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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VOLUME LX.

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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.

*** TAPLEY and KENT, JJ., retired at the expiration of their respective terms, and on Dec. 26, 1872, W. W. VIRGIN, Esq., and on May 15, 1873, Hon. JOHN A. PETERS, were respectively appointed Justices.

ATTORNEY-GENERAL.

HON. THOMAS B. REED.

TABLE

OF THE CASES REPORTED.

Allen *v.* And. R. R. Co. . . 494
Allen *v.* Jay 124
And. R. R. Co., Allen *v.* . 494
Annas, Burns *v.* 288
Atkinson *v.* Bridge . . . 396
Atkinson *v.* Runnells . . . 440
Atkinson *v.* White . . . 396
Atwood *v.* Winterport . . 250
Ayer *v.* Gleason 207

Baker, Gooding *v.* 52
Bangor & P. R. R. Co. *v.* Chamberlain 285
Bangor & P. R. R. Co., Davis *v.* 303
Bangor & P. R. R. Co. *v.* McComb 290
Bangor, Stetson *v.* 313
Bartlett *v.* Jones 246
Belfast & M. L. R. Co. *v.* Brooks 568
Belfast & M. L. R. Co. *v.* Moore 561
Bell *v.* Woodman 465
Benson *v.* Swan 160
Berry *v.* Sands 99
Berwick, Raymond *v.* . . 114
Bethel *v.* Oxford Co. Com'rs 535
Blaisdell, Young *v.* . . . 272
Bowker *v.* Hill 172
Brackett, Marrett *v.* . . . 524
Brainard *v.* Shannon . . . 342
Bridge, Atkinson *v.* . . . 396
Brooks, Belfast & M. L. R. Co. *v.* 568
Brown, Lovegrove *v.* . . . 592
Burns *v.* Annas 288
Butler, Ramsdell *v.* . . . 216
Buzzell, Ellis *v.* 209
Buzzell, Hayes *v.* 205

Chamberlain, Bangor & P. R. R. Co. *v.* 285
Chamberlain *v.* Lancey . . 230
Chipman *v.* Todd 282
Clewley, Small *v.* 262
Connor, Holbrook *v.* . . . 578
Creppin, Griffin *v.* 270
Crowley, State *v.* 103
Curtis *v.* Portland 55

Davis *v.* Bangor & P. R. R. Co. 303
Denison *v.* Portland Co. . . 519
Doherty, State *v.* 504
Dryden *v.* G. T. R. Co. . . 512
Duly *v.* Hogan 351
Dunn *v.* E. & N. A. R. Co. . 453

Edwards *v.* Moody . . . 255
Elder *v.* Miller 118
Ellis *v.* Buzzell 209
Ellsworth, Hartshorn *v.* . . 296
E. & N. A. R. Co. *v.* Dunn . 453
E. & N. A. R. Co., Gilman *v.* 235

Fairfield B. Co. *v.* Nye . . 372
Farmington *v.* Stanley . . 472
Farris *v.* Ware 482
Fogg, Read *v.* 479
Fogler, Hopkins *v.* . . . 266
Folan *v.* Lary 545
Foster *v.* Wyllie 109
Frankfort, Volney *v.* . . . 253
Frost *v.* Walker 468

Garcelon, McGee *v.* . . . 165
Gerry *v.* Stimson 186
Gilbert, Page *v.* 485
Gilead, Newry *v.* 154
Gilman *v.* E. & N. A. R. Co. 235

Gleason, Ayer *v.* 207
Gooch, Mitchell *v.* 110
Gooding *v.* Baker 52
Goodwin *v.* Nye 402
Goodwin *v.* Sag. Co. Com. . 328
G. T. R. Co. *v.* Dryden . . 512
G. T. R. Co., State *v.* . . . 145
Grant, Westbrook Manufacturing Co. *v.* 88
Greenwood, Walton *v.* . . 356
Griffin *v.* Creppin 270
Griffin *v.* Pinkham 123

Hagar, Harding *v.* 340
Hagar *v.* Springer 436
Haley, Willey *v.* 176
Hall, Skinner *v.* 477
Hamlin Grant Plantation, Pearson *v.* 157
Hanson, Neal *v.* 84
Harding *v.* Hagar 340
Harlow *v.* Stinson 347
Hartshorn *v.* Ellsworth . . 276
Hayes *v.* Buzzell 205
Hebron, Ripley *v.* 379
Hersey, Robinson *v.* 225
Hewett, Lime R. F. & M. Ins. Co. *v.* 178
Hill, Bowker *v.* 172
Hill, Piscat. F. & M. Ins. Co. *v.* 178
Hobbs *v.* Walker 184
Hogan, Duly *v.* 351
Holbrook *v.* Connor . . . 578
Holmes *v.* Rob. Manf. Co. . 201
Holt, Millett *v.* 169
Hopkins *v.* Fogler 266
Houdlette, Stilphen *v.* . . 447
Hussey, State *v.* 410

International Telegraph Co., True *v.* 9

James *v.* Tibbetts 557
Jay, Allen *v.* 124
Jones, Bartlett *v.* 246
Jordan, Martin *v.* 531
Jordan *v.* School Dist. 8 in Cape Elizabeth 540

Kehlor, Randall *v.* 37

Lancey, Chamberlain *v.* . . 230
Lary, Folan *v.* 545
Latner, Parker *v.* 528
Leach, State *v.* 58
Lime R. F. & M. Ins. Co. *v.* Hewett 407
Lovegrove *v.* Brown . . . 592

Me. Cent. R. R. Co., State *v.* 490
Marble *v.* McKenney . . . 332
Marrett *v.* Brackett . . . 524
Martin *v.* Jordan 531
Martin, Mudgett *v.* . . . 260
Mayo, Pen. R. R. Co. *v.* . . 306
McComb, Bangor & P. R. R. Co. *v.* 290
McKee *v.* Garcelon . . . 165
McKenney, Marble *v.* . . 332
Melcher *v.* Ocean Ins. Co. . 77
Miller, Elder *v.* 118
Miller *v.* Thompson . . . 322
Millett *v.* Holt 169
Mitchell *v.* Gooch 110
Mitchell, Pray *v.* 430
Moody, Edwards *v.* . . . 255
Moore, Belfast & M. L. R. Co. *v.* 561
Moran, Warren *v.* 227
Mosher, Thorn *v.* 463
Moulton *v.* Raymond . . . 121
Mudgett *v.* Martin . . . 260

Neal *v.* Hanson 84
Newry *v.* Gilead 154
Nickerson, Shaw *v.* . . . 249
Nye, Fairfield B. Co. *v.* . . 372
Nye, Goodwin *v.* 402

Ocean Ins. Co., Melcher *v.* . 77
Oxford Co. Com'rs, Bethel *v.* 535

Page *v.* Gilbert 485
Parker *v.* Latner 528
Patten *v.* Pearson 220
Paul, Sanborn *v.* 325
Pearson, Hamlin Gr. Plant. *v.* 157
Pearson, Patten *v.* 220
Peck, State *v.* 498
Pen. R. R. Co. *v.* Mayo . . 306
Perry, Stone *v.* 48
Pettingill *v.* Pettingill . . 411

Pettingill, Pettingill *v.* . . 411
Pillsbury, Rockland W. P. Co. *v.* 425
Pinkham, Griffin *v.* . . . 123
Pinkham, Vehue *v.* . . . 142
Piscat. F. & M. Ins. Co. *v.* Hill 178
Pope, Varney *v.* 192
Portland, Curtis *v.* . . . 55
Portland Co., Denison *v.* . 519
P. S. & P. R. R. Co. *v.* Saco 196
Pray *v.* Mitchell 430

Ramsdell *v.* Butler . . . 216
Randall *v.* Kehlor 37
Raymond, Berwick *v.* . . 114
Raymond, Moulton *v.* . . 121
Read *v.* Fogg 479
Read *v.* Whittemore . . . 479
Reed, State *v.* 550
Ripley *v.* Hebron 379
Robinson *v.* Hersey . . . 225
Rob. Manf. Co., Holmes *v.* . 201
Rockland W. P. Co. *v.* Pillsbury 425
Runnells, Atkinson *v.* . . 440

Saco *v.* P. S. & P. R. R. Co. 196
Sag. Co. Com., Goodwin *v.* . 328
Sanborn *v.* Paul 325
Sands, Berry *v.* 99
School Dist. 8 in Cape Elizabeth, Jordan *v.* 540
Shannon, Brainard *v.* . . . 342
Shaw *v.* Nickerson . . . 249
Skinner *v.* Hall 477
Small *v.* Clewley 262
Smith, Van Valkenburg *v.* . 97
Springer, Hagar *v.* . . . 436
Stanley, Farmington *v.* . . 472
State *v.* Crowley 103
State *v.* Doherty 504
State *v.* G. T. R. Co. . . . 145
State *v.* Leach 58
State *v.* Me. Cent. R. R. Co. 490
State *v.* Peck 498
State *v.* Reed 550
Stetson *v.* Bangor 313
Stilphen *v.* Houdlette . . . 447
Stimson, Gerry *v.* 186
Stinson, Harlow *v.* . . . 347
Stone *v.* Perry 48
Swan, Benson *v.* 160

Thompson, Miller *v.* . . . 322
Thorn *v.* Mosher 463
Tibbetts, James *v.* 557
Todd, Chipman *v.* 282
True *v.* International Tel. Co. 9

Van Valkenburg *v.* Smith . 97
Varney *v.* Pope 192
Vehue *v.* Pinkham . . . 142
Volney *v.* Frankfort . . . 253

Walker, Frost *v.* 468
Walker, Hobbs *v.* 184
Walton *v.* Greenwood . . 356
Ware, Farris *v.* 482
Warner *v.* Moran 227
Westbrook Manuf. Co. *v.* Grant 88
White, Atkinson *v.* . . . 396
Whittemore, Read *v.* . . . 479
Willey *v.* Haley 176
Winterport, Atwood *v.* . . 250
Woodman, Bell *v.* 465
Wormell, Yates *v.* 495
Wyllie, Foster *v.* 109

Yates *v.* Wormell 495
Young *v.* Blaisdell 272

ERRATA.

Page 37, 3d line from bottom, for 'commissioned,' read 'commission.'
" 230, 14th line, for 'resides,' read 'reside.'
" 535, 2d line from bottom, for 'to,' read 'on.'

VOL. LIX.

Page 548, 5th line from bottom, strike out 'not.'
" 551, 8th line from bottom, for 'were,' read 'was.'

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

GEORGE W. TRUE & another *vs.* INTERNATIONAL TELEGRAPH COMPANY.

Telegraph companies—power to limit their liability. Reasonable regulation—what is not. Damages—rule of, for non-delivery of night messages.

The defendant company transmitted messages during the night, known as night messages, at about one-half of the usual rates charged for day messages. And the plaintiffs having received a telegram offering them a cargo of corn, at ninety cents per bushel, went to the defendants' office, and, calling for one of their 'night-message blanks,' on which was printed, 'It is agreed between the sender of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message beyond the amount received by said company for sending the same,'—'send the following message subject to the above terms, which are agreed to,' replied by writing thereon a message, properly addressed, of the following tenor: 'Ship cargo named at ninety, if you can secure freight at ten—wire us the result,' and paid forty-eight cents, the rate for night message. The message was sent but not delivered, by reason whereof, the plaintiffs failed to obtain the corn at the terms offered, and the price of corn and freight immediately advanced. The defendants admitted their liability to the extent of sum paid. *Held,* That the terms of the foregoing condition are not reasonable, and do not exonerate the company from liability beyond the sum paid for the transmission of the message.

APPLETON, C. J., *dissenting.*

Held, also, that the rule of damages in such case is the difference between the price named, and that which the plaintiff would have been obliged to pay at the same place, in order by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, with the same rule in relation to the freight.

In the absence of any statutory restriction, a telegraph company may, before sending dispatches, prescribe the terms upon which alone it will send them. APPLETON, C. J.

If the terms are assented to, they constitute a contract between the sender and the company. APPLETON, C. J.

The rule of a telegraph company, understandingly assented to by the sender, that the company will not be liable for the non-delivery of any night message beyond the amount received by the company, not being inconsistent with R. S., c. 53, § 1, will exonerate the company from liability beyond that amount. APPLETON, C. J.

ON FACTS AGREED in the superior court for this county.

On January 12, 1870, the plaintiffs received a telegram, at Portland, from Messrs. Ridcliff & Patterson, of Baltimore, offering to sell them a cargo of corn, at ninety cents per bushel. Thereupon one of the plaintiffs went to the office of the defendants, in Portland, and, calling for one of the defendants' 'night-message blanks,' wrote thereon, the tenor of which, with that of the blank on which it was written, was as follows:

'NIGHT-MESSAGE BLANKS.

Office managers will not receive "night messages" unless written hereunder, and then only for places on the International and connecting lines where night operators are employed, east of St. Louis.

THE INTERNATIONAL TELEGRAPH COMPANY.

This company will transmit messages between the principal cities on its lines east of St. Louis, during the night, and deliver the same the succeeding morning, on the following terms:

For a message of twenty words or less, the usual tolls on a ten-word message will be charged.

For a message of more than twenty words, and not exceeding sixty words, twice the usual tolls on a ten-word message will be charged.

For a message of more than sixty words, and not exceeding one hundred and twenty words, three times the usual tolls on a ten-word message will be charged.

For each additional one hundred words, or part thereof, in excess of one hundred and twenty words, the usual tolls on a ten-word message will be charged in addition.

Such messages will be known as "night messages," and must be written hereunder, otherwise full tariff rates will be charged thereon. They will be received for transmission at any time during the day or evening, and will be sent during the succeeding night. No additional charges will be made for cipher messages.

And it is agreed between the sender of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same.

W. E. GOULD, *Treasurer.* E. K. HARDING, *President.*

PORTLAND, Jan. 12, 1870.

Send the following message, subject to the above terms, which are agreed to:

To Radcliff & Patterson, Baltimore,—Ship cargo named at ninety, if you can secure freight at ten—wire us result.

GEO. W. TRUE & Co.'

The message thus written was delivered to the clerk of the defendants, and the sum of forty-eight cents paid for its transmission by night to Baltimore; but the telegram was never delivered to Radcliff & Patterson, at Baltimore. The defendants admitted their liability for non-delivery, but claimed that they were not liable beyond the forty-eight cents paid.

By reason of the non-delivery of the telegram, the plaintiffs failed to obtain the cargo of corn, at the terms offered, and the price of corn and the rate of freight advanced immediately, and the plaintiffs lost the profits which they might have made thereon, and were obliged immediately to buy other corn, at higher prices, in carrying on their business.

The day-message blank of the defendants was of the following tenor:

'The sender of this message agrees to the following terms: The company is in no case liable for more than the sum received, for mistakes, or delays, or for the non-delivery of any message, unless requested to repeat it, upon payment therefor; nor for more than fifty times the sum received for any repeated message, unless paid for insuring it. The company is not liable for errors caused by messages being written obscurely, or in cipher; nor for unavoidable interruptions in its lines. And in sending messages over other lines, it is liable only as agent therefor. Nor is it liable upon any claim, unless it is presented to the president or treasurer in writing, within sixty days after its origin.

E. C. Bailey, *President.* S. F. Hersey, *Vice-president.*
W. E. Gould, *Treasurer.*

187

Send the following message—subject to the above terms, which are agreed to. To—'

If the plaintiffs were entitled to recover more than the amount paid by them for the transmission of said message, with interest thereon, upon the facts agreed, the full court to determine the rule upon which damages shall be assessed, and remand the case to the superior court, where damages will be assessed upon further hearing, by the judge of that court.

Symonds & Libby, for the plaintiffs.

Telegraph companies are not private bailees for hire; they exercise a public employment analogous to that of a common carrier, and the law applicable to common carriers furnishes a sure standard by which to determine the measure of their liability. 'Their obligations, as far as they reach, spring from the same source, viz., the public nature of their employment and the contract under which the particular duty is assumed.' *Parks* v. *Alta Cal. Tel. Co.* (1859), 13 Cal. 422; *Bowen* v. *Lake Erie Tel. Co.* (1858), 1 Am. Law Reg. 685; *Wash. New Orleans Tel. Co.* v. *Hobson*

(1860), 14 Grattan, 122; *N. Y. & Wash. Print. Tel. Co.* v. *Dryburg* (1860), 35 Penn. 298; *Bryant* v. *Am. Tel. Co.* (1865), 1 Daly, N. Y. 575; *De Rulte* v. *N. Y. & Albany Tel. Co.* (1865), 1 Daly, N. Y. 547; *Ellis* v. *Am. Tel. Co.* (1865), 13, Allen, 226.

Public policy demands the application of as stern a rule of responsibility in the case of telegraph companies as in the case of common carriers. Am. Law Reg. N. S., vol. 4, p. 199.

And no reason exists for extending the power of restricting their liability by printed notices beyond the point recognized in the case of common carriers.

The latter cannot protect themselves from the consequences of their own negligence or that of their servants, either by general notices or express contract. Such contracts are in violation of public policy which is the basis of their liability. *Newbern* v. *Just*, 2 C. & P. 76; Angel on Com. Car. §§ 267, 275; 2 Greenl. on Ev. § 215.

These principles are applicable to telegraph companies. 2 Redfield on Railways, § 12, p. 287; Redfield on Carriers, § 552; *Ellis* v. *Am. Tel. Co.*, 13 Allen, 226; *Burney* v. *N. Y. & Wash. Tel. Co.*, 18 Md. 34; *De Rulte* v. *N. Y. & Albany Tel. Co.*, 1 Daly, 547; Sedgwick on Damages, 413.

All rules for the conduct of their business must be reasonable, and the courts must determine this question in the last resort. The 'Condition' printed on the blank of this company is unreasonable and is not binding. It attempts to screen the company from the consequences alike of its gross carelessness or willful default, and leaves the company at liberty to send the message or not, at their option.

The amount paid for the message does not measure the liability of the company; whatever the amout paid, their liability for negligence is the same.

Scott & Jarnagin on Law of Telegraph, §§ 255, 256, and cases before cited.

The law of damages in cases like the present is well settled.

The party injured by a breach of contract is entitled to recover all his damages, including gains prevented and losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. The rule is not based so much on what is supposed to have been the actual expectation of the parties, as what it ought to have been under the circumstances, if their minds had been drawn towards the contingency of a failure in performance. Every commercial telegram is supposed to have a value, and in the present case the nature of the transaction was clearly indicated by the language of the message. *Hadley* v. *Baxendale*, 9 Ex. 341; *Colver* v. *Griffin*, 16 N. Y. 489; Sedgwick on Damages, vol. 2, pp. 301, 418; Redfield on Railways, 294; *U. S. Tel. Co.* v. *Wenger*, 55 Penn. 262; 'Law of Telegraphs,' § 397; *Landsberger* v. *Magnetic Tel. Co.*, 32 Barb. 550; *Parker* v. *Alta Cal. Tel. Co.*, 13 Cal. 422; *Rittenhonse* v. *Independent Line Tel Co.*, 1 Daly, 474; *John P. Squire et als.* v. *Wes. Union Tel. Co.*, 98 Mass. 232; *Bowen & McNancer* v. *Lake Erie Tel. Co.*, 1 Am. Law Reg. 685; *N. Y. & Wash. Print Tel. Co.* v. *Dryburg*, 35 Penn. 298; *De Rulte* v. *N. Y. & Alb. Tel. Co.*, 1 Daly, 547.

Plaintiffs are entitled to recover the difference between the price of the cargo offered and the price at which they were obliged to buy, together with the difference in freights.

Davis & Drummond, for the defendants.

1. Telegraph companies may fix reasonable terms for doing their business, and those who employ them are bound by such terms. And the terms fixed by the defendants in this case for 'night messages' are reasonable. *McAndrew* v. *Electric Tel. Co.*, 84 E. C. Law, 3; *Camp* v. *W. Union Tel. Co.*, 1 Met. (Ky.), 164; *Wann* v. *W. Union Tel. Co.*, 37 Mo. 472 (26 U. S. Dig. 519); Am. Law Reg., July, 1868, p. 615.

2. The writer of the message is presumed, without proof, to know the rules of the company. And he cannot set up the fact (nor is it attempted in this case), that he did not read the heading of the blank. *Birney* v. *N. Y. Tel. Co.*, 18 Md. 341; *Breese* v.

U. S. Tel. Co., 45 Barb. 274; *Carew* v. *W. U. Tel. Co.*, 15 Mich. 525 (Law Reg., Jan., 1868, p. 319); *Ellis* v. *Am. Tel. Co.*, 13 Allen, 226.

KENT, J. On the 12th of January, 1870, the plaintiffs received a telegram from a firm in Baltimore, offering to sell them a cargo of corn at ninety cents per bushel. Whereupon one of the plaintiffs went to the office of the defendants and asked for one of the 'night-message blanks,' and wrote thereon the following telegram, addressed to the said firm, and paid forty-eight cents, the sum demanded. 'To Radcliff & Patterson, Baltimore;—Ship cargo named at ninety; if you can secure freight at ten, wire us result. Geo. W. True & Co.'

It is admitted that the telegram was never delivered to Radcliff & Patterson. It is also admitted that the message was sent the same night to Boston, which is the western terminus of defendants' line, and was thence forwarded by the Franklin Telegraph Company, with which the defendants have a business connection, making them responsible for the whole distance; the lines of the Franklin company extending through Baltimore to Washington. No reason is assigned for the non-delivery of the message.

1. The defendants admit their liability for the mistake or delay in the transmission, and for the non-delivery of the telegram. This is an important fact, and relieves the case of any difficulty in determining this primary and fundamental point of actual liability.

2. The defendants claim that this liability is limited to the repayment of the forty-eight cents. The plaintiffs claim damages for losses sustained by them, beyond this small sum, by reason of the non-delivery of the message.

3. This claim of exemption, on the part of the telegraph company, is based upon a special condition, contained in the paper, on which the message, signed by the plaintiff, was written.

That paper, called a 'Night Message Blank,' contained, above the written message, several printed specifications of the terms and conditions on which these night messages would be received and forwarded. The last one was in these words:

'And it is agreed between the senders of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same.'

Then follows, next above the written message, the words, 'Send the following message, subject to the above terms, which are agreed to.'

There can be no doubt that the above condition, with the assent signified by the signature of the plaintiffs, covers this, and all other cases of mistake or non-delivery. The question is whether the contract can legally be thus limited, and the defendants be thereby exonerated for all liability, to the extent claimed.

There has been much discussion in various cases, as to the nature of this comparatively new contract for the transmission of messages, by means of electricity; and the liabilities, limitations, and qualifications of this undertaking. It has been likened to the case of a common carrier, and it is contended by many, that all the strictness of the common law, applicable to carriers, is to be applied to telegraph companies. On the other hand, it is contended that they are but simple bailees for hire, to do a certain specified thing, —'*locatio operis faciendi.*' It is clear that telegraph corporations or companies exercise a public employment, or as said by C. J. Bigelow, 13 Allen, 226 (*Ellis* v. *A. Telegraph Co.*), a *quasi* public employment; certainly as much so as express companies, or stage-coaches, or railroads. They often invoke the exercise of the right of eminent domain. They everywhere announce a readiness to transmit messages for all applicants, at fixed rates. The nature of their undertaking is analogous to that of carriers. One assumes to transmit a letter, the other a larger, sealed package, to a given destination. Both are bound by certain rules of law, and held to a faithful and exact performance of a specified duty. So far as public policy is concerned, there seems to be but little reason for not holding both to the same rules. It might be interesting to follow out these analogies, and to enter upon the discussion of various

questions, touching the extent of the common law and statute liabilities of these companies, and the extent of the right and power of these companies, to limit their liabilities by notice or conditions, apparently assented to by the other party.

But the case before us does not require this extended examination. It presents to us the single question, whether this condition is one which the company could rightfully impose upon its undertaking.

We are satisfied that telegraph companies, like all other corporations and individuals, may prescribe, adopt, and enforce reasonable rules and regulations for the convenient and prompt and satisfactory performance of their duties and obligations, not inconsistent with that performance. We think they may go further, and establish stipulations and regulations, to some extent restraining and limiting their common-law liabilities, made known to, and directly or indirectly assented to, by those employing them.

We are equally well satisfied, that there is a limit to this power of avoidance of legal liabilities. It does not rest with such companies to fix these conditions absolutely, by which they may avoid duties and responsibilities, by their mere will, or by their views of self-interest, or desire to shield the company or its officers from the direct consequences of neglect or carelessness.

The public and those who employ these agencies to perform important services, have rights, which cannot be ignored or avoided by stipulations made by interested parties. When a company assumes the position of offering its services generally, to all who may apply, under its character of a public corporation, it does not stand exactly in the same position as private individuals contracting in a single matter, on terms and conditions mutually agreed upon for that particular case.

The discussions in the text-books and in the decided cases have led to the conclusion, that whilst, in the first instance, the company may make its rules for the regulation of its business, and for the limitation of its liability, those rules must be reasonable, in view of all the circumstances, and of the nature of the business, its risks

and responsibilities, the necessity of securing to the public, who may have occasion to use this means of transmission, a reasonable protection against neglect or fraud or want of due care and effort, to perform punctually and correctly the act undertaken.

The company is not the ultimate judge of the reasonableness of an adopted rule. And in this single proposition, lies the gist of the whole matter. The court must determine in every case, when the question is directly raised, whether the particular restriction or qualification is a reasonable exercise of the powers residing in the company.

Several questions, as to reasonableness, have arisen under different conditions made by telegraph companies, and have been considered by the courts. One of them has arisen under a condition, which is found in the general blank of the defendant company, by which it is stipulated that the company will not be responsible, for more than the sum received, for mistakes or delays, or for non-delivery of any message, unless requested to repeat it on payment therefor, nor for more than fifty times the sum received for any repeated message, unless paid for insuring it.

It seems to be held, that however it may be in cases where the error causing the injury was occasioned by not repeating, or would have been manifestly prevented or avoided by repeating, yet this condition could not cover and excuse negligence or delay in delivering a message received, or any other nonfeasance or misfeasance not imputable to or excused by not repeating. *Graham* v. *Western Union Telegraph Company*, recently decided by the supreme court of Colorado, Am. Law Register, May 10, 1871; *Burney* v. *N. York & Washington Telegraph Company*, 18 Md. 341.

In the case at bar, no such question arises. No such condition is found in the 'night message blanks' of the company. These messages are of a special class, and are made subject to their own rules, as printed on the blanks. The charge for transmission of these night messages is considerably less than on those in the general business of the company, and, perhaps for this reason chiefly, the whole provision relating to repeating is omitted, and the sweep-

ing and comprehensive provision by which in effect all liability, beyond the price paid, is avoided is substituted. It is clear that a mere change of rates or prices cannot avoid legal liability. The duty and responsibility of the company cannot properly be measured by the price paid for the duty undertaken.

The single question on this part of the case is whether the stipulation, recited in full at the commencement of this opinion, is a reasonable one, or one which the company could lawfully impose as a condition of the contract.

After a careful reading, it seems difficult to give any other construction to this clause than a general and unlimited exemption from all and any liability beyond the sum paid. It is not limited to those cases where reasonable care and attention might not prevent mistakes or delays. It makes no reference to the subtle and mysterious agency employed in the transmission of messages, or to the peculiar liability to error in the work of the operator. As before stated, this provision, in relation to night messages, does not require the repeating of telegrams sent, before a liability should attach. It simply and nakedly exonerates the company from all liability (except for the fee paid) for any and all mistakes in the transmission of the message—and for all delays in transmitting—and all delays in delivery, or even non-delivery of the telegrams. These items seem to include all the cases of neglect, want of care or attention of which the company can be guilty, in reference to the performance of their duties and obligations under the contract. Even gross negligence and the want of the lowest degree of care are protected from complaint, although affirmatively proved by the other party. The operator may, from sleepiness or haste to close for the night, prefer to pay back the trifle paid, and leave the message unsent. Or a message may have been carelessly or even wantonly thrown into the waste basket, and never sent, or if sent it may have been treated in the same manner at the office of reception, and never delivered to a carrier, or if so delivered, it may have been thrown aside or destroyed by the carrier to save himself labor or trouble. And the sender, under this rule, must be debarred from

all remedy beyond a repayment of the few cents paid. This is not the establishment of a rule or rules for the management of the business which are reasonable and proper for the orderly conducting of its business, or to protect the company against unfair or unreasonable claims. In this case no attempt is made to excuse the non-delivery; but a liability is admitted.

We think this stipulation is not reasonable, for it does not come within any established principle, applicable to employments of this nature, whether called public or private. It goes altogether too far in attempting to cover all possible delinquencies. 'A party cannot in such a way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants and agents.' *Ellis* v. *The American Tel. Co.*, 13 Allen, 234. In the case of *Birney* v. *New York & Wash. Tel. Co.*, 18 Md. 341, the court say that 'courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power; one, indeed, that would leave the public almost remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select the agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to its agents their messages, however valuable they may be. Such being the case, public policy, as well as commercial necessity, require that companies engaged in telegraphing should be held to a high degree of responsibility.'

We restate our propositions and conclusions on this part of the case in order to prevent any misapprehension of the extent and limitations of the rules laid down.

1. This company, and all others of a like nature, offering and undertaking to perform acts or services for all applicants, at fixed rates, exercise at least a *quasi* public employment.

2. Such company may adopt and enforce reasonable rules and

regulations for the convenient and prompt and satisfactory performance of the act or duty undertaken.

3. This right in the company is not absolute and unlimited; but such rules are subject to the test of reasonableness in view of the rightful claims of public policy and private rights, and the enforcement of the obligation of good faith and honest effort to perform.

4. The test must be applied by the court, whenever the question arises on the validity of any such regulation, according to the rule before stated.

5. A rule, or stipulation, like the one in question, which covers all possible delinquencies, mistakes, delays, or neglects in transmitting or in delivering, or not delivering a message, from whatever cause arising, is not, for the reasons before stated, a reasonable regulation within the legal rule.

6. Such a rule is not saved from these objections, by the condition of a liability to repay, if required by the sender, of the trifle paid to them. It is a mere evasion of the legal liability and is never the measure of damages for non-performance of a contract of this kind.

It is an insufficient and, therefore, an unreasonable stipulation, and cannot save the otherwise clearly objectionable condition of which it is a part.

Another question is presented relating to the rule of damages. It is agreed, according to the report of the case, that 'if the plaintiffs are entitled to recover a greater sum (than thirty-eight cents) as special damages upon the facts aforesaid, this court is to determine the rule upon which damages shall be assessed.

The measure of damages in cases of this kind has been much discussed in the text-books and decisions in this country and in England. It would seem to be impracticable to attempt to lay down any single and simple rule, which can be made to apply, without qualification, to every case. There are, however, certain general principles, which may be considered as applicable, generally, to these cases, and to be now quite well established.

Before considering these principles, with these qualifications and

limitations, it may be well to examine the character and exact extent of the message in the case before us. We may then be better able to apply the rules, established or admitted, to this particular case. For it is the rule for this case, that we are called upon to define.

We assume that the plaintiffs can prove that the firm in Baltimore, to whom the telegram was addressed, had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiffs; that the telegram contained notice of acceptance of the proposition; that the condition named, 'if you can secure freight at ten' (cents), could have been complied with, if the message had been delivered when it should have been; that, if it had been thus delivered, the bargain would have been closed, and the plaintiffs would at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents.

The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act, by which the bargain would become operative and complete. It seems clear, that such a message has a distinctive and clear pecuniary value, and demands of the party, who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence; and that he is subject, at least, to like rules and liabilities, as if he (not being a common carrier), had undertaken to transport an article of merchandise.

On its face it gives clear intimation that it is of a business character, relating to a distinct and specific contract, and that, according to the well-known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured.

In this respect it differs from a class of cases to be found in the reports, where the message was so brief or enigmatical, or so obscure, that it gave the operator no notice that it was of any value pecuniarily.

It differs also from another class in this, that it is not a gen-

eral order to buy, if thought best, or if market had an upward tendency, or if there was a probable chance of profit, or any like condition. This telegram is a distinct acceptance of an offer, at a fixed price, of a cargo. Its binding efficacy was not dependent upon any contingency, or rise or fall in the market. If it had been duly delivered, the plaintiffs would have been, at that moment, the purchasers and owners at Baltimore of a cargo of corn at ninety cents, with freight at ten cents. It was not delivered, and the plaintiffs were not at that time and place such owners, as between the plaintiffs and defendants, the plaintiffs were entitled to be, at such price. They would have been such, but for the neglect of the defendants. What is the measure of damages? Clearly not the price paid for the transmission only. Paying that back would be rather in the nature of a rescission of the contract, than damages for its non-performance. And we have before determined, that the special condition was not binding so as to exonerate from all other damages occasioned by neglect or want of common care and attention in the performance of the contract and duty assumed.

A more difficult question arises in fixing an exact rule in determining the amount of damages in this case.

The general rule is familiar, and is among the rudimental axioms of the law.

In this State, the general doctrine was laid down at an early day in *Miller* v. *Mariner's Church*, 7 Greenl. 51, in an opinion of the court drawn by Mr. Justice *Weston* in his usually clear, discriminating, and accurate style, and precision in use of language. 'In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, and deducible from the non-performance, are not allowed. And if the party injured has it in his power to take measures by which his loss is less aggravated, this will be expected of him. If the party entitled to the benefit of a contract can protect himself from loss, arising from

a breach, at a trifling expense, or with reasonable exertion, he is bound to do so.'

The above extract, as it seems to us, contains the substance of the whole law applicable to this subject, and the germ from which long chapters and long opinions have been expanded. It is constantly cited as an early and authoritative statement of the legal rule on this subject.

The principles and rules laid down in this case have been reaffirmed in our court in many cases. In *Berry* v. *Dwinel*, 44 Maine, 255, it is held that 'remote and consequential damages, possible gains, and contingent profits are not allowed.' The rule was applied in this case to possible or actual loss to plaintiff in the future, which the defendant set up as a defense to recovery of damages, for non-delivery of logs at a stipulated price and time.

Perkins v. *P. S. & P. R. R.*, 47 Maine, 592; *Ripley* v. *Mosely*, 57 Maine, 76, and cases there cited. In that case it was held, that when the loss is not speculative nor dependent upon contingencies, but is one of the natural and direct results of the act, it may be recovered. But loss of probable profits is too uncertain and problematical to be a basis for estimation of damages.

In an English case, *Hamlen* v. *G. N. Railway*, 1 H. & N. 408, it is laid down as a general principle, that no damages can be given on contracts, which cannot be stated specifically.

Redfield, in his chapter on Telegraph Companies, § 1896, thus states it as applicable to such companies: 'The company must make good the loss resulting from any default on their part.' But what loss? Can a party recover for every loss, or injury which he can show, by facts subsequently occurring, did in truth result to him from the failure of duty on the part of the other party?

The clear preponderance and weight of the decisions are, that the qualification, which was thought formerly to be sufficient to meet all cases, is not satisfactory. That qualification was, that the injury must be the ordinary, natural, or even necessary result of the breach. But loss of profits may be clearly shown to have been occasioned by the failure, and from no other cause. So injury and

loss may be directly traced to the same cause, when the party is prevented from availing himself, by this breach of one contract, of some other collateral and independent contract entered into with other parties. Or where a party has been prevented from doing some act, or making some investment in his own business, not necessarily connected with the agreement in question.

These damages are disallowed, not because they cannot be traced directly as the immediate and undoubted effect of the breach, but because they are in their nature uncertain and contingent, and, perhaps more decidedly, because they are not such as would naturally flow from such a breach, and could not fairly be considered as having been within the contemplation of the parties at the time of entering into the contract. This rule necessarily excludes all remote, speculative, and uncertain results, as well as possible profits, advantages, and other like consequences which might have arisen, or which it can be shown would have arisen from the performance of the contract. This seems to be the doctrine in other States and in England. *Squire* v. *Western Union Telegraph Co.*, 98 Mass. 232; *Griffin* v. *Colver*, 16 N. Y. 490; *Leonard* v. *N. Y. Tel. Co.* 41 N. Y. 565; *Freeman* v. *Chute*, 3 Barb. 426; *Blanchard* v. *Ely*, 21 Wend. 342; *The Sch. Lively*, 1 Gall. 315; *Graham* v. *Western Union Tel. Co.* (Colorado), before cited; *Hadley* v. *Baxendale*, 26 Eng. L. & Eq., a leading case on resulting damages. Other English and American cases might be cited, bearing more or less directly on the subject. They can be found collected in Sedgwick on Damages, and other text-books.

But the negation of certain elements still leaves the true rule undetermined. This, we think, is to be found in the application of the principle, which, excluding all uncertain, problematical, and contingent profits, holds the party liable for the immediate and necessary result of the breach, and which may fairly be presumed to have been in contemplation of the parties at the time, and are capable of being definitely ascertained by reference to established market rates.

Now, in the case before us, the plaintiffs should have had, at the

time when the dispatch should have been delivered, a cargo at ninety cents and freight at ten cents. The natural consequence of this neglect, one which might well be anticipated or be in contemplation of the parties, was that the bargain would be lost, and that the cargo might be sold to other parties, or the seller would decline to accept a repetition of the offer, afterwards at same price. Plaintiffs wanted the cargo and had a right to have it at the price named. What was the damage?

Here comes in the second proposition in *Miller* v. *Mariner's Church*, viz., that the party should not at once abandon all attempts to procure the corn, and rest upon a claim for indefinite and possible profits which he might have made by a rise in the market, if he had obtained the article at the time, but must use reasonable diligence, after notice of the failure, to procure the same quantity, and the lowest freights, at the then market rates.

The sum, therefore, which would be a compensation for the direct loss and injury sustained by the non-delivery of this message, is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise, and the same rule applies to any increase of freight from the sum named, if it be shown that the corn could have been shipped by the sellers, at that rate, if the telegram had been duly received.

The case of *Squire* v. *W. U. Tel. Co.*, 98 Mass. 232, adopts this view, in a case very nearly resembling this in its facts.

Rittenhouse v. *In. L. of Tel.*, 1 Daly, N. Y., where the operator made a mistake in the article ordered, it was held that the company must make good the difference between the price of the article actually ordered, at the time when ordered, and the price of the same article, if purchased as soon as the mistake was discovered.

U. S. Tel. Co. v. *Wenger*, 55 Penn. An order to buy stocks; no reason given why not delivered; a case of negligence; stocks

ordered not bought on the day; they would have been, if telegram had been received, but were purchased three days afterwards at an advance. That difference, the court say, is undoubtedly the damages the plaintiff has sustained and is entitled to recover. 'The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it.' *Leonard* v. *N. Y. Tel. Co.*, 41 N. Y. 565, before cited, a case of mistake; *Griffin* v. *Culver*, 16 N. Y. 490; *DeRulte* v. *N. Y. & Al. and B. R. Tel.*, 1 Daly, 547; *Parks* v. *Alta Cal. Tel. Co.*, 13 Cal. 422.

In our own State, in the case of *Berry* v. *Dwinel*, before cited, the rule, in an analogous case, is thus stated; 'When a party contracts to deliver goods at a particular time and place, and no payment has been made, the true measure of damages is the difference between the contract price and that of like goods at time and place where they should have been delivered.'

And so it has been held that a common carrier, who unreasonably delays to transport or deliver goods intrusted to him, will be held to pay the difference between the market value at time and place when and where they ought to have been delivered, and the market value at that place on day of actual delivery. And this although no special contract as to time, and no special intended use, and no deterioration in the quality of the article. *Cutting* v. *G. T. R. R.*, 13 Allen, 381. The same decision has been made by this court in *Ball* v. *Railroad*—not reported. See *Weston* v. *G. T. R. Co.*, 54 Maine, 376.

Case remanded to the superior court, the damages to be assessed by the presiding judge of that court, upon further hearing, according to agreement of parties, and the rule of damages given in the opinion in the case.

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

The following dissenting opinion was pronounced by

APPLETON, C. J. This is an action on the case against the defendant corporation for negligence in not delivering a night message.

It is agreed that on the 12th of January, 1870, the plaintiff received a telegram from Radcliff & Patterson, of Baltimore, offering to sell them a cargo of corn at ninety cents per bushel; that the plaintiffs went to the office of the defendants, and, calling for one of the 'night-message blanks,' wrote thereon a telegram in reply, which is made part of the case and will be hereafter considered.

This message was delivered to the clerk of the defendants and the sum of forty-eight cents paid for its transmission by night to Baltimore. The defendants the same night sent the message to Boston, which is the western terminus of their lines, and the same was thence forwarded by the Franklin Telegraph Company, with which the defendants have a business connection, making them responsible for the whole distance, the lines of the latter company extending through Baltimore to Washington. The telegram was never delivered to Radcliff & Patterson.

In the absence of any statutory enactment, any individual or corporation having acquired the right so to do from the patentee, may send messages for others by the telegraph. Before sending them, the operator may prescribe the terms upon which alone he will send them. If the terms are assented to, they constitute a contract between the sender and the individual or company agreeing to transmit them. The contract may limit the damages to any amount agreed upon, in case of failure to transmit. The telegraph company may warrant the transmission and make itself liable for all damages if the message is not received. It may require all messages to be repeated as a condition of its liability. It may limit the damages to fifty times the price paid for transmission; or, in case the message is sent by night, to the repayment of the sum received. These, or any other terms, when understandingly agreed to, are as binding as any other contract, unless the general liberty of contracting in reference to sending telegraphic messages is inhibited.

By the common law there was no such inhibition before this great discovery, for it was not foreseen that any such would be made. There is none since, except as the result of some statute.

Now the liberty of contracting is unlimited except so far as it is affected by R. S., c. 53, § 1. This statute requires that messages should be sent in the order in which they are received, and 'in case of any error or unnecessary delay in writing out, or delivering a dispatch within their delivery limits, making it less valuable to the person interested therein,' the company 'shall be liable for the whole amount paid on such dispatch.' By § 3 the company is made liable for fraud and is not exonerated 'from any liabilities existing at common law for any neglect or wrong-doing of such company or its agents, etc.

Subject to this statute, 'the obligation of the company to use due care and skill in the transmission of the messages, says Lush, J., in *Playford* v. *United Kingdom Telegraphic Co.*, 11 Best & Smith, 759, 'is one entirely arising out of the contract.' The telegraph company may be liable to the party sending to the whole extent of the damages arising from a failure to transmit, unless that liability can in some way be limited or restricted. There is no legal limitation upon the price for sending and that may be graduated according to the greater or lesser risk and according to the damages consequent upon a failure. If the price is too high for a guaranty, the party wishing to send may abstain from sending upon a warrant, or may stipulate for the transmission of the message at a less price for himself, and with a reduced claim for compensation against the operator or company.

The common-law liability will be for the payment of such damages as may be agreed upon in advance, or in case there is no agreement, for all damages naturally and directly resulting from the violated contract. In *McAndrew* v. *Tel. Company*, 84 E. C. L., 12, the defendants had their liability limited by certain rules and regulations, somewhat like those in the case under consideration. The counsel claiming to recover, notwithstanding their rules and regulations, Jervis, C. J., very pertinently asks, 'Do you maintain that

the legislature meant to cast upon the company, for a reward of a few shillings, a liability to the extent of £10,000 or £100,000?

No principle of public policy is adverse to these principles. Indeed the general liberty to contract is the highest policy. The telegraphic companies may, by express contract or by reasonable rules and regulations made known to those dealing with them, limit their liabilities.

The terms upon which the defendant company offered to transmit messages fully appear in the case.

When these terms are assented to by the signature of the party sending the message, as they were by the plaintiff in the present case, they constitute a contract, which not being at variance with any statute or any of the rules of the common law, is binding upon the party signing the agreement.

That a contract is thus created, and that so far as relates to messages sent by day it is binding, has been settled by the general current of authorities in this country. In *Breese* v. *U. S. Telegraph Co.*, 45 Barb. 274, it was held that a printed blank like the above, being filled up was a general proposition to the public of the terms and conditions upon which messages would be sent and the company become liable in case of error or accident; and that by writing a message under such heading and signing and delivering it for transmission the sender accepted the proposition, and it became an agreement binding upon the company according to its terms and conditions. To the same effect are the cases of *The Western Telegraph Company* v. *Carew*, 15 Mich. 524; *Camp* v. *Western Union Telegraph Co.*, 1 Met. (Ky.), 164. One of the conditions of a telegraph company, printed in their blank form, was that they would not be liable for damages if the claim was not presented in sixty days from sending the message. Held, the condition was binding on one sending the message on the printed form.

On the telegrams were printed these words: 'Send the following message subject to the above terms, which are agreed to.' 'The message,' remarks Agnew, J., 'followed immediately, signed with the name of the plaintiff's firm. This, undoubtedly, amounted to a

written agreement by the plaintiff, to send the message according to the terms.' *Wolf* v. *Western Union Telegraph Co.*, 62 Penn., 83. By this agreement the statute of limitations was restricted to sixty days. If this can be done by the agreement of parties, there would seem to be no doubt that they might agree upon the damages to be paid in case of a breach of the contract. To the same effect is the case of *U. S. Telegraph Co.* v. *Gildersleeve*, 29 Md. 232.

So, too, in England, and in some of the States, telegraph companies are authorized by statute to establish reasonable rules and regulations, and rules and regulations like those of the defendant corporation have received the sanction of the court. In *McAndrew* v. *Telegraph Co.*, 84 E. C. L. 3, the plaintiff sent a message to the defendant's office to be transmitted by the telegraph to a vessel lying off Exmouth, requiring the master to proceed with her to Hull. The message was received by the defendants, subject, among others, to the following conditions: 'The company will not be responsible for mistakes in the transmission of unrepeated messages from whatever cause they may arise.' In the transmission of the message (which was an unrepeated one), 'Southampton' was by mistake substituted for 'Hull,' in consequence of which the vessel went to the former place, and the plaintiff sustained loss in the sale of the cargo at a bad market. The point was taken that here was gross negligence, but the court unanimously sustained the defense. The rule as to repeating messages was held a reasonable one. 'The public,' observed Crowder, J., 'have thus the opportunity of transmitting unimportant messages for a small charge; or if it be a matter of importance they may, at a moderate additional charge, have the message repeated, and so obtain a certainty almost of its being transmitted with perfect accuracy. I see nothing unreasonable in that.' The reasonableness of this as a regulation was affirmed in *Ellis* v. *Telegraph Co.*, 13 Allen, 226; *Albany & Buffalo Telegraph Co.* v. *DeRulte*, 1 Daly, N. Y. 547. In *U. S. Telegraph Co.* v. *Gildersleeve*, 29 Md. 232, Alvey, J., says 'the appellant had a clear right to protect itself against extraordinary

risk and liability, by such rules and regulations as might be required for the purpose.'

The question of liability before us arises as to the effect of the agreement between the parties as to night messages, limiting the liability of the defendant to the repayment of the amount received.

The defendants were under no obligation to send their messages by night. If for the accommodation of the public, they do it upon terms and conditions neither at variance with common nor statute law, to which the sender accedes, why should he not be bound by his deliberate assent thereto equally in this as in other cases.

The company transmit messages for different rates of compensation, and at different risks in case of failure, however caused. It insures the delivery of the message, at all events, for a premium. It becomes responsible for fifty times the sum received for a repeated message. It sends in the night at a much reduced price, and the sender agrees that the company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any message beyond the sum received. 'The appellee,' remarks Alvey, J., in *U. S. Telegraph Co.* v. *Gildersleeve*, 'by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or by special contract for insurance, could have secured himself against all consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message.' So here the sender chose the cheapest mode of transmission, agreed to the damages in case of non-delivery, and now claims to impose upon the corporation the liabilities incurred by a day message on more expensive terms. We perceive no reason why he should not be held to his contract.

The ordinary risks of transmission by telegraph by day, are increased when the message is sent by night. The operator at some station on the line may have left his post; the messenger may be absent; the price paid is less than in the day; the message, it may be presumed, is of minor importance; the greater diligence of the

day is not contracted for; the company says, I will send your message by night or repay you the money received for its transmission; the chance of its transmission is less than by day; my price is less; my interest is to send all messages, for it is my business, but if you choose to send by night, the only risk I will run is that of repayment; I am not compelled to transmit it by night. The sender agrees to this; here is a contract; the consideration is sufficient; it is entered into by parties competent to contract; there is no statute prohibiting; it is a contract for the liquidation of damages, and if there is anything parties can do without let or hindrance, it is to agree in advance upon the damages to be paid in case of a violated contract. Whether the damages thus agreed upon are large or small, is a matter for the contracting parties, and for them alone. If they are satisfied with large or small damages it matters not to any one else.

But in this case the damages agreed upon are precisely those prescribed by R. S., c. 53, § 1. If it be said that the company is not exonerated 'from any liabilities existing at common law,' that does not alter the result. The common-law liabilities are those arising from contract express or implied. Whatever they may be, they may be waived or modified by contract. But arising from contract, the damages may be agreed upon in advance as well as in any other case.

So if these conditions are to be regarded as rules and regulations, it is difficult to see why they are not reasonable and just.

It is said the defendants are common carriers. It is not so. The resemblance is but fanciful. They are not subject to the same legal rules and liabilities as common carriers. *Breese* v. *U. S. Telegraph Co.*, 45 Barb. 271. 'The reasons of policy and expediency on which the rule of the common law is founded which imposes on carriers of goods a liability for all losses not caused by the act of God or the public enemy,' observes Bigelow, C. J., in *Ellis* v. *American Telegraph Co.*, 13 Allen, 226, 'do not apply to the business of transmitting messages by means of the electric telegraph.' So in *The Western Telegraph Co.* v. *Carew*, 15 Mich. 524, it was held that

telegraph companies in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules. 'I can find no authority,' observes Hunt, J., in *Leonard* v. *The N. Y. Telegraph Co.*, 41 N. Y. 571, 'and can discover no principle upon which to charge such a company with the absolute liability of a common carrier. That liability was founded upon the necessities of the case, real or fancied, and has never been applied to any person or to any occupation, except those of carriers of goods and innkeepers.' Whether the liability of the telegrapher is based upon the contract he makes or upon his public duty, he does not come within any of the principles applicable to a common carrier.' In *Smithson* v. *U. S. Telegraph Co.*, 29 Md., 167, Nelson, J., in delivering the opinion of the court, says 'The defendants were bailees, not common carriers, and not to be held to the rigid and strict accountability of common carriers,' etc.

To the same effect is an English decision, *Playford* v. *United Kingdom Electric Telegraph Co.*, 11 Best & Smith, 759.

But if they were common carriers, the party sending his message might waive his common-law rights, and might limit the liability of the carrier to an amount as much less than that established by law, as he might deem expedient, as is done in the case of a carrier of goods. 'A public carrier,' observes Bigelow, C. J., in *Judson* v. *Western R. R. Co.*, 6 Allen, 489, 'may enter into a special contract with his employer, by which he may stipulate for a partial or entire exoneration from his liability at common law as an insurer of property committed to his custody, and such contract is not contrary to public policy, or invalid as transcending the just limits of the rights of parties to regulate their dealings by special stipulations. As a necessary corollary of this conclusion, it is also held in the best considered text-writers, that a notice by a carrier that he will not assume the ordinary responsibility imposed on him by law, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him, because it is tantamount to an ex-

press contract, that the goods shall be carried on the terms specified in such notice.' In *Austin* v. *Manchester, &c., Railway Co.*, 70 E. C. L., 453, horses were delivered to a railway company to be subject to a note or ticket containing the following notice: 'This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies, etc., the charges being for the use of the railway carriage and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking or before the same leave the station; nor for any damages, however caused, to horses, cattle or live-stock of any description traveling upon their railway or in any of their vehicles.' This contract was held valid and binding upon the parties. 'The question,' observes Creswell, J., 'therefore still turns upon the contract, which, in express terms, exempts the company from responsibility from damages, however caused, to horses, etc. In the largest sense, these words might exonerate the company from responsibility, even for damage done willfully, a sense in which it is not contended that they were used in this contract. But giving them the most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey; one of which, undoubtedly, is the risk of a wheel taking fire, owing to a neglect to grease it. Whether that risk is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract; and that such exemption appearing on the face of the declaration, no cause of action is disclosed, and that judgment must be arrested.'

In *Can* v. *L. & Y. Railway Co.*, 7 Exch., 707, it was decided, that when a railway company had made a contract, in which it was stipulated that they shall not be answerable for any accident, however caused, the contract bound the party, and the company was not answerable for any loss or injury though occasioned by their own negligence. In *Simons* v. *The Great Western Railway Co.*, 86

E. C. L., 805, the conditions were, 'That no claim for damages will be allowed unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered,' and 'in the case of goods conveyed at special or mileage rate, the company will not be liable for any loss or damage, however caused,' were held just and reasonable, much more would a mere limitation of damages be held reasonable, especially if assented to. In *Walker* v. *York & Midland Railway Co.*, 75 E. C. L., 750, the defendants printed notices declaring that they would not carry fish except on terms relieving them from all responsibility, and declaring that their servants had no authority to alter these terms. A notice was served on the plaintiff, who notwithstanding sent his fish. 'If a man,' says Wightman, J., 'is told that goods will not be received, except on certain terms, and, notwithstanding this, he will send the goods, I think he must be taken to agree that they shall be taken on those terms.' The verdict for the defendants was not set aside.

The defendants proposed to transmit night messages only on certain terms and conditions. To these the plaintiffs acceded and sent their message to them. Here is a contract between the parties. It is against no statutory provision. It is at variance with no rule of the common law.

After a breach the parties may agree upon any sum as damages. They may equally well do it before. It is incident to the general right to contract, with which no court can interfere, as long as the contract is not prohibited by law. The agreement made is lawful. It is binding. It should be enforced equally as any other case.

It results from these views, that telegraphic companies are not common carriers and not subject to their liabilities.

They may limit their liabilities by express contract, or by rules made known to those dealing with them.

When these terms are assented to by the parties sending the message, they constitute a contract, which if not at variance with the statute or the common law, is binding upon the party signing the same.

The limitation as to damages, that the company is liable only to repay the sum received in case of a failure to deliver a night message is not at variance with the statute nor with any rule of the common law.

The plaintiff having assented and agreed to the same is limited in his damages to the amount paid for the transmission of his message, there being a failure of its delivery.

Damages for the breach of a contract may as well be agreed upon before, as after such breach, and such agreement is binding in each case.

In my judgment, a default should be entered for forty-eight cents damages.

JOHN RANDALL & another *vs.* JAMES M. B. H. KEHLOR & others.

Jury trial—statute requiring defendant to pay jury fee to secure, constitutional—waiver of. Custom—parol evidence admissible to prove. Agent to sell—may warrant.

Pub. Laws of 1868, c. 151, § 6,* providing that 'the party demanding a jury shall pay the jury fee, and tax the same in his costs, if he prevail,' is not in contravention of Art. I. § 20, of the constitution of this State.

When a defendant in the superior court has demanded a jury, but declines to pay the jury fee, he thereby waives his right to a jury trial.

When a case in the superior court is tried by the presiding justice without the intervention of a jury, his findings of fact are conclusive.

Parol evidence is admissible to prove a custom among flour merchants in the place where it is sold on commission, whereby the vendee may rescind the sale and return the flour within ten days, if it prove to be unsound or damaged.

In such case the commission merchant to whom the damaged flour is returned in accordance with the custom, and who afterwards sells it as unsound, at its full real value, without laches on his part, may recover from his consignor the amount of the actual loss by such sale.

It seems, that in the absence of restrictions from his consignor, a commissioned flour merchant has the authority to warrant the quality and condition of flour sold by him.

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* Jury fees were repealed by Pub. Laws 1873, c. 123.

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

ASSUMPSIT to recover $417.16, loss on flour, sold by the plaintiffs on commission.

The defendants appeared at the return term, and, within the time prescribed by the rules, filed their plea of the general issue, and indorsed thereon the words, 'Defendants demand jury trial,' at the same time saying to the clerk that the defendants had no money, and should not pay the jury fee of seven dollars. The case was thereupon placed upon the list of cases to be tried by a jury. When the case was in order for trial, the clerk demanded the jury fee, which the defendants declined to pay, and demanded a trial by jury without the payment of the fee. The presiding justice ruled that the defendants were not entitled to a jury trial except upon the condition that they would first pay to the clerk the jury fee, and thereupon ordered the case to be transferred to the list of cases to be tried by the judge of the superior court without the intervention of a jury; and the defendants alleged exceptions.

Thereupon the case was tried by the judge without the intervention of a jury.

The judge made the following report of the case:

I find as facts,—

1. That the plaintiffs were commission merchants doing business at Portland, Me., and the defendants were flour manufacturers or millers, doing business at St. Louis, Missouri.

2. That on or about the 20th of April, 1871, defendants shipped to the plaintiffs five hundred barrels of flour, to be sold by them on commission; that two hundred barrels of the five hundred were of the brand called the Conqueror.

3. That on the 12th of May, 1871, plaintiffs made a sale of the two hundred barrels of the Conqueror to D. B. Ricker & Co., flour merchants at said Portland, for $7.75 per barrel, and warranted the same to be good sound flour, and the same day delivered a part of the flour to the said Ricker & Co.

4. That on the 15th day of May, plaintiffs rendered an account

of the said sale to defendants, in which they charged themselves with the sum of $1550 for the sale of the said flour, and charged their commissions to defendants, and drew on the defendants for a small balance to square the account, which draft defendants paid.

5. That on the 19th of May, 1871, a few days after they rendered the said account to defendants, Ricker & Co. notified plaintiffs that the flour was musty and unsound, and was not such flour as they bought, and requested plaintiffs to take it back.

6. That plaintiffs took back 180 barrels of the flour, and shipped it to Boston, where it was sold for unsound and musty flour, and paid Ricker & Co. the loss sustained by them on twenty barrels which they had sold to their customers in the country.

7. That at the time of said sale to Ricker & Co., said flour was musty and unsound; that there is no market for unsound flour in Portland, but there is a market for it in Boston.

8. That the amount actually realized by the plaintiffs on said sale to Ricker & Co. was $417.16 less than said $1550, and plaintiffs actually lost on account of said sale $417.16.

9. That Ricker & Co. notified the plaintiffs that the flour was unsound within ten days after said sale, and returned the flour to plaintiffs within that time.

10. That in the case of the flour and disposing of the same, the plaintiffs acted for the best interests of the defendants, and were guilty of no laches in the premises.

11. That at the time of the sale it was the custom of commission merchants in Portland to sell flour by samples.

Several witnesses, called by the plaintiff, testified against the seasonable objection of the defendants,—

That they had been commission merchants in Portland from twelve to thirty years; that it was the custom and usage among the flour merchants of Portland, if within ten days after the sale of flour it proves unsound, it is no sale, and the vendee has the right to rescind the sale.

If this testimony was admissible, then I find as a fact, that it is the custom and usage among the flour merchants of Portland, if

within ten days after sale flour proves musty and unsound, it is no sale, and the vendee has the right to rescind the sale and return the flour. And I rule as matter of law,—

1. That the flour proving unsound, and being returned within ten days after delivery, it was no sale by plaintiffs to D. B. Ricker & Co.

2. That plaintiffs being guilty of no laches in the premises, and the flour proving unsound, the defendants should bear the loss sustained in the sale of it.

The judge rendered judgment for the plaintiffs for $417.16 and interest from the date of the writ, and the defendants alleged exceptions.

L. B. Dennett, for the plaintiffs.

Geo. C. Hopkins, for the defendants, contended that

They were entitled to a jury trial without the payment in advance of the jury fee. Sec. 6, c. 151, Acts of 1868, if it makes such prepayment a condition without which a defendant cannot obtain a trial by jury is unconstitutional.

The constitution of Maine, Art. 1, § 20, gives the right absolutely and without condition to all parties in all controversies concerning property except in cases when it had heretofore been otherwise practiced.

In *Saco* v. *Wentworth*, 37 Maine, 173, the opinion of the court establishes the positions, that trial by jury is a right which the legislature cannot impair directly or indirectly, and that any act which renders it difficult to obtain, or requires conditions for the purpose of preventing such trial is opposed to the spirit of the constitution, and void because it indirectly impairs the right.

No public necessity is shown to exist calling for this provision in the act establishing the superior court, so it cannot be sustained upon that ground.

It certainly has the effect of preventing jury trials, and is a condition more directly tending to that end than the condition pronounced void in the case cited.

The cases, where it has been otherwise practiced, excepted in the constitution from the general grant of the right of jury trial are chancery suits, etc., where courts, when no jury was employed, had jurisdiction before the constitution was adopted. Such jurisdiction was not affected by the constitutional provision.

By uniform practice a defendant has always had the right of jury trial. It has never been otherwise practiced.

If it be said that plaintiffs have been required to pay the jury fee in advance, and the correctness of the practice never questioned, and as the constitution gives the right equally to both parties, it will therefore follow that the same prepayment may be required of a defendant, the answer is plain.

A *nisi prius* practice (for it lacks the authority of any reported case) is an insufficient basis for attaching a condition to a constitutional right. If it is, the principle ought to be carried no further than its actual application.

But there is no analogy between the position of a plaintiff and that of a defendant. The plaintiff complaining of a wrong and seeking a remedy asks the services of officers, court and jury, and assumes the burden of proving facts sufficient to make out his case before the constitutional tribunal. The defendant, however, assumes no burden and seeks no forum. His position is entirely negative.

A worthless plaintiff may sue a responsible defendant upon an unfounded claim. He can defend himself without counsel, but not without a jury. If this statute is constitutional he is forced to loan the plaintiff seven dollars for the purpose of maintaining a suit against himself. He is deprived of his property without his consent and without compensation. When the plaintiff sets out upon his lawsuit he knows the road he must travel and enters upon it of his own free will. The defendant, on the contrary, is an unwilling litigant. It cannot be said he wants the time of a jury without paying for it, for he wants no trial at all. But if a trial must be had, he demands it before the constitutional tribunal.

If a verdict shall decide that the defendant is the party in fault,

then an attachment of his property will compel him to pay this jury fee.

If he has no property, however, this statute would deprive him of trial by jury on account of his poverty.

Before the verdict, the presumption is that the defendant will never be liable to pay this expense, but this statute in effect shifts this presumption to the plaintiff. It puts the defendant in the position of the moving party and assuming that he is probably in the wrong, imposes a condition without which he cannot set himself right according to the law of the land.

But the defendant, if he chooses, has the constitutional right to call upon the plaintiff to prove before a jury the demand upon which he founds his action. *Frothingham* v. *Dutton*, 2 Greenl. 255.

It makes no difference that the case is tried by the court, for if the legislature can require this prepayment at all, it can make the penalty for not paying what it pleases, even find judgment against the defendant without proof or trial.

The case shows that plaintiff sold the flour and warranted it to be sound. This they had no authority to do in behalf of defendant. Usage is the measure of the authority of a factor or general selling agent to warrant. *Upton* v. *Suffolk Mills*, 11 Cush. 586.

No such usage is proved in the case, and the decision turned upon the admissibility of evidence of the custom.

The evidence of custom should have been excluded, for if the custom means anything, it means that upon the sale of flour there arises an implied warrant that the flour shall be sound.

It is settled in this State that no implied warranty of quality arises from the mere sale of goods. *Kingsbury* v. *Taylor*, 29 Maine, 508.

The custom being in direct opposition to this settled rule of law, the evidence tending to establish it should have been rejected. *Homer* v. *Dorr*, 10 Mass. 26; *Boardman* v. *Spooner*, 13 Allen, 359, 360; Hilliard on Sales, 2d ed., pp. 249, 250.

Custom is admissible to explain what is doubtful. *Leach* v. *Perkins*, 17 Maine, 462.

In the case at bar the custom was not to explain any ambiguity,

but to take the place of an express contract, and was inadmissible. *Atkins* v. *Howe*, 18 Pick. 16; *Ripley* v. *Crocker*, 47 Maine, 370.

Plaintiffs had no authority to send flour to Boston without knowledge of defendants. 1 Am. Leading Cases, 698, 699.

APPLETON, C. J. The act establishing the superior court for the county of Cumberland, c. 151, was approved 14th February, 1868. By § 6 it is provided, that 'if the plaintiff desires a jury trial, he shall indorse the same upon his writ at the time of entry. The defendant shall, within fourteen days after entry, file his pleading, and if the plaintiff has not demanded a jury, the defendant shall indorse on his plea his demand for a jury, if he desires one. Whenever a jury shall be so demanded by either party, the clerk shall enter the fact on the docket, and all other cases, except appeals, shall be tried by the justice without the intervention of a jury, subject to exceptions in matters of law, in term time, or if both parties desire, at chambers. The party demanding a jury shall pay a jury fee, and tax the same in his costs, which shall be the same as in the supreme judicial court, if he prevails; but in cases actually disposed of without a verdict, the jury fee, if any has been paid, shall be returned to the party paying it.'

By Art. 1, § 20 of the constitution of this State, it is provided that 'In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right, may be heard by himself and his counsel, or either at his election.'

It will be perceived that the right to a jury trial is given by the statute to either party at his option. Is the provision, by which the party desiring a jury trial is required to pay the customary jury fee, an infringement on the constitutional protection to the right of trial by jury?

The plaintiff, as a preliminary to a trial by jury, has always been held to pay the customary jury fee. If on the trial he succeeds, the amount paid is an item of cost, which the law imposes upon the defendant.

By the act under consideration, the defendant desiring a jury trial, must pay the fee. But the amount thus paid is a charge to be taxed in his bill of costs in case of his success. If unsuccessful, the defendant has only paid what, in such case, the law would compel him to pay.

The argument of inability to pay is alike applicable to the plaintiff as to the defendant. Because the defendant may be unable to pay the required amount, the loss of a jury trial would be no greater deprivation of a constitutional right to him, than to the plaintiff, if he were in the same category.

The prepayment of the jury fee is required of the party desiring a trial by jury. It is just as unconstitutional to require it of the plaintiff when he desires a trial by jury, as it is to require it of the defendant under the same circumstance, and no more so. But the prepayment of a jury fee by the plaintiff has never been deemed an infringement upon the right to a trial by jury. Nor can the prepayment by the defendant be so regarded, when it is made at his own option, and followed by the same consequences as when paid by the plaintiff.

In cases tried before justices of the peace, the defendant when unsuccessful and appealing is required to advance the jury fee. But this has never been held an infringement on his constitutional right to a trial by jury. But what matters it, whether the jury fee is paid by the defendant when he is an appellant or when he is not?

In *Beers* v. *Beers*, 4 Conn. 535, it was held that the act of the legislature enlarging the jurisdiction of justices was not repugnant to the constitution, as thereby impairing the right to trial by jury. 'An instrument,' observes Hosmer, C. J., 'remains inviolate, if it is not infringed; and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character. It could never be the intention of the constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made,

and no regulation, even of the right of trial by jury, could be had. It is sufficient and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new modes and even rendered more expensive, if the public interest demand such alteration.' So in *Jones* v. *Robbins*, 8 Gray, 329, it was held that a statute, which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the requirement of his giving bail for his appearance there, or in default of such bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury.

The defendant having desired a jury trial was entitled to it, upon complying with the condition invariably attached to such trials in civil cases,—the payment of the jury fee. With this he declined to comply. He stands in the same situation as a plaintiff would be in, who neglected or refused to comply with this requirement of law. Declining to make the required payment, the defendant must be held as waiving the right to a jury trial, when he refuses to do what is an essential and reasonable prerequisite to its enjoyment. All that remained to be done was a trial by the judge or the entry of a default. The defendant preferred a trial by the presiding justice, and the remaining inquiry relates to the ruling of the justice upon that trial.

When a cause is tried by the presiding justice, he is the final arbiter of the facts. His findings as to them are conclusive on the parties and his rulings as to the law, except so far as they are brought to the consideration of the court by exceptions or otherwise, are final.

The following facts were found by the justice before whom the cause was heard:

The defendants, flour manufacturers at St. Louis, on or about April 20, 1871, shipped to the plaintiffs, commission merchants at Portland, to be sold by them on commission, four hundred barrels of flour. Two hundred barrels were of the brand called the Con-

queror. On the 12th May following, the plaintiff sold the two hundred barrels of the brand Conqueror, to D. B. Ricker for $7.75 per barrel, and warranted the same to be good sound flour.

On the 15th May the plaintiffs rendered an account of said sale to the defendants, charging themselves with the proceeds of the flour sold, and charging their commissions to the defendants, and drew on them for the balance to square the account, which draft they paid.

On the 19th May, Ricker & Co. notified the defendants that the flour was musty, and was not such flour as they bought, and requested the plaintiffs to take back said flour, which they did, except twenty barrels which Ricker & Co. had sold, and paid them their loss on the flour sold. The plaintiffs, there being no market for musty and unsound flour in Portland, shipped it to Boston, where it was sold, at a loss of $417.16, which they seek to recover in this action.

It is in proof that the plaintiffs were notified of the unsoundness of the flour within ten days after the sale, and that the same was returned within that time, and the plaintiffs were guilty of no laches in the matter.

The plaintiffs offered testimony to show there was a custom among flour merchants of Portland, that if, after sale, flour proves musty and unsound, it is no sale, and the vendee has the right to rescind the sale and return the flour. The custom is not an unreasonable one. Evidence is admissible to prove a custom. Whether it is proved or not is for the determination of the presiding justice, when the cause is tried by him. He found there was such a custom. We cannot here try the correctness of his findings of fact.

The custom being established, the following rulings were made: 'That the flour proving unsound, and being returned within ten days after delivery, it was no sale by the plaintiffs to Ricker & Co., and that the plaintiffs being guilty of no laches in the premises, and the flour proving unsound, the defendants should bear the loss sustained in the sale of it.'

These are the only questions of law presented by the exceptions for our consideration. Now the sale in this case was conditional.

It was found that such was the custom. The flour was unsound. It was returned within the time fixed by custom. The time was a reasonable one, whether there was a custom on this subject or not. The authority to sell implies the right to give the vendee a reasonable time in which to ascertain the character of the article sold. The equities of the case are with the plaintiffs. The defendants are not entitled to the price of sound flour for the musty and unsound flour which they shipped the plaintiffs.

No question of law is raised as to the conduct of the plaintiffs in their disposition of the flour. That as matter of fact, it was judicious and for the best interests of the plaintiffs, is fully established by the findings of the judge.

It is said that the plaintiffs had no right to warrant the soundness of flour sold by them on commission. The exceptions present no ruling of law on this subject. It would seem, however, according to some authorities, that when there are no restrictions, a commission merchant would have that right. In Story on Agency, § 102, the law is thus laid down: 'An authority to sell a horse includes a power to warrant him; a power to sell goods includes a power to warrant them,' and in § 59 the law is thus stated: 'A servant employed to sell a horse is clothed, by implication (unless expressly forbidden), to make a warranty on the sale; so an agent or broker, having power to sell goods without any express restriction as to the mode, may sell by sample or with warranty.' An agent authorized to sell, is presumed to possess the power of warranting its quality and condition, unless the contrary appear; and this whether the agency be general or special. *Nelson* v. *Cowing*, 6 Hill, 336; *Andrews* v. *Kneeland*, 6 Cowp. 355. In *Upton* v. *Suffolk County Mills*, 11 Cush. 586, the warranty was that the flour should keep sweet during a sea-voyage, not that the flour was sweet at the time of sale. A warranty that an article when sold is sound, is materially different from a warranty that an article shall continue to remain sound for an indefinite period of time, and under conditions obviously endangering its soundness. But it is unnecessary to determine whether a commission merchant has a right to warrant or not, as it is not important to the decision of the case.

Upon the whole, we perceive no error of law on the part of the presiding judge, or that any injustice has been done. The defendants, if the flour was musty and unsound, were not entitled to the price of sound flour. If they have received more than the value of their flour, in consequence of the conditional sale made by the plaintiffs with a right to return, if the flour was found to be unsound, and the flour has been returned for that cause, and been sold again for its full value, though at a less price, the loss should be borne by the defendants, and not by the plaintiffs.

Exceptions overruled.

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

GEORGE F. STONE & others *vs.* EBEN N. PERRY.

Conditional sale—what is.

The plaintiffs, merchants in Boston, through a broker, on July 5th, sold for cash a lot of flour which they shipped to the vendees in Portland two days after, and on the 8th July forwarded a bill with 'terms cash' printed thereon. On the 10th July, one of the plaintiffs went to Portland, and ascertaining the vendees had failed, and that the flour had been attached, replevied it from the attaching officer. *Held*, that by the *lex loci*, the sale was upon the condition of payment in cash upon delivery; and that the action was maintainable without previous demand.

ON REPORT from the superior court for this county.

REPLEVIN for one hundred barrels of flour, which the defendant as sheriff of this county had attached as the property of Alonzo Butler, of Portland.

Writ dated July 11, 1871.

It appeared, on the part of the plaintiffs, that on July 5, 1871, a broker called at plaintiffs' place of business in Boston, and inquired the price per barrel of one hundred barrels of flour of a certain

brand; plaintiffs asked whom it was for, and the broker replied, Butler, of Portland; plaintiff said he did not know him, but would sell the flour at $8.75 for cash; that he went away, and soon returned and said he would take the flour; that the flour was shipped to A. Butler & Co., on Friday, July 7th; that on the next day plaintiffs forwarded to A. Butler & Co., a bill of the flour, with the words 'terms cash' printed on the margin thereof; that on the following Monday, one of the plaintiffs went to Portland, and ascertaining that A. Butler & Co. had failed, and that the flour had been attached by one of the previous debtors of Butler, replevied it from the officer.

It also appeared that under the custom and usage of trade in Boston, when flour is sold for cash, it means that the seller has the right to call for the pay at any time he pleases, but the custom is not to call until ten days; that there is no credit in the flour business unless the time is specified; that ten days is a courtesy and not a right, and is so defined in the rules of exchange.

On the part of the defense it appeared that the broker offered plaintiffs for Butler $8.75, and if he did not remit in ten days to draw at sight, and not on demand; and that plaintiffs said they would ship the first one hundred barrels they received.

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

J. H. Drummond, for the plaintiffs.

A. A. Strout, for the defendant, contended *inter alia* that the plaintiffs ratified the sale; that in *Blanchard* v. *Child*, 7 Gray, 155; *Deshon* v. *Bigelow*, 8 Gray, 159; *Tyler* v. *Freeman*, 3 Cush. 261; *Whitney* v. *Eaton*, 15 Gray, 225; and in *Farlow* v. *Ellis*, 15 Gray, 229, there were express conditions of sale. So in *Hirschorn* v. *Canney*, 98 Mass. 150.

Appleton, C. J. The plaintiffs, merchants in Boston, through the intervention of a broker, on July 5, 1871, sold to A. Butler & Co., one hundred barrels of flour, which they shipped on Friday,

the 7th July. The sale was for cash. The bill of goods, which was forwarded on 8th July, had on the margin the words, 'terms cash.' On Monday, one of the plaintiffs went to Portland, and, finding the firm of Butler & Co. had failed, and that the flour had been attached, commenced an action of replevin.

The sale to Butler & Co. was conditional. The condition has not been complied with. The attaching creditor can only acquire the right of his debtor. As between vendor and vendee, the vendor is to be deemed the owner. In *Deshon* v. *Bigelow*, 8 Gray, 159, the sale was for cash, and being conditional, it was held that the title did not pass to the vendee until payment, although the goods sold were delivered to the vendee. So when goods are sold on time, and delivered to the vendee, it being part of the contract that they are to be paid for by the negotiable note of the vendee, such payment is a condition precedent to the sale, and the title to the goods will not vest without such payment or a waiver of it. *Whitney* v. *Eaton*, 15 Gray, 225; *Farlow* v. *Ellis*, 15 Gray, 229; in *Hirschorn* v. *Canney*, 98 Mass. 149, a merchant in New York sold goods to a merchant in Boston, on condition that he should send his notes in payment therefor, and shipped the goods to Boston, mailing a bill of lading to the vendee, and requesting him to send his notes in payment, which was never done. It was held, that no title passed to the conditional vendee. 'The sale to the defendants,' observes Gray, J., in *Adams* v. *O'Connor*, 100 Mass. 515, 'having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers, until the terms of sale had been complied with.'

If goods are sold conditionally, and delivery made according to the custom of the trade, before the conditions are complied with, in expectation of compliance, the delivery is also conditional, and no title vests in the purchaser until performance of the condition; and if he steadily refuse compliance, the seller may recover the goods by action of replevin. *Bauendahl* v. *Horr*, 7 Blatchf. 548.

The contract was made in Massachusetts, and the law of that place must govern. By that law, the sale being upon the condition

of payment in cash upon delivery, no payment being made, the title of the vendor remains as between him and his vendee, or as between him and the attaching creditors of the vendee, in the former. The plaintiffs never parted with their title in Massachusetts, and their vendee has not acquired any.

There has been no waiver, nor is there any proof tending to show a waiver on the part of the plaintiffs, of any of their legal rights. On the contrary, they have been vigilant in their enforcement. The fact that the goods were actually forwarded to the purchaser before a compliance with the terms of sale is not necessarily a waiver of the conditions of sale. *Farlow* v. *Ellis*. Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms, at the time of delivery. It is sufficient, if the intent of the parties can be inferred from their acts or the circumstances of the case. *Hammett* v. *Linneman*, 48 N. Y. 399.

The defendant having wrongfully interfered with the property of the plaintiffs, is liable in tort for such interference without de mand.

Judgment for plaintiffs, and one cent damage.

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

JOSEPH GOODING, petitioner for review, *vs.* ABBY T. BAKER.

Referees—judgment on report of—when may be reviewed.

The supreme judicial court, held by one justice, may grant a review of a judgment rendered in the superior court, upon a report of referees in an action referred to them by rule of the latter court, although no other matters in dispute between the parties were included in the rule.

ON EXCEPTIONS.

PETITION for a review of a judgment rendered in the superior court, at the December term thereof, 1871, against the petitioner, on a report of referees in an action referred to them by rule of the superior court, no other matters in dispute between the parties being included in the rule.

The respondent contended that no existing statute authorized the review; but the presiding justice ruled otherwise, and granted the review, and the respondent alleged exceptions.

T. B. Reed, for the petitioner.

W. H. Vinton, for the respondent.

APPLETON, C. J. This is a petition for the review of a judgment rendered in the superior court for this county, upon a report of referees to whom the case was submitted by a rule of said court, no other matter between the parties being included in the rule of reference.

The question presented is whether a review in such case is authorized by statute.

By R. S., 1871, c. 89, § 1, 'the supreme judicial court held by one justice may grant one review in civil actions . . . when judgment has been rendered in any judicial tribunal, if petition therefor is presented within three years after the rendition,' and in certain special cases which are enumerated, the seventh of which is, 'when it appears that justice has not been done, through accident,

mistake, or misfortune; and that a further hearing would be just and equitable.'

The case presented is alike within the spirit and the letter of the statute. The great object in view is the furtherance of justice and the prevention of injustice. These objects are equally desirable, whether the judgment is rendered upon the report of referees or on the verdict of the jury.

The review is to be granted in civil actions, when a judgment has been rendered in any judicial tribunal. The action before reference was a civil suit. It was none the less so because it was referred by rule of court. It still remains a civil action. Judgment in a judicial tribunal has been rendered. It matters not whether the judgment is upon a verdict or an award, in either case it is the judgment of the court.

This view is fully confirmed by reference to the Statute of 1821, c. 57, and the subsequent revisions. By c. 57, § 1, the right of review was limited to cases where judgment was rendered on a verdict of a jury. By § 2, the right of review was given in all civil actions, whenever by reason of any accident, mistake or unforeseen cause judgment shall have been rendered on discontinuance, non-suit, *nil dicit*, *non sum informatus*, report of referees, or suits may have been discontinued without judgment, to the hinderance or subversion of justice.

