on the part of the plaintiffs, that the parties were partners, on equal terms, in the business of hunting; that they killed several moose, which the defendant sold and received the money for; that he had received other moneys belonging to the firm; and that on being called upon for payment, he told one of the plaintiffs he would pay when he had the money, and the other that he had received no more money than he had paid out. *Held*, that the action was not maintainable.

In case of a tenancy in common, each tenant may bring his several action; but two cannot join against a third, for they have no joint interest.

ON EXCEPTIONS.

ACCOUNT against the defendant as "receiver of moneys of the plaintiffs."

The plaintiffs proved that in the winter and spring of 1867, they and the defendant were partners in the hunting business, each being entitled to the profits and liable to the losses; that they killed several moose, some of which the defendant sold and received the money for; that the defendant collected an order of $108 and various other moneys belonging to the firm, amount not known; that the defendant told Farrar he would pay him as soon as he had the money, and told Webber (the other plaintiff) that he had received no more money than he had paid out.

The defendant moved that the plaintiffs be nonsuited, on the ground that they could not jointly maintain this action. But the presiding justice ruled otherwise, and ordered the defendant to account. Thereupon the defendant alleged exceptions.

P. G. White, for the plaintiffs, contended

That the object for which the partnership had been created, having ceased, a settlement only remained.

That the firm owed no debts; and that the defendant had converted everything into money.

That the plaintiffs were joint tenants in their share of the proceeds of the sale of the property, seized *per my et per tout.* Coll. on Part. § 123. And as such the defendant was bound to account to them jointly. *McMurray* v. *Rawson*, 3 Hill, 59; *Griffith* v. *Willing*, 3 Bain, 317; *Whelan* v. *Watmough*, 15 Serg. & R. 153; *James* v. *Brown*, 1 Dall. 339.

A. Sanborn, for the defendant.

APPLETON, C. J. This is an action of account. "Account render," observes Gibson, J., in *Geary* v. *Cunningham*, 10 S. & R. 230, "is at best but a clumsy remedy, and so greatly inferior to a bill in equity, that it is in England abandoned altogether." It is, however, still retained in this State.

At the trial at *nisi prius*, the presiding justice rendered the interlocutory judgment, *quod computet*, to which exceptions were taken. The question presented is whether the plaintiffs, upon the evidence produced, were entitled to this judgment.

The plaintiffs and defendant were partners. There has been no adjustment of the affairs of the partnership, and no balance ascertained. The interests of the several partners *inter sese* were several. There is nothing showing or tending to show any interest on the part of these plaintiffs, which alone would entitle them to maintain a joint action against their copartner. There is no express promise proved, and nothing from which one can be implied.

In *Whelan* v. *Watmough*, 15 S. & R. 153, this form of action was brought by one partner against two, and it was held not to be maintainable unless a joint liability was shown. "When the objection was first made, that there could not be a verdict and judgment for the plaintiff *quod computet*, unless the jury found a joint liability of the defendants to render an account, I was impressed," observes Duncan, J., "with an opinion that it was unanswerable. It seemed to me that it would be unsettling the first

foundations, to say that one man should be answerable for another, when there was no express contract, and when, from the nature of the consideration, there could be none implied. I did not then believe it to be law, and so instructed the jury, that on the plea of never bailiffs or receivers of the plaintiffs, unless they found that this was a house of partnership, consisting of two parties, the plaintiffs one and the defendants the other, then verdict should be for the defendants." This ruling was sustained and judgment entered on the verdict.

The same reasoning is still more applicable when there are two partners suing a third. The defendant may owe one and not the other, or one more than the other. The plaintiffs cannot have several judgments in accordance with the different amounts the defendant may owe them severally. They have no joint cause of action and therefore they cannot recover, though the same amount was due each. "Neither," observes Gould, J., in *Beach* v. *Hotchkiss*, 2 Conn. 425, "can one of the three (when the partnership consists of that number) recover against either of the others singly, since the mutual claims of any two of them cannot be completely adjusted without deciding upon those of the third." The only mode by which the affairs of a partnership, consisting of three or more, can be settled by suit is by bill in equity, where all the partners are made parties to a suit, in which their respective rights can be adjusted.

In *Portsmouth* v. *Donaldson*, 32 Penn. 202, the precise question here presented arose. It was there held that one partner could not maintain this action against his two copartners jointly, without showing a joint liability on their part to account. "The action of account render," observes Strong, J., in delivering the opinion of the court, "is founded upon contract, and the engagement between the partners is, that each partner shall account to every other for himself, and not for his copartner. It is a several liability, and no two partners are responsible to another jointly."

In case of a tenancy in common, each tenant may bring his several action, but two cannot join against a third, for they have no joint interest. *Sturton* v. *Richardson*, 13 M. & W. 17.

Had the plaintiffs brought assumpsit, the affairs of the firm remaining unadjusted, and no balance agreed upon, and no express promise proved, the plaintiffs could not recover. In such case the law will not imply a promise. *Exceptions sustained.*

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

JESSE PARTRIDGE *vs.* CHARLES E. WHITE.

Chattel mortgage—construction of. Ratification. Agent's declarations.

A mortgage of "the goods and chattels now in" the mortgager's store in a certain town named, "a schedule of which is hereunto annexed," covers only the goods then in the store of which a schedule was made.

By bringing a suit to recover the value of goods mortgaged to the plaintiff claiming to hold under the mortgage, the plaintiff thereby ratifies the act of his attorney in taking the mortgage in the plaintiff's name.

The declarations of an agent in regard to a past transaction are not admissible against the principal.

ON EXCEPTIONS.

TROVER wherein the plaintiff claims to recover the value of a stock of goods in Brunswick, in the county of Cumberland.

The plaintiff claimed to hold by virtue of a mortgage from one Strout to him, dated Dec. 29, 1868, to secure $700 and interest.

The defendant claimed, by virtue of a mortgage from said Strout, to one Thompson, deceased, to secure $300 and interest, dated April 8, 1864. The mortgage described the property as "the goods and chattels now in my store in Brunswick, aforesaid, a schedule of which is hereunto annexed."

It appeared that the defendant was the administrator of the estate of the mortgagee, Thompson.

There was evidence tending to show that the defendant took possession of the goods in controversy under the mortgage; that he had let Strout have $1,000, and was to have a claim on the goods

till the money was paid; that after taking possession, the defendant sold the goods for $3,635.39.

The presiding judge instructed the jury, that in order to hold the goods on the mortgage under which the defendant claimed, it would be incumbent on him to prove that the goods were the same which were covered by that mortgage, and that he could hold no other under it, but the identical goods that were in the store at the time it was given.

That admitting the Thompson mortgage to be valid, if there were more goods than were sufficient to pay the mortgage, then the plaintiff's mortgage conveyed to him a right of redemption of the Thompson mortgage, that not having been foreclosed; and if the Thompson mortgage was discharged without foreclosure, it would be no justification for the defendant.

The defendant denied the validity of the mortgage to Patridge because it appeared in evidence that it was taken by one Brown, an attorney at law, with whom the plaintiff had left a note against Strout, upon which to obtain security; and that it was in evidence that Brown had stated that he had no authority to take a mortgage.

And the presiding judge instructed the jury that Brown was not a party to the suit, and his admissions or statements at other times were not testimony, except so far as they tend to impeach his credibility as a witness.

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

J. D. Brown, for the plaintiff.

J. D. Simmons, for the defendant, cited *Abbott* v. *Goodwin*, 20 Maine, 408; *Jewett* v. *Preston*, 27 Maine, 400; 1 Greenl. on Ev. §§ 113 and 114; *Burnham* v. *Ellis*, 39 Maine, 319.

APPLETON, C. J. The mortgage to Samuel Thompson, under which the defendant justifies, was of "the goods and chattels now in my store in Brunswick aforesaid, a schedule of which is here-

unto annexed." This could only cover those then in the store, of which a schedule was made. The case of *Abbott* v. *Goodwin*, 20 Maine, 408, does not apply.

Whether Brown had authority originally to take the mortgage under which the plaintiff claims is immaterial. His action has been affirmed by the bringing of this suit. The defendant cannot complain, for his right was to the goods mortgaged to Thompson, and the jury by their verdict, under proper instructions, have found that none of those are embraced in the plaintiff's claim, or that the mortgage was discharged.

The rulings of the presiding justice were in strict accordance with law. *Exceptions overruled.*

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

PATRICK FOLAN *vs.* MATTHEW FOLAN.

Audita querela—when and by whom maintainable.

A judgment debtor, who was absent from the State and not served with process, may maintain *audita querela*, to set aside an execution issued on a judgment rendered on default, in a personal action, within one year thereafter, without first giving the bond prescribed in R. S. c. 82, § 4, notwithstanding the execution has been returned satisfied by a levy on the debtor's real estate.

ON FACTS agreed.

Case is stated in the opinion.

J. W. Williamson, for the plaintiff.

N. H. Hubbard, for the defendant.

APPLETON, C. J. On 16th August, 1865, the defendant sued out a writ of attachment against the plaintiff, who was at the time absent from the State, and did not return until after the judgment, hereinafter referred to, was rendered against him. There was no service upon the plaintiff, or his tenant, agent, or attorney, and no appearance by or for him. At the return term, notice was ordered to be given the plaintiff (then defendant) "by causing an attested copy of this action, with the order of court thereon, to be published three weeks successively in the 'Progressive Age,' etc. The order was complied with, and, at the next term, judgment was rendered on default and execution issued thereon, without any bond having been given by the defendant (then plaintiff) as required by R. S. c. 82, § 4. The execution thus obtained was levied upon the plaintiff's real estate, and returned satisfied, whereupon he has brought the writ of *audita querela*. Is it maintainable?"

The execution was irregularly issued against the express provisions of the Statute, c. 82, § 4. In such case there can be no writ of error. "The remedy of the party injured," observes Parsons, C. J., in *Johnson* v. *Harvey*, 4 Mass. 485, "is either by *audita querela*, or by motion to the court to set the execution aside." This is the proper remedy when an execution has issued without notice to the defendant, and without giving the bond required in such case by the statute. *Marvin* v. *Wilkens*, 1 Aiken, 107; *Whitney* v. *Silver*, 22 Vt. 634; *Porter* v. *Vaughan*, 24 Vt. 211. It lies to vacate a judgment irregularly issued, when the bond required by statute has not been given, though the execution has been satisfied by a levy on personal estate. *Alexander* v. *Abbott*, 21 Vt. 476. So it may be maintained by a judgment debtor not served with process to set aside an execution taken out by a creditor, without first filing the bond required by statute, even after the execution has been satisfied by a levy upon real estate. *Dingman* v. *Myers*, 13 Gray, 2. It is a concurrent remedy with a petition for a review. *Lovejoy* v. *Webber*, 10 Mass. 101.

The case of *Bryant* v. *Johnson*, 24 Maine, 304, is inapplicable. In that case, the service was duly made on the original defendant,

and judgment rendered for the amount due. The original plaintiff was entitled to an execution of right. The one issued was retained by the plaintiff's attorney, and a second one was issued, upon which a levy was made, which was the only matter of complaint. No wrong was done, "unless," as remarks Whitman, C. J., "the payment of an honest debt can be accounted an injury." Whether the second execution was issued irregularly or not, the court say they will not inquire. In the present case, the question was issued against the express prohibition of the statute, in a case where the defendant had no personal service, and where he was entitled to the protection of a statutory bond, before it could legally issue.

The writ of *audita querula* is a remedy to which the aggrieved party is entitled. That he may have another remedy is no reason why he should not have this.

Judgment for plaintiff, that execution illegally issued, and all proceedings under it vacated.

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

GEORGE B. STEARNS and wife *vs.* GEORGE SAMPSON.

Tenancy—termination of—right of landlord to enter and expel tenant. Assault of tenant by landlord—what will not support allegation of.

When a tenancy has been legally terminated by the landlord, he may peaceably enter the premises, whether he disclose or conceal his intentions of entering to be for the purpose of removing the tenant.

After such entry he may remove the tenant, using such force as will sustain a plea of *molliter manus*.

And in such case, if the tenant, after a reasonable opportunity therefor, neglects to remove his goods, the landlord may remove and deposit them, with due care, in some near and convenient place.

A declaration, alleging that the defendant, with force and arms, committed an assault upon the female plaintiff, is not sustained by evidence; that the defendant, a reasonable time after terminating the plaintiffs' tenancy, peaceably

entered the premises, requested the pl aintiffs to quit, and remove their furniture, and upon their refusal, burst open an inner door, which she wrongfully fastened, and refused to open, took off the doors and windows on a cold day in winter, brought a blood-hound into the house, made a great noise in the premises for several days, and refused to permit any food to be furnished to her from the outside.

On exceptions, and motion to set aside the verdict as being against law.

Trespass.

The writ contained three counts; one for breaking and entering the plaintiffs' close and carrying away the household furniture; the second, for taking and carrying away the household furniture of the wife; and the third, for assault on the wife.

There was evidence, tending to show that the plaintiffs had been in the peaceable possession of the premises in controversy for more than twenty years; that the defendant received the legal title in September, 1869; that the husband plaintiff, being absent most of the time, the defendant had an interview with the wife, informing her of his title, and asking her how long before she would be ready to leave, to which she replied, that "it would take her four weeks;" that the defendant told her the purpose for which he bought it, and asked her if he could commence repairs on the outside without disturbing her, to which she gave her consent; that defendant's workmen erected stagings about the third week in October; that the husband notified defendant to remove stagings; that the defendant caused a notice, to terminate plaintiffs' tenancy, to be made and served about October 25th; that the defendant consulted eminent legal counsel and followed their directions generally.

The mode of entering into the house will be found in the opinion detailed by each party.

There was evidence tending to show that after entry and notice to leave, and refusal by the wife and her mother, with an expressed determination on their part to hold possession against the defendant, the latter called in assistants and ordered them to remove the furniture, and they did remove it from some of the rooms; that

upon going to one of the rooms, the door was fastened and the assistants opened it; that the furniture, except bed, was removed from Mrs. Stearns' sleeping-room.

That the assistants remained there several days and nights.

That the defendant caused the windows to be removed; prevented food from being carried to the house; that a tenant was let into the L of the house, and had charge of the defendant's blood-hound, five months old, and permitted him to go into the house; that the furniture was removed into a house near by, and Mrs. Stearns notified of its whereabouts; that the doors fastened by Mrs. Stearns were removed; that Mrs. Stearns finally left by compulsion with an officer, and was sick several weeks.

The rulings sufficiently appear in the opinion.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions and also filed motions to set aside the verdict as being against law and the weight of evidence.

J. W. Bradbury & L. Clay, for the plaintiffs.

A. Libbey, for the defendant.

Appleton, C. J. The writ in this case contains three counts,—for trespass *quare clausum*, for an assault and battery upon the female plaintiff, and for taking and carrying away her goods.

The presiding justice, in his charge to the jury, assumed that the legal title to the premises upon which the alleged trespasses were committed, was in the defendant; that George B. Stearns had been a tenant therein; that the defendant had given him legal notice to quit; that his tenancy had been terminated, and that he thenceforth became a tenant at sufferance.

The defendant, these facts being unquestioned, after having given the plaintiff ample time in which to remove his goods and family, on the ninth of December entered into the premises in controversy, which had been and were then occupied by the plaintiffs. The plaintiff's' witness, Mrs. Best, gives the following account of the defendant's entry: "December ninth, as I was

passing through the entry, the bell rang. I opened the door. Being in my morning dress, I apologized. Mr. Owen was with Mr. Sampson; he introduced him to me. Without my asking him, he stepped in, and then into the parlor and asked for mother. I went and called her, and then went to my room to my baby. She soon called me. Mother said, Mr. Sampson has come to move the furniture. Owen went into the parlor. Mother was then in the parlor. Mr. Sampson said he had come to clear the house, and for us to leave at once," etc.

The defendant's testimony on this point was as follows: "On the 9th December, I went to the house with Mr. Owen, and rang the door-bell. Mrs. Best came to the door and invited Mr. Owen and myself into the house, and showed us into the south-west parlor. I asked for Mrs. Stearns, and she called her. Mrs. Stearns came in five minutes perhaps, or a little more. I then said to her I had come to take possession of the house; that I had consulted Mr. Paine and Mr. Sewall, and that they had told me to come to the house and take possession of it. She remonstrated," etc.

Now what, after this entry, were the relations of the parties? The defendant had, without force or violence, entered into his own house, in which the plaintiffs, their tenancy having been legally terminated, still remained? What were the respective rights and duties of the parties? The plaintiffs without title, their tenancy duly terminated, were there without right. Their continued possession was wrongful. The defendant was there by right in the possession of his own estate, having entered peaceably and without resistance on the part of the wrong-doing tenant. Both cannot rightfully remain. One or the other should quit. Can there be any doubt whose duty it was to leave. If the defendant could rightfully remain, the continued occupation of the plaintiffs was wrongful; as the plaintiffs could not rightfully remain, and the defendant could, and as one should quit, if he failed to quit voluntarily, there remained only the right of removal.

That right would be the same as where any person, having entered a dwelling-house, refuses to quit when requested. If there

is not this right of removal, then any knave may enter, remain, and refuse to quit, and there is no mode of dispossession. It is true every man's house is his castle. But his neighbor's house, where he has no legal right to be, is not his castle. The owner, in his castle, may remain, for it is his castle. The trespasser, in his neighbor's castle, must remove or be removed. If it be not so, the rights of the wrong-doer are equivalent to those of the owner, rightfully in possession of his own.

The facts as to the entry on 9th December were not in dispute. Upon these facts, the presiding justice instructed the jury as follows: "There is no controversy, that if he (the defendant) had obtained peaceful possession, he had a right to remain there, the property being his at the time. But what was the nature of his possession? Did he go there for the purpose of deception, merely to call as a friend on a visit, or did he go there with the intention, after making such an entry, to forcibly expel the inmates? If that was his design, then the entry would not be recognized, in law, to give him a peaceable possession." As the defendant had a right to enter peaceably into his own house, and being there to remain, and to remove the tenant wrongfully remaining, it does not affect the rights of the parties, whether he disclosed or concealed his intention to remove his tenant. Nor is it material whether he entered with such intention, or formed such intention after his entry, if his entry was peaceable, and without force. "It is not necessary," remarks Lord Tenterden, in *Butcher* v. *Butcher*, 7 B. & C. 399, 14 E. C. L. 59, "that the party, who makes the entry, should declare that he enters to take possession; it is sufficient, if he does any act to show his intention." In the same case, Bailey, J., says, "I think that a party, having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person, who being in possession at the time of his entry, wrongfully continues upon the land." The defendant might instantly bring trespass against the plaintiff, wrongfully remaining in his house, or he might remove her. As the law gave him a right to enter peaceably and remove his tenants and their goods, if it could be

done without a breach of the peace, the intention to do what the law authorizes, cannot make an entry with such intent wrongful.

The first branch of the instruction was correct. The verdict should be set aside as against law, the evidence on both sides showing the entry to have been peaceable.

If there is any evidence, to which the latter part of the instructions can apply, then the exceptions should be sustained; for a peaceable entry cannot be metamorphosed into a forcible one, by reason of an existing and concealed intention on the part of the party entering to do, after entry, what by law he was legally authorized to do.

The court instructed the jury that the plaintiffs could not recover on the count for breaking and entering. The defendant entering upon premises wrongfully withheld by the tenant, could not be deemed a trespasser. But if he was not a trespasser in entering into his own house, whatever his purpose or intention, then, being there, he might remove doors or windows. If the plaintiffs could not maintain trespass *quare clausum* for his entry, neither could they for his acts after such entry. *Meader* v. *Stone*, 7 Pick. 147. "The right of the plaintiffs to the possession of the house had terminated by their failure to pay rent, and the notice given to them by the defendant to quit the same. In this state of the facts," observes Dewey, J., in *Mugford* v. *Richardson*, 6 Allen, 76, "the defendant had the right to enter upon the premises and take out the windows of the same. . . . Being thus in peaceable possession of a portion of the tenement, the court properly instructed the jury that if the female plaintiff undertook to prevent him from taking out the windows, he had the right to use as much force as was necessary in order to overcome her resistance." In *Harris* v. *Gillingham*, 6 N. H. 11, the owner of the land, after requesting his tenant to leave, upon his refusal entered, tore down the chimneys and put the building in an uninhabitable condition, for doing which the tenant brought an action of trespass *quare clausum*. "We are of opinion," say the court, in delivering their opinion, "that the disturbance done to her possession, by putting the house in a situ-

ation which compelled her to leave it, did not make them trespassers *ab initio*, because she had no right to be there against the will of D. Gillingham, the owner of the land. *Erwin* v. *Olmstead*, 7 Cow. 229; *Wilde* v. *Contillac*, 1 Johns. Cases; *Hyatt* v. *Wood*, 4 Johns. 150; *Ives* v. *Ives*, 13 Johns. 235."

Neither can the acts complained of be deemed to constitute an assault upon the female plaintiff. As they were acts the defendant could legally do, they cannot become the basis of a suit or a foundation for a claim for damages.

The right of the plaintiffs to occupy having been legally terminated, they would have a reasonable time in which to remove their goods, after which the landlord might enter and remove them, storing them safely near by, provided it were done in a careful manner. *Rollins* v. *Mooers*, 25 Maine, 192. In case of a mortgage, the entry may be made by the mortgagee, before condition broken, without the consent and against the will of the mortgager, and the mortgagee may remove the personal property of the mortgager, provided it be done in a careful and convenient manner and to a safe place, without being liable in an action of trespass therefor. *Allen* v. *Bicknall*, 26 Maine, 436. In *Whitney* v. *Sweet*, 2 Foster, 10, a legal notice to quit on 20th October was given. "This," observes Bell, J., "was a sufficient notice, and the tenancy was by that notice terminated on the 20th. After that day the plaintiff was a trespasser; his goods were *damage feasant*, and the owner had a clear and perfect right to go into the house with suitable assistants, and then, peaceably and quietly, without breach of the peace, remove the goods to a near and convenient distance, and there leave them for the use of the owner, doing them no unnecessary damage." These views have been fully sustained by the supreme court of Massachusetts in repeated decisions. *Curtis* v. *Galvin*, 1 Allen, 215; *Mugford* v. *Richardson*, 6 Allen, 76. Indeed, after the legal termination of a tenancy, as in the case at bar, the tenant "could have no longer any other rights than those of ingress, egress, and regress, for a reasonable time to take care of and remove his property." *Moore* v. *Boyd*, 24 Maine, 242. Those

rights the plaintiffs had in the most ample manner, had they seen fit to exercise them.