These sections were condensed in the revision of 1840, c. 123, and instead of enumerating the special cases of judgments in which a review might be had, general language, embracing all the cases before specifically stated, was used, and the court were authorized to grant reviews 'in all actions, including petitions for partition, originally commenced in the late court of common pleas or district court, and on which judgment has been or shall be rendered in that court or in the supreme judicial court, whenever they shall judge it reasonable, and for the advancement of justice, without being limited to particular cases.'

In the revision of 1857, c. 89, § 1, and in that of 1871, c. 89, § 1, the same general language was used. In the last revision the

right of review was further enlarged. Indeed the tendency of legislation has been in the direction of increasing the powers of the court in granting reviews, in order to prevent the triumph of wrong.

But it is insisted that the right of review was limited by the act of 1860, c. 107, which is found in the last revision as the fourth special case, in which a review may be granted; that is, 'when a judgment has been rendered on the report of referees, in an action referred by rule of court, and other matters were included in the rule of reference.' But this section was to enlarge, not to restrict the power of the court. It was doubted, as such a case was a 'civil action' and something more, whether it would be included in the authority already given to grant reviews in all civil actions, in which judgment had been rendered in any judicial tribunal. It assumes that a review might be granted 'in an action referred by rule of court,' and extends the authority of the court to cases 'where other matters in dispute between the parties were included in the rule of reference.'

In a statute submission, where no civil action has been commenced, a different question arises, which it is not necessary at this time to consider.

The court had authority by statute to grant a review, and the exceptions must be overruled.

Exceptions overruled.

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

WILLIAM CURTIS & another, appellants, *vs.* CITY OF PORTLAND.

Damages for land taken for street—assessment of, when portion of street discontinued after appeal.

In 1870, the city council of Portland, under § 9* of their charter, laid out a street across the petitioners' land for which they awarded no damages, and from their adjudication as to damages this appeal was taken. After the appeal the city council discontinued a portion of the street. *Held*, That the petitioners may abandon their appeal with costs, or pursue it and have the damages assessed, for so much of the located street as is not discontinued.

ON REPORT.

APPEAL from the decision of the city council of the city of Portland in relation to damages for land taken for a street.

The facts sufficiently appear in the opinion, only one question being raised, to wit, how shall the damage be assessed.

W. L. Putnam, for the appellants.

Symonds & Libby, for the respondents.

*CITY CHARTER, SECT. 9. The city council shall have exclusive authority to lay out, widen, or otherwise alter or discontinue, any and all streets or public ways in the city of Portland, without petition therefor, and as far as extreme low-water mark, and to estimate all damages sustained by the owners of land taken for that purpose; but all locations below high-water mark shall be subject to the provisions of the laws relating to the commissioners of Portland harbor. A joint standing committee of the two boards shall be appointed, whose duty it shall be to lay out, alter, widen, or discontinue any street or way in said city, first giving notice of the time and place of their proceedings to all parties interested, by an advertisement in two daily papers printed in Portland, for one week at least previous to the time appointed. The committee shall first hear all parties interested, and then determine and adjudge whether the public convenience requires such street or way to be laid out, altered, or discontinued; and shall make a written return of their proceedings, signed by a majority of them, containing the bounds and descriptions of the street or way, if laid out or altered, and the names of the owners of the land taken, when known, and the damages allowed therefor; the return shall be filed in the city clerk's office at least seven days previous to its acceptance by the city council. The street or way shall not be altered or established until the report is accepted by the city council, and the report shall not be altered or amended before its acceptance.

DANFORTH, J. In 1870, the city of Portland laid out a street across the petitioners' land, for which no damages were allowed. From that adjudication as to damages this appeal was taken. After this appeal the city discontinued a portion of that street. Shall the appellants have their damages assessed in this process for the street as originally located, or for that part not discontinued?

This state of facts does not seem to have been contemplated by the legislature, in the act of 1863, c. 275, § 9, under which the respondents justify, and yet certain legal rights result to the parties therefrom.

There is here no question of the recovery of damages, but as to the basis upon which they shall be assessed. There is no judgment for damages in favor of the appellants, nor anything tantamount thereto. If there had been such an adjudication, the appeal would have suspended its effect until a final disposition of it. If there had been a final adjudication as to damages, and a subsequent discontinuance of a part of the road before the payment of the amount, it is very possible the land-owner might recover the full sum assessed, as no provision is made in the law for apportioning the damages between the different parts of the street. But upon this question we give no opinion. On what ground shall the damages be assessed under the facts developed in this case? The statute referred to gives the city of Portland exclusive authority to

A street or way shall not be discontinued by the city council, excepting upon the report of said committee. The committee shall estimate and report the damages sustained by the owners of the lands adjoining that portion of the street or way which is so discontinued, their report shall be filed with the city clerk seven days at least before its acceptance. Any person aggrieved by the decision or judgment of the city council in establishing, altering, or discontinuing streets, may, so far as relates to damages, appeal therefrom to the next court, having jurisdiction thereof, in the county of Cumberland, which court shall determine the same by a committee or reference under a rule of court, if the parties agree, or by a verdict of its jury, and shall render judgment and issue execution for the damages recovered, with costs to the party prevailing in the appeal. Such appeal shall be made to the term of the supreme judicial court, which shall first be holden in the county of Cumberland, more than thirty days from and after the day the street is finally established, altered, or discontinued, excluding the day of commencement of the session of said court.

'lay out, widen, or otherwise alter or discontinue any and all streets,' etc. Under this statute there can be no doubt that the city had full authority to discontinue any part of any street at any time after its location. We must, therefore, deem the discontinuance of a portion of the street in question, as legal, until quashed on *certiorari*. This discontinuance has no effect upon the remainder of the way. The result is, that a part of the original location upon the appellants' land is still a legal street, while the other part is not, and the city or the public have no rights therein. Further, the discontinuance was accomplished before the damages were paid or recovered, while the original adjudication, as to damages, remains the same. From this adjudication this appeal was taken, and, if prosecuted, the jury or committee will examine the road as they find it. They have no authority to estimate damages for a way which has no existence in law or fact, but only for that which does exist. Then the state of things has been somewhat changed since the appeal was taken. But this change is one which the respondents had a legal right to make, and to which the petitioners are legally bound to submit. Nor does it work injustice to them. They may, under the law, if they choose to submit to the original adjudication as to damages, withdraw their appeal with costs, or they may pursue it and recover such damages as they are entitled to for the street as now located; and if they are aggrieved at the damages allowed for the discontinuance, they may appeal from that and recover for all injuries, including that arising from the original location. These two processes are sufficient to secure the payment for all damages sustained. But if the claim of the appellants is allowed, to some extent double damages will be recovered, once under each appeal.

The result is, the appellants may, if they choose, abandon their appeal with costs, or pursue it and have the damages assessed for the location of the street as it now is.

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

STATE OF MAINE *vs.* EBEN LEACH.

'Misconduct in office'—what is. Evidence. Indictment—necessary allegations in.

'Misconduct in his office,' as used in R. S. of 1857, c. 7, § 15* is not limited to such acts as the law requires or expressly authorizes a register of deeds to perform

Thus, where a register of deeds, over his official signature, knowingly, purposely, and designedly, but neither corruptly nor with intent to defraud, made and delivered to another a certificate that he had examined the title of an individual therein named to a particular lot of land, and found no incumbrance on the same whatever,—when the register then well knew that the registry contained the record of an incumbrance by an attachment, and that the certificate was false,—he was *held* to be guilty of 'misconduct in his office,' although it was no part of his official duty to make such examination, or issue such certificate.

In such case, the fact that the certificate filed by the officer in the registry of deeds, and the record thereof, mention the middle initial letter of the attaching creditor as 'W.' instead of 'M.,' as in the writ will not exonerate the register.

In the trial of an indictment charging the 'misconduct in his office' of a register of deeds, by knowingly issuing a false certificate of a certain person's title to a particular lot of land, evidence comprising substantially the history of the certificate, and of the uses made of it in obtaining a loan by the person to whom it was issued, is admissible on the part of the prosecution under a count charging the offense done with an intent to defraud.

So is the writ on which the alleged attachment was made, together with a certified copy of the judgment thereon, the execution, levy, and of the record of the levy.

So is the record of the attachment, although the middle initial letter of the attaching creditor therein is 'W,' instead of 'M.,' as in the writ.

An indictment charging a register of deeds with 'misconduct in his office,' by knowingly issuing a certificate, that he had examined a certain person's title to a particular lot of land, and that he found no incumbrance thereon, when, in fact, he knew there was an incumbrance by attachment, need not particularly set out the writ of attachment and the other succeeding matters of record.

An allegation in such indictment that when said certificate was made and delivered as aforesaid, there was a valid and existing attachment for an amount specified, on said real estate named in said certificate, by virtue of a writ against the owner named in the certificate, 'all of which then and there appeared by the records of said registry of deeds,' sufficiently sets out the fact that the attachment had been recorded in said registry.

*See opinion.

State *v.* Leach.

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

INDICTMENT founded upon R. S. of 1857, c. 7, § 18 (R. S., c. 7, § 12), consisting of five counts, respectively alleging substantially,

1. That the respondent, on April 2, 1868, at Portland, was and still is register of deeds for the county of Cumberland, duly elected and sworn, and had given his official bond approved by the county commissioners, with sufficient sureties in the penal sum of two thousand dollars, conditioned for the faithful discharge of his duties as such register; that the respondent then and there, knowingly, purposely, designedly, and unlawfully did make, issue, and deliver to some person unknown, his official certificate as such register, in the words and figures following, viz.:

'Portland, April 22, 1868. This may certify, that I have examined the title of James W. Leavitt to lot situated on State street, Portland, and that I find no incumbrance on the same whatever.

Attest: EBEN LEACH, *Register.*'

That said certificate when thus made, issued, and delivered was false and untrue, and that said real estate, named in said certificate, was not free of all incumbrance, as therein stated, but that then and there, when the same was so made, issued, and delivered, there was a valid attachment thereon for the sum of fifteen thousand dollars, by virtue of a writ against said Leavitt, all of which Leach then and there well knew; that Leach, then and there, knowingly, purposely, designedly, and unlawfully made, issued, and delivered said certificate, in his official capacity as register of deeds, for said county, well knowing the same to be false and untrue; and that said Leach was then and there guilty of misconduct in his office of register of deeds for said county, and incapable of discharging its duties, against the peace, etc.

2. That the respondent, on April 22, 1868, at Portland, was and still is register of deeds for said county, and was then and there guilty of misconduct in his said office of register of deeds in this, that on said day and year, the said Leach, at said Portland, in his official capacity aforesaid, knowingly, designedly, unlawfully,

and with intent to defraud, made, issued, and delivered to some person unknown, a certain certificate in the words and figures following, to wit: [same as in first count].

That said certificate was then and there false and untrue, and the said real estate was then and there under a valid attachment on a writ against the said Leavitt for fifteen thousand dollars, and Leach then and there when he made, issued, and delivered said certificate, well knew it was false and untrue, and that said attachment existed on said real estate, against the peace, etc.

The third and fourth counts were similar to the second, without the allegation of the 'intent to defraud.'

The fifth count was like the first, with the exception that immediately following the certificate succeeded the allegations:

That said certificate, at said Portland, on the day and year last aforesaid, so made and delivered by said Leach as aforesaid, was false and untrue, and that the said Leach then and there knew the same was false and untrue in this, that when said certificate was so made and delivered, there was a valid and existing attachment for fifteen thousand dollars on said real estate, named in said certificate, by virtue of a writ against said Leavitt demanding that sum as damages, all of which then and there appeared by the records of said registry of deeds, etc.

It appeared in evidence on the part of the government, *inter alia*, that the respondent was duly elected and qualified as register of deeds in and for the county of Cumberland, and entered upon the discharge of his official duties on Jan. 1, 1868; that Leach detailed the circumstances of the giving of the certificate substantially as follows: that a few days before making it, while he was busy in the office of register, some person called and requested the respondent to look up the title to a piece of real estate on State street; that before he completed the search, the applicant called two or three times; that when he completed the search, respondent told the applicant that he had gone over the records and found no mortgage or conveyance, but had found an attachment, *Churchill* v. *Leavitt*, and pointed it out to the applicant, who replied that he knew all

about the attachment, which amounted to nothing; that the applicant said that the respondent might make out a memorandum of the result of his investigation; that the respondent asked the applicant if respondent should mention the attachment in the memorandum, and the applicant replied no, it was of no account, that the applicant only wanted it for his own private use, and upon the whole, that the respondent might make applicant a certificate without mentioning the attachment; that respondent replied he could not make the certificate without mentioning the attachment, whereupon the applicant said he did not want that put in, as it did not amount to anything; and that respondent was induced to give the certificate, because it was for the applicant's private use.

It also appeared that the respondent testified in the criminal prosecution of *State* v. *William Chase*, that at the time the respondent delivered the certificate, it was false, and that he knew it.

One Jerris, called by the government, was permitted to testify against the seasonable objection of the respondent: That in 1868, he was agent for selling real estate; that the certificate in question was presented to witness by one William Chase, who wanted to raise money on a mortgage, when witness told Chase that a certificate from the register of deeds would be required that there was no incumbrance on the property; that in consequence of the information contained in the certificate, witness loaned Chase $7,000 and took a mortgage on the property referred to in the certificate; that Chase was negotiating for James W. Leavitt, and witness for one Converse, who required a certificate from the register; that witness had no information that an attachment existed on that property when he negotiated the loan; and that the property was worth $10,000.

The government introduced against seasonable objection of the respondent,

A writ *James M. Churchill* v. *James W. Leavitt*, dated Jan. 25, 1868. On the writ was the officer's return of same date, of general attachment of Leavitt's real estate in the county of Cumberland; and a return of completion of service by summons.

There was also a return duly signed by the attaching officer, reciting in the usual form that he had filed an attested copy of his return of the attachment, etc., in the registry of deeds, Jan. 27, 1868.

The paper actually filed by the officer in the registry of deeds, was as follows:

'CUMBERLAND, ss. January 25, A. D. 1868.

At three o'clock and five minutes in the afternoon, by virtue of the within writ, I attached all the right, title, interest, estate, claim, and demand of every name and nature, of the within-named defendant in and to all and any real estate in said county of Cumberland. GEO. W. PARKER, *Sheriff.*

'The foregoing is a true copy of my return on a writ in favor of James *W.* Churchill, of Portland, in the county of Cumberland, against James W. Leavitt, now commorant at Paris, in the county of Oxford and State of Maine.

'Writ dated January 25, A. D. 1868, and returnable to the supreme judicial court, to be holden at Portland, in and for the county of Cumberland, on the second Tuesday of April, A. D. 1868.

'Said writ is in a plea of the case.

'The value of defendant's property which I am thereby commanded to attach, in fifteen thousand dollars.

Attested: GEO. W. PARKER, *Sheriff.*'

The foregoing paper bore the following filing upon its back:

'Attachment of real estate.

James M. Churchill v. *James W. Leavitt.*

Cumberland, ss. Registry of Deeds.

Received Jan. 27, 1868, and entered in vol. 9.

Attest: (Signed) EBEN LEACH, *Register.*'

The government also introduced, against the seasonable objection of the respondent, a copy of the judgment recovered on the foregoing writ, in Aug. 13, 1869; of the execution issued on the judgment, Aug. 26, 1869; of a return of a levy of the execution upon

the land mentioned in the certificate, dated Sept. 8, 1869; and of the record of said levy entered in the registry of deeds, Sept. 17, 1869.

The record of an attachment upon the book of the registry of deeds, upon a writ in favor of *James W. Churchill* v. *James W. Leavitt*, was offered by the government, and admitted against the respondent's objection.

The respondent made requests for instructions as follows:

1. That what the statute calls 'misconduct in office,' relates to some act which it is the person's official duty to perform. And as it is no part of the official duty of the register of deeds to examine the records and give certificates of title, the certificate given by the defendant in this case, even if given corruptly and fraudulently, did not constitute 'misconduct in office.'

2. That no act or omission of the register of deeds constitutes the offense of misconduct in office unless it is done corruptly, or with intent to defraud. And unless such intent is proved beyond a reasonable doubt, in this case the defendant is entitled to acquittal.

3. That if the defendant, when he gave the certificate in this case, knew it was untrue in that it stated there was no incumbrance on the record, at the same time supposed from the statement made to him by the person who obtained the certificate that the attachment recorded had in some way been discharged, and he made the certificate without any actual intent to defraud, and without any actual intent to aid said person to defraud, or knowledge that the certificate was to be used for any such purpose, then he is entitled to an acquittal.

4. That it is not enough for the government to show a valid attachment existing at the date of the certificate alleged to have been given by the respondent; but it must also show that the return required by law had been made to the registry of deeds, or that a record of such a return had been entered upon the proper book in the office.

5. That the return of the officer to the registry, put in evidence

in this case, does not conform to the requirements of the law, and is not sufficient to perfect the attachment in respect to the record of it in the registry of deeds.

6. That the record of the attachment put into the case is not a legal record of the attachment upon the writ put into the case.

7. Evidence of notice to Leach after the delivery of the certificate, of the existence of the mortgage or of the attachment, is not legal proof of an intent to defraud at the date of that delivery.

8. Evidence of notice to the respondent, after the delivery of the certificate, of the existence of the mortgage or of the attachment, is not legal proof of an intent to defraud at the date of that delivery, and is not to be considered by the jury in determining whether the respondent then had a fraudulent intent.

The presiding judge gave the seventh requested instruction, and refused to give the others, and charged the jury, *inter alia*, as follows:

'Respondent's counsel have desired certain instructions which I decline to give, except so far as they may be contained in what I am about to say:

'1. If you find that the respondent made, signed, and delivered to any person the certificate in question, at his office, at the time of its date, knowing it to be false at the time in a material particular, the act may amount to misconduct in office; it is evidence which would authorize a verdict against the respondent on all the counts but the second.

'2. That a valid and existing attachment for $15,000, on the property named in the certificate, is a material particular.

'3. That if you find the papers and records introduced genuine (and I do not understand that there is any question on this point), I am of opinion that Mr. Leach was justified in testifying in *State* v. *Chase*, that the certificate was, in that particular, false.

'You will, therefore, judge whether or not upon the admitted facts and records in this case, the respondent is not liable to conviction on all of the counts in the indictment, except the second.

'I will, however, observe, because one of the requests of the re-

spondent raises that point, that if Leach really supposed from the statement made to him by the person who obtained the certificate, that the attachment recorded on his records had in some way been discharged at the time he made and delivered the certificate, then he should be acquitted.

'I am not aware that there is any evidence, however, to that effect, nor did I observe that any such statement is contained in the account of the transaction given by Leach under oath, or to Jerris.

'Mr. Small's statement of it is, the person said, "he did not care anything about that, or it was of no account." And afterwards, when Leach objected to giving him a certificate for that very reason, "he said he did not want to use it, he wanted it for his own satisfaction, as a matter of reference." You will judge whether Leach's refusal at first to give a certificate, and this reply of the person do or not prove the contrary of what is assumed by this request.

'I might stop here if the government had not in the second count alleged a positive intent to defraud.

'Upon this point I instruct you that to convict the respondent on this count, you must be satisfied beyond a doubt that such was his intent. Now, what are the uncontroverted facts on this point?

'If you find that Leach knew of the falsity of his certificate when he issued it, was his intent fraudulent?

'You will notice that on the very next day, April 23, 1868, Mr. Jerris having, as he says, advanced to Leavitt $7,000 of the money of Mr. Converse, of New Hampshire, whose agent he was, took a mortgage from Leavitt, of his lot and house on State street, and that Leach recorded that mortgage that next day in his office.

'Was this or not notice, and early notice to Leach, that the certificate had been used for the very purpose that he says he did not mean to have it used?

'Again, some months after, Mr. Jerris says he personally called Leavitt's attention to the fact of the incumbrance, etc.

'Finally, Sept. 15, 1869, Leach was called on to record the actual levy by virtue of that very incumbrance. Was or not notice here directly conveyed to Leach of the incumbrance, the mortgage of

the property for $7,000, immediately after his certificate, and finally, the levy upon the whole of that property by the attaching creditor.

'Does it appear that any suitable explanation has been made or attempted. None at all appears until Chase's trial in January, 1870, four months after the levy.'

The respondent did not testify.

The verdict was, not guilty on the second count, and guilty on all the others.

Thereupon the respondent alleged exceptions.

The respondent also moved in arrest of judgment upon the alleged ground that no offense known to the law was set forth in the first, third, fourth and fifth counts in the indictment.

The presiding judge overruled the motion, and the respondent alleged exceptions.

Davis & Drummond, for the respondent.

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

KENT, J. The indictment in this case is founded upon R. S., 1857, c. 7, § 15, and is against the respondent as register of deeds for Cumberland county, and was tried in the superior court and comes here on exceptions. That section provides that 'when on presentment of the grand jury, or information of the attorney-general to the supreme judicial court, any register of deeds, by default, confession, demurrer, or verdict, after due notice, is found guilty of misconduct in office, or incapable of discharging its duties, the court shall enter judgment for his removal from office.' Provision is then made for the issuing of a writ to the sheriff to take possession of the books and papers belonging to the office, and for the delivery by him of the same to the clerk of the courts.

This provision, giving power to the court to remove a civil officer is, so far as we are advised, the only one of that nature to be found in our statute book. The constitution (Art. 9, § 5), gives the power of removal to the governor with advice of council, of

every person holding any office, on the address of both branches of the legislature. And it also, in the same section, provides that 'every person holding any civil office, under this State, may be removed by impeachment for misdemeanor in office.' In the single case of register of deeds, a like power is given to the court, when, under an indictment or information against that officer, he is found guilty of 'misconduct in office.'

It is to be observed, in the first place, that this section is not one providing for the punishment of the individual offender by fine or imprisonment for an offense against its provisions. It is not in that sense a strictly penal statute. It is rather in the nature of an inquest of office, and the consequences of a conviction under it reach only to the possession of the office and its emoluments. It seems much like the substitution of the court, for the legislature when acting by impeachment or address, as provided in the section of the constitution before alluded to. These distinctions may be of some importance in giving a construction to the statute, and in determining the limits to be given to the language used.

The principal question in this case is, what did the legislature mean by the words 'misconduct in office?'

The charge is, that the respondent, being register of deeds, on application to him, made and signed in his official capacity a certificate that he had examined the title of an individual named to a lot of land in Portland, within his county, and found no incumbrance on the same whatever; whereas, in fact, there was an incumbrance by an attachment to the amount of fifteen thousand dollars, which, as by law required, was entered in the registry and appeared on the records of the same; and the respondent well knew the fact when he gave the certificate, and well knew, at the time, that his certificate was false, and he knowingly, purposely, designedly, and unlawfully made and issued the certificate. In one count of the indictment he is charged with an 'intent to defraud.' But this intent is negatived by the jury. But with this intent eliminated, we have enough left to say, without hesitation, that the facts charged and in substance admitted, show 'misconduct' in whatever light

they are viewed. They show an act done, by one who may well be presumed to know the facts, having the custody and charge of the records, which was a false statement of the state of the title to a particular parcel of real estate, and well known by him to be false, and issued or delivered to another person, known or unknown, without qualification or restriction, which statement was not general, but particular in this, that it certified to an examination of the records touching this specific parcel of land. Although there might be no actual corruption shown by way of bribe or pecuniary inducements, yet the making, issuing, and certifying such false statement, knowing it to be such and knowing that it was calculated to deceive and mislead honest men, who might rely upon it unhesitatingly in their transactions, was an unjustifiable act, whether done by a man in office or by one out of office, and is mildly characterized by the word 'misconduct' if we prefix no adjective denoting the moral quality of the act.

But the respondent places his defense primarily and chiefly upon the distinction he makes between the misconduct of the act viewed as the act of a private individual, and misconduct in office. His counsel stated the point clearly in his first requested instruction, as follows: 'That what the statute calls "misconduct in office" relates to some act which it is the person's official duty to perform. And as it is no part of the official duty of the register of deeds, to examine the records and give certificates of title, the certificate given by the defendant in this case, even if given corruptly and fraudulently, did not constitute misconduct in office.' This request was refused, and the following instruction was given;

'I instruct you, that if you find that respondent made, signed, and delivered to any person the certificate in question, at his office, at the time of its date, knowing it to be false at the time in a material particular, the act may amount to misconduct in office; it is evidence which would authorize a verdict against the respondent on all the counts, but the second.' The second count alone charged that the certificate was given with intent to defraud. On this count the jury found the accused not guilty. On all the other counts they found him guilty.

Was this ruling erroneous? It was so clearly if the proposition contained in the request is the true construction of the statute. It is quite clear that the certificate in question is not one that the register was bound by law to give, and that it was not one which could be used as legal evidence of the fact in court. If therefore, the proof of misconduct in office, under this indictment, is to be strictly limited to evidence which relates to some act which it is the person's official duty to perform, the ruling was wrong.

We do not incline to the opinion that this statute intended to confer upon the court the unlimited power to remove an individual from office, upon proof of facts showing immoral or felonious conduct, entirely disconnected from his office, and not being, or purporting to be, in any sense an official act, or assuming to be such.

This apparently unlimited power to remove for private, as well as public or official acts done in or by color of office, is given to the governor and council on address by both branches of the legislature. But this does not cover the case before us. The act here complained of is one that purports to be an official act, and has relation to the records of which he is the legal custodian. It is a certificate of a fact, of what does or does not appear on those records, which it is his duty to record, and to certify, and to give attested copies of, which may be used as evidence. It is true that any private person may examine the records of deeds, and give a certificate as to the result of his search. If such private person should give to his employers a certificate which was entirely false, and known by him to be so, he could not be indicted under this statute. But he might be liable to indictment at common law, if any one was defrauded thereby, and be also liable to an action for damages. But the certificate in question derived its chief importance from the official signature as 'Register.'

It was calculated to mislead and deceive even the most cautious, and chiefly because it came with the color of office on its face.

On a careful examination of the statute in question, and of its objects and the wrongs and misdoings which the legislature had in view, we cannot come to the conclusion that it was the intention to

limit the misconduct in office, however flagrant, to acts which it can be shown were strictly such as the law required or directly authorized the officer to perform, and which had legal efficacy by reason of the official certificate. We think the legislature did not intend this to be a strictly penal statute, for the punishment by fine or imprisonment of the individual offender, but intended by this mode to reach every register of deeds who should use his office or his official name in a false or fraudulent manner, or give currency or credit to any official certificate or other paper, which might be used for the purpose of fraud or imposition to the damage of honest men. If a register should write out what purported to be a copy of a deed of a lot of land, none such being before in existence, and should certify thereon, falsely, that that deed was on the records of the county, naming the book and page, no one would question that such an act was 'misconduct in office.' But if he should certify under his official signature, that there was no deed on record from A. to B. of a particular lot, when there was one there, and he knew that it was there, it might be said that this would not be a certificate which he was bound to give and that it had no legal efficacy, yet who can doubt that such an act would be gross misconduct in office. The same may be said of records of attachment.

When an officer, acting in his official capacity, and under his official signature does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts knowingly, designedly, falsely, and the act is one calculated to mislead, and one that in its nature may be used for purposes of fraud or imposition, it is misconduct in office, within the intent of this statute. And this although no actual corruption by bribery or otherwise is proved. The mischief is the same, if the wrong was the result of unpardonable weakness in listening and yielding to the solicitations or representations of a fraudulent schemer, as when it is the result of a direct bribe. The law did not intend to allow a man to remain as the custodian of the records of all the titles to land in the county, and to give official certifi-

cates and copies of a most vital character, who is shown to have been guilty of giving knowingly a false certificate, touching what those records contained or did not contain. And this would seem to be an almost necessary rule to protect the public, when we find that such remarkable proceedings on his part as are developed in this case, made so slight an impression upon him, and were considered of so trivial a character, that he cannot remember who the individual was who procured the certificate, although he had had several conversations with him and had been persuaded by him to give the certificate against his convictions and knowledge.

It is well known that in our country, generally, intermediate title deeds do not pass with the title, from grantor to grantee as in England, when the land-owner has possession of all the original deeds, often from a remote antiquity. Hence our rule, which allows a party to prove the successive links of his title, by copies of deeds, certified by the register of the county, in whose registry they are recorded. This would soon become a dangerous and impracticable rule, if the most unbounded confidence is not reposed in the integrity and correctness, and even scrupulous care of the register. Proof of one intentionally false certificate, by which an imperfect title was supplemented, would lead to such mistrust, that the whole rule would be abrogated, which is now so useful and satisfactory.

The law will not allow a person who, assuming to be and acting as an officer, exacts illegal fees or does other illegal acts as such officer, to defend on the ground that he was not in fact such officer, duly qualified. The law says to him, 'you assumed to act as an officer and you led another party to regard you as such and to pay you money in that capacity, and you shall not now be allowed to deny your official character.' May not the law with equal propriety say to an officer: 'You undertook to do an act and give a certificate in your official character, touching matters belonging to your office, calculated to mislead honest men, and you shall not shelter yourself from a charge of misconduct in your office by setting up the plea that it was not an act which the law required you to do.'

There is a manifest distinction between a case of misconduct, resulting in loss of office only, and the charge of a legal crime, which requires proof of criminal intent before conviction, and punishment of the person by fine or imprisonment after conviction. In the latter there must be a direct charge in the indictment of the criminal intent and criminal act. 'Misconduct' does not necessarily imply corruption or criminal intention. We think the legislature used the word in its more extended and liberal sense. This statute is not, strictly speaking, a penal statute, but rather remedial and protective.

Our conclusion on this part of the case is that the first instruction given, as before stated, was correct, and the requested instructions on this point were properly withheld.

The defendant raises in argument several other points, more technical in their character, but which are properly presented and must be considered.

He objects to the admission of evidence, which may be briefly defined as the history of the certificate, and of the uses made of it, in obtaining a loan by the holder. We think this evidence was admissible on the trial of this indictment, and particularly under the second count, which charges an intent to defraud. The jury, it is true, negatived this charge, but the evidence was admitted to prove the truth of all the charges. It was competent for the government to show, under a charge of an intent to defraud, the fact that the instrument was used in fact for that purpose, and from that fact to argue that the purpose was known to the defendant, and that he must have corruptly intended to aid in the fraud. In all cases where the intent of an act becomes material, or where fraudulent or corrupt purposes are charged, great liberality is always exercised in admitting testimony bearing on the whole history of the transaction, and of the uses made of the alleged instrument by which the fraud may be consummated. Whilst the charge in the second count was in issue, it was competent for the government to prove a fraud committed, to strengthen, at least, the proof of the charge of a corrupt intent to defraud on the part of the respondent when he gave the certificate.

These remarks apply also to the objection to the introduction of the judgment and the levy. They are a part of the history, showing that the lien by attachment had been perfected by a levy, and thus the fraud had been successful, and are admissible on the same general principle. The judge instructed the jury that if they found the papers and records introduced genuine, the respondent was justified in saying, what Mr. Small testifies that he has stated under oath, that the certificate was, in that particular, 'false.' The respondent objects to this, and says that the documents, if genuine, were not sufficient to justify the charge. The first objection is that the return by the officer of the attachment does not correspond with the writ introduced, in this, that the name of the plaintiff in the writ was James *M.* Churchill, and in the return to the registry, James *W.* Churchill. This appears to be the fact. But the filing on the back of the return to the register is, 'Attachment of real estate, *James M. Churchill* v. *James W. Leavitt*,' made by the sheriff.

In determining whether this variation in the middle initial letter is so fatal as to exonerate legally the respondent, we must look at the nature of the charge, and of the offense. The charge is misconduct in giving a false certificate knowingly. The certificate given was general that there was no incumbrance, and not simply that there was no attachment on this particular writ. Now if he had, as he says he had, examined the records, he must have found, as he admits he did find, an attachment of the real estate of James W. Leavitt to a large amount. There was no mistake in the name of the debtor or defendant in that suit. If there had been, it would have presented a much graver question. The certificate was equally false, whether the attachment was by James *M.* or by James *W.* Churchill. There was a return of an attachment of the real estate of James W. Leavitt. There is no pretence that the respondent knew of any mistake. The filing, if he was curiously exact in his examination, gave the true name of the plaintiff. At all events, he knew that there did appear to be an attachment by some person, and it is not for him, under this charge of misconduc t

only, to say that his certificate was not false, because there was a difference in the middle initial letter of the plaintiff's name. We do not intend to say that such a return as this, taking it as it stands on its inside and outside, did not perfect and keep alive the attachment against subsequent purchasers. The great object of the return to the registry is to give notice of the fact of an attachment of the debtor's property, to all examiners of the record, and to put parties in possession of such information as may enable them to ascertain the nature and extent of the claim sued. The name of the plaintiff is of comparatively small consequence in this regard. And the officer does certify in his return upon the writ, that he did file in the registry of deeds, 'a true and attested copy of his return, together with the names of the parties.' It has not been decided that this return is not conclusive, in a controversy concerning the title, in analogy to the rule in cases of returns of levies on executions. But, as before said, the question here is not as to the effect of such partial misnomer in a suit involving the title, but as bearing upon the question of misconduct on the part of the register.

If a register, knowing that a return of an attachment was in the books of his office, should certify officially that he had examined and found no incumbrance, he could hardly clear himself from the charge of misconduct by proving that the writ on which the attachment was made contained only a money count, without any specification. This, under our decisions might be fatal, on trial, to the attachment as against subsequent purchasers. But if the fact was made known to a lender he would be likely to refuse the loan on this security, whilst such a cloud hung over the title.

We can see no force in the objection as to the certificate and attestation, and it does not seem to be relied upon in argument.

It is unnecessary to discuss the rulings of the court touching the question of a fraudulent or corrupt intent, as the verdict negatives such intent. The court also instructed the jury in substance, that if the respondent really believed, at the time he gave the certificate, that the attachment had, in some way, been discharged, he

should be acquitted. This was a favorable view for the accused. We do not think that the judge was bound to give the fourth and fifth requested instructions in the form and extent required, but did not err in giving the ruling on this point, which he did give, for the reasons before stated.

Finally; the respondent moves in arrest of judgment, because, he says, that no offense known to the law is set forth in the first, third, fourth, and fifth counts of the indictment or any of them. He specifies his objections in the argument.

1. That the writ and attachment and all matters of record should be particularly set out in the indictment. If such precision and exemplification of records is required in some cases of felony or other crimes, where they become the foundation of the charge, we do not think that, in a case like this, such minute and extended copies of documents are required. The charge here is misconduct in office, by making a false certificate of the real state of the title. These papers, the writ, attachment, and return are matters of evidence to establish certain facts, which tend more or less to prove the charge in the indictment. As well might it be required to spread out in the indictment the mortgage deed given to the person who loaned the money, before evidence could be given of a corrupt intent. It is never necessary to set out what is mere matter of evidence. It is necessary in a charge of forgery or fraud, where the crime rests, as one may say, in the instrument itself. In this case the certificate is set forth *verbatim* in each count; and it is declared in substance that it was untrue and known to be so by respondent, and knowingly, designedly, and unlawfully made and delivered to another person. This is a sufficient setting out.

2. The counts then set out that it was false, in this, that these then and there, when it was so made, issued and delivered a valid attachment thereon for the sum of fifteen thousand dollars, by virtue of a writ against said James W. Leavitt, all which defendant well knew.

The objection here is that there might be a valid attachment, and the register of deeds might have known it, not recorded in his

registry; and that, as his certificate refers only to his examination of the records, and that he there finds no incumbrance, there might be an attachment nevertheless, which would be good against all persons for five days without record, and good as a lien against the defendant's property until thirty days after final judgment. It is claimed that it should appear distinctly in the indictment, that the attachment had been recorded in the registry, otherwise the certificate might be true in its terms. But it is unnecessary to discuss this point, because the fifth count does contain the distinct allegation that there was a valid and existing attachment on a writ described, 'all of which then and there appeared by the records of said registry of deeds.' If it did so appear it must have been duly filed and entered, otherwise it would be no part of the records, and could not be said to appear by the records.

It is not a pleasant duty, but nevertheless it seems to us a duty imperative upon us to say, on the whole case,

Exceptions overruled.

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

The following dissenting opinion was drawn by

TAPLEY, J. I do not concur in the opinion sustained by the majority. It seems to me that 'misconduct in office' means official misconduct. That for all misconduct of the individual which is not official, he must be held, as others are, amenable to the laws provided for the punishment of such offenses as he is found guilty of.

Such a certificate as was given in this case the defendant was not required by law to give. It had no legal significance as such, or legal force beyond that given by any individual. The appending to the certificate words showing he was register of deeds at the time, did not change the fact that it was the certificate of one not required by law to give such, and did not make it an official act.

Another view of the case, to my mind important and not controverted or denied in the opinion, has been presented in defense,

and that is, that there was in fact no valid attachment or incumbrance existing upon the premises.

I think it cannot well be said the legislature designed to punish, by removal from office, a person who shall state truly an existing fact. It seems to me such an act is not 'misconduct in office,' whether this phrase be limited to official misconduct, or be extended beyond it.

GEORGE M. MELCHER *vs.* OCEAN INSURANCE COMPANY.

Chartered freight—where ship-owner's interest begins.

The plaintiff chartered his vessel to sail from New York to San Francisco, thence with convenient dispatch to Callao, thence to the Chincha Islands, and there to take on a cargo of guano for Hamburgh or Rotterdam. The defendants, thereupon, caused the plaintiff to be 'insured, lost or not lost,' several sums respectively, on charter, primage, and property on board, 'at and from New York to San Francisco.' The vessel sailed in accordance with the charter and was wrecked between New York and San Francisco, and condemned and sold. In an action upon the policy, *Held*, That the plaintiff's interest in the guano charter, commenced when his vessel left New York for San Francisco, and that the defendants were liable; and the fact that the plaintiff had, also, with the knowledge of the defendants, chartered his vessel to others from New York to San Francisco, and effected an insurance thereon with another company, constitutes no defense, in the absence of any evidence that the defendants were injuriously affected thereby.

ON REPORT.

ASSUMPSIT upon a policy of insurance dated March 23, 1864.

The ship 'C. S. Pennell,' being at New York, obtained a charter from New York to San Francisco, and effected an insurance thereon in the Washington Insurance Company.

Subsequently on Jan. 30, 1864, she obtained another charter from the Chincha Islands to Hamburg or Rotterdam.

The case has been before the court before. 59 Maine, 217.

The remaining facts sufficiently appear in the opinion.

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

In February, 1864, ship 'C. S. Pennell' is at New York, there obtains a charter from New York to San Francisco.

And also while at New York obtains a charter for a cargo of guano from Chincha Islands to Europe.

Latter charter declared that ship shall sail on or before June 1 to San Francisco, and thence to Callao and Chinchas.

A stipulation, or even permission that a ship go 3,000 miles out of her way, is unusual. But this ship had already taken a charter for San Francisco, and is permitted to execute it before going to Callao, or even sailing for that port.

Having obtained these two charters, plaintiff takes out two policies of insurance, one of which is sued in this action, by which defendants insure 'on charter, primage, etc., at and from New York to San Francisco.'

Ship loads with a full cargo for San Francisco sails, and is lost between New York and San Francisco.

First question is, what charter covered by this policy? Plaintiff says that it is not the one from New York to San Francisco, but that from Chinchas to Europe. And this court say that parol evidence is admissible to show what charter insured by this policy.

And plaintiff introduces evidence showing, as he says, that this policy covers, and was intended to cover, the guano charter.

Court will decide, from the evidence, which charter is covered.

If that from New York to San Francisco, plaintiff can recover any surplus not covered by the prior policy.

If court say policy was intended to cover guano charter from Chinchas to Europe, then we say that we are not liable, because policy never attached.

Remarkable provision in charter that ship go first to San Francisco, 5,000 miles beyond Callao, and then return there. And upon plaintiff's construction of policy, the insurance is of a remarkable and unusual character; insures from New York to San Francisco freight from Chinchas to Europe; does not cover any portion of the time, or any portion of the voyage in which the freight is to be actually earned.

Policy never attached, because ship never sailed upon the guano voyage, never sailed upon it, even in the most liberal legal sense,

never sailed an inch for the purpose of earning the guano freight, never sailed under the guano charter actually or legally.

A ship lying at A may be chartered for a voyage from B to C, the freight from B to C may be insured, and if vessel sails from A for B for the sole purpose of earning the freight from B to C, policy attaches; and if ship be lost before arriving at B, the insurers are liable on policy.

The principle is laid down, and the cases establishing it are all cited in 1 Pars. Ins. 169; 1 Phillips' Ins., § 335 (p. 178, 5th ed.); *Barber* v. *Flemming*, Law Rep. 5 Q. B. 59.

The ship must start for the sole purpose of performing that voyage and earning that freight; not for the purpose of performing a different voyage and earning a different freight.

Such are all the cases.

But here ship sailed from New York for San Francisco under a charter for San Francisco, to carry a cargo there, and to earn the freight upon it; had a full cargo for San Francisco, no other purpose.

After her arrival at San Francisco she had a further object; but while on her way to San Francisco, her sole purpose in pursuing that route was to execute her San Francisco charter, and to deliver an independent cargo there.

A ship cannot sail under and in the execution of two charters at the same time, any more than she can sail upon two voyages at the same time. One charter may follow another between foreign ports, and one voyage may follow another between foreign ports, but no ship can be in the process of executing more than one at the same time.

Plaintiff says that his other policy was on the freight from New York to San Francisco. He has probably received the amount due on that.

And can any case be found, where one recovered under the same casualty upon two different policies upon two different charters?

Whether sale of ship was justifiable, so as to make a total loss,

we submit to court upon the evidence. *Walker* v. *Protection Co.*, 29 Maine, 317; *Pierce* v. *Ocean Co.*, 18 Pick. 83; *Prince* v. *Ocean Co.*, 40 Maine, 481; *Stephenson* v. *Piscat. Co.*, 54 Maine, 55.

If court should think plaintiff entitled to recover, case must be sent back to *nisi prius*, as this is not a valued policy, and amount depends upon further evidence, and two trustee processes pending.

A. A. Strout, for the plaintiff.

APPLETON, C. J. On Jan. 30, 1864, the plaintiff, as master of the ship 'C. S. Pennell,' of which he was part owner, and as agent for the other owners, chartered her to Messrs. Schön & Co., and to Mutzenbecher Sons, merchants, and as agents of Messrs. Witte & Schutte, Lima, for the purpose of taking a guano cargo from the Chincha Islands, to Hamburg or Rotterdam.

It was provided by the charter-party, the 'C. S. Pennell' being then at New York, that 'the said vessel shall sail on or before June 1, 1864, to San Francisco, and thence proceed with all convenient dispatch to the port of Callao, Peru, where the captain shall immediately report his arrival to Messrs. Henry Witte & Schutte of Lima.' The vessel was then to proceed to the Chincha Islands, there load with guano, and after completing her loading to proceed to Hamburg or to Rotterdam, etc.

The charter-party is an unit. It is one contract. It is, as between the parties to it, but one continuous voyage. Its terms are such as the parties choose to enter into. They are as binding, during its continuance, as to one portion of the chartered voyage as to another.

On March 23, 1864, the defendants issued to the plaintiff the policy in suit, in and by which they caused him 'to be insured, lost or not lost, sixty-five hundred dollars on charter, twenty-six hundred dollars on primage, and also fifteen hundred dollars as property on board ship "Chas. S. Pennell," at and from New York to San Francisco.'

The evidence satisfactorily shows that this policy was intended to cover the charter-party of Jan. 30, 1864.

On April 1, 1864, the plaintiff sailed for San Francisco, in accordance with the charter. On the voyage, in May following, the vessel was stranded on a coral reef, in longitude 38° 42′ west, latitude 17° 18′ south. After laying there some thirteen hours, she came off on a flood tide and was taken by the master to Rio Janeiro, when it being found, upon examination, impossible to repair her, she was, in accordance with the recommendation of the surveyors, sold at public auction. Proof of loss was duly made, but the defendants declined adjusting it, on the ground that the policy did not cover the guano charter.

The parties to the policy in suit had a right to make their own contracts. The policy might cover the whole, or a part only of the chartered voyage. The civil war then raging, the plaintiff perhaps deeming the danger from the rebel cruisers to be greatest from New York to San Francisco, effected an insurance on that portion of the voyage described in the charter-party.

By this charter-party, no freight was to be earned between New York and San Francisco, nor between San Francisco and the Chincha Islands. To give any effect to the policy, it must be regarded as upon the freight which would have been earned during the whole voyage, if the loss occurred during a portion of the voyage which was insured, otherwise that part of the policy which insures 'sixty-five hundred dollars on charter' would practically be stricken out, and would be of no avail.

In *Davidson* v. *Willasey*, 1 M. & S., 313, a ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool, at the current rate of freight, to be paid one month from the discharge of her cargo at Liverpool; and the ship-owners effected a valued policy on the freight at and from Jamaica to her port of discharge in the United Kingdom; and the ship arrived at Jamaica, and, after taking on board one-half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped; held, that the assured was entitled to recover as for a total loss. 'The interest intended to be insured,' remarks Lord Ellenborough, C. J., 'was the freight which the assured would

have earned under the terms of the charter-party, if the voyage had not been stopped by the perils insured against, which has been held for upwards of twenty years past to be an insurable interest as freight.' In *Barber* v. *Fleming*, 5 Law Rep. Q. B. 59, which resembled the case at bar in all its essential particulars, Cockburn, C. J., says: 'It is a fallacy to say the freight is earned simply by bringing the cargo from the port of loading to the port of discharge; the freight is earned by the whole voyage, which it is necessary to make to fetch the cargo and bring it home.' But if the vessel is chartered for a circuitous voyage, and a policy is effected upon the chartered freight, the completion of the voyage is required to earn the freight; but if the voyage fails by reason of the perils insured against, the insured is entitled to recover, otherwise his policy would do him no good.

The law on this subject is very accurately stated by Mr. Justice Blackburn in *Barber* v. *Fleming*. 'I think,' he observed, 'as soon as the case is understood, it is very clear. It appears there is a policy of insurance made upon a voyage "from Bombay to Howland's Island and from thence to England;" that is the description of the voyage. The nature of the thing insured is "freight chartered or otherwise." So that upon the face of the policy there is a bargain between the insured and the underwriters which if, during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay. . . . When a ship-owner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage toward earning it, then his interest ceases to be a contingent thing, but became an inchoate interest, and is an interest which if afterwards destroyed by one of the perils insured against is lost and ought to be paid for by the underwriters.' Here the vessel had started upon the voyage as chartered, and a part of which was insured, with ac argo provided on its arrival at the Chincha Islands. The plaintiff's interest in the chartered freight had therefore commenced. The loss occurred during the portion of the voyage on which the insurance was effected.

The fact that there was a charter-party between the plaintiff

and others for a voyage from New York to San Francisco and an insurance thereon by another company, constitutes no defense, unless the liability of the defendants was thereby increased or injuriously affected. That there was to be freight from New York to San Francisco and the same was insured, was well known to the underwriters. The charter-party between the plaintiff and Schön and others, upon which the insurance in suit was effected, was binding in all its parts. It mattered not what liabilities the plaintiff might have incurred to others, he was bound by his contract with them to its full and entire performance. The underwriters cannot avail themselves of any contracts made by the plaintiff with others, when with a full knowledge of their existence they insured a specific charter and a specific risk. They assumed the risk for a portion of the chartered voyage for a consideration full and satisfactory. The plaintiff's interest attached the moment the vessel left New York on the chartered voyage, which the defendants insured. It is nothing to them that the vessel was earning freight, unless the risk was thereby increased, and that is not alleged. Most assuredly they cannot complain, when they well knew such was to be the case, and the policy was issued with such knowledge. Indeed, if the policy does not cover the risk as claimed, it covers nothing. The conclusion is irresistible that the defendants, with a full knowledge of all the facts relied upon in the way of defense, issued their policy in suit to protect the plaintiff from the very risk which has occurred.

The vessel being condemned and sold and the voyage abandoned, the defendants are liable for the insurance on the charter and on primage for $9,200.

Satisfactory proof of loss was made on 27th February, 1865, and the defendants' liability to pay, accrued according to the terms of the policy in sixty days thereafter.

Judgment for plaintiff for $9,200, with interest from April 28, 1865.

Cutting, Walton, Dickerson, Danforth, and Tapley, JJ., concurred.

JOHN NEAL *vs.* ASA HANSON.

Pleading. General demurrer. Conversion.

Under a general demurrer no advantage can be taken of purely formal defects in pleading.

Thus, in trover for a promissory note signed by the plaintiff and made payable by its terms to the defendant, the objection that the declaration does not allege that the plaintiff was possessed of the note as of his own proper goods and chattels; or that it does not allege the value of the note, being purely formal, cannot be taken advantage of by general demurrer.

The abuse of a lawful possession may constitute a conversion.

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

Trover for a promissory note dated Jan. 24, 1872, signed by the plaintiff and made payable to the defendant, in the sum of forty-eight dollars and twenty-eight cents.

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

The judge sustained the demurrer, and adjudged the declaration bad; whereupon the plaintiff alleged exceptions.

John Neal & Son, for the plaintiff.

A. Merrill, for the defendant.

1. To maintain trover, property in the plaintiff, and conversion by the defendant, must be proved. 1 Chit. on Pl. 170. It is confined to the conversion of goods and chattels. 1 Chit. on Pl. 168.

The plaintiff must, at the time of conversion, have a general or special property in the chattel, and either the actual possession, or the right to the immediate possession of it. 1 Chit. on Pl. 170; *Fairbanks* v. *Phelps*, 22 Pick. 538; *Ayer* v. *Bartlett*, 9 Pick. 156; *Howard* v. *Farr*, 18 N. H. 457; *Esty* v. *Graham*, 46 N. H. 169; *Ames* v. *Palmer*, 42 Maine, 197.

The action may be defeated by showing that the plaintiff had no

title at the commencement of the suit. *Clapp* v. *Glidden*, 39 Maine, 448.

It does not appear from the declaration that the plaintiff had any general or special property in the note, or any right of immediate possession of it. It alleges that the plaintiff was possessed of the note, but not 'as of his own proper goods and chattels.' Nor does it allege that it was the plaintiff's property, or that it was of any value. Value is an essential element in property. If a chattel has no value it cannot be property. Hence it must allege that it was the property of the plaintiff, or that it was of some value stated. Trover, therefore, cannot be maintained. Oliver's Prec. 467.

2. The declaration alleges that the plaintiff was possessed of a 'certain promissory note, signed by himself and payable to the defendant, in the sum of,' etc.; 'and, being so possessed, lost the same,' which afterwards came into the hands and possession of the 'defendant by finding,' i. e. lawfully, and if it did not come into defendant's possession lawfully, then the plaintiff should have brought *trespass de bonis;* for trover admits lawful possession, and trespass charges unlawful possession. Oliver's Prec. 164.

If it was never delivered to the defendant, then it has never become property at all, either in the plaintiff's or defendant's possession. If it has been delivered, then it was defendant's property, and the losing or finding does not change the property.

3. Assumpsit, and not trover, is the proper action if any can be maintained. *Floyd* v. *Day*, 3 Mass. 403.

Appleton, C. J. This is an action of trover for a promissory note. The declaration is in these words: 'For that whereas the said plaintiff, on the 24th day of January, 1872, at said Portland, was possessed of a certain promissory note, dated the 24th day of said January, signed by said John Neal, and payable on demand to the said defendant in the sum of forty-eight dollars and twenty-eight cents; and being so thereof possessed, thereafterwards, on the same day, casually lost the said note above described, which there-

afterwards, on the same day, came into the possession of the said Hanson by finding. Yet the said Hanson, well knowing the same to be the proper goods and chattels of the plaintiff, and of right to appertain to him, yet thereto requested, on the sixth day of February, 1872, has not delivered the same to the said plaintiff, but thereafterwards, on the same day last named, converted the same to his, the defendant's, use.'

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

The presiding justice adjudged the declaration bad, to which the plaintiff excepted.

A demurrer is general when no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer; the former will suffice when the pleading is defective in substance; the latter is required when the objection is only to the form of pleading. 1 Chit. on Pl., 14 Am. ed. 667. It is obvious, therefore, that when the defect is matter of form it must be specially set forth; in other words, there must be a special demurrer.

The first objection is, that the writ does not allege that the plaintiff was possessed of the note, 'as of his own proper goods and chattels.' In *Jones* v. *Winckworth*, Hardres, 111, the objection was taken 'that the plaintiff did not allege that he was possessed of the articles sued for as *de bonis propriis; sed non allocatur*,' say the court, 'after a verdict. And the declaration does mention that the defendant, knowing them to appertain to the plaintiff, implies as much,' and so judgment was rendered for the plaintiff. In *Good* v. *Harwick*, 15 S. & R. 99, this objection was taken; but, say the court, 'objections of this kind are not to be favored, especially after verdict.' Besides, the declaration alleges the defendant knew the note sued for 'to be the proper goods and chattels of the plaintiff, and of right to appertain to him,' which they could not know, if it were not so, and which they did know, the demurrer admits.

The next objection is, that the value of the note is not averred.

In *Wood* v. *Smith*, Cro. James, 130, the question arose, whether

judgment should be arrested after verdict because the value of the article converted was not alleged. Popham and Yelverton held the declaration ill; but Williams, Tanfield, and Fenner *e contra;* for they said it was not assumpsit, especially when the thing is not demanded, but damages for it; and therefor Williams cited the register, vol. 37, that such exception at the common law was not material; but they held at the most it was but defect of form, which is aided by the statute of 18 Eliz., c. 14.' The same question arose in *Pearpoint* v. *Henry*, 2 Wash. 192, and the court, regarding the objection as one of form, overruled the motion in arrest of judgment.

It is said the note came lawfully in the defendant's possession, and therefore that he has a right to retain it. But the declaration admits that the plaintiff was possessed of the note, and that the defendant knowing it to be of his proper goods and chattels, and of right to appertain to him, 'converted the same to his, the defendant's, use.'

'Assuming to one's self the property and right of disposing another man's goods is a conversion, says Lord Holt, in the case of *Baldwin* v. *Cole*, 6 Mod. 212, and this principle is adopted and sanctioned by Lord Ellenborough in the case of *McCombie* v. *Davies*, 6 East, 540. The defendant having come lawfully into the possession of the note forms no objection to the action. . . . It is the breach of the trust, or the abuse of such lawful possession, which constitutes the conversion.' *Murray* v. *Burling*, 10 Johns. 172.

Now the writ does not show for what purpose the defendant received the note. It only shows that being the plaintiff's property, and having received it, he is guilty of a tort by its conversion.

It was held in *Goggerley* v. *Cuthbert*, 5 B. & P. 170, that if A indorse a bill drawn in his favor to B, or order, that B may raise money for A by negotiating it, and B gives it to C, who puts it into the hands of D, without consideration two years after the bill is due, that A may recover back the bill from D in trover. The point was taken there as here, that the bill was of no value. To

this Mansfield, C. J., replies: 'As to the bill being worth nothing, it is of importance to the plaintiff to get it back again.' So here, if the note belongs to the plaintiff, it is of importance to him to get it back again, or to recover its value. So in *Murray* v. *Burling*, 10 Johns. 172, it was held that the plaintiffs could maintain trover for their own note, which the defendant received as their property for the purpose of raising money for them, but which he converted to his own use.

'The substantial matter,' observes Shepley, C. J., in *Lord* v. *Pierce*, 33 Maine, 350, 'upon which the action is founded is, that the defendant has, without right, the property of the plaintiff in his possession, and that he refuses to surrender it.'

The objections specially relied upon are purely formal. They could not be taken advantage of in arrest of judgment, nor are they available to the plaintiff on general demurrer.

Exceptions sustained.

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

WESTBROOK MANUFACTURING CO. *vs.* ISAAC R. GRANT.

Time—computation of. Bankruptcy. Attachment.

The maxim that in law there are no fractions of a day does not apply to proceedings in bankruptcy, where the exact time when the event occurred is made certain by record.

Thus, where a debtor's property was attached at seven o'clock in the afternoon of March 8, and his petition in bankruptcy under the U. S. Bankruptcy Act of 1867, was filed at two o'clock and fifty minutes in the afternoon of the 8th of July next succeeding; *Held*, that under § 14, the attachment was dissolved, the time between the two events falling short of four months by four hours and ten minutes.

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

CASE against the defendant as sheriff of the county of Waldo, for the delinquency of his deputy in not surrendering property at-

tached on a writ in favor of the plaintiffs, against James Treat and William Treat.

It appeared that the Westbrook Manufacturing Company sued out a writ in assumpsit against the Treats from the supreme judicial court of this county, on March 6, 1867. *Ad damnum* $4,000. That one Low, deputy of the present defendant, attached a stock of goods belonging to the Treats at seven o'clock in the afternoon of the 8th of March, 1867.

It also appeared that the original petition in bankruptcy of James Treat and William Treat was filed July 8, 1867, at two o'clock and fifty minutes in the afternoon.

That the bankruptcy of the Treats was suggested at the Oct. Term, 1867; that special judgment for plaintiffs for $2,020.88 debt, and $38.01 cost, Oct. 12, 1869; that execution issued Oct. 14, 1869, and was delivered to Irvin Calderwood on Nov. 9, 1869, then sheriff of the county of Waldo; who thereupon demanded the goods attached of said Low, who then and there refused to surrender or show the same to said Calderwood.

Upon the foregoing facts the presiding justice ruled, as a matter of law, that the proceedings in bankruptcy dissolved the attachment, and ordered judgment for the defendant. To which ruling the plaintiffs alleged exceptions.

W. L. Putnam, for the plaintiffs.

I. All the evidence as to the precise hours of the day when each event occurred, is immaterial.

The law does not generally regard fractions of a day, except where actual injustice would otherwise be done, or where it is necessary to determine priority between transactions of the same date. It is inconvenient, unnecessary, and would involve great uncertainty and embarrassment to investigate minute and unimportant questions of time.

See the remarks of Judge Prentiss on this general principle in the matter of Wellman, 7 Law Rep. 25; *Windsor* v. *China*, 4 Maine, 302; *Lester* v. *Garland*, 15 Ves. 253.

II. Time is not computed from a fixed 'day' or 'date' here, but from event to event.

Notwithstanding all the discussion that has taken place, unless this case shows some reason to the contrary, in computing from an act, the rule is to include the day of the act. The party who claims to compute otherwise, must bring himself within some exception to this rule. Soldiers' Voting Bill, 45 N. H., 613; *Windsor* v. *China*, 4 Maine, 303; *Atkins* v. *Sleeper*, 7 Allen, 488.

As this is a question of construction of a law of the United States, the decisions of the supreme court on this point are conclusive.

In *Griffith* v. *Bogert*, 18 How, 162–3, the court says: 'In common and popular usage the day *a quo* has always been included, and such has been the general rule both of the Roman and common law.' 'In the present case there is no reason for departing from the general rule and popular usage of treating the day from which the term is to be calculated or terminus *a quo* as exclusive.' See also, *Arnold* v. *U. S.*, 9 Cranch, 104.

'The first day of July is not within four months of the first day of March, but is four months from or after. There cannot be five first days of five several calendar months, within four calendar months.' The same remarks apply to the days March 8th and July 8th. An attachment made July 8th is not within four months of an event happening March 8th, but is at least four months after. On July 8th a child born March 8th may, in popular phrase, be said to be four months old, and to have been born four months ago, but unless fractions are closely calculated neither in popular nor strict manner of speaking, would any one say he was born within four months.

But this being a nice rule of law, based on a nice use of language, exceptions to it are favored whenever the reason of the case, the necessity or convenience of the parties, or the general purpose of the instrument or statute involved render it justifiable so to do. *Windsor* v. *China*, *supra*; *Griffith* v. *Bogert*, *supra*.

Among the exceptions are the following:

1. Where the time for doing an act is so short that the conclusion is irresistible that the first day is excluded, as where a notice is to be given within two days. *Tellew* v. *Wonford*, 9 B. & C. 134.

3. To save forfeitures and to prevent estoppels for which purposes the court favor a liberal construction in this as in other matters, as in cases of seizure of personal property on execution, of rights to redeem from mortgages or levies, of forfeitures of leases and of statute estoppels in pauper suits. *Windsor* v. *China*, *supra*; *Berry* v. *Spear*, 13 Maine, 187; *Sheets* v. *Selden*, 2 Wallace, 177, *Wing* v. *Davis*, 7 Maine, 33; *Moore* v. *Bond*, 18 Maine, 144; *Lester* v. *Garland*, *supra*.

3. Where persons are bound by law or contract to perform some act and liable to penalty or suit for not doing it, as obligations to pay money, to return executions, notes, and other commercial paper.

4. Where the language used is doubtful, but such construction is necessary to confirm and avoid destroying any *bona fide* transaction or title. *Griffith* v. *Bogert*, *supra*; which exception, perhaps, is embraced in the principle of the above No. 2.

In all other well-considered cases of departure from the general rule there has been some special reason in each case, indicating some special necessity or intention, which should control this as it would any other question of construction.

In this case, is there any such? Can any reason be thought of why the assignee should be favored over a diligent creditor who made an attachment so long before the bankruptcy proceedings commenced? Is not the defendant seeking to destroy a title *bona fide* obtained, within the meaning of *Griffith* v. *Bogert*, *supra*.

In the case last cited the form of the statute was the converse of the language in this case; it prohibited doing a thing until after the expiration of a certain number of months from an event. And the court held that the day corresponding to the eighth day of July in this case was after, so of course it was not within.

Bank v. *Burr*, 24 Maine, 266, was a case where the statute pro-

vided that the whole capital of the bank should be paid in within twelve months after receiving the charter; and further, that no stock should be transferred till the capital was so paid in. The charter was granted April 1, 1836, and the stock transferred April 1, 1837. The court held that there was a presumption, though there was no evidence that the capital was paid in within the twelve months, but that the transfer was not within twelve months after receiving the charter, 'for an act might legally have been done under the charter April 1, 1836.' That opinion was moreover delivered by the same judge who delivered the opinion in *Moore* v. *Bond*, *supra*. Now under this statute a petition in bankruptcy could be filed on the day of the attachment, after the attachment, so as to count one day upon the four months, precisely as in the last case the first of April, 1836, could count on the year.

III. To understand why this period of four months was fixed, reference must be had to §§ 35 and 39.

As all these sections are in *pari materia*, it cannot be denied that the six months in § 39 is the same period as the six months in § 35; and that the period of four months in § 35 is to be computed on the same principle as the period of six months in the same section.

The four months under discussion was evidently fixed for the same reasons as the four months in § 35, and is, therefore, the same period of time.

It follows that all these various periods are to be computed on the same principle.

The period of six months in § 39 is a period of limitation, within which a creditor is allowed to commence proceedings.

It is a privilege which he may or may not avail himself of, and not a duty which he must perform to save himself from suit, penalty, or forfeiture, or even to save his claim. The law, therefore, is not to be extended to favor him.

The petition may be filed the day the act of bankruptcy is committed. Wydown's case, 14 Vesey, 85.

The period named in a statute of limitations ordinarily includes

the day when proceeding may be commenced, was fully settled in *Presbrey* v. *Williams*, 15 Mass. 143; *Little* v. *Blunt*, 8 Pick. 488.

Our court in *Berry* v. *Spear*, 13 Maine, 190, made some comments on *Presbrey* v. *Williams*, but neither affirmed or disaffirmed it, as they finally rested the case at bar on the fact that no part of the day of the levy can practically be used for making the record.

IV. A similar question arose in *Cowie* v. *Harris*, 1 Moody & M. 141, in which Lord Tenterden decided that on a commission issuing on May 14th, a dealing on March 14th is valid, as more than 'two calendar months' before the issuing of the commission.

Howard & Cleaves, for the defendant.

WALTON, J. This is an action against the sheriff of the county of Waldo, for the alleged misdoings of his deputy in not keeping property attached. The defendant claims that the attachment was dissolved by the debtor's going into bankruptcy within four months after it was made.

The fourteenth section of the United States bankrupt act declares that any attachment of the bankrupt's property, made within four months next preceding the commencement of the proceedings in bankruptcy, is thereby dissolved.

The attachment in this case was made March 8, 1867, at seven o'clock in the afternoon. Proceedings in bankruptcy were commenced July 8, 1867, at two o'clock and fifty minutes in the afternoon. The time between the two events is four hours and ten minutes less than four months. It is, therefore, clear that the attachment was, in fact, made within four months next before the proceedings in bankruptcy were commenced. We fail to perceive any good reason why the attachment shall not be held to have been dissolved. Certainly it must be, if the exact truth and an accurate computation of the time are allowed to prevail.

The objection is, that such a decision will conflict with the maxim that in law there is no fraction of a day. But this maxim is a self-evident fiction; and, as Judge Story said in Richardson's case, 2 Story, 571, is true only *sub modo*, and in a limited sense, where

it will promote the right and justice of the case, and is never allowed to operate against the right and justice of the case. It is undoubtedly a very useful maxim when properly applied, as in the service of legal precepts and notices generally, and in mercantile contracts, as it avoids the inconvenience of endeavoring to ascertain with precision at what hour of the day the precept or notice was served, or at what hour a note or bill of exchange, payable on time, was signed, etc. But in a case like this, where the conflicting claims of creditors are to be determined by an accurate computation of time, and we have the means before us of computing the time accurately, and there is no inconvenience to be avoided, we think that any maxim which should lead the court to decide contrary to the truth, would be misapplied. The bankrupt act makes the commencement of the proceedings in bankruptcy the initial point, or *terminus a quo*, of the four months in question; and with positive record evidence before us, of the exact time when that event occurred, it seems to us it would be a plain and willful violation of the statute to commence the computation at any other time. We think the computation in this case should commence on the 8th of July, 1867, at two o'clock and fifty minutes in the afternoon, that being the precise time when the proceedings in bankruptcy were commenced, and by then reckoning backward four calendar months we shall reach the 8th of March, 1867, at the same hour of the day, namely, two o'clock and fifty minutes in the afternoon. By thus measuring the time truly and accurately, we shall see that the attachment was within the four months by four hours and ten minutes; for it was not made till seven o'clock in the afternoon of that day. It being thus demonstrated that the attachment was within four months next preceding the commencement of the proceedings in bankruptcy, our conclusion is that it was thereby dissolved. And in this conclusion we think we are not only justified by reason and the express requirements of the statute, but also by authority.

Professor Parsons says that in the application of the insolvent laws, the very hour is inquired into; that he is aware of no cases where the technical rule of the law, that no fraction of a day can

be allowed, has been adhered to in bankruptcy, save the matter of David Howes, 6 Law Reporter, 297; and the matter of Wellman, 7 id. 25, where the doctrine laid down in the first case is maintained and defended; and he expresses the opinion that the views of the judge, though able, savor of technicality. He says further, that the reason, or at least the justice, of allowing the exact time to be inquired into, is obvious; that if one's rights depend upon whether a certain thing was done more or less than a certain number of months before another, it is as proper to ascertain the exact time as it is when there is a question whether an attachment of land, or the record of a conveyance, was first made. Pars. Merc. Law, 2 ed. 282–3.

Godson v. *Sanctuary*, 4 Barn. & Adol. 255, is a case directly in point. There the bankrupt's goods had been seized on execution, and the question was, whether more or less than two calendar months had elapsed between the seizure and the time when he went into bankruptcy, and whether, in computing the time, the court could take notice of the fraction of a day; and the court held that they could. 'If,' said Baron Park, 'the fraction of a day be taken into account (as it may), it would appear that more than two calendar months had elapsed between the time of the seizure and the issuing of the commission; that is, between eleven o'clock of the forenoon of the 13th of August, and twelve o'clock of the 13th of October; because sixty-one complete days, which are the two calendar months, would have elapsed by eleven o'clock of the 13th of October, and the commission did not issue until twelve or one o'clock of that day.'

Mr. Powell says that the legal fiction that there is no fraction of a day, like all other legal fictions, holds good only in respect of the ends and purposes for which it was invented; that when it is urged to an intent not within the reason or policy of the fiction, the truth may be shown; that the presumption of law that an act done on any particular day was done the first moment of that day (which is only another mode of saying there is no fraction of a day), can never operate where there is positive evidence of the fact; for the

positive evidence must always control the presumptive; and he refers to many cases in illustration of these propositions. Powell on Powers, 631–7.

And in *Bigelow* v. *Wilson*, 1 Pick. 485, Mr. Justice Wilde says, 'This maxim is a fiction of law, and when it is material to distinguish, the truth may be shown; for a fiction of law, introduced for the sake of convenience and justice, ought never to be allowed to work a wrong; thus, when it is necessary to determine the priority of two attachments, the precise time of each attachment may be shown; and so in many other cases.'

We think these authorities abundantly justify us in the conclusion to which we have come, and which we have already expressed. Many others to the same effect, both English and American, could be cited; but we deem it unnecessary to do so. And we will add that this conclusion renders it unnecessary for us to enter the vortex of conflicting decisions, as to whether, in the computation of time from an act done, the day on which the act is done should be included or excluded. A very good review of the authorities upon this point will be found in 4 Am. Law Reg. (new series), 222, in which the learned writer comes to the conclusion that under statutes and rules of court, the current of authorities runs strongly in favor of excluding the day on which an act is done, an event happens, or of a date referred to, in the computation of time therefrom; and several of the decisions in this State, and the leading case of *Bigelow* v. *Wilson*, 1 Pick. 485, are among the authorities cited in support of the conclusion. If we should adopt the same view, the result would be the same as that to which we have already arrived.

Exceptions overruled.

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

DAVID A. VAN VALKENBURGH *vs.* FRANCIS B. SMITH and another.

In action on bond—want of consideration—cannot be set up.

An obligor in a bond cannot defend an action thereon, upon the ground of a want of consideration, or that the consideration had failed.

Thus, in order to obtain the discharge of a suit for services by the plaintiff against the P. & O. C. Railroad Company, the defendants gave the plaintiff their bond, conditioned that one of the defendants should, within thirty days, deliver to the plaintiff four notes payable for the sums and at the times, and indorsed as therein mentioned. In debt on the bond, *Held*, that it is not competent to set up in defense that the plaintiff's services, instead of being of any value to the railroad company, were injurious through his mismanagement and incompetency; and that the bond was given through misapprehension of the facts, and that the consideration had failed.

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

DEBT on a bond dated March 16, 1871, given by the defendants to the plaintiff, to obtain the discharge of an action pending against the P. & O. C. Railroad Company, in favor of the plaintiff, for his services. The condition of the bond was, 'that Francis B. Smith, within thirty days from the date of these presents, shall deliver to said D. A. Van Valkenburgh, four notes of two hundred and ninety-two $\frac{36}{100}$ dollars, in three, six, nine, and twelve months respectively, indorsed by F. O. J. Smith, or some other party equally as acceptable to said Van Valkenburgh.'

The defendants pleaded *nil debet*, with a brief statement, 'that the bond was not given for any alleged or supposed indebtedness of their own or of either of them, but for an alleged indebtedness of the Portland & Oxford Central Railroad Company, and without the knowledge or request of said company, or the board of directors thereof, not knowing that the same was not legally due, and for a valid consideration, but have since learned and been informed that said board of directors, or said company, do not recognize the

validity of the same, but that the same was wholly without good and valid consideration, and that said company have a just and legal ground of defense thereto, and that it is provable that the services alleged to have been rendered, and for which said bond was given, were not only valueless to said company, but absolutely injurious and damaging to the interests of said company through the mismanagement and incompetency of the plaintiff, and that said bond thereby was given through misapprehension of the facts respecting said claim, and without legal and valid consideration, and that the consideration thereof has utterly failed.'

The presiding judge ruled that evidence to support the allegations in the brief statement was not admissible, and that the defendants did owe in manner and form as declared against them, and assessed damages at the sum of $1,225.18, and the defendants alleged exceptions.

F. O. J. Smith, and *Bion Bradbury*, for the defendants.

Strout & Gage, for the plaintiff.

APPLETON, C. J. The plaintiff having a suit pending against the P. & O. Central Railroad for services, the defendants, 'to obtain the discharge of said suit,' gave the bond, which this action is brought to enforce.

There is no allegation of fraud or misrepresentation on the part of the plaintiff in procuring it. The bond, being under seal, the law implies a consideration. 'A bond,' observes Parsons, C. J., in *Page* v. *Trufant*, 2 Mass. 159, 'from the solemnity of its execution, imports a consideration, the want of which the obligor is estopped by law to plead. He may avoid the bond, by showing it was obtained by fraud or duress, or that the consideration is illegal or against the policy of the law.' But the defendants offer no such proof. There is nothing illegal in the discharge of a pending suit. 'At law,' remarks Spencer, J., in *Dorr* v. *Munsell*, 13 Johns. 430, 'the defendant cannot avoid a solemn deed on the ground of want of consideration. That inquiry is precluded by the very nature of the

instrument. The case of *Vroman* v. *Phelps*, 2 Johns. 177, is directly in point, that a fraudulent representation of the quality and value of a thing sold, forms no defense in a suit on a specialty. In some of the elementary writers it is stated, that fraud may be be given in evidence under the plea of *non est factum*. This must be confined to cases where the fraud relates to the execution of the instrument, as if a deed be fraudulently misread, and is executed under that imposition; or where there is a fraudulent substitution of one deed for another, and the party's signature is obtained to a deed which he did not intend to execute.'

Exceptions overruled.

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

JAMES BERRY *vs.* JACOB SANDS.

Submission—report under—when returnable.

A report of referees made under a statute submission stipulating that the report shall be made to the January term, 1871, cannot be made to and accepted at the January term, 1872, although the parties, on Jan. 26, 1871, indorsed upon the submission that 'in case the court should adjourn before the referees should make up their report, when it is made up, it is to be entered on the docket at the term at which it is made returnable.'

ON EXCEPTIONS.

REPORT of referees under a statute submission.

The submission, made and executed Dec. 5, 1870, stipulated that judgment rendered on their report, or that of a majority of them, made to the supreme judicial court, within and for the county of Cumberland, next to be held at Portland, on the second Tuesday of January, A. D. 1871, shall be final, and bore the following indorsement:

'In case the court should adjourn before the referees make up their report, when it is made up, it is to be entered on the docket of the term at which it is made returnable.

Jan. 26, 1871. JAMES BERRY.
Attest: JACOB SANDS.
AMHERST WHITMORE, By HENRY ORR, at their request.'
S. A. PERKINS.

It was admitted that Henry Orr was authorized by the parties to sign the indorsement, which was written and signed in their presence.

The report was returned to the January term, 1872, of this court for this county, and filed on the sixth day.

The acceptance of the award was contested upon the ground that the award not having been returned to the term of the court named in the original submission, as required by the statute, was invalid, and of no effect; that the court had no jurisdiction in the premises; that the written memorandum upon the award, signed by the parties, was invalid, and not binding upon the parties thereto; and that said memorandum does not authorize and render legal the return of said award at the January term of the supreme judicial court, A. D. 1872.

The presiding judge overruled the objection, *pro forma*, and ordered the acceptance of the award. Thereupon Jacob Sands alleged exceptions.

Bion Bradbury & A. W. Bradbury for Sands, cited *Sargent* v. *Hamden*, 29 Maine, 70; *Abbott* v. *Dexter*, 6 Cush. 108; *Burghart* v. *Owen*, 13 Gray, 300; *Franklin Mining Co.* v. *Pratt*, 101 Mass. 359; R. S. of 1857, c. 108, §§ 1, 3, 4, 9.

N. Webb, for James Berry.

By R. S., 1857, c. 108, § 1, the formalities of the submission are prescribed. Sect. 3 confers on parties the right to modify the form set out in § 1, in the respect of the time when the report is to be made. These two sections contain all the requirements of the statute as to the form of submission.

Sect. 9 confers authority on the parties to vary the time limited in the submission for making the report to the court. This authority is not the same as that in § 3. The one contemplates the naming in the submission the time for the report to be made; the other is an authority to depart from the time limited in the submission.

Sect. 3 requires the parties to indicate in the submission the time believed to be sufficient for a hearing, determination, and report.

Sect. 9 provides against the failure of the whole proceeding, and the making of useless expense, by any unforeseen delay, either in the readiness of referees to attend, the preparation of parties, the attendance of witnesses, or the duration of the hearing, and the consultations of the referees. While affording the parties this protection, it does not prescribe any formalities to be observed by them, as a condition. They have only to agree.

The case shows a submission with all due formality under the statute. No objection is made to anything in the proceedings, except the time when the report was returned to the court.

But the case shows a varying of the time for such return, by the agreement of parties, which is justified by R. S., 1857, c. 108, § 9.

By that agreement the report when made up was to be entered on the docket of the term at which it is made returnable.

This must be interpreted to be an agreement to vary the time, so as to have the report made to the court whenever prepared.

The report was finally made up addressed to the January term, 1872, and was returned at that term, and then entered on the docket.

This was a full compliance with all the requirements of the statute in force when the submission was made, and which determined the rights of the parties.

These rights are not impaired by the repeal of c. 108 of R. S., 1857, in the general repealing act of March 24, 1870, since by § 2 of that act all rights and remedies are expressly saved.

APPLETON, C. J. On Dec. 5, 1870, the parties to this litigation entered into a statute submission to certain referees therein named, in and by which it was provided that 'judgment rendered on their report or that of a majority of them, made to the supreme judicial court within and for the county of Cumberland, next to be holden at Portland on the second Tuesday of January, 1871, shall be final.'

The report of the referees, dated Jan. 8, 1872, was returned to the January term, A. D. 1872, of the supreme judicial court for the county of Cumberland, and filed on the sixth day of said term.

The jurisdiction of this court over awards under a statute submission, is created entirely by statute and can only be exercised in conformity with its provisions. *Sargent* v. *Hampden*, 29 Maine, 70; *Franklin Mining Co.* v. *Pratt*, 101, Mass. 359.

The award not having been returned to court within the time limited in the submission cannot legally be accepted at a term subsequent thereto.

To avoid the effect of this and to authorize the acceptance of the report, reliance is placed upon the following agreement, which was indorsed upon the submission but was not acknowledged.

'In case the court should adjourn before the referees should make up their report, when it is made up, it is to be entered on the docket of the term at which it is made returnable.

JAMES BERRY.

Jan. 26, 1871. JACOB SANDS.

By HARRY ORR, at their request.'

By R. S. 1857, c. 108, § 3, 'The parties may agree when the report shall be made and, in that respect, vary the form without being confined to one year.'

By § 9, 'The report shall be made to the supreme judicial court within the time limited in the submission unless varied by the parties.

It would seem from the memorandum of Jan. 26, 1871, that the court, to which the report was returnable, was then in session and

might adjourn before the award should be completed. To avoid this difficulty, it was agreed, in case the court should adjourn before the award was ready, that it might be returned to the clerk, who was thus authorized to enter it on the docket of January, 1871, to which, by the submission, the return was to be made. But this was not done. As the report was not offered within the terms of this agreement, it is not necessary to determine whether the parties could legally give such authority to the clerk.

If this is not the true construction of the agreement referred to, still the same result must follow. The agreement is not one to vary the return day of the award to January, 1872, or to any other time. The statute requires a definite time when the report should be made, or a limited time within which it should be returned. But here there is no definite time fixed, and no time limited within which a report was to be made. The report might as well have been made ten years after the agreement as one year.

Exceptions sustained.

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

STATE OF MAINE *vs.* DAVID CROWLEY and others.

Recognizance—construction of—what is sufficient in criminal prosecution.