There is in the declaration a count for an assault and battery upon the female plaintiff. In reference to this branch of the case, the following instructions were given. "Was there a trespass committed upon the female plaintiff? She is the only one who seeks for damages. Whatever may have been the injury inflicted upon the other inmates of that house, she can recover on this suit only for that which was inflicted upon her. In order to constitute an assault, it is not necessary that the person should be touched, but there should be certain indignities. In the language of one of the decisions, if the plaintiff was embarrassed and distressed by the acts of the defendant, it would amount in law to an assault." The acts and indignities which from the charge might constitute an assault, were the bursting open a door, which the defendants had no right to fasten, and the inconveniences resulting from taking off the doors and taking out the windows, which made it uncomfortable for the female plaintiff to remain, where remaining, she was a trespasser. So the bringing a blood-hound by the defendant into his house, which is proved to have barked, but not to have bitten, and the making a noise therein, with other similar acts, it was contended, would amount to an assault and trespass," and of that the jury were to judge." Now such is not the law. An assault and battery is clearly defined by R. S. c. 118, § 28, thus: "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another, however small, in a wanton, willful, angry, or insulting manner, having an intention, and existing ability, to do some violence to such person, shall be deemed guilty of an assault; and if such attempt is carried into effect, he shall be deemed guilty of an assault and battery." Now the removal of a door or windows, of the owner in possession, would constitute no assault. Indeed, as has been seen, 6 Allen, 76, the owner would, in attempting it, have the right to use as much force as was necessary to overcome the resistance of the unlawfully resisting and trespassing tenant. Acts which may embarrass and distress do not necessarily amount

to an assault. Indignities may not constitute an assault. Acts aggravating an assault, differ materially from the assault thereby aggravated. Insulting language or conduct may aggravate an assault, but it is not an assault. So the acts of the defendant, in taking out the windows of his own house, in a bleak and cold day, might distress one unlawfully occupying, and illegally refusing to quit his premises, but they could in no sense be regarded as an assault upon her. One may be embarrassed and distressed by acts done "in a wanton, willful, angry, or insulting manner," where there is no "intention," nor existing ability to do some violence" to the person, and yet there be no assault. The instruction on this point is equally at variance with the common law, and the statute of the State.

The plaintiffs rely mainly, in support of their suit, upon the case of *Newton* v. *Harland*, 39 E. C. L. 581, in which it was held that where a tenant remains in possession after the expiration of his term, the landlord is not justified in expelling him by force in order to regain possession. But the case relied upon is different in its facts from the present. There physical force was used to enter and expel the tenants. In the case at bar the entry was peaceable. The court in that case were divided. Coltman, J., in delivering his opinion, says, "I am not aware that any doubt exists, that after the entry made, he (the landlord) may turn any ordinary trespasser off the land; and I am unable to see any principle which should prevent him from treating his tenant at sufferance in the same way, for such a tenant is a mere wrong-doer. Co. Lit. 576; Pike & Hassen's case, 3 Leon, 233; Sir Moil Finches' case, 2 Leon, 143."

"For the preservation of the peace, the law will furnish forcible entry; but the tenant at sufferance being himself a wrong-doer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

"The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn

in a marked way in the cases in our old books relating to the statutes of forcible entry. Although by those statutes all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the Year Book, 9 H. 6, 19; 15 H. 7, 17; F. N. B. 248 H."

The opinion of the majority in this case, too, is alike adverse to the prior as well as the subsequent decisions of the English courts on this question.

In *Taunton* v. *Costar*, 7 D. & E. 43, Lord Kenyon uses the following language. "Here is a tenant, from year to year, whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear the landlord could have justified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the slightest pretence for considering him as a trespasser in this case." It is to be borne in mind, as was held in *The King* v. *Wilson*, 8 D. & E. 358, the words *manu forti*, are understood to import something criminal in their nature; something more than is meant by the words *vi et armis*. In *Harvey* v. *Bridges*, 14 M. & W. 437, Park, B., uses this language. "If it were necessary to decide it, I should have no difficulty in saying that when a breach of the peace is committed by a free-holder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, though the free-holder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt, that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing, a breach of the peace was

committed." In *Pollen* v. *Brewer*, 97 E. C. L. 371, Erle, C. J., after stating the modes in which the tenancy was terminated, says, "I am of opinion that either of these was a sufficient intimation to the plaintiff that he was no longer tenant at will, and that his continuance of the possession was without a shadow of right, and therefore that the defendant was justified in treating him as trespasser and removing him from the premises. There was abundant evidence that at the time of the expulsion, the plaintiff was on the premises without any right."

In *Burling* v. *Read*, 63 E. C. L. 907, Lord Campbell says, "The plaintiff is a trespasser. What right can he have to prevent the owner of the soil from pulling down the house?"

The authorities in Massachusetts are in conformity with the later English authorities on this subject. *Meader* v. *Stone*, 7 Met. 147. "By the principles of the common law," observes Wilde, J., in *Fifty Associates* v. *Howland*, 5 Cush. 214, "some degree of force is allowed in expelling an intruder into a man's lands or tenements, who refuses to quit, although he has no right to the possession. The owner is not justified to use such degree of force, as would tend to a breach of the peace, but he is allowed to use such force as would sustain a plea of justification of *molliter manus imposuit*." In *Curtis* v. *Galvin*, 1 Allen, 215, it was held, that a tenant at sufferance could not maintain an action against the owner of the premises, who entered upon and expelled him, and removed his furniture. In *Mugford* v. *Richardson*, 6 Allen, 76, the owner of a tenement entered the same without objection, as in the present case, and removed the windows. The female plaintiff attempted to prevent their removal. The court held the defendant was justified in using sufficient force to overcome her resistance.

In New York, it was early determined, that if a person, having a legal right to enter upon land, enters by force, though liable to indictment, he is not liable to a private action for damages at the suit of the person whom he turns out of possession. *Hyatt* v. *Wood*, 4 Johns. 150; *Ives* v. *Ives*, 13 Johns. 235. It was held in *Willard* v. *Warren*, 17 Wend. 257, that to constitute a forcible

entry, there must be something beyond a mere trespass upon the property. Breaking the door of an out-house in the actual possession of the plaintiff, by forcing the lock, was decided not to be a forcible entry. But in the case under consideration the entry was peaceable and without force.

The plaintiff, upon the termination of his lease, became tenant at sufferance. In such case the owner of the fee may enter at any time and put an end to his holding. *Reed* v. *Reed*, 48 Maine, 388. In *Allen* v. *Bicknell*, 36 Maine, 436, it was held that the mortgagee might enter on the mortgager by force and remove his goods, and that the mortgage would afford a complete justification. The same principles apply where the tenancy is legally terminated. Indeed, such is assumed to be the law in *Cunningham* v. *Horton*, 57 Maine, 420.

Without determining the effect of a forcible entry on the rights of parties, after the due termination of a tenancy, it seems to be fully settled by the weight of judicial authority, when a tenancy has been legally terminated, that the landlord may enter peaceably upon the premises; that thus entering, he may remove the tenant therefrom, using such force as would sustain a plea of *molliter manus imposuit*; and that he may remove his goods, if the tenant after a sufficient opportunity, neglects to do so, using due care and caution in their removal and depositing them in a near and convenient place. *Motion sustained. New trial granted.*

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

NATHANIEL AVERILL *vs.* FELIX ROONEY.

Motion for new trial. Practice.

Under R. S. c. 77, § 13, and Public Laws of 1872, c. 83, two distinct tribunals, each exclusive of the other, have cognizance of a motion to set aside a verdict when the evidence demands it; and the aggrieved party has his election.

Thus, under R. S. c. 77, § 13 he may present his motion when accompanied by a report of all the evidence signed by the presiding judge, to the law court; or under Public Laws of 1872, c. 83, if two verdicts have not been rendered against him in the cause, he may at the same term at which the verdict was rendered, present his motion to the presiding justice who rendered it, without a report of the evidence.

ON EXCEPTIONS AND MOTION to set aside the verdict as being against law and evidence.

REAL ACTION.

The verdict was for the plaintiff. Thereupon the defendant, under Public Laws of 1872, c. 83, moved that the verdict be set aside, which the presiding justice overruled, and the defendant alleged exceptions.

The defendant also, under R. S. c. 77, § 13, filed a motion to set aside the verdict, and accompanied the motion with a report of the evidence signed by the presiding judge.

N. H. Hubbard, for the plaintiff.

T. W. Vose, for the defendant.

KENT, J. By R. S. c. 77, § 13, it is provided that among the cases which "come before the court as a court of law" are "cases in which there are motions for new trials upon evidence reported by the judge." Under this provision heretofore, all motions for such new trials have been heard and determined by the law court.

By the statute of 1872 it is provided, that any justice of the supreme judicial court may set aside a verdict and grant a new trial in a case tried before him, when in his opinion the evidence in

the case demands it. Such verdict must be set aside at the same term at which it was rendered, but it shall not be set aside by a single justice when there have been two verdicts rendered against the applicant.

The question is, how far do these provisions of the new statute abrogate, modify, or affect the former statute.

We think it clear that the legislature did not intend to repeal the provision in the revised statutes, and thus take away from the law court the consideration and determination of all such motions for a new trial. There are no words in the new statute which indicate any such intention. Nor do we think that it was the intention to give a right to a hearing of the same motion by two distinct tribunals, either by appeal or by exceptions. But it was intended that two distinct tribunals might have cognizance in such motions, each exclusive of the other, and that an aggrieved party might select the tribunal. He may file his motion and obtain a report of the evidence, certified by the judge according to the provision in the revised statutes; in which case the whole matter goes to the law court, or he may, without obtaining any such report of the whole evidence, certified by the judge, submit the questions arising under his motion to the determination of the presiding judge at the term, on the evidence in the case, of which the judge has knowledge, from his minutes or from recollection. If he does thus submit the matter to the presiding judge, the decision is final on the party filing the motion. It is a matter of discretion and not of law, and no exceptions or appeal lie in such cases, unless expressly given by statute.

The limitations of the right of a single judge contained in the new statute, by which the powers must be exercised at the term when the trial is had, and the other limitation as to the number of verdicts which he may set aside, clearly show that it was not the intention of the legislature to repeal or abrogate the existing right of a party to have a hearing before the law court, which is not thus limited unless he voluntarily selects the new tribunal, a single judge at the term. If the legislature had intended to take away

the existing power in the law court, or to give a right of appeal or exceptions from the decision of the single judge, they would have used language plainly expressing such intent. We think the construction we have given will reconcile both statutes and give a rule of practice, plain and efficient, in securing the rights of all parties.

In the case before us, as the motion was made to and passed upon by the judge at *nisi prius*, the decision was final on the defendant.

Motion and exceptions overruled.

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

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94 394

BARNABAS CANNELL *vs.* THE PHŒNIX INS. CO.

Policy of insurance—construction of. Condition—what within Public Laws of 1861, c. 34. Evidence.

A change from occupancy to disuse of a building insured, is a change in "its use and occupation," within the meaning of the remedial statute of 1861, c. 34, § 4.

In a fire policy running by its terms "from the 6th day of October, 1866, at noon, to the 6th day of October, 1870, at noon," the stipulation that if the premises insured "become vacant and unoccupied for a period of more than thirty days, the policy shall be void," is not a limitation of the time of the insurance, but is in form and substance a condition of the contract, within the scope of Pub. Laws of 1861, c. 34.

The breach of such a condition by the insured does not, in the absence of fraud, affect the contract of insurance, unless the risk is thereby materially increased.

The question, whether an unoccupied building is a more hazardous risk than one occupied, does not relate to matters of science or skill, and the opinion of a witness is not admissible.

ON EXCEPTIONS to the rulings of *Goddard*, J., of the superior court. Defendants also filed a motion to set aside the verdict as being against evidence.

Cannell *v.* Phœnix Insurance Company.

Assumpsit upon a policy of insurance against loss by fire, on dwelling-house and barn.

The ground of defense was that the policy provided, that it should become and be void, if the premises insured remained vacant and unoccupied for more than thirty days without the consent of the company written on the policy; and that in fact the buildings insured were vacant and unoccupied at the time of the fire, and had then been so vacant and unoccupied from June, 1867, to December, 1868, without the knowledge or consent of the defendants, and contrary to the provisions of the policy, and the representations in the application for insurance.

The plaintiff did not controvert the fact of vacancy as asserted by defendants, but contended that the facts alleged in defense constituted no defense to the action unless the jury should find the risk was thereby materially increased; and defendants also claimed it was a material increase of risk.

The counsel for defendants offered to show by the testimony of the witness as an expert in the business of insurance, its risks and hazards, and by other expert witnesses, that an unoccupied building is a much more hazardous risk than one which is occupied, which proposed evidence was excluded by the court.

Counsel for defendant then proposed to ask the witness, under which class of risks, hazardous, extra-hazardous, and prohibited, an unoccupied or vacant dwelling-house would fall in the defendant company; which question was excluded.

It was also proposed to show, by the same witness, that if notice had been given under this policy of insurance, that this house was vacant for more than thirty days, under the regulations and instructions of the company to their agent, the risk would not have been continued; which was excluded.

The same witness was asked, "As a matter of fact, how does the proportion of losses to the whole number of policies upon unoccupied buildings, compare with the proportion of losses to the whole number of policies upon occupied buildings?"

"Does the Phœnix Insurance Company, of which you are gen-

eral agent, instruct their agents not to issue policies of insurance upon unoccupied buildings as such?"

"In which class of buildings, the unoccupied or the occupied, is the percentage of loss the largest?"

All these questions were objected to by the attorney of the plaintiff, who admitted, for the purposes of the objection, that the witness had made the relative number of losses upon occupied buildings and unoccupied buildings a special matter of study,—and all said questions were excluded by the court.

The counsel for defendants, with other requests which were granted, asked the judge to instruct the jury as follows:

1. That the contract of insurance was for the insurance of the buildings for so much of the time as they were occupied, and for intervals of vacancy not exceeding thirty days, and for no other time, and that the defendants are not liable for loss occurring at other times.

2. That the fact that the buildings remained unoccupied for more than thirty days, without the written assent of the defendant company indorsed on the policy, made the policy void, and entitled the defendants to a verdict in their favor.

3. That there is a material difference between a change of occupancy and no occupancy, or being vacant.

4. That while it is for the jury, under the law of this State, to determine whether a change in the nature of the occupancy of the building insured materially affected the risk, yet under the policy and contract of insurance in this case, if they find that the premises remained unoccupied for more than thirty days, without the assent of the company, they must give their verdict for the company, without regard to how the risk was affected.

5. That the plaintiff is not entitled to recover in this case upon the evi lence.

All which requested instructions the presiding judge declined to give.

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

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

N. Webb, for the defendants.

1. The evidence offered by the defendants and excluded should have been admitted.

It was not in regard to matters of which the jury were as capable of judging as anybody. The evidence offered is of two kinds.

a. The opinion of witnesses, admitted to be experts, based upon especial skill and knowledge, derived from experience and study of the subject-matter. And these opinions were asked on the general subject and not on the particular case.

b. Evidence of facts, within the knowledge of the witnesses, which facts had a direct probative force upon the question of materiality. It was a proposition, on the part of the defendant, to exhibit carefully observed and recorded facts instead of loose and vague impressions. Nothing is more familiar than that observation and registry of facts bring to light truth in conflict with popular belief, and this, too, in regard to the most familiar and frequently recurring incidents, with regard to which, *a priori*, one man's opinion would seem to be worth as much as another's. It was the result of such observation in regard to the proportion of fires in buildings occupied and in those unoccupied, which the court excluded. 2 Duer on Ins. 683, 687, and cases cited; 2 Kent's Com. 284, note; *Howes* v. *N. E. Mut. Mar. Ins. Co.*, 2 Curtis, 229; 1 Greenl. Ev. § 440; 1 Phillips on Ev. 290.

2. The court erred in committing the case to the jury upon the question whether the continued vacancy of the building insured materially affected the risk. So doing was in conflict with the contract made. As long as there was nothing illegal, immoral, or prohibited in the contract made by the parties, they might make such contract as pleased them. And their respective rights and obligations were to be controlled and determined by their contract. Neither the court nor the jury had power to substitute one different from that which the parties had made.

3. The statute of 1861 was not applicable to this case. The

question raised by the defense was that they never took certain risks, and not that the risks which they did take had been increased.

4. The instructions asked were improperly refused. They include the proper legal construction of the policy.

BARROWS, J. Item four of the provisions appended to the contract of indemnity, which the defendants gave the plaintiff, consists of something more than half a page of conditions upon the happening of either or any of which, it is stipulated that "then, in every such case, this policy shall be void."

Prominent among these interpolated conditions of defeasance are placed cases of "false representation by the assured of the condition, situation, or occupancy of the property," of "omission to make known every fact material to the risk," of "over-valuation or any misrepresentation whatever, either in a written application or otherwise,"—cases where "the assured is not the unconditional and sole owner of the property," or where "the interest of the assured in the property . . . is not truly stated in this policy," or where the "policy shall be assigned either before or after a loss without the consent of the company indorsed thereon," or where "the assured shall have, or shall hereafter make, any other insurance on the property insured, or any part thereof, without the consent of the company written hereon," etc., etc., etc.,—"then in every such case this policy shall be void." Now with reference to the introduction of these and the like stipulations into policies of insurance, the legislature of this State, in c. 34, Laws of 1861, have provided that,—"No insurance company shall avoid payment of a loss by reason of incorrect statements of value or title, or erroneous description by the insured in the contract of insurance, if the jury shall find that the difference between the property as described, and as really existing, did not contribute to the loss or materially increase the risk; any change in the property insured its use or occupation, or breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased."

While the legislature has not hereby, in so many words, prohibited the fettering of these contracts of indemnity with conditions thus introduced, they have in effect done it by an express provision as clear as words can make it, that no breach of any of them by the insured shall "affect the contract unless the risk was thereby materially increased."

And this comprehensive clause is superadded to an enumeration of some of these conditions, and followed in section 5 by an explicit declaration, that "all provisions contained in any policy or contract of insurance in conflict with any of the provisions of this act, are hereby declared null and void, and all contracts of insurance hereafter made, renewed, or extended in this State, or on property within this State, shall be subject to the provisions of this act."

These parties made their contract in subjection to this clear and positive statutory enactment, and by it their mutual rights and obligations are to be determined. There was an evil which it was designed to remedy, and it should receive a liberal construction in furtherance of its design. These conditions by which insurers undertook to avoid the risk which they had first assumed in general terms, being inserted commonly in fine print, bore no slight resemblance to the "promise not to pay" (the negative part of which, the courts have summarily set aside), and they were little likely to attract the attention of the insured; and so the legislature interposed and said to parties, that the breach of none of them by the party insured, should affect the liability of the insurer, unless the risk was thereby materially increased, or there was fraud on the part of the insured.

But it is said that in the present case, this stipulation that "if the above mentioned premises . . . become vacant and unoccupied for a period of more than thirty days . . . this policy shall be void," is only fixing the time of expiration of the policy, and that the policy had "expired by efflux of time" before the loss occurred, and therefore the plaintiff cannot recover,—in fine, that this language, which we have just quoted from the policy, does not constitute any part of the terms or conditions of the contract, and, therefore, the case is not affected by the statute.

It is impossible to give the language the construction claimed for it. The time limited in the policy is "four years." In the outset the defendants undertake to insure the plaintiffs against loss or damage by fire, in sums certain, upon the various parcels, for "four years at 1 per cent," and they agree to make good unto the said assured, his executors, etc., all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified, from the 6th day of October, 1866, at noon, to the 6th day of October, 1870, at noon." That risk continued (unless avoided by some one of the terms and conditions of the policy) for four years from the time of its inception. The lapse of time alone did not affect it until the expiration of the full term. It was only by the breach of what is stated (in Item 4, of "the terms of this policy hereinafter mentioned") both in form and substance as a condition, that the defendants claim to be relieved. To say that this appended stipulation, by reason of which, in a certain contingency, this policy was to "be void," was a limitation of the time of the insurance, is simply a subterfuge.

Each one of the matters and things specified in §§ 3 and 4 of c. 34, Laws of 1861 (respecting which, those sections declare that the liability of the insurance company to the insured shall not be affected unless there was fraud on the part of the insured or the risk was materially increased), is made by the terms of the policy, the subject of a similar limitation. If it is to be construed as merely fixing the termination of the policy by the happening of a certain event, then all the other terms and conditions with which it is associated must be construed in the same way and the statute is effectually nullified. It might just as well be said that the policy expired when the insured got additional insurance, or when he assigned his policy without the consent of the company indorsed thereon, and that the company insured only till these things occurred, and that they constituted simply limitations of the time for which the policy was to run, and not "terms or conditions of the contract." Yet such a construction would be manifestly absurd.

The plaintiff paid the premium for a term of four years. That

was the time for which the policy was to run, but by the condition added to the contract the policy was to be void, if the house remained unoccupied more than thirty days. Such a condition is clearly within the scope of the statute of 1861. It was within the very mischief that the statute was designed to remedy. The plaintiff had a paid-up policy for four years on his house. It can hardly be deemed possible, that if he had understood that any such limitation of the term, or condition of the policy as is now set up, existed, he would have coupled his claim of loss in December, 1868, with the distinct statement that "said buildings were unoccupied at the time of said fire, and had been so unoccupied ever since June, 1867, having been vacated by my family at that time," etc. Apparently he was entirely ignorant that this fact constituted an objection to the payment of his loss. His policy did not set forth in direct terms an agreement to insure for such term of time not exceeding four years, as the house should be occupied, and for thirty days after it was vacated, but an agreement in the first place to insure for four years, followed by many conditions, one of which, on examination, proves to be that if it should "become vacant and unoccupied for a period of more than thirty days . . . then . . . this policy shall be void." This can be reasonably construed only as a condition of the contract, to be observed by the insured upon peril of forfeiture of the term to which he would otherwise be entitled. Then the statute steps in to the relief of the insured, declaring that, in the absence of fraud, a "breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased." And this presents, at once, a question of fact to be determined by the jury,—Was the risk materially increased? And this must depend as every one will see, upon a great variety of circumstances respecting the situation of the house, and its surroundings and neighborhood.