Section 24, c. 33 of Pub. Laws of 1858, which provides that no surety in any recognizance 'taken by virtue of the provisions of this act,' shall be discharged from his liability therein by a surrender of his principal in court after he has been defaulted upon his recognizance, applies to those recognizances only mentioned in the preceding clause of the section; and does not apply to recognizances taken in the supreme judicial court 'in proceedings under this act,' and in conformity with Pub. Laws of 1867, c. 130, § 6, which latter act is 'additional to, and amendatory of' the former.

When, from the tenor of a recognizance in a criminal prosecution it can be sufficiently understood 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, an action upon the recognizance cannot be defeated upon the ground that it contains conditions additional to those authorized by the statute.

Thus, in a recognizance taken in the supreme judicial court, under Pub. Laws of 1867, c. 130, § 6, the condition provided not only that the party respondent shall appear and answer to the complaint at the court designated, but also that he 'shall abide and perform the order and judgment of the court that may be rendered therein, and shall not depart without license;' *Held*, that the recognizance is sufficient, and that the extra-statutory conditions may be rejected as surplusage.

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

The superior court having been established in 1868, Pub. Laws of 1868, c. 216, § 1, provided that at the end of the then next succeeding July term of the supreme judicial court, all original and appellate jurisdiction in criminal business vested in that court should be transferred to the superior court.

SCIRE-FACIAS on a recognizance entered into at the July term, 1868, of the supreme judicial court for this county, in the sum of five hundred dollars, as provided in Pub. Laws of 1867, c. 130, § 6. The condition of the recognizance was of the following tenor:

'That if the said David Crowley shall personally appear before the superior court, to be holden at Portland, within and for the county aforesaid, on the first Tuesday of January next, to answer to all such matters and things as may be objected against him in behalf of the State, relative to an complaint found against him, now pending in said court, for keeping and depositing liquors at Portland aforesaid, in the shop kept by him and said Patrick, on the northerly side of Commercial street, being the third building westerly of India street, with intent to sell the same in violation of law, and shall abide and perform the order and judgment of the court that may be rendered therein, and shall not depart without license, then this recognizance to be void, otherwise to be in force.'

The defendants pleaded *nul tiel record*, with a brief statement alleging that the recognizance was void.

The prosecutor replied that there was such a record, and prayed inquiry by view and inspection.

On the third day of the May term, 1869, the sureties surrendered the principal defendant into court, and moved that they be dis-

charged upon payment of costs; and the principal defendant prayed that the penalty of the recognizance be remitted.

But the presiding justice ruled, that § 24, c. 33 of Pub. Laws of 1858, applied to the recognizance, and denied the motion upon that ground. Thereupon the case went to trial.

The defendants claimed that the recognizance was void because the condition thereof was not authorized by law. But the court ruled otherwise, and rendered judgment for the State in the sum of five hundred dollars and costs; and the defendants alleged exceptions.

So much of the statutes as is essential will be found in the opinion.

W. L. Putnam, for the defendants.

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

BARROWS, J. David Crowley recognized with the other defendants as his sureties at the July term of this court, 1868, in the sum of $500 for his appearance at the next January term of the superior court for Cumberland county (to which the criminal jurisdiction of this court in that county was then transferred), to answer to a complaint for the offense of keeping liquors in his shop in Portland, with intent to sell the same in violation of law. They were defaulted on the recognizance at the January term, but at May term following (the next term at which criminal business was transacted), on the third day of the term, after *scire-facias* had been issued, the sureties surrendered the principal in court, and thereupon moved that they themselves might be discharged on payment of costs. The judge overruled the motion, not as matter of discretion, but because he held that the statute of 1858, c. 33, § 24 (forbidding the remission by any court, of any portion of the penalty of any recognizance taken by virtue of the provisions of that act, in any suit upon such recognizance, or the discharge of any surety from his liability thereon by a surrender of the principal in

court, after a default upon the recognizance), applied to this case and imperatively precluded any such remission or discharge.

A provision so highly penal in its nature as that above cited, from § 24, affecting not only persons charged with offenses, but sureties also, is to be strictly construed, and not extended by construction to cases not clearly falling within its terms. The claim on the part of the State is, that 'any recognizance taken by virtue of the provisions of this act,' is identical with 'any recognizance taken in any proceedings under this act.' We do not think it can be properly so construed. The recognizance 'taken by virtue of the provisions of this act,' spoken of in the third paragraph of § 24, c. 33, Laws of 1858, must mean the recognizances specially provided for in the preceding paragraph, in immediate connection with which this provision occurs. These seem to be the only recognizances which are taken 'by virtue of the provisions of this act.' Other recognizances, though taken in the course of proceedings under that act, cannot be said to be taken by virtue of its provisions. They are taken 'by virtue of' the common-law authority vested in the court to compel parties to answer to its process, civil or criminal, and of certain constitutional and statutory provisions conferring and regulating the power to require them.

The second paragraph of § 24 runs thus: 'In case of appeal from a sentence of imprisonment under the seventh section of this act, the penal sum of the recognizance shall be two hundred dollars; and in all other appeals from any judgment or sentence of a magistrate in proceedings under this act, the penal sum of the recognizance shall be one hundred dollars.' Then follows the prohibition of remission or discharge; and it seems to apply to these recognizances thus specially provided for. The legislature had just had occasion to use the phrase 'in proceedings under this act,' and it is not probable that they would have adopted a different phraseology if they had designed to convey the same idea, or to interfere with the general power conferred upon the court in R. S. c. 133, § 19, except in relation to the recognizances they had just specifically provided for.

In 1867, by an additional act, c. 130, § 6, it is provided, among other things, that 'no recognizance in the supreme judicial court, in proceedings under said acts (c. 33, 1858, and c. 130, 1867), shall be in a penal sum less than five hundred dollars.' But no such restriction upon the discretion of the court is appended to this provision; and there would seem to be little propriety in applying the same rule to the $500 recognizances taken under the law of 1867, which was thought suitable in the case of the smaller recognizances taken by virtue of the provisions of the act of 1858.

At least, it was not done by the legislature, and we think the judge of the superior court erred in transferring it by construction to the recognizance taken in this case, in the sum of $500 in conformity to the provisions of the act of 1867.

The defendant further contends, that, inasmuch as the condition of this recognizance provides not only that David Crowley shall appear and answer to the complaint at the court designated, but that he shall abide and perform the order and judgment of the court that may be rendered therein, and shall not depart without license, the whole recognizance is void, and no action can be maintained upon it for the breach of any of the conditions.

With R. S. 1857, c. 133, § 20, before us, we should hesitate about coming to such a conclusion, even though we might be of the opinion that the requirement that David Crowley should perform the judgment of the court was unauthorized.

Under statutes substantially similar, it was held in *Commonwealth* v. *Nye*, 7 Gray, 316, that a recognizance conditioned among other things that the principal 'shall do and receive that which by the said court shall be then and there enjoined upon him,' was valid and sufficient. The offensive condition is quite as prominent as in the case at bar.

'Superadded words of condition beyond what are authorized by the statute, do not invalidate the recognizance, but it has precisely the same effect as if they had been omitted.' *Howe* v. *State*, 1 Ala. 113.

Referring now to R. S., 1857, c. 133, § 20, above cited, inasmuch

as it can be sufficiently understood from the tenor of this recognizance 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 a recognizance in the case, we hold that the action cannot be defeated on account of what may well be rejected as mere surplusage. If David Crowley would have saved his sureties from grief and loss he should have appeared and answered to the charge at the court specified. It will be time enough for his sureties to complain when they are required to see that he does anything more. The court has said in *State* v. *Young*, 56 Maine, 221: 'The conditions of all recognizances are fixed by law. Hence parties and their sureties understand perfectly what their liabilities are; and when defective or illegal recognizances have been returned, there can be neither hardship nor injustice in allowing them to be amended as soon as the defect or error is discovered.' And this may be done even after suit commenced upon the recognizance. *State* v. *Young*, *ubi supra*, and cases there cited.

The cases in which the recognizances have been declared invalid, and which are relied on here in defense, will all be found to be cases of recognizances taken in civil cases. To such recognizances the provisions of R. S. of 1857, c. 133, § 20, do not apply.

But the judge should have ascertained whether the failure to appear was so far excusable that the claims of justice would not be prejudiced by a remission of the penalty instead of holding that no such remission was allowable under any circumstances.

Exceptions sustained.

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

Samuel L. Foster *vs.* Elizabeth Wylie.

Chose in action payable to a bankrupt—in whose name to be sued.

An account payable to one who has since gone into bankruptcy, may be sued in the bankrupt's name, notwithstanding his assignee sold it to another, for whose benefit the action was brought.

On exceptions to the ruling of *Goddard*, J., of the superior court for this county.

Assumpsit on an account annexed.

After the contraction of the alleged indebtedness of the defendant to the plaintiff, the latter filed his petition in bankruptcy and received his discharge under the provisions of the U. S. bankrupt act of 1867, prior to the commencement of this action.

The plaintiff offered to prove that the alleged claim against the defendant was sold at auction by the plaintiff's assignee in bankruptcy under the provisions of said act, and prior to the date of the writ. But the presiding justice ruled that the action could not be maintained in the name of the plaintiff, and the plaintiff alleged exceptions.

Mattocks & Fox, for the plaintiff.

S. L. Carlton, for the defendant.

Walton, J. An action may be maintained on a chose in action payable to the plaintiff, notwithstanding he has gone into bankruptcy, and the demand has been sold by his assignee, and the action is brought for the benefit of the purchaser.

The authority given an assignee in bankruptcy to sue for and recover, in his own name, the debts due the bankrupt, is not for the benefit of the debtors, nor of the purchasers of such debts, but for the benefit of the estate; and when the estate is not to be benefited by such a suit, no reason is perceived why it should be brought

in his name. Certainly, the objection that the action is not brought in the name of the assignee in bankruptcy is one which the defendant cannot avail himself of; for he is in no way prejudiced by it. Every ground of defense is open to him that would be if it were thus brought. *Stone* v. *Hubbard*, 7 Cush. 595; *Drury* v. *Vannevar*, 5 Cush. 442. *Exceptions sustained.*

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

DANIEL L. MITCHELL *vs.* BENJAMIN GOOCH.

Attachment—what will dissolve. Receiptor—liability of—how terminated.

The plaintiff, as an officer, having on July 13th attached a debtor's personal property, took from the present defendant an alternative receipt to pay a certain sum or re-deliver the goods attached on demand, whereupon the goods went back into the debtor's possession. On Sept. 2d, the debtor filed his petition in bankruptcy, and on the succeeding 27th was adjudged a bankrupt. In an action on the receipt in the name of the officer for the benefit of the assignee of the debtor, *Held*, (1) That the attachment was dissolved by the taking of the receipt; and (2) That the officer's liability being thereby discharged, the receiptor's liability also ceased.

ON FACTS AGREED in the superior court for this county.

ASSUMPSIT.

On July 13, 1869, two harnesses and a wagon were attached by the plaintiff, a deputy-sheriff in and for this county, on a writ in favor of Enoch Martin and another, against one Little, as the property of Little, and, on the same day, this defendant, in order to relieve the property from attachment, gave this plaintiff a receipt, dated the same day, therein promising, *inter alia*, 'to pay the plaintiff, or his order, one hundred and twenty-five dollars on demand, or to redeliver the harnesses and wagon to the plaintiff or his successor in office, on demand,' etc.

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On the 25th day of September, 1869, Little filed his petition in the U. S. district court for this district, praying to be adjudged a bankrupt under the provisions of the U. S. bankrupt act of 1867, which prayer was duly granted on the following 27th.

On the 11th day of October following, Charles P. Mattocks, who prosecutes this action in the name of the attaching officer, was appointed assignee of said Little, bankrupt, and an assignment of all the property of Little duly made to him. On the 5th day of April, 1870, the plaintiff, by direction of said assignee, made a demand on the defendant for the delivery of the goods; and the defendant refused to deliver them.

The present action was commenced Dec. 14, 1870, and entered at the succeeding January term; and the action of *Martin* v. *Little* was pending when this action was commenced.

The court to render legal judgment upon the facts.

Charles P. Mattocks & Edward Fox, jr., for the plaintiff.

There are four undeniable propositions, perhaps axioms, in the law of attachment upon which this case must be determined.

First, the liability of the receiptor is determined by the liability of the officer to whom he receipts. *Sawyer* v. *Mason*, 19 Maine, 49; *Plaisted* v. *Horr*, 45 Maine, 380.

Second, upon the dissolution of the attachment the officer's liability to the plaintiff ceases. *Sprague* v. *Wheatland*, 3 Met. 416.

Third, although the officer's liability to the plaintiff ceases, he is still liable to the debtor and his legal representatives. *Cooper* v. *Mowry*, 16 Mass. 8.

Fourth, the messenger or the assignee in bankruptcy is the proper legal representative of the debtor, and where the attachment is dissolved, it is his duty to take possession of the attached property, whether in the possession of the officer or the receiptor. U. S. bankrupt act, § 14; *Penniman* v. *Freeman*, 3 Gray, 245; *Andrews* v. *Southwick*, 13 Met. 535.

An application of these principles to the present case is easy. The attachment of Little's property was made July 13, 1869.

The receipt was given the same day. All facts recited in the receipt are *prima facie* true. In this case the defendant introduced no evidence to disprove any one of them. It must be taken, therefore, as absolutely true, that there was a valid attachment. *Lyman* v. *Lyman*, 11 Mass. 317.

That the property attached was the property of Little. *Burt* v. *Perkins*, 9 Gray, 317.

That the real value of the goods is the value mentioned in the receipt. *Smith* v. *Mitchell*, 31 Maine, 287.

That the property after attachment was delivered to the receiptor, and was kept by him in accordance with his agreement 'safely to keep' down to the time of the demand upon him by the officer. *Spencer* v. *Williams*, 2 Verm. 209; *Allen* v. *Butler*, 9 Verm. 122.

Little petitioned in bankruptcy Sept. 25, 1869, and was adjudicated a bankrupt the 27th. Charles P. Mattocks was afterwards appointed his assignee and a transfer to him of all the property and estate of the bankrupt duly effected in accordance with the provision of § 14 of the U. S. bankrupt act, whereby the attachment of Martin & Waterhouse, not being four months old at the time of the commencement of proceedings in bankruptcy, was dissolved.

Immediately upon the dissolution of this attachment the sheriff's liability to Martin & Waterhouse ceased. With the liability of the sheriff ceased the liability of the receiptor likewise. The reasoning that because the attachment is in one sense dissolved by the giving of the receipt, as in *Waterman* v. *Treat*, 49 Maine, 309, therefore the dissolution of the attachment accomplished by force of the bankrupt act works no further change upon the respective rights and liabilities of the parties, is fallacious. The giving of the receipt dissolves the attachment only as regards third parties, *bona fide* purchasers, or creditors making second attachment. *Perry* v. *Somerby*, 57 Maine, 557.

Between the first attaching creditor, the debtor, and the receiptor, the attachment remains in force until dissolved by law, and the liability of the receiptor to the attaching creditor depends upon the existence of the attachment, and ceases with the dissolution of the

same. *Sprague* v. *Wheatland, ubi supra; Butterfield* v. *Converse*, 10 Cush. 317; *Ives* v. *Sturges*, 12 Met. 462; *Perry* v. *Somerby, ubi supra.*

The attachment being gone, the sheriff is bound to deliver to the true owner, or his representative, on demand. It is partly to guard himself in this respect that the sheriff inserts in his receipts an agreement on the part of the receiptor to redeliver on demand. In this case the assignee called upon the sheriff for the property, the sheriff called upon the receiptor. The receiptor, for some unknown reason, has refused to redeliver it, and his liability is fixed at the amount mentioned in the receipt, $125, with interest from the date of demand, April 5, 1870.

H. P. Deane & B. D. Verrill, for the defendant.

APPLETON, C. J. This is an action on an officer's receipt for property attached.

The attachment was made July 13, 1869, in a suit, *Enoch Martin* v. *Charles J. Little.* On Sept. 25, 1869, Little filed his petition to be adjudged a bankrupt, and on 27th of the same September he was so adjudged.

The attachment not having been made four months previous to the proceedings in bankruptcy is dissolved. As the attachment was dissolved by operation of law, the officer's liability to the creditor, at whose suit the attachment was made, is at an end.

The receipt bears the same date as the attachment. It was given to relieve the property from attachment. It is in the alternative, to pay a certain specified sum or deliver the goods attached. The attachment, upon giving this alternative receipt, was dissolved. *Waterman* v. *Treat*, 49 Maine, 309. Being dissolved, the debtor held the property attached divested of all lien. He might sell it, or it might be attached as his property. The control of it at once passed to him, and it nowhere appears that he has parted with such control.

Upon the dissolution of the attachment, as it is admitted that the goods attached went into the possession of the debtor, the officer

does not require their possession for the purpose of returning them to him, for he has them. Nor does he need them to return to his assignee in bankruptcy, for he must look to the bankrupt who has the goods, and not to the officer who has them not.

In *Perry* v. *Somerby*, 57 Maine, 552, the attachment was made more than four months before the petition in bankruptcy of the defendant in the suit in which the attachment was. The officer, consequently, was liable to the attaching creditor, and the receiptor to the officer. The receipt given was not in the alternative as in the one under consideration, and the receiptor was there properly held liable as the bailee of the sheriff. The case, therefore, does not apply.

The liability of the receiptor is limited to and determined by that of the officer. As the officer is not liable to either plaintiff or defendant in the suit on which the attachment was made, neither is the receiptor, and a nonsuit must be entered. *Plaisted* v. *Horr*, 45 Maine, 380; *Sawyer* v. *Mason*, 19 Maine, 49; *Butterfield* v. *Converse*, 10 Cush. 317; *Shumway* v. *Carpenter*, 13 Allen, 68.

Plaintiff nonsuit.

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

INHABITANTS OF RAYMOND *vs.* INHABITANTS OF NORTH BERWICK.

Pauper. Illegitimate child—settlement of.

Under Pub. Laws of 1821, c. 122, § 2, illegitimate children followed, and had the settlement of their mother at the time of their birth.

An unemancipated, illegitimate, minor child, who lived with its mother on March 21, 1821, did not follow the new settlement thus gained by its mother, but retained the one derived from its mother at its birth.

ON EXCEPTIONS.

ASSUMPSIT for pauper supplies furnished by the plaintiffs to one Geo. A. Jones, a pauper found in need of relief in the plaintiff town.

The only question raised was that of settlement.

It appeared on the part of the plaintiffs, that certain pauper supplies were furnished by them to the pauper, found in their town, and in need of relief, in 1858; that the defendants, upon the usual seasonable notice given, paid the bill; that the pauper was found in Gray, in 1860, in need of relief, was supplied by that town, and that upon being notified, the defendants paid that bill.

The plaintiffs made out a *prima facie* case and stopped.

It appeared, on the part of the defendants, that Tobias Jones, the grandfather of George A. Jones, the pauper, had his settlement in North Berwick, and that he was the father of Levi Jones, who was the father of the pauper; that Tobias Jones was a mulatto, and that Abigail Green, his reputed wife, and the mother of Levi Jones was a white woman; that Levi Jones, a minor, together with his father, Tobias Jones, and his mother, brothers, and sisters, lived together as one family in the defendant town on March 21, 1821, and that they removed from that town within three years thereafter, and before Levi arrived at the age of twenty-one years, and that he never afterwards resided there.

The plaintiffs claimed that Levi Jones gained a derivative settlement in the defendant town from his father Tobias; and if he did not gain such settlement through his father, then through his mother, or in his own right, by actually dwelling and having his home in the defendant town on March 21, 1821.

The defendants contended that the marriage between Tobias Jones and Abigail Green was void, and that Levi Jones was therefore illegitimate and followed the settlement of his mother, and did not gain a settlement in his own right by his residence in North Berwick in 1821, nor derivatively from his father, Tobias Jones, and that the marriage between Levi Jones and his wife was void, and that George A. Jones, the pauper, followed and had the settlement of his mother, and not the settlement of Levi Jones.

But the court instructed the jury, that if the parents of Levi Jones were in fact married to each other before he was born, and afterwards lived together as husband and wife in good faith, believ-

ing the marriage to have been legal, and there was nothing to invalidate it except thatthe father was a mulatto and the mother a white woman, and the father, mother, and child were living together as one family in the defendant town, March 21, 1821, so that they all actually dwelt and had their homes there on that day, and neither of them had, within one year previous to that date, received support or supplies from any town as a pauper, it was immaterial whether Levi was to be regarded as the legitimate child of his father, or the illegitimate child of his mother, for if the former, he thereby acquired a settlement from his father, in the defendant town; and if the latter, he gained one in his own right, by actually dwelling and having his home there on that day. To this ruling the defendants alleged exceptions.

Howard & Cleaves, for the plaintiffs.

1. The pauper had his settlement in the defendant town, as admitted by the payment of bills to Raymond, in 1858, and to Gray, in 1860. *Harpswell* v. *Phipsburg*, 29 Maine, 313, 317; *Hallowell* v. *Augusta*, 52 Maine, 216.

2. If the marriage of Tobias Jones and Abigail Greene were void, she gained a settlement in the defendant town in her own right, it not appearing that she ever resided in any other town.

There is no evidence that the marriage was solemnized in this State, and was not therefore illegal by the laws of this State. *Medway* v. *Needham*, 16 Mass. 159.

3. Levi Jones was the legitimate son of Tobias, and acquired a derivative settlement from him in the defendant town; and the pauper took his father's derivative settlement. Levi's marriage to a white woman was not prohibited by law. *Medway* v. *Natick*, 7 Mass. 88; Pub. Laws of 1821, c. 70, § 2.

4. If Levi was an illegitimate son by reason of the void marriage of his mother, then as he, a minor, together with his father, mother, brothers, and sisters were living together as one family, in the defendant town, on March 21, 1821, he would gain a settlement there, at that time, in his own right. Pub. Laws of 1821, c. 122, § 2, mode 7.

Under such circumstances, the law would regard him as fatherless, and emancipated from his mother, and would confer on him a settlement. He would be a child of the State, and protected by her laws. *Lubec* v. *Eastport*, 3 Maine, 220.

5. *Biddeford* v. *Saco*, 7 Maine, 272, affords no precedent for the defense. There the illegitimate children on March 21, 1821, were living with their mother, comprising part of her family, and dependent upon her, and therefore not emancipated. In case at bar, the father was the head of the family, and *de facto* controlled it; and this worked the emancipation of the son from his mother.

A. A. Strout, for the defendants.

APPLETON, C. J. This is an action of assumpsit to recover supplies furnished one George A. Jones, a pauper, found in distress and in need of relief in the plaintiff town. The settlement of the pauper, if in the defendant town, was derivative from his grandfather.

Tobias Jones, the grandfather of the pauper, had his settlement in the defendant town. He was a mulatto, and Abigail Greene, his reputed wife, and the mother of Levi Jones, the father of the pauper, was a white woman. Their marriage was void, and their children illegitimate. *Bailey* v. *Fiske*, 34 Maine, 77.

Levi Jones, the case finds, was living with his father, in the defendant town, on March 21, 1821. At that time he was a minor. There is no evidence that he had been emancipated from the control of his mother, and emancipation is not to be presumed. Being illegitimate and not emancipated by statute 1821, c. 122, § 2, he had the settlement of his mother at the time of his birth.

Where that settlement was at the time of the birth of the son, is nowhere shown. It was for the plaintiffs, to entitle them to recover, to prove it to have been in the defendant town. This they have failed to do.

Nor, though the mother might gain a new settlement by residence in the defendant town on March 21, 1821, would the settle-

ment of the son, while a minor, accompany or follow that of the mother. It was held in *Biddeford* v. *Saco*, 7 Greenl. 270, that illegitimate children, under age, living with the mother on March 21, 1821, do not follow a new settlement acquired by her residence in some town in this State on that day, but retain the settlement, which she had at their birth.

It is not pretended that the pauper had, in any way, acquired, in his own right, a settlement in the defendant town. It is seen that his father not having any, he did not gain one by derivation, nor by residence. *Exceptions sustained.*

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

WILLIAM ELDER and another *vs.* GRANVILLE D. MILLER.

Chattel mortgage—description of property in—parol evidence.

A duly recorded chattel mortgage of a livery stock, describing the horses as 'eight horses,' 'being the same now in stable No. 19, Silver street,' is sufficient as against a subsequent purchaser of two of the horses, although at the time the mortgage was executed, for some time previous and subsequent thereto, many other horses not owned by the mortgagor were constantly boarded there.

Parol evidence to establish the identity of personal chattels embraced in a mortgage, but not particularly described therein, is admissible.

ON EXCEPTIONS to the rulings of *Goddard*, J., of the superior court for this county, who reported the case as follows:

TROVER for two horses. Plea, general issue.

Plaintiffs claim as mortgagees, by virtue of a mortgage dated Dec. 3, 1870.

Defendant claims by purchase from the mortgagors, made after recording of the mortgage, he being ignorant of its existence.

And it was shown as follows: Mortgagees never took actual possession of the mortgaged property.

In October, 1870, the mortgagors purchased from Geo. B. Jordan & Co. certain stable property, including eight horses, two of which were the horses in suit. And said eight horses, purchased of Jordan & Co., were in the stable described in the mortgage when the mortgage was made, and it is not questioned that, as between the parties to the mortgage, said eight horses were thereby conveyed.

At the time the mortgage was made, and for some time previous and subsequent thereto, from twelve to fifteen other horses were constantly kept in said stable, as boarders, not being the property of the mortgagors; and there were no horses kept there which were the property of mortgagors, except said eight horses purchased of Jordan & Co., which eight horses were a part of their stable stock, and were constantly in use by them.

The execution of the mortgage having been duly proved, defendant objected to the admission of the same as evidence of the plaintiff's title as against the defendant, on the ground that it did not legally and sufficiently describe the horses mortgaged; but the facts being as stated above, the court admitted the mortgage in evidence to sustain the plaintiff's title.

And thereupon the defendant alleged exceptions.

W. L. Putnam, for the defendant.

M. P. Frank, for the plaintiff.

APPLETON, C. J. This is an action of trover for two horses. The plaintiffs claim under a mortgage from Jordan & Rice, dated Dec. 3, 1870, and duly recorded.

The defendant claims as a purchaser of the horses in controversy subsequently to the recording of the mortgage.

Jordan & Rice, at the time of giving the mortgage to the plaintiff, were keeping a livery stable. The mortgagors describe the stable, the property mortgaged, as carriages, phaetons, eight horses, etc., 'the said property being the same now in said building or stable.'

The only objection taken to the plaintiff's right to recover, is that the description of the horses is not sufficiently definite. But the mortgagors warrant their title to the property mortgaged. They describe the building in which it then was. The fact that other individuals were boarding their horses at the same stable does not affect the plaintiff's right to recover. Parol evidence is necessarily admitted to show the identity of the property mortgaged. In *Brook* v. *Aldrich*, 17 N. H. 443, the mortgage was of two horses belonging to the mortgagor, and the description was held sufficient. In *Harding* v. *Coburn*, 12 Met. 333, a mortgage of 'all and singular, the stock, tools, and chattels belonging' to the mortgagor, 'in and about the wheelwright's shop occupied' by him, was held valid. In discussing the necessity of resorting to parol evidence, to identify the mortgaged property, Dewey, J., says, 'take the case of live stock on a farm; the general description would be 'all my stock on my farm.' The particulars are, 'ten cows, two yoke of oxen,' etc.; but in both you must rely on other sources than the mortgage for the identity of the property mortgaged.'

The cases are numerous in this State in which descriptions like that in the mortgage under consideration have been sustained. *Chapin* v. *Crane*, 40 Maine, 561; *Skowhegan Bank* v. *Farrar*, 46 Maine, 293.

The evidence to show that the horses in controversy were owned by the mortgagors at the time of the mortgage, and were then in the stable, and embraced within the mortgage, was properly received. *Exceptions overruled.*

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

EBENEZER MOULTON *vs.* INHABITANTS OF RAYMOND.

Commutation.

A town cannot constitutionally raise money to reimburse one of its citizens for the amount paid by him as commutation under the act of congress of March 3, 1863, c. 75, § 13.

Thompson v. *Pittston*, 59 Maine, 545, re-examined and reaffirmed.

ON REPORT from the superior court of this county.

ASSUMPSIT on the following note indorsed by the payee to the plaintiff.

'For value received by the town of Raymond, and pursuant to a vote passed by said town at a legal meeting of the inhabitants thereof, holden at the town-house in said Raymond on the third day of August, A. D. 1863, and which vote is made a part of these presents, the inhabitants of said town, in their corporate capacity, promise to pay Barn. H. Nason, or order, the sum of three hundred dollars within one year from the date hereof, and interest thereon annually, at the treasurer's office in the town of Raymond until said sum shall be paid. In testimony of which vote and promise, the undersigned selectmen and treasurer of said town, in our official capacity, hereunto subscribe the name of said town, at Raymond on this fifth day of September, A. D. 1863. Inhabitants of the town of Raymond by,

IRA WITHAM, } *Selectmen for and in*
FRANCIS SMALL, } *behalf of said town.*

JOHN NASH, *Treasurer.*'

The other facts sufficiently appear in the opinion.

H. J. Swazey & Son, for the plaintiff.

Howard & Cleaves, for the defendants.

APPLETON, C. J. The second article in the warrant calling a town meeting of the inhabitants of Raymond, on Aug. 3, 1863, was, 'To see if the town will pay a bounty to drafted men or substitutes when they are mustered into the United States' service, and if so, how much.'

Upon this article, the vote was in the negative 'by vote of twenty-four yeas and forty-eight nays.'

The question presented for the consideration of the town by the second article in the warrant would thus seem to have been finally disposed of.

The town then voted 'to pay a bounty of $300 to every man that is drafted, and may be accepted by the board to examine drafted men, and that the selectmen and treasurer be authorized to raise the same on the credit of the town.'

It will be perceived that by this vote there was no requirement that the individual drafted and accepted should be mustered into the service of the United States. It was enough that he was drafted and liable to do duty, though he should never enter the service of the United States. It was a vote to pay the commutation money, which was allowed by the Act of Congress, c. 75, § 13, approved March 3, 1863, to be paid in lieu of actual service, to all who were drafted and liable to do duty, but who paid commutation money.

The liability of one drafted, but who will neither serve nor procure a substitute, to pay the sum fixed as and for commutation, is a personal liability, which he is as much bound to discharge as he is to pay a tax assessed against him, or to discharge a debt due, or to do or perform any act, the doing or the performance of which is imposed by contract or by statute. A town cannot raise money gratuitously to discharge the pecuniary obligations of its citizens.

The payee of the note in suit was never mustered into the military service of the United States. He chose to pay the sum fixed as commutation. The town could not constitutionally raise money to pay this sum for him, any more than it could to pay any debts he might owe. It is not a legitimate public purpose to raise money to give away to private individuals. This question was very fully and carefully considered in *Thompson* v. *Pittston*, 59 Maine, 545, and of the soundness of the conclusions to which this court then arrived, we have no doubt. *Plaintiff nonsuit.*

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

CHARITY GRIFFIN *vs.* WILLIAM PINKHAM.

Amendment.

A writ sued out in the name of 'Charity Griffin, to wit, Charity Pinkham,' may be amended by striking out the words—'to wit, Charity Pinkham.'

ON EXCEPTIONS.

THE plaintiff in her writ described herself as Charity Griffin, to wit, Charity Pinkham. The defendant appeared at the return term and filed a plea in abatement seasonably to the effect that the plaintiff could not hold and sue by two names at the same time; the plaintiff asked leave to amend by striking out the words 'to wit, Charity Pinkham,' and prosecuting her suit in the name of Charity Griffin, to which the defendant objected. But the presiding judge ruled the amendment to be legal, and allowed the plaintiff to amend by striking out the words aforesaid, and to prosecute her action in the name of Charity Griffin. To which ruling, allowing the amendment, the defendant excepted.

D. J. Simmons, for the plaintiff.

H. Orr, for the defendant, cited R. S., 1857, c. 81, § 26; c. 82, § 12. *Woodward* v. *Ware*, 37 Maine, 563; *White* v. *Curtis*, 35 Maine, 534; *Roach* v. *Randall*, 45 Maine, 438; *Evans* v. *King*, 1 Willis, 554.

WALTON, J. Amendments of mere clerical errors are allowed with great liberality. Not only amendments of the cause of action, but amendments of the names of the parties, of plaintiffs as well as defendants, are an every-day occurrence. Thus, in *Wight* v. *Hale*, 2 Cush. 486, the plaintiff's name was amended by substituting Wight for Wright. In *Elder and Deacons of Baptist Church in Lowell* v. *Bancroft*, 4 Cush. 281, the name of the plaintiffs was amended by striking out the words 'Elder and,' and thus substituting the name of an entirely different corporation from the

one first described; for there were in fact two distinct corporations, the one bearing the name first inserted in the writ, and the other the name afterwards inserted by way of amendment. In *Crafts* v. *Sykes*, 4 Gray, 194, the plaintiff's name was amended by substituting 'Justus Crafts' for 'Justus Stark,' the attorney making the writ having, by mistake, inserted the name of the former instead of the name of the latter, there being in fact two persons bearing severally those names. Similar amendments are of daily occurrence, and it is unnecessary to multiply the citation of cases.

In this case the plaintiff's attorney had, for some unexplained reason, described his client as follows: 'Charity Griffin, to wit, Charity Pinkham.' The presiding judge allowed him to amend by striking out the words 'to wit, Charity Pinkham.'

That the court possessed the power to allow the amendment we cannot doubt. *Exceptions overruled.*

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

JOSHUA ALLEN and others, petitioners in equity, *vs.* INHABITANTS of JAY and others.

Towns not constitutionally authorized to loan credit to individuals to engage in manufacturing.

The legislature cannot constitutionally authorize towns to loan their credit to such persons as, in consideration thereof, will engage therein in manufacturing for their private emolument.

Thus the defendant town, at a meeting legally called therefor, voted to loan its credit to Hutchings & Lane, to the amount of ten thousand dollars, at six per cent annually, issue its bonds therefor, and exempt H. & L.'s mill and lumber from taxation for ten years, provided H. & L. would invest twelve to thirteen thousand dollars, at or near Jay Bridge, in building a steam saw-mill with box machinery, and in putting in one run of stones for grinding meal; keep the same in good repair, and amply insured; secure the town by mortgage on the property, at the rate of one dollar for every seventy-five cents thus loaned, and pay all interest, and ten per cent on the principal annually, after three

years; and carry on said manufacturing business not less than ten years. Thereupon the legislature enacted, that, whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchings & Lane, in accordance with a vote taken by said town for the encouragement of mannfactures in said town. On petition for injunction, *Held*, that the act of the legislature is unconstitutional; and that the respondents be perpetually enjoined from issuing the bonds.

It is for the court, and not the legislature, to determine whether the use for which private property is taken, in a given case, is or is not a public use.

On petition by Joshua Allen and nine other taxable inhabitants of the town of Jay, against the inhabitants of the town, and Rodolphus P. Thompson, John Hanson, and Warren Leland, selectmen of the town.

The petition alleges substantially,—

That the petitioners are taxable inhabitants of Jay; that the town, on April 21, 1870, at a legal meeting called therefor, passed the following vote (see opinion); that so much of the vote as assumes to authorize the town to loan its credit for the amount and purpose, and upon the conditions therein named, and the authority assumed thereby to be conferred upon the selectmen of Jay, to issue bonds in the manner and for the purposes indicated in said vote, were and are without authority of law, the town having no legal right or power to authorize the acts complained of, and which, if done, will be in derogation of the rights of the petitioners and other tax-payers in town; and that the petitioners are informed and believe it to be the intention of the selectmen named to issue the bonds, under the vote, to the amount of $10,000 to said Hutchings and Lane, in accordance with the vote.

And they pray that the selectmen named, and their successors, be enjoined from issuing or negotiating such bonds, for the purposes and to the uses named or contemplated in said vote, and that the inhabitants and their officers and servants be alike enjoined,—and for process.

On March 2, 1871, notice was ordered upon the respondents returnable on March 11, to be heard by the judge who should preside at the March term in this county, the hearing to be whether or not

a temporary injunction should issue. At the hearing. a temporary injunction was granted. Thereupon it was agreed to submit the case to the law court, upon the facts stated, together with Private Laws of 1871, c. 716. And if the complainants were entitled to the relief claimed, the court to issue the proper decree.

Robert Goodenow, for the petitioners.

S. Belcher, for the respondents.

APPLETON, C. J. A town meeting of the inhabitants of Jay was duly called to see if the town would loan its credit to Hutchins & Lane, on certain terms, provided 'said Hutchins & Lane shall move their new saw-mill and box factory from Livermore Falls to Jay Bridge, and also put in operation one run of stones for grinding meal, and establish their manufacturing business as soon as the month of September, A. D. 1870, at or near Jay Bridge.'

At a legal meeting held upon this call on April 19th, and by adjournment on April 21, 1870, the town 'voted to loan their credit to the amount of ten thousand dollars, at six per cent annually, to H. W. Hutchins and B. R. Lane, provided said Hutchins & Lane will invest the amount of from twelve to thirteen thousand dollars in building a steam saw-mill, box factory machinery and land; also to put in one run of stones for grinding meal, to be located at or near Jay Bridge, and to keep the above-named property in good repair, and also keep it amply insured, and to cause said manufacturing business to be carried on for a term not less than ten years, said Hutchins & Lane to pay all the interest, and ten per cent of the principal annually, after three years,' the town to be secured by a mortgage of the mill, machinery, and land, 'at the rate of one dollar for every seventy-five cents thus loaned by said town, and the selectmen are hereby authorized to issue town bonds for the above amount, payable in yearly instalments after three years, at six per cent interest annually, viz.: one thousand dollars the first year, and nine hundred dollars each year for the ten succeeding years, providing the whole amount shall be necessary to establish said manufacturing business.'

The legislature passed an act, c. 716, approved Feb. 25, 1871, in the following terms:

'Whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchins & Lane, in accordance with a vote taken by said town on the 21st day of April, eighteen hundred and seventy, for the encouragement of manufacturing in said town.'

The complainants, ten taxable inhabitants of Jay, under R. S. c. 77, § 5, by which this court has equity jurisdiction, 'when counties, cities, towns, or school districts, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation, or to pay money from their treasury,' have filed a bill in equity, praying that the defendants and all their officers may be enjoined from issuing certain bonds, duly described in the bill, the issue thereof, being for a purpose not authorized by law.

The purpose is obvious, and the inquiry is, whether the purpose is one authorized by law?

Whether the loan be of town bonds or of money, as, if the loan be of bonds, the town must ultimately be liable for their payment, and as the payment is to be raised by taxation, matters not. The question proposed is whether the legislature can authorize towns to raise money by taxation, for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Is the raising of money to loan to such persons as the town may determine upon as borrowers, a legal exercise of the power of taxation? Ultimately, it will be found that the question resolves itself into an inquiry, whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine.

A tax is a sum of money assessed under the authority of the State, on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the

raising of money for public uses, and exclude the raising if for private objects and purposes. 'I concede,' says Black, C. J., in *Sharpless* v. *Mayor*, 21 Penn. 167, 'that a law authorizing taxation for any other than public purposes, is void.' 'A tax,' remarks Green, C. J., in *Camden* v. *Allen*, 2 Dutch. 839, 'is an impost levied by authority of government, upon its citizens or subjects for the support of the State.'

'No authority, or even *dictum*, can be found,' observes Dillon, C. J., in *Hanson* v. *Vernon*, 27 Iowa, 28, 'which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the governmental divisions of the State.'

If there is any proposition about which there is an entire and uniform weight of judicial authority, it is that taxes are to be imposed for the use of the people of the State in the varied and manifold purposes of government, and not for private objects or the special benefit of individuals. Taxation originates from, and is imposed by and for the State.

In this case the vote of the town of Jay, and the act of the legislature passed to enable the town to carry that vote into effect, are both before us. Taking the vote of the town in connection with the article in the warrant calling the meeting, it seems that Hutchins & Lane had a 'new saw-mill and box factory at Livermore Falls,' which they were then carrying on at that place, and the town of Jay proposed to loan their credit for ten thousand dollars, and issue bonds of the town for that amount, if they would remove their saw-mill and box manufactory and put in one run of stones for grinding meal, to be located at or near Jay Bridge. The vote contemplates a mere matter of private business, the removing of certain business from one town to another, whereby the town to which the removal is made is expected to be a gainer by encouraging manufactures therein, and the town from which the removal is made is to be a loser to precisely the same extent by their removal therefrom.

Capital naturally seeks the best investment, or its owners do.

Those who by industry and economy have become capitalists are more likely to invest it well than those who, having gained none, have none to lose. The sagacity shown in the acquisition of capital, is best fitted to control its use and disposition.

It is obvious, that, if the removal from Livermore Falls would be made without special inducement, in other words, if the prospect of profit at Jay Bridge were sufficient to induce Messrs. Hutchins & Lane to move their saw-mill, etc., without any special offer of the defendant town, there would be no necessity for making such offer. It is not readily perceived that raising money under such circumstances would be of public benefit. If they should not so deem it, and it is not advantageous on the whole for them to make the removal, then it is a premium offered for them to make a removal injurious to their interest, and which they would not otherwise make, and of sufficient magnitude to induce them to meet the probable loss. Still less can it be conceived to be of 'benefit' in such case to raise money to promote losing enterprises.

It is said that it induces enterprises which would not otherwise be undertaken. But why not undertaken? Every man is the best judge of his interest. There may be exceptions, but such is the general rule. Now why is not capital invested at Jay Bridge? The answer is obvious. No one having capital to invest or loan, is willing, for any existing prospect of gain, to invest or to loan money to be thus invested. The want of existent capital or sufficient probability of profit, is the reason why the proposed undertaking has not been carried into operation.

The idea seems to be that thereby capital would be created. But such is not the case. Capital is the saving of past earnings ready for productive employment. The bonds of a town may enable the holder to obtain money by their transfer as he might do by that of any good note. But no capital is thereby created. It is only a transfer of capital from one kind of business to another.

Nor is capital created by the raising of money by taxation. If the wealth of the country were increased by taxation, the result would be, the higher the taxes the more rapid the increase of its

wealth. But the reverse is the case. The wealth of the country is lessened by the time spent in assessing and collecting taxes, and by the taxes collected, if unproductively expended.

Is the removal of the new saw-mill, etc., by Messrs. Hutchins & Lane, a public or private enterprise? Hutchins & Lane are now at Livermore. They propose to remove to Jay Bridge. It is their interest alone which they will consider. But why remove? It is no more a public purpose than any other removal of manufacture from one town to another. The town of Jay is to have no share in the anticipated profits of Messrs. Hutchins & Lane. The State is not to be a partaker of their gains. The new mill, etc. being removed, the town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation. Their grists are ground for the same customary toll as those of others.

The industry of each man and woman engaged in productive employment is of 'benefit' to the town in which such industry is employed. This can be predicated of all useful labor—of all productive industry. But because all useful labor, all productive industry conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? If so, then there is no kind of labor, no manufacturing for which the minority of a town may not be assessed for the benefit of an individual. There is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill. The sailor, the farmer, the mechanic, the lumberman, are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. Hutchins & Lane. Our government is based on equality of right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and par-

ticular and special industries at the cost and charge of the rest of the community.

Unless there is something peculiar and transcendental in the new saw-mill to be removed, and in the grist-mill to be erected, and in the labor of Messrs. Hutchins & Lane, it must stand in the same category with other saw-mills and grist-mills, which are and have been, and will be built, and other laborious industries, which are pursued for private gain and emolument.

The alleged justification for raising money to be loaned to private individuals for their own profit, arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. The town has lost all power over the use and disposition of their loan. True, it may sue for any violation of the contract, if any is made, in reference to the manner of using the bonds or money loaned. The loan, when once made, becomes like all loans. The other borrower has it. It is his. The loan effected, there is the end of the matter.

The question recurs, can the town raise money by taxation, merely to loan again to individuals for their own purposes; for it has been seen that the loan effected, the town loaning cannot control the use of the loan, and the loan is merely for the benefit of the individual borrowing. The bonds to be loaned, or the money to be loaned are in the hands of the loaning committee. It is to be loaned for a longer or shorter time, upon security good, bad, indifferent; fortunate, if only the latter. Is the loaning of bonds or money by the town, in any respect different from the loaning of money by individuals? Does the mere fact that the town makes the loan irrespective of any other consideration make the loan a public 'benefit' more than, or different from any other loan by an individual or banking corporation having funds to loan?

That a town cannot raise money to divide again among its inhabitants was conclusively settled, long ago, in this State, in *Hooper* v. *Emery*, 14 Maine, 379. 'To contend,' observes Shepley, J.,

'that towns have the power to assess and collect money for the purpose of distributing it again according to numbers, is to ask for a construction, not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation employed in giving powers to towns to grant money. It not only does this, but it asks the court to give a construction to statutes, which would authorize towns, if so disposed, to violate the principles of moral justice. For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town had passed into and out of the treasury; and until an equalization of property had been effected, as nearly as it could be expected to be by placing it all in one common fund, and then dividing it by numbers, *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual industry and exertion. It would authorize a violation of what is asserted in our 'declaration of rights, to be one of the natural rights of men, that of acquiring, possessing, and protecting property. Such a construction would authorize a violation also of that clause in the constitution of this State, which provides that private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it. No public exigency can require that one citizen should place his estates in the public treasury for no purpose, but to be distributed again to those who have not contributed to accumulate them, and who are not dependent on public charity.'

But whether the money raised is to be distributed *per capita* or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated.

If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries not thus aided.

If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected.

If it were proposed to pass an act enabling the inhabitants of the several towns by vote to loan horses or oxen, or to lease houses to any individual for his private gain, whom the majority may select, the monstrous absurdity of such legislation would be transparent. But the mode by which property would be taken from one or more and loaned to others can make no difference. It is the taking to loan, or otherwise disposing of property for private purposes, against the consent of the owner, that constitutes the wrong, no matter how taken. Whether the horse be taken from the reluctant owner to be loaned to some favored livery-stable keeper, or the loan be of money raised by the collector on its sale or by the payment of the tax to avoid such sale, does not change the result. In either case the horse or the value thereof is loaned by others, without the owner's consent. If a part of one's estate may be taken from him and loaned to others, another and another portion may be taken and loaned until all is gone.

By the constitution of this State, 'certain natural inherent and unalienable rights' are guaranteed to the citizens of this State, 'among which are those of . . . acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.' What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer by gift or loan, to certain favored and selected individuals through the medium of direct taxation, such portions of one's estate as they may deem expedient. Men only earn when they are protected in the acquisition, possession, and enjoyment of their property. The barbarous nations of Asia have neither industry nor capital, the result

of saving, for the reason that property is without protection. Where is the protection of property if one's money or his goods can be wrested from him and loaned to others? Where is the difference between the coerced contribution of the tax-gatherer to be loaned to individuals for their benefit, and those of the conqueror from the inhabitants of the conquered territory? If one's money may be taken from him without and against his consent, to be loaned to an individual whom he would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, what protection is afforded him? What would be thought of a statute requiring individuals to give their notes to others to be discounted for their special benefit, or to raise money to be thus loaned? What differs it whether individuals are compulsorily required to loan their notes on time to others, to be discounted for such others, or the bonds of the town are issued to be loaned, which the citizens may ultimately be compelled to pay? All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others, or to pay his contributory share of loans of money or bonds made to others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority.

Further, by the constitution, 'private property shall not be taken for public uses without just compensation, and unless public exigencies require it.'

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for public use when some public exigency requires it, and not otherwise.

But this is not the case of taking private property under the right of eminent domain, but of taking it under the power of taxation. But the power of taxation, as well as the right of eminent domain, has its limits, which cannot be constitutionally transcended.

In his answer to certain inquiries proposed by the legislature of this State, 58 Maine, 616, Mr. Justice Tapley uses the following clear and expressive language: 'Without entering at this time into

a discussion, or recapitulation of the reasons for the rule and the necessities which require it, I hold that the taking of private property, against the will of the owner, must find a justification in some public use and under some public exigency, and accompanied by a just compensation, and this is true whether the property be a direct seizure of it in specie and irrevocably committing it to a use, or taken by the indirect method of a loan, accompanied by some fancied or real security for a subsequent reimbursement.'

'Some distinction has been sought to be made between the right to seize specific articles of property for public use, and obtaining money through the ordinary forms of taxation, and we sometimes have a justification under the taxing power of the government. I am not able to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right, as described by Judge Story, "of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty to public purposes. The difference is in the mode of taking only."'

Three elements are required to bring a case within the provision of the constitution under consideration — a public use, a public exigency, and a just compensation.

Is the removal of a new saw-mill by the owners from one town to another adjacent, to be there carried on by themselves for their own profit, for the public use? Is the building of a new grist-mill, the toll to be taken by the builders, for the public use?

Is it any more for the public use than any other industry, the benefit of which incidentally results to the public, but which is carried on for private gain? If Messrs. Hutchins & Lane were to saw for the public without compensation, or grind all grists brought to their mill without toll, the saw-mill and the grist-mill might be deemed public, precisely as a court house or State house or highway is public; but it is not pretended that such is their intention. They remove because more sawing is to be done, and more tolls are to be taken. The charges are not to be lessened. The saw-mill and the grist-mill are private property, as are all other mills

and farms owned by individuals, carried on for their own use and profit, and enacting that they are for a public use, without changing the rights of the public in the least degree, as to their right to use them cannot alter the question. It is beyond the legislative power, by force of an enactment to make that public which is essentially private.

But a public use is not all. Is there any public exigency existing requiring the removal of the new saw-mill of Hutchins & Lane from Livermore Falls to Jay Bridge to be there carried on for their benefit? Does the public exigency require the building of a new saw-mill there? If there are such public use and public exigency, then anybody's land, or mill site and land, may be taken from him by vote of the town, and leased to a lessee to be selected and voted for by the majority, and his money may be wrested from him by the tax gatherer, to pay for the mill to be erected thereon.

The remarks of Mr. Justice Woodbury, in the *West River Bridge Co.* v. *Dix*, 6 How. 545, are very pertinent and applicable to the question under consideration. 'Nor do I agree that, in all cases of public use, property which is suitable or appropriate can be condemned. . . . But the doctrine that this right of eminent domain existing for every kind of public use, or for such use when merely convenient, though not necessary, does not seem to me, by any means, clearly maintainable. It is too broad, too open to abuse. When the public use is one, general and pressing like that often in war, for sites of batteries or for provisions, little doubt would exist as to the right.

'But when we go to other public uses not so urgent, not connected with precise localities, not difficult to be provided for without this right of eminent domain, and in places where it will be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for a public use for a marine hospital or State prison?

'So a custom-house is a public use for the general government, and a court-house or jail for the State; but it would be difficult to find precedent or argument to justify taking private property, with-

out consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure.'

But if there is no such exigency in the cases mentioned, even where the use is public, for taking private property without consent, still less can there be such exigency, where the use is private. If there is no such exigency as will justify the taking of a man's land for a jail or court-house, still less is there for taking his mill site which he may wish to occupy, or his money which he may wish to use, to lease the one and loan the other or any portion thereof, to enable Messrs. Hutchins & Lane to place their new saw-mill, or to erect a new grist-mill thereon, or to furnish them with funds to carry on their own business.

Neither is there found the just compensation which the constitution requires. The possible, contingent and indirect benefit resulting from a manufacturing business, the prospects of which are such that the manufacturer will not invest his own, the prospects of which are such that he either will not or cannot borrow funds for the purpose, and the only mode of obtaining them is the enforced contribution from those who have no funds to loan, or having them, have no faith in the object for which the contributory assessment and collection is made, nor in the individual for whose use and profit they are collected, assuredly is not the just compensation contemplated. If the result proves fortunate, which can hardly be anticipated, the indirect benefit is no just compensation to those who have no participation in the profits. If unfortunate, it is still more difficult to perceive the 'public benefit' likely to result from an unsuccessful and disastrous speculation.

That the money may possibly be repaid is not the just compensation justifying a compulsory loan. It may never be repaid, and then where is the compensation? Besides, the true question is, whether a man is to lend his own money or others are to loan it for him, and if he is unwilling to advance to a tax-gatherer for others to loan, the legislature can constitutionally authorize the sale of his property, or commit him to jail for non-payment.

The constitution further provides that no person shall 'be deprived of his life, liberty, property, or privileges, but by the judgment of his peers or the law of the land.' Property taken by taxation is not taken by the judgment of one's peers. A statute in direct violation of the essential principles of justice, is not 'the law of the land' within the meaning of the constitution. Every citizen holds life, liberty, and property by the law and under its protection. Every enactment is not of itself and necessarily the law of the land. To declare it to be so would render this portion of the constitution nugatory and ineffectual. The phrase is adopted from Magna Charta. 'As to the words from Magna Charta,' observes Johnson, J., in *Bank of Columbia* v. *Okely*, 4 Wheaton, 235, . . . after volumes spoken and written, with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' But can any one conceive a more arbitrary exercise of the powers of government than the enforced collection of money from one man to loan the same to another?

The constitutional provision that 'private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it,' by necessary implication prohibits the taking of private property for private purposes by legislative action.

If the use or the exigency for which property is taken is public, the determination of the legislature that the necessity of so taking it exists, is conclusive. *Spring* v. *Russell*, 7 Greenl. 273.

As private property can only be taken without the consent of the owner for public uses, and upon the payment of a just compensation and the existence of a public exigency requiring it to be so taken, it becomes important to consider whether the legislature are the final and conclusive judges of the existence of the public use, for which private property is authorized to be taken under the constitution. 'The provision in the constitution that no part of the property of an individual can be taken from him or applied to pub-

lic uses without his consent or that of the legislature, and that where it is appropriated to public uses, he shall receive a just compensation therefor, necessarily implies,' observes Bigelow, C. J., in *Talbot* v. *Hudson*, 16 Gray, 421, 'that it can be taken only by such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and an act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should, by statute, take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, when this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. This is a power in its nature essentially judicial, which they are by article 30 of the Declaration of Rights, expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits of the constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected when they are invaded by legislative acts which go beyond the limitations imposed by the constitution. In *Tyler* v. *Beecher*, 44 Verm. 651, the principle under discussion was considered by the court, and Mr. Justice Wheeler, in delivering the opinion of the court, uses the following language: 'Wherever the use is public, the legislature has full power to determine whether a necessity for taking for such use in any class of cases exists or not. *Williams* v. *School District*, 33 Verm. 271. And the legislature has the sole prerogative of determining as to the propriety of exercising the power it has upon the necessity that does exist in any class of cases. But the legislature has not the power to so determine that a use is a public use as to make the determination conclusive. The attempt, therefore, of the legislature to exercise the right of eminent domain, does not settle that it has the right; but the existence of the right in the legislature in any class of cases is left to be determined under the constitution by the courts.'

In delivering the opinion of the court in *Concord Railroad* v. *Greeley*, 17 N. H. 47, Gilchrist, J., in referring to a provision of the constitution of New Hampshire, similar to that of this State on this subject, uses the following language: 'The words are very comprehensive. It may include a multitude of objects. Their construction is a matter of judicial decision; because, however decided may be the opinion of the legislature that property in a given case has been taken for a public use, still, whenever the question arises whether it has been taken, within the meaning of the constitution, it becomes our duty to determine it. The opinion of the legislature is not final upon this, more than upon any other point, when claims, cognizable in this court, depend upon the question whether or not an act of that body is or is not in conflict with the constitution. Thus, even if the legislature should declare that an act taking the property of A and giving it to B as his private property, was an application of it to public uses, no one would contend that such a declaration made that public which, in its nature and object, was private.' It is obvious, if the determination of the legislature that the purpose for which private property is taken is for a public use, and that the necessity for so taking it exists, is conclusive, that all property is held subject to its uncontrolled will. But such it seems is not regarded to be the law, but it is for the court to determine whether the use for which property is taken is or is not public.

But to constitute a public use, that will justify the taking of private property under the constitution, it is not essential that all portions of the community should derive equal benefit from the purpose for which the property is taken. It may be taken, though only portions of the community are thereby benefited.

The line of demarcation between the case when property is taken for public, and when taken for private purposes, may not always be easily determined. But in the case before us, the removal by the owners of their mill, and the business connected with it, from one town to another, cannot, under the most liberal construction, be deemed other than a private matter. It may be a loss to one town

and a gain to another, but the removal is for the private gain of the persons moving. It is in no respect other than the moving of one business man with his implements of business from one place to another.

Neither can it be deemed a public use to raise money from all the inhabitants of a town to be given, or to be loaned to one of its number, to be used by him for his individual gain.

The very object of the provision of the statute, under and by virtue of which this bill is brought, was to prevent the misappropriation of the funds of a town when collected, or to prohibit the issuing of bonds hereafter to be paid from the moneys of the same when collected.

But even if the moving of a new saw-mill from one town to another adjacent, or the building of a new grist-mill, the moving being for the benefit of the owners of the mill, and the building of the grist-mill for the benefit of the builders, or the giving or loaning money to produce such results for such purpose, were by some strange perversion of language from its ordinary acceptation to be deemed a public use, though the public have no more right to use it than they have any other property of individuals; and if by strength of imagination a public exigency could be perceived in making such change of location and such new erection, or in giving or loaning for such purposes, and a just compensation could be found when there is or may be none whatever, and it were to be deemed a just protection of property that a majority might loan the property of a minority, or incumber it with debts for private objects against the will and protestations of such minority, still the complainants are entitled to have the injunction heretofore granted made perpetual. The legislature have not said that the removal of the new saw-mill of Messrs. Hutchins & Lane, or their building a grist-mill with one run of stones is for the 'public use,' or is required by any public exigency, but many things may be for the 'benefit' of Jay, and not for public use. Many things may be for the 'benefit' of the people of the State, which are not required by any existing 'public exigency.' All the legislature seem to have deter-

mined is that Jay affords a better site for the saw-mill and grist-mill of Messrs. Hutchins & Lane than the one occupied by them in the town of Livermore.

The constitution of the State is its paramount and binding law. The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates, in whole or in part are thus confiscated. No surer or more effectual method could be devised to deter from accumulation—to diminish capital, to render property insecure, and thus to paralyze industry.

Injunction made perpetual.

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

DICKERSON, J., concurred in the result upon the principles stated in his opinion in 58 Maine, 600–606.

JOSEPH VEHUE, by *pro. ami*, *vs.* NAHUM PINKHAM.

Infant—services—how estimated.

An infant may repudiate his contract and recover from his employer what his services were reasonably worth under all the circumstances of the case.

Thus, in assumpsit for the recovery of such services, where it appeared that the plaintiff, contrary to orders, harnessed the defendant's colt to the defendant's wagon whereupon the bit broke, the colt became unmanageable and the wagon was injured, the jury may consider those circumstances in estimating the value of the plaintiff's services.

ON EXCEPTIONS.

ASSUMPSIT to recover for labor from Oct. 10, 1867, to July 25, 1868, $124.91.

The account annexed contained a credit by various articles furnished and supplied amounting to $84.91, leaving a balance of $40.

There was evidence tending to show that the plaintiff, nineteen years of age, first agreed to work for the defendant one month for $13; and then a year from the expiration of one month, for $130; that the plaintiff worked about nine months in all and quit.

At the trial the plaintiff being still a minor, repudiated his contract, and claimed to recover on a *quantum meruit* the balance stated as the reasonable compensation for his services.

It appeared that while the plaintiff was in the employment of the defendant, and during the latter's absence, the plaintiff, for his own gratification, harnessed the defendant's partially broken colt to the defendant's wagon; that the bit broke, the colt became unmanageable, and, running, threw the wagon against the barn and broke the wagon and harness.

The plaintiff claimed that the colt was harnessed by the permission and with the consent of the defendant; but the defendant testified that the colt was harnessed without his knowledge and against his orders.

The presiding judge instructed the jury,—

That the plaintiff, being a minor, had a right to repudiate his contract and recover what his services were reasonably worth, deducting therefrom what had been paid him by the defendant. And that if they should find that the colt was harnessed by the consent of the defendant, the plaintiff would not be liable to have the damages done by the same deducted from his wages; but if the colt was harnessed contrary to the defendant's orders, the jury might deduct the amount of the injury so done from the value of his services to the defendant.

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

H. L. Whitcomb, for the plaintiff.

Currier & S. Belcher, for the defendant.

BARROWS, J. The jury were explicitly instructed that the minor was not bound by his contract, and was entitled to recover the value of his services, deducting what he had received from the defendant; and 'that if the colt was harnessed with the consent of the defendant, the plaintiff would not be liable to have the damage deducted from his wages; but if plaintiff harnessed the colt contrary to the defendant's orders, the jury might deduct the amount of the injury so done from the value of his services to the defendant.'

The phraseology of this last instruction was faulty; but we do not perceive that the plaintiff could have been wronged thereby. It was what his services were reasonably worth under all the circumstances of the case that he was entitled to recover. If by his negligence or disobedience of orders he broke his employer's tools or damaged his property, his services were manifestly worth just so much less. The proper instruction would have been that the jury might consider such circumstances in estimating the value of his services.

Practically, however, the effect of the instruction given was precisely the same. The plaintiff was not injured by the failure of the presiding judge to use language that was technically correct.

Exceptions overruled.

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

STATE OF MAINE *vs.* GRAND TRUNK RAILWAY CO. OF CANADA.

Indictment.

R. S., c. 51, § 36, provides that any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents which are employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred, nor more than five thousand dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally.

An indictment on this section, must aver that the person whose life was lost, left a widow or heirs or both, as the case may be; and an averment that he 'then and there having a lawful wife and child alive' is not sufficient.

Nor is the averment 'that there is now living a widow and one child.'

And the indictment must set out the names of the persons who are to receive the forfeiture; an averment that 'their names are to the jurors unknown,' not being sufficient.

ON EXCEPTIONS.

INDICTMENT founded on R. S., c. 51, § 36.

'That the Grand Trunk Railway Company of Canada, a corporation established by law, and having an office for the transaction of its business at Portland, in the county of Cumberland, and State of Maine, on the first day of August, in the year of our Lord one thousand eight hundred and seventy-one, and within one year from the day of finding this indictment, at Greenwood, in the county of Oxford, were the occupants and possessors of a certain railway known and called the Atlantic and St. Lawrence Railroad, running from Portland through said Greenwood to Bethel, in the county of Oxford aforesaid, thence north-westerly through said State to Montreal, in the Dominion of Canada; and then and there at Greenwood aforesaid, over and upon said railway, did run their locomotive engines and trains of cars by their servants and agents, for the carriage of passengers and transportation of freight for hire; and then and there at Greenwood aforesaid, upon said railway did employ divers persons as their servants and agents, to labor upon said railway, in mending and keeping the track and bed

of said railway in repair; and in running a hand-car over and upon said railway, said servants and agents being in the lawful employment of said Grand Trunk Railway Company of Canada, and said Grand Trunk Railway Company, in running their said locomotive engines and trains of cars aforesaid, over and upon their said railway, were then and there, at Greenwood aforesaid, bound and required by law, by themselves, their servants and agents, to exercise proper care and prudence for the protection and safety, as well of their servants and agents aforesaid, employed as aforesaid upon said railway, in laboring upon the same, in mending and keeping the said track and bed of said railway in repair, and in running a hand-car over and upon the same, as of all other persons lawfully upon said railway, and in the employment of said Grand Trunk Railway Company of Canada; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said Grand Trunk Railway Company of Canada, at Greenwood aforesaid, on the first day of August, in the year of our Lord one thousand eight hundred and seventy-one, over and upon said railway did run and cause to be run, a certain locomotive engine, between Portland aforesaid, and Gorham, in the county of Coos and State of New Hampshire, and situated upon the line of said railway, leaving Portland aforesaid at three o'clock and forty minutes in the forenoon, at great speed, and that while said locomotive engine was then and there at Greenwood aforesaid, moving and running at great speed as aforesaid, one David Robbins, then and there at Greenwood aforesaid, upon the railway aforesaid, and in the employment of the Grand Trunk Railway Company of Canada aforesaid, lawfully and in the exercise of due care and diligence, being, standing, and laboring, was then and there at Greenwood aforesaid, lawfully, and in the exercise of due care and diligence, laboring upon said railway, in running a hand-car over and upon the same, for the purpose of mending and keeping in repair the said track and bed of the said railway, and upon which the locomotive engine aforesaid was then and there at Greenwood aforesaid moving and running as aforesaid, the said Grand Trunk Railway Company

of Canada, then and there at Greenwood aforesaid, 'by their servants and agents employed' in the business of said Grand Trunk Railway Company of Canada, then and there at Greenwood aforesaid, in the charge of said locomotive engine, unlawfully, negligently, and carelessly, run the said locomotive engine against and over the said David Robbins, then and there at Greenwood aforesaid, in the exercise of due care and diligence in laboring upon said railway, in running a hand-car over and upon the same, for the purpose of mending and keeping in repair the said track and bed of the said railway as aforesaid, and as he had a lawful right to do; and the said Grand Trunk Railway Company of Canada did then and there, at Greenwood aforesaid, and by means of the aforesaid unlawful, negligent, and careless management of said locomotive engine, inflict and cause to be inflicted in and upon the said David Robbins, divers mortal injuries, bruises, and wounds, of which said mortal injuries, bruises, and wounds, the said David Robbins, then and there at Greenwood aforesaid, in the county of Oxford aforesaid, on the said first day of August, in the year of our Lord one thousand eight hundred and seventy-one, instantly died, and so the jurors aforesaid upon their oath aforesaid do say, that the life of the said David Robbins, he the said David Robbins being in the exercise of due care and diligence, by the negligence and carelessness of the Grand Trunk Railway Company of Canada, and of their servants and agents, then and there at Greenwood aforesaid, in the business of said Railway Company, in charge of said locomotive engine at Greenwood aforesaid, was unlawfully, negligently, and carelessly destroyed and lost, he, the said David Robbins, then and there having a lawful wife and child alive, against the peace of said State, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the Grand Trunk Railway Company of Canada, a corporation established by law, and having an office for the transaction of its business at Portland, in the county of Cumberland, and State of Maine, on the first day of August in the year of our

Lord one thousand eight hundred and seventy-one, and within one year from the day of the finding of this indictment, at Greenwood, in the county of Oxford, and State of Maine, were the occupants and possessors of a certain railroad, known and called the Atlantic and St. Lawrence Railroad, running from Portland, in the county of Cumberland aforesaid, through said Greenwood to Bethel in said county of Oxford, thence north-westerly through said State and to Gorham in the county of Coos and State of New Hampshire, thence north-westerly through said State of New Hampshire to Montreal, in the Dominion of Canada; and then and there at Greenwood aforesaid, over and upon said railroad, did run their locomotive engines and trains of cars, by their servants and agents, for the carriage of passengers and transportation of freight for hire; and being such occupants and possessors of said railroad, for carriage of passengers and transportation of freight, did by their servants and agents, on the first day of August, in the year of our Lord one thousand eight hundred and seventy-one, at said Greenwood, in the county of Oxford aforesaid, run, conduct, and drive a certain locomotive engine, over, upon, and along said railroad, and by their agents and servants then and there had the custody, care, and management of said railroad and locomotive engine, and by the negligence and carelessness of their said agents and servants, the said locomotive engine was then and there run, conducted, and driven with great, unreasonable, and improper speed, without proper care, and without due and reasonable notice, and in an unsafe and unskillful manner. And the jurors aforesaid, upon their oath aforesaid, do further present, that one David Robbins, at Greenwood aforesaid, on the said first day of August, in the year of our Lord one thousand eight hundred and seventy-one, was lawfully upon the said railroad, and in the exercise of due care and diligence, and that while he, the said David Robbins, was then and there lawfully upon said railroad, and in the exercise of due care and diligence, the said Grand Trunk Railway Company of Canada, by their servants and agents, then and there employed in the business of said railway company, then and there run, con-

ducted, and drove said locomotive engine with so great, unreasonable, and improper speed, and without proper care, and without due and reasonable notice, and in so unskillful a manner that he, the said David Robbins, was then and there by said locomotive engine, run over, whereby divers injuries, bruises, and wounds were then and there inflicted on the head, body, and limbs of him, the said David Robbins, of which said injuries, bruises, and wounds, he the said David Robbins, then and there instantly died. And so the jurors aforesaid, on their oaths aforesaid, do say, that the life of the said David Robbins, he being then and there in the exercise of due care and diligence, and lawfully upon said railroad, was lost, by reason of the negligence and carelessness of the aforesaid agents and servants of said Grand Trunk Railway Company of Canada, in manner and form aforesaid, the names of which said agents and servants are to the jurors aforesaid unknown. Whereby the said Grand Trunk Railway Company of Canada have become to forfeit not less than five hundred dollars, nor more than five thousand dollars, to be recovered by indictment found within one year, to the use of the widow and child equally of said David Robbins, and that there is now living a widow and one child of said David Robbins, whose names are to the jurors aforesaid unknown. Against the peace of said State, and contrary to the form of the statute in such case made and provided.'

It appeared in evidence that one David Robbins, employed by the defendant corporation as a trackman, or section-man, while engaged in and about his business as employee, was run over and killed by a locomotive engine driven by another employee of the corporation.

After the introduction of the evidence, the defendants requested the presiding justice to instruct the jury,—

That if Robbins, at the time he was killed, was a servant of defendant corporation and in their employment, the defendants are not liable on this indictment for his death, if it was caused by another servant of defendant corporation, and in their employment in the same general business;

That if Robbins, at the time he was killed, was a servant of defendant corporation, and in their employment, and his death was caused by another servant of defendant corporation, and in their employment in the same general business, the defendants are not liable on this indictment for his death, if the managers of the business of defendant corporation used ordinary care in the selection and employment of the latter servant;

That if Robbins, at the time he was killed, was a servant of defendant corporation and in their employment, and his death was caused by Cobb, another servant of defendant corporation, and in their employment in the same general business, the defendants are not liable on this indictment for his death, unless it be proved that the managers of the business of defendant corporation did not use ordinary care in the selection and employment of Cobb, the fellow-servant.

Which requested instructions, for the purposes of this trial, the court declined to give.

And the defendants alleged exceptions.

The jury returned a verdict of guilty; whereupon the defendants moved an arrest of judgment upon the ground that the indictment did not allege what heirs the person killed left at his decease, nor their names; which motion the court overruled, and the defendants alleged exceptions.

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

T. B. Reed, attorney-general, and *E. Foster, jr.*, county attorney for the State, cited 1 Wharton's Prec. c. 2, *Rex* v. *R. R.*, 489; Same, 18, *People* v. *White*, 32 N. Y. 465.

DANFORTH, J. This is an indictment under R. S. 1871, c. 51, § 36. After verdict of guilty a motion in arrest of judgment was filed, 'because said indictment contains no averment what heirs the party killed left, nor their names.'

In the first count the averment is, 'then and there having a lawful wife and child alive.' As a dead man cannot with much pro-

priety be said to have a lawful wife, it may be inferred that this allegation refers to his condition before death and leaves it uncertain whether that wife became a widow or otherwise. In the second count the averment is, 'that there is now living a widow and one child,' etc. This must refer to the time of finding the indictment, leaving it uncertain what other children might have been left at the time the man was killed. Neither of these allegations is such distinct, unequivocal statements, as the statute contemplates and criminal or civil pleading requires. *Commonwealth* v. *Eastern Railroad*, 5 Gray, 474.

But a more serious defect in the indictment is the omission of the names of those persons who are to receive the forfeiture.

By the provisions of the statute, the forfeiture recovered is wholly to the use of the widow or children or heirs, and no part of it to the State. If there is a conviction the judgment must follow the indictment.

As the case now stands no valid judgment can be rendered. No fines can be imposed to the use of the State because the statute does not authorize it. Nor for the use of those for whose benefit it was intended, because they are not named upon the record, nor is it even alleged that it is to be appropriated to the use of any persons other than the State. A judgment giving the penalty to the widow and child of the deceased person, or to his heirs, would be too indefinite and uncertain, to be of any force or effect. In cases where the form of the process necessarily indicates the person who is to receive this penalty, or where the law makes a special appropriation of it to a particular individual or to a corporate body of which the court can take judicial notice, a formal averment of the appropriation of the penalty may be unnecessary. *State* v. *Cottle*, 15 Maine, 473; *Commonwealth* v. *Messenger*, 4 Mass. 462.

But when those persons for whose benefit the forfeiture is incurred, are not made certain by the process, or by the law without the introduction of testimony; in other words, when there may be an issue of fact in relation to them, there must be a formal aver-

ment in the indictment setting out the names. In the case of *Commonwealth* v. *Messenger*, above cited, Parsons, C. J., says: 'The exception which has most weight is, that the complainant neither shows on whose behalf he complains, nor what the defendant has forfeited by his offense, nor consequently how the statute has appropriated the forfeiture. To an information *qui tam* at common law this exception would be fatal.' If fatal to an information, it would be no less so to an indictment.

In *Commonwealth* v. *Frost*, 5 Mass. 53, an objection was made to the competency of a witness, because the statute gave him 'one moiety' of the penalty, and he was therefore interested in the result. But this objection was overruled on the ground, as stated by Parker, J., in the opinion of the court, page 58, that 'to entitle Clough to receive one moiety of this penalty, it should appear on the record that he prosecuted, complained, or sued for it. . . . Whether he complained or informed does not appear to the court, there being no record of any complaint or information; nor is it alleged in the indictment that any person other than the government is interested in the penalty; so that the court are not authorized to award any part of the penalty to Clough, nor has he any means of obtaining it.'

In *Commonwealth* v. *Howard*, 13 Mass. 221, the judgment awarded one-third of the penalty to one Chase as informer, though he was not named in the information. The court held the judgment erroneous on that ground.

We have been referred to no case nor have we been able to find any, where the penalty, or any portion of it, has been awarded to a person not named in the process as entitled to receive it, except such cases as are before noticed, where the law itself makes an appropriation such as the court can take judicial cognizance of. To do so would be contrary to all analogy in legal proceedings, both civil and criminal.

But it is said in the argument 'that when a name is to the jurors unknown, it is sufficient for them to say so.' This is undoubtedly true as to all persons 'whose existence is legally essential to the

charge.' This is allowed from the necessity of the case as a matter of public policy. But this does not apply to persons who for special reasons are allowed to receive all or a portion of the penalty, and whose existence is not essential to the charge. There is no pressing necessity in such case. By giving the whole of the penalty to individuals, the legislature has made the prosecution as much a private matter as a public one. If those who are to receive the penalty make no claim to it, none can be enforced. If they do claim it, it is quite as easy for them to make known their names as their right. In public prosecutions where the penalty goes to the State the judgment is in favor of the State, where it goes to an individual the judgment must be in favor of that individual; but no judgment can be rendered in favor of an unknown person.

The case of *Commonwealth* v. *Boston & Worcester Railroad Corporation*, 11 Cush. 517, is founded upon the true distinction. It is there held that it is not necessary to set out the names of the heirs of the person killed. Under the statute upon which that decision rests the existence of heirs is essential to the charge, but the forfeiture is payable to the administrator. In that indictment the name of the administrator is given, and the court held that sufficient. In the opinion it is said, 'This indictment does name the administrator of the estate of the deceased, and, therefore, makes certain the party to whom the fine is to be paid when received by the Commonwealth.

Under our statute the forfeiture is to be paid directly to the heirs. The result is that as persons necessary to sustain the charge, the heirs, if unknown, need not be named; but as persons for whose benefit the forfeiture is incurred and to whom it is to be paid, there must be a formal averment in the indictment setting out these facts and giving their names.

Exceptions to overruling the motion in arrest of judgment sustained. *Judgment arrested.*

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

Inhabitants of Newry *vs.* Inhabitants of Gilead.

Pauper living in an unincorporated place—what town must relieve.

The younger of the two towns adjoining a place not incorporated cannot furnish pauper supplies to a person living in such place, and then recover the value of them from the older adjoining town. notwithstanding the pauper's settlement was in the latter town.

On report.

Assumpsit for pauper supplies. The facts appear in the opinion.

D. Hammons, for the plaintiffs, contended.

1. That each town is required to relieve all of its paupers within its own limits.

2. That each town is required to relieve all paupers found within its limits.

3. That Public Laws of 1868, c. 219 (R. S., c. 24, § 22), requires the oldest town adjoining a plantation to relieve all paupers, other than its own, found within such plantation in distress; and the general statute requires it to relieve its own under same circumstances.

4. That any town may relieve a pauper found in any unincorporated place and have reimbursement under c. 219, from the town of the pauper's settlement.

E. Foster, jr., for the defendants.

Appleton, C. J. This is an action of assumpsit for supplies furnished by the plaintiffs to one Polly Leavitt, who was then residing on an unincorporated plantation called Riley, and who, as the plaintiffs offered to prove, had her legal settlement in the defendant town.

The plaintiffs in their writ allege that 'being the oldest incorporated adjoining town, they furnished the supplies sued for, to Polly Leavitt, who had fallen into distress within the said Riley plantation, and then and there stood in need of relief,' etc.

It may be regarded as admitted, for the purpose of ascertaining if this action is sustainable, that Polly Leavitt, at the time the supplies were furnished, was residing in Riley plantation, that she had fallen into distress and stood in need of relief, that she was relieved by the plaintiff town, that the supplies furnished were reasonable and proper, and that the legal settlement of the pauper was in the defendant town.

By R. S., 1857, c. 24, § 22, 'persons living in places not incorporated and needing relief are under the care of the overseers of the adjoining town, where they are liable to be taxed,' etc. In commenting upon this section in *Ellsworth* v. *Goldsboro*, 55 Maine, 97, Mr. Justice Kent says: 'Questions may arise as to which of the adjacent towns is intended. The liability to taxation may be questionable or indefinite, or not clearly fixed, and the towns may be disputing as to their respective duties and obligations, whilst the poor paupers are perishing for lack of food. Perhaps a more definite and satisfactory designation would be that of the oldest adjacent town, or the town nearest the place of the pauper's residence when he fell into distress, or the town first applied to for relief.'

Accordingly, by c. 219 of the acts of 1868, the following section was substituted for R. S., c. 24, § 22. 'Persons living in places not incorporated, and needing relief, are under the care of the overseers of the oldest incorporated adjoining town, or the nearest incorporated town when there are none adjoining, who shall furnish relief to such persons in the same manner as though they were found in such town; and such overseers may bind to service the children of such persons, as they may those of paupers of their own town, and may bind out persons described in section twenty in the manner therein provided, residing in such unincorporated place, as if in their own town, such persons being entitled to a like remedy and relief. When relief is provided for paupers residing in such places, the towns furnishing it are entitled to the same remedies against the town where they have a settlement, as if such persons resided in the town where such relief is afforded,' etc.

The writ alleges that the plaintiff town is the oldest incorporated adjoining town, but the proof negatives that fact.

The plaintiffs then claim, as the defendant town was the oldest incorporated adjoining town, and, as such, bound to furnish supplies to the pauper, that they are entitled to recover, as they have done for the defendant town what it ought and should have done. But such we think is not the law.

A town is not bound to furnish relief to a pauper in distress and standing in need of relief except only, and so far, as it is a matter of statutory enactment. Unless, therefore, the plaintiffs can bring their case within the provision of some statute they must fail, for there is no moral obligation resting upon the defendant town to support its paupers.

Now the paupers to be relieved are not under the care of the overseers of the poor of the several towns in the State, but of 'the overseers of the oldest incorporated adjoining town,' who, by the statute, 'shall furnish relief to such persons in the same manner as though they were found in such town.' In other words, the overseers to whose care the pauper and his family are intrusted, are to have the charge of them and to furnish relief to them, not the overseers who have no control over them.