This matter of a change in the use or occupation of the property insured is one of those specifically provided for, and it is too subtle a refinement to limit the operation of a remedial statute withal, to

say that a change from occupancy to disuse is not, strictly speaking, a change in the use or occupation. And even if this specific provision could be thus strictly construed, the general language that follows would, as we have seen, embrace cases like the present.

Again it is said, that it appears by the context that the parties regarded the vacating of the house, for a period of more than thirty days, as necessarily involving an increase of risk, and that for this reason, the question is not now open to the plaintiff. But even if we are required, against the probabilities of the case, to hold the plaintiff cognizant of the precise terms of the condition and its context, it is not apparent why the result claimed should follow.

The statute makes the effect of the breach of condition by the party insured to depend upon the actual fact of a material increase of risk, and not upon any assumption of the parties with regard to it. Such assumption may have some force as an argument in support of the position that the risk was materially increased, but we do not see any good reason for holding that it precludes the plaintiff from raising the question which the statute makes the decisive test.

The argument that the insurance company might and probably would not have entered into the contract without the insertion of this condition, applies with equal force to all the other terms and conditions covered by the statute.

The answer is, that the insurance company must be conclusively presumed to know the law, and if they contract at all they must contract in conformity with it, and can claim nothing by virtue of the terms and conditions of the contract which is in conflict with the provisions of the statute.

The question is not how the parties regarded it, but whether the risk was, in fact, materially increased by the breach of this condition of the contract.

The jury found that it was not. The evidence discloses nothing from which we can conclude that that finding was clearly erroneous.

The defendants claimed that they did not take this risk. We find by the policy that they did assume it, and then undertook, by means of a condition, to provide for a forfeiture by the insured.

They insist upon this forfeiture, because "'tis so nominated in the bond,"—in the policy. But there is virtue in the laws of other States, besides Venice.

The forfeiture which they claim is prohibited by our statute, unless the risk was materially increased by the breach of the condition.

The principal question raised by the exceptions with regard to the admissibility of testimony was decided adversely to the defendant in *Joyce* v. *Maine Ins. Co.*, 45 Maine, 168. The facts which they offered must, in their very nature, have depended upon hearsay, and have involved an endless and fruitless inquiry into the circumstances of many losses.

Such evidence was rightly excluded.

Motion and exceptions overruled.

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

APPENDIX.

RESOLUTIONS OF THE BAR OF THE COUNTY OF CUMBERLAND, ON THE DEATH OF THE HON. WOODBURY DAVIS, LATE ASSOCIATE JUSTICE OF THIS COURT.

At the October term of this court, A. D. 1871, held at Portland, in the county of Cumberland, Tapley, J., presiding, Hon. Joseph Howard announced the death of the late Judge Woodbury Davis in appropriate remarks, whereupon Nathan Webb, Esq., chairman of a committee of the Cumberland Bar Association selected for that purpose, presented the following resolutions:

We, the Cumberland Bar Association, frequently reminded of the uncertain tenure of human life by the frequent removal from our ranks of our most honored and best-beloved brothers, desire so to mark the decease of each one, that the memory of his virtues may be preserved, and the benefit of his example may be manifested in the professional life and conduct of those who survive him.

In the death of the Honorable Woodbury Davis, we recognize the departure of an upright man, a distinguished lawyer, and a worthy citizen, whose life was of great value to the whole community. But we feel that to us, as his professional associates and friends, his loss comes with peculiar impressiveness.

For his active and conscientious interest in all matters affecting the general welfare, for his public spirit, for his benevolent and devout nature, and for his high moral courage, and his unfaltering and uncalculating adherence to what he had deliberately conceived to be the requirements of duty, we are thankful. That these exalted qualities and services were manifested in and illustrated his career as a lawyer we are proud.

With all honor for his professional power and attainments, we still accord the chief honor to his character. Without such character, genius and learning may fall short of usefulness, or even prove instruments of evil.

When, then, one dies, in whom, as in our Brother Woodbury Davis, have been united pure character and high attainments, let us pause to give a tear to his memory, and, reflecting on his course, renew our devotion to the principles of justice and truth, without which our profession is shorn of its glory.

Animated with these sentiments, and seeking to give them suitable expression, we have

Resolved, That by the death of our late Brother Woodbury Davis, the Cumberland Bar Association has lost one of its worthiest members, a sound lawyer, and an esteemed friend, whose memory will be cherished with reverence and affection.

Resolved, That his surviving professional brethren revert with pride and pleasure to the record of his life among them, and gain strength and courage for the labors and responsibilities of their calling by contemplating what he was, what he suffered, and what he accomplished.

Resolved, That we extend to his bereaved family our sympathy in their affliction, and our congratulations that living he was so true, and dying he has left to them so sweet memories of his life.

Resolved, That these resolutions be presented to the supreme judicial court at its next session in Cumberland county, with the request that they be entered on the records of the court.

Resolved, That a copy of the record of these proceedings of the Bar Association be sent to the family of our deceased brother.

Thereupon Hon. J. H. Drummond addressed the court as follows:

May it please your Honor,—My brethren of the association have assigned to me the duty of seconding the resolutions just presented. It was my good fortune to be associated with Judge Davis during the last five years of his life, in the most intimate relations that members of our profession can hold with each other,—relations in which one discloses to the other his real character, personal and professional, his qualities of head and heart, his knowledge of legal principles, as well as his power of discriminating between right and wrong. From a prior acquaintance I had formed a high opinion of his legal attainments and his personal worth. But the more intimately I knew him, the greater were my respect, admiration, and affection for him; and I scarcely dare trust myself to speak of him here to-day, lest I seem to do so in terms of indiscriminate and fulsome eulogy.

As a lawyer, he was more thoroughly acquainted with fundamental principles than with technical rules. Possessing an almost intuitive perception of the right and a broad common sense, he was wont to work out a result in accordance with justice, without that blind obedience to the technical rules of law which is apt to char-

acterize the mere lawyer. Indeed, his indignation at attempted wrong would sometimes lead him to espouse a cause which, under those rules, could not be maintained. While possessing a high respect for precedents, he subordinated them to principles. Clear in his conception of questions at issue, he enforced the principles applicable to them with a logic that was generally irresistible. The character of his mind, fashioned perhaps in some measure by his judicial experience, was more that of a judge than that of an advocate.

But the sentiment of the resolutions that, high as was his eminence in his profession, the purity of his character gave him the greatest hold on his associates and the public, is eminently just. Strong in his convictions, he was so earnest in their support that he exposed himself to the charge of intolerance. But those who knew him best can positively declare that he was exceedingly tolerant in respect to the opinions of others, when really and honestly entertained. But for hypocrisy and insincerity, there were no bounds to his scorn and contempt.

When convinced of the justice of any course, he adopted it without regard to the countenance he had from others. In his youth, satisfied of the wickedness of the institution of slavery, he demanded that all efforts of the government, not in violation of the constitution, should be given to prevent its spread and for its abolition, when such a course exposed him to almost universal obloquy and reproach, and persisted in this demand until that institution perished. Aroused by peculiar circumstances to an appreciation of the evils of intemperance, he gave many of the best years and most arduous labors of his life to its suppression, though he was on that account subjected to abuse and persecution.

Naturally of an impetuous temper, he learned to command it under all circumstances; from his manner, he was often taken to be cold and unapproachable, but in fact was warm-hearted, sympathetic, and genial.

It may not become me to speak of his character as a Christian; but I never can forget that when he stood face to face with death, his faith was so perfect, that an allusion to it only drew from him

an expression of surprise that any question in regard to it *should be made.*

Though taken away in the prime of his manhood, Judge Davis's life was well rounded, and is another illustration that the length of life is measured by deeds and not by years. While we cannot help mourning the loss that we, in common with the whole people, have sustained in his death, we are consoled by the reflection that he was able to do so much good while he was with us,—an amount of good that we can scarcely hope to equal, even if allowed to reach the extreme limit of human life.

There is nothing more trite than the saying, and nothing more solemn than the conviction, that death must inevitably come to us all. Still, it is the fond hope of every one to leave his memory to be treasured by some, when he has passed away. To breathe that last aspiration—"*non omnis moriar*"—clings to our heart's affections even when that heart is about to be still forever. Our brother, whose loss we mourn to-day, has left us an example, whose imitation by us will insure that we *shall* be remembered,—that when those who come after us shall meet to pay here a tribute to our memory, it will not be a mere formal ceremony, but, as with us now, a heartfelt expression of grief, respect, and love.

When a good man dies, those of us who have been engaged with him in the same labors, who have listened to the wisdom of his words, and have felt the healthful influence of his example, would be as unimpressible as animals who lay no death to heart, if we were not aroused to ask ourselves whether *we* have so lived as to deserve the same honors, or *any* commemoration of our deeds, and whether those who shall survive us will have reason to speak of us as we must speak of him. The death of such a man—of a man loyal and faithful, earnest and laborious—is worth more to us than a volume of precepts; it teaches us most impressively that the ends worth living for are not the honors of place or rank, nor wealth, nor show, nor luxury, nor influence, but those things which continue after death, and are not buried with our bodies.

These lessons are most impressively taught, especially to us of this association, by the life and death of Woodbury Davis; may

we so heed them that when we come to follow him "through the dark valley," we may be sustained by the same faith, and leave behind us the same lessons.

At the same time, resolutions having been presented, and appropriate remarks made upon the death of the late Hon. P. Barnes,

Judge TAPLEY responded as follows:

Words upon an occasion of this kind fail to convey a correct idea of the feelings of the speaker. It is but an attempt, and at the very best but an approximation toward it. While words may be ample in the declaration of a principle, in the relation of a fact, in the record of historic acts and deeds, they are never adequate in the expression of a sentiment of the heart.

Here, all will feel how weak they are in the office of even shadowing the feelings of those who have spoken or those who have listened. Yet they are the only things we can now record indicative of the respect we entertain for the virtues of the departed, and the pain we experience in being separated from them. If others shall hereafter perform these offices for us, the record of our acts done will indicate the sincerity of our utterance now, and show the depth of feeling engendered by these demises of our brethren. More potent than our words will be our acts. The one is a breath, the other a deed. One is something promised, the other something done. One may perish with the breath that gave it birth, while the other may live beyond our earthly existence a thing of influence.

The subjects of the memorials and resolutions you have presented to-day were men of no ordinary mark from whatever standpoint you view them.

In their profession both were distinguished patterns of those excellences requisite for the perfect lawyer and counselor of the court; a position second in honor and influence to none filled by men.

While in much unlike each other, they were in much remarkably alike. Alike, ever careful that no act of theirs should ever bring discredit upon their profession. Alike, ever true to the

court as well as to their clients. Alike, faithful in the performance of any duty cast upon them, and alike successful in all such efforts.

Unlike, however, in mode of thought, and in applying means to reach an end. One was anxious, solicitous, hoping and fearing; the other was imperturbable, deliberate in action, and calmly awaited results. One moved out into new paths in search of light; the other extracted his light for the future from things that were. As not unfrequently (but inaptly expressed) one was radical, and the other conservative; but both were searching for the same truths in the moral and material world, and were equally earnest in their efforts, the difference only being in the lights they used and the aids they sought.