So the towns furnishing relief 'are entitled to the same remedies against the towns where they have a settlement, as if such persons resided in the town when the relief is afforded.' But the towns furnishing must be under a statutory obligation to furnish relief, else they are without remedy. One town has no right to intervene for another town and voluntarily to furnish supplies, which by law it was not obliged to furnish, and then recover the amount so furnished of the town which was obliged to furnish it. The plaintiff town was under no greater legal obligation to furnish supplies to Polly Leavitt, than any other town in the State. It had not and could not rightfully have any care of, or oversight over, the paupers on Riley plantation. That duty is devolved by the statute upon the defendant town alone. The plaintiff town is a mere volunteer and must fail. *Plaintiffs nonsuit.*

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

WILLIAM H. PEARSON *vs.* INHABITANTS OF HAMLIN'S GRANT PLANTATION.

Equalization statute—construction of.

None of 'the soldiers who enlisted or were drafted and went any time during the war'* are entitled to any of the surplus reimbursed by the State, above the amount paid out by the town in which they resided, unless they represented their town in the army.

ON REPORT.

ASSUMPSIT to recover one-sixth of $517, being the surplus received by the defendant plantation from the State, under Pub. Laws of 1868, c. 225, and by vote appropriated 'to the soldiers who enlisted or were drafted and went any time during the war, or, if deceased, to their legal representatives,' as provided by § 6.

It appeared that of the six persons residing in the plantation who served in the war, four served on the quota of the defendants, and two, one of whom was the plaintiff, served before the call of July, 1862, during their term of service and were honorably discharged. but not on the credit of the defendant plantation. It also appeared that the plaintiff subsequently re-enlisted and served on the quota of another town.

The only question in issue was, the plaintiff claimed that he was entitled to one-sixth of the surplus received from the State by the defendants, and the defendants contended that the four soldiers only who served on their quota were entitled to the surplus.

*Pub. Laws of 1868, c. 225, § 6. 'No towns or plantations which furnished their quotas as aforesaid without the payment of any bounty or by the payment of a less aggregate bounty than the sum reimbursable under this act, shall be entitled to receive the certificate provided by § 3, until they shall have furnished the commission with a certified copy of a vote of such towns or plantations appropriating the sum to which they would be entitled or the surplus of the same above the amount actually paid out, to the soldiers who enlisted or were drafted and went any time during the war, or, if deceased, to their legal represent atives.'

E. Foster, jr., for the plaintiff.

D. Hammons, for the defendants.

DANFORTH, J. The plaintiff in this case has mistaken his remedy. The surplus found in the hands of the defendants, part of which he claims, is money paid to them in trust, 'to be appropriated to the soldiers who enlisted or were drafted and went any time during the war, or, if deceased, to their legal representatives.' Amendments of the Constitution, Art. II.; Acts of 1868, c. 225, § 6.

The case finds that there are at least four other persons who are interested and entitled to a share in this same fund, and whose term of service was longer than plaintiff's. There is nothing in the constitution or law referred to, requiring the appropriation to be in equal parts; but on the other hand, the fair inference is that it is to be in proportion to the term of service, having regard to the amount previously received.

But it does not appear that the plaintiff is entitled to any part of the fund. The language in section 6 of the act relied upon, 'the soldiers who enlisted or were drafted and went at any time during the war,' taken alone is sufficiently broad to cover the plaintiff's claim. It is, however, very evident that the words used cannot be taken in this general sense, for if so, it would include all at least who went from the State.

There must then be some limit to its meaning and for that limit we must look to the act itself. The object of the act was to reimburse towns in part for expenses incurred in furnishing soldiers. It provides for the payment of a certain sum for each soldier furnished. Previous to the sentence referred to no soldiers are spoken of except such as are furnished by the several towns.

The words 'the soldiers' in the sentence in questiou must necessarily refer to those before spoken of. This construction gives a clear and consistent meaning to the act. It authorizes payment to the towns for soldiers furnished under and subsequent to the call of

July 2, 1862, and requires towns to pay over any surplus received to such soldiers as they may have furnished, whether before or after that call, but gives no rights and imposes no obligations in relation to any soldiers not furnished by them respectively.

The only ground upon which the plaintiff rests his claims is his citizenship. But this is not sufficient. He must also be a soldier of the defendant plantation, and this can only be by draft or contract. The plaintiff was not drafted, nor so far as appears was there any contract between him and the defendants. There was no action on their part in procuring his enlistment, no assent on his part to serve on their behalf. After the act of Congress of 1863, c. 75, he might still, by the consent or agreement of the parties, have been credited to and thus, as held in *Wayland* v. *Ware*, 104 Mass. 50, have become a soldier and virtually have served on the quota of the plantation of which he was a resident. But the case finds that he did not serve on any quota of that plantation, nor does it appear that he was, or consented to be, credited to it. As a soldier no relationship existed between the plaintiff and defendants. He was indeed a citizen of the plantation, but did not represent it in the army. The plaintiff himself is an illustration of these principles. After his re-enlistment he was still a resident of Hamlin's Grant, but by his contract, a soldier of Clinton. If Clinton, whose fund from the State the plaintiff helped to increase, had received a surplus, he might with propriety have claimed a share of it. But as he in no way added to the defendant's surplus, or in any sense represented them as a soldier, we see no ground upon which he is entitled to recover. *Plaintiff nonsuit.*

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

CHARLES B. BENSON *vs.* NATHAN E. SWAN.

Descent of property.

By virtue of R. S. of 1857, c. 75, § 1, cl. 6, when a minor dies without having been married, the property which he inherited from his father descends in equal shares to his father's other surviving children, and to the issue of deceased children by right of representation.

Thus a father died leaving a widow and one child by a former wife. Thirteen days after his death, a posthumous child was born and died twenty-four days after its birth. *Held*, that the real estate which the deceased infant inherited from his father, descended to the surviving child to the exclusion of the mother.

R. S. 1857, c. 75, § 1, cl. 6, is not restricted to those cases only where the parent 'leaves a child or children and the issue of one or more deceased children.'

ON REPORT.

WRIT OF ENTRY.

On Dec. 18, 1847, one Drake, owning the land in controversy, conveyed it to Elisha T. Swan, who, on same day, mortgaged back to secure the purchase money.

E. T. Swan was first married Feb. 18, 1850, and had by this wife one child, Martha J. Swan. His wife having died, he married again March 31, 1861, and died Nov. 6, 1862. On Nov. 19, 1862, the surviving widow gave birth to a child, which died Dec. 12, 1862, these two children being the only children E. T. Swan ever had by both of his wives.

To sustain the plaintiff's title, he introduced the deed from Drake to Swan, and a deed, dated Jan. 20, 1870, from S. S. Brown as guardian of Martha J. Swan, to the plaintiff, with the admission that the proceedings of the guardian were all legal.

To sustain the defendant's title, he put in the mortgage from E. T. Swan to Drake; an assignment of the mortgage to Mehitable B. Swan (E. T. Swan's mother); assignment of same by administrator of Mehitable's estate to A. P. Andrews, quitclaim deed from Maranda K. Swan (second wife and surviving widow of E. T.

Swan, and mother of the posthumous child), to Oren B. Swan, warranty deed of the latter to the defendant.

It appeared in evidence, that E. T. Swan paid to Drake the sum and interest secured by the mortgage, and took up the notes; and that Drake, at the request of Swan, then assigned the mortgage to Mehitable, Elisha's mother.

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

E. G. Harlow, for the plaintiff.

A. Black, for the defendant.

KENT, J. Elisha T. Swan died in Nov. 1862, leaving a wife and one child by a former wife, named Martha J. Swan. Thirteen days after his death a posthumous child was born. These two children, it is admitted, were his sole heirs. The infant died twenty-four days after its birth.

The principal question, in this case before us, is whether the surviving child took the estate, which came to the infant from its father, or whether it descended to her and its mother. If the former, then the plaintiff, having acquired all the estate of the surviving child, is entitled to recover the whole of the demanded premises.

On a review of the legislation, both colonial and by the Commonwealth of Massachusetts, and by this State, it is evident that a distinction has always been made in the descent of the general estate of an intestate, between what he has himself acquired, and which he leaves at his death, whether he is then of age or not, and the specific and distinct estate which he inherits from a parent. In the latter case, when he dies a minor, never having been married, the law intends that the specific, inherited estate shall, in effect, go back to the parent's estate and become a part of it, as if the child had died before the parent. This is the view of Chief Justice Shaw

in *Nash* v. *Cutler*, 16 Pick. 499; *Renney* v. *Edwards*, 15 Mass. 291; *Sheffield* v. *Lovering*, 12 Mass. 491.

The distinction and the reason for it are both obvious. The child having died a minor, never having been married, and having received a portion of the estate of his parent, which he leaves, the law deems it just, that this share of the parent's estate should go to the other children or grandchildren.

There have been some changes of phraseology in the different statutes, but the leading idea and purpose has, we think, been preserved in all of them. In our State, the first statute of descents in 1821, c. 38, § 17, contains a proviso to all the rules for distribution, qualifying each, in these words: 'Provided, however, that when any child shall die, under age, not having been married, his share of the inheritance, that came from his father or mother, shall descend in equal shares to his father's or mother's other children, then living, and to the issue of such other children as are then dead, if any, by right of representation.'

This seems to be plain and unequivocal. *Nash* v. *Cutler*, *ante*.

The revision in 1841 changes the phraseology somewhat. The provision on this subject, c. 93, § 1, is as follows:

'Sixthly. Provided, however, that if any person shall die, leaving several children, or leaving one child, and the issue of one or more others, and such surviving child shall die under age, not having been married, all the estate which came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of such other children who shall have died, by way of representation.'

The R. S. of 1857, c. 75, § 1, were in force when the intestate died. The section is in these words: 'When he leaves a child or children, and the issue of one or more deceased children, and one of those surviving children dies, without having been married, and under age, the share of his father's estate that descended to him, descends in equal shares to the other children of his father, and to the children and grandchildren of those deceased, by right of repre-

sentation, in equal shares, if they are all of the same degree of kindred, otherwise according to the right of representation.'

In the year 1870, many of the statutes relating to probate matters were revised by a convention of the judges of probate, and the same were simplified, condensed, and improved. The legislature adopted these recommendations, and by act of 1870, c. 113, § 26, 6th specification, struck out the former provision in the R. S. of 1857, and inserted this in its place: 'Sixth. When a minor dies, unmarried, leaving property inherited from either of his parents, it descends to the other children of the same parent, and the issue of those deceased, in equal shares, if all are of the same degree of kindred, otherwise according to the right of representation.' This law of 1870 is incorporated into the recent revision of 1871, c. 75, § 1.

It should be added, that, in all the foregoing statutes, the provision is made that when all are in the same degree they shall inherit equally, otherwise by right of representation.

The only point made in this case on the construction of the statute of 1857, is whether the provision can be applied to a case, unless the parent left a child, or children and grandchildren, the issue of one or more deceased children. It is claimed that according to the language, the provision is restricted to those cases where there are not only children, but grandchildren, and, therefore, the law cannot be applied to this case.

It is undoubtedly true, that in the revisions, the language has got a little mixed. But we do not perceive any intention on the part of the legislature to change or limit the provisions clearly set out in the original statute, by the change of phraseology. We should require the most positive and unmistakable evidence of such intent, because such a construction as is contended for, would be clearly in contravention of the spirit and intent of the provision.

The object, as before stated, was to secure the inherited property (and that alone) of an unmarried minor to the estate of the deceased parent. When it is restored to that estate, it is to go to his children, living or dead,—to the living equally, to the dead by representation. Can any sensible reason be given why this should

not be done when there are only living children? Living children are the first objects of a parent's bounty, and it would be a singular, if not an absurd law, which should require the existence of a grandchild, before the child could inherit. In the revision of 1841, the language is, 'die leaving several children, or leaving one child and the issue of one or more others.' This, if literally interpreted, would give to the living children, if there were more than one, a right to inherit, although there were no grandchildren, but if but one living child, then he could not inherit, unless there was a grandchild.

The intention of the legislature, by the use of these different forms of expression, was to cover all possible contingencies, but not to exclude a child, unless all the possible contingencies existed in the given case. This view is confirmed by the last expression of the legislative will in 1870. But we find a provision in the concluding words of the section in question, which clearly shows that the legislature recognized the right of a child to inherit, when there was no grandchild. After providing that the estate of the deceased minor child shall descend in equal shares to the other children of his father, and to the children and grandchildren of those deceased, by right of representation, it is added, 'in equal shares if they are all of the same degree of kindred, otherwise according to the right of representation.' This clearly shows that there may be cases within this section where all take equally, being children, or all goes to one. If the provisions of this section could only apply to a case where there were both children and grandchildren, they could not be all of the same degree of kindred, and yet the law evidently contemplated a case, where all were of equal degree.

The result is, that Martha J. Swan inherited the whole estate in question. The defendant, by his plea of the general issue, admits himself to be in possession, claiming a freehold.

The mortgage given by Elisha T. Swan to Drake, cannot avail in the defense, even if the evidence was admissible under the pleadings. The case is referred to us with jury powers, and we find that on the evidence that the mortgage was paid by the mortgagor

before his death, and although, at his request, a formal assignment was made to his mother, yet that was for his use and benefit, and subject to his control, and the mortgage cannot be upheld as against him or his estate. *Judgment for demandant for seisin and possession of all the land and estate demanded in his writ and declaration.*

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

ELIZA J. MCKEE *vs.* CHARLES E. GARCELON.

Personal property—sale of between husband and wife—what delivery necessary.

A husband, having purchased some neat stock with money lent him by his wife for the purpose, and put it upon a farm carried on by him and on which she resided with him, thereupon, for the purpose of repaying her for the money conveyed to her the stock by an absolute bill of sale which he delivered to her and which she ever after retained. No other delivery of the stock was made, and it remained and was used on the farm as before. Three months thereafter, the defendant, as an officer, attached some of the stock on a writ against the husband. In replevin by the wife, *Held*, That there was no sufficient delivery of the stock from the husband to the wife.

Also, held, that notice of the sale to the officer holding the writ, before service, uncommunicated to the attaching creditor is not notice to the latter.

ON EXCEPTIONS.

REPLEVIN for two cows and one calf which the defendant, as deputy-sheriff, had attached on a writ in favor of one *Davis* v. *Simeon Nichols & John McKee*, the latter being the husband of the plaintiff in this action.

The case showed that the cattle replevied, with others, were purchased by the plaintiff's husband with money which the plaintiff lent him for that purpose from her own earnings before her marriage, which took place in 1864. That the plaintiff resided with

her husband on the farm where all the cattle were kept and used. That some three months prior to the attachment, the plaintiff's husband conveyed the cattle to her by an absolute bill of sale under seal, for the purpose of repaying her for the money she had let him have. That said bill of sale was delivered by him to the plaintiff, at its date, and has been retained by her ever since. That no other delivery of the cattle was made, but they remained and were used upon the farm as before. That on the day the cattle were attached, but before the attachment, the husband informed the officer that the cattle belonged to his wife.

The case was withdrawn from the jury and submitted to the presiding justice, reserving right of exceptions, who gave judgment for the defendant upon the ground that there was no sufficient delivery of the cattle from John McKee to the plaintiff, whereupon the plaintiff alleged exceptions.

Asa P. Moore, for the plaintiff, cited

Story on Sales, § 353, 362; *Ludwig* v. *Fuller*, 17 Maine, 162; *Bethel S. M. Co.* v. *Brown*, 57 Maine, 18; Story on Sales, § 312, *b*; *Stinson* v. *Clark*, 6 Allen, 340; Story on Sales, § 298, *a*; *Shurtleff* v. *Willard*, 19 Pick. 210; 13 Pick. 183; 3 Pick. 45; *Hotchkiss* v. *Hunt*, 49 Maine, 213; *Means* v. *Williamson*, 37 Maine, 556, and cases cited; Story on Sales, § 312; *Beaumont* v. *Cram*, 14 Mass. 400; 5 Pick. 525; 2 Met. 350; R. S., c. 96, § 8; Hill. Rem. for Torts, c. 2, § 1 (*a*), c. 7, § 23.

Wm. P. Frye & John B. Cotton, for the defendant.

DICKERSON, J. The rule of law is well established that in order to pass the title to personal property by a sale, as against subsequently attaching creditors of the vendor without notice, there must be a delivery, actual, constructive, or symbolical. *Cobb* v. *Haskell*, 14 Met. 303; *Burge* v. *Cone*, 6 Allen, 413.

What amounts to proof of delivery has been much discussed by courts and jurists, and where so much depends upon the nature of the subject-matter of the sale, its situation and condition, the usual

course of trade, and all the other attendant circumstances, together with the subsequent acts of the parties as showing their intention at the time of the sale, it will be found exceedingly difficult, if not absolutely impracticable, to lay down a general rule applicable to all cases.

Though this is undoubtedly true, yet it is proper to observe, in general terms, that to constitute proof of a delivery, there must be such evidence arising from the conduct of the parties as shows a relinquishment of ownership and possession of the property by the vendor, and an assumption of these by the vendee. This is the case:

1. Actually, when there has been a formal tradition of the property to the vendee; or,

2. Constructively, when, the property not being present, or accessible, as a ship at sea, the vendor gives the vendee a grand bill of sale, under which he takes possession upon her arrival in port; or, if the property is difficult of access, as logs in a stream, or incapable of manual tradition, as large blocks of stone, when the vendor approaches in view of it with the vendee, and proclaims a delivery to him; or, when a part of the goods are delivered for the whole; or, if the goods are in the custody of a third party, where the parties to the sale give such party notice of the transfer; or,

3. Symbolically, when the vendor gives the vendee the key to the warehouse in which the goods are stored, or an order on the wharfinger, or warehouse-keeper who has them in charge, or a duplicate invoice of a ship's cargo, authenticated by the master, or a bill of lading duly indorsed.

Though the assignment and delivery to the vendee by the vendor of a bill of lading, invoice, or other like documentary evidence of his title to the goods has been held good, as a symbolical delivery, the delivery of a bill of parcels, or bill of sale by the vendor to the vendee has been held insufficient, as these depend solely upon the vendor for their authenticity, and may be multiplied indefinitely; such memoranda are not, technically considered, documentary evidence of the vendor's title.

Thus in *Lanfear* v. *Sumner*, 17 Mass. 117, a merchant in Philadelphia made out and receipted a bill of sale of a number of chests of tea, supposed to be on their passage from China to Boston, though they were then in the custom-house in Boston, and before the agent of the vendee demanded possession of them they were attached by the creditor of the vendor. The court sustained the action on the ground that the goods not being at sea there was no delivery actual or symbolical before the attachment.

So in *Carter* v. *Willard*, 19 Pick. 9, the only evidence of delivery was the giving of a bill of sale of the goods by the vendor to the vendee, and the court held that that was not sufficient. So, also, in *Burge* v. *Cone*, 6 Allen, 413, the same question arose with the same result.

The doctrine of delivery rests upon the ground that the vendee should have the entire control of the property, and that there should be some notoriety attending the act of sale; and hence, proof of delivery will not be dispensed with on account of the peculiar situation or relations of the parties with respect to the property at the time of the sale, nor will these constitute sufficient evidence of delivery.

Accordingly it has been held to be no proof of delivery, that the vendor and vendee reside in the same house, *Trovers* v. *Ramsy*, 3 Cranch, 354, not even if they are brothers, *Haffron* v. *Clark*, 5 Whart. 445, or son-in-law and father-in-law, *Stulwagon* v *Jeffries*, 44 Penn. 407; nor if the vendor resides with the vendee, *Halle* v. *Cralle*, 8 B. Monroe, 11; nor when the vendor's agent remains in possession with the vendor, *Medell* v. *Smith*, 8 Cowp. 333; nor though the parties are partners with respect to the property sold, *Shurtleff* v. *Willard*, 18 Pick. 201.

It is clear from these cases that there is the same necessity of a delivery, when the parties to the sale are husband and wife, that there is in other cases. For this purpose the wife sustains the same relation to the husband as any other person; and though, in respect to personal property owned by the wife in her own right, she stands upon the same footing that the husband does to his, we are

not aware that the authorities have yet gone so far as to dispense with the necessary formalities to be observed in acquiring property in her favor. *Hanson* v. *Millett*, 55 Maine, 189.

In this case there was no actual delivery. John McKee, the vendor, and husband of the plaintiff, held the same possession after as before the sale of the cattle. There was no change of possession by the act of sale. The plaintiff had no possession either of the cattle or the farm on which they were kept. She resided on the farm simply because her husband did. Nor was there any constructive or symbolical delivery, unless the delivery of the bill of sale constituted one; and that, as we have seen, is not sufficient, there being nothing to prevent an actual delivery by a transfer of the manual possession of the property to the vendee.

Notice of the sale to the officer holding the writ, before service, uncommunicated to the creditor, is not notice to him. *Stanly* v. *Peasley*, 5 Maine, 369.

The adjudication of the presiding judge in giving judgment for the defendant was in strict accordance with the law of the case.

Exceptions overruled.
Judgment for Defendant.

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

ELBRIDGE G. MILLETT *vs.* DUDLEY B. HOLT.

Money paid under mistake may be recovered back.

The plaintiff and defendant being joint tenants of a certain parcel of land, agreed to cut the wood and timber therefrom, and to share equally the expenses and proceeds of the operation. The defendant's expenses amounted to $3,033.58, and the defendant's to $421. In their settlement, the plaintiff paid the defendant $1,727.29, a sum equal to one-half of the whole expense. *Held*, (1) That there was no partnership; and (2) That the plaintiff paid the defendant too much by $421, and that it may be recovered back in action of assumpsit.

ASSUMPSIT for $421.

ON FACTS AGREED.

The parties were joint owners of a parcel of real estate, and agreed to cut the wood and timber on the same, pay each his half of the expense of the operation, and divide equally the proceeds of the sale of the wood and timber so cut. Holt had the general charge of the business, employing the most of the laborers, and paying most of the bills, amounting to $3,033.58. Millett boarded some of the choppers, and hauled some of the wood, and his bill amounted to $421. Upon settlement, the parties added all the expenses together, making $3,454.58, and then divided the sum by two, making the quotient $1,727.29, which each should pay. And thereupon the plaintiff paid the defendant the sum of $1,727.29, and now brings this suit to recover the sum of $421 which he claims was paid by mistake.

The writ contains a count on an account annexed; and the general consolidated money count. If the action is maintainable, case to stand for trial.

W. P. Frye & J. B. Cotton, for the plaintiff.

M. T. Ludden, for the defendant, contended

1. That a partnership subsisted between the parties.

2. That no partnership is set out in the declaration; that no allegation that the partnership has closed, or that there is a final balance due; nor is it shown by implication from the declaration that a verdict for or against the plaintiff would settle all partnership matters between the parties, all of which are essential to the maintenance of the action. *Gamersall* v. *Gamersall*, 14 Allen, 60; *Holyoke* v. *Mayo*, 50 Maine, 385.

DANFORTH, J. The principles of law applicable to actions between partners are not involved in this case. The parties were not partners, and the fact that the plaintiff in his writ proposes to prove them so, cannot overcome the facts agreed upon. As appears from the case, hardly an element necessary to constitute a

partnership, entered into the agreement. It was a tenancy in common, and nothing more.

But if a partnership had existed in relation to the cutting and sale of the wood and timber, it could be no objection to the maintenance of this action. It involves no partnership transaction, none of the facts necessary to sustain the action refer to their dealings with third persons, or tend to change the condition of either party growing out of their agreement relative to the wood and timber. Though the subject-matter of the action is a consequence of that agreement, it is not a necessary one, and in no proper sense can it be considered a part of it. It is simply a mutual mistake, the opportunity for which was furnished by the agreement, but it is in no way an element of that agreement. The action does not propose even to open a settlement, but only to correct the mistake.

It seems that the parties in making their settlement, added the plaintiff's bill to the defendant's, when it should have been deducted from it, in consequence of which the plaintiff paid four hundred and twenty-one dollars more than he should have done. This was done as much by the mistake of the one as the other, and now he asks that it may be paid back to him. And why should it not be? If this action is sustained under the statement of facts presented, it will only be invoking one of the most common principles of law, and add one more to the long list of cases maintained to recover back money paid under a mutual mistake of fact.

Action to stand for trial.

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

ALBERT BOWKER, *scire facias*, *vs.* WILLIAM HILL.

By c. 384 of the Special Laws of 1867, the charter of the Piscataqua Fire and Marine Insurance Company was repealed, and the existence of the Company terminated.

By the operation of that act and of c. 46 of the R. S. (1857), all attachments in cases against that company, pending when that act took effect, were dissolved.

The treasurer of a corporation cannot be charged as its trustee for funds held by him officially.

Nor can he be charged as trustee for such funds pledged to him to secure an indebtment of the company to him.

An alleged trustee cannot be charged for promissory notes and stocks pledged to secure them, originally given to the principal defendant, and afterwards transferred to him; and § 52 of c. 81 of the R. S. (1857) does not apply in such a case.

An alleged trustee is not chargeable for city and railroad bonds held by him, belonging to the principal defendant.

If an alleged trustee does not disclose in the original action, he is liable to costs on *scire facias*, although the attachment is dissolved before judgment is recovered in the original action.

SCIRE FACIAS against the defendant as trustee of the Piscataqua Fire and Marine Insurance Company. The plaintiff discontinued as to Ricker.

The facts sufficiently appear in the opinion.

Putnam and *E. B. Smith*, for plaintiff.

Davis & Drummond, for defendant

Contended (*inter alia*), that, as the attachment was dissolved in the original action before judgment, there was no necessity for any disclosure, and the defendant is not liable to costs on *scire facias*, but is entitled to recover costs. The statute giving costs in *scire facias* against a trustee who did not disclose in the original case, is limited to those cases in which he is finally discharged on examination. R. S., c. 86, § 71. If he prevails on any other ground, he is entitled to cost as the prevailing party.

APPLETON, C. J. *Scire facias* against the defendant, as the alleged trustee of the Piscataqua Fire and Marine Insurance Company. The plaintiff discontinued his suit against Ricker, and the only question presented relates to the liability of Hill.

The original process was served on the defendant June 8, 1866.

The charter of the Piscataqua Fire and Marine Insurance Company was surrendered, and the surrender accepted by an act approved Feb. 28, 1867, c. 384.

Judgment was rendered against the principal and trustee at the April term, 1868, in this county, and a demand was seasonably made upon the trustee.

The defendant was not examined, and did not disclose on the original suit. By R. S. 1857, c. 86, § 70 on *scire facias*, in such case 'he may be examined as he might have been in the original suit, and if on such examination, he appears not chargeable, the court shall render judgment against him for costs only,' &c.

If he had been examined, the court by § 87 may permit him to be examined anew, 'and he may then prove any matter proper for his defense; and the court may enter such judgment as law and justice require, upon the whole matter appearing on such examination and trial.'

The rights of the defendant are the same, save as to costs, as if he had been examined in the original suit.

By the act approved Feb. 28, 1867, c. 384, § 1, the affairs of the company were to 'be wound up in the manner provided in sections nineteen and twenty of chapter forty-six of the Revised Statutes, and the corporation shall continue for the purposes provided for in said sections,' etc.

By R. S. c. 46, § 19, 'when the charter of a corporation expires or is terminated' the court may appoint trustees. This was done and the affairs of the company are in the charge of trustees.

By R. S., c. 46, § 20, 'The debts of the corporation are to be paid in full by such trustees, when the funds are sufficient; when not ratably to those creditors who prove their debts, as the law provides, or as the court directs.'

By the act of 1867, c. 384, § 2, 'Actions pending against said company when trustees are appointed as provided in said sections, may be discontinued, without payment of costs, or continued, tried, and judgment rendered as in other cases; actions may be also maintained upon claims disallowed in whole or part by the trustees, and all judgments shall be satisfied in the same manner as other claims against the company are satisfied by the trustees.'

In short, all claims, whether in judgment or not, are to be paid ratably. The trustees are to collect the debts and dispose of the assets of the corporation and then make a ratable division of the same. The effect of all this is a dissolution of existing and pending attachments. The attachment of the plaintiff was dissolved when the corporate existence of the insurance company was terminated.

By R. S., c. 46, § 17, 'acts of incorporation passed since March 17, 1831, are liable to be amended, altered, or repealed by the leg islature, as if express provision therefor was made in them, unless they contain an express limitation,' etc.

All persons dealing with the insurance companies are bound to know the general laws of the State, and are presumed to contract with reference thereto. The repeal is conclusive upon the corporation. The creditors of the corporation are bound by the repeal and its legitimate consequences. 'Indeed,' remarks Tenney, J., in *Read* v. *Frankfort Bank*, 23 Maine, 318, 'it is not seen how any objection can be taken by those who had no other connection therewith than that of being creditors. Whoever entered into contracts with it, exposed himself to losses which might arise from its dissolution, as he would with natural persons, by their death. No security was provided by the charter or any other statute against such an exposure to injury.' This decision was affirmed in *Whitman* v. *Cox*, 26 Maine, 335.

The attachment of the plaintiff having been legally dissolved by the termination of the corporate existence of the insurance company, the plaintiff thereby lost any lien he might have acquired by his original attachment.

But upon examination, it will be perceived that in no event could the trustee be charged. He was the treasurer of the corporation, and so far as he held its funds officially, he is not chargeable. As treasurer, he holds the funds of the corporation. The funds are held by the corporation through its treasurer. It is the only way the corporation can hold its funds, by its appropriate officers. *Pettingill* v. *Androscoggin R. R. Co.*, 50 Maine, 379. *Sprague* v. *Steam Navigation Co.*, 52 Maine, 592.

It is admitted by plaintiff's counsel, that on the day of the service of the trustee process on the defendant, the corporation owed him absolutely $25,003.43, and that he was liable, in addition, for the corporation for $35,527.50, as indorser for which he held collateral security, and that he had $35,836.00. But the cash in hand, after deducting the absolute indebtedness, was held by him as treasurer, for which he cannot be charged as trustee.

For funds in his hands, rightfully received in payment of the indebtedness of the company to him, the trustee could not be charged.

The defendant held as collateral a large amount of notes due to and deposited with him by the corporation as security for his claims against the same. These notes, so deposited, were secured by mortgage or by pledge of stock. The insurance company transferred the notes thus secured, with the pledges held by them, to the defendant to indemnify him for his claims against the company whether as indorser or otherwise.

The notes thus transferred to the defendant by the insurance company were the principal. The bank, railroad, and other stock were collateral thereto, and must abide the fate of the principal. Now notes and bonds are not attachable, nor can they be sold on execution. The defendant cannot be held as trustee on account of them.

Neither is the defendant chargeable within the provisions of R. S., c. 86, § 52. The principal defendant in the original suit, the insurance company, was not the owner of the collateral security given to secure the notes due them. The company held the col-

lateral as pledgee. The collateral security could not be sold as their property, for their interest was not absolute. If the amount for which they were pledged to the defendant should be paid him by the plaintiff, he would have no right to sell. The collateral would still be liable to redemption by the several pledgors, whose notes it was given to secure.

The interests of the several original pledgors to the insurance company in the bonds or stock by them pledged, cannot be seized and sold, for there is no suit against them. The interests of the original pledgees, the insurance company, are not attachable and could not be sold on execution against the corporation.

A large portion of the collaterals consisted in city and railroad bonds, for which the defendant could in no event be charged as trustee. *Smith* v. *Kennebec & Portland R. R. Co.*, 45 Maine, 547.

Defendant discharged as trustee.
Execution to issue against him for costs.

KENT, J., concurred; and WALTON, BARROWS, and DANFORTH JJ., concurred in the result.

MARGARETT WILLEY *vs.* NEWBURY HALEY.

Tenancy in tail—how barred.

A tenant in tail under her grandfather's will, by her deed of June 3, 1796, duly executed before two witnesses, and for a valuable consideration therein expressed, and duly acknowledged and recorded, did 'bargain, sell, and confirm unto' the defendant's predecessor in title, 'all my [her] right and title to the estate of my [her] grandfather,' situate in Kittery, 'that is to say, all which by his last will and testament he bequeathed to me [her] as may appear from his will, it being the half of his real estate, which property I warrant to defend against the claims of any person or persons to said estate.' In a writ of entry by an heir-at-law of the tenant in tail, *Held*, that the estate tail was barred under the provisions of Mass. Statute of March 8, 1792, § 1.

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On Report.

Facts appear in the opinion.

Appleton, C. J. Josiah Chase, by his will of March 7, 1775, devised to his granddaughter, 'Mary Chase and heirs,' half of his estate after the decease of her father, and further added, that his will was that 'all his lands and buildings should be equally divided between his daughter, Sally Chase, and granddaughter, Mary Chase, in quantity and quality, and in case his said grand-daughter, Mary Chase, should die without lawful issue, then he gave the said one-half of his estate to his grandson, Joshua Chase, . . . to him, the said Joshua, and to his heirs forever.'

The demandant claims as heir-at-law of Mary Chase, who deceased Jan. 20, 1865.

Assuming the estate of Mary Chase to have been a tenancy in tail, the question presented is, whether or not it has been barred.

On June 3, 1796, Mary Chase, by deed, bargained, sold, and confirmed to Joseph Litchfield, under whom the tenant derives title, all her 'right, title to the estate of her late honored grand-father, Josiah Chase, of Kittery, deceased, that is to say, all which by his last will and testament he bequeathed to me, as may appear from his will, it being the half of his real estate, which she therein warranted to defend against the claim, of any person or persons to said estate. This deed being in accordance with the statutes constitutes a bar to the tenancy in tail. By the act of Massachusetts of March 8, 1792, 'a more easy and simple method' was provided 'of barring estates tail in land,' by which a 'deed duly executed before two or more credible witnesses, acknowledged . . . before any justice of the peace in this Commonwealth, or before a justice of the peace of some other of the United States of America . . . for a good and valuable consideration *bona fide*,' conveying lands held in tail to a grantee to hold in fee-simple, vested the absolute inheritance, in fee-simple of such lands, 'in such purchasers or grantees, without any fine or common recovery made or suffered,' etc. In *Williams* v. *Hichborn*, 4 Mass. 190, Parsons, C. J., says, 'By the first sec-

tion of this statute, a tenant in tail may, by a deed for good and valuable consideration, sell his estate tail, to be holden by the purchaser in fee-simple.' And it seems, it matters not though the deed be by release, if it was 'executed in the presence of two witnesses and was made *bona fide* and for valuable consideration, as the statute requires.' *Cuffee* v. *Milk*, 10 Met. 366.

The tenancy in tail being barred by the deed of Mary Chase to Joseph Litchfield, by the agreement of parties, a nonsuit must be entered. *Plaintiff nonsuit.*

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

I. G. Jordan, for plaintiff.

Goodwin & Lunt, for defendant.

PISCATAQUA F. & M. INSURANCE COMPANY and others, in equity, *vs.* WILLIAM HILL.

Construction of Spec. Laws, 1867, *c.* 384, *and R. S. c.* 46, § 19. *Equity jurisdiction in cases of fraud. Trustees.*

The trustees appointed under Special Laws of 1867, c. 384, accepting the surrender of the charter of the Piscataqua Fire and Marine Insurance Company, cannot maintain a bill in equity in their name and that of the corporation in behalf of the creditors or stockholders of the corporation as such.

In case of alleged misconduct of the corporation or its officers, creditors or stockholders must pursue their remedy in their own names.

R. S., c. 46, § 19, confers upon the court no new equity jurisdiction for the collection of debts, or in relation to injuries to the property of the corporation.

The treasurer of the corporation is not a trustee in any such sense as to give the court equity jurisdiction in controversies between him and the corporation.

When compensation in damages is the only relief that can be given in case of an alleged fraud, the court has no jurisdiction in equity.

Piscataqua Fire and Marine Insurance Company *v.* Hill.

BILL IN EQUITY by the Piscataqua Fire and Marine Insurance Company, and the trustees appointed under c. 384 of the Special Laws of 1867 against the defendant, heard on demurrer to the bill.

The bill purports to be brought by the plaintiffs in behalf of the creditors, and in their capacity as trustees. It alleges that the defendant was treasurer and a director of the corporation from 1860 to the time of the surrender of its charter; that the company was, and for a long time had been insolvent; that the defendant was a stockholder and received dividends and interest on his stock; that other parties named, not resident in this State, were stockholders, and received interest and dividends on their stock, having deposited collateral securities therefor; that it was the defendant's duty as treasurer, to take care of and administer faithfully the funds of the company; that he had not done so, but had illegally surrendered to such stockholders their securities in whole or in part, and had illegally converted others to his own use; that the defendant had received dividends on his stock when he knew the company was insolvent; that he had illegally sold to the company a large amount of stock and received payment therefor, when he knew the company was insolvent; that he had converted to his own use the funds of the company in pretended payment of company notes to him, which the bill alleges to have been illegal, without consideration, and void; and that the defendant had committed a variety of acts, set out in detail, done by virtue of contracts with the company, which the bill alleges were illegal, fraudulent, and void. The bill also seeks a discovery from the defendant as to the amount and nature of the property held by him for the company, and of his indebtedness to the company.

E. B. Smith, for plaintiff.

The complainants found these proceedings upon a fraudulent breach of trust by the respondent in his capacity as treasurer of the Piscataqua Fire and Marine Insurance Company, and as a director.

Two parties were injured by Hill's acts, the stockholders and the creditors.

Both of these parties are now, in a measure, represented by the trustees appointed under the provisions of c. 384 of the Special Laws of 1867.

By this act the existence of the corporation is continued for the purposes of having its affairs wound up by the trustees according to R. S., c. 46, §§ 19 and 20.

Although these trustees represent both stockholders and creditors, whose interests are distinct, and after the funds come into the hands of the receivers, will become antagonistic, yet in obtaining these funds from him who illegally withholds them, these complainants have a common interest which is identical.

Therefore it is that c. 46, § 19, provides that either a stockholder or a creditor, indifferently, may apply for the appointment of trustees. Over all proceedings by said trustees in discharge of their trust, this court has jurisdiction as a court of equity, c. 46, § 19. Hence, when this bill was brought, the company still having its existence, though a qualified one, and its interest and that of the creditors being identical, and adverse to Hill in the same respect and throughout, it was not only proper but even necessary that these parties should be joined as complainants in the bill.

Properly all persons or corporations should be made parties who have an interest in the property in dispute. Calvert on Parties in Eq., 123. Story's Eq. Pl., § 72 *et seq.* and cases *passim.* That is to say, all who have an interest in the object of the suit. Story's Eq. Pl., § 72.

Or in 'the event of the suit,' *Williams* v. *Russell*, 19 Pick. 165. Or as said in *Fitch* v. *Creighton*, 'in the principal matter in controversy.' 24 Howard, 164.

Hence the supreme court of the United States have held that both the trustee and the *cestuis que trust* must be made party to a bill to subject the property to the provisions of the trust deed. *McRea* v. *Branch Bk.*, 19 Howard, 376.

So the court of New Hampshire declares it a general rule that all who are to be affected, either immediately or consequentially, by the decree, should be made party to the bill. *Busby* v. *Littlefield*, 11 Foster, 193.

The special act of 1867, c. 384, is an assignment of the assets and effects of the company for the payment of its debts, and the surplus, if any, reverts to the stockholders who constitute it. Now the court of Massachusetts holds, that to a bill brought by the assignee of a chose in action the assignor is a necessary party 'if there remain any right to be affected by the decree.' *Montague* v. *Lobdell*, 11 Cush. 111.

The capital stock of the company was a trust-fund for the payment of losses and expenses. Not only was it pledged to creditors for these purposes, but its officers were responsible to the stockholders that it should be so applied. *Wood* v. *Dummer*, 3 Mason, 308; *Baker* v. *Bank*, 9 Met. 192; *Koehler* v. *The Black River Co.*, 2 Black. 715; *New Albany* v. *Burke*, 11 Wallace, 106.

And any stockholder might have applied by bill in equity to this court, but for the appointment of the complainants as trustees. *Dodge* v. *Wolsey*, 18 Howard, 331; *Brewer* v. *Boston Theatre*, 104 Mass. 378.

That a creditor could maintain a bill to obtain payment of his debt from any property fraudulently conveyed to Hill, individually, by Hill, the treasurer, is too plain for argument.

Certainly, then, these trustees who represent all the creditors and all the stockholders, and who, in their official capacity, are proceeding to discharge their trust under the suspension of this court in equity, R. S., c. 46, § 19, can properly file this bill.

If the parties be those that ought to appear on the record in this cause, the case made by the bill is one of clear equity jurisdiction, not merely under the provisions of R. S., c. 46, § 19, but upon the general principles of equity jurisdiction and practice.

The defendant was treasurer of the company, and held its funds in trust, but he converted them to his own use.

The pretended sale by the defendant of the stock to the company at par was a fraud, which gives the court jurisdiction in equity.

Davis & Drummond, for the respondent.

DANFORTH, J. This case comes up on demurrer, and many objections are made to the form and substance of the bill, most of which appear to be well founded. If, however, that which relates to the jurisdiction of the court is sustained, it will be unnecessary to consider the others.

It appears by c. 384 of the private and special acts of 1867, that a surrender of the charter of the plaintiff company was accepted by the legislature and its affairs were to be 'wound up in the manner provided in sections nineteen and twenty of chapter forty-six of the Revised Statutes, and the organization of the company shall continue for the purposes provided for in said sections.'

The several individuals named as plaintiffs were appointed trustees under the sections referred to. Their powers and duties as defined in § 19, are simply 'to take charge of its estate and effects, with power to collect its debts, and to prosecute and defend suits at law.' The corporation ceases for the purpose of business, and the trustees in its place, and with its rights, are to perform such acts as are necessary to close up its affairs. They represent the corporation alone and not its creditors or stockholders. The creditors or stockholders can have no legal interest in the property involved in this suit. A recovery may increase the general fund for the payment of debts or distribution, but the property, if recovered, is still that of the corporation legally as well as equitably. The claims of the creditors and of the stockholders, if they have any, are in the first instance against the corporation, and they have no other except as provided by law. If the conduct of the corporation, its officers, or stockholders, has been such as to give other remedies to the creditors, such may properly be pursued in their own names. So far as their rights are in question they must be vindicated by themselves and not by others in their behalf. The same is true of the stockholders. *Ken. & Port. R. R. Co.* v. *Port. & Ken. R. R. Co.*, 54 Maine, 181; *Peabody* v. *Flint*, 6 Allen, 52; *Brewer* v. *Boston Theatre*, 104 Mass. 378.

And the act of 1867, c. 384, above referred to reserves both to the creditors and stockholders all the rights they previously had,

and retains for them the same remedies before existing. There is, then, no occasion for the plaintiffs to represent the creditors or stockholders in this or any other process; nor can the bill be sustained on any such ground.

Neither does the provision in § 19 give the court jurisdiction in this case. That refers to the proceedings of the trustees in settling up the affairs of the corporation. It does not, nor does it purport to give new remedies for the collection of debts, or for injuries to property already committed. Nor is the treasurer a trustee in any such sense as to give equity jurisdiction. True, he holds an office of trust, but he does not hold the property as trustee. He is a mere depositary and has no interest in, or title to, the property whatever. *Pettingill* v. *Androscoggin R. R. Co.*, 51 Maine, 370; *Sprague* v. *Steam Nav. Co.* 52 Maine, 592.

The only other foundation claimed for the bill is that of fraud. In most, if not all the acts of the defendant complained of, it is alleged in the bill that he not only claimed to have, but did have the authority of the company or its officers. True, it is said, this authority was invalid, not because fraudulently obtained, but because it was fraudulently given. Not that either party was deceived, but that the two parties conspired to cheat others. Under such facts it is difficult to see how the plaintiff corporation can have any rights under a fraud to which it was a party, or how the trustees, representing that corporation, can have any greater rights. Such a fraud may lay the foundation for a new remedy for the creditor or stockholder, but certainly not for such as are guilty of the wrong.

But passing that, the statute gives this court equity jurisdiction 'for relief in cases of fraud.' Assuming the fraud to exist as alleged in the bill, what relief can this court give. There is no contract obtained by fraud from which the plaintiffs ask to be released, none which they ask to have the defendant perform. There is no allegation in the bill showing that the defendant has, by false reprerentation or deceit obtained from the plaintiffs any specific piece of property they would have restored. There is no danger impending, no obstacles in the path of the plaintiffs, to be removed. The

wrong and injury have all been done. As the plaintiffs' counsel well says, 'The whole substance of the bill is a complaint against William Hill, defendant, for breach of trust as treasurer.' That breach, as the bill shows, is a failure on his part, with or without the assent of the directors, to account for the property and funds intrusted to him, and in his disposal of them to others, or conversion of them to his own use. The wrong is fully accomplished, and the only relief now to be obtained is compensation as damages. For this there is a full and adequate remedy at law. Such is never decreed by a court of equity 'only as incidental to other relief sought by the bill, and granted by the court.' Story's Eq. Jurisp., §§ 794 to 799.

No other relief is sought here. *Bill dismissed with costs.*

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

EURAN H. HOBBS *vs.* IVORY L. WALKER.

Sheriff's deed of an equity of redemption—validity of.

A sheriff's deed of an equity of redemption, executed at the time of the sale on execution, conveys to the purchaser all the judgment debtor's right, title, and interest in the premises, as against the debtor having legal notice of the sale, although the deed was not acknowledged, delivered or recorded until three months and fourteen days after the sale.

ON EXCEPTIONS.

WRIT OF ENTRY.

It was agreed that on July 8, 1868, the defendant being seized in fee of the demanded premises, conveyed them in mortgage to one Thompson, who on April 30, 1869, assigned and transferred the mortgage and note thereby secured to the plaintiff; that on Jan. 16, 1869, the equity of redeeming the premises from said

mortgage was duly seized, notified, and sold by one Mitchell, a deputy-sheriff of this county, on an execution against the defendant, and the same was duly purchased by the plaintiff; that the officers' deed conveying the same to the plaintiff was made on the day of sale, but was not acknowledged, delivered, or recorded until April 30, 1869.

All the proceedings prior to the execution of the officer's deed were in due form.

The plaintiff claimed to have judgment for the premises by virtue of the mortgage and officer's deed.

The defendant contended that judgment should go as on mortgage only, because the officer's deed was not acknowledged, delivered, or recorded within the three months prescribed by R. S., 1857, c. 76, § 33.

The presiding judge ordered judgment for the plaintiff as on mortgage, and the plaintiff alleged exceptions.

Ira T. Drew, for the plaintiff.

S. K. & B. F. Hamilton, for the defendant.

DANFORTH, J. The only question involved in this case is whether an officer's deed of an equity of redemption, not recorded within three months, is void under R. S., 1857, c. 76, § 33. In *Houghton* v. *Bartholomew*, 10 Met. 138, it was held that a similar deed was good as against a subsequent purchaser with notice. Much more would it seem to be good against the debtor, who, as the case finds, had the legal notice of the sale.

The Statute of Massachusetts under which that decision was made is the same as our own. The opinion in that case is elaborate, meeting every objection raised in the agreement, and is, in our opinion sound. *Exceptions sustained.*

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

SALLY GERRY, in equity, *vs.* ANDREW J. STIMSON, adm'r, & others.

Trust. Dower. Administrator—injunction of. Deed—improper retention by wife of grantor.

Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein.

The wife of such grantee has a right of dower in the premises.

Where such a conveyance was intended to be in trust for the grantor and his wife, but the trust was not expressed in the deed, no resulting trust can arise from the subsequent payment of money by the children of the grantor.

The administrator of an intestate estate may be enjoined from casting a cloud, by means of a fictitious sale, upon the title of property once held, but subsequently *bona fide* sold by his intestate.

When the wife of the grantor in a deed which has been delivered, receives it for the avowed purpose and with the agreement to join her husband therein, and release her right of dower in the premises, and subsequently refuses to surrender the deed or the consideration for her release, the grantee is the proper party to seek redress, although he has conveyed the premises to another.

BILL IN EQUITY.

Heard on demurrer.

The case is sufficiently stated in the opinion.

E. B. Smith, for the complainant.

Bradbury & Bradbury, for the respondents.

APPLETON, C. J. The case comes before us upon bill and demurrer.

The complainant in her bill alleges that she was married to one Joshua Gerry; that prior to 1846, said Gerry had acquired by deed a title to the lot of land described in the bill; that being embarrassed in his affairs and of intemperate habits, 'it was talked over and arranged amongst the family of said Joshua' 'that said Joshua should part with his title to the land for the benefit of his family before the same should be squandered and lost, and that the children

of said Joshua should all join together and help pay up the debts of their father, and that the land should be deeded to one of the children to hold the same in trust for a homestead for the said Joshua and this complainant during their lives and the life of the survivor of them, and after their decease in trust for their children, the same as though said Joshua had not parted with title therein;' that on 4th October, 1846, said Joshua conveyed said premises to his son Oliver, 'by deed in common form;' that said Oliver paid nothing for the conveyance; that said Joshua deceased in March, 1863, leaving heirs; that ever since the giving of said deed, the premises have been used and occupied as the family homestead by said Joshua and this complainant during his life-time, and, since his decease, by this complainant; that the children of said Joshua have paid divers sums for the repairs and improvement of said homestead and discharge of the debts of said Joshua; that said Oliver paid a portion of said sums; that he married Eliza A. Stimpson, by whom he had three children living; that during the life-time of said Oliver, said Eliza claimed that as wife she had the right of dower in said premises, and denied that said Oliver held the land in trust; that to prevent future difficulties it was arranged that Jotham Gerry should take a deed in trust for the life of this complainant and then in fee-simple to said Jotham after her decease; that said Eliza refused to release her dower unless said Jotham would give his note for $200; that said Jotham did give his note for that sum running to said Eliza; that said Oliver did make and execute a deed to said Jotham with the trust to this complainant expressed therein; that said deed was dated in February or March, 1866, and delivered to said Jotham; that said Jotham went to said Eliza with said deed and note; that she took the same and agreed to sign the deed; that she now holds the deed and note, and refuses to deliver either the note or deed to said Jotham; that said Oliver deceased leaving other property more than sufficient to pay his debts; that Andrew J. Stimpson, one of these respondents, was appointed administrator on the estate of said Oliver; that after obtaining due license therefor, he proceeded to sell the same at public auction to one Ephraim

Spinney; that before the conveyance was made and executed, the said Spinney being notified of the trust estate aforesaid, would not take a deed; that said Oliver while he held the title mortgaged the said estate by two several mortgages to one John McIntyre; that said McIntyre assigned said mortgages, and the notes thereby secured, to said Jotham, and that said Jotham assigned the same to this complainant; that the heirs of said Joshua on 23d September, 1869, by their deed of that date conveyed all their right and interest in the premises in controversy to this complainant, the said Jotham joining as a grantor therein; that the deed from said Joshua to said Oliver makes a cloud upon this complainant's title, though in fact she is seized in fee of the premises; that notwithstanding the premises the said Eliza and the said Andrew are still endeavoring to hold said premises, and to turn this complainant out of the possession thereof; that she is remediless at law, and can only be protected in a court of equity, and cannot, without the aid of this court, sitting in equity, have the cloud that rests upon her title removed, and the said Eliza and said Andrew, and the children of said Eliza, their aiders and abettors, enjoined from proceeding to make fictitious titles upon the premises of this complainant, and further embarrassing the title thereof.

The bill then prays for an injunction upon the respondents against setting up and acting under the title of said Oliver, etc., etc.

To the bill there is a general demurrrer.

1. It is claimed that the estate in Oliver by deed from his father, of Oct. 4, 1846, was in trust. But the deed is in common form, and it discloses no trust. Now by the statutes of this State, all trusts must be 'created or declared by some writing signed by the party or his attorney' except those 'arising or resulting by implication of law.' R. S., c. 73, § 11. The conversations and intentions of the family before the deed was given could not alter or change its effect. Parol evidence of the object and purpose for which the conveyance was made thereby, to convert the deed into one of trust, is not admissible. *Flint* v. *Sheldon*, 13 Mass. 448.

Nor is there a resulting trust. The payments by the different

members of the family were made at different times after the title was in Oliver. Nothing was paid by any one when the conveyance was made, and it is well settled that no resulting trust can arise from the payment or advance of money after the purchase is completed. *Farnham* v. *Clements*, 51 Maine, 426. *Dudley* v. *Bachelder*, 53 Maine, 403.

2. The bill sets forth mortgages given by said Oliver to one McIntyre, and duly assigned to the complainant. The mortgages, if subsisting, are valid in the hands of the assignee, and it is not perceived that her title could be affected by anything which the respondents might do. As the assignee of a valid outstanding mortgage, the complainant has no occasion to ask the intervention of this court, as a court of equity. Her remedies at common law are ample and sufficient.

3. The bill alleges that Oliver deeded the premises in dispute to Jotham, by deed dated in February or March 1866, and that that deed was duly delivered to the grantee, and that he by his deed of Sept. 23, 1869, conveyed the same to this complainant, thus transferring to her the legal title to the same. All this the demurrer admits. It is only by virtue of the title thus acquired, that this bill can be sustained, if at all.

4. The material allegations in the bill are, that the complainant has the legal title to the premises in controversy; that Oliver had parted by deed with his title thereto; and that the administrator upon his estate, Andrew S., proposes to sell these premises as a part of said Oliver's estate, thereby embarrassing the complainant and creating a cloud upon her title.

It is well settled that courts of equity will order to be cancelled, or set aside, or delivered up, deeds or other legal instruments, fraudulent, fictitious, and void, which are a cloud upon the title to real estate. But the same reason, which justifies the court to compel the cancellation of a deed, or a release of supposed rights acquired under it, will authorize the prevention of such fictitious and fraudulent titles coming into existence. It is better to prevent the creation of a fictitious or fraudulent title, than to compel its cancellation or its release after it had been created.

'The jurisdiction of this court,' observes Chancellor Walworth in *Pettit* v. *Shepherd*, 5 Paige, 501, 'to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up and cancelled, appears now to be fully established. See *Ward* v. *Ward*, 2 Hayw. 226; *Leigh* v. *Everhart's Ex'rs*, 4 Munroe, 380; *Hamilton* v. *Cummings*, 1 Johns. 517; *Apthorp* v. *Comstock*, 2 Paige, 482; *Grover* v. *Hugell*, 3 Russ. 432. And if a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be delivered up and cancelled, as forming an improper cloud upon the complainant's title to his farm, it seems to follow as a necessary consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale.'

Now whether the fictitious title arises from a sale by a sheriff or by an administrator can make no difference. The cloud thus arising would be as injurious in the one case as in the other. 'Whatever doubts might once have been entertained of the jurisdiction of a court of equity, . . . have been settled by modern decisions,' observes Gilchrist, C. J., in *Downing* v. *Wherren*, 19 N. H. 91, 'and the relief afforded seems to be on the principle of a bill *quia timet*, lest the deed might be injuriously used against the party, or might throw a cloud or suspicion over his title.'

It seems, therefore, upon the facts as admitted by the demurrer, that the bill may be sustained against the administrator, and that he may be enjoined from proceeding to sell the premises in question, as a part of the real estate of his intestate.

The allegation that the deed of Joshua to Oliver makes a cloud upon the demandant's title is erroneous. She claims under and through this deed. The deed of Oliver to Jotham and from Jotham is the chain she sets forth as the basis of her claim. It is not, then, that the deed to Oliver is a cloud upon her title, it is that a deed subsequent thereto, from Oliver to Jotham, is wrongfully withheld from the possession of the grantee, that constitutes the source of embarrassment.

5. It is apparent that the widow of Oliver has a right of dower, unless she has joined with her husband and released it in the deed from him to Jotham. If she agreed to do it and has not done it, the note which was the consideration for doing it would be void. The improper retention of the deed of Jotham, or the violation of her contract with him, are wrongs to him, for which he is the proper party to seek redress. The bill does not allege that she has any interest save as dowress, nor that she has interferred with or intends to interfere with the title of the complainant, or to do any act which would cast a cloud upon her title. The allegations that her children have title are no more than an assertion of opinion on her part. Her claim for dower would seem to be valid, unless in some way discharged.

The bill as to Eliza Stimpson cannot be sustained.

6. The heirs of Oliver are made parties to the bill. They have an interest in the subject-matter of this litigation, and, being minors, should answer by guardian.

7. The result is, that the demurrer of Eliza Stimpson is good and is allowed as to her. The demurrer of Andrew J. Stimpson must be disallowed, and he is to answer further.

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

ELIJAH VARNEY, in equity, *vs.* ISAIAH POPE & another.

Nuisance—injunction in cases of.

An injunction will not be granted to stay or prevent a nuisance under R. S., c. 17, unless an indictment, complaint, or action for the nuisance be pending in court.

An injunction will not be granted, under the general equity powers of the court, to restrain a nuisance, unless the complainant's rights have been settled in a suit at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage.

BILL IN EQUITY heard on demurrer to the bill.

THE CASE is stated in the opinion.

J. H. Drummond, for the complainant.

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

APPLETON, C. J. The complainant in his bill alleges that for more than fifty years last past, he and those under whom he claims, have been the owners, in fee-simple, and have been in possession of a parcel of land in Windham, in the county of Cumberland, with a water-power and mill-privilege thereon, upon Ditch brook, so called, running from Little Sebago pond; that for more than ten years past he has owned in fee-simple, and has been in possession of said parcel of land, having a mill on said privilege; that during this time he has used said mill and privilege for the manufacture of various kinds of lumber, and when not prevented from so doing by the defendants, has used said Ditch brook and the ponds connected therewith for running logs to said mill, and the waters thereof for sawing the same into boxes, shingles, staves, and shooks; that said Ditch brook, if unobstructed, furnishes sufficient water in the spring of each year to enable him to run his logs to his saw-mill, and that, as he has been informed and believes, it has been used for such purposes by those owning mills on it for more than sixty years, etc.

That during the year 1861 and three years next thereafter, these defendants erected a dam across the waters from which the Ditch brook is supplied, at a point in said Windham called the Ridge, through which the waters of the Little Sebago pond flow in passing into Ditch brook, and from time to time have increased the height of their dam, adding thereto three feet during the past year, whereby they have from time to time entirely obstructed and prevented the flow of water into said Ditch brook, and rendered it impossible for the complainant to operate his mill, and run logs to the same, as he had been accustomed and had a right to do.

That during the spring of every year since, the defendants have kept the gates in said dam closed, and thus prevented the water from flowing through the same, and from operating his mill for three months every year, and the complainant from running logs to the same; and that in the spring of 1867 the defendants, after having kept their gates closed, and thus prevented the flow of water for a long time, opened the same and caused the water to flow in unusual quantities into said Ditch brook, whereby his mill-pond was overflowed, and his logs were carried away and lost.

That for two months past the defendants have kept the gates in their dam closed, thus keeping back the usual flow of water to the complainant's mill, and preventing him from running logs to his mill and operating the same, and though frequently requested to open said gates, they refuse so to do, and avow their intention to keep them closed, according to their own pleasure, and without regard to the rights of this complainant.

In consideration whereof, inasmuch as he has and can have no adequate remedy at law, and can be relieved and protected in the enjoyment of his rights only in a court of equity, he prays this court to grant a writ of injunction, under the seal of the court, to restrain the defendants, and each of them, and their agents, servants, and workmen, from keeping the gates aforesaid in said dam closed so as to prevent water at all times from passing and flowing through the same, equal in amount to what would flow if no dam had been erected at said place, etc.

The bill is dated April 21, 1871, and the subpœna issued Sept. 10, 1871.

The counsel for the complainant claim that the erection of the dam was a nuisance within R. S., c. 17, § 5, which declares the 'obstructing or impeding, without legal authority, the passage of any navigable river, harbor, or collection of water, . . . shall be deemed nuisances within the limitations and exceptions hereafter mentioned.'

But assuming the dam not to be within the exceptions of § 10, still, as the complainant has not commenced any suit at law, and as there has been no indictment found or complaint made for the nuisance, the bill cannot be maintained under this statute.

By § 16, 'Any court of record, before which an indictment, complaint, or action for a nuisance is pending, may, in any county, issue an injunction to stay or prevent such nuisance, and make such orders and decrees for enforcing or dissolving it, as justice and equity require.' The bill fails to allege the pendency of an indictment, complaint, or action for a nuisance, without which the injunction contemplated by this section cannot issue.

It remains to be seen whether the bill can be sustained under the general equity power conferred on this court 'in cases of nuisance and waste.' Chap. 77, § 5.

By § 7, 'writs of injunction may be issued in cases of equity jurisdiction, and when specially authorized by statute.' The injunction prayed for is not specially authorized by statute. It remains to be considered, whether it is authorized by the general course of procedure in equity cases.

The dam which constitutes the nuisance complained of, was erected in 1861.

'It is not every case which would furnish a right of action against a party for a nuisance, which will justify the interposition of a court of equity to redress the injury or remove the annoyance.' Story, Eq., § 925.

When the alleged nuisance is prospective and threatened, a court of equity may interfere to prevent its being brought into existence.

80 Me 310
89 Me 309
102 " 55, 62
97 " 479

When what is claimed to be a nuisance already exists, the general rule is, that the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate. *Porter* v. *Witham*, 17 Maine, 294. It must be a case of imperious necessity, or the right must have been previously established at law, or long enjoyed without interruption, to authorize the interposition of the court by injunction. *Jordan* v. *Woodward*, 38 Maine, 423. The same doctrine is held in *Morse* v. *Machias W. P. Co.*, 42 Maine, 119, and *Eastman* v. *Company*, 47 N. H. 71.

More than three years have elapsed since the dam, which constitutes the gravamen of the bill was erected, and in such case the courts of equity refuse to grant relief by injunction, unless the rights of the party complaining have been established at common law. *Dana* v. *Valentine*, 5 Met. 8; *Coe* v. *Winnipiseogee Man. Co.*, 37 N. H. 254; *Parker* v. *Winnipiseogee Lake M. & W. Man. Co.*, 1 Clifford, 247.

102 Me 55

That there is no pressing necessity for the interference of the court is abundantly apparent from the delay of the complainant in prosecuting his claim. In the *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515, the danger apprehended was of a serious nature, that of draining water from a great reservoir of the canal; yet Lord Eldon refused the injunction, leaving the company 'to take their chance at law,' because they delayed coming to the court till two years after notice from the defendants. 'They must establish their right to damages at law,' said he, 'before I ought to grant this injunction.' In *The Earl of Ripon* v. *Hobart*, 3 M. & K., these views of Lord Eldon received the sanction of the court. A court of equity will not undertake to decide whether a nuisance exists, until the plaintiff shall fully establish his claims at law. *Eastman* v. *Amoskeag Man. Co.*, 47 N. H. 71.

That the damages sustained may be recovered in a suit at law, is obvious. The injury, therefore, is not irreparable. 'To authorize the court's interference by injunction,' remarks Bell, C. J., in *Wason* v. *Sanborn*, 45 N. H. 169, 'there should appear imminent danger of great and irreparable damage, and not of one for which

an action at law would furnish full indemnity. *Bemis* v. *Upham*, 13 Pick. 169; *Van Winkle* v. *Curtis*, 2 Greenl. 422.

Demurrer sustained. Bill dismissed with costs.

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

PORTLAND, SACO & PORTSMOUTH R. R. CO. *vs.* CITY OF SACO.

Taxes—exemption. Depots and other buildings of railroad corporations not exempt.

R. S., 1857, c. 6, § 4, providing 'that the track of the road and the land on which it is constructed, shall not,' for the purpose of taxation, 'be deemed real estate,' does not apply to, and exempt from taxation, depots and other erections of railroad corporations upon land owned by them.

Personal property belonging to a railroad corporation, but not composing any part of its capital stock, is liable to be taxed where the corporation has its place of business.

In an action by a railroad corporation against a town to recover back money paid for taxes assessed upon wood, upon the ground that its place of business was not in the defendant town, the *onus* is upon the plaintiffs to show where it was.

Such an action pending before the full court upon an agreed statement will fail unless it appear that its place of business was not in the defendant town.

ON REPORT.

ASSUMPSIT to recover amount of taxes assessed for the year 1866, and paid under protest Sept. 23, 1867.

The amount of the inventory of real estate upon which the tax was assessed was $3,420, including depot buildings at $2,000. The inventory of personal estate was 100 cords of wood at $4 per cord. The aggregate tax $84.04.

The main track of the plaintiffs passes through the main passenger depot, leaving only the wall of the building upon the northeasterly side of the track, while all the rooms and platforms lie on the opposite side.

The other buildings connected with the passenger depot, used for wood-sheds and storage are contiguous to, but not over or across any track, though wholly within the four rods taken for the road by the plaintiff.

The cord-wood had been bought, cut, and piled by the plaintiffs for their own use on and about the trains and depot in their ordinary course of business.

The other facts sufficiently appear in the opinion.

The court to enter legal judgment.

Edward Eastman, for the plaintiffs, cited *Worcester* v. *Western R. R. Corp.*, 4 Met. 564; *Lehigh Nav. Co.* v. *Northampton County*, 8 Watts & Serg. 334; *Railroad* v. *Berks County*, 6 Barr, 70; *Vermont Central R.* v. *Burlington*, 28 Verm. 193; Mass. R. S., 1836, c. 7, § 2; R. S., 1857, c. 6, § 2; Pub. Laws, 1843, c. 9; Pub. Laws, 1845, c. 165; *B. & P. R. R. Co.* v. *Harris*, 21 Maine, 533.

E. B. Smith, for the defendants.

DICKERSON, J. The plaintiffs claim to recover back money paid by them to the defendants, for taxes alleged to have been illegally assessed upon their depot buildings and real estate, and, also, upon one hundred cords of wood, the property of the plaintiffs, situate and being in the defendant city.

It is agreed that the proceedings of the city and its officers in raising the money, and in assessing and collecting the taxes, were in accordance with the provisions of the statute, and that the taxes were paid by compulsion and under protest.

The power of taxation extends to all the persons and property of the body politic, whether private or corporate. It is a necessary incident of the right of property, that it is liable to bear a share of the public burdens. This right of taxation is inherent in the government, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporations; and its exercise, with respect to any particular species of property, real or personal, will not be presumed to have

been relinquished by the legislature. In order to entitle any kind of property to exemption from taxation, the intention of the legislature to exempt it must be expressed in clear and unambiguous terms; taxation is the rule; exemption is the exception. *Bangor* v. *Stetson*, 56 Maine, 294.

In this State all real estate is expressly made subject to taxation, unless when specifically exempted; and, for the purposes of taxation, the term real estate includes 'all lands and all buildings and other things erected on or affixed to the same.' R. S., 1857, c. 6, §§ 2, 3.

It is obvious that, under this statute, railroad depots and other buildings erected upon the land of railroad corporations are to be regarded as real estate for the purposes of taxation. But the counsel for the plaintiff corporation contends that such erections are exempted from taxation by R. S., 1857, c. 6, § 4, which provides 'that the track of the road and the land on which it is constructed, shall not, for the purposes of taxation, be deemed real estate.'

We do not think that such is the true construction of that provision of the statute. It certainly does not, in terms, have such meaning; and, as exemption from taxation is against common right, the statute must be strictly construed. The exemption from taxation is limited to 'the track of the road and the land on which it is constructed;' it does not, in terms, extend to their appurtenances. Railroad depots constitute no part of 'the track of the road.' If they are exempted from taxation, it is because they are to be regarded as 'the land on which the track is constructed.'

But how can they be regarded in this light? They are not land, but are clearly distinguishable from it. The definition of the terms, depot, and land, are distinct and dissimilar. A description of the one does not answer for the other, nor does the mention of either include the other. Besides, a previous section of the same chapter of the statute (§ 2) makes 'all buildings and other things erected on or affixed to land, real estate for the purposes of taxation.' Such erections are taxable, as real estate, and the land on which they rest is, also, taxable. For the purposes of taxation

each is separate and distinct from the other. The exemption of the land from taxation does not imply the exemption of the buildings erected thereon, any more than the exemption of the buildings implies the exemption of the land. As respects taxation the two descriptions of property are as separate and distinguishable as real estate is from personal property. The statute means what it says, and no more; if the legislature intended to give it a broader meaning than is expressed, it would have said so. The court will not enlarge the meaning of the statute by implication in order to give it an effect contrary to common right.

The liability to double taxation, or taxation of the real estate, and taxation of the shares which represent it, is obviated by R. S., 1857, c. 6, § 11, which provides that in assessing the stockholders for their shares in the corporation, the proportional part of the real estate shall be deducted from the value of such shares. In giving a construction to this identical provision, contained in a previous statute, the court, Rice, J., delivering the opinion, held, that, notwithstanding the charter of the plaintiff corporation required that the whole property of the corporation should be divided into shares, and that such shares should in all respects be considered, as personal estate, the real estate of the corporation, as such, was liable to taxation.

We do not think that, either upon principle or authority, railroad corporations are entitled to an immunity from sharing the public burdens attached to their real estate, arising from their public character, duties, and obligations, or their qualified right to, or limited use of, the real estate acquired under their charter by right of eminent domain; and certain we are, that if there is any such implied exemption, it is subordinate to the sovereign power of taxation vested in the legislature.

The case of *Inhabitants of Worcester* v. *The Western R. R. Corporation*, 4 Met. 564, cited by the counsel for the plaintiffs, is not applicable to the question under consideration which depends upon the construction of the statutes of this State relating to taxation. The court in this State, at least, has never denied the power of the

legislature to authorize the taxation of the description of property under consideration, and if the court in Massachusetts has given railroad corporations such immunity from legislative authority, this court does not feel at liberty to follow its example. Broad and comprehensive as the doctrine of *Inhabitants of Worcester* v. *The Western R. R. Co.* is, we do not understand that it denies to the legislature authority over this subject. However this may be, we do not regard that case as authority for the one at bar.

The grounds of our decision may be thus stated. Rule X, for the construction of statutes, declares that 'the words, "real estate," include lands and all tenements and hereditaments connected therewith, and all rights thereto, and interests therein.' Under this rule, an easement which is a right that one proprietor has to some profit, benefit, or lawful use out of, or over the estate of another proprietor, is to be regarded as 'real estate.' The rights of railroad corporations to land acquired by right of eminent domain constitute an easement. The statute makes all 'real estate' subject to taxation unless it is expressly exempted therefrom. By R. S., 1857, c. 6, § 4, 'the track of the road (of railroad corporations) and the land on which it is constructed' are not deemed 'real estate' for the purposes of taxation. This immunity from taxation is limited to the franchise, or right of way over the strip of land prescribed in the charter of the corporation, and to the track of the railroad, constructed thereon, and does not include the depots, engine-houses, turn-tables, car-houses, and other buildings, or erections. This conclusion is in harmony with the rights of property, and the theory of taxation, as recognized and maintained by courts of the highest authority. *Providence Bank* v. *Billings*, 4 Pet. 563; *Phila. & Wil. R. R.* v. *Maryland*, 10 How. 393.

The plaintiff corporation assumes the burden of proving that the taxes complained of were illegal. The remaining tax was assessed upon a quantity of wood in Saco. By R. S., 1857, c. 6, § 10, all personal property, except in certain enumerated cases, must be assessed to the owner in the town where he is an inhabitant. If the property belongs to a corporation, and does not compose a part of

its capital stock, it is liable to be taxed where the corporation has its place of business. *Augusta Bank* v. *City of Augusta*, 36 Maine, 255; Redfield on Railways, c. 30, § 228, cl. 5.

The agreed statement of facts does not show where the plaintiff corporation had its place of business, when this tax was assessed. We have, therefore, no means of determining whether the tax on the wood was illegal or not, and the burden being upon the plaintiff corporation, it must, also, fail upon this branch of the defense.

Plaintiff's nonsuit.

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

EBENEZER R. HOLMES *vs.* ROBINSON MANUFACTURING COMPANY.

Declaration—amendment of. New cause—what is.

In assumpsit on an account annexed for a certain number of tons of hay at a specified rate per ton, wherein the only dispute relates to the quantity, an amendment adding a count on a parol submission and award, of the specific question in controversy introduces no new cause of action, and is allowable.

But an amendment, adding a count on a parol submission and award, not of the quantity of hay, but 'of divers controversies' between the parties, does introduce a new cause of action; and still if it is certain that no testimony was introduced in support of such an amendment, and the jury only considered the testimony under the other counts, exceptions will not be sustained for allowing the amendment.

And it seems such an amendment may, under such circumstances, be stricken out after verdict.

ON EXCEPTIONS, AND MOTION to set aside the verdict as being against the weight of evidence.

ASSUMPSIT on an account annexed for eight tons of hay at fifteen dollars per ton, delivered March 1, 1867.

The writ was dated Jan. 31, 1870, and returnable at the succeeding March term.

At the following September term the plaintiff obtained leave to amend against the seasonable objection of the defendants, by adding the two following counts:

For that on the ——— day of November, A. D. 1868, the said defendants having before that time purchased and received of the plaintiff a certain quantity of hay, at the rate of fifteen dollars per ton; and a controversy has arisen between the said defendant and the said plaintiff concerning the quantity of said hay purchased and received as aforesaid, thereupon the said plaintiff and defendants aforesaid, at said Oxford, to wit, at said Paris, by their mutual agreement, appointed one William W. Dennen to hear and determine for them the said controversy, and then and there mutually and concurrently promised each other to stand to, abide by, and perform the award of the said Dennen thereupon. And the said Dennen, thereafterwards, to wit on the same day, there heard the said plaintiff and the said defendants concerning the same, and adjudged on the premises, and awarded that the said defendants had purchased and received as aforesaid the full amount of eight tons of hay as aforesaid, and then and there notified the said parties, plaintiff and defendant aforesaid, of the said award. In consideration whereof the said defendants then and there became liable to pay to the said plaintiff fifteen dollars for each and every ton of said eight tons of hay aforesaid, and in consideration thereof promised the plaintiff to pay him the same sums, amounting in all to one hundred and twenty dollars on demand.

Also, for that on the ——— day of November, A. D. 1868, there were divers controversies between the plaintiff and defendants concerning their mutual debts and dealings, and thereupon they then, at said Oxford, to wit, at said Paris, by their mutual agreement, appointed one William W. Dennen, to hear and determine for them all the said controversies, and mutually and concurrently promised each other to stand to and abide by and perform the award of the said Dennen thereupon. And the said Dennen thereafterwards,

on the same day, there heard the plaintiff and defendants, and adjudged upon the premises, and awarded that the said defendants should pay to the plaintiff the sum of one hundred and twenty dollars on demand, and then and there notified the same parties of the same.

The only question of fact in controversy was as to the quantity of hay delivered.

There was testimony on the part of the plaintiff tending to prove that he sold and delivered to the defendants, in March, 1867, eight tons of hay at fifteen dollars per ton.

There was testimony on the part of the defendants, tending to prove that the hay weighed but 12,180 lbs.

There was testimony on the part of the plaintiff tending to show that the parties submitted the question as to the quantity of hay by parol to one Dennen, and that he orally published his award, finding that there were eight tons. And there was testimony on part of the defendants tending to show that the submission was revoked and the award never made.

The jury returned a verdict for the plaintiff of $131.82; and the defendants alleged exceptions to the ruling, allowing the amendments.

J. J. Perry, in support of the exceptions, that the amendments introduced a new cause of action, and were inadmissible. *Haynes* v. *Morgan*, 3 Mass. 208; *Ball* v. *Claflin*, 5 Pick. 303; *Guilford* v. *Adams*, 19 Pick. 176; *Annis* v. *Gilmore*, 47 Maine, 152; *Cooper* v. *Waldron*, 50 Maine, 80; *Greenwood* v. *Curtis*, 4 Mass. 93; *Vancleef* v. *Therasson*, 3 Pick. 12; *Newhall* v. *Huzzey*, 18 Maine, 249.

That the submission and award is a bar to an action on the original claim. *Duren* v. *Getchell*, 55 Maine, 241, 249; *Colcord* v. *Fletcher*, 50 Maine, 398; *Wyman* v. *Hammond*, 55 Maine, 534; Colby's Pr. 32.

Counsel also argued the motion at length.

Virgin & Upton, for the plaintiff.

APPLETON, C. J. This is an action of assumpsit on an account annexed for eight tons of hay at fifteen dollars per ton. There was no dispute as to the price of the hay. The only controversy between the parties related to the quantity.

The plaintiff was permitted to amend by adding a count setting forth that a controversy had arisen as to the amount of hay delivered, and that this question had been referred by parol to a referee, who awarded the amount of hay to be the same as set forth in the first count, and a promise to abide by and perform said award.

The hay referred to in the first is the same as that mentioned in the second count. The amendment, therefore, introduces no new cause of action. In *Perrin* v. *Keene*, 19 Maine, 355, a suit was brought upon a note signed in the name of the firm by one of the copartners after its dissolution. It was held not binding upon the firm, and leave to amend was granted by filing a new count upon the original cause of action.

In *Burnham* v. *Spooner*, 10 N. H. 165, the plaintiff declared upon a promissory note given for certain goods sold by him to the defendant. He was permitted to amend by filing a count for goods and merchandise sold and delivered. In *Downer* v. *Shaw*, 23 N. H. 125, in debt on a judgment recovered in another State, on a promissory note, the court allowed the declaration to be amended by adding a count upon the note. In *Goodrich* v. *Bodurtha*, 6 Gray, 323, it was held that an action pending upon a judgment which was reversed during the pendency of the suit for want of jurisdiction, might be amended by declaring upon the note. The first count was properly added by way of amendment. *Colton* v. *King*, 2 Allen, 317.

It is not perceived why the award, relating only to the quantity, might not have been introduced to support the first count. In that case, the amendment would be unnecessary and immaterial.

The second count, which was added by way of amendment, sets forth that various controversies having arisen between the parties, they were submitted to a referee, by whom an award was made, and that the defendant promised to abide by and perform said

award, etc. This manifestly introduces a new cause of action, for any matter in controversy might have been introduced under this count. But the evidence is fully reported, and it is abundantly manifest that no evidence was offered to support this count. The defendant has in no wise suffered from this amendment. As the case shows that no evidence was offered under this count, it may be stricken out after verdict. *Hayward* v. *French*, 12 Gray, 453.

There is no such preponderance of proof on the part of the defendant as would justify or require that the verdict should be set aside as against evidence. *Exceptions and motion overruled. Judgment on the verdict.*

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

THOMAS HAYES *vs.* ANDREW BUZZELL.

Execution—officer's sale of personal property on.

If an officer sell on execution the personal property of the execution debtor, at an adjourned sale, without having posted up public notice of the time and place of such sale, forty-eight hours prior thereto, in two or more public places in the town or place of sale, as required by R. S., c. 84, §§ 4 and 5, the sale will be void and the officer a trespasser *ab initio*.

ON REPORT.

TRESPASS for taking and carrying away personal property of the plaintiff, value $76.75.

The defendant justified the taking as a deputy-sheriff, having seized the property as belonging to the plaintiff and sold it by virtue of an execution issued upon a judgment recovered in favor of one Eaton against the plaintiff.

The writ, judgment, and execution and officer's return on the execution were introduced subject to objection.