As a judge, it may be enough to say of Judge Davis that in the performance of the duties devolving upon him, he exceeded the highest anticipations of the most sanguine of his friends, and left no cause of complaint for those who at first doubted his fitness. Those volumes of the Maine Reports issued while he was upon the bench show how well he performed the duties of a judge, sitting in *banc*, and reflect honor and credit upon him as a lawyer. Those clear, precise, and yet comprehensive rulings, and those lucid charges to the jury, for which he was so distinguished, can be remembered only by those who heard them, there being no other record of them left. His opinions, as published in the Reports, will afford others ground of belief that they were of no ordinary character. If at any time any felt they savored of argument they felt also that the argument was on the side of justice. As a citizen, his conduct was above reproach.

In the inner and more sacred walks of life, the family circle, he was all the head of a family could or need be; in fine, I think we all reflect with satisfaction that he loved his God, his country, and humanity.

Less cannot in justice be said of Mr. Barnes. While the reports of the decisions of this court do not show him as a judge, they are replete with his learning as a lawyer, and logician, and his accomplishments as a scholar. Not unfequently will the student turn from the opinion to the brief in his cases to drink deeper of the law of the case.

As a lawyer nothing left his hands unfinished, and what he said was always well said. His briefs and written arguments are models of logic, rhetoric, and law. They were always prepared with care, executed with neatness, and were remarkable for their comprehensiveness, conciseness, and condensation—characteristics seldom found in one argument. To the court his briefs were of great value. His addresses to the court and jury were singularly perfect in expression and arrangement, and never needed a touch to fit them for pubilcation in any review, however high its character as a literary journal. There are very few at the bar who have not admired the elegance of his diction, and fewer still who were his superiors in that particular. As a citizen he was upright, conscientious, and exact in all his dealings. As a man, in all his relations to society, whether in his own domestic or more enlarged circles, no cloud ever dims a page of its history.

In the death of such men not our profession alone feel their loss, but the whole community in which they live, mourn their departure. To us it would seem these brethren of ours were in the height of their usefulness here, and of their own personal enjoyment and happiness. That they were better than ever prepared to serve the great purposes of life, and these thoughts not only increase with us the mysteries of the Divine hand, but add new regrets at their sudden departure. While this view saddens us, there is a satisfaction in reviewing their history, and in reading upon its final page the record of man in his fulness of being, in the highest development of mind and intellect. It is the full perfect fruit gathered in without blemish arising either from the weight of years or physical infirmities. We close their record in high, bright noon, instead of the clouded sunset. They die men, and not children. They leave no delusive indications of man's decay, but speak only of his immortality. In a few words, such men have not lived too long.

We cannot all be as great as they were, but may we not be as good.

Let the resolutions offered be spread upon the record, of this court, and the court stand adjourned until to-morrow morning.

RESOLUTIONS OF THE BAR OF THE COUNTY OF KENNEBEC, ON THE DEATH OF THE HON. NATHAN WESTON, LL. D., LATE CHIEF JUSTICE OF THIS COURT.

At the June law term of this court, A. D. 1872, held at Augusta, in the middle district, Appleton, C. J., presiding, Hon. J. W. Bradbury, chairman of the committee selected for that purpose, presented the resolutions of the Kennebec bar, prefaced with the following remarks:

May it please the Court,—As the organ of the bar of the county of Kennebec, and at their request, I announce to your honors the death of the Honorable Nathan Weston, for a long period a member, and for several years chief justice of this court. He departed this life at his residence in this city on Tuesday afternoon, the 4th inst., laden with years and with honors, and with the benedictions of the community where he has resided nearly ninety years. His life and history are well known, especially to those of your honors who have had the pleasure of an intimate personal acquaintance.

He was born in this city, then a part of the town of Hallowell, June 27, 1782, and, with brief exceptions, has continued his residence here up to the time of his decease. He was graduated at Dartmouth College in 1803. He studied law with Mr. Whitwell in Augusta, and George Blake in Boston, and was admitted to the bar in 1806. He opened an office in Augusta, but shortly afterwards removed to New Gloucester, where he remained for three years, during which time he was elected representative from that town to the legislature of Massachusetts. He returned to Augusta in 1809, and the year following he received the appointment of chief justice of the circuit court of common pleas for the second eastern circuit at the age of twenty-nine. He filled this place with ability and dignity, and to universal acceptance, until his appointment, in 1820, as one of the three justices constituting the supreme judicial court upon the organization of Maine as an independent State. He held this place until 1834, when, chief justice Mellen having reached the age which was the constitutional

limit of the office, Judge Weston received the appointment of chief justice of this court as the successor of Judge Mellen. He presided as chief justice for the term of seven years, when the judicial tenure of office having been limited to that term of years by constitutional amendment, he retired from the bench in October, 1841. He was renominated for this high position by the executive of the State, acquainted with his qualifications, whose rule of duty was the public good.

During all his long judicial career, Judge Weston has ever sustained the character of an able, impartial, upright judge; honest in his purposes, patient in investigation, bringing all the stores of extensive reading, deep research treasured up by a tenacious memory and analyzed by a vigorous, discriminating mind to his aid in the administration of justice, and the decision of the cases that came before him.

As a presiding officer in court he was dignified and impartial, prompt in his rulings, courteous and unruffled in his bearing, and ever popular with the bar.

His recorded opinions in the first twenty volumes of the Maine Reports will be the lasting monument of the clear and lucid style, the elegant diction, and the learning and ability of Judge Weston.

In 1820, Judge Weston was appointed one of the trustees of Bowdoin College, under the law of Maine giving the governor and council the power to appoint twelve trustees to that institution, and he has been constant in his attendance at the board until the last three years.

In 1843, this college conferred upon him the honorary degree of LL.D. He received the same degree from Dartmouth and Waterville.

Since his retirement from the bench, Judge Weston has been permitted by a kind Providence to remain with his friends and neighbors in the tranquil pursuits of private life, in the full possession of his bodily and mental powers, in the enjoyment of uninterrupted health, his eyes undimmed, his memory unfailing, an agreeable companion, ever ready to impart to others, with his unusual powers of conversation, the rich stores of knowledge he had accu-

mulated in the course of a long and active life. The elastic step, the cheering word, the kind, benignant face of our venerable and venerated neighbor and distinguished fellow citizen will henceforth cease to gladden our streets.

Mortalitate relecta, vivit immortalitate indutus.

I present and ask to have entered upon the record of the court, the following resolutions, which have been adopted by the bar:

Resolved, That the members of the Kennebec bar have received the intelligence of the death of the Hon. Nathan Weston with a sadness that is softened by the belief, that having lived a devoted Christian life here, he has entered upon a happy immortality above.

Resolved, That we record with deep sensibility our profound respect for the memory of the deceased who was for a long period a member, and for seven years chief justice of the supreme judicial court of this State.

During all his long public service upon the bench, as chief justice of the circuit court of common pleas for the second eastern circuit, while Maine was a part of Massachusetts, as one of the justices of the then supreme judicial court under the first organization of Maine as a State, and as chief Justice of this court, Judge Weston earned and sustained the character of an able, learned, and upright judge, commanding the confidence of the public, and the regard and affection of his judicial associates and of the bar.

He presided with ease and dignity, and inspired universal confidence in his integrity, learning, and desire to administer justice.

His written opinions, contained in the first twenty volumes of the Maine Reports, will constitute an enduring memorial of the learning and ability of the venerated and excellent judge.

Resolved, That in the retirement of private life, with a memory stored with rare and varied learning, Judge Weston was ever the genial, instructive, and interesting companion and friend, and the accomplished Christian gentleman.

Resolved, That as a mark of our respect the bar will attend the funeral of the deceased.

Resolved, That the foregoing resolutions be, with the permission of the court, entered upon the records thereof.

Resolved, That a copy of these resolutions be presented to the family of the deceased.

Chief Justice Appleton responded as follows:

The resolutions of the bar which have been so eloquently and feelingly announced, are but the fitting and appropriate tribute to the memory of one who held, for so long a time, a distinguished place in public regard. An honorable and honored life, far exceeding the period allotted to men, is at an end. One venerable

for his years, venerated for his virtues, receiving and deserving the confidence of the public, honored in all the relations of life, public and private, beloved and respected by all who knew him, in the fullness of a ripe old age, has departed from among us.

The late Chief Justice Weston I first knew when occupying a place on this bench. He was a short time at the bar; but the reputation he there gained for honor and integrity, and as one "learned in the law," is best established by the fact, that at an age when most men are still struggling in the race for professional distinction, his standing was such as to command an appointment to the responsible office of chief justice of the court of common pleas of the judicial district in which he resided,—an office which he held until the separation of this State from Massachusetts, when, by the concurring and unanimous voice of the bar and the public, he was appointed a justice of this court, and upon the retirement of its first judicial magistrate, Chief Justice Mellen, to whom the State owes so much, was commissioned as his successor and followed worthily in his steps.

I well remember him as a member of this court. With a mind eminently judicial, accustomed to the labors of the bench, its duties were easy and their performance a pleasure. As a judge, kind, prompt, and ready in his rulings, he presided with an ease and courtesy which inspired the confidence of the young, and with a dignity which commanded the respect of all. Patiently he listened to the arguments of counsel.

His charges were in language clear and distinct. With a tenacious memory he retained the facts developed in testimony; with unusual quickness of perception, he rapidly seized upon the salient points at issue, and then disentangling the mass of facts which encumber a case and distract attention, selecting those upon which the right decision of the case depends, applying to them with clearness and precision the principles of law applicable thereto, without interfering with their province, he aided the jury in arriving at the great end for which alone they exist—a just determination of controverted facts.

He was a learned man. Of studious habits, he early made him-

self master of the law. The quaint and rugged style and the vast and antiquated learning of Coke, the classical pages of Blackstone, the dark mysteries of special pleading, almost forgotten or dimly remembered by the bar in these days of innovation, and the principles of commercial law, the grand product of modern civilization were alike at his command. With his retentive memory he retained and had ready for use the acquisitions of a long life of labor.

His best monument, the highest proof of his judicial ability, the best record of his learning, are to be found in the judgments delivered while he was a member of this court or presided over its deliberations. In those, he discussed the questions involved with abundant research and ample learning, stating the questions for determination with precision, laying down the legal principles upon which the case must rest, with a purity and elegance of diction which Addison might almost have envied, and with a strength of argument which carried conviction.

Thirty years upon the bench—thirty years of judicial labor, rarely exceeded in length of service, still more rarely exceeded in purity of purpose, in fidelity to the high trust reposed in him, in diligence, in integrity, and in impartiality in the administration of justice. Well and truly of him may it be said, "the memory of the just is blessed."

A watchful observer of public affairs, of scholarly tastes, fond of literature, acquainted with books, few men were more interesting in social life.

An upright magistrate and learned, a warm friend, of unspotted integrity, he has gone before us to the final resting-place of all. His labor is accomplished. His work, well done, is ended. With him the cares and the struggles, the joys and the griefs of life are over. In the full hope of a blessed future, with trust and without fear he has gone to his rest. "The steps of a good man are ordered by the Lord, and he delighteth in his way. Mark the perfect man and behold the upright, for the end of that man is peace." While we sympathize with his family in the loss of their honored head, there remains for them as for us, the recollections of his

many virtues, the memory and noble example of a pure, upright, and honorable life. When the inevitable day shall come to us as it has come to him, as it comes to all, may we, as he was, be prepared and ready to depart.