By the officer's return, it appeared that he seized the property in controversy, on Sept. 22, 1871, and on the 25th same September, gave public notice that he would sell the same at auction at J. B. Eaton's dwelling-house, in Fryeburg, on September 30th, and two o'clock P. M., by posting up public notices of said time and place of sale forty-eight hours before said time of the sale aforesaid, one at the store of E. P. Weston & Co., and the other at the store of John Locke, two public places in said Fryeburg; that pursuant to said notices, on the 30th of said September, at two o'clock P. M., at the dwelling-house of said Eaton, he sold certain articles of personal property to the several buyers, and at the respective prices named. 'Then adjourned for want of bidders to Oct. 5, 1871, at two o'clock P. M. Pursuant to adjournment, met and sold the following goods:' [Here follows a schedule of goods sold, with name of purchaser, and price of each, amounting to $22]. Then the return continues: 'Adjourned to Oct. 10, at two o'clock P. M.' etc. The return makes no mention of any notices of the several adjournments.

The view taken by the court renders any further report of the facts in the case unnecessary.

After the testimony was closed, the case was withdrawn from the jury and reported to the full court to render the proper judgment.

D. R. Hastings, for the plaintiff, contended, *inter alia*, that the officer did not follow the provisions of R. S., c. 84, §§ 4, 5, in the sale, and was a tresspasser, *ab initio*, citing *Knight* v. *Hunt*, 48 Maine, 533; *Moore* v. *Penley*, 52 Maine, 162; *Ross* v. *Philbrick*, 39 Maine, 32; and *Muzzey* v. *Cummings*, 34 Maine, 76.

Seth W. Fife & J. B. Eaton, for the defendant.

DICKERSON, J. Without considering the other alleged infirmities in the defense, we think that the omission of the officer to give notice of the several adjournments of the sale is fatal. Failing to comply with the requirements of R. S., c. 84, §§ 4, 5, the officer became a trespasser *ab initio*.

Judgment for plaintiff, for $76.75.

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

JAMES C. AYER *vs.* DAVID C. GLEASON.

Writ—amendment of.

Neither the common law, nor the statutes of this State, allows the plaintiff, in an action of trover, to amend his writ by inserting the names of other plaintiffs. Thus, where the defendant was summoned in action of trover to answer to 'James C. Ayer and ——, of,' etc. 'copartners under the style and firm name of James C. Ayer & Co.,' an amendment by inserting the names of the other members of the firm, is not allowable.

ON REPORT.

TROVER.

The writ, in the usual form, commanded the officer to summon the defendant to appear and 'answer unto James C. Ayer and ——, of,' etc., 'copartners in trade and doing business under the style and firm name of James C. Ayer & Co.,' etc.

At the March term, 1872, the plaintiff asked leave to insert the names of F. K. Ayer, A. G. Cook, and H. Ely, the other members of the firm, which was granted upon terms.

If this amendment was allowable, the case to stand for trial, otherwise plaintiff be nonsuit.

S. F. Gibson, for the plaintiff.

W. W. Bolster, for the defendant.

APPLETON, C. J. The defendant was summoned to answer to the suit of 'James C. Ayer and —— —— of Lowell, in the county of Middlesex and State of Massachusetts, copartners in trade and doing business under the style and firm name of James C. Ayer & Co., said company being established agreeably to law, and now is a legal company.' The names of the partners of Ayer were not inserted in the writ. The court, on the plaintiff's motion, permitted the writ to be amended by inserting the names of the several individuals constituting, with said Ayer, the firm of Ayer & Co. To this the defendant excepted.

Exceptions do not lie to the granting or the refusing of amendments legally allowable, but when an amendment not authorized by law is permitted, the party aggrieved may except therefor. *Newell* v. *Hussey*, 18 Maine, 249.

By the common law, amendments by striking out the names of existing plaintiffs or defendants, or by inserting those of new and additional ones, were not allowable in actions of assumpsit or on contracts.

In a writ of entry, an amendment by striking out the name of one of the demandants was not allowed in *Treat* v. *McMahon*, 2 Greenl. 120. In assumpsit against two or more, the plaintiff was not permitted to amend by striking out the name of one of the defendants. *Redington* v. *Farrar*, 5 Maine, 379. In actions on contract at common law, the names of new plaintiffs or defendants cannot be added by way of amendment. *Winslow* v. *Merrill*, 11 Maine, 127. In an action by husband and wife to recover back usurious interest, the plaintiff was not permitted to amend by striking out the name of the wife. *Roach* v. *Randall*, 45 Maine, 438.

The common law, so far as relates to defendants, was changed by statute in 1835, c. 178, § 4, by inserting or striking out the names of the defendants. R. S., 1871, c. 82, § 11. But this provision has never been held to authorize any amendment of a similar character as to plaintiffs. *White* v. *Curtis*, 35 Maine, 534. This court cannot legislate, however desirable any particular legislation may be in their judgment upon the subject-matter of amendments.

In petitions for partition the petition may be amended, in certain cases, by striking out the names of the petitioners and inserting those of others. R. S., 1871, c. 88, § 11.

As the amendment in question was not allowable at the common law, and as the legislature have changed the law of amendments only as to defendants, the common law must be regarded as in force so far as it relates to plaintiffs, and consequently the amendment is not allowable.

Amendments, like the one granted in the present case, have been allowed in some of the States, but their allowance is placed upon special statutory provisions, by which they are authorized. *Stuart* v. *Corning*, 32 Conn. 105; *Pitkin* v. *Roby*, 43 N. H. 138. In the latter case the court expressly say that 'at common law, such amendments could not be made in actions of assumpsit.'

Exceptions sustained.

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

JOHN Q. A. ELLIS *vs.* JONATHAN BUZZELL.

Slander—actions for—measure of evidence to support justification.

In an action of slander for charging one with adultery, a preponderance of testimony will support a plea of justification.

ON EXCEPTIONS.

CASE for slander, charging that the defendant accused the plaintiff with the crime of adultery.

Plea, general issue, with justification.

The defendant testified that he saw the plaintiff in the act of adultery with a certain woman. This the plaintiff denied by his own testimony, and introduced the deposition of the *particeps criminis*, which also denied the charge.

The plaintiff requested the presiding judge to instruct the jury that the truth of the statements of the defendant concerning the plaintiff's alleged act of adultery must be made out beyond a reasonable doubt, the same as in the trial of an indictment for adultery, in order to constitute a defense. This the court refused to do. But did instruct the jury that if the defendant made out by a preponderance of testimony, as in ordinary civil suits, that the words spoken by the defendant, concerning the alleged act of adultery by plaintiff, were true, that they should find for defendant,

and that the truth of the statements of the defendant concerning the alleged act of adultery by the plaintiff being proved, would be a complete justification of the defendant for uttering the same.

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

Lebroke & Pratt, for the plaintiff.

In civil cases where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict; but where no such issue is raised by the pleadings, the jury may decide upon the preponderance of evidence. 2 Greenl. on Ev., § 408; *Thayer* v. *Boyle*, 30 Maine, 475; *Sinclair* v. *Jackson*, 47 Maine, 102.

Knowles v. *Scribner*, 57 Maine, 495, being a bastardy process, does not conflict with this rule.

Same evidence is required to support a plea of justification in slander where crime is imputed. 2 Greenl. on Ev. § 426.

Counsel also cited. *Mitchell* v. *Borden*, 8 Wend. 570; *Woodbeek* v. *Keller*, 6 Cowp. 118; *Clark* v. *Debble*, 16 Wend. 601; *Hopkins* v. *Smith*, 3 Barb. 599; *Steinman* v. *Mc Williams*, 6 Barr, 170; *Grimes* v. *Coyle*, 6 B. Monr. 301; *Wonderly* v. *Nokes*, 8 Blackf. 589; *Gorman* v. *Sutton*, 32 Penn. St. 273; *Forshee* v. *Abrams*, 2 Clarke, 571; *Newbit* v. *Statuck*, 35 Maine, 315.

J. A. Peters & F. A. Wilson, for the defendant.

Barrows, J. The plaintiff claims to recover damages of the defendant, because, he says, the defendant falsely charged him with the commission of the crime of adultery.

The defendant says the plaintiff ought not to recover damages, because the accusation was not false, but true, and he testifies that he saw the plaintiff in the act of adultery with a certain woman. The plaintiff denies this in his testimony, and produces the deposition of the woman, who denies it also. Hereupon he requests the judge to instruct the jury that the defendant, in order to maintain

the defense, must prove the act of adultery upon him beyond a reasonable doubt, the same as if he was on trial for the commission of the crime.

The judge refused so to instruct, and, on the contrary, instructed the jury that if the defendant had made out the truth of the charge against the plaintiff by a preponderance of testimony, it was sufficient to entitle him to a verdict; and that proof of the truth of the statements made by the defendant would be a complete justification for uttering them.

In suits to recover damages for what is alleged to have been slander, the truth of the charges made by the defendant against the plaintiff has always been deemed a sufficient justification, even though they were maliciously made. We see this in the form and tenor of the plea in justification which simply asserts the truth of the words spoken. Went. Pl., vol. 3, p. 236; Chit. Pl., vol. 3, p. 525; *Foss* v. *Hildreth*, 10 Allen, 76.

Unless the charge made by the defendant against the plaintiff was false, as well as malicious, the plaintiff has no right to recover damages from him. The falsehood of the charge is a necessary element in the plaintiff's case. He cannot complain of any one for speaking of him nothing but the truth.

The burden, however, of proving that what he has said is true, rests rightfully enough upon the defendant, not only because he holds the affirmative according to the pleadings, but because of the presumption of innocence. This presumption, as well as whatever testimony the plaintiff may offer to repel the charge, the defendant must be prepared to overcome by evidence.

But when he has done this by that measure and quantity of evidence which is ordinarily held sufficient to entitle a party upon whom the burden of proof rests, to a verdict in his favor in a civil case, shall he be required to go further, and in order to save himself from being mulcted in damages for the benefit of the plaintiff, free the minds of the jury from every reasonable doubt of the plaintiff's guilt, as the State must in the trial of a criminal prosecution?

We see no good reason for thus confounding the distinction

which is made by the best text-writers on evidence, between civil and criminal cases with regard to the degree of assurance which must be given to the jury as the basis of a verdict. Greenl. on Ev. vol. 3, § 29; Roscoe's Crim. Ev. p. 15; Best on Presumptions, § 190; Starkie on Ev., 1st Am. ed., Part 3, § 52, vol. 2, pp. 450, 451.

It is true, that this distinction has heretofore been carried into civil cases and applied to suits in which it incidentally became necessary to determine, in order to settle the issue which the parties were litigating, whether one of the parties had committed an offense against the criminal law. Hence have arisen in these actions for defamation among others, a series of decisions which, if juries had acted according to their tenor, would have been productive not unfrequently of very unjust results.

Practically we do not consider the form of expression used in the instructions to juries in cases of this description as very likely to change the result. We do not believe, if the jury in the present case found themselves inclined to believe upon the whole evidence that the plaintiff was verily guilty, as the defendant had said, that they would have proceeded to assess damages in his favor, because he might have started a reasonable doubt in their minds whether he ought to be convicted of the crime and sent to the State prison, upon that evidence, even had they been so instructed. The practical effect of such an instruction would probably have been to eliminate the doubt from the minds of the jury, not to change the result at which they arrived.

But we think it best to recognize what has been justly said to be 'well understood, that a jury will not require so strong proof to maintain a civil action as to convict of a crime;' and to draw the line between the cases where full proof beyond a reasonable doubt shall be required, and those where a less degree of assurance may serve as the basis of a verdict, where the juror instinctively places it, making it to depend rather upon the results which are to follow the decision, than upon a philosophical analysis of the character of the issue. We must remember, as remarked by Roscoe, *ubi supra*,

that 'in civil cases it is always necessary for a jury to decide the question at issue between the parties; . . . however much, therefore, they may be perplexed, they cannot escape from giving a verdict founded upon one view or the other of the conflicting facts before them; presumptions, therefore, are necessarily made upon comparatively weak grounds. But in criminal cases there is always a result open to the jury which is practically looked upon as merely negative, namely, that which declares the accused to be not guilty.'

This is often substantially deemed equivalent only to 'not proven,' and in cases of doubt it is to this view that juries are taught to lean.

A greater degree of caution in coming to a conclusion should be practiced to guard life or liberty against the consequences of a mistake always painful, and possibly irreparable, than is necessary in civil cases, where, as above remarked, the issue must be settled in accordance with one view or the other, and the verdict is followed with positive results to one party or the other, but not of so serious a nature. In England there was a reason for carrying the distinction thus made between civil and criminal cases, into suits of this description,—which never existed here,—because there, as Lord Kenyon remarked in *Cook* v. *Field*, 3 Esp. 133, 'where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury;' and so penal consequences might in some sort be said to follow the verdict in a civil cause. See note (*a*) to *Willmet* v. *Harmer*, 8 Car. & P. 695, in E. C. L. R., vol. 34, p. 590, and the cases there cited.

Considering the universal presumption in favor of innocence, and the fact that whether it is presented directly, on the criminal side, or arises incidentally on the civil side, it is still the same question—guilty or not guilty—which is to be determined, it is not at all strange that those English decisions should have been followed in this country, though the reasons that operated there were wanting.

But we think it time to limit the application of a rule which was originally adopted *in favorem vitæ* in the days of a sanguinary penal

code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or encumber the action of juries in civil suits sounding only in damages. Nor in so doing do we deprive the plaintiff in an action of this sort of any substantial right. It is doubtless incumbent upon the defendant to 'make out' (as the phrase was in the ruling here complained of), *i. e.* to satisfy the minds of the jury by a preponderance of evidence of the strict truth of the words he uttered. And the plaintiff is entitled to the full benefit of the presumption of innocence; for as was justly suggested by Walton, J., in *Knowles* v. *Scribner*, 57 Maine, 497 (where we held the complainant in a bastardy process against a married man not bound to furnish the same amount of proof of the defendant's guilt, as would be necessary to convict him if he were on trial for adultery, in order to entitle herself to a verdict and contribution from the father of her bastard child), 'it is more accurate to say that there is no preponderance unless the evidence is sufficient to overcome the opposing presumptions as well as the opposing evidence.'

If the words said to be slanderous impute to the plaintiff the commission of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent, and to do this he must furnish evidence enough to overcome, in the minds of the jury, the natural presumption of innocence, as well as the opposing testimony. But to go further, and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of an issue between the State and a person charged with crime and exposed to penal consequences if the verdict is against him.

The doctrine contended for by the plaintiff did not prevail in the courts of New Hampshire or North Carolina. *Matthews* v. *Huntley*, 9 N. H. 150, per Parker, C. J.; *Folsom* v. *Brown*, 5 Foster, 122; *Kincade* v. *Bradshaw*, 3 Hawks., 63.

It is worthy of remark, that, with a very few unimportant exceptions, the cases in which it has been held, that to sustain a plea of

justification the defendant in an action of slander must adduce such proof as would suffice for the conviction of the plaintiff upon an indictment, have been cases in which the words used imputed perjury to the plaintiff, and in most of them, the matter more directly under consideration, has been the propriety of regarding the plaintiff's testimony upon the occasion referred to, as evidence in the case, to be overcome by the production of more than one witness to prove its falsity,—the necessity of showing that his testimony was false in intent as well as in fact,—its materiality or some point affecting the truth of the charge, and not the necessity of proving the commission of the crime beyond a reasonable doubt.

We have no occasion to question those decisions so far as they enforce the necessity of proving all the elements necessary to constitute the crime charged by an amount of evidence sufficient to overbalance the plaintiff's side of the case.

It may be, and probably is true, that the compendious phrase, 'sufficient to convict the plaintiff upon an indictment,' has had reference more frequently to the matters which it was necessary to establish, than to the degree of assurance upon which the jury should act.

In our own case of *Newbit* v. *Statuck*, 35 Maine, 318, the consideration of the precise question here raised was studiously and expressly avoided. *Exceptions overruled.*

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

BETSEY RAMSDELL *vs.* ELVERTON P. BUTLER.

Where equity, and not an action for money had and received, is proper remedy.

On Nov. 27, 1860, the plaintiff conveyed with covenants of warranty, certain real estate to one J.; but some doubt having been thrown upon the title by a levy of a creditor of the plaintiff's husband, the plaintiff, in accordance with a written agreement with her grantee, deposited with the defendant the consideration money, 'to remain with him as collateral to said warranty for a reasonable and satisfactory time.' On June 27, 1870, the grantee having deceased, and the premises passed to his devisee, the plaintiff demanded the money of the defendant, and, upon refusal to deliver it up, sued him in an action for money had and received; *Held*, that the action was not maintainable; but that a suit in equity was the proper remedy.

ON REPORT.

ASSUMPSIT for money had and received. Writ dated Sept. 20, 1870.

On March 29, 1859, the plaintiff received a conveyance of a certain house and lot of land, and on Nov. 27, 1860, in consideration of $1,000, conveyed the same premises by deed of warranty, to one Hiram Joy, who thereupon entered into possession of, and occupied the premises quietly, until his death in October, 1865, when his widow, as devisee of the estate, entered, and possession has ever since been retained by her, her tenants, and grantee.

On June 24, 1859, a creditor of Wm. Ramsdell, the plaintiff's husband, levied his execution upon a portion of the premises conveyed in the plaintiff's deed to Joy, alleging that the premises were paid for by the plaintiff's husband, but conveyed to the plaintiff in fraud of the husband's creditors. In consequence of the doubt thrown upon the plaintiff's title by the levy, the consideration money received by the plaintiff from Joy was, in pursuance of a written agreement executed by them at the time of the conveyance, together with the agreement deposited with the defendant, 'to re-

main with him as collateral to said warranty, for a reasonable and satisfactory length of time.'

On Dec. 12, 1855, Ramsdell petitioned for a review of the judgment of his creditor satisfied by the levy, obtained a writ of review in Jan., 1860, which was pending when Ramsdell died in the following March. No letters of administration of his estate being taken out, the action of review was finally dismissed.

In Dec., 1865, the judgment creditor commenced a bill in equity against the plaintiff, Mrs. Joy, based upon the levy, for the purpose of enforcing a conveyance of the property levied upon; but the bill was finally dismissed at June term, 1870. Whereupon a certificate of the dismissal, under the hand of the clerk of the court, was presented to the defendant in this action, and the money deposited with him demanded on June 25, 1870, and upon his refusal to pay, this suit was commenced.

The case was reported to the full court, who were to render judgment according to the legal rights of the parties.

A. W. Paine, for the plaintiff.

N. Wilson, for the defendant.

WALTON, J. This is an action for money had and received. The money came into the defendant's hands in this way:

The plaintiff conveyed a parcel of real estate to one Hiram Joy, with covenants of warranty; and there being some doubt about the title, a creditor of the grantor's husband having levied upon it as his property, it was agreed that the consideration money (a thousand dollars) should be placed in the hands of the defendant, 'to remain with him as collateral to said warranty, for a reasonable and satisfactory length of time.'

The plaintiff contends that the money has remained in the defendant's hands a reasonable length of time, and that being reasonable it should be construed to be satisfactory, and that she is now entitled to recover it in an action for money had and received against the defendant.

It will be noticed that the defendant is a mere depositary or trustee. He has no interest in the money. He holds it for the sole benefit of others. It does not appear that he was authorized to determine how long he should keep the money, nor when it should be given up, nor to which party it should be given. Joy, the original grantee, is now dead, but his widow, to whom he devised the estate, is not willing that the money should be given up. She says it has not been judicially determined that the levy upon the property is not valid, and that there is now the same reason for having the money remain in the defendant's hands as there was for placing it there in the first place.

What, then, was the defendant to do? Was it his duty to surrender this deposit simply because the plaintiff demanded it, when the party for whose security it was placed in his hands forbade his doing so?

We think not. As before remarked, it does not appear that he had any authority to determine to whom the money would eventually belong, or when it should be given up. It was, therefore, no breach of duty on his part to refuse to surrender it to the plaintiff. And without a breach of duty no action can be maintained against him. This is a self-evident proposition, and needs no authorities to support it.

We have been urged to enter into a consideration of the equities of the case as between the plaintiff and the widow of Hiram Joy, and to determine whether or not the levy was valid. It is a sufficient answer to this proposition, that neither the widow, nor the levying creditor, nor those claiming under him, are parties to the suit. It is, therefore, impossible for the court to render a judgment which shall be conclusive upon their rights; and any attempt to do so would be a clear violation of the fundamental maxims upon which justice is administered. The validity of the levy can only be determined in a suit to which those claiming title under it are parties. The interest of Hiram Joy's widow in the money sought to be recovered in this suit can only be determined in a suit to which she is a party.

But suppose the law were otherwise, and we should enter into a consideration of the rights of persons not parties to the suit, and should come to the conclusion that as against them the plaintiff's claim is the best, this would not place the defendant in the wrong. He could not know in advance what the decision of the court would be, and ought not to be made to pay the penalty of a lawsuit for not knowing.

The plaintiff has mistaken her remedy. Her claim, however just, is one which cannot be enforced in a suit against the defendant alone. He is a mere trustee holding the funds for the security of another, and is not, therefore, the real party adversely interested. The proper remedy in such cases is in equity, where all the parties in interest can be made parties to the record, and a judgment rendered that shall do justice to all, and be obligatory upon all. If in a case like this, one of the claimants could sue the trustee, so could the other; and as neither would be a party to the other's suit, a recovery in one would be no bar to a recovery in the other; and in this way, the defendant might, by the verdict of different juries, be compelled to pay double the amount he received, with two bills of cost added. The law does not tolerate the possibility of such a result. *Plaintiff nonsuit.*

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

JOHN PATTEN *vs.* WILLIAM T. PEARSON.

Sale of trust property to trustee may be disaffirmed—when.

If the indorser of a note, secured by a mortgage containing a power of sale can disaffirm an auction sale of the premises to the assignee of the mortgage, he must do so within a reasonable time.

Where a sale was made in Aug., 1859, and no disaffirmance attempted until Dec., 1861, when the indorser was sued on the note, and the property had passed to third persons, it was held too late.

ON REPORT.

ASSUMPSIT for money had and received. Writ dated Dec. 11, 1861.

The plaintiff put in a witnessed note dated 'Chelsea, Oct. 15, 1858,' signed by Augustus W. Pratt, payable to the defendant, or order, in three years, with interest semi-annually, indorsed by the defendant to Bragg and Patten and by them indorsed to the plaintiff.

On the note was an indorsement of the following tenor:

'Received Aug. 1, 1859, $1,081.'

The defendant contended that much more had been paid upon the note than was indicated by the indorsement, by sale of the property mortgaged to secure the note. The undisputed facts upon this point were, that the plaintiff and one Bragg were partners in the lumber business in Bangor, under the firm name of Bragg & Patten; that the defendant being indebted to them in the sum of about $2,090 and embarrassed, turned out to them this note in Oct., 1858, with the mortgage given by the maker to secure it, the mortgage being then in the registry of deeds in Massachusetts. On Nov. 1, Bragg and Pearson being in Boston, Pearson assigned the mortgage and delivered it to Bragg in completion of the bargain. The mortgage contained a power of sale, authorizing the mortgagee or assigns to sell on breach of the conditions.

After the failure of payment of the first semi-annual interest

which fell due, Bragg & Patten employed one Fiske to sell the mortgaged premises. He advertised it in due form and exposed it at auction sale, and bid it in; whereupon Bragg, on Aug, 16, 1859, executed a deed thereof to Fiske who bid it in for $1,950. From the amount of the sale Fiske deducted the principal of the prior mortgage, interest on the note at the time of the sale, interest on the prior mortgage and expenses of sale, and the balance, $1,081, he indorsed on the note in suit.

On Sept. 1, 1859, Fiske conveyed the premises to Bragg & Patten, no consideration being paid on either side.

In April, 1860, Bragg & Patten dissolved partnership; and, in dividing their assets, Patten took the note and Bragg the mortgaged premises, Bragg & Patten indorsing the note to Patten, and Patten conveying his interest in the premises to Bragg.

On March 12, 1861, Bragg sold and conveyed the premises to one Sargent, the consideration stated in the deed being $2,200.

The defendant contended that the sum received by Bragg from Sargent, should be accounted for by the holder of the note as part payment of it; that that was the first sale, the one by Fiske being a sham and the indorsement of $1,081 false, no sum having been received; and that the mortgaged estate was really held in trust for the security of this note.

On this point the defendant put in the deposition of Fiske, in which he deposed substantially, that he was employed by Bragg to advertise and sell as agent the mortgaged premises, and to bid them in unless they brought enough to cover the mortgages; that he was present at the auction on Aug. 1, 1859; that no one except himself and auctioneer were present; and that the deponent bid off the premises for Bragg. The defendant also put in office-copies of the mortgage, assignment thereof, deed to Fiske, Fiske's deed to Bragg & Patten, and Bragg's deed to Sargent.

The plaintiff testified substantially that he and his partner, Bragg, employed Fiske to sell the mortgaged premises, Bragg making the bargain with him; that Fiske made the indorsement upon the note; and that the plaintiff gave no instructions to Fiske or any one else to bid in the property.

Bragg, called by the plaintiff, that his only instructions to Fiske were to sell to the highest bidder, and did not instruct Fiske to bid it in, but was disappointed because Fiske did bid it in, and should not have taken it of Fiske had he been responsible.

The jury returned a verdict for the plaintiff for $2,267.

The jury returned the following answers to the following questions respectively:

1. Was the purchase made by Fiske at the auction sale, of the mortgaged premises, for himself, or for Bragg & Patten, or either of them?

Ans. The jury do not agree on this point.

2. How much is due on the note deducting the indorsement thereon?

Ans. $2,267.

3. How much is due, deducting the amount received by Bragg for the sale of the house?

Ans. $1,016.49.

4. Was the sale by Fiske fraudulently managed, so that it was sold for less than its worth, in order to obtain an absolute title thereto under its true value?

Ans. The jury have no evidence that it was so sold.

The defendant seasonably filed a motion that the verdict be set aside as against law and evidence; because the damages are excessive, and because the answers to 2d and 3d questions were against law and evidence.

The case was finally reported to the full court to determine from all the admissible evidence and findings of the jury (with a right to draw inferences), what sum the plaintiff is entitled to recover, and to change the verdict to express that sum.

J. A. Peters, for the plaintiff.

J. S. Rowe, for the defendant, cited *Howard* v. *Ames*, 3 Met. 311; *Downes* v. *Gravebrook*, 3 Maine, 200; *Middlesex Bank* v. *Minot*, 4 Met. 325–329; *Montague* v. *Dawes*, 14 Allen, 369; 1 Wash. on Real Prop. 499, 500; 1 Story's Eq., §§ 321, 322; Hill on Trusts, 159,* 536.*

WALTON, J. It is undoubtedly a rule of very general application, that when a trustee of any description, or any person acting as an agent or attorney for another, sells trust property, and becomes himself the purchaser, either directly or indirectly, the *cestui que trust*, or person for whom he acts, may, at his election, disaffirm the sale, provided he does so within a reasonable time. The law does not allow him to lie by for an unreasonable length of time, and then disaffirm the sale, especially where the rights of third persons have in the mean time attached. And it has been doubted whether this rule ought to be applied at all to public sales made under a power contained in a mortgage. It seems that in England, a mortgagee is allowed to bid under an order in chancery for the sale of a mortgage estate. *Ex-parte* Marsh, 1 Madd. 148. And in New York it is declared by statute, that a mortgagee may purchase at a sale at auction under a power in his mortgage. 4 Kent's Com. 10th ed., p. 517, *note*. It is quite certain that in such cases, where the property mortgaged is not sufficient to pay the debt, the mortgagee will be quite as anxious to have the property sell for all it is worth as the mortgagor.

But whatever the rule may be in such cases, it is well settled that if the mortgagor elects to treat the sale to the mortgagee as invalid, he must signify his intention to do so within a reasonable time. And if one collaterally interested, as a surety or indorser on the note secured by the mortgage, has a right to interfere and insist that such a sale shall be treated as a nullity (which we think may well be doubted), it is clear that he ought to exercise his right to do so in a reasonable time.

In this case the sale was made in August, 1859; and when this suit against the defendant, to recover of him as indorser, the balance due on the note was commenced, neither he, nor the mortgagor, nor any one else, so far as appears, had intimated an intention to disaffirm the sale, or had claimed that it was not fairly made, and for a fair price. We think the attempt made to disaffirm it at the trial of this cause was too late.

Besides, if the attempt should succeed, the result would not be

what the defendant claims. He could not claim what the property was subsequently sold for. That was *inter alios*. The effect would be that the mortgagor's right of redemption would not be sold at all; for if the first sale under the power is avoided, the subsequent sales will of course become inoperative. And then, instead of recovering only the balance due on the note, we perceive no reason why the plaintiff would not be entitled to recover the whole amount for which it was given, with interest. The defendant would then have a right to be subrogated to the rights of the mortgagee, but whether he would thereby better his condition may well be doubted. Clearly he has no right to treat the property as sold for the purpose of passing the title, and to disaffirm the sale for the purpose of claiming a larger price. He must either affirm or disaffirm the sale as a whole, and abide the consequences.

But, for the reasons before stated, we think the sale cannot now be avoided. The rights of third parties have intervened, and the claim to avoid it was not made within a reasonable time. Nor are we satisfied that the defendant is a proper party to avoid it; nor that it could be avoided in this collateral way by any one.

Treating the sale, then, as valid, nothing remains but to ascertain the amount due upon the note. The parties have agreed that the full court shall fix the amount notwithstanding the verdict of the jury. And the only matter likely to mislead is the fact that the interest on the note in suit was paid to Aug. 1, 1859, but was not indorsed. The amount indorsed upon the note was the balance in the holder's hands, after the interest to Aug. 1, 1859 ($105.21), had been taken out. The amount for which the plaintiff is entitled to judgment, is the face of the note, $2,215, less the indorsement, $1,081, and interest from Aug. 1, 1859. Principal, $1,134. Interest, $832.73. Total, $1,966.73. The verdict should be reduced to the latter sum, on which it will be the duty of the clerk to add interest from the time of the rendition of the verdict to the date of the judgment, as provided by law. R. S., c. 77, § 23.

The certificate should be as follows:

Verdict reduced to $1,966.73. *Judgment on the verdict, when thus reduced, with interest from time of the rendition of the verdict to the date of the judgment.*

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

LORING D. ROBINSON *vs.* WILLIAM C. HERSEY.

Guardian's liability.

A mechanic cannot maintain assumpsit against the guardian of a minor for labor performed upon the ward's buildings.

ON REPORT.

ASSUMPSIT for labor of the plaintiff and his apprentice in erecting certain buildings upon land in Stetson owned by certain minor children, of whom the defendant was the legal guardian.

The plaintiff claimed a lien on the buildings on which the work was done, and offered a schedule and statement filed in the office of the town clerk of Stetson, Feb. 24, 1871.

The plaintiff testified to the performance of the work charged in the account; that the balance was due, and unpaid; that he made contract for labor with the defendant, who did not inform him, and the plaintiff did not know, that the defendant did not own the land on which the buildings were erected; that he did not know the contrary until after the work was done; that the defendant told the plaintiff while the work was progressing, that he thought he had money enough to finish the buildings, but did not state whose money it was.

The defendant controverted these facts, and claimed that he did

not notify the plaintiff that the land belonged to the wards, and that he was acting as their guardian.

The plaintiff contended that judgment should be entered against the property specifically.

The defendant contended that no such judgment should be entered.

Thereupon the case was reported to the full court; and if, in the opinion of the court, the fact that the plaintiff knew the defendant was acting as guardian, in making the contract, and knew also when it was made, and while erecting the building, that the land belonged to the defendant's wards is material, the action to stand for trial.

J. F. Godfrey, for the plaintiff.

D. D. Stewart, for the defendant.

TAPLEY, J. The action in this case is confessedly one to recover for services performed for the benefit of certain minor children of the defendant, whose legal guardian he was.

The parties disagree as to whether the defendant contracted in his individual capacity or as guardian, and it is stipulated that if the fact the plaintiff knew he was contracting as guardian is material, the case must stand for trial.

We think this is quite material, for if he contracted as guardian it became a liability of his wards, and not one of his own, and this action cannot be maintained. *Raymond* v. *Sawyer*, 37 Maine, 406; *Homestead* v. *Loomis*, 53 Maine, 549; *Cole* v. *Eaton*, 8 Cush. 587.

As the plaintiff may never recover judgment against this defendant, it is unnecessary to discuss any question of lien. If he proceeds against the defendant's wards, their estate is held as against them to satisfy the judgment, and if this defendant should not pay it from their estate, he is liable to the plaintiff on his guardian's bond. Same cases. *Action to stand for trial.*

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

BURNET F. WARNER and another *vs.* MARGARET A. MORAN.

Wife—coercion of, by husband. Judgment creditor—remedy of against fraudulent debtor not having legal title.

If a wife, in the presence of her husband, knowingly aids him in a fraudulent transfer of his real estate to her, the *prima facie* presumption is that she acted under coercion; but this presumption may be rebutted.

If the husband never had any legal title to land paid for by him but conveyed to his wife, the remedy of a judgment creditor of the husband is in equity and not by a levy.

ON REPORT.

CASE founded on R. S., c. 113, § 51. Writ dated Dec. 14, 1869. Plea, general issue.

On May 18, 1864, Patrick Moran, then the defendant's husband, was indebted to the plaintiffs in the amount of a judgment recovered by them against him at the April term, 1857, of this court, for this county; and on the day of the date of this writ he was indebted to the plaintiffs in the amount of a certain other judgment recovered by them against him at the October term, 1868, on the former judgment.

On May 18, 1864, Moran verbally agreed to purchase of Andrew Frost the lot of land described in this writ, for the sum of $1,000, and paid Frost $100 in advance. Upon Moran's informing his wife thereof, she at once replied: 'Have the deed made to me, for you owe a good many persons; and if you take the deed they'll jump right on and attach it.'

Thereupon the land was conveyed to the defendant, and her husband paid the balance of the purchase money in cash.

Prior to the commencement of this action, the defendant was divorced from her husband.

If upon this state of facts the action is maintainable, it is to stand for trial.

A. Sanborn, for the plaintiffs, cited R. S., c. 113, § 51; c. 61, § 1; *Spaulding* v. *Fisher*, 57 Maine, 411; *Griffin* v. *Nitcher*, 57 Maine, 270; *Dockray* v. *Mason*, 48 Maine, 178.

W. McCrillis, for the defendant, contended that in a civil action against the wife for the commission of a tort, the presence of the husband is conclusive evidence that she acted by coercion. And that the plaintiffs' exclusive remedy is by levy, citing R. S., c. 61, § 1.

TAPLEY, J. R. S., c. 113, § 51, provides that, 'Whoever knowingly aids or assists a debtor or prisoner in a fraudulent transfer, or concealment of his property, to secure it from creditors, and prevent its attachment or seizure on execution, shall be liable to any creditor suing therefor in an action on the case, in double the amount of property so fraudulently transferred or concealed, not exceeding double the amount of such creditor's demand.'

This action is founded upon this section. It appears by the report in this case, that Patrick Moran, the husband of the defendant, being indebted to the said plaintiffs, on the 18th of May, 1864, made a purchase of certain real estate, and paid therefor the sum of $1,000, and at the instance and request of this defendant, and for the purpose of hindering and delaying these creditors, caused the deed to be made to her.

The question presented is, can the action be maintained upon this state of facts?

It is contended that the transaction having taken place in the presence of the husband, she is conclusively presumed to be under his coercion in the act.

This position, we think, cannot be maintained. In *Marshall* v. *Oakes*, 51 Maine, 308, it was held that the presumption is *prima facie*, that the wife acted under coercion, if the husband was actually present, and that it applied as well in civil suits as in criminal cases; and that such presumption may be rebutted by evidence, and the wife shown to be the instigator or active party.

We perceive no reason for doubting that the principle was correctly stated in that case. The reasoning, and authorities cited in that case, we refer to upon this point.

Section 1, chapter 61, provides, among other things, that 'when payment was paid for property conveyed to the wife from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase.'

Under this provision of statute, it is contended that 'the remedy of the creditor is by levy upon the estate as the property of the husband.'

It has been held upon consideration in this State, that where the title never vested in the husband, a levy was not effectual, and that a deed given to the wife by a third party upon payment made with the husband's property, did not so vest the estate in the husband that it could be taken by levy, but the creditor must proceed by equity.

It is sufficient at this time to refer to the recent case of *Webster* v. *Folsom*, 58 Maine, 230, and the cases there cited.

The wife having, since the conveyance and before the action was commenced, been divorced from the husband, and the evidence showing that she was the instigator and active party, and not in fact under the coercion of the husband in the act, we think the action is maintainable. *Case to stand for trial.*

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

GEORGE W. F. CHAMBERLAIN, administrator, in equity, *vs.* WILLIAM K. LANCEY.

Trusts—bill in equity to enforce—pleading.

In a bill seeking the inforcement of an alleged trust in relation to real estate held by a deed absolute in form, but as security for certain loans, no allegation of a demand for an account, or of a tender of the amount due is necessary, as in a bill for the redemption of a statutory mortgage.

Such a bill, brought in the name of one who is one of the heirs of the deceased *cestui que trust*, and also administrator of the estate, for the benefit of the estate and of himself and the other heirs, cannot be maintained; but all the heirs must be made parties, although all of them except the complainant reside without the jurisdiction.

BILL IN EQUITY heard on demurrer.

The bill is brought in the name of the complainant administrator of the estate and heir of Geo. W. Chamberlain, for the benefit of the estate and for each and all of the heirs as well as for himself, and alleges, substantially,

That his intestate died July 19, 1868, leaving certain heirs named (resident in other States); that his intestate, at the time of his decease, was indebted to the respondent on account of certain loans of money had during his lifetime, and for the security of which, the intestate had at sundry times conveyed divers parcels of land to the respondent by deeds absolute in form, but intended as mortgages.

That on June 25, 1855, Lancey agreed to loan the intestate $2,000, and receive as security therefor certain land by deed absolute in form, to be held in trust as security for that sum; that the land [described] was accordingly conveyed and the money loaned and the intestate's note given therefor.

That on divers days specified, the intestate paid the respondent several sums named.

That in August, 1856, in recognition of the trust, the respon-

dent gave the intestate a bond to reconvey, upon payment of $2,000 on or before Oct. 28, 1857; that on Oct, 22, 1857, the intestate paid the respondent $600 which was indorsed on said note, and on Oct. 27, $168, and Oct. 10, 1859, $638.

That on Oct. 5, 1859, the intestate procured another loan from the respondent of $300 and gave his note therefor, and conveyed two other lots of land described in form and intent as before; and that at sundry times named the intestate paid the respondent divers sums on account of said loans amounting to $450; that at the time of the decease of the intestate, and of the appointment of the complainant, the loans remained unpaid, in part, and the respondent held the lands and notes as security therefor.

That during the latter part of intestate's life he was feeble in health, wrote several letters to the respondent to come and see him and arrange their matters; went to see the respondent who agreed to effect an arrangement the next week, but neglected to do so; that respondent then stated that the amount due him Nov. 1, 1862, was $1516.49, and that he would release the lands for that sum and compound interest at twelve per cent from said time; that he would settle the matter soon.

That after repeated agreements by the respondent with the complainant to settle and adjust the matter, the respondent finally refused to receive less than the sum named and twelve per cent compound interest, which the complainant refused to pay.

That the complainant has the right to redeem the land, and is ready and willing to pay the respondent all sums due on said loans in redemption of the lands.

Prayer—for answer and true account of all moneys advanced and payments received, and all rents and profits; and that the respondent may be declared to hold the lands in trust and as security for the loans, and be compelled to release the same to the complainant and his said co-heirs upon payment or tender of the amount due, he offering to perform all acts necessary.

J. S. Rowe, for the complainant.

The nature of the bill rests on trust and fraud. It is not a bill to redeem a mortgage described in R. S., c. 90, § 1.

The demurrer admits the facts alleged *pro hac vice*. Those facts show that the defendant holds lands in trust for the Chamberlain heirs, and fraudulently refuses to execute that trust.

The bill is brought by one heir for the benefit of himself and the other heirs, who are all out of the jurisdiction of the court. It seeks a discovery of a trust, and a release to all the heirs.

So far as it seeks a discovery, there can be no question.

As to relief, the common practice of courts of equity is to allow one of a class to bring a bill for the benefit of himself and the others of his class, where convenience requires it, and no injustice can be done to others, as in case of creditors, legatees, members of voluntary associations, etc., etc. Story's Eq. Pl., §§ 76 *c*, 77, 96. This case comes under the exception in § 78.

Whether one or all the heirs are parties, can make no difference to this defendant, nor to the character of the defense. The interest of absent heirs cannot be affected injuriously. The relief asked can be solely for their benefit. All that is asked is a release to them of their shares, as heirs at law, of the intestate's land.

In *Harding* v. *Handy*, 11 Wheaton, 104, a bill was filed by some of the heirs of a deceased person, to set aside a deed procured from the ancestor, by fraud, the case was heard fully on the proofs which were voluminous, and the circuit court decreed that the deed be set aside, and that the land be sold, and the receipts be applied first to discharge the liens which the grantee had on it, and then the surplus to be distributed among the heirs. The supreme court held this decree to be right as to the setting aside of the deed, but that the order to sell shares of the absent heirs could not properly be made till they had been summoned in, for the sale of their shares might be injurious and undesirable to them.

Story's Eq. Pl. (3d ed., 1844), §§ 135 *a*, 136, and 47th and 48th Equity Rules of the Supreme Court of the U. S., cited in note under them.

A. Libby, for the defendant.

APPLETON, C. J. The bill alleges that the defendant held the real estate, therein described, in trust for George W. Chamberlain, and as security for loans from him to said Chamberlain; that said Chamberlain has deceased, that this complainant is administrator on his estate and one of his heirs at law, and that he brings this bill for the benefit of his co-heirs and of the estate. The prayer of the bill is that the defendant may be declared to hold the lands described in the bill in trust, and as security for certain loans therein set forth, and be compelled to release the same to this complainant and his co-heirs upon being paid or tendered the amount which may be due him for and on account of loans made.

The complainant describes himself as administrator and heir, but there is no allegation in the bill that the estate of George W. Chamberlain is insolvent.

The defendant has demurred to the bill. The demurrer admits the facts set forth in the bill. A trust estate, therefore, for the purpose of this discussion, may be assumed to exist.

Two causes of demurrer only have been argued, which we propose to examine.

1. It is objected that there has been no demand for an account and no tender of the sum due. In other words, that the complainant does not bring himself within the provisions of R. S., c. 90, § 17, which sets forth what a mortgagee is required to do when seeking to redeem his mortgaged estate.

The bill does not set forth a statute mortgage. None such is pretended to exist. The bill is not brought under the provisions of the revised statutes relating to mortgages. It seeks only the enforcement of an alleged trust, not the redemption of a statutory mortgage. The offer, too, is made to pay whatever there may be due the trustee. This objection cannot avail.

2. It is objected that there are not the proper parties to the bill.

The enforcement of a trust is sought for. George W. Chamberlain was the original *cestui que trust*. Upon his death, his rights devolved upon his heirs. The defendant, assuming the ex-

istence of a trust, holds the estate for the benefit of his heirs. If it is to be enforced, it is to be enforced by them.

One of the heirs only is a party. The general rule is, that all interested in the object of the suit ought to be made parties. There is no reason perceived why the co-heirs of the complainant may not and should not be parties. There is no allegation that the other heirs have declined to become parties complainant. If they had so declined, they might have been made parties defendant.

Nor is the allegation that they are residents without the State a sufficient reason for not making them parties. 'It is usual . . . to add in the bill the name of the person out of the jurisdiction of the court, so far as may be necessary to connect his case with that of the other parties. But in such case, the bill should not only allege, that the person is out of the jurisdiction, but it should go on to pray process against him, so that he be made amenable to the process of the court, if he should come within the jurisdiction.' Story's Eq. Pl., § 80.

The trustee should not be liable to but one process. The rights of all those for whose benefit the trust exists should be finally settled in this case. What may be the relations between the co-heirs we do not know. One heir may have acquired the equitable rights of his co-heirs. In such case, a conveyance to all the heirs might be adverse and prejudicial to the interests of some one of them, and lead to further litigation. The rights of parties not before the court cannot safely be determined in their absence.

Demurrer sustained.

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

BENJAMIN P. GILMAN *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Railroad fence. Proximate cause. Contributory negligence.

By the requirements of R. S., c. 51, § 20, legal and sufficient fences are to be made on each side of land taken for a railroad, where it passes through inclosed or improved land or woodlots belonging to a farm, before a construction of the road is commenced, and they are to be kept in good repair by the corporation.

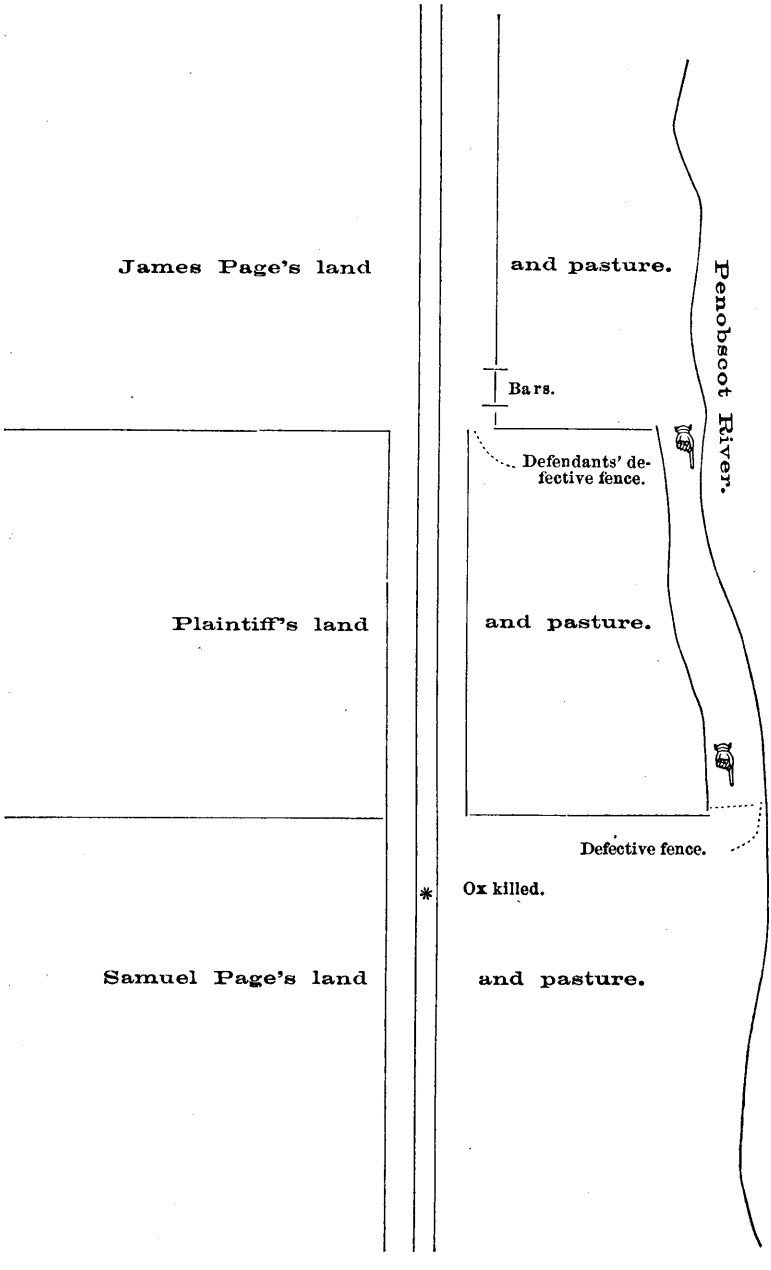
An agreement between a railroad corporation and an adjoining proprietor not to require them to fence but one side of their road across his land until notified by him, will not relieve them from any liability they may thereby incur to any person not cognizant of or assenting to it.

If, in an action against a railroad company for the value of the plaintiff's ox killed by their train, the defendants would have their exceptions sustained upon the ground that the ruling complained of is in conflict with the well-established principle that a railroad company is not bound to fence against cattle wrongfully upon the adjoining close, it must appear from the exceptions that there was testimony tending to show that the plaintiff's ox was wrongfully there.

The plaintiff's lot and those adjoining on the north and south, were crossed by the defendants' road, and bounded on the east by a river, the division fence between so much of the plaintiff's and the south lot as lay between the railroad and river (being the plaintiff's pasture) being defective. The railroad fence extended on both sides of the road across the plaintiff's lot; that on the river side of the road, across the north lot setting several feet further from the track did not form a continuous line with that across the plaintiff's; while pursuant to an agreement between the defendants and the proprietor thereof, there was no railroad fence on the south lot on the river side of the road. The plaintiff's pasture was also fenced on the river bank above high-water mark. An ox of the plaintiff escaped from his owner's pasture through the gap of the defendants' fence, occasioned by want of continuity upon the track, was driven thence by the defendants' employee upon the north lot, whence during the next six hours, the ox wandered along the river bank across his owner's land outside of its inclosure, to and upon the south lot and thence upon the track, where he was killed by the defendants' locomotive while being managed with proper care on their part. *Held*, That the gap in the defendants' fence on the plaintiff's land through which the animal escaped from his pasture was the efficient procuring cause of the accident, and that the maxim, '*causa proxima*,' etc., had no proper application to the case.

Also, *held*, that the omission of the plaintiff to erect a sufficient fence between his pasture and the south lot cannot be imputed to him as contributory negligence.

2 Am. Law Reg. 559


James Page's land
and pasture.
Penobscot River.
Bars.
Defendants' defective fence.
Plaintiff's land
and pasture.
Defective fence.
Ox killed.
Samuel Page's land
and pasture.

ON EXCEPTIONS.

TRESPASS for negligently killing one steer, and injuring another Aug. 11, 1870; and killing an ox Sept. 21, 1870, by the defendants' locomotive engine.

The plaintiff's land, and the adjoining lot on the north owned by James Page, and adjoining lot on the south owned by Samuel Page, are bounded on the east by the Penobscot river, and crossed by the defendants' railroad.

There was evidence tending to show that the lots were severally inclosed by divisional fences, but the fence between so much of the plaintiff's lot as lay between the railroad and the river, and constituting the plaintiff's pasture, and Samuel Page's lot on the south was defective.

That the defendants had constructed their fence across the plaintiff's lot on both sides of their road; across James Page's lot on the river or easterly side of their road, several feet further from the track than the fence on the same side of the road on the plaintiff's, so that instead of forming a continuous line there was a jog, which consisted of a defective brush fence; that when Samuel Page settled the land damage with the defendants, it was agreed between them that the defendants should not be required to fence his land on the river side of their road until he should notify them to do so; and that he did not give them such notice, and they did not build it until after Sept. 21, 1870.

That there was a defect in the defendants' fence at the corner of James Page's land, and where it joins the plaintiff's pasture, and on the plaintiff's land.

That on the morning of Sept. 21, 1870, the plaintiff's ox passed through such defective fence upon the railroad track, whereupon an employee of the defendants drove the ox through the bars of James Page's fence into the latter's pasture, between the railroad and river, the employee supposing it to be the plaintiff's pasture.

That after the plaintiff's steers were killed, and before his ox was killed, the plaintiff built a fence from the line between his land and that of James Page's around and near the bank of the river,

above high-water mark, to the railroad on the boundary line between his land and land of Samuel Page.

That the ox wandered from the pasture of James Page, to which place he had been driven by the defendants' employee in the morning, across the plaintiff's land and outside of the plaintiff's pasture fence on the bank of the river, seventy rods, upon Samuel Page's land between the railroad and river, and thence upon the railroad track, where he was killed about noon of the same day, by a passing train of the defendants.

The presiding judge instructed the jury that if the ox escaped through the defendants' fence on plaintiff's land, at the corner of James Page's land, on account of a defect therein, defendants would be liable, although the ox was put into James Page's pasture by defendants' servant, and afterwards came down and around the fence of plaintiff across plaintiff's land, being on the river side of the railroad outside his fence, on to land of Samuel Page, and from land of Samuel Page, on to the railroad track. And although there was such an agreement between Samuel Page and defendants, that defendants need not fence between his land and track, until he notified defendants so to fence, and although he did not so notify defendants.

The jury rendered a verdict for plaintiff for $200, and found specially that the railroad fence at the corner of James Page's land was defective, that plaintiff's ox, in consequence of such defective fence, and through it passed on to the railroad track on the morning of Sept. 21st.

That the railroad company was not guilty of any neglect in the management of the train when the injury to the steers, or the killing of the ox occurred. To which rulings defendants alleged exceptions.

J. W. Emery & Chas. P. Stetson, for the defendants.

Where there is no agreement, prescription, or statute assignment, a tenant is not bound to fence against an adjoining close; in such case there being no fence, each owner is bound to keep his cattle

on his own close. *Rust* v. *Low*, 6 Mass. 90; *Little* v. *Lathrop*, 5 Greenl. 356; *Sturtevant* v. *Merrill*, 33 Maine, 62.

When a tenant is bound to fence against an adjoining close, it is only against such cattle as are rightfully in that close. *Lord* v. *Wormwood*, 29 Maine, 282. And such is the case where it is provided by statute that the party in fault shall be liable for all damages arising from his neglect. *Lawrence* v. *Coombs*, 37 N. H. 331.

These principles have been applied to the construction of the statutes requiring railroad corporations to fence the lines of their railroad through inclosed or improved land. *Towns* v. *Cheshire R. Co.*, 21 N. H. 364; *Perkins* v. *Eastern R. Co.*, 29 Maine, 307; *Cornwall* v. *Sullivan R. Co.*, 28 N. H. 161; *Eames* v. *Salem & L. R. Co.*, 98 Mass. 566.

The rights of persons having no interest in the adjoining close, remain unaffected by the statute, and are to be defined and protected by the common law, and the obligation of railroad companies to build fences along their road only extends to the owner and rightful occupier of the adjoining close, and not to mere trespasses thereon. *Bemis* v. *Conn. & Passumpsic R. Co.*, 42 Verm. 378; *Jackson* v. *Rut. & Bur. R. Co.*, 25 Verm. 156; Redfield's Am. Railway Cases, 374 and notes. *Woolson* v. *Northern R. Co.*, 19 N. H. 267; *Chapin* v. *Sullivan R. Co.*, 39 N. H. 53 and 564; *Mayberry* v. *Concord R. Co.*, 47 N. H. 391.

Where there is a contract with the land owner to make and maintain the fence required of the company, or that the company shall not be required to build the fence across his land, the corporation cannot be liable to him because there is no fence, nor to any one except passengers and those persons who are rightfully upon the railroad. *Cornwall* v. *Sullivan R. Co.*, 28 N. H. 171; *Jackson* v. *Rut. & Bur. R. Co.*, 25 Verm. 156.

The plaintiff's ox came on to the railroad before he was killed, from the land of Samuel Page, on the river side, and when the land damages were settled, it was agreed by the railway company and Page that defendants should not be obliged to fence his land on the river side until he should notify the company, and that he

did not so notify the company until after the killing of the ox. The ox was therefore either a trespasser and wrongfully on Samuel Page's land, or there by consent of Samuel Page.

If he was a trespasser, then plaintiff cannot recover. If on Page's land by consent of Page, plaintiff can stand no better than Page,—Page could not recover for damage to his cattle going from his land on to the railroad, because there was the agreement not to fence,—it is equally clear that plaintiff cannot recover.

The fact that the ox six hours before escaped through a defect in the fence of defendants seventy rods distant, and was turned from the railroad track into the pasture of James Page cannot render the company liable.

Because he came after that into the custody and on to the premises of plaintiff, and thence on to Samuel Page's land and thence on to the railroad.

Because the defect in the fence at corner of James Page's land was not the proximate cause of the injury. Sherman & Redfield on Negligence, § 10, p. 12; *Moulton* v. *Sanford*, 51 Maine, 127; *Marble* v. *Worcester*, 4 Gray, 397; *Ryerson* v. *Abington*, 102 Mass. 532.

Because the negligence of plaintiff contributed to produce the injury. *Moore* v. *Abbott*, 32 Maine, 46; *Coombs* v. *Topsham*, 38 Maine, 204; *Anderson* v. *Bath*, 42 Maine, 346.

It was the duty of plaintiff to have a proper fence between him and Samuel Page, the want of such fence was negligence on his part, contributing to the injury, or rather the proximate cause of the injury.

W. C. Crosby, for the plaintiff.

BARROWS, J. The plaintiff's land is bounded easterly by the Penobscot river, northerly by land of James Page, and southerly by land of Samuel Page. The defendants' railroad intersects all three lots, where the land is improved. There was a line fence between the plaintiff's land and James Page's, and a defective one

between plaintiff's and Samuel Page's on the easterly or river side of the railroad. Defendants had built their fence across the plaintiff's land on both sides—across James Page's on the river or easterly side, and across Samuel Page's on the westerly side of their railroad; and in settling land damages with Samuel Page they had obtained a stipulation from him that they should not be required to fence the easterly or river side of their road across his land until notified by him, and at the time the plaintiff's ox was killed they had not been notified. But there was a defect in defendants' fence on the plaintiff's land at the point where their fence across James Page's land on the river side of the railroad commenced, and through that defect the plaintiff's ox passed from his pasture on to the railroad some five or six hours before he was killed. Several weeks before this time, the plaintiff's steers had been injured on the railroad, and thereupon he built a fence across his own land from James Page's line, around and near the bank of the river above high-water mark, continuing it on the boundary between his own land and land of Samuel Page to the railroad, and thus effectually inclosing his pasture except for the defect in the defendants' fence above mentioned. The morning of the day the ox was killed, an employee of the defendants found the ox on the railroad track, drove him from it into James Page's pasture (erroneously supposing it to be the plaintiff's), and thence it appeared that the ox had traveled around on the river bank across his owner's land, but outside of his pasture fence, about seventy rods, to Samuel Page's land, which was unfenced along the line of the railroad on that side, in accordance with the stipulation above referred to, and so the ox went directly from Samuel Page's land upon the track, and was killed.

The defendants' claim to be relieved from paying for him by virtue of their agreement with Samuel Page, inasmuch as he at last came on to the track from Samuel Page's land.

But the presiding judge instructed the jury that if the ox escaped through the defendants' fence on his owner's land, and by reason of a defect therein, the defendants would be liable, notwithstanding

the agreement between Samuel Page and the defendants, and notwithstanding the facts above stated as to the whereabouts and wanderings of the ox after his escape from the owner's pasture as aforesaid.

The defendants insist now that the ruling was erroneous, because they say that the ox at last came upon their track from S. Page's land, and whether he was there by consent of Page or as a trespasser, the owner cannot recover, and they cite cases in which it is held with more or less distinctness that at common law every man must, at his own proper peril, keep his cattle on his own land; that except by virtue of some agreement, prescription, or statute assignment or requirement, no one is bound to fence against an adjoining close; and that, when one is thus bound, it is only against the cattle lawfully upon such close; that these principles have been and should be applied to the construction of statutes requiring railroad companies to fence their roads where they pass through inclosed or improved land; that those statutes do not affect or add to the rights of those who have no interest in the adjoining land, nor the obligations of the railroad company to them, but those rights and obligations still remain as at common law; and that any contract which the company may make with the adjoining proprietor as to the building or omitting to build the statute fence through his land is valid and binding upon such proprietor, and relieves the company from any liability for injury to his cattle or any cattle coming upon the track from his land, to the extent of its provisions, unless such injury is inflicted by the wanton or careless mismanagement of their engines and trains.

Hereupon they argue that if the ox was on S. Page's land with Page's consent, his owner can have no greater rights against the company than Page himself would have had; that Page could not recover in such a suit because of their agreement; that they are not liable on account of the original escape, because the ox afterwards went across his owner's land; and that the negligence of plaintiff in not fencing between his land and that of Samuel Page, on the river bank,—not the defect in the defendant's fence by

which the animal first escaped,—was the proximate cause of the injury, or at least contributed to produce it.

But we think the defendants fail to bring their case within the principles decided in the cases they cite, and behind which they seek to intrench themselves, in more than one important particular.

1. If they would have us decide that the rulings of which they complain militate against the cases which hold, as we have done in *Perkins* v. *Eastern R. R. Co.*, 29 Maine, 310, that the railroad company is not bound to fence against cattle wrongfully upon the adjoining close, they should, at the very least, have made it appear in their exceptions that there was testimony tending to show that the plaintiff's ox had no right to pasture upon Samuel Page's land there between the railroad and the river. In the absence of any such statement we infer that those decisions were inapplicable to the facts in the present case. Were there nothing else to found it on, the form of the defendants' argument would fairly justify the inference. Their position is that if the ox was on Page's land with his consent, the plaintiff is barred from recovering by reason of the agreement with Page that they need not build the fence until notified by him, thus assuming the fact with regard to Page's consent to be as the plaintiff claims it was. But it was incumbent upon the excepting party to state how the fact was, if it were otherwise. We cannot presume a fact which the case does not show, in order to base upon it an argument that there was error in the instructions.

2. The defendants also cite cases in which it has been held that where there is a contract with the adjoining proprietor that the company shall not be required to build the fence across his land, he cannot recover for injuries accruing from the want of such fence. But the defendants had no such contract with the plaintiff. They claim that the same result follows as to all cattle lawfully running upon Page's land. But we do not think that an agreement like this for the nullification of a statute of this State can be regarded as having any effect upon the rights of any one who is not a party to it, nor shown to be cognizant of or assenting to it. The statute requirement is explicit. 'Legal and sufficient fences are to be

made on each side of land taken for a railroad where it passes through inclosed or improved land, or woodlots belonging to a farm, before a construction of the road is commenced, and they are to be maintained and kept in good repair by the corporation.' A penalty is imposed for the breach of this law. R. S., 1857, c. 51, § 23 *et seq.;* R. S., 1871, c. 51, § 20 *et seq.*

An action lies in favor of one who, without fault on his own part, has suffered damage by reason of the defendants' disregard of the law. If they will stipulate with adjoining proprietors to suffer them to break it, such an agreement will not relieve them from any liability they may thereby incur to any innocent third party. A covenant of that description does not 'run with the land.'

The statute provision is an important one for the safety of the traveling public, the railroad company itself, and the whole community. An agreement to disregard it will bar the rights of no one who is not culpably consenting to it. It follows that the ruling was right, even if the want of the fence on S. Page's land is to be regarded as the proximate cause of the injury.

3. But we think it is a refinement quite too subtle to relieve the defendants from liability, when the ox escaped from the owner's inclosure on to the track by reason of the defect in the defendants' fence, to claim that this was not the proximate cause of the accident because he was driven thence by a railroad employee into another man's pasture, and strayed thence across his owner's land outside of his inclosure on to the track again at the place where he was killed. He escaped from the inclosure in which his owner had placed him for safe keeping through the fault of the defendants. He was not restored by them to the custody of the owner. That he was driven on to Page's land and returned again upon the track, after crossing unenclosed land belonging to his owner, can make no difference as to the liability of the defendants.

If, after thus escaping upon the track, he had strayed through other defects in the defendants' fences upon the lands of other adjoining proprietors before he met his death upon the track, there would be no propriety in permitting the defendants to set up the

fact that he was unlawfully upon such neighbors' lands, because it was through their fault and not the fault of the plaintiff that he was there at all. They could not be thus permitted out of two wrongs to make a right. '*Nemo ex suo delicto meliorem suam conditionem facere potest.*'

The case bears no resemblance in its facts to that of *Eames* v. *S. & L. R. R. Co.*, 98 Mass. 561. Neither is it one to which the maxim, *causa proxima, non remota, spectatur* can be usefully or properly applied. There would be just as much propriety in attributing the loss to the perversity of the animal in remaining upon the track instead of moving aside at the approach of the engine, as there would be in reckoning as a proximate cause its wanderings after it had escaped from the owner's inclosure through the fault of the defendants. Their neglect was the true efficient procuring cause, without which the accident could not have happened.

4. The plaintiff does not appear to have been negligent in any respect. It would seem that he had taken special care after the accident to his steers, and fenced his pasture against the river as well as on the line between the pasture and S. Page's land, so that his cattle would have been secure but for the defect in the defendants' fence. It cannot be imputed to the plaintiff as negligence, that he did not fence between his land and the land of S. Page on the river bank, where his cattle were not allowed to run, and where the ox could not have gone if the defendants had done their duty. None of the cases which have turned upon the question of contributory negligence on the part of plaintiffs, present similar features or anything analogous.

We are satisfied that the instruction given by the presiding judge, directed the attention of the jury to the only question they had to consider, and that the matters relied on by the defendants, afford them no legal defense to the plaintiff's claim.

Exceptions overruled.

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

DENMAN BARTLETT *vs.* PHILIP C. JONES.

Conditional deed—rent of land conveyed by.

The defendant conveyed a farm to the plaintiff by a deed containing the condition, that if the plaintiff or his heirs shall pay the defendant certain notes at maturity, 'the deed shall become of full force, otherwise shall be null and void and of no force or effect.' The first note not being paid at maturity, the defendant took possession of the premises and leased them. Subsequently the plaintiff having paid the notes, entered into possession, and brought this action of assumpsit to recover the rent received by the defendant. *Held*, that in the absence of any express promise, on the part of the defendant, to pay the plaintiff, the action would not lie.

Also held, that no promise was implied from the facts.

ON REPORT.

ASSUMPSIT on account annexed; money had and received; and for use and occupation.

The defendant conveyed a farm to the plaintiff April 23, 1866, by his deed duly acknowledged and recorded. The deed contained this condition: The condition of this deed is such that if the said Denman Bartlett or his heirs shall pay to the said Philip C. Jones three notes of hand, each at maturity, bearing even date with the instrument, of one hundred dollars each, and payable in one, two, and three years from January, 1867, this deed shall become of full force, otherwise shall be null and void and of no force or effect. The first note was not paid at maturity and Jones thereupon entered upon the land; took possession of it as his own property, for breach of this condition, and let it to a tenant for a compensation; that is, for one-half of the crops, a part of which he had sold and got his pay. About a year after the expiration of the lease to Jones's tenant, Bartlett paid Jones the notes and brought this action to recover of Jones what he received from his tenant for the use of the land. If the action cannot be maintained a nonsuit to be entered.

McCrillis, for the plaintiff.

The defendant received the payment of the notes, and thus treated plaintiff's estate in the farm as not at an end.

Defendant cannot treat plaintiff's title at an end for the purpose of taking the income, and as continuing for the purpose of collecting the notes.

Bartlett's estate in the farm continued the same as if the notes had been paid at maturity. *Guild* v. *Richards*, 16 Gray, 309; *Stone* v. *Ellis*, 9 Cush. 103, 97 Mass. 192, 193.

The entry was not for condition broken.

A. Sanborn, for the defendant.

The condition in the deed is a condition precedent; and the estate did not vest in the plaintiff by the deed. 1 Black. Com. 154, 155; 4 Kent's Com., 125; *Robbins* v. *Gleason*, 47 Maine, 273.

The condition was not performed and the deed was null and void by its express terms.

The plaintiff, who had no interest in, no title to, and no possession of, the land, claims to recover for the use and occupation of the land of defendant in whom both the title and possession were united.

The acceptance of payment of the notes did not operate as a waiver so as to vest the title in the plaintiff. 1 Black. Com., 155, 156; 4 Kent's Com., 128; 2 Greenl. Cruise, Title 13, 29 and note; *Chalker* v. *Chalker*, 1 Conn. 79.

But if it did, it could only operate to vest it in him at, and not before the time of acceptance, because, by the terms of the condition, it would not vest till all of the notes were paid. And he could not, therefore, legally claim to recover for the use and occupation before that time, of defendant.

Appleton, C. J. On April 23, 1866, the defendant conveyed a farm to the plaintiff by a conditional deed in the following words: 'The condition of this deed is such, that if Denman Bartlett or his heirs shall pay to the said Philip C. Jones three notes of hand, each at maturity, bearing even date with the instrument, of one

hundred dollars each, and payable in one, two, and three years from January, 1867, this deed shall become of full force, otherwise shall be null and void and of no force or effect.'

The first note was not paid at maturity and the defendant thereupon entered upon the land, took possession of it as his own property and leased it.

By entering for condition broken, the defendant is in possession of his original estate as owner of the fee. In leasing the estate he acted as owner and not as agent for or tenant of any one.

The rent was his. He never promised or agreed to account for it to any one. He was under no legal obligation to account for it. The case shows nothing from which a promise can be inferred.

It seems the plaintiff subsequently paid his notes and entered into possession. But this was the result of a new bargain. His estate had become forfeited. The defendant as owner had received the rent. The estate and the rent accruing therefrom were his. There is no evidence tending to show that the defendant ever promised to account for past rent, or that the plaintiff expected he would. If such was the agreement, the amount should then have been deducted from the notes. There is nothing from which any promise to account for the rent received can be implied. At no time did the relation of landlord and tenant, or of principal and agent, exist between these parties.

The plaintiff cannot recover for use and occupation, for the defendant never occupied his land. He cannot recover for money had and received, for the defendant has not had or received any of his money. The account annexed is for the rent of the land and stands on the same footing with the claim for use and occupation.

Plaintiff nonsuit.

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

HANNAH SHAW *vs.* AARON W. NICKERSON.

Real estate—attachment of.

No attachment of real estate can be made on a writ containing simply a count for money had and received, without any specification of the claim to be proved under it.

ON FACTS AGREED.

WRIT OF ENTRY. The only question was the validity of an attachment made on a writ, the declaration in which was simply a count for money had and received, with no specification.

W. H. McLellan, for the plaintiff.

Boyle & Johnson, for the defendant.

APPLETON, C. J. The writ in the suit *Shaw* v. *Newhall*, contained only a count for money had and received.

Property can be attached only to secure demands in suit. 'When the writ contains the money counts there may be difficulty,' observes Shepley, J., in *Fairbanks* v. *Stanley*, 18 Maine, 302, 'in determining what demands were put in suit.' To make that certain the statute of 1838, c. 344, which is found in the revision of 1857, c. 81, § 31, was enacted. By this section no attachment is valid 'unless the plaintiff's demand on which he founds his action, and the nature and amount thereof, are substantially set forth in proper counts or a specification thereof is annexed to the writ.' If a count sets forth the nature and amount of the plaintiff's demand, so that one may know the ground upon which he claims to recover, that is sufficient. But in the count for money had and received no one can tell upon what ground a recovery is sought. Hence in those cases a specification is required setting forth the nature and amount of the plaintiff's claim. Otherwise, the plain-

tiff might introduce, under the money counts, subsequently acquired demands. *Saco* v. *Hopkinson*, 29 Maine, 268; *Osgood* v. *Holyoke*, 48 Maine, 410; *Forbes* v. *Hall*, 51 Maine, 568; *Drew* v. *Alfred Bank*, 55 Maine, 450. *Plaintiff nonsuit.*

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

SAMUEL ATWOOD *vs.* INHABITANTS OF WINTERPORT.

Enlistment—legal evidence of.

Parol evidence of a person's enlistment into the military service of the United States is not admissible.

Nor is a certificate officially signed by the provost-marshal of the district, that the plaintiff 'has this day been credited as a recruit in the navy, to the' defendant town, 'by order of the A. A. Pro. Mar. Gen. of Maine,' legal evidence of his enlistment.

Nor is such a certificate sufficient evidence that the plaintiff has been 'duly accepted as a soldier of the United States for the term of one year.'

ON REPORT.

ASSUMPSIT to recover a bounty of $300 as per votes of the defendant town, at a meeting held Jan. 21, 1865, and Feb. 10, 1865, for enlisting as a naval recruit and being counted on the quota of the defendants under the call of Dec. 19, 1864.

The vote of Jan. 21, 1865, was, 'to pay to every volunteer three hundred dollars, in addition to the bounty he may receive from the State, on presentation of a certificate from proper authority that he has been duly accepted as a soldier of the United States for the term of one year, and that the town of Winterport has credit for the same,'—'and that the bounty of three hundred dollars be paid to the person enlisting, by the town treasurer.'

And that of Feb. 10th, 'to authorize the selectmen (of said town) to hire for a term of years, not to exceed two years, on the

best terms they can, a sum of money sufficient to pay a town bounty to our quota of men, under the call of the president of the United States of Dec. 19, 1864, for three hundred thousand men, the sum of three hundred dollars each, when said men are mustered into the service of the United States, and counted upon the quota of said town, whether as volunteers or substitutes.'

It appeared by parol that the plaintiff, on Feb. 28, 1865, presented himself at the office of the provost-marshal of the 5th district (within which was the town of Winterport), as a volunteer for the navy, for the quota of that town; that he was mustered into the service of the United States on April 12, 1865; and by the certificate of the provost-marshal (see opinion) that he was credited on the defendants' quota.

It also appeared that the certificate was presented to the treasurer of the defendant town shortly afterwards, and payment of the $300 demanded.

After the evidence had all been put in, the case was continued on report, with the stipulation

The plaintiff to become nonsuit, if, upon so much of the evidence as is legally admissible, he is not entitled to recover.

T. W. Vose, for the plaintiff.

N. H. Hubbard, for the defendants.

APPLETON, C. J. There is no legal proof of the plaintiff's enlistment.

Parol proof of the plaintiff's enlistment is not admissible.

To prove this enlistment the plaintiff offered the following certificate:

'PROVOST-MARSHALL'S OFFICE, 5TH DIST. OF MAINE,
BELFAST, ME., May 29, 1865.

I hereby certify that Samuel Atwood has this day been credited as a Recruit in the Navy, to the town of Winterport, by order of the A. A. Pro. Mar. Gen'l of Maine.

A. D. BEAN, CAPT. AND PRO. MARSHALL,
5TH DIST. OF MAINE.'

The fact of enlistment is a matter of record. It must be proved by a duly authenticated copy from the army records. A sworn copy is admissible or a copy certified by the proper certifying officer. But the certificate offered is not, and does not purport to be a copy of any recorded fact, or of any record. It is the assertion of the person certifying that the fact therein stated is true. A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact. *Owen* v. *Boyle*, 15 Maine, 147. The officer certifying should certify a transcript of the record.

The certificate does not show that the plaintiff has been 'accepted as a soldier of the United States for the term of one year,' or for what period of time he has been so accepted. He may, for ought that appears, have entered the service for a lesser period of time. The certificate, therefore, if without objection on other grounds, does not bring the plaintiff's case within the vote of the town.

The 'bounty of three hundred dollars' was to be 'paid to the person enlisting.' To entitle the 'person enlisting' to receive this sum, an enlistment, it would seem, must be shown. But none has been legally proved, though the objection was specially taken.

The certificate offered does not even state the fact of enlistment, though, perhaps, that might be inferrible, if this were the only objection.

If the enlistment appears in the office of the adjutant-general, there is no certificate signed by him in relation thereto, though such certificate would be admissible by R. S., c. 82, § 101.

Plaintiff nonsuit.

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

VOLNEY A. SPRAGUE *vs.* INHABITANTS OF FRANKFORT.

Assignment—parol.

At a legal meeting held Jan. 28, 1865, the defendant town voted a bounty of $300 to each person regularly mustered into the military service of the U. S., as a substitute for an enrolled man, and counted on the town's quota; and at a meeting held February, 1865, the vote was reconsidered. At a meeting held March, 1865, they voted a bounty of $300 to any enrolled man who should furnish a substitute. The plaintiff, thereupon, in accordance with a parol agreement with one Clark, in consideration of $600, entered the service as his substitute, Clark to have all the plaintiff's bounties. The last two meetings having been decided by the full court to be illegal, one Treat procured a written assignment of the plaintiff's claim to a bounty from the town, with full knowledge of the parol assignment to Clark, and brought this action to recover the bounty under vote of January, 1865. *Held*, That the parol assignment was valid; and that the action could not be maintained.

ON REPORT.

ASSUMPSIT by Russel A. Treat, in the name of the plaintiff, on a vote of the defendant town, passed at a legal meeting held on Jan. 28, 1865, whereby they voted:

'That the selectmen are hereby authorized and empowered to pay an enlistment bounty of three hundred dollars in addition to any bounty the State or United States may pay, to each and every person who shall be regularly mustered into the military or naval service of the United States as a volunteer, or as substitute for an enrolled or drafted man, and counted on the quota of this town, under the late call of the president of the United States for three hundred thousand men.'

At a meeting of the defendants held Feb. 8, 1865, the town voted: 'To reconsider the doings of the town at their meeting of the 28th January, 1865.'

At a meeting held March 6, 1865, the town voted to pay any person who may furnish a substitute, etc., $300.

In April, 1865, one Rogers, in behalf of John C. Clark, hired

the plaintiff to go into the U. S. military service as the substitute of Clark. He offered the plaintiff $500, suggesting that he would probably draw a bounty additional; but finally the parties agreed that the plaintiff should receive from Clark $600 cash, and Clark to have all bounties. Thereupon the money was paid and the plaintiff was duly mustered and credited upon the defendants' quota and received from Clark $600.

In 1867, this court in *Clark* v. *Wardwell*, 55 Maine, 61, decided that the meetings of February and March were illegal.

On Nov. 29, 1870, the plaintiff, in consideration of $10, made a written assignment to Russel A. Treat, of 'all his right to recover of the town of Frankfort the sum of $300, for a bounty voted by said town, for being mustered into the military service of the United States for 1865, and counted upon the quota of said town.' But before executing the assignment he informed Treat that he had no claim against the town, but that whatever claim there was belonged to the person whose substitute the plaintiff was.

The testimony was quite voluminous, and somewhat conflicting. The case was withdrawn from the jury and reported to the full court who were to render legal judgment.

N. H. Hubbard, for the plaintiff.

N. Abbott, for the defendants.

KENT, J. It is admitted that the plaintiff had a legal claim for three hundred dollars against the defendants. He is entitled to recover, unless it has been paid, or the town released. He makes no claim to it for his own use and benefit, he having assigned to Russel A. Treat on Nov. 29, 1870, all his right to recover of the town the sum of three hundred dollars, voted as a bounty to him for having been mustered in as a soldier of the United States and counted on the quota of the town. This action is brought for the benefit of Treat.

But it clearly appears from the evidence that Sprague had before, by parol, assigned to another all claim to this or any other

bounty, in consideration of six hundred dollars, paid to him by the person as whose substitute he entered the army. The evidence leaves no doubt on our minds, that it was distinctly agreed by the nominal plaintiff, that he would and did release and assign to the other party to the agreement, all claim and right to any bounty to be paid by the town, which might be payable under any vote.

Treat had sufficient notice that Sprague so regarded it and that he made no claim in his own right, when, after long-continued effort, he obtained this subsequent assignment for the consideration of ten dollars.

The town has paid or satisfied the first assignee. The only question before us is, whether the action can be maintained for the use of Treat, in the name of the plaintiff. We think it cannot be. *Judgment for the defendant.*

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

SAMUEL EDWARDS and another *vs.* THOMAS F. MOODY.

Judgment of justice of the peace—interest to be allowed upon.

Interest is allowed on amount found due for damages and costs in actions on judgments recovered before any justice of the peace, without proof that payment had ever been demanded of the judgment debtor.

ON REPORT.

DEBT on a judgment recovered before a justice of the peace within and for the county of Waldo, April 29, 1854.

Payment of the judgment had never been demanded of the judgment debtor.

If the interest is allowable, the plaintiff to have judgment accordingly.

J. Williamson, for the plaintiff.

W. H. Fogler, for the defendant.

The powers and duties of justices of the peace are derived from the statute. Certain courts are declared to be courts of record; but justice's courts are not included. R. S., c. 81, §§ 79, 97.

Hence interest on their judgments is not recoverable. R. S., c. 82, § 28.

The judgment of a justice is simply a debt due on demand. Interest is not payable until demanded.