Let the resolutions of the bar be entered upon the records of the court. In token of respect, the court is adjourned.

On the conclusion of Judge Appleton's remarks the court was adjourned, and the judges, lawyers, and officers of the court repaired to the Episcopal Church to attend the funeral.

ADDITIONAL RULE IN CHANCERY.

Hereafter, when a defendant demurs to a bill in equity, the judgment thereon will be final, except that for good cause shown, the court may allow the party demurring to replead upon such terms as may be deemed just and reasonable.

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AID.

See PAUPER, 4.

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1. In an action of covenant broken upon the covenants in a lease for not keeping "in proper repair the outside of the" house described in the lease, but suffering "the blinds of said house to remain in a shattered state," the plaintiff introduced evidence, without objection, relating to the damage to the window-glass, and the defendant showed that the glass was put in proper state of repair soon after the execution of the lease. When the plaintiff had nearly concluded his closing argument, the presiding justice allowed him to amend by adding after the word "state" the words, "by reason whereof the window-glass was broken and destroyed." *Held*, (1) That the amendment introduced no new cause of action, but simply a specification under the general allegation of want of repair of the outside; and (2) That if the defendant had objected at the time the evidence was offered, the amendment might then have been made. *Potter* v. *Lucas*, 212.

2. A writ against the master of a vessel to recover the penalty provided in Public Laws of 1869, c. 36, for the unlawful use of a seine for the taking of menhaden or porgies, directing an attachment of the vessel and seine, may, after the attachment of such vessel and seine, be served upon the defendant by a separate summons. Such a writ is a writ of attachment, and it may be amended upon such terms as the presiding judge deems proper, by adding a direction that the "goods or estate of" the defendant be attached.
Turner v. *Friend*, 290.

3. Where the earliest item in the account annexed bears the date of January 15, 1864, and the specification in the writ is, that under the count for money had and received, the plaintiffs claim to prove and recover of the defendant the sum of sixteen thousand dollars delivered him on and since the 15th of January, 1864, according to the account annexed,— an amendment so as to enable the plaintiffs to recover sums received since January 1, 1863, is a new cause of action and inadmissible against the objection of the defendant.
Parkman v. *Nutting*, 398.

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AUDITA QUERELA.

A judgment debtor, who was absent from the State and not served with process, may maintain *audita querela*, to set aside an execution issued on a judgment rendered on default, in a personal action, within one year thereafter, without first giving the bond prescribed in R. S. c. 82, § 4, notwithstanding the execution has been returned satisfied by a levy on the debtor's real estate.

Folan v. *Folan*, 566.

AWARD.

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See BOND.

BANKRUPTCY.

In order to avoid a defendant's discharge under the United States bankrupt Act of 1867, on the ground that the schedule verified by oath did not contain a statement of his debt to the plaintiff, and that the latter had no notice of the proceedings in bankruptcy, and did not prove his claim, it must appear that the omission was fraudulent and the affidavit willfully false.

Symonds v. *Barnes*, 191.

BILLS, ETC.

1. A promissory note of the tenor,— "Portland, Aug. 29, 1863. One month after date, we promise to pay to the order of E. Atkins & Co., four hundred and forty-four dollars. Value received. Augusta Shovel Co. A. D. Brown, Pres."—will not sustain a count against A. D. Brown alone, describing it as his note or as the joint and several note of the Augusta Shovel Co. and A. D. Brown. *Atkins* v. *Brown*, 90.

2. An accommodation indorser of a negotiable promissory note cannot recover of the maker the amount of the note, on the ground of payment thereof by another note, unless it appear that the second note was given under such circumstances as to constitute it a payment by the plaintiff.

Lentell v. *Getchell*, 135.

3. Thus the plaintiff, at the request and for the accommodation of the defendant, became second indorser of a promissory note made payable to the order of, and signed and indorsed by the defendant. At maturity the note was taken up by one of like tenor, signed and indorsed by one Thompson, and further

See ASSUMPSIT, 1, 2, 3. EVIDENCE, 13. PARTIES, 2. PRINCIPAL AND SURETY, 1, 2.

BOND.

The principal defendant having been arrested on a special writ, in favor of this plaintiff, gave a bond with the other defendants, sureties, therein acknowledging themselves bound to the sheriff by name who made the arrest in a specific sum named, "to be paid unto" the plaintiff, "her heirs and assigns," with the condition annexed in the usual form of a bail-bond. In debt on the bond brought in the name of the plaintiff, *Held*, (1) That if the instrument declared on be a bail-bond, *scire facias* and not debt is the remedy; and (2) That if it be deemed a common-law bond, the action must be in the name of the sheriff to whom it was given, and not in the name of the plaintiff.

Packard v. *Brewster*, 404.

BONUS.

See ARBITRATION, 3.

BOUNTY.

1. A contract between a minor and his master whereby the former paid his bounty money to the latter in consideration of his consent to the minor's enlistment, may, after the minor's decease, intestate, be rescinded by the administrator of his estate, and the money recovered back. *Dinsmore* v. *Webber*, 103.
2. The plaintiff, when a minor, enlisted into the military service of the U. S., with the consent of his father, to whom he gave his bounty-money, and, subsequently, deserted from the service. When he became of age, he demanded the money of his father, who refused to refund it. In assumpsit for money had and received, *Held*, (1) That the action was maintainable; (2) That a person must be lawfully convicted of desertion before "he shall be deemed and taken to have voluntarily relinquished and forfeited his rights of citizenship;" (3) That interest is recoverable from the time it was received by the father.

Holt v. *Holt*, 464.

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See EVIDENCE, 8.

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See PRINCIPAL AND SURETY, 1.

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See TAX, 5.

COLLECTOR.

1. A collector of taxes who, after selling a distress, fails to restore the balance to the former owner, after deducting the unpaid taxes and legal expenses of sale, is a trespasser *ab initio*. *Carter* v. *Allen*, 296.

CONSIDERATION.

See BILLS, &c., 8, 9, 10, 11, 12. CONTRACT, 4. TRUSTEE PROCESS, 1.

CONSTITUTIONAL LAW.

1. The legislature may, by private statute, authorize county commissioners to lay out a highway across a river running between two towns, and apportion the expense of erecting and maintaining the bridge upon the towns, in proportion to their respective State valuations. *Waterville* v. *Co. Com.*, 80.

2. This court will not declare such a statute invalid, as being unreasonable, and hence in contravention of Art. IV. Part III. § 1, of the constitution of this State, when it is not made to appear that it operates unequally or oppressively. *Ib.*

3. The legislature did not exceed its constitutional power in prescribing in R. S. c 122, § 4, the form of an indictment "for committing perjury before any court or tribunal." *State* v. *Corson*, 137.

4. The constitution does not authorize a town to raise money to refund money given to it without expectation of repayment. *Perkins* v. *Milford*, 315.

5. So much of c. 55, of Pub. Laws of 1869, as attempts to ratify the action of towns in voting money for the payment of the commutation fees of individuals drafted into the public service, is beyond the sphere of constitutional legislation. *Thompson* v. *Pittston*, 545.

CONSTRUCTION OF WILLS.

See EQUITY, 5.

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See ERROR, 3.

CONTRACT.

1. A contract between a minor and his master whereby the former paid his bounty money to the latter in consideration of his consent to the minor's enlistment, may, after the minor's decease, intestate, be rescinded by the administrator of his estate, and the money recovered back. *Dinsmore* v. *Webber*, 103.

2. The interests of the parties to a contract, whether of purchase or sale, or for work or labor, are adverse and inconsistent with each other. *E. & N. A. Railway Co.* v. *Poor*, 277.

3. If a director of a railroad corporation enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract. *Ib.*

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See PLEADING, 8, 13.

DESERTION.

The plaintiff, when a minor, enlisted into the military service of the U. S., with the consent of his father, to whom he gave his bounty-money, and, subsequently, deserted from the service. When he became of age, he demanded the money of his father, who refused to refund it. In assumpsit for money had and received, *Held*, That a person must be lawfully convicted of desertion before "he shall be deemed and taken to have voluntarily relinquished and forfeited his rights of citizenship. *Holt* v. *Holt*, 464.

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See EVIDENCE, 15.

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See PRINCIPAL AND SURETY, 1, 2.

GUARANTY.

Upon the defendant's written guaranty of the following tenor,—"Oct. 14, 1860. Let the bearer buy merchandise to the amount of two or three hundred dollars, on six months, and I will see you paid,"—the plaintiffs sent to the bearer merchandise to the amount of two hundred and thirty dollars and thirty cents, and in November and December following, one hundred and ten dollars' worth more, *Held*, That the defendant's liability was limited to the first bill of goods. *Reed* v. *Fish*, 358.

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See APPEAL. CARRIER, 2. CONSTITUTIONAL LAW, 1. COUNTY COMMISSIONERS, 2. FENCE, 1. NUISANCE. WAIVER, 2. WAY, 3.

IMPOUNDING.

1. A person injured in his lands by neat-cattle, may distrain and impound the animals doing the mischief; or he may have an action of trespass. *Mosher* v. *Jewett*, 453.

2. A person taking up an estray forfeits all claim for keeping the same unless he commits it to the pound-keeper within ten days. *Ib.*

3. Thus the plaintiff's bull broke and entered the barn of the defendant, who immediately posted notices thereof in three public places, and advertised the same in a daily paper. Within ten days the plaintiff called and saw the bull, but was doubtful of the bull's identity. After ten days, the defendant offered to deliver the bull to the plaintiff on proof of property and payment of five dollars for keeping, and indemnity against the claim of any other owner, but the plaintiff did not comply with the conditions. In thirty days the plaintiff demanded the bull and offered the defendant ten dollars for keeping, but the defendant refused to deliver him, whereupon the plaintiff replevied him. *Held*, that the defendant had no right to possession of the bull, nor any lien upon him which would authorize a judgment in his favor for the expense of keeping or for his damage. *Ib.*

INSTRUCTIONS.

See PRACTICE, 3, 4, 11.

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JURY.

See PRACTICE, 12, 20. WAY, 7.

KENNEBEC AND PORTLAND RAILROAD COMPANY.

The Kennebec & Portland Railroad Company, on the 15th of October, 1852, pursuant to a vote of its directors, mortgaged its road, franchise, and other property to certain persons named, in trust, for the benefit of the holders of a certain class of its bonds, duly issued by the company, with interest payable semi-annually. The company having neglected to pay the interest coupons due on the bonds, on and after April 1, 1856, the trustees, upon due application by the holders of the bonds to an amount exceeding one-third of the amount of the mortgage, on the 18th of October, 1859, in accordance with the Public Laws of 1857, c. 57, gave the public notice, and caused the same to be published, and a copy of the printed notice recorded at the time and place and in the manner prescribed in said statute, for the purpose of obtaining a foreclosure of the mortgage for the breach of its condition. In a bill to redeem, *Held*, by a majority of the court, that the mortgage was legally foreclosed.

Kennebec and Portland R. R. Co. v. *Portland and Kennebec R. R. Co.*, 9.

LAND DAMAGES.

See COUNTY COMMISSIONERS, 3. RAILROAD, 8. WAY, 6.