BARROWS, J. The plaintiff brings suit upon a judgment rendered by a justice of the peace in 1854. The only question raised is, whether, in making up judgment in his favor in this action, interest should be reckoned upon the amount of the original judgment without proof that payment had ever been demanded of the judgment debtor. The only direct statute provision which we have relating to the recovery of interest in actions of debt on judgment may be found in R. S., c. 82, § 28, and is as follows: 'Interest is to be allowed on amount found due for damages and costs in actions on judgments of a court of record.'

This is all that remains after successive revisions (except as otherwise and elsewhere provided for in the revised code), of c. 59, §§ 34, 35, 36, of the laws of 1821. In the original statute, §§ 34 and 35 contain elaborate provisions for the commencement and maintenance of actions of debt upon judgments. Section 34 relates to suits upon judgments, 'rendered and recorded by any court of record or any justice of the peace of this State;' and prescribes where such suits shall be brought, and how the judgment shall be certified.

Section 35 contains corresponding provisions relative to actions upon judgments 'rendered and recorded by a court of record in any other of the United States, or by a court of record of the United States.'

Section 36 provides 'that in the action of debt which shall be duly maintained upon any judgment as aforesaid, lawful interest shall be allowed as well upon the costs as upon the debt or damages,' etc.

In the outset of our judicial history, then, interest was to be allowed upon the judgments of justices of the peace in actions of debt founded thereon.

In the revision of 1841, the formal and systematic provisions authorizing the commencement and maintenance of suits upon the judgments of the various courts above described were dispensed with, though the right to maintain them is recognized in various sections scattered through the code. Thus, in the chapter relating to the 'commencement of civil actions,' R. S., 1841, c. 114, § 4, we find a provision showing the place where all actions of debt founded on judgments rendered by any court of record in this State may be commenced. Nowhere in the revised code of 1841 do we find any special provision touching the commencement or maintenance of actions of debt upon judgments rendered by courts of record of the United States, or of the other States, or of justices of the peace in this State, to take the place of those which existed in c. 59, §§ 34, 35, of the laws of 1821; but in c. 146, §§ 1 and 25, are provisions respecting the limitation attaching to 'actions of debt brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States, or of some justice of the peace in this State.'

And in the chapter on 'Proceedings in Court,' R. S., 1841, c. 115, § 79, we find the provision for the allowance of interest upon the judgment of any court of record, substantially as it now stands in R. S., 1871, c. 82, § 28.

But the right to maintain actions of debt upon the judgments of justices of the peace in this State, was not abrogated, because the specific provisions authorizing the same were never re-enacted. The action, with all its appropriate incidents, was preserved by virtue of the general enactments defining the jurisdiction of courts and justices of the peace in civil actions. Accordingly, we find in the Laws of 1852, c. 276, a provision, that, 'in all actions now pending or hereafter commenced in any court competent to try the same on a judgment declared in the plaintiff's writ to have been rendered before a justice of the peace within and for any county in

this State,' if the justice has died or removed from the State, and his records have not been deposited as required by law, a writ of execution, issued by the justice on the judgment, accompanied by an affidavit of the plaintiff or his attorney indorsed thereon, that it has not been satisfied, shall have the same effect in evidence as a duly authenticated copy of the record of the judgment. And this was incorporated into the R. S., 1857, c. 83, § 20, and is now applied to the proof, under like circumstances, of judgments rendered by trial justices. R. S., 1871, c. 83, § 27.

Now the form of these executions had been changed by Statute, of 1836, c. 250, so as to embrace interest which the officer since then has always been directed to collect as part of the sum due upon judgments of justices of the peace, as well as upon those of courts of record. R. S., 1841, c. 115, § 107; R. S., 1857, c. 82, § 116; R. S., 1871, c. 82, § 129.

These provisions sustain the right to recover interest in actions upon judgments of justices, very much as the right to maintain an action of debt upon such a judgment is sustained, *i. e.* by implication. It is implied that such an action may be sustained when the legislature except such actions from the six years' limitation, and prescribe twenty years as the time after which payment of such judgments shall be presumed. It is implied with equal force that interest upon the original judgment may be allowed in such action when the legislature direct the officer to collect interest upon the execution issued upon such judgment from the day of its rendition, and change the form of the execution to conform to this order, and then make such an execution evidence, under certain circumstances, to sustain an action upon the judgment in lieu of the record, or a copy of the record. With a similar statute provision for the collection of interest upon executions before them, the court of New York said in *Sayre* v. *Austen*, 3 Wendell, 496, which was an action upon a judgment rendered nearly twenty years before the commencement of the suit, that it cannot be contended with any show of reason or authority that a judgment is not a debt due until demand of payment is made, while the existence of the judgment of itself

shows that the original cause of action had not only been demanded but had been prosecuted to judgment, the highest evidence of debt known to the law, upon which execution may be issued forthwith. And they thence conclude that the judgment is a debt due with interest from the time of its rendition, which, since the statute, might be collected on the execution, and, before the statute, could have been recovered by an action of debt on the judgment.

The same court, in *Klock* v. *Robinson*, 22 Wendell, 157, an action of debt on a judgment for costs held interest recoverable from the date of its rendition, proceeding apparently upon the idea that a judgment rendered, *ipso facto*, imports a debt due which may be assimilated to a contract to pay a certain sum with interest, and hence interest is recoverable by way of damages, for the detention of the debt, and as part thereof.

Inasmuch, then, as the propriety of adding interest to the judgment of the justice appears inferentially from the other statute provisions to which we have referred, we conclude that the omission to provide for it directly, in the revision, ought not to be construed as effecting a change in the law. There would be just as much ground for saying that the omission of the direct and specific provisions for the maintenance of an action of debt upon such judgments took away the remedy altogether.

Upon this view of the case, the question whether a justice's court is a court of record, becomes for the present a matter of curious inquiry, rather than of practical utility, and may well be postponed. It is safe to observe in passing, that the specific mention made of justices of the peace in the various statutes to which we have referred, where they are spoken of in connection with courts of record, would seem to imply that they were not regarded by our legislators as included in the phrase 'courts of record,' and that while it is probable that for certain purposes their courts must be so classed, they are wanting in some attributes necessary to entitle them to be so considered in all respects.

One important objection is, that the jurisdiction expires with the person, or with the expiration of his commission. Yet during its

continuance the living justice has very many, if not all of the powers that are requisite to constitute a court of record, and he proceeds in many of his functions according to the course of the common law.

Blackstone says (Black. Com., vol. 3, p. 25), 'the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record.'

Error may be maintained to reverse their judgments while *certiorari* goes to courts not of record. *Vide* the reports of this court and that of Massachusetts, *passim.*

In further illustration of the remarks made on this point, see *Morrison* v. *McDonald*, 21 Maine, 556; *Woodman* v. *Somerset*, 37 Maine, 37, 38; *Downing* v. *Herrick*, 47 Maine, 467; *Ex-parte Gladhill*, 8 Met. 168.

But by reason of the other considerations to which we have adverted, we think the entry should be,

Judgment for plaintiff for amount of the original judgment, with interest from the date of its rendition.

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

JOSEPH G. MUDGETT *vs.* SELDON MORTON.

Intoxicating liquors sold by one not licensed—money paid for not recoverable back.

Neither by the common law, nor by any statute in this State, can a person who has purchased intoxicating liquors of one not licensed to sell them, and who has paid for and received them, recover back the money paid therefor, when no element of oppression or deceit enters into the case.

BARROWS, J. The plaintiff claims that he bought a barrel of whiskey of the defendant, and that as defendant violated the law

in selling it to him, he can recover, in this suit, the cash and the value of the other articles which he delivered to defendant in payment for it. Assuming that such were the facts, we think the plaintiff cannot prevail.

Although he incurred no penalty under this statute, yet he was privy to and aided in the commission of the defendant's offense, which could not have been completed without his aid. The law will not lend its aid to one thus implicated in a traffic prohibited by statute, so as to enable him to recover the consideration which he voluntarily parted with to induce his neighbor to violate the law.

'By the common law,' remarks Shepley, C. J., in *Ellsworth* v. *Mitchell*, 31 Maine, 251, 'a person who has purchased intoxicating liquors of one not licensed to sell them, and who had received and paid for such liquors, could not recover back the money so paid.'

Some of the earlier statutes of this State, designed to restrict the sale of intoxicating liquors, expressly authorized such a recovery. But those provisions were abrogated many years since, were not renewed in the prohibitory law of 1858, or in any subsequent enactment, and the case is left to be settled by common-law principles.

Observing the distinction between executed and executory contracts, and between acts made unlawful by statute to protect the ignorant and unwary from oppression and extortion, and those which are prohibited because they are against public policy, we find, that while the illegality of the consideration may be set up in defense to a contract so long as it is executory, it will in general afford no ground for recovering back that consideration after it has passed, when no element of oppression or deceit enters into the case, and the act is prohibited as against public policy, as it is here. *Lowry* v. *Bordieu*, Doug. 468; *Smith* v. *Bromley*, Doug. 697 in notes; *Worcester* v. *Eaton*, 11 Mass. 368.

The evidence here shows nothing like extortion or imposition. Apparently one rumseller bought a barrel of whiskey of another rumseller and paid him for it. As between those two men, the

law and the court will leave the transaction where the acts of the parties left it. *Judgment for Defendant.*

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

T. W. Vose, for the plaintiff.

N. H. Hubbard, for the defendant.

HARRISON SMALL *vs.* ROBERT P. CLEWLEY.

Slander—pleading in.

In an action of slander, where the words 'you swore to a lie, and I can prove it,' are relied on as imputing to the plaintiff the crime of perjury, there must be an averment in the declaration that the words were spoken with reference to some proceeding before some specified court, tribunal, or officer created by law, or in relation to some specified matter or thing where an oath is authorized by law; and the allegation must be supported by proof or the action is not maintainable.

In such case the general averment, that the defendant intended thereby to charge the plaintiff with the crime of perjury is not sufficient.

An allegation 'you have committed the crime of perjury,' when supported by proof will sustain an action of slander.

ON REPORT.

'IN a plea of the case for that whereas the plaintiff is a good and faithful citizen of the State of Maine, and has never been guilty of the crime of false swearing and perjury; nevertheless, the said defendant in nowise ignorant of the premises, but contriving falsely, maliciously, and fraudulently to injure and defame the plaintiff in his good character, and to expose him to the penalties of the law against perjury, to wit, on the thirteenth day of December, A. D. 1870, to wit, at Belfast, in the county of Waldo,

speaking to the plaintiff in the presence and hearing of many good citizens of this State, did falsely and maliciously utter and publish, in substance, the following scandalous and false words, to wit, 'You (meaning the plaintiff), swore to a lie' (meaning that he, the plaintiff, had committed the crime of perjury), and that he (meaning the defendant), 'would prove it;' that 'you' (meaning the plaintiff), have committed the crime of perjury, and that he (meaning the defendant), would prove it; by means of publishing which false and scandalous words, the plaintiff is greatly injured in his good name and reputation, and has been rendered liable to a prosecution for perjury, and all of which to the damage of the said plaintiff as he says the sum of ten thousand dollars.

'Also for that the said defendant, to wit, at Belfast, in the county of Waldo, to wit, on the thirteenth day of December, A. D. 1870, falsely and maliciously, in the presence of good citizens of this State, uttered and published of and concerning the plaintiff in substance, the following other false, scandalous, and defamatory words, to wit, you (meaning the plaintiff), swore to a lie, and I (meaning the defendant), can prove it, meaning that the plaintiff had perjured himself, by means of publishing which false and scandalous words, the plaintiff has been greatly injured in his good name and reputation, and injured in the appointment of men who are his enemies, as commissioners on the insolvent estate of Wm. Clewley, which estate is owing him a large sum.'

The evidence was, that the defendant, in the presence of several persons, told the plaintiff, 'you swore to a lie, and I can prove it;' that the plaintiff called attention of those present to the charge and told the defendant he should require him to prove it; and that the defendant did not retract.

N. Abbott, for the plaintiff elaborated the following propositions.

1. That all defamatory words spoken of another maliciously, are actionable *per se*. *Chaddock* v. *Briggs*, 13 Mass. 252.

2. That among slanderous words, actionable in themselves, are those which impute perjury, and that for such words an action may

be maintained without proof of malice or special damages. *Newbit* v. *Statuck*, 35 Maine, 315.

3. The words, 'you swore to a lie, and I can prove it,' fairly impute perjury. 1 Hill. on Torts, 283, 284.

4. If they do not necessarily impute perjury, they are to be so construed, if men of common sense and ordinary understanding, would so regard them. 2 Greenl. on Ev. 417; 1 Hill. on Torts, 261.

5. That when the plaintiff has once made out a *prima facie* case, by evidence of the publishing of words apparently injurious and actionable, a nonsuit should not be ordered; for the burden of proof is then upon the defendant to show, if he can, that the apparent meaning of the words is not their true meaning. 2 Greenl. on Ev. 5th ed. 418.

6. That a defamer is not to escape, with impunity, because his words do not necessarily impute crime or positively charge it; but if the jury believe they were so intended, and so understood, they are bound to give damages; for the words are just as injurious, as words which do necessarily impute crime, or positively charge it. 8 Mass. 126.

7. That when the speaker names no time, place, court, or circumstances under which words of doubtful, or uncertain meaning are uttered, the words are actionable, without any colloquium, because no colloquium is possible in such a case. 1 Hill. on Torts, 284.

F. S. Nickerson, for the defendant.

WALTON, J. In an action of slander, where the words 'you swore to a lie, and I can prove it,' are relied on as imputing to the plaintiff the crime of perjury, there must be an averment in the declaration, that the words were spoken with reference to some proceeding before a court, or tribunal, or officer created by law, or in relation to some matter or thing where an oath is authorized by law; and the averment must be supported by proof, or the ac-

tion is not maintainable. The general averment that the defendant intended thereby to charge the plaintiff with the crime of perjury is not sufficient. The averment must be specific, naming the particular court, or tribunal, or officer, or matter, or thing in relation to which the alleged false swearing is said to have taken place, or it will not be sufficient.

In this case there is no such averment, and no such proof. It is in one place stated that the defendant said, 'you have committed the crime of perjury.' This would be a sufficient allegation to support the action, if it was sustained by the proof. But it is not. The other allegation is that the defendant said 'you swore to a lie, and I can prove it, or will prove it.' But there is no colloquium connected with this averment to show what matter or proceeding the supposed false swearing referred to; or before what court, tribunal, or officer it took place. If it had been averred that the plaintiff was a witness before the commissioners of insolvency, and that the words spoken had reference to his testimony then and there given, the averment would have been sufficient; and if supported by the evidence, would have made out a *prima facie* case for the plaintiff. But there is neither this, nor any similar averment. Nor is there any evidence to support such an averment if one had been made. The same defects exist in both counts of the declaration.

It is clear, therefore, that upon such a declaration, and such evidence, the action is not maintainable. *Patterson* v. *Wilkinson*, 55 Maine, 42; *Emery* v. *Prescott*, 54 Maine, 389, and authorities there cited. *Plaintiff nonsuit.*

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

EDWARD HOPKINS, petitioner for *certiorari*, *vs.* WILLIAM H. FOGLER and others.

Writ of certiorari—the granting of—matter of judicial discretion. Unliquidated claim for damages—not to be appraised under R. S., c. 113, § 31.

The granting of a writ of *certiorari* is a matter of judicial discretion; and it should never issue to quash the disclosure of a poor debtor for merely trivial or formal error, or when it is apparent that no injustice will be done by refusing the writ.

Thus, where a debtor has been imprisoned on execution, and released upon giving a bond approved in writing, by two disinterested justices of the peace and of the quorum, one of whom was chosen by the jailer for the creditor, and the other by the debtor, and it is apparent from the debtor's answers made before a tribunal formally organized to hear his disclosure, that, having no real or personal estate, the poor debtor's oath was properly administered to him; this court, in the absence of all proof upon the subject, will not, for the purpose of quashing proceedings otherwise regular, assume that the jailer chose the justice for the creditor before the latter had refused, or unreasonably neglected to choose one.

An action for damages for a malicious prosecution, prior to rendition of judgment thereon, is not an item of property within the meaning of R. S., c. 113, § 31, which should be appraised and set off to the creditor as provided in said section.

ON EXCEPTIONS.

PETITION for a writ of *certiorari* to quash the record of the proceedings in the disclosure of Asaph A. Carleton as a poor debtor.

It appeared that Carleton was arrested on an execution issued July 28, 1871; on a judgment recovered in favor of this plaintiff, and committed to jail in this county; that afterwards, on the 31st of said July, Carleton was released from imprisonment by giving a bond with two sureties approved in writing, as follows:

'Waldo, ss. We, the subscribers, two disinterested justices of the peace and of the quorum of said county, do approve the sureties named in the foregoing bond.

Chosen by the jailer for creditor, WM. H. FOGLER, } *Justices of the peace and quorum.*'
Chosen by debtor, W. P. HARRIMAN, }

That on Aug. 1, 1871, Carleton made his application in writing, to a justice of the peace, claiming the benefit of the oath authorized in R. S., c. 113, § 30, and the justice appointed a proper time and place; that at the time and place designated, Carleton appeared and selected W. H. Fogler, Esq., and Hopkins selected Joseph Williamson, Esq., two disinterested justices of the peace and quorum, who organized themselves into a court. Thereupon the creditor objected to any further proceedings being had in the disclosure, for the alleged reason that the bond given by the debtor was not approved, as required by c. 113, § 24; that not having given such a bond, he could not avail himself of § 26, and that the justices had no jurisdiction.

This objection was overruled by the justices.

It further appeared that the debtor disclosed,

That he had no real or personal estate nor interest in any except what is exempted from attachment and execution; that since any part of the debt or cause of action accrued, he had not directly or indirectly sold, conveyed, or disposed of, or intrusted to any person any of his real or personal property to secure it or receive any benefit from it to himself or others, with intent to defraud any of his creditors; and that he had not under his control any bank-bills, notes, accounts, bonds, or other contracts or property, not exempted from attachment, which cannot be come at to be attached.

He also disclosed a claim for damages against one Morton, of Frankfort, in this county, for $1,500 for malicious prosecution, which claim was sued and then pending in the supreme judicial court for this county.

The creditor contended that this claim should be appraised by the justices, and enough of it to satisfy the debt, cost, and charges set off to the creditor, the debtor not agreeing to apply any part of the same towards said debt.

The justices, not agreeing whether such appraisal and assignment ought to be made, selected a third disinterested justice of the peace and quorum for this county, whereupon a majority of the justices decided that such appraisal and assignment ought not to be

made; and thereupon, after the debtor had signed and made oath to the truth of his disclosure, they administered to the debtor the oath prescribed in § 30.

The presiding judge, at *nisi prius*, ruled that the writ prayed for be denied; and the petitioner alleged exceptions.

T. W. Vose, for the petitioner.

W. H. McLellan, for the respondents.

APPLETON, C. J. This is a petition for a writ of *certiorari* to quash the record of the proceedings on a poor debtor's disclosure.

The record shows that the creditor, after being notified, chose one of the magistrates; that after objecting to their jurisdiction his attorney proceeded to examine the debtor, and that from his answers it is apparent that having no real nor personal estate he was properly permitted to take the poor debtor's oath.

The granting or the refusal to grant the writ of *certiorari* is a matter of judicial discretion. The writ should never issue when proceedings are sought to be quashed for merely trivial or formal error, or when it is apparent no injustice will be done by not permitting it to issue.

The objection is taken that the debtor, being imprisoned in jail, 'had not given the bond required by R. S., c. 113, § 24, said bond never having been approved by the creditor in writing, nor by two or three justices of the peace and of the quorum in writing selected, and proceeding as in c. 113, § 42, and that, therefore, said debtor was not legally released from his said imprisonment.'

If not legally released, it is obvious that the plaintiff has his remedy against the jailer for any illegal action on his part.

But the bond is approved by two justices of the peace and quorum, one of whom was chosen by the jailer for the creditor and one chosen by the debtor. By § 42, in case of a refusal or of unreasonable neglect on the part of the creditor to choose a justice, he may be chosen by the officer who has the debtor in charge, etc. The bond being approved by a justice chosen by the person hav-

ing the debtor in charge, and there being an entire absence of proof on the subject, we will not assume the action of the jailer unlawful for the purpose of quashing proceedings otherwise regular.

The second objection taken is, that the justices did not appraise a claim for malicious prosecution, which the debtor had against one Selden Morton, and on which he had commenced a suit in which damages to the amount of $1,500 were claimed, to be gnedassi and delivered by the debtor to the creditor, and applied towards the satisfaction of his demand.

It would, undoubtedly, be a matter of great difficulty to appraise the cash value of a claim for malicious prosecution, the damages for which are to be assessed hereafter by a jury upon evidence of which the magistrates are not shown to possess any knowledge. But the statute imposes no such duty upon them. By § 31, when the 'debtor possesses or has under his control any bank-bills, notes, accounts, bonds, or other contracts or property, not exempted by statute from attachment, which cannot be come at to be attached,' then, in a certain contingency, 'the justices, hearing the disclosure, shall appraise and set off enough of such property to satisfy the debt, cost, and charges,' etc. But it is manifest that an unliquidated claim for damages for a malicious prosecution, the amount of which is unascertained and unascertainable by the magistrates, is not an item of property within this section, which they are to appraise and set off, in whole or in part, to satisfy the debt, cost, and charges.

It was held in Massachusetts that a claim against a railroad for an injury to the person does not pass by an assignment of his estate under their insolvent laws before the recovery of judgment. *Stone* v. *Boston & Maine Railroad*, 8 Gray, 539. 'An action for damages to the person is not property, nor a right of property, nor a debt, until it is reduced to judgment; and then,' say the court, 'it passes, because it has assumed the form of a debt.' So, in the case of *McGlinchy* v. *Hall*, 59 Maine, 152, it was decided that a

suit for personal damages for an assault was not assignable until judgment was entered up. *Writ denied.*

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

GEORGE R. GRIFFIN *vs.* JOHN T. CREPPIN and another.

In trespass quare clausum—possession presumed in real owner. Land sold for taxes—to be accurately described.

In *trespass quare clausum*, the possession is presumed to be in the owner of the legal title, in the absence of all other evidence.

In the sale of land for non-payment of taxes, the land assessed and sold must be accurately described.

Thus in the notice of the State treasurer's annual sale of lands in places not incorporated, and forfeited for state and county taxes, certain land, situated in township No. 8, South Division, in Hancock county, consisting of twenty thousand acres, was advertised and described as follows: 'Track No. 8, S. D. Advertised 4197; *Held*, That the description was too vague to pass the title.

APPLETON, C. J. This is an action *trespass quare clausum.* On Sept. 27, 1860, D. W. Davis & Susan Woodbury conveyed by deed of warranty, four hundred and forty-nine acres by metes and bounds in the unincorporated township of No. 8, South Division, Hancock county. It is admitted that this deed conveyed a legal title to the premises upon which the trespass was committed.

The plaintiff, having thus acquired a legal title to the land in controversy, and no one being shown to be in adverse possession, will be presumed to be in possession of the premises conveyed by his deed, and that possession will be presumed to continue, until it is shown to have ceased.

The defendant claims that this land has been forfeited to the State, and that he has acquired title to the forfeited estate.

No. 8, South Division, contains twenty thousand acres. Of this

it is claimed that four thousand one hundred and ninety-seven acres have been forfeited for the non-payment of taxes.

Assuming there has been such a forfeiture, the evidence fails to show any title in the defendants by which they can justify as against the plaintiff. The advertisement of the sale, upon which the defendants rely, described the premises to be sold as follows:

'Hancock county.

Tracts.	Advertised.	Sold.	State tax.	Interest.
No. 8, S. D.	4197	4197	10.42	3.13

Co. tax.	Interest.	Cost.	Due.	Sold for.	To whom sold.
1.42	41	1.00	16.38	16.38	Isaac R. Clark.'

The description thus given is too vague to pass any title. No. 8, S. D. gives no satisfactory information. What does S. D. mean? The advertisement gives no indication of the meaning of these letters. That must be sought elsewhere. Certain number of acres are to be sold. Are they to be sold in common or in severalty? The language does not describe any particular portion of the township. If the sale is to be of the specified number of acres, where are they situated; in the eastern or western, in the northern or southern part of the town, or in the centre? The language locates the land as much in one part of a town as in another. But the value of the lot depends in no slight degree upon an answer to the questions suggested.

'In a deed between individuals,' observes Ruggles, J., in *Tallman* v. *White*, 2 Comst. 66, 'a part of the description of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. But in sales for non-payment of taxes there is no intention of the owner to convey anything. In such cases, therefore, no questions of intention can arise. The description must accurately describe the land assessed and the land sold.' That the description in this case is fatally defective, would seem to be well established by repeated decisions of courts before whom similar questions have arisen. *Larrabee* v. *Hodgkins*, 58 Maine, 412;

Greene v. *Lunt*, 58 Maine, 519; *Lafferty* v. *Byers*, 5 Ohio, 290; Blackwell on Tax Title, c. 5 and c. 22.

But this is not all. It nowhere appears that the plaintiff's lot, which he owns in severalty is included in the 4,197 acres alleged to have been forfeited. If not so included, there has been no forfeiture, and if no forfeiture, there has been no land of the plaintiff which anybody has been authorized to sell.

Defendants defaulted. Damages to be assessed by the judge at Nisi Prius.

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

J. S. Rowe, for the plaintiff.

E. Hale & L. A. Emery, for the defendants.

MUNROE YOUNG *vs.* JAMES M. BLAISDELL.

Statute of Frauds.

On April 2d, the owner of a large quantity of bark situated on his wharf, billed it to his creditor as security for indebtedness and delivered it to the defendant as his creditor's agent. On April 19th, the bark remaining on the owner's wharf, he bargained it to the defendant for $650, but made no written memorandum of the bargain, received nothing in payment and made no delivery of any portion of it, although the defendant subsequently went and measured it of his own motion. On April 28, the original owner sold, and gave a bill of the bark to the plaintiff who paid for it; and while the bark was being measured the defendant interfered and claimed it by an alleged sale on April 19th, whereupon the plaintiff replevied it. *Held*, that the bargain to the defendant was within the statute of frauds, there having been no delivery or acceptance of the bark; and that the plaintiff's knowledge of the facts would not affect the sale.

ON REPORT.

THE FACTS are sufficiently stated in the opinion.

———, for the plaintiff.

Eugene Hale & L. A. Emery, for the defendant.

APPLETON, C. J. On April 2, 1869, Scamman & Dyer gave a bill of sale of a quantity of bark on Scamman's wharf to N. A. Joy, as security for their indebtedness to him. The bark was delivered to the defendant as the agent of Joy.

The bark still remaining on Scamman's wharf, on April 19, 1869, Scamman & Dyer bargained the bark to the defendant for $650, but there was no memorandum in writing of the bargain, nothing given in earnest to bind the bargain, and no payment of the price by cash or note. There was no delivery nor acceptance of the bark, the contract being made at the house of Scamman and at a distance from the wharf on which the lumber was piled.

On April 28, 1869, Scamman & Dyer sold this bark and gave a bill of sale thereof to the plaintiff, who paid for the same. While the bark was being measured the defendant interfered, claiming to have purchased it previously. The plaintiff thereupon brought replevin, and the question to be determined is in whom is the legal title.

The plaintiff, having a bill of sale and delivery of the bark, and having paid for the same, would seem entitled to maintain his suit unless his vendors had previously parted with their title.

By R. S. of 1857, c. 111, § 5, 'no contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof, is made or signed by the party to be charged thereby or by some person by him legally authorized.'

There was no executed contract between the defendant and Scamman & Dyer. Their property was not in his possession. True, he had accepted the delivery for Joy and as his agent, but the bark remained on the Scamman wharf as before. As there was no note or memorandum in writing, no price paid, nor earnest given, and no acceptance by the defendant or delivery to him, he could not maintain any action in relation to the bark against his vendors, nor could they against him. 'It is very clear,' remarks

Parker, C. J., in *Penniman* v. *Hartshorn*, 13 Mass. 87, 'that a mere contract to sell, without a delivery either actual or symbolical, does not pass the property; and that a subsequent sale and delivery to another person would have vested the property in him.' Thus, too, is the law as laid down in 2 Kent's Com. 493. 'To make the contract of sale valid in the first instance, according to statute law, there must be a delivery, or tender of it, or payment or earnest given, or a memorandum in writing signed by the party to be charged; if nothing of this kind takes place it is no contract, and the owner may dispose of his goods as he pleases.'

The owners did as they pleased and sold to the plaintiff. In conformity with these views are the decisions in this State. *Means* v. *Williamson*, 37 Maine, 556.

It is true the defendant testifies, that after the verbal bargain, he went over the bark and measured it, and that this was before Mason came down and surveyed the bark from Scamman & Dyer to the plaintiff. But this would not constitute an acceptance. It was done in the absence of the owners, and they made no delivery to him. Indeed, the act was not done as an acceptance, nor was it so understood by the defendant. In *Holmes* v. *Hoskins*, 28 L. & Eq. 564, the defendant verbally agreed to purchase of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his check-book in order to pay for the cattle, but finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's grain, which was done; held, that there was no evidence of an acceptance of the cattle to satisfy the statute of frauds. Park, B., says, 'I am of opinion that there was no reasonable evidence to go to the jury of an acceptance and receipt of the cattle. In order to satisfy the statute there must be an acceptance and an actual or constructive delivery. Now in this case there was no actual delivery; and, therefore, to entitle the plaintiff to recover there must be such a dealing with the cattle by the defendant as

owner, that the plaintiff would lose his lien. . . . In *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680, which was an action for the price of a horse, which had died, after the time when it was sold by parol and before it was delivered or paid for, the only evidence of acceptance and receipt was, that while the horse remained in the possession of the vender, the purchaser made his servant gallop it, and gave directions about its future treatment, requesting that it might be kept by the vender a week longer; and the court of King's Bench held that there was no acceptance within the meaning of the statute.' In the same case Martin, B., says, 'There was a perfectly good verbal bargain; and if the common law had not been altered by the statute in question, the plaintiff would have been clearly entitled to recover. But the statute says that no contract of the sort shall be binding, unless the buyer shall accept part of the goods and actually receive the same, or unless there be a part payment or note in writing.' In this case none of these requisites have been complied with. In *Shindler* v. *Houston*, 1 Comst. 261, the plaintiff and defendant bargained respecting the sale by the former to the latter of a quantity of lumber, piled apart from other lumber, on a dock, and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant the lumber is yours. The defendant then told the plaintiff to get the inspector's bill and take it to one House, who would pay the amount. This was done the next day and payment refused. The price was over fifty dollars. It was held, in an action to recover the price, that there was no delivery and acceptance of the lumber within the meaning of the statute of frauds, and that the sale was void. 'The statute of fraudulent conveyances and contracts,' observes Gardiner, J., 'pronounced this agreement void when made, unless the buyer should "accept and receive some part of the goods." The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing and did

nothing subsequent to the agreement, except through his agent, to repudiate the contract. There was, consequently, no evidence of a delivery.' It is manifest that the evidence in this case, according to the recognized principles of law, shows no acceptance whatever.

It is claimed that the plaintiff was aware of the transactions which took place between the defendant and Scamman & Dyer. Be it so; still the knowledge on the part of the plaintiff of an unexecuted verbal bargain, which was void by statute of frauds, if fully established, would not defeat his rights as a purchaser for a full consideration.

Judgment for plaintiff, one cent damage.

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

FREDERICK E. HARTSHORN, petitioner for mandamus, *vs.* ASSESSORS OF ELLSWORTH.

School district tax—what property liable to be assessed. Mandamus—requisites of mandate.

By virtue of Pub. Laws of 1869, c. 42, § 1 (R. S., c. 11, § 44), when a school district votes to raise money for any legal purpose, not only residents are to be assessed as heretofore, but also persons who at the time of raising said money own therein the class of property mentioned in the first clause of R. S., c. 6, § 14, are liable to be assessed therefor.

The writ of mandamus should expressly state the duty required of the defendant.

A mandate requiring the defendant to assess a school district tax 'according to law,' being a requirement to look beyond the writ, is erroneous.

Where, on a petition for mandamus, by the terms of the exceptions, 'if the petitioners were not entitled to have the writ as prayed for, the petition was to be dismissed, and the prayer was that the defendants should 'assess said district tax according to law, to wit, on the personal estate within the district of non-residents of the district,' and the defendants could not lawfully assess such property unless such 'owners should occupy,' as is provided in the first clause of R. S., c. 6, § 14, a mandate cannot legally issue as prayed for.

On exceptions.

Petition by the school agent of district No. 18, in Ellsworth, for mandamus against the defendants, as assessors of Ellsworth.

The petition sets out substantially,

That at a legal meeting of school district No. 18, in Ellsworth, held July 18, 1871, it was voted unanimously to build a new school-house, according to a certain plan approved by the superintending school committee, adopted by the district, and to hire $2,500 therefor through one Davis as agent; that at a legal meeting of the district, held Oct. 5, 1871, the district voted to hire $1,500 through Davis to continue the work; that at a legal meeting, held March 20, 1872, and adjourned to April 17th following, the district voted to hire $1,100 more through Davis to complete the work, and that Davis negotiated the loans accordingly of the persons and at the rates mentioned; that previous to the erection of the new school-house the district had none suitable; that the clerk certified the votes to the assessors and treasurer of Ellsworth.

That the assessors refuse to assess the money as by law required.

That there are certain large quantities of logs, lumber, and boards manufactured in the district, and certain stocks in trade, including stocks employed in said business of manufacturing lumber, the manufacturers and owners whereof, though dwelling in other districts, occupy stores, houses, and mills in said district, and own and manufacture large quantities of personal property in said district, which by law ought to be assessed with their relative part of said tax; that no part of said tax has been assessed on said property, but the whole tax has been assessed on the estates of the residents.

That a written demand by the petitioner was made upon the defendants to assess the tax according to law, but they utterly refused to comply; by means of which refusal the inhabitants of the said district are aggrieved and deprived of their just right.

Wherefore the petitioners pray

That a rule be issued to said assessors, to wit, Erastus Rodman, Charles Joy, and Josiah Higgins, to appear at such time and place as the court may deem convenient, to show cause why a writ of mandamus should not be issued 'commanding them to assess said school tax according to law, to wit, on the personal estate within the district of non-residents of the district.'

Notice was ordered Oct. 10, 1872, returnable Oct. 14, 1872, service to be made upon the 10th by reading.

The respondents appeared and demurred. The court overruled the demurrer and ordered the alternative writ to issue.

If the petitioners were entitled to have a writ issued as prayed for, such writ to issue, otherwise the petition to be dismissed with costs for respondents. Case to be argued under R. S., c. 77, § 14.

Geo. P. Dutton, for the plaintiff.

E. Hale and *L. A. Emery*, for the defendants.

It was not intended that the rule, applicable to the class of property mentioned in the first clause of R. S., c. 6, § 14, in towns, should apply to school districts. The direction in c. 11, § 44, to assessors, 'to assess as they do town taxes,' is but the condensed form of the direction in statute of 1821, and the statute upon education of 1850, 'to assess in the same manner as town taxes are assessed.' This includes no rule as to the property. Pub. Laws 1821, c. 117, § 9; 1850, c. 193, art. 111, § 2.

Nor does the statute, as amended by statute of 1869 (R. S., c. 11, § 44), so change the rule of taxation in school districts as to include personal property of a person resident in another district. 'Shall assess as they do town taxes' have been used since 1842. The substitution of the words 'residents and owners in' for the words 'inhabitants of' does not effect such a revolution.

The statute of 1869 was enacted for the purpose of fixing the time when taxation should fall upon property in school districts, to wit, 'at the time of raising the money;' hence the clerk was to certify 'the time when the same is raised.'

In recasting the section to embrace this change, 'residents and owners' were substituted for 'inhabitants' because they seemed to the commissioners a fitting correlative of 'polls and estates.'

The succeeding clause, providing for the taxation of non-resident real estate, shows the same intention; the commissioners would have added 'and upon all logs,' etc., 'belonging to any person occupying a store, etc., in said district.'

The design of the exception mentioned in *Ellsworth* v. *Brown*, 53 Maine, 521, is not applicable to districts.

Baker v. *School District in Weymouth*, 9 Gray, 433, is not in point.

Statutes providing for taxation should be construed most strongly against the taxing power. Chapter 11, § 44, does not plainly give the power. Taxation of non-resident real estate is plainly expressed. *Expressio unius est exclusio alterius.*

'Estates' is generic, including real and personal. Non-resident real estate is plainly expressed; non-resident personal estate is as plainly excluded.

The general rule is, that personal estate follows the person. Clear exceptions are made as between towns; none between districts. Section 44 includes all personal estate or none.

The adjunct 'in the district' modifies the next preceding substantives 'residents and owners,' as in R. S., 1857, it modifies 'inhabitants;' and same order of words is preserved. The adjunct cannot modify 'polls and estates' without violating known rules and rendering 'residents and owners' meaningless.

APPLETON, C. J. The general rule of taxation is, that the personal property of an individual should be assessed to him in the town where he is an inhabitant on the first day of April, in each year.

The first exception is found in R. S., c. 6, § 14, and is as follows: 'All goods, wares, and merchandise, all logs, lumber, boards, and other lumber, and all stock in trade, including stock employed in the business of any of the mechanic arts, in any town

within this State other than where the owners reside, shall be taxed in such town, if the owners, their tenants, or any person contracting under them for the building of any house, shop, store, or vessel, occupy any house, shop, mill, wharf, landing, or ship-yard therein, for the purposes of such tenancy or contract.'

The object of this provision is, that taxes on the capital named shall be assessed, where the investment is made, the business done, and the profits gained. This would seem to be in accordance with the principles of equity.

The rule for the assessment of money raised or borrowed by school districts, as established by R. S., 1857, c. 11, § 39, was as follows: 'When a district votes to raise money for any legal purposes its clerk shall, forthwith, or within the time prescribed by the district, certify the amount thereof to the assessors of the town; and within thirty days after receiving such certificate they shall assess it, as they do town taxes, on the polls and estates of the inhabitants of the district, whether wholly in their town or not, and on the non-resident real estate within, but not on any real estate without, the district.'

In 1869, this section was amended by c. 42, § 12; and the amendment was adopted in the revision of 1871, c. 11, § 44, and is in these words: 'When any district votes to raise money for any legal purpose, its clerk shall, forthwith, or within the time prescribed by the district, certify the amount thereof to the assessors of the town, and the time when raised; and within thirty days after receiving such certificate they shall assess it, as they do town taxes, on the polls and estates of the residents and owners in the district at the time of raising said money, whether wholly in their town or not, and on the non-resident real estate in the district.'

The existing statute was thus altered in two respects.

1. The clerk was required to certify 'the time when raised,' so that the tax should be imposed only on the 'polls and estates of the residents and owners in the district at the time of raising said money.'

2. The assessors, when thus notified, were to assess the amount

raised on the polls and estates 'of the residents and owners in the district' 'as they do town taxes,' and not on 'the inhabitants of the district' as heretofore. Previously, the inhabitants alone were liable to assessment. By the change, they, or their equivalent, residents in the district, are to be assessed as formerly, and in addition thereto a new class is made liable to assessment, that is, owners in the district. Owners of what? Personal estate. Owners where? In the district. How to be assessed? As the assessors do town taxes. The word owners was unnecessary, if only resident owners were to be assessed.

We think the manifest intention of the legislature was to adopt the equitable rule established by c. 6, § 14, for the assessment in towns, and apply it to the analogous case of school districts. If not so, the alteration was immaterial. The certifying 'the time when raised' is of little importance, and if that was all the change intended, there would be no occasion to substitute 'residents and owners' instead of 'inhabitants,' as in the section before its amendment.

But though the assessors may have erred in making their assessment, it does not follow that the writ of mandamus should issue as prayed for.

The prayer of the petitioner is, 'that a rule be issued to said assessors, to wit, Erastus Rodman, Charles Joy, and Josiah Higgins, to appear, etc., to show cause, if any they have, why a writ of mandamus should not be issued by this court, commanding them to assess said school tax, according to law, to wit, on the personal estate within the district of non-residents of the district.'

The greatest care is to be bestowed upon the proper framing of the mandatory clause, the rule being, that the writ must be enforced in the terms in which it is issued or not at all. *Rex* v. *St. Pancras*, 3 A. & E., 542. It should expressly state the duty required of the defendant. When a mandamus is awarded for purposes partly legal or partly not, the court will not enforce it by a peremptory writ limiting its effect, but will quash it; for though the court will, for the purpose of justice, mold the rule for the

writ, yet it cannot mold the writ itself. The defendant is not required to look *dehors* the writ to ascertain his duty, but the requirement to assess 'according to law' is a requirement to look beyond the mandate of the writ, and therefore is erroneous. The defendant looks only to the mandatory clause, to ascertain what is required of him, and not elsewhere. Topping on Mandamus, 324 *et seq.*

By the exceptions, 'if the petitioners are entitled to have a writ issued as prayed for, such writ is to issue, otherwise the petitioner is to be dismissed with costs for respondents.'

The mandate of the court, if issued according to the prayer of the petitioners, would be that the defendants should 'assess said school tax . . . on the personal estate within the district of non-residents of the district;' but this they could not properly do, unless such non-resident owners should occupy a 'store, shop, mill, wharf, landing, or ship-yard therein,' as provided in c. 6, § 14. A mandate, therefore, cannot legally issue as prayed for.

There are other objections raised against the maintenance of this process, but it is not necessary to consider them, as we are satisfied that no such mandate as prayed for can legally issue.

Petition dismissed with costs for defendants.

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

ZACHARIAH CHIPMAN *vs.* SETH M. TODD.

Surety. Attachment—abandonment of.

The abandonment of an attachment of property in a suit against one surety on a note, constitutes no bar to the maintenance of a subsequent suit against the co-surety.

ON REPORT.

ASSUMPSIT on a promissory note of the following tenor:

'$1,000. CALAIS, October 18, 1869.

Sixty days after date I promise to pay, to the order of Z. Chipman, one thousand dollars at St. Stephen's Bank, N. B., in U. S. currency, value received. J. M. HALL.'

On the back of the note were the names, Rufus Ham and Seth M. Todd.

Writ dated Sept. 29, 1870.

The plaintiff read the note and rested his case.

It appeared on the part of the defense, that the plaintiff had no interest in the note at the time of the commencement of the suit, having previously sold it to Sawyer & Kelley.

The defendant procured the note of the plaintiff before he sold it, placed it in the hands of an attorney, who commenced a suit upon it, in the name of the payee, against Ham, and personal property attached to secure it. Subsequently, and before the commencement of this action, the former action was discontinued without any instruction from the present defendant.

Those who signed their names upon the back of the note did so at the request and for the accommodation of Hall.

The action was withdrawn from the jury and reported to full court, who were to render the legal judgment thereon.

J. & G. F. Granger, for the plaintiff.

A. McNichol, for the defendant.

WALTON, J. The note in suit was signed by J. M. Hall as principal, and the defendant and one Rufus Ham as sureties. Hall wrote his name on the face of the note, and the sureties wrote theirs on the back. This undoubtedly made them original, joint and several promisors; but the evidence shows that Hall was the real debtor, and Ham and Todd only sureties.

The defense to the present suit (which is against Todd alone), is that a suit was first commenced against the other surety (Ham),

and property attached sufficient to secure the demand; and that this suit was afterwards discontinued, and the present suit commenced. It is claimed that the abandonment of the former suit, and consequent loss of the attachment, were equivalent to an agreement for delay and a release of security, and that this, by operation of law, discharged the present defendant.

We think not. Such might have been the effect if the former suit had been against the principal on the note; for, notwithstanding it was held, in *Page* v. *Webster*, 15 Maine, 249, that where the debtor's property is attached on a writ, the creditor may nevertheless abandon his suit and the attachment without discharging the surety, it was held in the subsequent case of *Springer* v. *Toothaker*, 43 Maine, 381, that where property of the principal debtor is seized on execution, an abandonment of the lien thereby created will discharge a surety.

We think it will be difficult to explain why the abandonment of a lien created by a seizure on execution should discharge a surety, and the abandonment of a lien created by an attachment on a writ should not.

But whatever the rule may be, we are not aware of any authority in which it has been held that the release of an attachment of the property of a surety will release a co-surety. We think such is not the law. Between sureties there are no superior equities. The creditor may enforce his claim against either as he chooses; and an abandonment of an attachment of property in a suit against one, will be no bar to the maintenance of a suit against the other.

The evidence fails to show any agreement for delay; and the right of the equitable owner of the note to maintain a suit in the name of the payee (the note having been sold, but not indorsed) is unquestionable.

Judgment for plaintiff for amount of the note and interest.

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

BANGOR & PISCATAQUIS R. R. Co., petitioners, appellants from decision of County Commissioners, *vs.* CALVIN CHAMBERLAIN.

Losing party—who is.

R. S., c. 51, § 8, provides that when an appeal is taken from the county commissioners' estimation of damages for land taken by a railroad corporation, 'the losing party is to pay the cost thereon.'

On the written application of a railroad corporation, the county commissioners estimated the damages for the defendant's land taken, at $650; and on appeal by the corporation, the jury estimated them at $435. *Held*, that the corporation was the losing party, and liable for costs.

ON FACTS AGREED.

The petitioners made written application to the county commissioners, to estimate the defendant's damages for land taken for the location of the petitioners' railroad; and after due proceedings, the commissioners estimated them at the sum of six hundred and fifty dollars, and made their return thereof in July, 1871. Thereupon the petitioners appealed. And after due proceedings, the jury estimated the damages at $435, and rendered their verdict accordingly, which was duly returned and confirmed.

Neither party made any objections to the acceptance of the report of the person who presided at the hearing before the jury, nor to the acceptance of the verdict.

Both parties claimed costs, and reported the case to the full court to determine which was the losing party.

Robinson & Hudson, for the petitioners.

Josiah Crosby, for the defendant.

WALTON, J. The damages occasioned by the taking of land for railroad purposes are to be estimated in the first instance by the county commissioners. If dissatisfied, either party may appeal and have the damages re-assessed by a jury. 'When an appeal is

63 Me. 363

taken, the losing party is to pay the cost thereon.' R. S., c. 51, § 8.

In this case the damages were first estimated by the county commissioners. The railroad company was dissatisfied, and appealed. They were then re-assessed by a jury. The county commissioners estimated the damages at $650; the jury at $435. Which party recovers costs? The statute says that the losing party shall pay costs. Which was the losing party? In other words, which was the prevailing party?

We think the land-owner, who made and successfully maintained his claim for damages, was the prevailing party.

True, he did not recover at the second trial so large a sum as at the first. But to be a prevailing party does not depend upon the amount recovered. The party who sues for ten thousand dollars, and recovers but one, has always been regarded as the prevailing party. Nor does it make any difference how many trials there may have been. If there should be two trials in an action pending in this court, and the plaintiff should recover ten thousand dollars at the first trial, and but one thousand at the second, still he would be regarded as the prevailing party. Nor does it make any difference that the trials were before different tribunals. In an action brought before a magistrate, if the plaintiff should there recover twenty dollars, and the defendant should appeal, and in this court the plaintiff should recover but one dollar, still he would be regarded as the prevailing party and entitled to full costs.

Such is the well-settled meaning of the term 'prevailing party.' To be a prevailing party does not depend upon the degree of success at different stages of the suit; but whether at the end of the suit, or other proceeding, the party, who has made a claim against the other, has successfully maintained it. If he has, he is the prevailing party.

In this case, the land-owner seems to have been quiescent throughout. When his land was taken he does not appear to have complained, or to have commenced any proceedings for redress. He was summoned before the county commissioners to establish

his claim for damages, if he had any. He appeared, made his claim, and successfully maintained it. Being again summoned before another tribunal, he again appeared, and again successfully established his right to damages. He did not apply to the county commissioners, he did not apply for a jury. He appears to have been at all times willing to accept such damages as should be awarded him. If the tribunal first applied to awarded him more than the second, it by no means follows that the first was wrong, and the second right. A jury is the ultimate tribunal, under the constitution, to settle the amount; and by their verdict the parties must abide. But it does not follow for this reason that they are more likely to be right than an intelligent board of county commissioners. The land-owner appears to have been willing to abide by the judgment of either tribunal. He has commenced no proceedings, he has made no appeals. Why he should now be required to pay the cost of those proceedings, or the cost of the appeal, is not easy to be seen.

We cannot believe that in a case like this the legislature intended that he should pay cost. If he had been the appealing party, and had thereby occasioned the costs of the appeal, the case might be different. But he was not. He simply appeared, when summoned, first before the county commissioners, and then before the jury, and in both instances established his claim to substantial damages. We think he must be regarded as the prevailing party, and entitled to costs on the appeal. *Costs for respondent.*

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

WILLIAM BURNS *vs.* MOSES C. ANNAS and others.

Location of roads through selected lands—to be done by county commissioners. Dedication. User.

The land agent has no authority to locate roads through public lands selected for settlement, but only to 'cause such roads to be located as the public interest and the accommodation of the future settlement require.' R. S., c. 5, § 29.

The authority to locate such roads is, by R. S., c. 18, § 32, vested in the county commissioners.

Neither can the land agent establish such road by dedication.

A road by user cannot be established in less than twenty years.

It is not competent for a town to establish a way across the private land of one of its citizens, by a simple vote of acceptance, without any previous location by its selectmen.

ON REPORT.

TRESPASS QUARE CLAUSUM.

The case is sufficiently stated in the opinion.

C. M. Herrin, for the plaintiff.

Powers, Madigan & Donworth, for the defendants.

WALTON, J. The question is whether a road, which crosses the plaintiff's land, was legally located, so as to justify the highway surveyor in opening it and fitting it for public travel.

We think not. It was located, or rather 'staked out,' by Emmons Whitcomb, in 1862. He does not appear to have had any other authority for so doing than the fact, as he says, that Mr. Norris, then land agent, wrote him in the spring of 1862, that he saw by the records in the office, that he (Whitcomb) was local agent of letter C, range 1, and wished him to go on as local agent, —'wished him to locate roads and get the settlers on.' The letter was not produced at the trial, and we are inclined to believe that Mr. Whitcomb must have mistaken its import; for while the statutes, then and still in force, make it the duty of the land agent to

appoint some suitable person or persons in the vicinity to superintend the location of settlers, and to see that they perform their road labor, and other duties required of settlers in unincorporated townships, no statute has been cited, and after a diligent search none has been found by us, conferring upon either the land agent, or his assistants, authority to locate highways through the public lands or elsewhere. It is made the duty of the land agent to 'cause' such roads to be located as the public interest and the accommodation of the future settlement require; but the authority to 'locate' them is vested in the county commissioners. See act of 1850, c. 206, §§ 2 and 4; R. S. of 1857, c. 18, § 30; R. S. of 1871, c. 18, § 32; c. 5, § 29.

Nor do we think the road can be regarded as legally established by dedication or user. A dedication by the land agent, or his assistant, would be as unauthorized as a location, and would have no more effect. A road by user cannot be established in less than twenty years. At the time of the alleged trespass this road does not appear to have been used more than eight years. It also appears that for a portion of these eight years, if not during the whole time, gates and bars had been kept up across the road. And it was the removal of these gates and bars that constituted the principal grievance of which the plaintiff complains. It appears in evidence that he was willing the defendants should use the road if they would shut the gate after them. But this they refused to do. It is clear that there has been no such use of the road as to establish it by prescription, or twenty years' adverse use.

It appears that in June, 1870, the town (which had then been incorporated by the name of Easton) voted to accept the road from Walter Dockendorff's to William Hutchinson's, which is the road in dispute. Whether this was before or after the acts of trespass complained of, is not clear from the evidence. If it was after the trespass was committed, of course it would have no effect. And if it was before, we think it is clear that the vote would not have the effect of making a legally established way of it. There had been no previous location of it by the selectmen. And it is not compe-

tent for a town to establish a way across the private land of one of its citizens, by a simple vote of acceptance, without any previous location by the selectmen.

We think it is clear that the road had not been legally established; that the removal of the gate, and otherwise fitting the road for public travel, were illegal, and a trespass upon the plaintiff.

Judgment for plaintiff.
Damages to be assessed at nisi prius.

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

BANGOR & PISCATAQUIS RAILROAD COMPANY, petitioners, *vs.* WILLIAM MCCOMB.

Damages for land taken for a railroad—elements of.

In estimating the damages of a land-owner, for the taking of a strip of his land across his lot for the location of a railroad, the award must be restricted to the direct injuries to the lot in question.

Thus a sheriff's jury may consider the value of the land taken; and if the remainder of the lot is rendered less valuable by reason of being severed, or disfigured on account of the strip taken and the use made of it, they may allow such sum as they find the injury to be: and in determining the consequent depreciation of the lot, they may consider the use to which the strip taken is appropriated; the character, situation, present and probable use of the remainder of the lot; the distance of the owner's buildings from the location of the railroad; and any facts which the jury, from a view and the testimony, shall find injure the value of the premises by a proper and legal use of the road.

So, also, they may consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, and from smoke, so far as they severally arose from the use of the strip taken and upon it, excluding all common and indirect damages.

So, also, if they find that the real value of the remainder of the lot and of the erections thereon was actually diminished, by exposure to fire from the company's locomotives, they may assess such sum as will be a just compensation for such diminution, taking into consideration, at the same time, that by the statute if property is injured by fire communicated by a locomotive engine, the company using it is absolutely responsible for such injury.

Bangor and Piscataquis R. R. Co. *v.* McComb.

On motion by the petitioners to set aside the verdict of a sheriff's jury for damages for land taken for the location of a railroad, the presiding judge declined to hear witnesses known to the petitioners and obtainable at the trial before the jury, or which by ordinary diligence might have been known to and had by them at the trial; *Held*, to be no ground for exceptions.

This court will not set aside the verdict of a sheriff's jury upon the ground of excessive damages, when the chief evidence relating thereto was derived by the jury from a view of the premises.

The owner of land taken for the location of a railroad is entitled to interest on the amount of the damages, from the time of the taking to the time of the assessment.

ON EXCEPTIONS AND MOTION.

PETITION for diminution of damages, allowed by the county commissioners for this county to the respondent, for land duly taken by the petitioners for the location of their railroad, and on appeal heard and tried before a sheriff's jury, summoned and impanelled for that purpose on Jan. 23, 1872.

It appeared that the jury proceeded with the officer, parties, and counsel to, and viewed the premises when the respondent put in his title deeds; that the petitioners had taken one hundred and fifty-one and one-half rods of the respondent's land, and that his entire premises, out of which the strip of land was taken, contained seven acres and fifty-three rods.

No question was made as to the title to the land, or to the charter and location of the road.

The parties then agreed that the question of damages should be submitted to the jury upon the foregoing testimony and their view, without argument, under instructions as to matters of law from the officer presiding, S. D. Lindsey, Esq., who thereupon instructed the jury

'That Mr. McComb was entitled to damages from the railroad company for his land so taken; that these damages included the value of the land taken, and the direct injury to the land remaining by the taking and use of this portion.

'That it was proper for the jury to consider the value of the land taken and its effect upon the remaining land. And if the remaining land is less valuable by reason of being severed, or by

any disfigurement on account of the land taken and the use made of it, they should allow such sum as they find the injury to be.

'In determining whether the remaining land was lessened in value, they should consider the use to which the land taken is appropriated, and the character, situation, present and probable use of the lands remaining; the distance of the owner's building from the location of the road, and any other facts, which, from their view and the testimony, they should find injured the land by the use of the road in a proper and legal manner.

'The question may arise, whether they should consider the exposure of the remaining lands to fire from the company's engines as an element of damage.

'Where the common law governs, the corporation is only responsible for the exercise of reasonable care and skill, and conditions might exist where this element would enter into the estimate of damages.

'In this State, the statute provides that when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it are responsible for such injury. The intention of the law being to require the railroad company to so run their trains that no fire shall be communicated to property along the route from their engines. If fire, in fact, is communicated, then the corporation is responsible.

'The jury may be satisfied as matter of fact, that as engines are now constructed and used, fire may be, and sometimes is, set by them, and that property along the line is subject to risk. The owner is entitled to just compensation for his actual damage.

'In this case they might consider the situation of the remaining lands, and by the term lands are included the buildings and erections on them. And if they find that their real value is actually lessened by exposure to fire from the company's locomotives, taking into consideration at the same time, that if a fire does occur, that the company must pay the damage, they may assess such sum as will be a just compensation for such lessened value. The requirement being that the land-owner shall receive a just compen-

sation for the direct damage growing out of the taking of his land for this purpose. If the real value of the land immediately before and after the location of the road could be ascertained, the difference between these two sums would be the damage.

'The market value of the land at the times mentioned is, perhaps, the nearest approximation to its real value, and they may consider the diminution of its market value by the location of the road over it, excluding, however, any general depreciation of lands, by reason of the extension of the road, which affected all lands in the village and neighborhood. It is the direct depreciation of this land, in consequence of the location of the road over it, that is to constitute your measure of damages.

'Merely speculative and conjectured damages are not to be considered. They must assume that the corporation will perform its obligations and operate their road in conformity to the requirements of law.

'In estimating these damages, they will take counsel of their own experience and knowledge of like subjects, and their view of the premises, and such testimony as has been offered. They will determine what was the actual damage sustained by Mr. McComb by the location of this road over his land.

'That the jury should allow interest on the sum they found the damages to be from that time.'

The presiding officer was requested by the counsel for the railroad company to give the jury the following instructions:

'1. That for all inconvenience arising from the sounding of whistles, the ringing of bells, the rattling of trains, the jarring of the ground, and for smoke, which are common to all the inhabitants and proprietors along the line of the railroad, no damages can be assessed by the jury in this case.

'2. That in this case they are not authorized to assess any damages for the prospective damages from fire, which may be communicated by the locomotive engines of the corporation to the property of the claimant McComb.

'3. That any insufficiency or want of culverts or cattle passes are not matters which can be redressed in this verdict.'

The first requested instruction the presiding officer declined to give, except as already covered in the instructions given, remarking to the jury that 'the inconveniences named in the requested instruction, to constitute elements of damage in this case, must be the direct result of the location of the road over the premises in question; that whistling, ringing of bells, etc., at a distance, and which constituted a common annoyance, was not to be considered.'

The second requested instruction the presiding officer also declined to give, further than the same was covered by the general instructions already given, relating to fires.

The third requested instruction was given.

The jury found a verdict for the sum of $1,750 and interest, which was sealed and returned to the February term, 1872, of the court, and opened on the second day thereof. Whereupon the petitioners alleged exceptions and moved that the verdict be set aside,

1. Because it was against evidence and the weight of evidence;
2. Because it was against law; and
3. Because the damages were excessive.

The petitioners objected to the acceptance of the verdict and report because the law, as given to the jury by said presiding officer, was wrong, and caused a large measure of damages against said company; and said presiding officer should have given the required instructions.

The petitioners offered witnesses to prove that the verdict of the jury as to damages was excessive. The presiding judge, upon the hearing as to the motion to set aside the verdict, ruled that he would not receive witnesses to affect the questions which were known to the petitioners, and obtainable by them at the trial before the jury, or which with ordinary diligence might have been known to them, and had by them at the trial.

The presiding judge, *pro forma*, overruled the motion for a new trial, his ruling not to affect the rights of the parties to be heard upon that question before the full court.

A. M. Robinson, for the petitioners, cited R. S., c. 51, § 32; *Hart* v. *Western R. R. Co.*, 13 Met. 99; 1 Redf. on Railways, 334; *Mason* v. *Ken. & Port. R. R. Co.*, 31 Maine, 215; *Stowell* v. *Flagg*, 11 Mass. 364; *Stearns* v. *At. & St. L. R. R. Co.*, 46 Maine, 114, 115; *Prop. of Locks and Canals* v. *Nash. & Low. R. R. Co.*, 10 Cush. 385; 1 Redfield on Railways, 291, 292, and cases cited; *Holman* v. *Townsend*, 13 Met. 299.

Josiah Crosby, for the respondent.

KENT, J. The questions presented for our determination in this case arise from exceptions to the rulings of the presiding officer, at a hearing before a sheriff's jury, impanelled at the request of the petitioners. There is also a motion to set aside the verdict on the ground of excessive damages, and exceptions to the ruling of the judge of this court in refusing to hear certain testimony offered under that motion.

The first and principal question of law relates to the rule of damages given to the jury, touching the various aspects of the case. It is conceded that the respondent's land was taken, to be used for the track of the railroad. It is a case where private property has been taken for public uses, without the consent of the owner, because the public exigencies required such taking.

This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess, and defend property. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy.

It is only when the sovereign power declares that a public exigency, to carry out a public purpose, requires that the individual right to possess must yield to the higher demands of the sovereign

power, that private property can be taken without consent. And even this right to take is not affirmatively given in the bill of rights, but is necessarily inferred. The section first gives an emphatic protection to private property, even against the public and the sovereign,—'private property shall not be taken.' It then qualifies this absolute negation, by excepting the cases where a public purpose and a public exigency concur in requiring or justifying the exercise of the right of eminent domain.

But can this right be exercised absolutely, tyrannically, and without care for the rights of the owner? Can the public say, we need your property and therefore we take it, and you must submit to be a victim for the public good, and yield your property for the common benefit? The constitution asserts no such right. No government, short of the most absolute tyranny, ever did, or ever can, maintain or tolerate such a doctrine.

The third and most expressive condition is, that private property shall not be thus taken 'without just compensation.' It is with this provision that we have to deal in this case. But in considering the extent and meaning of this clause it is important to regard the whole provision. We are not to forget that the property has been taken without consent of the owner; that the act overrides the fundamental right of every man to possess, manage, and defend his property, and that it is enough thus to seize his estate without making him a pecuniary sufferer.

The words selected are significant,—'just compensation.' These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property,—as far as compensation in money can go,—under the rules of law applicable to such cases.

In some cases it is very easy to apply those rules. If it is clear that all of a lot of land, shown to have been worth two thousand dollars, was taken, then that sum would be the extent of the damage. If personal property is taken from the possession of the

owner and converted to the use of the public, the value of the thing taken, at the time of the taking, would be the just compensation required. If a man's horse is taken and it goes from his possession, he has no longer any connection with the subsequent use or appropriation of the property. It can no longer affect him in the use or value of his remaining property.

But not so with land, unless the whole lot is taken. The land remains unmoved, and in various ways the taking of a part may injure the former owner beyond the mere value of so much land.

The effect of the location of the part taken, upon the remaining portion, may be such as to render it of very little value. It may leave only small gores, or parts incapable of profitable use. Or it may disfigure the lot, so that it would be worth but little, although the extent of the part remaining might be greater than of the part taken. Another, and often a more serious injury, is in the use to which the land taken is to be appropriated. If for a common highway, the use might be much less injury to the remaining land, than if for a railroad. There are various considerations, applicable to different cases, and to the situation of different lots, which may properly be regarded in determining the just compensation to the owner. The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot, and its erections thereon remaining, worth to the owner, as property to be used or leased or sold the day after the part was taken, to be used for the purpose designed, than the whole lot intact was the day before such taking?

There must be, however, a limit, which will exclude remote, indefinite, or possible damages. The damages must be direct, not such as are general or common to others or to the whole communi-

ty. They must be such as it may be fairly anticipated will result from the taking of the land, in the form, direction, and use of the track or road taken to the remaining part, and to the erections thereon.

Although it might be difficult to exclude from the enlarged idea of a 'just compensation,' some of those damages which are termed indirect, yet the difficulty of estimating them, and the almost unlimited range which such a discussion must take, and the impossibility of justly giving damages for such indirect, remote, or general injuries, when one man's land is taken, and refusing them to his neighbor who may be an equal sufferer in fact, from the proximity of his premises, no part of which is taken for the road, have led to the conclusion that the only practicable rule is, to confine the award to the direct injuries to the lot in question.

On a careful examination of the rulings of the presiding officer on these points, we see no reason to question their fulness or correctness. The jury were told 'to allow the value of the land taken, and if the remaining land is less valuable by reason of being severed or by any disfigurement on account of the land taken and the use made of it, they should allow such sum as they find the injury to be. And that in determining whether the remaining land was lessened in value, they should consider the use to which the land taken is to be appropriated, and the character, situation, present and probable use of the lands remaining, the distance of the owner's buildings from the location of the road, and any other facts, which, from their view and the testimony, they should find injured the land, by the use of the road in a proper and legal manner.'

The jury were instructed to exclude 'merely speculative or conjectural damages, and that they must assume that the corporation will perform its obligations and operate their road in conformity with the requirements of law. The direct depreciation of this land in consequence of the location of the road over it, is to constitute your measure of damages.'

The corporation requested the instruction, that the jury 'are not

authorized to assess any damages for all inconvenience arising from the sounding of whistles, the ringing of bells, the rattling of trains, the jarring of the ground and for smoke, which are common to all the inhabitants and proprietors along the line of the railroad.'

The presiding officer instructed the jury that the inconveniences named in the request, to constitute elements of damage in this case, must be the result of the location of the road over the premises in question. That the whistling, ringing of bells, and other matters named, at a distance, and which constituted a common annoyance were not to be considered.

We understand that the fair meaning of this instruction is, that these matters off of the premises in question, at any distance therefrom, must be excluded from consideration. But the jury might consider them, when arising from the use of the land taken, and on that land.

No one can seriously question that many, if not all, the matters specified in the request may be specially annoying to the owner in the use of his property. The track may be so near his house that smoke may enter it every time the engine passes. His house may be at the exact distance from a crossing, which the law designates as the place where the whistle shall be sounded with its shrill cry. If the jury might properly consider the use to be made of the land, then all the natural, usual, and lawful results from that use may be considered, when restricted to the lot itself. A common nuisance, which annoys the whole neighborhood, may also be a private and special nuisance to an individual, beyond that endured by the public.

We see no ground to except to this instruction, qualified as it was in the giving, and also qualified by a reference to the former part of the charge, by which all common and indirect damages were excluded.

There was another instruction, which it is contended more strenuously and confidently, was erroneous.

The instruction was, that if the jury find that the real value of the remaining land, and buildings and erections thereon, is actually

lessened by exposure to fire from the company's locomotives, taking into consideration at the same time, that if a fire does occur, that the company must pay the damage, you may assess such sum as will be a just compensation for such lessened value.

The presiding officer had, before giving this rule of damage, stated to the jury, that by the existing law of this State the corporation was absolutely liable for all injury occasioned to property of others by fire, communicated by a locomotive engine, in use by the company.

In fact and substance the company is an insurer against such injury, and bound to repair, restore, or pay the amount of such injury so occasioned.

It is not questioned seriously, that independent of this statute, the danger from fire from the use of locomotives, over the land taken, would be a proper subject for consideration by the jury in estimating the damages. But it is contended that the liability of the corporation, before stated, covers all the ground, and that there can be no appreciable damage beyond this insurance.

It must be confessed that, at first view, this position seems reasonable and tenable. But a little consideration of the elements which go to make up the just estimate will show that there are reasonable grounds on which the ruling may be sustained. The rule contended for is simply the increased cost of insurance as the only allowable damage. If before, the buildings could be insured for one per cent per annum, and after the location two per cent would be demanded, then the additional premium would be the exact injury, in this particular. But we are to remember that the question is, how much is the lot and property injured, depreciated, as property to be used, leased, or sold. The actual injury, in these particulars, is to be settled at once and for all time. The right to call upon the company to restore the building, if burned, or to pay its value, may, it is true, go far to protect the owner from pecuniary loss. But are there not other evils, other depreciating effects from a constant and imminent danger of fire, causing not merely mental anxiety, but constant watching and loss of time.

There may be cases where property which before could be leased for a large rent, to responsible tenants, would be left unoccupied by such tenants, if daily and nightly in danger of being set on fire by locomotive engines. And the same effect would follow, if offered for sale. In such cases the mere liability to pay the actual physical damage to the property would not be a just compensation. It would not cover the actual depreciation of the property occasioned by this liability to fire. There may be cases where perhaps this insurance would, in the sound judgment of a jury, be a sufficient protection. But the question is, whether there may not be cases where the rule given in this case is the proper one.

To illustrate further. If the sovereign power should determine that the public exigency required the erection, by the State, of works for the manufacture of gunpowder, and should designate a commission to select a site, and take the same under the right of eminent domain, a just compensation to be paid to the owner, and with the express provision that if any injury should be done to any of the buildings or erections on the remaining part of the lot, by an explosion of gunpowder there manufactured or in any stage of manufacture, the injury done to such property should be repaired or paid for by the State, would this provision be regarded by any impartial tribunal as excluding from consideration, in determining what should be a just compensation to the owner, the constant and imminent danger of an explosion? The prospective right of repair would hardly induce an owner or his tenant to live contentedly and with a feeling of security, with this hourly fear of an explosion.

The jury were instructed to start in this matter of danger from fire, with the established fact that if a fire does occur, from the use of locomotive engines, the company are liable for the damages actually done to the buildings. With this admitted, we see no objection to the rule given by the presiding officer.

The court in Massachusetts, in the recent case of *Pierce* v. *W.*

& N. R. R., 105 Mass. 199, recognize the correctness of the ruling of the presiding officer in this case. He instructed the jury clearly and distinctly, that they could not estimate or allow anything equivalent to insurance against actual damage or destruction by fire, occasioned by a locomotive engine of the company.

There remain for consideration the exceptions to the rulings of the judge of this court, at the hearing on the motion to set aside the verdict of the jury, and for a new trial.

As we gather the facts from the somewhat complex and confused statement of them, these proceedings originated in a petition by the railroad company for a diminution of damages, allowed by the county commissioners. The verdict of the jury was returned into court, and thereupon the company moved to set it aside and for a new trial. The presiding judge ruled that he would not hear witnesses, whose testimony might affect the questions before him, if such witnesses were known to the petitioners, and obtainable by them at the trial before the jury, or which by ordinary diligence might have been known to them and had by them at the trial.

In thus ruling the judge only followed well-settled rules of practice in this court, which are reasonable and require no words in defense.

The motion for a new trial was overruled, but it is added that this *pro forma* ruling is not to affect the rights of the parties to be heard upon that question before the full court.

It is not necessary for us to say more than if that motion is properly before us, we can find no ground to sustain it, on the facts reported. The chief, if not the whole evidence touching the matter of damages was derived from the view of the premises. The parties agreed to submit the case to the jury on this view. We, of course, cannot have the benefit of this kind of evidence.

The jury were instructed to allow interest on the damages found, after the time when the land was taken by the corporation. We see no legal objection to this rule. The respondent's land was taken from him and his compensation has been detained from him

by the acts and proceedings of the corporation. *Reed* v. *Hanover B. Railroad*, 105 Mass. 303. The result is, that

All the exceptions before us are overruled. Motion overruled. Judgment to be rendered on the accepted verdict of the jury.

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

B. H. DAVIS and others, petitioners, *vs.* BANGOR & PISCATAQUIS RAILROAD COMPANY.

Sheriff's jury—mode of impanelling.

In impanelling a sheriff's jury, summoned to assess damages for land taken for the location of a railroad, the parties are not entitled to have the names of all the jurors summoned placed separately in a box, and the jury drawn in accordance with the provisions of R. S., c. 82, § 66.

Nor have they the right peremptorily to challenge two jurors.

ON EXCEPTIONS AND MOTION.

ON petition for increase of damages assessed against the respondents by the county commissioners, for land of the petitioners taken by the respondents for the location of their road, and for a jury, on appeal, to estimate the damages.

The jurors summoned duly appeared on Jan. 24, 1872. Before they were sworn, the respondents moved that the names of all the jurors summoned be placed separately upon tickets in a box, and drawn and impanelled in the manner provided in R. S., c. 82, § 66; and that they be allowed to peremptorily challenge two jurors. But the presiding officer, S. D. Lindsey, Esq., ruled, as matter of law, that the respondents were not entitled to have the names placed thus on tickets, and drawn as moved, and that they

were not entitled to two peremptory challenges. Thereupon the jury were duly impanelled.

It was admitted that the railroad company had duly proceeded in the taking of the petitioners' land, and that the title thereof was in the petitioners.

Upon request of the parties, the presiding officer stated to them the instructions he should give the jury in matters of law, which were the same as in *Bangor & Piscataquis R. R. Co.* v. *McComb*, *ante*. The presiding officer also declined to give the requested instructions as in the above-named case.

It was thereupon agreed by the parties that the jury, under the instructions, should return a verdict, *pro forma*, for seven hundred and fifty dollars, as the damages sustained by said petitioners by the location and construction of their railroad over their land, and a verdict was so made and signed by said jurors.

The respondents alleged exceptions to the rulings and refusals to instruct, and moved to set aside the verdict for the same reasons as in the case *ante*.

At the February term, 1872, upon motion to set aside the verdict for excessive damages, the presiding judge ruled as in the preceding case.

Lebroke & Hudson, for the respondents.

J. Crosby, for the petitioners.

KENT, J. All the questions, except one, arising in this case have been considered and decided in the case of the *Petitioners* v. *William McComb*, *ante*.

The question remaining has reference to the impanelling of the sheriff's jury. The respondents claimed that the names of the jurors summoned should be placed separately in a box and be drawn and the jury impanelled according to the provisions of R. S., c. 82, § 66, and also claimed a right peremptorily to challenge two jurors.

We think it is very clear that it was not the intention of the

legislature that these provisions of the recent statute should apply to sheriffs' juries, drawn as this one was for a special case and purpose.

No right of challenge is given in the act under which this jury was drawn. The provisions of c. 82, § 66, are in terms applicable only to civil and criminal cases pending in a judicial court. The object plainly is to give a party to such suit, so pending, a right to have a jury of twelve, selected by lot from at least two full panels, or from all the jurors in attendance not otherwise engaged.

The names of all such jurors are to be placed separately in a box, and the clerk of the court is to draw the names of a sufficient number to fill the panel, after the whole have been thor oughly mixed.

Only twelve jurors can be summoned by the sheriff for his jury. It would be simply absurd to place these names only in a box, and then after thoroughly mixing them draw the same twelve names to constitute the jury.

The names are to be drawn by the clerk. The sheriff or person presiding has no such officer under him.

The right to challenge peremptorily two jurors is only given in connection with proceedings under c. 82, before referred to.

The same entry must be made in this as in the other case.

All the exceptions before us are overruled. Motion overruled. Judgment to be rendered on the accepted verdict of the jury.

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

PENOBSCOT RAILROAD COMPANY *vs.* GIDEON MAYO.

Trusts—discharge of. How enforced by cestui que trust, using the name of the trustee.

If a *cestui que trust* be induced by fraud to discharge the trust, it must be considered as extinguished so far as an innocent purchaser of the trust-property, who buys relying upon the discharge, is concerned.

But if a person whose own note is deposited in trust for others, among whom its proceeds are to be divided, obtain possession of it without the consent of the *cestuis que trust*, an action for money had and received brought against him, in the name of the depositary, by and for the benefit of one of those entitled to a share of the amount due on the note, is maintainable; nor can the suit be discontinued by the nominal plaintiff, or his assignee without the assent of the party in interest.

THE PLAINTIFFS' writ contains three counts, to wit:

1. Upon the following account annexed:

1870. GIDEON MAYO TO THE PENOBSCOT RAILROAD CO. Dr.

To amount collected by you, of different individuals, not paid over or accounted for by you,	$2,000
To $68,700 Penobscot Railroad Bonds belonging to plaintiffs, at 33⅓ per cent, which you sold and received the money for, to the European & North American Railway Co., October, 1863,	$22,900
To notes and cost in addition to the above,	7,500
To interest on the above,	8,000
	$40,400

2. For $60,000, money had and received.

3. Upon note of defendant to plaintiffs or order for $4,000, dated May 28, 1862, payable in one year with interest.

This suit is instituted, in the name of the plaintiff corporation, by and for the benefit of Nathaniel Wilson. To maintain it testimony tending to prove the following facts was introduced by the

plaintiff. All acts relating to the organization of the railroad company, and its corporate action in accepting the same and establishing by-laws, electing officers, etc. That of $300,000 worth of bonds, issued to aid in the construction of the road, $68,700 were left unsold in the hands of the company and were, in November, 1855, conveyed and delivered in trust to E. P. Butler to secure Wilson and others for advances. That, subsequently, the defendant, who was president of the company of which said Wilson was a director, by certain false and fraudulent representations, made for this purpose, obtained a delivery of these pledged bonds to himself, under the color of a sale, giving for them the note mentioned in the third count of the plaintiff's writ; and, by the same means, Mayo procured the discharge of Butler from his trust, and the assent of the beneficiaries thereto, it being agreed that the note should be held by the treasurer to secure Wilson and others for advances to the road, and that when paid the money should be divided ratably among these persons. Subsequently, without the knowledge and consent of Wilson, and by other fraudulent representations (as is alleged), Mayo procured the surrender to him of his note without payment of any part of it.

By c. 321 of the Special Laws of 1864, the European & North American Railway Company succeeded to all the rights of the plaintiff-corporation, its existence being continued to preserve the interests of the first-named company. By consent the defendant introduced, subject to legal objection, a release of this action by the European & North American Railway Company.

The plaintiff moved for a nonsuit which was granted, to be taken off or confirmed as the court may find the legal rights of the parties.

N. Wilson, pro se.

Charles P. Stetson, for the defendant.

The nominal plaintiff is merged in the European & North American Railway Co., and that company has succeeded to all the plaintiff's right's and property, including this claim; hence this ac-

tion cannot be maintained without the consent of the European & North American Railway Co. *Adams Bank* v. *Jones*, 16 Pick. 575; *Ashuelot Manuf. Co.* v. *Marsh*, 1 Cush. 507.

Mayo was president and trustee for the R. R. Co. *European & No. Am. Railway Co.* v. *Poor*, 59 Maine, 277.

Wilson's remedy, if any, is in equity.

APPLETON, C. J. This action is brought for the benefit of Nathaniel Wilson, and the material question is as to his right to prosecute the same.

On July 15, 1863, a lease from the plaintiffs of all their estates, real, personal, and mixed, to the European & North American Railroad Company for the period of nine hundred and ninty-nine years, was signed by the defendant as president of the plaintiff corporation, and by John A. Poor as president of the European & North American Railroad Company, and the seals of the respective corporations duly affixed.

This lease, at a meeting of the directors of the European & North American Railroad, held on the same day, was 'approved, ratified, and confirmed.'

At a meeting of the directors of the plaintiff corporation held on the same day it was voted, 'that an instrument dated this day, in the nature of a lease . . . is hereby approved, ratified, and confirmed as the act and deed of said Penobscot Railroad Company,' subject to certain conditions specified in said vote, and authority was given to a majority of the directors, in a certain contingency, to 'authorize the delivery of said instrument; otherwise and unless a majority of said directors concur in the delivery, said instrument shall not be delivered and shall be and become null and void.'

At this meeting but three directors were present, one of them being Nathaniel Wilson.

At a meeting of the directors of the plaintiff corporation held Feb. 1, 1864, Nathaniel Wilson, a director, being present, full authority was given the defendant, as president of the corporation, 'to complete the execution of the contract and lease, made by and

between said company and the European & North American Railroad Company, dated July 15, 1863, and now in his hands, and make delivery of the same and of all documents and other writings necessary to carry the same into full execution and effect.'

As a majority of the directors were required to authorize the delivery of the lease, and as the vote of Wilson was necessary to constitute that majority, and as there is no evidence of his dissent or refusal to act, we may well presume that his concurrence was had in the vote as recorded.