LANDLORD AND TENANT.

1. When a tenancy has been legally terminated by the landlord, he may peaceably enter the premises, whether he disclose or conceal his intentions of entering to be for the purpose of removing the tenant. *Stearns* v. *Sampson*, 568.
2. After such entry he may remove the tenant, using such force as will sustain a plea of *molliter manus*. *Ib.*
3. And in such case, if the tenant, after a reasonable opportunity therefor, neglects to remove his goods, the landlord may remove and deposit them, with due care, in some near and convenient place. *Ib.*

See ASSAULT.

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See PRACTICE.

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PAYMENT.

See BILLS, &c., 2, 3.

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PERJURY.

The legislature did not exceed its constitutional power in prescribing in R. S. c. 122, § 4, the form of an indictment "for committing perjury before any court or tribunal," and an indictment drawn in accordance with the form prescribed is good; and it need not be distinctly alleged that the words set forth as the testimony given were false. *State* v. *Corson*, 137.

PETITION FOR PARTITION.

See SEISIN AND DISSEISIN.

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See MEETING-HOUSE, 2, 3, 4.

PEW OWNER.

See MEETING-HOUSE, 2, 3, 4.

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See CARRIER, 1, 2.

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1. A count in common form upon a submission and award is not vitiated by allegations in the same count setting up a lien claim; but the lien claim being waived, the allegations relating thereto may be rejected as surplusage. *Bodge* v. *Hull*, 225.

PRESCRIPTION.

PRINCIPAL AND SURETY.

See BILLS, &c., 13. WITNESS, 7.

PROBATE ACCOUNT.

See PROBATE COURT.

PROBATE COURT.

PROBATE OFFICE.

See EVIDENCE, 9.

PROSECUTING COMMITTEE.

See TAX, 9.

QUOTA.

Neither c. 170 of the Public laws of 1863, c. 226 of 1864, nor c. 298 of 1865, authorizes a town to refund money voluntarily contributed by an individual in 1864, to aid the town in procuring soldiers to fill its quota.

Perkins v. *Milford*, 315.

See COMMUTATION, 2.

RAILROAD.

1. If a director of a railroad corporation enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract. *E. & N. A. Railway Co.* v. *Poor*, 277.
2. A railroad corporation engaged a contractor to construct "under the general supervision of the chief engineer of the company" a specific portion of its railroad, located across the plaintiffs' timber tract; and the sub-contractor and his employees cut a tote road through the plaintiffs' premises, outside of the location, and set fires which, through their negligence, spread and burnt the plaintiffs' timber. *Held*, that the company, not having directed the acts complained of, and having no such control over the persons who committed them as to direct or remove them, was not liable for the damages occasioned thereby. *Eaton* v. *E. & N. A. R. Co.*, 520.
3. If the company's engineer direct the sub-contractor to do an unauthorized act, such as grading outside of the limits of the true location, the company is liable therefor. *Ib.*
4. A railroad corporation is not liable under R. S. of 1857, c. 51, § 25 (R. S. § 22) for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road committed by contractors or the servants of contractors. *Ib.*
5. Where the charter authorized the taking of land "not to exceed six rods in width," and by an act of the legislature the time for completion was extended two years, and "all rights, privileges, and grants theretofore appertaining to said company" were thereby continued, *Held*, that the charter was thereby renewed in its entirety, and the company retained the right to take land six rods in width, although the general statute allowed but four. *Ib.*
6. Where the time for filing the location with the county commissioners was fixed by a statute to be on February 8th, a depositing of it at their office, with their clerk, on February 6th is seasonable, although a term of the commissioners' court did not occur until the following April. *Ib.*

See ADVANCEMENT. ESTOPPEL, 4. EVIDENCE, 2.

RECITAL.

See ESTOPPEL, 4.

REVENUE STAMP.

To authorize the court to declare an unstamped recorded indorsement on a chattel mortgage to be "invalid and of no effect," it must affirmatively appear that the omission of the stamp was the result of an attempt to evade the statute. *Brown* v. *Thompson*, 372.

REVIEW.

1. A petition for the review of an action is to be served and entered as an independent proceeding. *Bradstreet* v. *Partridge*, 155.
2. If a writ of review be granted, the order is entered under the entry of the petition, and all further proceedings under the petition are ended. *Ib.*
3. No final judgment can be rendered under the petition so long as it is continued. *Ib.*
4. A writ of review cannot be sued out until final judgment on the petition. *Ib.*
5. A writ of review may be sued out at the next term after final judgment on the petition. *Ib.*
6. A writ of review must be made a new entry, and it cannot be entered, heard, or determined under the petition. *Ib.*

ROLL-WAY.

See CASE, 2.

RULE OF COURT.

Hereafter, when a defendant demurs to a bill in equity, the judgment thereon will be final, except that for good cause shown, the court may allow the party demurring to replead upon such terms as may be deemed just and reasonable.

See PRACTICE, 17.

SALE.

A sale on *mesne process* of the personal property of a stranger to the process, conveys no title to the vendee; and the real owner may replevy it from the purchaser after it has come into his possession. *Coombs* v. *Gorden*, 111.

SCHEDULE.

See BANKRUPTCY. MORTGAGE, 13.

SCIRE-FACIAS.

The principal defendant having been arrested on a special writ, in favor of this plaintiff, gave a bond with the other defendants, sureties, therein acknowledging themselves bound to the sheriff by name who made the arrest in a specific sum named, "to be paid unto" the plaintiff, "her heirs and assigns," with the condition annexed in the usual form of a bail-bond. In debt on the bond brought in the name of the plaintiff, *Held*, That if the instrument declared on be a bail-bond, *scire-facias* and not debt is the remedy.

Packard v. *Brewster*, 404.

SEINE.

A writ against the master of a vessel to recover the penalty provided in Public Laws of 1869, c. 33, for the unlawful use of a seine for the taking of menhaden or porgies, directing an attachment of the vessel and seine, may, after the attachment of such vessel and seine, be served upon the defendant by a separate summons. *Turner* v. *Friend*, 290.

SEISIN AND DISSEISIN.

In August, 1836, the petitioners, together with their sister, entertaining the mistaken hypothesis that their father, instead of their mother, owned the land in question, by their deed of quitclaim duly recorded, released their interest therein to the respondents, who entered under the deed, claiming to own the land, and in December, 1848, divided the premises by mutual deeds of release, and subsequently thereto their occupation was in severalty and was open, notorious, adverse, and known to the petitioners. On petition for partition, commenced in September, 1868, *Held*, that in the absence of any actual entry by either of the petitioners within twenty years, their right of entry was gone.

Mitchell v. *Persons Unknown*, 448.

SETTLEMENT.

See PAUPER, 4.

SHIPPING.

1. Before a vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the State. *Perkins* v. *Emerson*, 319.

2. After it is registered or enrolled, a mortgage of it will not be valid against any person other than the mortgager, his heirs and devisees, and persons having actual notice thereof, unless recorded as required by the laws of the United States. *Ib.*

SMUGGLED PROPERTY.

In August, 1866, the owner of a horse in Canaan, Vermont, took him one and one-half miles into Canada, to a race, where he kept him six weeks, when he returned with the horse to Canaan without having entered him at the custom-house, either in going or returning. In the following November, the owner, without informing him that he was a Canadian horse, sold him to the defendant, who, in the following June, sold him in good faith, without knowing he was smuggled or claimed as a smuggled horse, to the plaintiff. In August, 1867, the horse was seized and taken from the plaintiff by a U. S. revenue officer, and, after due proceedings, sold in September. In assumpsit brought August 31, 1867, *Held*, (1) That the horse having been brought into the U. S. in violation of the revenue laws, became forfeited by that act; and (2) That the plaintiff is entitled to recover of the defendant the value of the horse at the time of the seizure. *Kneeland* v. *Willard*, 445.

SOLDIERS' MONUMENT.

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See PRACTICE, 2.

SURETY.

The defendant's husband borrowed fourteen hundred dollars of the plaintiff, for which he then gave his promissory note, and, at the same time, agreed to procure a good additional signer the next day. Eighteen months afterwards, in the sick-room of the husband where he was confined to his bed in his last sickness, and four days prior to his death, the defendant, without receiving any consideration therefor, in the absence of the plaintiff, in ignorance of her husband's agreement, but at his request, placed her name upon the back of the note. In an action on the note against her, *Held*, That she was not liable.
Sawyer v. *Fernald*, 500.

See PRINCIPAL AND SURETY. PROBATE COURT.

SURPLUSAGE.

See PLEADING, 1, 17.

SURVEYOR OF HIGHWAYS.

1. An action of trespass cannot be maintained against a surveyor of highways for removing fences standing within the limits of the location of a highway in his district, when their continuance has been less than forty years next after the location of the highway. *Whittier* v. *McIntyre*, 143.

2. It is not essential that the unlawful existence of such fences should be established on indictment and conviction under R. S. c. 18, § 76, prior to such removal. *Ib.*

TENANT.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

TENDER.

See INDICTMENT, 4.

TIME.

See PLEADING, 4. RAILROAD, 6, 7. SURVEYOR OF HIGHWAYS, 1.

TITLE TO PROPERTY.

See REPLEVIN, 1. TAX, 4.

TOLL-BRIDGE.

See WAIVER, 2. PRACTICE, 19.

TOTE-ROAD.

See RAILROAD, 2.

TOWN.

See CONSTITUTIONAL LAW, 4.

TOWN ORDER.

See COMMUTATION, 1, 2.

TOWN WAY.

See EVIDENCE, 11. PRACTICE, 11. WAY, 3, 4.

TRESPASS.

1. An action of trespass cannot be maintained against a surveyor of highways for removing fences standing within the limits of the location of a highway in his district, when their continuance has been less than forty years next after the location of the highway. *Whittier* v. *McIntire*, 143.

2. Section 7, c. 74, of the Special Laws of 1821, did not take away from the plaintiffs the common-law remedy of trespass *quare clausum*.
Cumberland & Oxford Canal Corporation v. *Hitchings*, 206.

3. To sustain an action of *trespass quare clausum* against one having no right to be upon the premises, the plaintiff put in evidence a deed of quitclaim to himself from one who never had either title or possession. The deed was never recorded until after the trespass complained of, and it did not appear that the plaintiff ever had possession under it. *Held*, insufficient.
Savage v. *Holyoke*, 345.

4. A certified copy of a certificate of the entry by the mortgagee of a mortgage given by a married woman in 1845 to secure the purchase-money of land conveyed to her, on June 4, 1847, for the purpose of foreclosing it, in the absence of any evidence that such possession was continued, would not be sufficient evidence of possession to enable him to maintain trespass for acts happening twenty years thereafter. *Ib.*

5. The lien given by R. S. c. 23, § 4, in the action of trespass is not one that gives the right of possession to the party injured; but it can only be enforced by attachment. *Mosher* v. *Jewett*, 453.

6. A railroad corporation is not liable under R. S. of 1857, c. 51, § 25 (R. S. § 22) for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road committed by contractors or the servants of contractors.
Eaton v. *E. & N. A. R. Co.*, 520.

See EXECUTOR, &c., 5. IMPOUNDING, 1. PRESCRIPTION.

WHARF.

See TAX, 3.

WHARFAGE.

See WHARF.

WIDOW.

WILL.