By a special act, c. 321, approved Feb. 20, 1864, the instrument or lease of July 15, 1863, received the sanction and approval of the legislature, and after reciting that the European & North American Railway Company had acquired all the estates of the Penobscot Railroad Company of every description, it was enacted by § 5 that 'the rights and properties held by said Penobscot Railroad Company shall hereafter be vested in said European & North American Railway Company, and shall remain in full force and efficiency unannulled and unimpaired, by any subsequent defeat or dissolution of the Penobscot Railroad Company, whether by limitation of the time in which the road should be completed, or by any other means.'

As the charter of the plaintiff corporation would otherwise have expired by lapse of time, it was further enacted in the same section that it should 'be regarded as still subsisting, so far as its continuance for the purpose of upholding any right, title, or interest, power, privilege, or immunity ever possessed, exercised, or enjoyed by it, may be necessary for the protection of the European & North American Railway Company, its exercise of the powers and its enjoyment of the privileges and immunities so transferred, being suspended so long as the European & North American Railway Company shall exercise and enjoy them.'

It is thus seen that all claims of the plaintiff corporation against the defendant, of every description, were transferred to and became vested in the European & North American Railway Company, with the knowledge and approval of Wilson, the only plaintiff in interest, or at any rate without objection on his part.

The interest on the claim in suit having thus become vested in the European & North American Railway Company, that company settled and adjusted all claims against the defendant, as appears by a vote of their directors at a meeting held on Oct. 14, 1870, and directed this suit to be discontinued. The plaintiff corporation having no interest in the demand in suit,—having assigned the same to the European & North American Railway Company and existing for the purpose of upholding their interests, and they having settled and adjusted this suit,—it remains to be seen why it should be further prosecuted.

It certainly cannot be prosecuted further for the benefit of the nominal plaintiff. It remains to be seen what rights Mr. Wilson may have for its further prosecution for his benefit.

It seems that Wilson, prior to Nov. 21, 1855, with others, had become liable for the plaintiff corporation, as surety, and had advanced funds on their account, and that at a meeting of the directors, Gideon Mayo, Israel Washburn, jr., Nathaniel Wilson, and Eben Webster being present, it was voted 'to transfer, assign, and convey to E. P. Butler of Orono, in his individual capacity and not as treasurer,' certain second mortgage bonds in trust, among other things, 'to pay all and singular the sums advanced or paid for the company, as aforesaid,' etc.

By this vote the second mortgage bonds were held by E. P. Butler, the treasurer of the plaintiff corporation, in his private capacity as a trustee of Wilson.

But at a subsequent meeting of the directors, Butler, as trustee, was discharged from his said trust, and on April 10, 1862, Mayo, Webster, Wilson, and Washburn by their writing, directed to said Butler, discharged him from said trust, using therein the following language, 'We each of us for himself and others hereby release and discharge you from said trust, and request you to deposit the same with the treasurer of said company for the use and benefit of said company, and to be held for such other and further action of the said company, as they may order and direct.' It thus appears that the bonds held in trust were thereafter to be held freed from any trust and as the property of the plaintiff.

At the meeting on April 10, 1862, it was voted that the bonds held by the treasurer, being sixty-eight thousand seven hundred dollars (being the amount of part of the claim sued for) should be delivered to Gideon Mayo, president of the company, 'to be used by him, the said president, for the company, as he shall deem expedient.'

As Mr. Wilson released and discharged the trust created for his benefit, he would seem, at law, to be estopped to claim it as still subsisting.

At a meeting of the directors of the plaintiff corporation, held May 28, 1862, Mayo, Wilson, and Webster being present, it was voted to sell all the bonds in Mayo's hands to him for his note for the sum of $4,000, and that the 'note be retained by said treasurer as security to the directors for the several amounts by them advanced to said company, and now due them, as individuals, from said company, and when collected shall be divided to said directors in proportion to the sum actually due each.'

At a meeting of the directors of the plaintiff company, held July 13, 1864, it was voted that the directors cancel the note given by Mayo May 28, 1862, for $4,000, and deliver the same to him; and further, to deliver over to the European & North American Railway all deeds of right of way, and all other demands and property of every kind belonging to this company, agreeable to the contracts of the two companies and the act of the legislature passed last winter.

It is urged that the trust, created Nov. 21, 1855, by which certain bonds were transferred to Butler for the security of the plaintiff and others, was discharged through the fraud and misrepresentation of the defendant. So be it. The first trust was discharged by the action of Wilson. The discharge appeared on the record of the company as well as under his hand. There is no evidence that the European & North American Railway knew of this fraud or were in any way parties to it. They contracted in good faith, relying upon the records of the plaintiff corporation and upon the written discharge of the trust by Wilson, and had a perfect right

to the bonds previously held in trust, and to hold them discharged of all trust.

The only remaining subject of inquiry is the note for $4,000 of the defendant of the date of May 28, 1862, which was surrendered by a vote of the directors of July 13, 1864, at which Wilson was not present. This note, it will be observed, was to be retained by the treasurer as security to the directors for their unpaid advances and in proportion to such advances. The treasurer therefore held this in trust for Wilson and others, but as the division was not to be made until collected, it is obvious the plaintiffs, to whom it was payable, were to enforce its collection.

The plaintiff in interest, Wilson, offers to show that this note, without his knowledge or consent, was surrendered to Mayo without payment, in consequence of his false and fraudulent misrepresentations to the plaintiff corporation. The other directors, who were equitable assignees, could not, by any vote of theirs, deprive Wilson of his claim upon the security retained in part for his benefit.

Assuming the facts to be as they are offered to be proved, the defendant owes the plaintiff corporation $4,000, of which Wilson is equitable assignee to the extent of his proportional share of the advances made by the directors. True, the note has been given up through the defendant's fraud, as the plaintiff offers to prove, but it is none the less due. A recovery may be had on a note lost or destroyed. *Moore* v. *Fall*, 42 Maine, 450. The liability of the defendant continues. A cancellation of a note, by and through the fraud of the maker, cannot protect him.

When the lease was made by the plaintiffs to the European & North American Railway on July 15, 1863, the note had been equitably assigned to the directors of the plaintiff company, and was to be retained by their treasurer for the security of such directors. This appears by their records. It did not, therefore, pass to the lessees. It follows, therefore, that the release of the European & North American Railway cannot avail the defendant so far as relates to the interest of Wilson, the equitable assignee in this note.

The plaintiff corporation is not absolutely dissolved. Besides, there is no plea of *nul tiel corporation* in abatement. By pleading the general issue, the defendant admits the legal capacity of the plaintiff to maintain this action. *Ministerial and School Fund in Dutton* v. *Kendrick*, 3 Fairf. 381. *Savage Manuf. Co.* v. *Armstrong*, 17 Maine, 34.

The note being assigned, the equitable assignee has a right to use the name of the assignor to enforce its collection, at any rate, to the extent of his proportional interest.

Exceptions sustained.

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

CHARLES STETSON, appellant, *vs.* CITY OF BANGOR.

Dedication of way—when the way terminates on a navigable stream presumed to extend to low-water mark.

Where riparian proprietors have laid out and sold their land in lots as delineated upon a plan having streets indicated thereon, terminating upon a navigable stream, such streets will be considered as dedicated to the use of purchasers of such lots and of the public, down to the water at all stages of the tide, unless there be some express reservation of the flats, although the lines upon such plan, indicating the boundary of the tier of lots nearest the river, be drawn at high-water mark.

The conversion of a way dedicated to the use of purchasers of adjoining lots into a public way does not authorize the award of more than nominal damages.

ON APPEAL from the decision of the city council of Bangor, awarding a dollar damages for extending Hancock street from high-water mark, over the flats, to the margin of the wharf on Kenduskeag street, under c. 465 of the Special Laws of 1870.

The only contest was, whether nominal or substantial damages should have been awarded upon the following facts, proved or ad-

mitted, viz.: Kenduskeag stream is a navigable stream, the tide usually flowing from fifteen to twenty feet at the point in controversy; the street as now laid out extends from high-water mark, over the flats, to the wharf line established by the city under the authority of the legislature. In 1801, the proprietors of the land, lying at the junction of this stream with the Penobscot, caused a plan thereof to be made, dividing it into lots and streets, of which Hancock street was one; and all the lots delineated thereon have since been sold according to the streets and numbers so laid down. One of these proprietors presented a copy of this plan to the inhabitants of Bangor, assembled in town-meeting, and it was there voted to accept the roads laid down upon it, returned by the selectmen, who subsequently made such return, but omitted to mention Hancock street therein. Upon the plan the line indicating the water-front of the lots was drawn at or near high-water mark, and the delineation of Hancock street terminates at that line. It was shown that the public had used the flats, over which this extension is now to be made, as a landing-place for more than forty years, and that the street commissioner had assumed to control its condition; and, on the other hand, that one of the proprietors had, without molestation, used a part of it temporarily while engaged in building in that vicinity, and, upon another occasion, had forbidden its use to a citizen.

A. W. Paine, for appellant.

Damages are to be paid unless some reason exists for their denial. The question is, whether plaintiff is entitled to actual damages, or only to the nominal sum awarded him; this depends upon another, which is the real question, whether or not the public had an easement over the flats taken by the city.

There was no previous laying out; hence, if the public have such right, it exists by dedication or by prescription.

1. As to dedication. The purchasers of lots had the right to use the streets delineated on the plan; nor is it contended, that, when the city adopted these streets, the proprietors were entitled

to more than nominal damages; but the question is, whether the premises now taken, below high-water, were by the plan designated for a street. This must be determined from the plan alone, which fixes the water-line at high-water mark for the lots and for Hancock street, while York street is carried beyond this point. The proprietors had no right to extend the streets into tide-water however. *State* v. *Wilson*, 42 Maine, 25. Nor was there any necessity for it, since the public have a right to go over the flats for travel and landing. Hancock street never was adopted by the city until this action was taken, under express authority of the legislature, which was unnecessary, if the right to extend it into tide-water already existed.

2. As to prescription. All the user shown has been connected with the navigation of the stream; to land lumber, etc., etc. By common law the flats, belonging to the commonwealth, are not subject to prescription. Colonial Laws, c. 63, p. 148; *State* v. *Wilson*, 42 Maine, 9; *Com.* v. *Alger*, 7 Cush. 53.

The street commissioner used the flats only as any other citizen might. His acts, unless there has been a previous laying out, do not affect the town. *Gilpatrick* v. *Biddeford*, 51 Maine, 182, and 54 Maine, 93; *State* v. *Bradbury*, 40 Maine, 154, 157.

This was a 'landing-way,' which is 'more than a highway,' 42 Maine, 27, and cannot be acquired by prescription. *Bethune* v. *Turner*, 1 Greenl. 111; *Littlefield* v. *Maxwell*, 31 Maine, 134; *Coolidge* v. *Learned*, 8 Pick. 504; *Pearsall* v. *Post*, 20 Wend. 111.

A. G. Wakefield, for appellee.

KENT, J. The case before us is much simplified by the admissions made by the counsel for the appellant. He admits that by the proceedings of the owners, in the early part of this century, in causing their land to be run out into lots and streets, and a plan thereof to be made, and afterwards selling lots according to that plan, they gave a right to the grantees to use those streets, and to have them kept open as such. And he does not deny that when

the city afterwards assumed to appropriate and lay out such street as a public way, the owners of the fee were barred from recovering more than nominal damages. His reasons for this conclusion are clearly stated, and are more fully quoted at the conclusion of this opinion.

We think it clear that on the facts proved and admitted, the counsel is fully justified in making these admissions, and that in doing so he shows a very commendable spirit of fairness and good sense, and is enabled thereby to bring his own argument directly to the real question in issue. He states the question on this part of the case thus,—'the simple question is, whether the premises, now taken below high-water mark, were by the plan appropriated for a street.' Perhaps a more exact statement of the question would be,—what was the extent of the dedication made by the owners, as shown by their plan, by their deeds, and by the facts connected with the subsequent use and occupation? It being admitted that as to the upland embraced within the lines of Hancock street no damages, certainly none beyond nominal, can be rightfully and legally claimed, the question is, whether any damages, or any beyond nominal, can be claimed for the taking of the land below high-water mark, for the purpose of establishing Hancock street as a town way, under the recent act of the legislature. As before stated, that must depend upon the extent of the dedication.

The appellant claims a right to full damages, as the absolute owner of the unincumbered fee. This claim rests upon the assumption that by no acts of theirs the original proprietors lost any of their absolute and unqualified right to own, possess, and use the flats. It is not questioned that if there was any dedication reaching the flats it was of a right of way, like that on the upland.

In order to ascertain the intention of the owners, all the facts must be taken into consideration. The quantity, location of the whole plat,—the purpose and intent of the owners in thus laying it out into small lots on the rivers, and into larger ones on the land more remote,—the streets designated, and the purpose in view in

thus laying them down. No one can doubt that the leading object of the proprietors was to make such a location, and such a plan, as should offer inducements to purchasers to invest in these lots. It is evident that the sagacious owners foresaw that these shore lots, particularly, would be, in time, occupied by blocks of stores, each lot having its share of the flats in front. They also saw that if they limited the streets on the plan to Poplar or Exchange or Washington streets, there would be no access to the stream or river by the public or by the owners of the lots. They therefore extended the seven or more streets to the water, on the plan which was presented to the town. It is admitted, as before shown, that this was a good dedication, binding the owners of the land to high water. But what was the great value or use of these streets, or ways, or docks, except to connect the upland with the river, so that the two highways might be made continuous?

It is urged that the line drawn on the plan is that of high water, and that therefore the dedication could not extend beyond that point. But it is to be observed that this line of high water is the same on all the lots, and was adopted to designate the line between the upland, or dry land, and the river. And yet there can be no doubt that the flats in front of the lots were not reserved by the owners (although it was competent for them to convey only the upland), but passed by the colonial ordinance to the persons who bought the lots by the plan. But strictly measured they do not extend beyond high-water mark on the plan. There is no line drawn across these streets at the stream to indicate a termination of the street or way at that point. We think that the true construction of the plan and deeds referring to it is, that the Kenduskeag stream and the Penobscot river were adopted as the boundary lines; or, in other words, that so far as these streets are in question, it was the intention to make a direct and unbroken connection between the street and the river at all times of the tide.

The Penobscot river and the Kenduskeag stream are both highways, over which the public have a right to pass and repass with

boats, vessels, or rafts. But they would not have a right to land and to use the upland as a way or road to transport their water-borne goods, without the assent of the owner of the land. These proprietors, we think, intended to give by dedication this right. This is admitted as to land above high water. But that right would be of very little use or value, if it could be only exercised when the tide was at the exact point of high water. If no part of the flats could be thus used there could be such use only twice in twenty-four hours. And further, as we understand the claim on which the appellant rests, he might close all connection between the two highways by building a wharf or stores over the whole parcel of land or flats in front of the lines of the street. Could this have been the intention of the donors?

The case of *People* v. *Lambier*, 5 Denio (New York), 9, was a case where a street had been laid out to East river. It was held that the river was a highway, and that there was a continuous public way upon the river, as well as on the street to the river, and that the public had a right to this connection or continuation; and where an owner, authorized by statute, erected a bulk-head and other works and filled in with earth between the former termination of the way and the river, that the way was extended over these new erections and this filling in. Or, in brief, that the clear intent was, that the street should, at all events, reach and connect with the other highway on the river. See also, 4 Paige, Ch. Rep. 410.

The case of *Barclay* v. *Howell*, 6 Peters, 512, involved some principles applicable to this case. One of them is thus stated by the court: 'It is admitted by both parties that the river Monongahela, being a navigable stream, belongs to the public, and a free use of it may be claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend that between this boundary and the public right a private and hostile right could exist would not only be unreasonable, but against law.'

The proprietors having sold all the lots according to the numbers, and according to the plan which contained all these streets, the purchasers have a right to have these streets kept open and unincumbered. The proprietors impliedly covenant, or certainly are estopped from denying, that the streets are to be kept open, and that they are not to be appropriated by any act of theirs to private use. This proposition is not denied. But it is denied that this right extends beyond high-water mark to the individual purchaser of a lot, even of the lots on each side of the street. This construction would diminish the value of all the lots, and of these corner lots more than of the other lots. We think that the manifest intent was, that these docks or streets not only reached the line of high water, but that it was the intention that the stream should be the limit, and that the purchasers should always have an open dock or way on one side of their wharves or lots. They must have so understood the plan. We should require the most conclusive and absolute evidence of the existence of a reservation, which would allow the proprietors selling these lots by that plan to erect the next week a wharf covering the whole flats, and excluding any connection with the stream as a highway or landing-place, or as an open dock, before we could yield to such a result.

Proof of user by the public is competent evidence in determining whether a dedication has been made. *Mayor, etc., of Jersey City* v. *Morris Canal*, 1 Beasley, 583. In the case before us, the report finds such user for forty to fifty years for a landing-place to haul out lumber, timber, wood, etc., which was transported over the street to different places in the city. The street commissioners, since 1857, have exercised a care over it, working upon it, and filling out with earth so as to make it passable to get to low water,—removing obstructions on it and also a building erected without authority, and facilitating such egress and ingress by erecting wharves with suitable slips. No opposition was made to the doings of the street commissioners. Although the street was sometimes obstructed by timber and lumber, hauled out of the stream, yet a passage-way was always left to the stream, and the

street commissioners gave notice to the owners of such timber to remove it, and in case of neglect caused it to be removed, exercising the same care over this street as over other streets in the city.

The single act of Zadoc French, one of the original proprietors, in undertaking to monopolize the use of the slip, or as much as he wanted for his building materials, when erecting the Penobscot Exchange, cannot overcome the effect of this long-continued use by the public. It was only a claim to use it temporarily for his own private purposes, and was more than forty years ago. It was not followed up. It was not a formal entry to assert title for himself and other owners. If there had been a dedication, he could not revoke it by such an act, and he was but one of the three owners. And the same remarks, or most of them, apply to the deed made by Amasa Stetson, another proprietor, in 1834. But this deed is a simple release of all right, title, and interest which the grantor then had in the premises. It does not purport to convey the land, but merely the then existing right in the grantor, if any. If he had before parted with his right by dedication or by conveyance, he could not, and he did not undertake to convey anything by this deed. It has been decided by this court that such a release does not convey the land itself or any particular estate in it, but simply and only the actual right or title, which may be then in the grantor. *Coe* v. *Persons unknown*, 43 Maine, 432.

The deed, however, is significant, as showing the understanding of this original grantor, or donor as to the original intent of the proprietors. It speaks of it as the extension of Hancock street to said stream, and as being the slip or dock at the bottom of Hancock street, as laid down on this plan. Then follows a condition that the grantee is not to obstruct it by buildings, but 'the same is to be kept open as a wharf or street way from said Poplar (Exchange) street to Kenduskeag stream.' This clearly shows that Amasa Stetson, under whom the appellant claims, understood that there was a slip or dock, and that the way was to be kept open and free to the stream, thus, at all events, connecting one highway with the other.

The appellees do not claim any prescriptive right by reason of this public use of the flats for more than twenty years. It was decided in *State* v. *Wilson*, 42 Maine, 9, that the public having a right at common law to pass over the stream as a highway, no adverse right could be acquired by a rightful and legal user. But this uninterrupted and unresisted use of this dock or slip as a continuation of Hancock street, by the public for so many years, is a fact to be duly estimated in determining the question of dedication and of the extent of the dedication.

We return to the single point on which the decision of this case must rest. A dedication or appropriation to some extent being admitted, the question is, did it end at high-water mark?

Our conclusion is that it did not. We think the intent was to connect the two highways, and to make the margin of the stream, at all states of the tide, the point of connection, and thus authorize the use of the flats, as they have been used by the public as a part of the way.

The way being thus dedicated, the right of the public to use it did not require any special laying out by the public authorities, so far as the rights of individuals were in question. But it was perhaps thought that the assent of the legislature was required to lay out a street over these tide-waters, and that such laying out would mark more exactly the lines and give greater confidence to the authorities in acting in reference to this street.

But at all events, it could not operate to the injury or loss of the owners of the soil. It is to be remembered that the question before us is not as to the legality of such laying out, but as to the damages to the claimant, assuming, as he does in the case, that the laying out was legal.

His counsel admits that if the land had been dedicated, even if the dedication had originally been only in favor of that part of the public who had become purchasers of the lots on the plan, yet 'the law would give the proprietor no damages for extending that right to embrace the whole public; for as a mere owner of the soil, no

damage is occasioned by this enlargement of the use.' This is well-settled law, and good common sense.

The facts stated in relation to the mode adopted by the city to make this use available, cannot be properly considered in this case, as the question here relates solely to the damages for taking the land for a street. If the authorities do not keep it properly as an open way, it is a matter for the public, or for those using it, to remedy by indictment or otherwise.

The result is that the appeal is dismissed.

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

JAMES E. MILLER and another *vs.* JAMES THOMPSON and another

Vessel—sale of by master—notice to owners. Trover.

The sale, by the master, of such parts of a vessel as belong to part-owners who were not, but might have been, notified by telegraph in season to act in the premises before the sale, is void.

Thus a vessel went ashore on one of the 'Wolves' in the Province of New Brunswick, on the morning of July 6, and the master, leaving her in charge of the mate, arrived at noon of the same day in Eastport. Between Eastport and New York there was constant telegraphic communication, and a telegram sent by the master on his arrival in Eastport, to the plaintiffs resident in New York, would, in the usual course of business, have received an answer several hours before the sale, which took place in the afternoon of the next day. *Held*, that the sale was void.

One of the defendants bid off a vessel at a sale thereof by the master, which was void for want of notice of the disaster to the plaintiffs who were part-owners. The other defendant paid part of the purchase-money, the expenses of fitting her for sea, insured her in his own name, participated in her earnings, and refused to recognize the plaintiffs as owners of any part of her. *Held*, that trover would lie.

DICKERSON, J. Trover for one-sixteenth of the brig L. L.

Wadsworth. The report of the evidence in *Gates et als.* v. *Thompson*, 57 Maine, 442, is made a part of this case.

From that report it appears that the vessel went ashore on one of the 'Wolves,' about twelve miles from Eastport, on the morning of July 6, 1866. The master arrived in Eastport about noon of the same day, and notified one of the owners who resided in Calais, but neglected to notify the plaintiffs, in that action, who had their place of business, and one of whom resided, in Calais. The owner who was notified, arrived at Eastport on the evening of the same day, and was present at the sale of the vessel which took place on the afternoon of the next day. Under this state of facts, we held that the sale by the master was void, as to the plaintiffs in that suit, because the master did not notify them of the disaster before the sale.

The principal question submitted for our decision is, whether the same rule of law is applicable to this case that obtained in *Giles et al.* v. *Thompson.* We think it is. The present plaintiffs, residing in the city of New York, were part-owners of the same vessel, were uninsured, and were not notified of the disaster until after the sale of the vessel. They repudiated the sale as soon as they heard of it. There was, at the time of the disaster, constant communication by telegraph between Eastport and New York. No reason is assigned why the master did not improve this mode of communicating with the plaintiffs, nor is any explanation given why he was careful to notify the owners who were insured, and neglected to notify those who were not insured.

The master is not restricted to any particular means of communicating intelligence of such a disaster to his owners, but is bound to use the earliest and most expeditious means ordinarily available for that purpose. He will not be justified, in such an emergency, in using the mail when the telegraph is open to him, or the stage-coach where a railroad or steamboat is available. Vessels are built, loaded and sailed, and masters are appointed with the full knowledge of the ordinary public means of intercommunication; and it is within the reasonable expectation of ship-owners,

shippers, and insurers, that the master will use the earliest and most expeditious means, ordinarily available, for communicating such important information to the parties directly interested. It is of the very essence of the common law, that it is capable of adapting itself to the improvements in the arts, and the discoveries in the sciences, that constitute so distinguishing a feature in modern civilization; and it is the duty of the court to extend rather than restrict the scope of its usefulness in this direction. Indeed, it would be a reproach upon the common law, to withhold the application of its benign principles from the demands, the wants, and the vicissitudes of human development and progress.

If the master had notified the plaintiffs of the disaster by telegraph, upon his arrival at Eastport, according to the usual course of business, in that line, he would have received an answer from them several hours before the sale took place. He had authority to act in the premises, only when the plaintiffs had no opportunity to speak for themselves. To sell the vessel, or run the risk of getting her off, was a question upon which they had a right to be heard. The chance of recovering the vessel was worth as much to them as it was to anybody. It was not necessary that they should be present themselves, or dispatch an agent from New York to act for them. They could have sent instructions to the master or some commission merchant in the vicinity; but the inexcusable neglect of the master deprived them of the opportunity of doing either. For this cause the auction sale was void, and the purchasers of the vessel acquired no title whatever to the plaintiff's share in her.

It is argued in defense that McLarren is not liable upon the ground that the vessel was bid off by Thompson, the other defendant. But we think this objection is not well taken. The payment by McLarren of a part of the purchase-money, and the expenses of fitting her for sea, his getting her insured in his own name, his employment and control of her, his participation in her earnings, and refusal to recognize the plaintiffs as owners of any

part of her, clearly bring the case within *Wood* v. *Stockwell*, 55 Maine, 86, and render him liable in trover.

Defendants defaulted and to be heard in damages.

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

Granger & Pike, for the plaintiffs.

Bradbury & Bradbury, for the defendants.

ALDEN SANBORN *vs.* JACOB M. PAUL.

Law—referees judges of.

If a submission contain no provision in relation to the rules of evidence that shall govern the referees, they are not restricted to the rules of the common law, but may receive the statements of parties without requiring them to be first sworn.

To an action on a common-law award based upon the breach of a written contract, it is no defense that the contract before the referees was not identified so long as they had the right one.

ON REPORT.

ASSUMPSIT on an award made upon a submission at common law, which may be found in the opinion.

After the paper evidence, including submission and award, was put in,

One of the referees testified substantially

That due notice of the hearing was given the parties; that the defendant was not present; that the referees went and examined the mill, but administered no oath to any witness; that the amount of $25.97, included in the award, was the amount of the private account for repairs on mill, made by the plaintiff, submitted to the

referees by the plaintiff, and asserted by the plaintiff to have been made by him; that the matter was talked over between the referees and the plaintiff and one or two others present at the hearing; that the referees made up their award mostly by the papers, the lease, and the rule which was their guide; that a lease was shown the referees, but it was not particularly identified.

The case was withdrawn from the jury and reported to the full court, who were to render judgment according to the law and evidence.

N. Abbott, for the plaintiff.

J. Williamson, for the defendant, cited *Strong* v. *Strong*, 9 Cush. 577; 2 Greenl. on Ev. § 78; *Buck* v. *Spofford*, 35 Maine, 526.

APPLETON, C. J. On Dec. 8, 1870, these parties entered into a submission at common law.

The submission is as follows:

'Whereas we, the undersigned, Alden Sanborn and Jacob M. Paul, on the fourth day of December, A. D. 1869, made and signed a contract as to the leasing and sale of the Sanborn mill, land, and privilege situated in Brooks, and whereas said Paul has refused to convey said premises, or neglected to do so; now, therefore, a dispute having arisen between us as to the damages said Paul shall pay to said Sanborn for the breach of said contract, we, the undersigned, hereby agree to refer said question of damages to William E. Mitchell of Belfast, Emery A. Calderwood of Waldo, and Richard A. Gurney of Belfast, the report and award of whom or a majority of whom shall be final and binding upon the parties. Said referees shall give notice to the parties and determine said question of damages at the earliest convenient day. Dated at Belfast this 8th day of December, A. D. 1870.

ALDEN SANBORN.
JACOB M. PAUL.'

By this submission the question of damages only were submit-

ted. The liability of the defendant was admitted. The extent of that liability was the only question to be determined. *Samson* v. *Young*, 50 N. H. 62.

The referees gave due notice to the parties of the time and place of hearing. After waiting at the time and place appointed, the defendant not appearing, the referees, having the contract for the breach of which damages were claimed, proceeded to examine the premises to which the contract related, to hear the statements of the plaintiff and others, and then to make their award.

The objection is taken that the parties received and acted upon statements of the plaintiff and others not under oath, and upon the original contract without its being identified.

The referees were the judges of the law and the fact. They were not restricted to the technical rules of the common law in the admission of evidence. They might receive the statements of parties without requiring them to be sworn, and it would not affect their award. It has been repeatedly held, that it was no ground for setting aside an award that the witnesses were not examined under oath, particularly when no objection is made at the time. *Ridout* v. *Pye*, 1 B. & P. 91; *Maynard* v. *Frederick*, 7 Cush. 247. After fully examining the authorities upon the subject, Woods, J., in *Johnson* v. *Noble*, 13 N. H. 295, says, 'The plain doctrine, deducible from the cases cited, is, that a submission of the law of a case to referees is to be considered as embracing in it a submission of the rules of evidence; and that the decision of the referee is as conclusive in relation thereto, as in relation to any other matter of law or fact submitted. And it is a reasonable doctrine.' To the same effect was the decision of this court in *Smith* v. *Gorman*, 41 Maine, 406. The defendant, by neglecting to appear, is not to be in a better condition than if he had appeared and objected, in which case, as has been seen, his objections would have been overruled.

The original contract before this court at *nisi prius* is the one which the referees had. If they had the right one, and it was the basis of their award, that is sufficient. It matters not that the signatures were not proved, when they are not even now denied.

Nothing in proof shows misconduct on the part of the referees. No reason is perceived why the plaintiff is not entitled to judgment.

If parties desire that referees should be governed by the strict rules of the common law, they should specially so provide in their agreements to refer. *Sanborn* v. *Murphy*, 50 N. H. 65.

Judgment for plaintiff for the award and interest.

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

AARON H. GOODWIN and others, appellants, *vs.* COUNTY COMMISSIONERS of SAGADAHOC COUNTY.

Town-way—jurisdiction of county commissioners to lay out,—how want of to be taken advantage of.

To confer on the county commissioners jurisdiction of the laying out of a town-way leading from land under improvement to a town or highway, founded upon the unreasonable refusal of the municipal officers, the petition to the commissioners must distinctly set out all the jurisdictional facts, and among them that the refusal on the part of the municipal officers was 'unreasonable.'

And the want of jurisdiction of the commissioners resulting from the omission of such an allegation, may be taken advantage of in the supreme judicial court when the report of the committee of appeal from the decision of the county commissioners comes up for acceptance; and the proceedings may be quashed.

ON EXCEPTIONS.

At a court of county commissioners for the county of Sagadahoc, on the first Tuesday of March, 1871, held by ad ournment on the second Tuesday of May, 1871, a petition, signed by Aaron H. Goodwin and twenty-four others, was entered, alleging—'that a town-way from or near the residence and land under the improvement of Charles L. Doughty and Aaron H. Goodwin, to the river

road leading from Lisbon to Topsham village, in said town, would be of great public convenience; that the selectmen of said towns, after notice and petition being presented to them, refused to act on said petition, but recommend said petitioners to petition the county commissioners. 'Wherefore,' the petitioners prayed that the county commissioners 'would, agreeably to law, lay out said town-way.'

Thereupon, the commissioners ordered notice upon the petition; and afterwards, pursuant to the notice, met the parties, viewed the route and roads connected therewith, heard the parties, and at their July term, 1871, adjudged and determined 'That common convenience and necessity do not require the establishing of the road prayed for in the foregoing petition.' Thereupon Aaron H. Goodwin and Charles L. Doughty appealed from the decision of the county commissioners to the succeeding August term of the supreme judicial court for the county of Sagadahoc, which appeal was duly entered at the August term of the appellate court, when J. L. Swift, Lemuel H. Storer, and Charles C. Humphreys were appointed a committee, who, upon due notice, viewed the premises, heard the parties, and made their report to the April term, 1872, of the supreme judicial court, reciting therein

'That the judgment of the county commissioners, in refusing to lay out a way as prayed for, ought to be reversed in whole; that public convenience and necessity do require that a town-way, as prayed for, be laid out by the county commissioners over the route viewed by the committee, three rods wide.' Then followed the several courses and distances of the proposed road. The report was signed by two only of the committee.

At the April term, 1872, the inhabitants of Topsham appeared by their attorney, and filed a motion that the report be set aside, and that the petition and all proceedings thereunder be quashed,

1. Because neither the county commissioners nor this court had, or has any jurisdiction of the matter embraced therein; and . . .

14. Because there has been no adjudication that the municipal officers of Topsham 'unreasonably refused' to lay out the way prayed for.

The presiding judge ruled the objections well taken, and rejected the report of the committee; and the appellants alleged exceptions.

H. Orr, for the appellants, contended

That the objection to the jurisdiction came too late, and cited *Brunswick* v. *Co. Com. of Cumb. Co.*, 37 Maine, 446; and that *Small* v. *Pennell*, 31 Maine, 267, was between persons not parties to the record—collateral parties—and not applicable to this case, which is between the immediate parties.

W. Gilbert, for the respondents.

WALTON, J. When the municipal officers of a town unreasonably neglect or refuse to lay out or alter a town-way, or a private way, on petition of an inhabitant, or of an owner of land therein for a way leading from such land under improvement to a town or highway, the petitioner may, within one year thereafter, present a petition stating the facts to the commissioners of the county at a regular session, who are to give notice thereof to all interested, and act thereon as is provided respecting highways. When their decision is returned and recorded, parties interested have the same right to appeal to the supreme judicial court, and also to have their damages estimated by a committee or jury as is provided respecting highways. R. S., c. 18, § 23.

It is well settled that the petition to the county commissioners must state directly such facts as are necessary to give them jurisdiction. Nothing can be left to inference. Whatever is necessary to give the county commissioners jurisdiction of the case, must be stated clearly and distinctly.

In *Pownal* v. *Co. Com.*, 8 Maine, 271, it was held that on an application to the county commissioners to lay out a town road, in the nature of an appeal, founded on the unreasonable refusal of the selectmen, the unreasonableness of their refusal should be adjudged by the commissioners, and entered of record, as the foundation of their jurisdiction, or it would be error. In this case there is no such adjudication; nor is there any such averment in the petition.

In *State* v. *Pownal*, 10 Maine, 24, the same objection to the doings of the county commissioners was again presented and more fully considered. The petition appears to have been, in many respects, much more full and formal than the one presented to the county commissioners in this case. But with respect to the point we are now considering, both the petition and the adjudication of the county commissioners appear to have been identical with the ones presented in this case. It was there stated in the petition to the county commissioners, that the selectmen 'had refused' to lay out the road prayed for, but it was not stated that they had 'unreasonably' refused. The county commissioners there adjudged the way to be 'of common convenience and necessity,' but did not adjudge that the selectmen had 'unreasonably' refused to lay it out. At least no such adjudication appeared in their record. So in this case. The petition states that the selectmen 'refused' to act, but it does not state that they 'unreasonably' refused. The adjudication of the county commissioners is that 'common convenience and necessity' do not require the way prayed for in the petition. The adjudication of a majority of the appeal committee appointed by this court is in favor of the road prayed for; but they do not adjudge that the selectmen of the town had 'unreasonably neglected or refused' to lay it out. Upon this vital point the record is entirely silent, from beginning to end. The original petition neither avers, nor do the subsequent adjudications establish this vital jurisdictional fact. Nor are there facts enough stated from which the unreasonableness of the refusal could be inferred, if such an inference were proper. Of the nine men applied to to locate the road, only two are in favor of it. The presumption that majorities are more likely to be right than minorities, would seem to lead to the inference that the road is not needed. But as before stated, jurisdictional facts must not be left to inference. They must be averred directly and positively. *Bethel* v. *County Commissioners*, 42 Maine, 478.

It is claimed that there are fourteen other fatal errors in the proceedings, and in the records, in this case. But as the one al-

ready considered is fatal, we have not deemed it necessary to examine the others. One 'fatal' error must produce the same result as fifteen.

It is claimed in defense, however, that such an error can only be taken advantage of on a writ of *certiorari*. If the proceedings were closed,—in other words, if a final judgment had been rendered,—a writ of *certiorari* would be the proper remedy; although, in cases of this description, where jurisdictional facts are omitted in the record, it has been held that the proceedings may be impeached collaterally. *Small* v. *Pennell*, 31 Maine, 267.

But when the proceedings have not been closed, and no final judgment has been rendered,—when, as in this case, the road has not in fact been located,—the proper course is to arrest further proceedings and quash what has already been done. It would be the height of folly to send the commissioners forward to locate and establish the road, and incur further expense, when it is seen for a certainty that in the end their proceedings will have to be quashed.

Exceptions overruled.

Proceedings quashed.

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

BENJAMIN F. MARBLE and others, petitioners for injunction, *vs.* TURNER MCKENNEY.

Petition for injunction—practice in. School district—appeal from action of. Record of meeting. School-house—location of—money raised for erecting—when illegal.

In cases of petition by 'ten taxable inhabitants' of certain *quasi* corporations for injunction, the common practice of continuing the temporary injunction from term to term until the case is ready for final hearing, unless it is sooner dissolved on motion, is not in contravention of R. S. of 1857, c. 77, § 10.

And where, in such case, the docket showed the special entry, 'temporary injunction to continue to end of next term, and time of taking testimony extended to same time' followed the next term by the entry—'continued as before,' the latter entry has the same effect as the former.

Marble *v.* McKenney.

Money raised for the erection of a school-house upon a lot other than the one legally designated by the municipal officers of a town, upon a proper appeal from the action of a school district, is deemed to be raised for an illegal purpose.

When a meeting of a school district has been legally called, notified and held for the purpose of locating a school-house, the clerk thereof cannot so destroy the effect of the action of the district as to prevent an appeal therefrom, by refusing to record the application, warrant and return thereon, for the next meeting, so long as clear proof of the facts can be made *aliunde*.

On a petition by 'ten taxable inhabitants' of a school district, praying that the town treasurer be enjoined from paying out money raised for the purpose of erecting a school-house upon a lot other than that legally designated by the municipal officers on appeal from the action of the district, the court will make the injunction perpetual when the only error pointed out is the omission of the notification of the school-district meeting, to state that the public and conspicuous places in which the notices were posted, were within the district, especially when such is the real fact and the notice of the meeting, at which the money was raised, so states.

PETITION by Benjamin F. Marble and nine others, taxable inhabitants of School District No. 1, in Woolwich, under Pub. Laws of 1864, c. 239, against the town treasurer.

The case is stated in the opinion.

J. S. Baker, for the petitioners, cited *Soper* v. *School District in Livermore*, 28 Maine, 193; *Collins* v. *School District in Liberty*, 52 Maine, 522; R. S. of 1857, c. 11, §§ 27, 28, 29.

Effect of appeal, *Campbell* v. *Howard*, 5 Mass. 376; *Keen* v. *Turner*, 13 Mass. 266; *Penhallow* v. *Doane*, 3 Dall. 87–119; *Suggs* v. *Suggs*, 1 Overt. 2; *Davis* v. *The Seneca*, Gilpin, 34.

Tallman & Larrabee, for the respondents.

The injunction of Sept. 16, 1868, was temporary, and without further action on the part of the petitioners could not continue beyond the end of the next term. R. S. of 1857, c. 77, § 10. The injunction, therefore, was dissolved by force of the statute. 1 Hoffman's Ch. Pr. 336.

The money was not raised 'for any purpose other than those for which the district has a legal right.' Pub. Laws of 1864, c. 239. But for a legal purpose. R. S. of 1857, c. 11, § 22.

The district, in raising the money, was acting within its legitimate sphere. *Johnson* v. *Thorndike*, 56 Maine, 37.

The money was raised at a legal meeting. No objection has been raised against it.

As the record of the school district stood at the date of this petition, and to April term, 1869, there was nothing to show for what purpose the meeting of March 28, 1867, was called. The application and warrant not having been recorded, there was no legal starting-point from which to appeal under R. S. of 1857, c. 11, § 27.

The return does not show that the places where the notices were posted were within the district, and hence the meeting was illegal. R. S., c. 11, § 18; *Clark* v. *Wardwell*, 55 Maine, 66.

BARROWS, J. If obstinate persistency on the part of a small numerical majority of the voters in a school district, in locating and building the district school-house where it pleased themselves, in defiance of repeated decisions of the statute appellate tribunal, and of the provisions of law, and in total disregard of the wishes and rights of a minority, embracing nearly half the legal voters of the district, would make a good case for this respondent, he ought to prevail.

The facts appear to be in brief as follows: The old school-house in the district having been burned, at a meeting held March 28, 1867, the district, under an appropriate article in the warrant, voted, eighteen to fourteen, to locate 'on the spot occupied by the old one,' and the clerk recorded the vote, specifying the location for which the minority voted. The records further show, that upon an appeal claimed by three of the minority, under the provisions of R. S. of 1857, c. 11, § 27, the selectmen of the town, after due notice, on the 13th of April, 1867, unanimously decided in favor of the spot selected by the minority, and located the school-house there, and certified their decision to the clerk of the district the same day; and, on the 23d of May, duly laid out a lot for that purpose, and filed their location, with the boundaries and admeas-

urements, with the district clerk on the 18th of June, 1867, awarding damages to the owners of the lot in the sum of $45. The district, however, did not 'proceed to erect' the school-house there according to the requirement of the statute, but the majority within the year united with the owners of the lot in a petition to the county commissioners, under R. S. of 1857, c. 11, § 29, to have both the questions of location and damages tried by a jury. But after the jury had been ordered, and the warrant issued, apparently distrusting the result, the petitioners asked leave of the county commissioners to withdraw their petition; notwithstanding which, it would seem that the county commissioners declined to recall their warrant, and on the 11th of May, 1868, the jury was impaneled, and made up and signed their verdict, affirming the decision of the selectmen as to the location, and ordering the payment of $30.30 as damages to the owners of the lot.

But, pending these proceedings, the majority of the district, who favored the old location, procured a meeting of the district on the 8th of April, 1868, at which the district again voted, twenty to fifteen, to locate the school-house on the old lot, the minority adhering to the location made by the selectmen at their request the year preceding. Regardless of the decision of the selectmen and of the proceedings still pending, the majority went on, at this meeting, and voted to build the house and complete it by the first of December ensuing, and to raise $600 therefor, and chose a building committee to superintend the expenditure. The clerk of the district certified the vote to raise the $600 to the assessors of the town; and, to prevent its being collected and paid out, ten taxable inhabitants of the district brought the process now before us, claiming, that, under these circumstances, the district had no legal right to raise money by taxation to build a school-house on that lot, and that if collected and paid out for that purpose, it would be devoted to an illegal purpose, within the mischief intended to be prevented by R. S. of 1864, c. 239. A temporary injunction was ordered, and the question is, shall it be made perpetual?

If it is material, and parol evidence is admissible to prove it,

it may be considered as proved, that on April 25, 1868, a claim of appeal from the second location upon the old lot, made by the district, April 8, 1868, was presented to the selectmen. The record shows that for some unexplained reason, the selectmen delayed action upon the appeal, but that on the 9th of September, 1868, they again unanimously decided in favor of the location voted for by the minority of the district, and certified the location accordingly to the clerk of the district. On the part of the respondent, there is testimony tending to show that the last decision of the selectmen was not made until after the school-house on the old lot was completed; and there is record evidence offered by them to show that the clerk of the district (who acted with the majority), did not record the warrant and return for the meeting of March 28, 1867, until compelled to do so by a peremptory mandamus from this court ordered at the December term, 1869, upon a petition entered by some of the petitioners in this case at the December term, 1868; and that the majority of the district, after service of the temporary injunction in this case, still proceeded, at a meeting held October 3, 1868, to accept the school-house which they had caused to be erected on the lot where the old one stood.

This respondent has never filed any answer or plea in this case, but the parties interested, intervening in his name, resist any order making the injunction perpetual on the following grounds:

1. Because, they say, the temporary injunction ordered in vacation (Sept. 16, 1868) ceased to be operative, inasmuch as there was no motion to make it permanent before the end of the next term, by virtue of R. S. of 1857, c. 77, § 10. But the docket entries show, that at every term, up to and including the August term, 1869, there was a special entry, that the injunction should be continued to the end of the next term, and the time of taking testimony was extended to same time; and that, thereafterwards, the entry was at each term 'continued as before,' until the last April term, when the case was marked 'Law on statement of facts to be agreed upon.' Apparently, by consent of counsel, the report of evidence before us was substituted for the statement of

facts. It is common practice in these cases to continue the temporary injunction from term to term until the case is ready for a final hearing, unless it is sooner dissolved on motion; and this is not in contravention of the statute cited; and we think that after the docket has once exhibited this entry, the entry of 'continued as before' (which is the clerk's compendious method of stating that the case goes forward under like orders and stipulations as at the previous term) will have the same effect.

2. It is argued, that because the general power to build school-houses and to raise money for that purpose is given by statute to school districts, it follows that this money was not proposed to be raised for an illegal purpose, and, therefore, this process cannot be maintained, and the case of *Johnson* v. *Thorndike*, 56 Maine, 37, is cited. That was a correct and wholesome decision, and if the case fell within the principle there enunciated, we should be spared the trouble of further examination.

But when an appeal has been taken from the action of a school district in selecting a site for their school-house, and another lot has been designated by the municipal officers of the town, in pursuance of the power conferred upon them by the statute, the district no longer has the legal right to determine where the school-house shall be located by anything short of a two-thirds vote, or to raise money for the erection of a school-house upon any other lot, than the one thus designated by the appellate tribunal; and money raised or paid for the erection of a school-house upon any other lot, must be considered as raised and paid for an illegal purpose; for the statute is express, that, when the decision of the municipal officers shall have been recorded, 'the district shall proceed to erect or remove the school-house, as if determined by a sufficient majority of the voters present at said meeting.' Until the location thus designated has been changed by the verdict of a jury, or by the removal of the objections entertained by the minority in the district, it is not competent for them to evade the duty thus imposed, or to raise money for the erection of a school-house upon a lot not designated by 'a sufficient majority of the voters present' at the

meeting. Unless the general power of a district, to determine the location of its school-house and to raise and expend money for the erection thereof, is thus limited, the provisions respecting appeals are completely nullified, for there would be no power to restrain a bare majority of the district from doing as this one has done. In so doing the district was not 'within its legitimate sphere of action,' and herein there is an essential difference between this case and that of *Johnson* v. *Thorndike*. The district had no legal right, under the circumstances then existing, to raise money by taxation to build a school-house on the lot where they did build it. It is not a question of expediency merely, as to the raising of money for that purpose, but one of legal right purely. Has any majority, less than two-thirds of a school district, the power under our statutes to locate a school-house, and raise money to build it, on a lot to which more than one-third of the voters present and voting object, and against which the appellate tribunal, created by the statute, have filed their decision?

The answer must be in the negative.

3. But it is suggested, that until after the reception of parol evidence of the application to the agent, and the ordering of the mandamus to the clerk of the district, there was no record evidence that the meeting of March 28, 1867, was a legal meeting, and, therefore, the appeal from its decision, and the decision of the municipal officers in favor of the location, voted for by the minority, were invalid. Not so. If the fact of the application and subsequent legal proceedings existed, and the meeting was actually regularly called and notified, its proceedings were valid. The clerk's dereliction and the failure to record the application and warrant, might make the proof more difficult, but it did not invalidate the doings of the meeting. Certainly as among themselves the voters of the district must be held cognizant of the facts. That parol evidence is admissible to supply the deficiency, was expressly decided in *Soper* v. *Livermore*, 28 Maine, 202. It is not in the power of the clerk of a school district to destroy the effect of the action of his district, by failing or refusing to record the proper pa-

pers to show that a meeting was regularly called and notified, so long as clear proof of those facts can be made *aliunde*.

4. Again it is claimed that the record does not now show that the meeting of March 28, 1867, was a legal meeting, because it is not directly stated, in the return of the warrant, that the meeting-house and Crosby Reed's shop, the two public and conspicuous places where the copies of the warrant and notice were posted, were within the district. And again we ask, what was the fact? If the places where the warrant and notice were posted are within the district, and the voters had, in point of fact, the precise notice which the statute requires, there would seem to be little wisdom or propriety in overturning the doings of the meeting on account of such an omission in the record. And other records in the case (among them the return upon the warrant for the meeting of April 8, 1868, at which the district voted to raise the money) show, that those places were within the district, and were the usual places to post notifications of district meetings when there was no school-house.

We see no good reason why this injunction, which has been so long continued, should not be made perpetual.

But as there seems to have been no cause for the long delay in bringing this matter to a hearing, we think the plaintiffs should tax no costs after December term, 1869, except for copies of the case, and the clerk's fee for entry upon the law docket, and certificate of decision.

Decree accordingly. *Injunction made perpetual.*

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

EDWARD K. HARDING *vs.* JAMES M. HAGAR.

Commercial broker.

To entitle a plaintiff to recover compensation for 'negotiating freights for the owner of vessels' within the meaning of the U. S. Statute of 1864, c. 173, § 179, cl. xiv,* it is incumbent upon him to prove that he was licensed as commercial broker.

ON EXCEPTIONS.

ASSUMPSIT to recover two and one-half per cent commissions for chartering two ships belonging to the defendant, of 889 and $756\frac{72}{100}$ tons respectively, to the U. S. government, in Dec. 1864, for the transportation of hay.

It appeared by the testimony of the plaintiff, among other things, that he agreed with the defendant to charter the entire capacity of his ships 'May Flower' and 'Ida Lilly,' to transport hay for the quartermaster's department, and the defendant agreed to give him $2\frac{1}{2}$ per cent commissions; that that was a fair and the usual commission; that the plaintiff had chartered twenty-five vessels for the government at that rate; and that the vessels were in the employ of the government,--one four months, and the other five months and ten days.

The view taken by the court renders a more extended report of the evidence unnecessary.

The defendant requested the presiding judge to instruct the jury, *inter alia*,

That an agreement to pay a commission by the defendant to the plaintiff for procuring charters from the government for the defendant's ships, is against public policy and cannot be enforced by the

*U. S. Statute of 1864, c. 179, § 73, cl. xiv. Commercial brokers shall pay twenty dollars. Any person or firm whose business it is, as a broker, to negotiate sales or purchases of goods, wares, or merchandise, or to negotiate freights and other business for the owners of vessels, or of the ship-owners or consignors or consignees of freight carried by vessels, shall be regarded a commercial broker.

court, and that if the plaintiff would recover compensation as a commission merchant or broker, it is incumbent upon him to prove that he was legally licensed to transact such business, that the burden is upon him to prove such license.

The judge declined to give either of said instructions, but did instruct the jury that if the defendant's ships were put into plaintiff's hands, and if plaintiff was in the regular business of brokerage, and in looking around in the exercise of his vocation, he honestly and without any wrong applied to the government, and procured a charter, he would be entitled to his compensation, just as he would if he had procured it from an individual.

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

Whitmore & Gilbert, for the defendant.

KENT, J. It is not denied that the plaintiff was a commercial broker within the definition given in U. S. statute of 1864, c. 173, § 79, art. 14, as his business was 'to negotiate freight, and other business for the owners of vessels.' Such broker was required to pay twenty dollars for a license. By § 73 it is made a highly penal offense for any person, of whom a license is required, to do any act 'for the exercising, carrying on, or doing of such business, trade, or profession, without taking out such license.'

The plaintiff sues to recover payment for such acts. It is too well settled to require the citation of authorities; that no party can recover for acts or services done in direct contravention of an express statute, or for property so sold and delivered. When the case develops such forbidden acts, unless protected by a license or authority, it is incumbent on the plaintiff to show such license. 'Otherwise,' as stated by the defendant's counsel, in his brief, 'he comes into court avowing acts, which, done without a license, are prohibited, as the basis of his action, and recovers without proof of the fact necessary to make them lawful.' *State* v. *Whittier*, 21 Maine, 341; *State* v. *Crowell*, 25 Maine, 171; *State* v. *Churchill*,

25 Maine, 306; *Morgan* v. *Ruddock*, 1 Harr. & Wollaston (Eng. K. Bench), 505.

Exceptions sustained.

New trial granted.

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

EDWARD H. BRAINARD, in *sci. fac.*, *vs.* JEREMIAH SHANNON.

Disclosure of trustee. Personal wages—exemption. Payment—how appropriated.

R. S., c. 86, § 55, exempting from the process of foreign attachment a sum not exceeding twenty dollars as wages for personal labor, does not apply to that which is due from the alleged trustee, for the wages or work of other men employed by the principal defendant, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, enter to prove the price he is to receive, even though the amount thus due at the time of the service of the process does not exceed the amount of his wages for his personal labor during the month next preceding.

It must appear by the disclosure, that the money is due as the wages of personal labor in order to bring it within the statute exemption.

Under a *bona fide* contract that the principal defendant, in a process of foreign attachment was to receive a certain sum *per diem* for his own wages, and pay for the work of others employed by him at a fixed rate, the wages of the principal defendant's personal labor, so far as can be ascertained from the accounts, not exceeding the statute amount during the preceding month, may be exempted.

Payments under such a contract, in the absence of any specific appropriation by the parties, would be appropriated to the earliest items of debit in the account.

In a disclosure on *scire facias*, all doubtful or uncertain statements are construed against the trustee having it in his power to make them positive.

Thus, where a trustee disclosed that at a time specified, the principal defendant in the original action was 'nearly paid up,' it is incumbent upon the trustee to show how nearly, and why any portion of the balance should be taken as due for personal wages, if he would have a further deduction upon that score.

Where in *scire facias* against a trustee, the exceptions state that the trustee was discharged on said disclosure, it cannot be contended that he was discharged because of the failure on the part of the plaintiff to exhibit the record alleged in the writ, unless such failure appear in the disclosure.

A respondent in *scire facias* against a trustee, will not be relieved from the payment of costs under R. S., c. 86, § 78, on the ground that the officer who served the original writ upon him, told him in the street that he had such a writ, but did not read it to him, or give him a copy, and that he did not know that it was necessary for him to appear and disclose, especially when the officer made return of legal service.

ON EXCEPTIONS.

SCIRE FACIAS against the defendant, who was defaulted as trustee of one Turner in a process of foreign attachment.

The respondent disclosed substantially, as follows:

'That at the time of the service of the original writ upon him, to wit, on the 29th day of July, A. D. 1871, he had not in his hands and possession any goods, effects, or credits, of the said Turner, except as hereinafter stated.

That at the time of said service, said Turner, with divers servants of said Turner, was in the employment of the defendant; that his own wages were three dollars per day, and his servants' wages at an agreed price; that on July 29, 1871, the wages of Turner and his servants amounted to $252.45; that he had paid him $234.50, leaving a balance due Turner of $17.95.

That he did not disclose in the original action, because the officer who served the writ only told him in the street that he had such a writ, but did not give him a copy, or read it to him; and that being unacquainted with legal proceedings, he did not understand that it was necessary to appear and disclose.

That Turner did not work constantly with his men on the defendant's work, but had other jobs in progress at the same time.

That the amount of Turner's own work, done by himself in the month of July, before the service of the original writ, and all within one month next before said service, was $21.90.

That he had not paid Turner fully at any time, but nearly paid him up July 27, 1871, when he paid him $50. And after that, and up to July 29th inclusive, his own labor amounted to $2.25.

The presiding judge discharged the defendant on said disclosure, and thereupon the plaintiff alleged exceptions.

F. Adams, for the plaintiff.

W. Gilbert, for the defendant, cited R. S., c. 86, § 55, cl. 6; c. 86, §§ 73, 79, 71, 78; *Starret* v. *Barber*, 20 Maine, 457; *Portland Bank* v. *Brown*, 25 Maine, 295.

BARROWS, J. By R. S. of 1871, c. 86, § 55, among other rights and credits exempted from the process of foreign attachment, is a sum not exceeding twenty dollars due to the principal defendant as wages for his personal labor for a time not exceeding one month next preceding the service of the process, provided the suit is not for necessaries furnished him or his family.

But this provision does not exempt that which is due to him for the wages or work of other men employed by him, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, go to form the price which he is to receive, even though the amount thus due to him at the time of the service of the process does not exceed the amount of his wages for his own personal labor during the time specified.

It must appear by the disclosure, that the money is due as the wages of personal labor, in order to bring it within the statute exemption.

The disclosure expressly admits a balance due the principal defendant in the original process of $17.95. This negatives the idea started by respondent's counsel, that this was an incomplete job, upon which nothing was due until it was finished, or upon which respondent might be entitled to recoupment. The statement is, that Turner had been doing work for Shannon, for which he was to have a certain sum *per diem* for his own wages, and pay for the work of the men employed by him at a fixed rate. Under such a contract, honestly made without any fraudulent practice or design, we think that the wages of the principal defendant's personal labor may be exempted, so far as it can be ascertained from the accounts what is actually due for such wages.

Payments under such a contract also would be appropriated in the absence of any specific appropriation otherwise by the parties, to the earliest items of debit in the account. But all doubtful or uncertain statements must be construed against the party having it in his power to make them positive and definite.

Now the respondent says that a payment which he made to Turner July 27th, nearly paid him up. After that, and up to the time of the service of the original process, Turner's personal services, according to the account rendered, amounted to $2.26.

It follows, necessarily, that nearly all that accrued afterwards, was not for the wages of his personal labor, but was for the work of the men whom he employed.

'Nearly paid up.' It was incumbent on the respondent to have shown how nearly, and why any portion of the balance should be taken as due for the wages of the principal defendant's personal labor, if he would have had a further deduction on that score. On this disclosure, the respondent should have been charged for $15.70. But he was defaulted in the original suit, and this is *scire facias* to procure a judgment against him personally. He was called upon to make known to the court why the plaintiff should not have such a judgment.

He files the disclosure before us, and the exceptions state that 'on said disclosure,' the presiding judge decided to discharge him. His counsel now suggests, that it does not appear in the exceptions that there was any judgment in the original suit, or any demand by an officer on the trustee within thirty days after such judgment. If any failure on the part of the plaintiff to exhibit the record alleged in his writ of *scire facias*, was the true cause of the discharge, the statement in the exceptions that he was discharged on the disclosure, was untrue, and the exceptions should not have been allowed. The filing of a disclosure without raising any objection against the regularity of the previous proceedings, is a substantial admission that he was properly chargeable unless he discharged himself by his disclosure. What does he say in it? He says, 'he ought not to be adjudged, etc., because, he says, that at the

time of the service of the original writ, etc., he had not in his hands and possession any goods, effects, or credits of the said Turner, except as hereinafter to be stated.'

The exceptions say he was discharged on the disclosure, and this excludes the idea that it was upon any other plea or proof, matter or thing, except what appears in the disclosure. It is true that the whole case comes up under c. 86, § 79, to be re-examined and determined by the law court; but questions which have no foundation in the papers before us, cannot be raised by surmise at the suggestion of counsel.

But the vigilant counsel claims that the respondent ought at least to be relieved from the payment of costs on *scire facias* under § 78, because he says in his disclosure, that the officer who served the original writ upon him, only told him in the street that he had such a writ, but did not give him a copy, or read it to him, and he did not understand that it was necessary for him to appear and disclose.

So far as this goes to contradict the officer's return, it is not competent here. The respondent speaks elsewhere in his disclosure of the service of the original writ upon him, and gives the date of that service. If none was made, and he suffers thereby, it is a matter to be settled between him and the officer.

His own want of knowledge of his legal obligations upon being served with process, does not appear to us to be a sufficient reason for his non-appearance, to entitle him to relief in the matter of costs.

Exceptions sustained. Trustee charged on disclosure for $15.70. *Judgment for plaintiff for that sum and costs.*

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

CHALMERS HARLOW, appellant, *vs.* BRADLEY V. STINSON.

Partition fence—division of—by prescription.

The respective owners of adjacent lands may become bound by prescription, to maintain specific portions of their partition fence.

Thus, in replevin for the plaintiff's oxen, which escaped from his land to the adjoining land of the defendant, and by the latter taken up and impounded, the jury were instructed that if they should find that the owners of the adjacent lands, or their grantors or persons from whom they respectively derived title, severally maintained and supported well defined and specific portions of the line fence for twenty consecutive years, each repairing his own part, recognizing his obligation to do so, it would be a division of such fence by prescription; and thereafter, it would be obligatory upon such owners, to keep in repair such portions as they had so severally maintained for twenty years; and that if the jury find that the cattle escaped from the plaintiff's close to the adjoining close of the defendant, over that part of the line fence, which the defendant, under the foregoing rule had become liable to keep in repair, which was out of repair, then the restraining and impounding of the cattle by the defendant was unlawful. *Held*, that the instruction was unexceptionable.

Parol evidence is admissible to show the division of a line fence made more than forty years before.

ON EXCEPTIONS.

REPLEVIN of six oxen, property of the plaintiff, taken upon the defendant's land, to which they had escaped from the plaintiff's adjoining land, and by the defendant impounded.

It was contended by the plaintiff, that the partition fence between their respective adjacent lands had been divided more than forty years before, and that the plaintiff's oxen had escaped from his close to that of the defendant, through a defect in that portion of the partition fence which the defendant was bound by prescription to maintain.

The plaintiff introduced parol testimony, which was admitted against the seasonable objections of the defendant, to show a division of the fence more than forty years ago.

The presiding judge instructed the jury that if they should find that adjacent owners of the land or their grantors or persons from

whom they derived title severally, maintained and supported well defined and specific portions of the line fence for twenty consecutive years, each repairing his own part, recognizing his obligation to do so, it would be a division of such fence by prescription; and thereafter it would be obligatory upon such owners to keep in repair such portions as they had so severally maintained for twenty years, and that if the jury find that cattle escaped from the close of the plaintiff to the close of the defendant over that part of the line fence, which the defendant, under the foregoing rule had become liable to keep in repair, which was out of repair, then the restraining and impounding of such cattle by the defendant was unlawful.

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

W. P. Hall, for the plaintiff.

J. W. Spaulding, for the defendant.

1. R. S., c. 23, § 4, provides that if the beasts were lawfully on the adjoining lands, and escaped therefrom in consequence of the neglect of the person suffering damage to maintain his part of the partition fence, their owner shall not be liable therefor.

'His part of the partition fence,' means only such part as has been assigned by virtue of c. 22, § 13, by fence viewers or by recorded written agreement of parties.

No other method is pointed out in the statute, so that each could 'maintain his part.'

The statute was intended to take away the common-law mode of assignment by prescription.

Prescriptive rights are recognized in c. 92, on Flowage; c. 105, Real actions; c. 81, Payment; c. 18, Ways, etc., etc., but not in c. 22 or 23.

2. Two fundamental elements enter into prescriptive rights—a reason and a necessity. There is no necessity for assignment of partition fence by prescription.

If fence can be divided by prescription, the lands cannot be subsequently made common.

3. The question was not in issue in *Rust* v. *Low*, 6 Mass. 90. That was decided before the statute 1785, when there was a necessity for it.

The subsequent cases recognizing prescription in Maine, rest upon the *dicta* in *Rust* v. *Low*, as *Heath* v. *Ricker*, 2 Maine, 69; *Little* v. *Lothrop*, 5 Maine, 357; *Knox* v. *Tucker*, 48 Maine, 375.

On the other hand are *Sturtevant* v. *Merrill*, 33 Maine, 64; *Webber* v. *Closson*, 35 Maine, 28; *Bradbury* v. *Guilford*, 53 Maine, 99.

4. But if prescription exists at all in such cases, it must be by virtue of 'a usage beyond the time of memory.' *Knox* v. *Tucker*, *supra*; *Wright* v. *Wright*, 21 Conn. 329.

APPLETON, C. J. 'Prescription to fence,' says Parsons, C. J., in *Rust* v. *Low*, 6 Mass. 97, 'is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time. . . . The country has now been settled long enough to allow of the time necessary to prove a prescription; and ancient assessments by fence-viewers, made under the late provincial laws, and also ancient agreements made by the parties, may have once existed, and be now lost by lapse of time.

'Every person, then, may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription.' Such was the law of Massachusetts at the time of the separation of this State, as determined in that case, and subsequently sanctioned by repeated decisions.

In *Heath* v. *Ricker*, 2 Maine, 72, it was decided that parol proof of usage in the maintenance and repair of separate portions of a partition fence, was admissible evidence to show a prescription. In *Little* v. *Lathrop*, 5 Maine, 357, the court fully affirmed the law as laid down by Mr. Chief Justice Parsons, in *Rust* v. *Low*, and held that when there was no prescription, agreement, or statute assignment, no tenant was bound to fence against an adjoining close;

but, in such case, there being no fence, each owner was bound at his peril, to keep his cattle on his own close. In *Knox* v. *Tucker*, 48 Maine, 375, Mr. Justice Kent uses the following language: 'It is now the well-settled law in this State, and in Massachusetts, that the neglect, which is made a bar to recovery in an action of this kind (*trespass quare clausum*), can arise only from a division of the fence, either by fence viewers, acting under the statute, or by a valid and binding agreement between the parties owning adjoining lots, or by prescription.

The counsel for the defendant, in his very able and ingenious argument, has called our attention to certain decisions of this court, as indicating a different view of the law on this subject. On examining, however, the cases to which we have been referred, it will be found that the question of prescription was not considered or discussed by the court. In *Sturtevant* v. *Merrill*, 33 Maine, 63, there was no evidence tending to show a prescription, nor did any question relating to this subject arise. That the views of Mr. Justice Tenney were in accord with the previous decisions of this court, is abundantly manifest by his subsequent concurrence in the opinion of Mr. Justice Kent, in *Knox* v. *Tucker*, to which reference has been had. In *Webber* v. *Closson*, 35 Maine, 26, it appeared that the parties had jointly maintained a partition fence. There was no particular portion, therefore, that either the plaintiff or the defendant, was bound to keep in repair. It was for the plaintiff, therefore, to keep his own sheep on his own land. In *Bradbury* v. *Guilford*, 53 Maine, 99, the question of prescription is not discussed, nor is there in the opinion anything adverse to the previous decisions of this court.

In *Wright* v. *Wright*, 21 Conn. 330, it was held that a party was 'not precluded by anything in the nature of a statute of limitation.' But in Connecticut, a party is obliged to fence against cattle at his own risk, while in this State, the owner must see to it that his cattle do not trespass upon the land of others. In *Wright* v. *Wright*, the court was divided. So in *Glidden* v. *Fowle*, 31 N. H. 147, it was held that there was no law of prescription to fence,

but that the statute law was the only law of the State governing partition fences.

The statute of Massachusetts on the subject of fences is almost identical with that of this State. In *Thayer* v. *Arnold*, 4 Met. 589, after a full examination of the subject, the court say the common law as to prescription was not altered by the statutes relating to fences; and, as has been seen, such has been held to be the law in this State. *Exceptions overruled.*

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

BARKER DULY *vs.* WILLIAM HOGAN, and trustees.

Practice. Amendment by summoning additional defendants.

In an action founded on contract against a sole defendant, the plaintiff cannot, under R. S., c. 82, § 11, summon in, as additional defendants, joint promisors unless he intends to prosecute his action against the party originally sued, or in case of his death, then against his personal representative.

If the original party sued die before the joint promisors are summoned in, the plaintiff may, under R. S., c. 82, § 23, pursue his remedy either against the survivors, or the estate of the deceased, or against both, in separate suits.

Prior to the passage of Pub. Laws of 1870, c. 128, there could be no summoning in any surviving joint promisors as additional defendants, when the only original defendant was the personal representative of a deceased party.

Since the passage of that statute, re-enacted in R. S., c. 87, § 10, the summoning in of survivors, with the personal representative of a deceased joint promisors is not authorized, except in cases where, if the plaintiff prevail, a joint execution can issue without violating other statute provisions.

A joint execution cannot issue without contravening R. S. c. 66, §§ 16, 17, when the estate of the deceased defendant is represented insolvent.

BARROWS, J. The plaintiff commenced an action against Wm. Hogan, returnable at the August term, 1871, upon an account annexed for the price of certain stone, which he claimed to have furnished Hogan, to be used in the construction of the Knox & Lin-

coln Railroad, and summoned the R. R. Co. as Hogan's trustees. The action stood continued at the August term. Hogan dying in vacation, and his estate being represented insolvent, the plaintiff, at the December term following, suggested these facts and moved for leave to amend his writ, by discontinuing against the trustees and declaring against Oliver Moses and Edward Sewall, alleging that since the previous term he had discovered that they were joint contractors with Hogan in the work he was doing for the R. R. Co. This was allowed and an order issued authorizing the amendment introducing Moses and Sewall as co-defendants, and providing for a service upon them at least fourteen days before the April term, 1872. The docket of the December term shows a discontinuance as to the trustees, and also leave to cite in Hogan's administrator. The administrator, however, was not cited. Copies of the writ were served upon Moses and Sewall March 2, 1872, and on the first day of the April term the plaintiff discontinued as to Hogan, and now claims that this transformation of his suit v. *Hogan et Trustee* into a suit v. *Moses et al.* has been legally effected. We are at a loss to perceive what useful end could be subserved by such a cumbrous process, and none has been suggested. The naked question is, whether it can be lawfully done under our statutes regulating the commencement of civil actions and proceedings in court.

R. S., c. 81, § 2, seems to require that an action of this description shall be commenced by an original writ. When this action was entered in court, the writ did not run against any defendant whom the plaintiff now claims to hold. As against Moses and Sewall it can hardly be said that this action was commenced by original writ. It was rather by an order of court permitting them to be made parties defendant to an action already pending on the docket. Was this allowable under the circumstances of the case?

It is provided in c. 82, § 11, 'that a writ founded on contract, express or implied, may be amended by inserting additional defendants; and the court may order service to be made on them, and their property to be attached as in case of original writs; and on

return of service duly made, they shall be deemed parties to the suit, but not liable to costs before such service.' If Hogan had been living then, at the December term, when the order to cite in Moses and Sewall was made, this mode of making them parties by way of amendment would have been unobjectionable.

But what ought the proceedings to be when the joint contractor originally sued is dead? Looking at c. 82, § 23, we find that 'the goods and estate of a deceased debtor in a joint contract, express or implied, or in a judgment on contract are as liable, and the creditor has his remedy, as in case of a joint and several contract.' In other words, the death makes the contract several as well as joint, and the creditor may pursue his remedy, either against the survivors or the estate of the deceased, or against both, in separate suits.

This remedy, thus pursued, has always been open to the creditor in this State. See Laws of Maine, vol. 1, p. 238; Statutes of 1821, c. 52, § 25; R. S. of 1841, c. 115, § 23; R. S. of 1857, c. 82, § 23.

It had its origin in a Massachusetts statute passed Feb. 26, 1800, before which time, in this State, no action could be maintained against the personal representative of a deceased joint promisor, whom the other promisors survived, the remedy of the creditor being against the survivors alone. *Foster* v. *Hooper*, 2 Mass. 572.

And it was necessary for the creditor to pursue his remedy, by separate suits, against the executor or administrator of the deceased joint promisor and against the survivors, until the passage of statute of 1870, c. 128. *McNally* v. *Kerswell*, 37 Maine, 550; *Treat* v. *Dwinal*, 59 Maine, 341.

The statute which had governed the course of proceedings in the case of the death of one of the several plaintiffs or defendants, in an action that survived, provided that, upon suggestion of the death on record, 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 administrator of the last surviving plaintiff or defendant. R. S. of 1857, c. 87, § 10; R. S. of 1841, c. 120, §§ 19, 20.

But there could be no joinder of an executor or administrator with survivors, and, consequently, no summoning in of any such surviving parties, as additional defendants, when the only remaining party was an executor or administrator.

Looking, now, to see under what circumstances our present statutes permit this joinder, we find that by R. S. of 1871, c. 87, § 10, which is substantially a re-enactment of Laws of 1870, c. 128, '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 administrator jointly, or by either of them; and judgment may be entered against the survivors and also against the goods and estate of the deceased, in the hands of such executor or administrator, and a joint execution issued.'

Section seven, herein referred to, authorizes the citing in of the executor or administrator of a sole plaintiff or defendant in a pending action which survives, if he does not appear voluntarily at the second term after the death of the party or after his appointment. Viewing this provision in connection with those which authorize the summoning in of additional defendants, and the prosecution of a single suit upon a joint contract, against the survivors and the personal representatives of a co-promisor, deceased, as co-defendants, we see no objection, in cases where the plaintiff desires to prosecute his claim as well against the estate of the deceased joint contractor as against the survivors, and can entitle himself thereby, if successful in his suit, to a joint execution against all the parties, to his summoning in, as additional defendants, the surviving joint contractors to answer with the executor or administrator of a sole defendant deceased. To hold otherwise would be too narrow a construction of the statute to be wholesome.

If it were the only objection to the course pursued here that § 10 speaks only of cases where there are several plaintiffs or de-

fendants, we think that taking all the provisions together, they might be fairly construed to cover cases like this.

But a statute which was designed to authorize the summoning in of additional defendants, where there is a *bona fide* intention to pursue the claim against all the original joint promisors, ought not to be perverted into a means of conjuring a fresh set of defendants into a suit, already commenced, which is not intended to be prosecuted against the party originally sued. That is not a summoning in of additional defendants, but an entire change of the parties defendant,—a substitution of one defendant for another.

The provision authorizing the summoning of additional defendants never could apply to cases where the bringing in of the new parties would make a misjoinder. Hence, prior to the statute of 1870, it did not authorize the summoning in of survivors with the personal representatives of a deceased joint promisor. The statute of 1870, as re-enacted in § 10, does not authorize it except in cases where, if the plaintiff prevail, a joint execution could issue without violating other statute provisions.

In the case at bar, even if the plaintiff had been intending to proceed against Hogan's estate, and had prevailed in his suit, no joint execution could issue as required in § 10, because Hogan's estate was insolvent, and the issuing of any execution against his goods and estate is forbidden by c. 66, §§ 16, 17.

Surviving joint promisors cannot be summoned in as additional defendants with the executor or administrator on an insolvent estate, against which the joint execution, provided for in § 10, could not issue.

We think Moses and Sewall are entitled to have the action commenced against them by an original writ, in accordance with c. 81, § 2. *Action dismissed.*

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

Tallman & Larrabee, for the plaintiff.

Gilbert, for Moses and Sewall.

SYLVESTER J. WALTON, county attorney, *vs.* ALBERT N. GREENWOOD and others, county commissioners.

Petition for writ of prohibition—who should be made parties to. Exceptions to the judge's finding of facts. Constitutional law. Judgment of county commissioners—final in certain cases. Construction of special statute. Authority of town in certain cases.

By virtue of Pub. Laws of 1872, c. 8, § 3,* the previous sections thereof (changing the place of holding the supreme judicial court from Norridgewock to Skowhegan, and authorizing the county commissioners to erect a court-house in the latter place), were to be void, unless the town or citizens of Skowhegan should, on or before March 1, 1872, without expense to the county, provide suitable room and other accommodations for the court and officers, to the acceptance of a majority of the county commissioners; and secure to the county the use thereof for the purposes, and during the time therein specified, and the conveyance of a suitable site in Skowhegan for the county buildings. By § 4, when such room and accommodations had been provided, the county commissioners should cause the records in all the county offices, with the records and files of all the courts, to be removed to the places prepared in Skowhegan, and cause notice of the facts to be published as therein directed. On petition praying that a writ of prohibition may issue against the county commissioners, prohibiting them from ordering such removal or publishing such notice; *Held*, (1) That the county attorney had no right to institute this process in his official capacity, or in behalf of the county; and, (2) That the town of Skowhegan should have been made a party.

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*STAT. OF FEB. 15, 1872. SECT. 1. The several terms of the supreme judicial court which are now required to be holden at Norridgewock, in and for the county of Somerset, shall, after the first day of March, in the present year, be holden at Skowhegan, in said county; and all writs, processes of any kind, and all proceedings shall, after that time, be made returnable accordingly; and all writs, processes and proceedings commenced prior to that time, and which would otherwise be returnable to the March term of said court at Norridgewock, shall be entered and have day in said court at Skowhegan.

SECT. 2. Within five years from the passage of this act, the county commissioners of the county of Somerset, or a majority of them, are hereby authorized, empowered, and required to cause a court-house to be erected at Skowhegan suitable for the accommodation of the courts and offices of said county, and to procure a loan of money for that purpose, and assess taxes for the payment of the same in such amounts, and at such times as in their judgment shall be most advantageous to the interests of said county.

Also *held*, That exceptions do not lie to revise the decision of the presiding judge upon the question whether the facts alleged in the information as the foundation for the writ, are substantially true as alleged.

Also *held*, That the act is not unconstitutional for the reason that by the provisions of § 3, the previous sections were to be void, unless the town or citizens of Skowhegan should perform the conditions therein mentioned.

Also *held*, That, in the absence of proof of fraudulent connivance, the judgment of the county commissioners, of the suitableness of the accommodations furnished, and of the sufficiency of the securities given was conclusive.

Also *held*, That the conditions provided in § 3 did not require the town or its citizens to furnish a jail.

Also *held*, That the town of Skowhegan had authority under the act to hire the apartments to be leased to the county, and through their selectmen specially authorized by vote to lease them for the purposes indicated in the act.

Also *held*, That a bond of 'the town of Skowhegan, and the inhabitants thereof,' to the county and the county commissioners of the county, executed in behalf of the town by the selectmen in their official capacity, and acting also as a committee specially authorized therefor, agreeing 'to convey to said county,

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SECT. 3. The previous sections of this act shall be void and of no effect, unless the town of Skowhegan, or its citizens, shall, on or before the first day of March, in the present year, without expense to said county of Somerset, provide suitable room and other accommodations for said court and officers, to the acceptance of a majority of said county commissioners, and shall execute and deliver to them a good and sufficient lease, or other instrument, to secure the use thereof to said county for the purposes aforesaid during said five years, if the same shall be occupied so long for the purposes specified in this act, and shall also convey, or secure the conveyance in like manner, of a suitable site for county buildings in said Skowhegan.

SECT. 4. The county commissioners shall forthwith, after rooms for the accommodation of the court and officers as specified in section three of this act have been provided, cause the records in all the county offices, including the registry of deeds, registry of probate, the records of the county commissioners, and the records and files of all the courts which now are, or have been held in said county, to the places prepared for them in Skowhegan, which from that time forward shall be the shire town of said county, and said commissioners shall cause notice of the fact that suitable rooms have been furnished, as provided in section three of this act, and of the removal of the records as aforesaid, by publication in all the public newspapers printed in said county, also in the State paper, and the Lewiston Daily Journal, and to be continued in all the daily and weekly issues of each of said papers for three weeks successively thereafter.

SECT. 5. The inhabitants of Skowhegan are hereby authorized to raise money for the purposes named in this act, by loan or otherwise. Taxes therefor may be assessed at such times and in such amounts as said town may vote.

SECT. 6. All acts and parts of acts inconsistent with this act are hereby repealed.

SECT. 7. This act shall take effect when approved.

in such form and at such time within five years of this date as they may require, a suitable site for county buildings in said Skowhegan . . . to the acceptance of the county commissioners of said county,' is a sufficient obligation to secure the conveyance of a suitable site for the county buildings, when a majority of the county commissioners shall see fit to exercise the power conferred in § 2.

Also *held*, That the legislature did not intend to make the selection of a site on or before March 1, 1872, mentioned in § 2, an indispensable prerequisite to the taking effect of the act.

On exceptions.

Petition for a writ of prohibition against the county commissioners for this county.

The petition is brought in the name of Sylvester J. Walton, 'attorney for the State for said county, for and in behalf of the county of Somerset,' and alleges substantially,

That in pursuance of an act entitled an 'Act to change the place of holding the supreme judicial court in the county of Somerset, and to change the shire town of Somerset county,' passed on Feb. 15, 1872, the county commissioners met at Skowhegan, on March 1st, to examine rooms prepared for the court and officers, all included in what was claimed to be a lease to the county from the town, signed by one Folsom, Snow, and Eaton, selectmen and committee of the town, and to which the town derived title by several leases described [copies annexed], and received an obligation [annexed] of same date from the town of Skowhegan, signed by the selectmen as such, and as a committee for the purpose, agreeing to convey a suitable site for a court-house.

That at a court of county commissioners held at Norridgewock, on first Tuesday of March, 1872, the commissioners accepted the same and entered their acceptance of record;

That the above-named act was of no validity, and the county commissioners had no jurisdiction in the premises under it; that neither the town, nor any citizen of Skowhegan, has executed and delivered to the county good and sufficient lease or leases of the building, rooms, and vaults provided for the county, or other instrument to secure the use thereof to the county, as would appear by the copies thereof annexed to the petition; that no provision had

been made for a jail, or an office for the jailer; and that the county commissioners accepted the rooms and other accommodations so prepared, and adjudged as matter of law, that the papers presented, and the accommodations constituted a compliance with the requirements of the third section of the act.

That sufficient had not been done by the town or citizens to give the county commissioners jurisdiction, but that the petitioner feared they would act in the premises, remove the records, and publish the facts to the great injury and detriment to the interests of the county, wherefore prayed,

That a writ of prohibition might issue to the county commissioners, prohibiting them from ordering such removal, or publishing such notice, or doing anything further in the premises.

Annexed to the petition were

An obligation dated March 1, 1872, whereby 'the town of Skowhegan and the inhabitants thereof, by Levi H. Folsom, Daniel Snow, and Horace Eaton, undersigned selectmen of said town, and a committee thereof specially authorized thereto, in consideration of an act entitled 'an act,' etc., approved Feb. 15, 1872, hereby agree, and bind themselves to the county of Somerset, and the county commissioners of said county, to convey to said county in such form and at such time within five years of this date, as they may require, a suitable site for county buildings in said Skowhegan, which said site and conveyance shall be to the acceptance of the county commissioners of said county.

Also, lease of certain rooms and buildings from same to same, and executed in the same manner.

Also, lease from Skowhegan Hall Association to the inhabitants of Skowhegan; from Second Nat. Bank to same; Mrs. J. H. Williams to same, of the rooms, vaults, etc., named in the lease from the town to the county.

A copy of the judgment of the county commissioners dated March 1, 1872, annexed to the petition, was as follows:

SOMERSET, ss.:—We certify that on the first day of March, A. D. 1872, the town of Skowhegan provided suitable room and other

accommodations for the courts and county officers of this county to our acceptance, and have executed and delivered to us a good and sufficient lease of the same, for the term of five years, free from expense to the county, which we have accepted and placed on file; and have also given to us an obligation to convey to said county in such form and at such time within five years of this date, as the county commissioners may require, a suitable site for county buildings in said Skowhegan, which said site and conveyance shall be to the acceptance of the county commissioners of said county, which obligation we have accepted and placed on file as a full compliance with the provisions of the act requiring said town of Skowhegan to convey or secure the conveyance of a suitable site for county buildings in said Skowhegan.

At the March term of this court held at Augusta, in the county of Kennebec, on March 11, 1872, notice to the county commissioners of Somerset county was ordered returnable at the term of this court, to be held at Norridgewock, for the county of Somerset, on the third Tuesday of March, and a temporary prohibition was granted.

At the March term, 1872, at Norridgewock, the respondents filed their answer, alleging substantially,

1. That the town of Skowhegan fully complied with all the conditions of the act of the legislature, within the time specified, to the acceptance of the county commissioners. [Here follows a detailed statement of the acts of the town under this head.]

2. That their acceptance of the premises was conclusive.

3. That but for the order of the court at Augusta, they should have performed the remaining duties imposed on them by the act, and caused the records to be removed to the places prepared for them, and should have published the notices commanded by the act.

4. That a writ of prohibition can only be issued to some court to restrain judicial action, and not ministerial acts, and that the acts complained of were purely ministerial.

5. That such writ can only be issued to some inferior court hav-

ing no jurisdiction of the subject-matter complained of; that the act conferred in express terms the most ample and exclusive jurisdiction over the entire subject complained of.

6. That the town of Skowhegan should have been made a party; and

7. That by the statute and common law they are the only persons authorized to institute proceedings for the county.

Upon a hearing at Norridgewock, at the time appointed, the presiding justice decided that the conditions of the act to change the place of holding the supreme judicial court for the county of Somerset, and to change the shire town of Somerset county approved Feb. 15, 1872, had been complied with, and that the supreme judicial court must be held at Skowhegan, and thereupon immediately went to Skowhegan, and opened court, and dismissed the temporary prohibition. And the petitioner alleged exceptions.

J. H. Webster, for the petitioner.

The act of the legislature never became a law. R. S., c. 78, § 11; Const. of Maine, Art. I, § 2; Art. IV, part 1, § 1, part 3, § 2.

The conditions in the act have not been performed. No jail or substitute for one is furnished. R. S., c. 77, § 2; c. 80, §§ 22, 26.

The town of Skowhegan were not authorized by law to hire apartments to let, it not being a power conferred upon it by the general statute, nor by this act, *Hooper* v. *Emery*, 14 Maine, 375; *Mitchell* v. *Rockland*, 41 Maine, 363; *Same* v. *Same*, 45 Maine, 496; *Same* v. *Same*, 52 Maine, 118; *Small* v. *Danville*, 51 Maine, 359.

The selectmen cannot bind the town without a vote.

The town obtained no legal interest in the apartments by the leases which the selectmen received, and conveyed none by their lease to the county.

The lease from the Second Nat. Bank was invalid,—neither the president and cashier, nor the bank having any power to make it. R. S., c. 46, § 15; Laws of Cong. of 1863, c. 58; *Ibid.* of 1864, c. 86, §§ 8, 9, 28, 53, 69.

The decision of the county commissioners as to the suitableness of room and other accommodations is subject to revision by this court. R. S., c. 77, §§ 3, 4.

Neither the town nor its citizens, have conveyed or secured the conveyance of a suitable site for county buildings, to the acceptance of the county commissioners.

The records not removed under § 4.

No particular form of proceeding is necessary in matters of this kind, as this court has supervision of inferior courts, and control of their own records. R. S., c. 77, § 3.

Writ of prohibition obtained in two ways,—petition and suggestion. Bac. Abr., 'Prohibition' A. C. E., Anc. Char. 330, 331.

It is grantable when inferior court or officer exceeds his jurisdiction or wrongly executes his trust. Bac. Abr. Prohibition J. H.; *Gould* v. *Gapper*, 5 East, 345; *People ex re Averill* v. *Works*, 7 Wend. 486; *Harriman* v. *Co. Commissioners*, 53 Maine, 83.

D. D. Stewart, for the respondents.

As to the remedy. *Washburn* v. *Phillips*, 2 Met. 298; *Ex-parte Davis*, 41 Maine, 39 and 57; 2 Burrill's L. Dict., 834, 835; 3 Blackstone, 112–114 and note; *People* v. *Supervisors Queens Co.*, 1 Hill, 200, 201; 2 Sellon's Prac., 308, 'Prohibition.'

As to the conclusiveness of decision of Co. Commissioners. *School Dist.* v. *Dresden*, 54 Maine, 512; *Baxter* v. *Tabor*, 4 Mass. 364, 366; *Codman* v. *Lowell*, 3 Greenl. 52, 57; *Hanson* v. *Dyer*, 17 Maine, 96; *Cary* v. *Osgood*, 18 Maine, 152; *Cooper* v. *Bakeman*, 33 Maine, 379; *Zadden* v. *Hanson*, 39 Maine, 359.

On right of county attorney to institute this process. R. S., c. 78, § 10; *Hampden* v. *Franklin*, 16 Mass. 88; *Emerson* v. *Co. of Washington*, 9 Greenl. 96; R. S., c. 78, § 13.

Town a party. *Ex-parte Davis*, 41 Maine, 59.

Barrows, J. Obviously there are insuperable technical objections to the maintenance of this process, which seems throughout to have been irregular and inapplicable to the case as stated by the petitioner.

The prayer of the petition is, 'that a writ of prohibition may issue to said court of county commissioners (meaning the respondents), prohibiting them from causing the records and files in the various county offices in Somerset county to be removed to Skowhegan, and from causing notice of that fact to be published in certain news papers, as provided in § 4 of an act of the legislature approved Feb. 15, 1872.

1. The petition is subscribed and sworn to by Sylvester J. Walton as county attorney for Somerset county, and the only persons or parties named as respondents therein, are 'Albert N. Greenwood, John Russell, and Sylvanus B. Walton, county commissioners of Somerset county.'

Proper and competent parties are indispensable in every legal process. The petitioner here asserts no personal grievance. He undertakes to intervene in behalf of the county and to represent it in this proceeding. In view of R. S., c. 78, § 10, which confides this power in express terms to the county commissioners, we do not think it competent for the county attorney to interfere of his own motion in behalf of the county in this manner. Under the section referred to, the county commissioners are to 'represent' the county,—are 'to have the care of its property and the management of its business.' They are responsible directly to the people who elect them for the manner in which they discharge their duties. But while they are in office, they, and not the county attorney are to represent the county in business of this description, and the county attorney acts under their direction and simply as an attorney, in the matters in which the county is interested.

It is true, that in cases where a writ of prohibition appears to be necessary to keep an inferior court within the limits of the jurisdiction prescribed by the laws and statutes of the State, it may issue at the suggestion of, or upon information laid by, either of the parties or by a mere stranger. Bacon's Abr., Vol. IV, p. 243, tit. Prohibition (C).

It may well be, that if the county attorney or any other citizen of the county, acting in his individual capacity, laid before us an

information, suggesting that the court of county commissioners were usurping any authority over the county records not given them by the statutes of the State, or were exercising their powers in a manner unauthorized by law, we should feel bound to listen to his proofs, and apply the remedy required. But it does not follow that when, as in this petition, he assumes to speak 'for and in behalf of the county of Somerset,' in his official capacity only, we can disregard the remonstrance of these respondents, claiming that they alone legally 'represent' the county, and 'have the care of its property, and the management of its business,' and that the county attorney has no right, in the name of the county or in his official capacity, to institute a process of this nature.

2. But if there is a want of a proper party plaintiff, it is equally apparent, that inasmuch as the writ of prohibition, if granted, operates against the party adversely interested, the town of Skowhegan has such an interest in the question here presented, that it ought to be made a party respondent and have notice of the pendency of this petition.

To proceed without such notice to the town would violate the fundamental rule that, in all suits in courts of common law, a service upon the persons or parties adversely interested is indispensable. *Ex-parte Davis*, 41 Maine, 59; *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456.

3. This case comes before us only upon exceptions filed to the rulings and adjudication of the judge presiding at *nisi prius*. The question presented is, were the rulings and decision erroneous as to matters of law?

What is called 'the proof of the suggestion,' or, in other words, the question whether the facts alleged in the information, upon which the claim for the prohibition is founded, are substantially true as alleged, was submitted to him, and upon well-known rules his decision upon that question is binding and conclusive, and cannot be reviewed on exceptions.

Now the exceptions themselves state that he decided 'that the conditions of the act to change the place of holding the supreme

judicial court for the county of Somerset, and to change the shire town of Somerset county, approved February 15, 1872' (and above referred to), 'had been complied with.' If this were so, then the county commissioners were expressly required, by the act referred to, to do that which the petitioner asks us to prohibit.

The gravamen of the petitioner's complaint appears to be that these conditions have not been complied with, and this is alleged, with much detail and divers specifications, as a reason why the prohibition should be granted.

The finding of the judge as set forth in the exceptions negatives these allegations directly, and this should have been the end of the case. It has been so often held, that exceptions do not lie to correct error in the decision of questions of fact, that a citation of authorities is needless. This precise point seems to have been in the mind of the judge when he certified the exceptions as 'correct and allowed if exceptions will lie in the case.' The order of the presiding judge, dismissing the temporary prohibition and the petition, was in perfect accordance with the long-settled course of proceeding upon applications of this sort, and the petitioner had no ground for complaint thereof. For 'though a surmise be matter of fact and triable by a jury, yet it is in the discretion of the court to deny a prohibition when it appears to them that the surmise is not true.' *Aston Parish* v. *Castle Birmidge Chapel*, Hobart, 67.

'When a prohibition is moved for, the method is for the party to file a suggestion in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; upon this the court grants a rule for the other party to show cause why a writ of prohibition should not issue; and if it appear to the court that the surmise is not true or not clearly sufficient to ground the writ upon, they will deny it.' Bac. Abr., Vol. IV, tit. Prohibition (A) in notes.

It is only when the cause alleged is seen to be true and clearly sufficient, that the prohibition is granted.

While it it thus evident, that, whatever might be the general merits of the petitioner's case, this process must fail; yet, inasmuch

as those merits have been elaborately discussed by counsel, and as the matter involved possesses sufficient local interest and importance to make it probable that the main questions, if not now settled, would be presented in some other form, we think it best not to base our judgment exclusively upon objections simply technical, but to give the positions taken in behalf of those opposed to the removal of the county seat from Norridgewock to Skowhegan, a deliberate and careful consideration.

The case is this. Section 3, of the 'act to change the place of holding the supreme judicial court in the county of Somerset and to change the shire town of Somerset county runs thus: 'The previous sections of this act shall be void and of no effect unless the town of Skowhegan, or its citizens, shall on or before the first day of March, in the present year, without expense to said county of Somerset, provide suitable room and other accommodations for said court and officers, to the acceptance of a majority of said county commissioners, and shall execute and deliver to them a good and sufficient lease or other instrument, to secure the use thereof to said county, for the purpose aforesaid, during said five years, if the same shall be occupied so long, for the purposes specified in this act, and shall also convey or secure the conveyance in like manner, of a suitable site for county buildings in said Skowhegan.' Hereupon it is argued that here was an unconstitutional delegation of the power of legislation to the town of Skowhegan, or its citizens, at whose option the act was to be void, and that there are constitutional objections to a piece of legislation which makes the place where the courts shall be holden in a county, to depend upon the acts or omissions of any particular town or its citizens, and the judgment of the county commissioners thereupon. We do not find either in the letter or the spirit of the constitution anything which forbids the legislature to attach conditions of this description to their acts. Upon the wisdom or expediency of so doing, it is no part of our duty to express an opinion. Of that, the law-making power, commissioned by the people for that purpose, must judge. Our office is to give a just and proper interpretation to all these

clauses as we find them spread upon the statute-book, and to hold them valid and binding, unless they appear clearly to be repugnant to the constitution of this State or to that of the United States.

The conditions are as much part of the act as the positive provisions to which they are subjoined, and which they qualify. The whole taken together, expresses the will of the legislature in the form of law, and, not being in conflict with any constitutional provisions, but on the other hand being sanctioned by numerous precedents, must be held valid and binding.

Again it is urged that the act has become void under its own provisions, by reason of an alleged non-compliance with its conditions.

The conditions are found in § 3 above recited, and in substance were that the town of Skowhegan, or its citizens, should on or before March 1, 1872, without expense to the county, provide suitable room and other accommodations for this court and the county officers to the acceptance of a majority of the county commissioners, and give a good and sufficient lease or other instrument to secure the use thereof to the county for five years, if so long needed, and 'convey or secure the conveyance in like manner of a suitable site for county buildings in said Skowhegan.'

These several matters are required to be done to the acceptance of a majority of the existing board of county commissioners, who in all business matters represent the county, and are charged, by law, with 'the care of its property and the management of its business.' Were the several conditions fulfilled?

It appears that they were, at all events, to the full satisfaction, not of a majority merely, but of the entire board. The justice of this court, who presided at the term, seems to have so found in express terms; and the diligence and acumen of the petitioner's counsel, though fruitful in surmises and suggestions, fail to raise in our minds a serious doubt that there was a substantial compliance with all the conditions of the act.

We remark, in the outset, that wherever the legislature made the county commissioners the judges of the suitableness of the accom-

modations to be furnished, and of the sufficiency of the securities to be given, by providing for the performance of the condition 'to the acceptance of a majority' of the commissioners, the judgment of such majority, in the absence of proof of fraudulent connivance, must be deemed final and conclusive, and not subject to revision by any tribunal whatever.

The county commissioners, besides being the general business agents of the county, were specially empowered and directed by this act to cause the removal and publication, which the petitioner asks us to prohibit, when the rooms for the accommodation of the court and officers have been provided as specified in the third section, *i. e.* to the acceptance of a majority of said county commissioners.

From the nature and necessities of the case, the provision can only be construed as confiding to the commissioners an unlimited discretion and power to determine whether the conditions had been so performed that they ought to be accepted, and, in case such was their judgment, to accept them, and forthwith to act in pursuance of their decision.

And that decision is not to be revised for mere errors in judgment, and cannot be impugned for anything short of corruption and fraudulent collusion, of which there is here no pretence.

Such we believe to have been the uniform current of decisions in analogous cases. We see not how it could be held otherwise, in the present instance, without involving the whole course of legal proceedings in the county at every step in inextricable confusion and uncertainty.

We think this substantially covers the whole case. The commissioners executed in good faith a power which was intrusted to them by the legislature with full knowledge of their liability to err; and their decision of the questions necessarily involved, right or wrong, must be held conclusive. It would be a strange and totally inadmissible construction of the legislative act, which would involve the administration of justice in that county in such uncertainty as must prevail until a final decision was reached, if it were

made to depend upon the view which another fallible human tribunal might take of the legal accuracy of the judgment of the commissioners.

While this construction of the act (which we adopt upon the fullest consideration) must be decisive of the case against the petitioner, we have not omitted to review the various points where in it is claimed that the commissioners erred; and we think that a detailed examination of them would lead to the same result.

At *nisi prius* it seems to have been conceded, that the certificate of the county commissioners was full and satisfactory evidence that the full condition, which calls for the provision of 'suitable room and other accommodations' for the court and county officers, had been complied with. Now, however, the ingenuity of counsel has discovered that a jail, or at least a substitute for one, should have been included in these accommodations, and that, notwithstanding they were found satisfactory by the county commissioners, they are in other respects deficient.

The case is devoid of any evidence to impeach the commissioners' certificate in any particular. We could not accept the assertions of counsel in lieu of evidence; and, moreover, we are clear that the language of the condition does not require the town or its citizens to furnish a jail. Compare the language used with that of Laws of 1865, c. 334, § 3, touching the same subject.

It is insisted that the leases which have been given and accepted, to secure the use of these rooms for the five years, if so long required, are invalid, and divers suggestions are thrown out in derogation of the title and authority of those by whom they purport to have been made. But not one of these suggestions is sustained by any proof, and we fail to see that they have any foundation, either in law or fact. Power to do any specific act, embraces the power to do all that is incidentally necessary to its accomplishment. The town of Skowhegan unquestionably has authority under the act to hire the apartments to be leased to the county; and it seems to have been done by the selectmen, not only in their capacity as the

prudential agents of the town, but as a special committee duly authorized by a vote of the town at a legal meeting.

The objections to the title and authority of the leases of the town, are equally wanting in the proof that was necessary to give them any vitality. That surely ought to be deemed sufficient which accomplishes the purpose for which it was designed. The county has undisturbed possession of the premises by virtue of these leases, and we see no good cause to question their validity. *Omnia præsumuntur rite acta*, at least, until some scintilla of evidence appears to the contrary. So long as the county has the enjoyment of the premises which the leases were designed to secure, neither the petitioner nor any other inhabitant of the county seems to have any substantial ground of complaint on that score.

Particular stress is laid upon the alleged failure to 'convey or secure the conveyance in like manner of a suitable site for county buildings in said Skowhegan.' The commissioners accepted, as a fulfillment of this condition, the bond of 'the town of Skowhegan and the inhabitants thereof,' to the county of Somerset and the county commissioners of said county, executed in behalf of the town by the selectmen in their official capacity and acting also as a committee specially authorized therefor, agreeing 'to convey to said county in such form and at such time within five years of this date, as they may require, a suitable site for county buildings in said Skowhegan . . . to the acceptance of the county commissioners of said county.'

We see no good reason to question the validity and sufficiency of this obligation to secure the conveyance of a suitable site for the county buildings at any time within five years, when a majority of the county commissioners shall see fit to exercise the power given them, in § 2 of the act, to erect such buildings. The legislature required either the conveyance of a suitable lot, or security that such conveyance should be forthcoming when necessary. The commissioners accepted the security above described.

It is argued that here was a misconstruction of the statute which constituted their authority to act in the premises. If it were mani-

festly so, we might be justified in interfering with a writ of prohibition.

But we think that the better opinion is, that the legislature did not intend to make the selection of a site within fifteen days after the passage of the act an indispensable pre-requisite to its taking effect. The county commissioners were to erect the county buildings at such time as they might select within five years, and the design of the clause under consideration was, to secure the conveyance without expense to the county, of such a site as should be acceptable to the county commissioners.

We think the condition is fulfilled by securing the conveyance of a suitable site which shall be acceptable to such board of county commissioners as shall initiate the erection of the buildings, and that this is accomplished by the bond of the town.

The bond is in substance and effect a security for the conveyance of such a lot as the county, through its commissioners, may deem suitable; and if the town should fail to convey according to their agreement, they must be held to pay for such lot as the commissioners may reasonably select when they proceed to build. The alternative of conveying or securing the conveyance seems to have been designed to enlarge the time for selection to the manifest advantage of the county.

Even if we did not consider the acceptance of the bond by the commissioners conclusive, we should be ready to hold that, as to this item, as well as all the others, the conditions prescribed by the act had been substantially complied with.

Exceptions overruled.

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

Fairfield Bridge Company *vs.* Joseph Nye.

Contract. Sale—delivery—consideration. Mortgage. Pledge. Replevin of property mortgaged or pledged.

On Nov. 13, 1869, A. contracted with the plaintiff bridge company, to furnish materials and build two granite piers of Hallowell granite, according to certain specifications, for fourteen dollars per cubic yard, five hundred dollars to be paid down, and five hundred dollars monthly, until the piers shall be completed and accepted, when the balance is to be paid, and all to be completed before the following spring freshets. Thereupon A. procured the blocks of granite, hauled them upon land leased by him near the contemplated location of the bridge, and commenced dressing and fashioning them. The plaintiffs duly paid the first four installments, and before the next one became due, and before any of the granite was placed in the piers, it was attached by A.'s creditor. In replevin by the bridge company, *Held*, That the plaintiffs acquired no title by virtue of the contract and the payments made, or any rights or interest in the granite as against the attaching creditor.

Also *held*, That the bridge company could not hold the stone as against the attaching creditor by virtue of an absolute bill of sale thereof from A. to the company, the consideration of which was the four payments made in accordance with the terms of the original contract.

As between a vendee of a quantity of granite and an attaching creditor of the vendor, an actual or symbolical delivery is necessary.

To render a mortgage or pledge of personal property valid as against attaching creditors of the mortgagor or pledgor, there must be, at least, a distinct and specific condition that can be clearly stated, on performance of which the property would be released.

By virtue of R. S., c. 81, § 42, a mortgagee or pledgee of property attached, cannot replevy it from the attaching officer, until he has given the officer 'at least forty-eight hours' written notice of the claim and the true amount thereof.'

On report.

Replevin. Writ dated Aug. 2, 1870.

Plea, general issue, and brief statement that the stones were the property of one Andrews, and that the defendant held them as an officer by virtue of an attachment made Feb. 23, 1870, on a writ *Joseph R. Bodwell* v. *Ira Andrews*.

There was evidence tending to prove that on Feb. 15, 1870,

Andrews called on one Totman, at Fairfield (director of the plaintiff company, and one of the persons designated to supervise the work), for his monthly pay for February; that as the water was rising, and stones could not be laid, he told Andrews the company must have some security for the money paid; that Andrews agreed to give it; that an absolute bill of all the stones (then mostly fitted and marked), was made in consideration of the sum of two thousand dollars to the bridge company, and upon its being executed by Andrews, Totman paid him the February installment of $500; that Andrews said he must have more money with which to settle with his men, and Totman paid him $190 more; that Andrews and Totman did not go out to the stone together after the execution of the bill of sale; that no actual delivery was made of the stone by Andrews to Totman or to any one else; that some of the employees of Andrews continued to work under Andrews' superintendent until the 17th, when they picked up their tools and quit.

The remaining facts appear in the opinion.

The full court to render judgment according to the law and the facts as they should find them.

S. S. Brown, for the plaintiffs.

Plaintiffs rely on written contract dated Nov. 13, 1869, and bill of sale dated Feb. 15, 1870. Symbolic or constructive delivery is sufficient for this kind of property. *Vining* v. *Gilbreth*, 39 Maine, 496; *Boynton* v. *Veazie*, 24 Maine, 286; *Ludwig* v. *Fuller*, 17 Maine, 162; Story on Sales, §§ 311, 311*a*, 312.

The parties intended the title should pass as soon as granite was fitted.

The intention of the parties must govern. 2 Parsons on Contracts, § 3. The title to the granite passed when the monthly payments were made. Story on Sales, § 234; *Woods* v. *Russell*, 5 Barn. and Ald. 942. The work was done under the superintendence of Mr. Totman, he exercising the right to accept or reject. His acceptance and payment were sufficient to pass the title, as to all granite marked and set aside for the piers. The completion of

the granite to the acceptance of Totman in the proportions contemplated by the contract was a condition precedent to the payments.

The bill of sale of Feb. 15th, was designed, either as an independent transaction, or as supplementary to the contract of Nov. 13th. As an independent contract, it was sufficient in form to convey the property, if the parties to it designed it to have that effect. The consideration of this bill of sale was the $500 paid at its date, and the abandonment of the original contract. Though designed for a security only, it needed no recording. *Knight* v. *Nichols*, 34 Maine, 208.

If the bill of sale of the date of Feb. 15th, was designed as a supplement to the original contract, its effect is the same as a statement in the original contract, declaring that all the granite prepared at the date of this bill of sale should be the property of the corporation.

No delivery under either contract was necessary, as Bodwell, the attaching creditor in the trustee writ, had knowledge of the facts before he made his attachment. The rights of these parties can be fully and best settled under the trustee writ. The officer is affected by notice to the attaching creditor. *Ludwig* v. *Fuller*, 17 Maine, 162. Amendment of officer's return on the trustee writ, at *nisi prius*, was unauthorized and void. Howe's Prac., 364; 9 Pick. 160; 3 Greenleaf, 260; *Fairfield* v. *Paine*, 23 Maine, 498.

J. S. Abbott, on same side, cited, on the point of delivery, *Shumway* v. *Rutter*, 5 Pick. 56; *Tuxworth* v. *Moore*, 9 Pick. 347.

J. Baker, for the defendant.

KENT, J. This case is replevin for a quantity of granite stones, and is submitted to the court to determine the law and facts, and thereupon to render judgment. The issue is on the title of the plaintiffs to the stones in question. If that title is not shown, the judgment must be for the defendant.

Both parties claim title or right under Ira Andrews. The defendant by an attachment of the stones as the property of Andrews. The plaintiffs on several grounds to be hereafter stated.

The first ground assumed by the plaintiffs is based upon a written contract between Andrews and themselves. By that contract, Andrews, in consideration of payments, as afterwards specified, promises and agrees with the company, 'to build two granite piers of Hallowell granite, of first class masonry, of the form and dimensions particularly specified. The piers to be commenced as soon as the stage of water will admit, and be completed during the winter, or before the spring freshets. The work to be carried up under the supervision of persons named.

The company, on their part, agreed to pay Andrews the sum of fourteen dollars per cubic yard, the first installment of five hundred dollars to be paid on the 13th of November, which was the date of the contract, and five hundred dollars monthly, until the piers are completed and accepted, when the whole shall be paid.

The first five hundred dollars were paid on the day first named, and another like sum on the 13th of December, and another like sum on the 13th of January, and another like sum on the 15th of February,—all in accordance with the terms of the contract.

Andrews proceeded on his part to commence the execution of the contract, and obtained, on his own credit, a quantity of Hallowell granite, and had it brought to Kendall's Mills and deposited near the railroad, on ground obtained for that purpose by him, from the railroad corporation.

He then hired men to dress and prepare the stones, on that spot, ready to be put in their places in the piers. No part of the stones were placed in the piers, but they remained on the land when attached by the defendant.

It is contended by the plaintiffs, that by virtue of the contract and the payments made, they acquired a title to the stones, thus in process of preparation, or a right or interest in them, which would prevent a legal attachment by a creditor of Andrews. How far such a right or title might be sustained, if the stones had actually been placed in the pier or piers, and had become a part of the promised erections, it is unnecessary to decide.

The contract was an entire and single one, viz., to erect and build

two piers of Hallowell granite. The contractors must furnish and fashion the materials and put them in place, and when he had done so, his contract was performed.

He could not call upon the company to purchase or become surety for the price of the Hallowell granite. The contract does not give any lien or property in the stones as the work progressed.

If a man contracts with a builder to erect for him a house on his land, at a fixed price, and according to certain specifications, and further agrees to pay money to him at specified times, some of which are clearly before the commencement of the work, and there are no other terms or conditions, the man, for whom the house is to be built, does not acquire a title to the lumber which the contractor may purchase and take to his shop to be prepared and fitted for the house.

We think the first proposition cannot be sustained.

The plaintiffs, however, next produce an absolute bill of sale from Andrews to them, dated the 15th of February, 1870, the day when the last payment of five hundred dollars was made. The consideration named is two thousand dollars, paid by the company, and the bill purports to convey to the company 'all the granite stones, piled near the depot, which I have fitted for the new piers of said bridge company, to have and to hold forever.'

This is an absolute bill of sale, with no conditions or qualifications.

If it is to be viewed as an absolute sale, the defendant objects that it is void as against the attaching creditor.

1. Because there was no consideration for it. It was declared early in this State, in the case of *Gorham* v. *Herrick*, 2 Maine, 98, that a 'defendant, representing a creditor, has a right to require that such sale and transfer should appear to have been made *bona fide*, and for a good and sufficient consideration. The same doctrine is found in *Richardson* v. *Kimball*, 28 Maine, 470; *Whitaker* v. *Sumner*, 20 Pick. 404.

Now what consideration was there for this bill of sale. The evidence declares none, except it be found in the payments that had

been made, which were the two thousand dollars paid in the four installments. But those payments were made in strict accordance with the terms of the agreement. The plaintiffs saw fit to agree to make those payments on certain days named, without making them dependent at all upon the amount of work done. Indeed the first payment was to be made, and was made, on the day the contract was executed.

The contract had not been abandoned at the time of this absolute sale. The order for one hundred and ninety dollars was not given until after the bill of sale, and was no part of the consideration, as appears by the evidence. It was not drawn, as the other orders were, upon the treasurer, by name of his office, but seems to be a mere memorandum to show a subsequent advance toward the next installment. It is difficult to find any legal consideration for such an absolute bill of sale of property, worth, according to the statements of witnesses, about thirty-eight hundred dollars. Andrews owed nothing to the company at that time. He received only what was legally due to him. According to the terms of the bill of sale, it was not taken as security for the performance of the contract, or for any purpose of security.

2. But if the sale does not fail for want of consideration, there does not appear to have been any delivery, either actual or symbolical. Andrews did not go to or near to the stones, after signing the bill of sale, with any purpose to make delivery; but departed on the train from the town immediately after signing the bill of sale. The stones remained in the possession or charge of his foreman for some days. No possession was taken by the vendees, nor any act of ownership exercised before attachment. A delivery of some kind is essential, as between vendees and subsequent purchasers or attaching creditors. The delivery must be by some act, express or symbolical, by which the possession is transferred to the buyer.

No sufficient notice is proved, or actual possession acquired, before the attachment.

If regarded as an absolute bill of sale, we cannot find sufficient evidence of the delivery required by law.

It is finally contended, that if the sale cannot be sustained, if viewed as an absolute one, yet that under the facts proved, it may be sustained, as a mortgage or pledge, or in some form as security.

There are indications, and perhaps sufficient evidence, that the real intention of the parties was not an absolute sale, irrespective of any future connection between the parties, but rather that the contract remaining in force and not abandoned, the sale should stand so as in some form to operate as security.

But it is difficult, if not impossible, to say, upon the evidence, that there was any definite and distinct agreement as to what was to be secured. If we felt at liberty to ingraft upon the bill of sale conditions of defeasance, we should be at a loss to determine what they are, or should be. There seems to have been some confused and indefinite idea of 'indemnity for the past, and security for the future,'—for the money paid under and according to the terms of the contract, and security for the performance in the future. But we can find no specific and exact matter or thing which could be stated as the condition of a mortgage or pledge. In order to have a mortgage or pledge good as against attaching creditors, or subsequent purchasers, there must be, at least, a distinct and specific condition that can be clearly stated and understood, and which, being performed, the property would be released.

It must be such a demand or claim, as can be stated, under the requirements of R. S., c. 81, §§ 41, 42, 43, so definitely that the sum to be paid by the attaching officer is fixed and certain.

We have thus considered the case upon the several points raised, and argued on the merits, because we suppose that the parties desired such consideration. But on the last proposition, which regards the sale in the light of a mortgage or pledge, there seems to be an insuperable objection to the maintenance of this action against the attaching officer, in the provisions of R. S., c. 81, § 42. That section provides that 'when personal property, attached on a writ, or seized on execution, is claimed by virtue of such mortgage, pledge, or lien, the claimant shall not bring an action against the

attaching officer therefor, until he has given him at least forty-eight hours' written notice of his claim, and the true amount thereof; and the officer or creditor may, within that time, discharge the claim by paying or tendering the amount due thereon, or restore the property.'

The object of this provision is manifest, and the legislature has seen fit to make it a condition precedent to the bringing of an action.

We find no evidence that such a notice was given in this case. It would seem to be a conclusive objection, so far as relates to this transaction received as a mortgage or pledge or lien.

The result is, that judgment must be given for the defendant, and for a return. The parties can probably adjust all questions as to amounts, without further action by the court. But the judgment must be

Judgment for the defendant, and for a return of the property replevied and for costs, and for damages for detention, to be assessed and determined at nisi prius term, where case is pending.

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

INHABITANTS OF RIPLEY *vs.* INHABITANTS OF HEBRON.

Declaration—amendment of. Evidence. Pauper.

In an action by one town against another, to recover the value of supplies furnished a pauper, a declaration alleging that the pauper fell into distress in the plaintiff town 'on Dec. 2, 1868,' and the plaintiffs furnished the pauper with supplies from that time to Nov. 24, 1869, 'to the amount in all of $469,' may be amended by substituting 1867 for '1868.'

Inhabitants of Ripley *v.* Inhabitants of Hebron.

Where, in a pauper case, upon the issue, whether the pauper had had his home five consecutive years, between March, 1860, and December, 1867, in the plaintiff town, the question turned mainly on the facts connected with an undisputed absence of three weeks, in March, 1863, in another town, where he went and resided with one K. and of another of a few days in September, 1863, it is competent for the plaintiffs to show, that the pauper came to the witness's house in the plaintiff town and wanted to stay a spell, but that the witness declined to allow him to stay but a short time, stating to the pauper the condition of the witness's family as the reason for thus declining; and also to show that when the pauper came, he brought nothing except the clothes he had on.

Held, That such conversation tended to show the character of the residence and was not mere declarations.

Held, also, that it was competent for such witness to testify that while the pauper was thus stopping at his house in March, 1863, he heard K. propose to the pauper to go and live with him in D.,—that he would give him a home there as long as he wanted one; that the pauper replied he would think of it; that two days afterwards K. came and renewed his proposition, when the pauper said he would go, and did go the next morning.

Also *held*, that it was competent for such witnesses to testify whether or not, at the time the pauper thus left the witness's house, there was any understanding between the witness and the pauper, or any authority given by the witness to the pauper, that the latter might return to the witness's house.

But *held*, also, that it was not competent to prove the declarations of K. (who was not a witness) as to his understanding of the nature of the pauper's residence with him.

When a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period.

Nor does the law presume that he has no such intention.

But it leaves it to the jury to determine upon all the evidential circumstances and probabilities in the case, what his intention in fact was.

It is not necessary that there should be any distinct declaration of intention proved; but it may be latent in the mind of the pauper.

Where the original settlement of a pauper is admitted to have been in the defendant town, and in setting up a subsequent five years' continuous residence, between the years of 1860 and 1867, in another town, a personal absence of three weeks in March, 1863, appears, it is incumbent upon the defendants to satisfy the jury, from all the circumstances and probabilities in the case, that when he left he did not intend to abandon it as his home, but did intend to retain his connection with the town as his home during his absence, and to return to it, as such, after accomplishing the purpose of his absence.

Exceptions will not be sustained for declining to give certain requested instructions as matters of law, when in effect they would decide questions properly belonging to the jury.

On Exceptions.

Assumpsit to recover pauper supplies.

The declaration contained a special count only, as follows:

For that one John Washburn, a person having his legal settlement in the town of Hebron, fell into distress in said town of Ripley on Dec. 2, 1867, and then and there stood in need of immediate support and relief; and the plaintiffs, by their overseers of the poor, then and there, and from that time to Nov. 24, 1869, furnished and continued to furnish the said John Washburn with food, clothing, medical aid, and nursing and attendance, board, necessaries, labor and support, to the amount in all of four hundred and nineteen dollars; and the plaintiffs aver that at the time the said John Washburn so fell into distress and stood in need of immediate relief, and was relieved and supported as above stated, his legal settlement was in said town of Hebron; that within three months after said Washburn so fell into distress and was relieved by the plaintiffs, they, by their overseers of the poor, gave written notice to the overseers of the poor of said Hebron of the fact, that said Washburn had so fallen into distress in said town of Ripley and stood in need of immediate relief and support, and that the plaintiffs had furnished said relief and support; that said Washburn had a legal settlement in said town of Hebron, and that said overseers of the poor of said Hebron were requested to pay for the support already rendered, and remove him to their own town and relieve the plaintiffs from further expense and charge on his account.

And the plaintiffs further aver, that no answer was returned to their said notice within two months after the same was received by the overseers of the poor of the town of Hebron; by reason whereof the said town of Hebron is barred from contesting the settlement of said Washburn. And by reason of the premises the said town of Hebron have become liable to the plaintiffs, and, in consideration thereof, promised to pay them the sum expended as aforesaid on demand.

Writ dated Feb. 5, 1870. *Ad damnum*, $500.

The action came on for trial at the December term, 1871, when the plaintiffs obtained leave, against defendants' objections, to amend the declaration by substituting the year 1867, as the term when the pauper fell into distress, in place of 1868, as alleged.

To the ruling allowing the amendment, the defendants alleged exceptions.

The case was thereupon continued on motion of the defendants.

At the following March term the case came on for trial.

The only question submitted to the jury was that of settlement.

The defendants admitted that the pauper had his settlement in their town prior to 1830, but claimed that he had gained a settlement in the plaintiff town between March, 1860, and Dec. 2, 1867, when he fell into distress and was relieved by the plaintiffs, and introduced testimony tending to show that he did have an uninterrupted residence in Ripley during that time.

The plaintiffs claimed that the pauper's residence was interrupted during that period, and introduced evidence tending to prove, that in March, 1863, he abandoned Ripley and went to reside with one Kennedy, in Dexter, where he remained more than three weeks; that again in September, 1863, he abandoned Ripley and went to live with one Stafford, in St. Albans, where he continued a few days; that he had no home save where he worked, and no effects save the clothes he wore; and that he left nothing of his in Ripley during said absences.

The defendants denied that he abandoned his residence in Ripley; that the absences were temporary, that in each instance he returned to Ripley as soon as the purpose of his absence was accomplished, and that the continuity of his residence in Ripley was not thereby broken. One Seavey, called by the plaintiffs, testified substantially, that Washburn came to witness's house in Ripley, first of March, 1863, and wanted to stay a spell; that witness told him that witness's wife had no help; that wife's mother was sick and needed wife's care; that witness was then supporting a town pauper under contract; that witness refused to keep Washburn but a short time; and that Washburn had no bundle of any kind with him, and no clothes except what he had on.

That witness lived about eighty rods from one Kennedy who lived in Dexter; that when Washburn had been at witness's house five or six days, Kennedy came and proposed to Washburn to go and live with him, and that if he would go, he (K.) would give Washburn a home as long as he wanted one, whereupon Washburn replied that he would think of it a short time; that two days afterward, Kennedy came again and asked Washburn if he would go and live with him, repeating the former proposition and adding, that if Washburn would go, he should have a home at Kennedy's house as long as K. lived; and that Washburn replied he would go, and did go the next morning.

That when Washburn left witness's house, and went to Kennedy's, there was no understanding between witness and Washburn that the latter might return to witness's house.

That he heard a proposition made to Washburn, at witness's house, by Stafford, that he wanted some one to take care of his barn; that he, Stafford, could not give Washburn any rum, but that Stafford's wife could give him three drinks a day; that Washburn replied that he would go and stay through the winter, and went the next morning; and that witness did not see Washburn back in Ripley until the next spring.

Seavey's wife testified to the same as her husband substantially.

The testimony of Seavey and his wife was admitted against the seasonable objection of the defendants.

The defendants offered, by depositions and witnesses, to prove by the declarations of Kennedy while Washburn was at his house in March, 1863, the nature of Washburn's residence with him, but the presiding justice excluded the testimony.

Among other requested instructions which were given, the defendants asked the presiding justice to give the following:

1. That if the jury find Washburn had a residence established in Ripley, in order to break that residence, they must find that he departed from Ripley with intention to abandon.

2. That in our pauper laws 'intention' does not necessarily imply thought or mental action, but may be understood as implying

those circumstances and relations or state of feeling which have a tendency to lead a person to remain in, abandon, or return to a place of residence.

3. That if from the consideration of Washburn's circumstances, relations, and conditions,—his habits and associations, his object in going, and the duration of his stay, the jury should find it reasonable to expect he would return to Ripley, and should find that he did return accordingly, they should find that he so intended at the time of his departure, and that the continuity of his residence in Ripley was not broken.

4. That if they should find that Washburn left Ripley for a temporary purpose, and when that purpose, was accomplished he returned to Ripley, they should find he intended to so return when he left Ripley and the residence would not thereby be broken.

The court declined to give the instructions except as given in the charge, but did instruct the jury,

That if a man, in removing from his place of residence, takes all his goods with him, if a man of family takes his family and household goods, all connected with him; then, in order to retain his home where he left, it must be made apparent that he did not intend to change his home, but to retain it while absent, and to return to it when his temporary purpose was accomplished. That it is not necessary there should be a distinct declaration of such purpose, that the purpose or intention may be latent in the mind of the party, and that the jury should determine what the actual purpose and intention was from all the evidence.

The point to be established is, did he go away and remove for any length of time, and if so, did he intend to come back when he left and retain the intention during his absence? For a man to be resident, in the eye of the law, of a town where he is not, where his family is not, and where he has nothing left, the jury must be satisfied that when he went away and thus took up his residence, as it were, that he intended, when he went away, that it was his purpose not to abandon the town, but actually intended to return to it when this temporary purpose was accomplished.

Where a temporary absence is shown, where a man actually takes away all that he has with him, and stays a longer or shorter time in order to keep his residence in the town he left, it must be shown to your satisfaction that he intended to retain a residence in the town, and to go back to it as his home.

You have a right to consider what would be reasonable to expect from all the circumstances would be his intention, when that intention is not otherwise clearly proved. "

The verdict was for the plaintiff.

To which admission and exclusion of testimony, instructions and refusals to instruct, the defendants alleged exceptions.

A. Black, for the defendants.

1. The amendment allowed the plaintiff to prove and recover for supplies furnished from Dec. 2, 1867, to Nov. 24, 1869, instead of from Dec. 2, 1868, extending the time an entire year, enlarging the claim originally declared on and thereby introducing a new cause of action, which was not allowable. *Robinson* v. *Miller*, 37 Maine, 312; *Wyman* v. *Kilgore*, 47 Maine, 184; *Slater* v. *Nason*, 15 Pick. 345; R. S., c. 82, § 9; 5th Rule of Court; *Parkman* v. *Nutting*, 59 Maine, 398. There is no bill of particulars, and *prima facie*, an enlargement of the time is an enlargement of the claim, since supplies were furnished between Dec. 2, 1867, and Dec. 2, 1868.

It is the practice to set out in gross a larger sum than is expected to be proved, and the gross sum affords no information of the real amount claimed. The only limit is the time.

The conversations between Kennedy and Washburn and Stafford and Washburn were not *res gestæ*. Washburn's declarations to Kennedy and Stafford were not admissible as facts any more than those with Seavey. Declarations as original evidence are admitted without regard to their truth or falsity, and are not to be used as testimony to prove or disprove the case. They are admitted with reference to their effect upon third persons in influencing their conduct, when it is at issue, or to show mental condition, be-

lief, etc., of the declarant, but not where the declarations themselves are to be used as proof in the case. The object of them was to prove Washburn's intention. If false the plaintiffs would no longer consider them worth proving. The intrinsic weakness of hearsay testimony, its incompetency to satisfy the mind as to the existence of a fact, and the frauds which may be practiced under its cover which have induced its exclusion except in certain instances, are equally applicable to their conversations. 1 Greenl. on Ev., § 99; *Smith* v. *Coffin*, 18 Maine, 157.

The declarations of Kennedy while Washburn was at his house, showed the nature and purpose of his stay. The declarations of Washburn, the other party to the conversations, were admissible when explanatory of his intention in staying at Kennedy's as *res gestæ*. 1 Greenl. on Ev., § 108; *Bangor* v. *Brown*, 47 Maine, 100.

Where an oral contract as that between Washburn and Kennedy is being executed, the declarations of either party to it are admissible as *res gestæ*. 1 Greenl. on Ev., § 108; *Baring* v. *Calais*, 11 Maine, 463.

2. The second request should have been given. 'Intention,' as generally used, is a synonym for mental action, design, purpose; while in a majority of cases under our pauper law, it means those attachments, associations, and feelings which would lead a pauper to form an active intent, if he should give the matter any thought. No person as he daily goes from his house to place of business forms a real intention to return to it. People hardly ever think about returning. Yet it cannot be said they had no intention in the premises. Juries may commit great errors unless they are at liberty to infer intention from all the circumstances.

The language in the third and fourth requests may be too strong, but the meaning is evident. Leaving for a temporary purpose, implies an intent to return.

A residence once established is presumed to continue till a change is proved. *N. Yarmouth* v. *W. Gardner*, 58 Maine, 207, made no change in the law in this respect. The burden of prov-

ing the want of intention to return remains upon the party alleging the abandonment, and the *onus* is not changed until a *prima facie* case of such want of intention is made out.

If the instruction that 'where a temporary absence is shown' and the pauper 'stays a longer or shorter time,' it must be shown to the satisfaction of the jury that he intended to return, or the residence is broken, is the law, it will be difficult to fix the settlement of persons without family and property. It gives the town alleging abandonment an advantage amounting to positive injustice.

The jury might well consider that 'purpose,' as used in the instructions meant mental activity.

D. D. Stewart, for the plaintiffs.

The amendment was allowable. *Brewer* v. *E. Machias*, 27 Maine, 494; *Cummings* v. *Buckfield B. R. R. Co.*, 35 Maine, 480; *Haynes* v. *Morgan*, 3 Mass. 210; *Perrin* v. *Keene*, 19 Maine, 335; *Barker* v. *Burgess*, 3 Met. 274; *Solon* v. *Perry*, 54 Maine, 493-496; *McVicker* v. *Budy*, 31 Maine, 314.

The amendment was unnecessary, the time being within the statute of limitations. 1 Chit. Pl. 257; *Purcell* v. *McNamara* 9 East, 162; *Coxon* v. *Lyon*, 2 Camp. 307, 308; *Phillips* v. *Shaw*, 4 B. & Ald. 435; *Miller* v. *Walker*, 2 Saund. 5 (note); *Pierce* v. *Pickens*, 16 Mass. 472; *Little* v. *Blunt*, 16 Pick. 365. The liability of the defendants was implied by law upon proof of certain distinct facts, one of which was the falling into distress of the pauper. Exactly when that was, was wholly immaterial if before suit brought and within statute of limitations. *Moore* v. *Boyd*, 24 Maine, 242.

KENT, J. There are two bills of exceptions in this case, presented and allowed at different terms. The first relates exclusively to the allowance of an amendment of the declaration. The suit is to recover a sum named for the support of a pauper. The allegation in the declaration was, that the pauper fell into distress on the second day of December, A. D. 1868. The plaintiffs moved

to amend by inserting the year 1867, as the time when the pauper fell into distress. The judge overruled the objection made by the defendants and allowed the amendment, and granted a continuance at the motion of the defendants. The defendants except to the allowance of the amendment.

The exception can only be sustained by establishing the proposition, that it was such an amendment as could not be legally authorized by the presiding judge. Or, in other words, that it was beyond the power of the judge to grant it under any state of facts.

The first question is, whether this allegation of a particular day, on which the pauper fell into distress, is one that the plaintiffs are bound to prove, exactly as laid in the declaration.

The action is assumpsit, on an implied contract. It seems to be well settled, by a long series of decisions, that while an allegation of time is necessary in all declarations on a promise, it is not necessary to prove the day as alleged, except in case of the date of a written contract, named as bearing a particular date. In other cases, proof of the facts upon which the plaintiff rely, is admissible and sufficient if within the time of the statute of limitations.

In the case of *Little* v. *Blunt*, 16 Pick. 365. Mr. Justice Wilde, who was eminent as a pleader of the old school, says, 'The general rule is, that in all torts and parol contracts, the day when the tort is alleged to have been committed, or the contract made, is not material; and if the defendant makes it material by his plea, the plaintiff may reply another day, and it will be no departure, and the same principle applies to a case where it becomes necessary to prove when a contract was made, and it does not agree with the time alleged in the declaration.'

Chitty states the rule in similar terms, and concludes thus: 'In assumpsit upon a contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove that the contract, whether it be express or implied, was made at any other time.' He also says that 'the declaration must, in general, state a time when every material or traversable fact happened. The statement of the real or precise time, however, is not necessary

even in criminal cases, unless it constitutes a material part of the contract declared upon, or unless the date of a written contract or instrument is professed to be described. 1 Chitty on Pl., 257; *Coxon* v. *Lyon*, 2 Camp. 307; *Phillips* v. *Shaw*, 4 B. & Ald. 435, where it was held that where there is an allegation of a substantive matter, going to make up the necessary points of the case, and not a mere description of a record or paper, the allegation of time is immaterial, even when clearly erroneous. *Miller* v. *Walker*, 2 Saund. 5, (note).

In the case before us, the essential allegations to sustain the implied assumpsit, are these. That the person named fell into distress and was unable to provide for himself; that the plaintiffs furnished supplies to him as a pauper, and the amount of the same; that due notice was given to defendants; and that the pauper at the time had his legal settlement in the defendant town. The material points are, pauperism—needed supplies furnished—notice—legal settlement. These being established, the law holds the defendants as on an implied promise to pay the amount reasonably incurred for such aid and relief. Time is not essential, provided it is within the statute of limitations applicable to such a case. The action is instituted to recover for supplies furnished a pauper. The time when he fell into distress is to be proved by parol, and therefore does not come within the exception of the date of a written instrument. The allegation is of a substantive matter, going to make up the necessary points of the case, and appears to be within the cases cited and the rule of the common law. If the time is not material within this law, the amendment could be allowed, although not absolutely necessary.

But it is farther objected that the amendment enlarged the claim, as stated originally in the writ, and, therefore, could not legally be allowed. The claim, as stated, is for four hundred and nineteen dollars, expended for the relief of this pauper. No account is annexed and no specifications of dates or items. The claim is not enlarged by the amendment. It still stands for four hundred and nineteen dollars only. Whether furnished one year or another,

all that can be recovered in this suit is the amount furnished within the time of the statute of limitations.

It is true that the declaration, as it was drawn, stated that the pauper fell into distress on the second day of December, 1868, and that the plaintiffs then and there, and from that date to Nov. 24, 1869, furnished and continued to furnish supplies. But if the time was immaterial and could be amended, the subsequent allegations must follow the amendment and conform to it.

It is not a case where an account is annexed to the writ, containing specific items, and dates and amount, and an attempt is made to enlarge the bill by the addition of new items, or of items of an earlier date. The claim here is for a sum named, and no request to enlarge it. We have seen that the claim is, in substance, for supplies to a pauper, within the time limited by statute. The exact day when they were first furnished, need not be proved as alleged. Of course the time when the subsequent supplies were furnished must follow the same rule.

The case of *Parkman* v. *Nutting*, 59 Maine, 398, was one where the account annexed was for items of cash beginning Jan. 15, 1864, and the specification in the writ was, that the plaintiffs claim to prove and recover 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 asked to amend by enlarging the claim, so as to enable them to recover amounts received since Jan. 1, 1863. The court held that this manifestly introduced a new cause of action, as it would enable the plaintiffs to recover, not only for all they had claimed in the writ, *i. e.* all monies received after January, 1864, but in addition thereto, monies not claimed or covered by the declarations and specifications. The amendment was, therefore, not allowed. The court decided that it was introducing a new cause of action, and, being such, it could not be allowed. But here no new cause of action is introduced and no enlargement of the real claim made, which is for a specified sum for pauper supplies.

The first exceptions must be overruled.

The case was tried at the next term, and another bill of exceptions was then allowed, and is now to be considered.

The first exception relates to the admission of certain testimony. The great question in the case was whether the pauper had had his home for five consecutive years in Ripley; and the decision of this question turned mainly on the facts connected with the commencement of his residence, and on those relating to two undisputed absences, during the five years. Jonathan I. Seavy, called by plaintiffs, was allowed to testify against the objection of defendants, in substance, that the pauper came to his house in March, 1863, and wanted to stay a spell, but witness declined to allow him to stay but a short time, stating to him the condition of his family, as the reason for thus declining. He also stated that he brought nothing with him, except the clothes he had on.

This evidence was pertinent to the issue, and bore directly upon the question of the nature, extent, and character of the pauper's residence in Ripley. It was not hearsay, nor mere declarations, but evidence of facts, important and legitimate, going to prove the character of the residence.

The same witness, under a like objection, was allowed to testify as to a bargain which he heard made between the pauper and one Kennedy. The case finds that the pauper, in the same month of March, 1863, went from Ripley to Dexter to reside with Kennedy, where he remained about three weeks. It was claimed that this residence broke the continuity of the five years. It was, therefore, an important point to be determined, whether it was of such a character and with such intentions, and accompanied by such facts as showed that it did thus break in upon the five years of continued residence in Ripley.

The witness testified that he heard Kennedy, at the house of witness, and whilst pauper was staying there, make a proposition to the pauper to go and live with him, and if he would he would give him a home there as long as he wanted one. The pauper said he would think of it for a short time. Two days afterwards Kennedy came again and renewed the same proposition, and Washburn (the pauper), said he would go, and he did go the next morning.

This is but evidence of a contract made between two parties —distinct and definite. It is not hearsay, nor mere naked declaration. It is certainly unobjectionable to prove under what agreement of hire or employment, or terms as to time or as to board, a pauper goes into a town, where the very question is as to the nature of his residence there, and whether temporary or not.

For the same reasons, we see no objection to the question to the witness, whether at the time the pauper left his house there was any understanding between them, and any authority given from witness to him that he might return to his house. The answer being in the negative, the evidence negatived the existence of a fact, which, if left in doubt or to inference, might go far to sustain the proposition that the pauper intended to return when he left.

There was a second absence at one Safford's in St. Albans, and the witness testified to a similar kind of agreement between the pauper and Safford, before going, as to terms, etc. We see no distinction in the rule of law to be applied to the two cases. They both relate to an actual fact and bargain. The testimony of Mrs. Seavey simply confirms that of her husband, and comes within the same principles.

The defendants, on their part, offered proof of certain declarations of Kennedy, the man with whom the pauper lived in Dexter. They were offered as 'tending to show the purpose and intent of his being there.' They were excluded. They were mere naked declarations of a third party, not offered to contradict him, for it does not appear that he was a witness. They were not evidence of any distinct fact or bargain, but mere declarations of this third party as to his understanding of the nature of the pauper's residence with him.

The pauper was not present. Kennedy might have been a witness for either party. His naked declarations could not be given, unaccompanied by any act.

The exceptions as to the admission and exclusion of evidence must be overruled.

The other portion of this bill of exceptions, relates to the ruling

of the judge at the trial on the question of residence. He instructed the jury that 'if a man, in removing from his place of residence,—takes all his goods with him,—if a man of family takes his family and household goods, all connected with him, then, in order to retain his home there while absent, it must be made apparent that he did not intend to change his home, but to retain it while absent, and to return to it when his temporary purpose was accomplished. That it is not necessary that there should be a distinct declaration of such purpose; that the purpose or intention may be latent in the mind of the party, and that the jury should determine what the actual purpose and intention were from all the evidence. The point to be established is, did he go away and remain for any length of time, and if so, did he intend to come back when he left and retain that intention during his absence; and this must be shown to the satisfaction of the jury.'

The same idea in substance was repeated several times, and the final instruction was, that 'where a temporary absence is shown, when the man actually takes away with him all that he has, and stays a longer or shorter time, in order to keep his residence in the town he left, it must be shown to your satisfaction that he intended to retain a residence in the town and to go back to it as his home.

In this case, the defendants having admitted that the pauper had originally a legal settlement in their town, that settlement remained until another was acquired. They undertook to establish this new settlement in the plaintiff town, by showing that the pauper had 'his home in that town for five successive years.' It was not denied that more than five years had elapsed, after his first coming into Ripley. The question was, whether he had had his home there uninterruptedly for that time. It was not controverted that at two different times within the five years he had been absent for some weeks in all, taking with him all his possessions, and having no family or any house of his own, nor any place to which he had a right to return as a home, and that he had no home save where he worked, and no effects save the clothes he wore.

The defendants having undertaken to overcome the effect of the admission of a prior legal settlement, they were bound to satisfy the jury that the pauper had his home in Ripley for an unbroken, continuous term of five years. If broken for a month or a day, it was not within the statute requirement.

The rulings of the court become important as bearing on the point of the nature and effect of such absences, and were made as applicable to the facts developed.

When a man leaves a town where he has resided and goes away, and is no longer personally residing there, and leaves no family, nor property, nor place to which he has any claim, can he yet retain a home in the town he has left, and if he can, what is the criterion or test or fact that thus holds him to the place where he is not in fact dwelling?

After all the decisions on this vexed point, is not the solution to be found in the proposition, that, notwithstanding all these *indicia* usually conclusive of abandonment, the home may still remain, if it is made to appear that the person when he left, did not intend to abandon it as his home, but did intend to retain his connection with the town as his home, during his temporary absence, and to return to it, as such, after accomplishing his purpose. It is the *animus revertendi* whilst it is operative and controlling, that keeps him a real, although unseen resident. It is the chain that binds him still to the town, although as a wanderer—

'He drags at each remove a lengthening chain.'

But it must be a chain—one end of which remains fixed in the spot from which he started. And if one link be broken by a distinct abandonment of the intention for a day,

'Tenth or ten thousandth breaks the chain alike.'

And this link may be broken at either end, at any moment within the five years; the intention to return may be abandoned by mental action, and without any return to the place from which he removed. *Hampden* v. *Levant*, 59 Maine, 557.

When a man has thus left a town, and has, to human view, no habitation there, and no visible hold on it, the law does not assume, or presume that he intends a temporary absence, and has a continuing purpose to retain it as his home, and to return to it as his home at some future period. Nor does the law assume that he has no such intention as a legal presumption.

But it leaves to the jury to determine, upon all the evidence and all the circumstances and all the probabilities, what his intention and purpose were in fact. The party setting up the five years' continuous residence, is bound to prove it. This is undoubted. If, whilst attempting to prove it a break in the actual residence is shown, it is for that party to establish such a state of facts as shows that the legal home remained there, notwithstanding the absence. In other words, the party is bound to make out his case, and if obstacles intervene, he is the one to remove them. The other party is not bound to prove a negative, or to show that an actual removal was no removal at all.

The rulings seem to be in accordance with the recent decision of this court in *North Yarmouth* v. *West Gardiner*, 58 Maine, 207, in which most of the cases are cited and commented on. It is unnecessary to discuss them anew.

The defendants requested certain instructions, which were not given in the language of the requests.

The first and last requests as to abandonment and intention have been sufficiently considered.

The second request asked for an instruction to the jury, 'that in our pauper law, intention does not necessarily imply mental action, but may be understood as implying those circumstances, and relations, or state of feelings, which have a tendency to lead a person to remain in, abandon, or return to a place of residence.' And 'that if, from the consideration of the pauper's circumstances relations, and conditions, his habits and associations, his object in going, and the duration of his stay, the jury should find it reasonable to expect he would return to Ripley, and should find that he did return accordingly, they should find that he so intended, at the time

of his departure, and that the continuity of his residence in Ripley was not broken.'

The judge did so far comply with these requests, as to say to the jury, that there need not be any distinct declaration of intention proved; that it may be latent in the mind, and that the jury should determine what the actual purpose and intention were from all the evidence; and that the jury had a right to consider what it would be reasonable to expect, from all the circumstances, would be his intention, when that intention is not otherwise clearly proved.

We think these instructions went as far in favor of the defendants as established principles would justify.

The court could not properly give the requested instructions as matter of law binding on the jury, and in effect deciding questions properly belonging to the jury.

All the exceptions in the case are overruled.

Judgment on the verdict.

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

JOSEPH ATKINSON, administrator, *vs.* GREENLEAF B. WHITE and another.

SAME, *vs.* JAMES BRIDGE and another.

Judgment—when it may be pleaded in bar.

A judgment in an action of trover against the defendants' warrantee, rendered upon a trial involving only the defendants' title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendants themselves, involving the same issue, and to be supported by the same testimony.

Thus, the owner of a lot of logs conveyed them to the defendants by a mortgage bill of sale, and subsequently, by an absolute bill of sale, to the plaintiff's intestate. Still later, the defendants sold a portion of the logs and warranted the title to one Conner, who converted them; whereupon the plaintiff sued him in trover for their value. At the trial, the only question tried was the strength of the defendants' title under the mortgage as against that of the plaintiff's intestate under the absolute bill, and the defendant recovered judgment. In this action, involving precisely the same question, and depending upon the same testimony; *Held*, That the judgment in favor of Conner was a bar.

THE SECOND case was tried in Kennebec county.

The cases are sufficiently stated in the opinion.

Lancaster and *Wm. Atkinson*, for the plaintiff.

J. S. Abbott, for the defendants.

DANFORTH, J. One J. W. Larry was the owner of certain logs which he sold by a mortgage bill of sale to the defendants. He subsequently sold the same logs to the plaintiff's intestate by an absolute bill of sale. It is admitted that the only question in dispute in this action is whether these defendants, by virtue of their mortgage, acquired a good title to these logs as against the plaintiff's intestate.

After their purchase, these defendants sold a portion of the logs, warranting their title, to one Wm. Conner, who converted the same to his own use, and for so doing, this plaintiff, as administrator, prosecuted an action of trover against him to recover their value. After a full hearing, final judgment was rendered on the merits of the case in favor of the defendant. It is admitted, that, in this last-named case, the only question tried was precisely the same as the one involved in the case at bar, viz., the title of these defendants as against that of the plaintiff's intestate.

This title is fully sustained by the judgment. The present defendants pleaded this judgment in bar, and the presiding judge sustained the plea. Was this ruling authorized by law? That the question involved in each suit is precisely the same, and to be proved by the same testimony is beyond a doubt. It is equally clear that the plaintiff is the same, and that he has had his day in court. He has had a full hearing upon the law and fact involved in the very question he now proposes to try again in another suit. He has had every privilege the law allows him, unless he is entitled to another hearing, simply because he is now attempting to enforce his claim against another defendant in name, indeed, but the same in interest.

Ordinarily judgments have been held conclusive only between parties and their privies, and only when both parties are bound.

But this rule is subject to exceptions; as in the case of an alleged trespass by two persons, when one acts as servant of the other, and by his command. Such persons are not privies, and yet if the plaintiff fails in his action against one, he is precluded by that judgment from maintaining an action for the same trespass against the other. *Emery* v. *Fowler,* 39 Maine, 326.

So, too, if an indorser of a note fails in a suit against the sureties, the judgment in their favor will protect them against the suit of any other indorser. *Dunham* v. *Giles*, 52 Maine, 206.

In *Emery* v. *Fowler*, above cited, on page 329, Shepley, C. J., says: 'To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony.' In *Dunham* v. *Giles*, above cited, on page 208, Appleton, C. J., says: 'Their (the sureties) rights and liabilities have been once judicially determined in a suit by the indorser of the note against them, and cannot again be called in controversy. If it were not so, they might be harrassed by as many suits as there should happen to be indorsers.' These cases, and others of a like character, which might be cited, seem to settle the principle that where a party has once tried a question in one suit, he shall not, without regard to mutual estoppel, again try the same question, involving the same testimony in another suit. On this principle the ruling in the case at bar is right. The defendants here were the defendants in interest in the suit against Conner.

In that suit, the validity of their title was the only question involved. Precisely the same question, depending upon the same testimony, is in dispute in this. The plaintiff being the same in both suits, if the judgment in the former is not conclusive upon him, he is allowed 'two trials for the same cause of action, to be proved by the same testimony.'

There is a broad distinction between the case at bar and those cases against joint trespassers, and those against principals and sureties in contracts. In the latter, though the trespass or contract may be the same, yet the liability of the several parties may rest upon entirely different principles, and sustained by different testimony, while in the former the question at issue involves the same principles, and the same testimony as those settled in the judgment pleaded, while the fact that the defendants are warranted of their title, is immaterial to their case.

But is it quite clear that the defendants in this suit were not parties to the former, so far as to make the estoppel mutual? They were parties in interest, and as such had a right to assume the defense of that, and be heard therein. Besides, the nominal defendant in that had a legal right to notify them of its pendency, and in either case they would be bound by the judgment, or, if Conner chose to defend the suit against him, it was for the benefit of these defendants, and we now find them adopting that defense, whether their own or Conner's, and attempting to avail themselves of it in the defense of this suit. It is true that the case does not find that they actually assumed that defense, nor does it find that they did not; while, as a matter of inference, all the facts lead to the conclusion that they did.

But if we hold that the old principle, that 'estoppels must be mutual,' is applicable to this case, ought we to be bound by it any longer?

That law was adopted when parties could not be witnesses, and from a very tender care of suitors, lest by possibility injustice might be done. For it is said, and this appears to be the only reason on which the law is founded, that 'if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust.'

Since the statute, making parties and all interested persons witnesses, this foundation has been taken away. No danger of injustice from that source now exists; and the reason of the law having

ceased, why should the law be retained? It should be remembered that this is not a question in which these parties alone have an interest. Other suitors, waiting for their turn should not be delayed by repeated trials of the same question, not required to secure justice. Public policy also requires that there should be an end of litigation. If this matter has been once adjudicated upon, even the defendants themselves cannot waive that adjudication if they would. It has become the law of the case, and binding upon all parties who have had an opportunity to be heard thereon.

We can see no possible ground of suspicion even of injustice to the plaintiff in holding the former judgment against him conclusive.

Exceptions overruled.

Nonsuit confirmed.

CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred. APPLETON, C. J., and KENT, J., did not concur.

CUTTING, J. It appears that both parties claim title to the lumber in controversy indirectly under one J. W. Larry, who on April 6, 1850, mortgaged this and other lumber, being his whole previous winter's operation, to White & Norris, who manufactured a part at Kendall's Mills in 1851. Sold a part to Wm. Conner, Sept. 27, 1851, and the remainder to Bridge & Sturgis, the defendants, April 2, 1852.

That the same Larry, on Oct. 10, 1850, subsequent to his mortgage to White & Norris, conveyed the same lumber to one Parker Sheldon, who on June 6, 1851, sold the same to Parker C. Sheldon, the plaintiff's intestate.

Had the mortgage to White & Norris been duly recorded, many of the questions which have since arisen, might have been avoided, greatly to the advantage of the many litigating defendants. But in the suit *Parker Sheldon* (the official predecessor of the present plaintiff) v. *William Conner*, 48 Maine, 584, it was decided that actual knowledge was not equivalent to a record; hence arises the controversy as to the actual possession under the mortgage, and in

a subsequent trial of the same case the plaintiff probably would have prevailed, had not the defendant, Conner, proved such possession to the satisfaction of the jury.

In 56 Maine, 546, a petition for a review of the aforesaid action was presented to the court, alleging that one William Lisherness, a witness on the former trial, had testified falsely as to the possession taken under the mortgage. The opinion of the court, drawn by Judge DICKERSON, recites very fully the processes and proceedings previously had, and comes to the conclusion that the petition should be denied. This case is referred to, as it may have some bearing upon the present decision; and it will be perceived, that the petition was denied principally upon the ground of inexcusable neglect in the discovery of the alleged new testimony.

In *Atkinson* v. *White* (a case not as yet reported), the defendants plead in bar the judgment in *Atkinson* v. *Conner*, and that plea was sustained by a majority of this court.

In the case at bar, there is substantially the same plea and an admission by the plaintiff of its truth; 'but he claimed that at the trial of the action against Conner, William Lisherness, a witness for defendant, was guilty of perjury.' And this claim is all that distinguishes the one case from the other.

But so long as the judgment in the Conner case stands, so long will stand these pleas in bar. The petition for a review was aimed at the Conner judgment, but failed, and that judgment remains intact, and so must the pleas. This is the only question of law which this case presents, and, according to the agreement of the parties, there must be *Judgment for the defendants.*

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

BENIAH C. GOODWIN, administrator, *vs.* WILLIAM NYE and others.

Municipal officers—authority of, to locate school-house.

The municipal officers of a town have no authority to 'decide where a school-house shall be placed,' until 'more than one third of the voters present and voting' at a district meeting, legally called for the purpose, shall have objected to the place voted by the majority.

The simple adjournment for one month of a district meeting, called for the purpose of locating a school-house, lays no foundation for the jurisdiction of the municipal officers in the premises.

ON REPORT.

TRESPASS QUARE CLAUSUM.

It was admitted that a trespass was committed by the defendants [a building committee] as alleged in the writ, unless they show that the premises had been legally designated, laid out, and taken for a school-house lot for school district No. 2, in Mercer.

The view taken by the court, renders a report of the following facts only, necessary.

On Aug. 10, 1871, a meeting of the district was notified, by the agent, to be held on Aug. 18, 1871, 'to see if the said district will vote to select a suitable lot of land to build or put a new school-house thereon,' etc.

At a meeting held Aug. 18, in accordance with the previous call, without voting upon the article in relation to selecting a site for a school-house, the district 'voted to adjourn to Sept. 18, 1871.' And at the adjourned meeting, the district voted, *nem. con.*, 'to select the lot on which the school-house stands and has stood for the last twenty years,' etc.

It appeared that on Aug. 31, 1871, the selectmen issued a warrant for a meeting of the district, upon the application of three persons named, 'legal voters in said district,' to be held Aug. 28, 1871, 'for the purpose of hearing the inhabitants of said district, on the subject of the disagreement in respect to a suitable place to

be selected for the erection of a school-house in said district.' That after the hearing, the selectmen selected a place upon the land of Hannibal Ingalls (plaintiff's intestate, since deceased), and proceeded to locate the lot and fix the damages. That Ingalls refused to sell the land, and after tender of the damages the defendants, as building committee, built a house upon the lot thus designated, which the district occupied during the winter of 1871-2.

The full court to enter such judgment as the law and facts required.

S. D. Lindsey, for the plaintiff.

Hiram Knowlton, for the defendants.

The court do not hold school-districts and towns to such strict compliance with the statute, as other parties. *Kellar* v. *Savage*, 17 Maine, 447; *Mussey* v. *White*, 3 Greenl. 301; *Chapman* v. *Lincoln*, 56 Maine, 394; *Austin* v. *York*, 57 Maine, 304; *Wells* v. *Battelle*, 11 Mass. 481.

The district refused by adjourning. Refusing to act is equivalent to an absolute vote refusing to locate. *Blake* v. *Sturtevant*, 12 N. H. 73.

The subsequent action of the district shows the determination of the majority.

KENT, J. The defendants justify their entry on the lot in question, on the ground that, as they allege, the *locus in quo* had been legally laid out, located, and taken from the owner for a school-house lot, agreeably to the provisions of the R. S., c. 11. The only question before us is whether it has been thus taken. It is admitted, that, if taken, it was taken without the consent of the owner and against his declared will. In such case it is familiar law, that all the substantial requirements of the statute, conferring this power of eminent domain on a school district, must have been complied with, before the owner, objecting, can be dispossessed of his real estate.

The case, as presented to us, involves many facts and records

touching the proceedings of the school district, which on their face lead to the suspicion, at least, that the inhabitants of this district in Mercer are more anxious to save money than to advance the cause of education, or to secure the comfort of their children when at school. But these inferences cannot affect the right of the plaintiff's intestate to continue to hold his title to his lot of land. Has it been legally taken from him?

It is not contended that the district has, by vote, located a school-house on this lot. But the legislature has, very wisely, refused to leave the final determination of this and many other questions to a vote of the district, knowing well the unwillingness of some districts to raise or expend money for erecting or repairing such school-houses as the wants of the district require, or for purchasing suitable lots for them to stand upon. It has, therefore, given a *quasi* appeal from the district to the town, or its municipal officers, whenever it is apparent that the district is too careless or indifferent to do what the comfort of the children and the best interests of the cause of education require.

The first matter, where this appeal to the town is allowed, is where the district refuses to raise money for the purposes before alluded to, such as erecting or repairing school-houses, or purchasing land for the same, and other purposes specified in § 24, item 1. In such cases, where the refusal is to raise money, there seem to be two provisions, each providing for a distinct mode of appeal. 1. By § 27, where a minority, at any legal meeting of the district, are of the opinion that the majority are opposed to raising a sum sufficient for the purpose in question, any five or more voters may require of the municipal officers of the town to bring the question before the town at its next meeting, by an article in the warrant, and the town shall determine the matter effectually and finally, as provided in that section. This was the first provision that was made. In 1867 (R. S., c. 11, § 28), it was provided, that without any meeting of the district, the superintending school committee might testify to the municipal officers, that in their opinion the district unreasonably refuses or neglects to raise money for the

specified purposes, and that, thereupon, the town officers should insert an article in the warrant 'to see if the town will vote to raise money, in such school districts, for the above purposes.' And if raised, it is to be assessed and collected as if originally raised by the district. And the municipal officers shall appoint a committee to superintend the expenditure of the money.

These provisions, however, all relate to raising money and its expenditure. But there is another fruitful source of local trouble and disagreement, which often leads to bitter feuds and neighborhood quarrels. Where shall the school-house be located? And this is the question, which it has been found expedient also to remove from the final action of the district. But the mode is somewhat different, and the appeal is to a different tribunal.

The power 'to determine where the school-house shall be located' is, in the first instance, given directly and unqualifiedly to the district. Chap. 11, § 24, item 2.

The only qualification or limitation of this absolute right on this point of location is found in § 32. It provides 'that at any district meeting, called for the purpose of removing a school-house or locating one to be erected, if more that one-third of the voters present and voting object thereto, the clerk shall make a record of the facts, and the municipal officers on written application of any three or more of said voters, or any committee of the district, made within thirty days thereafterwards, shall, as soon as may be, appoint a time and place in the district to hear the parties, and give such notice as is required for a district meeting; and after such hearing, they may decide where the school-house shall be placed.' Some other provisions, as to certifying, and the duty of the district to erect or remove the school-house, follow in the same section.

Then in the next section, § 33, we find the authority to take land. 'When a location for the erection or removal of a school-house and necessary buildings has been legally designated, and the owner thereof refuses to sell or asks an unreasonable price for it in the

opinion of the municipal officers, they may lay out a school-house lot, not exceeding forty square rods, and appraise the damages,' etc.

It will be observed that a vote of two-thirds of the district is final, and no appeal lies. The location of the school-house is a matter peculiarly proper for the determination of the inhabitants of the district, and, therefore, the statute has given them this power. But it has limited this power to determine this question finally, when more than one-third of the voters present and voting object, and the clerk makes a record of the fact. This is the only case in which the question may be carried to another tribunal. But in such a case, the appeal is not to the town, but to the municipal officers. The town has no power to act, in any case, relating to this matter of the location of a school-house.

This seems to have been the understanding of the town and the school district in this case. The town acted on the matter of raising money, but not on the question of location. A district meeting was called to meet on the 18th of August, 1871, under a warrant which contained an article, 'to see if the district will vote to select a suitable lot of land to build or put a new school-house thereon.' The district met and voted to adjourn to Sept. 18, 1871. Thereupon, and without further action by the district, three persons, described as legal voters of the district, applied in writing to the municipal officers of the town to act on the matter and determine the location, under the provisions of § 32 before recited. These officers gave notice on the 21st day of August, that they would meet the legal voters of the district on the 28th of August, and they did meet in pursuance of the notice on that day, and decided that the location for the school-house should be on the lot in question, owned by the plaintiff's intestate. They also declared that the owner did refuse to sell the lot, and they thereupon appraised the damages.

The fundamental errors in their proceedings is, that there had been no foundation laid for their jurisdiction over the question, by any vote of the district. The district had a legal right to adjourn, as they did, for one month, without action or vote on the article in

the warrant. Even if at the adjournment a vote had been taken, and the votes of one-third of the voters had been recorded against it, as provided in the statute, it would have been too late to authorize their proceedings, which were all finished in August. But nothing of the kind was done. This lot, therefore, has never been legally designated and taken.

There are some other objections made, which it is unnecessary to consider.

It seems that the district has built a new school-house on this lot, suitable every way for the use of the district. It will be a source of regret if the district shall continue to refuse to act, or to act in such a manner as to impede the cause of education, and deprive their children of the use of a comfortable house. But we can only administer the law, applicable to the case before us. It is for those interested to determine what further measures they will take, if any, to secure this lot legally.

Judgment for the plaintiff for one dollar damages.

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

LIME ROCK F. & M. INS. CO. *vs.* PETER A. HEWETT and another.

Promissory note—what is not.

A written promise to pay the plaintiff insurance company, at a time specified, 'the sum of two hundred and twenty-five dollars, and such other sums as may arise as additional premium' on an insurance policy, is not a promissory note within the meaning of R. S., c. 81, § 83, which excepts from the six years' limitation 'actions on promissory notes signed in the presence of an attesting witness.'

ON EXCEPTIONS.

ASSUMPSIT on an instrument of the following tenor:

'Policy No. 4,838. 3-4 Sch. Justiana.

ROCKLAND, May 21st, 1853.

For value received, we promise to pay the Lime Rock Insurance Co. or order, fourteen months from date with interest after, the sum of two hundred and twenty-five dollars, and such other sums as may arise as additional Premium on said Policy.

P. A. HEWETT.

BENJ. CRANDON.

Attest:—C. R. MALLARD.'

Plea, general issue and statute of limitations.

The case was heard by the presiding judge with right to except.

The presiding judge found that the instrument was attested by Mallard, at the request of the officers of the insurance company, in the presence of Peter A. Hewett, the first signer; that the signature of Crandon was affixed some time afterwards; that the attention of Hewett was not called to the attestation by Mallard when he signed and Mallard witnessed it; that Crandon's attention was not called to the fact that the note had been attested when he signed it.

The presiding judge ruled,

That the note was not a witnessed note as required by law, and was barred by the statute of limitations; and ordered judgment for the defendants.

The plaintiffs alleged exceptions.

D. N. Mortland, for the plaintiffs.

O. G. Hall, for the defendants.

WALTON, J. The plaintiff contends that the ruling of the presiding judge that the instrument declared on 'was not a witnessed note as required by law,' and was, therefore, barred by the statute of limitations, was erroneous.

We think not. And in coming to this conclusion, it is unneces-

sary to inquire whether the instrument was or was not properly witnessed; for very clearly it was not a promissory note. One of the requisites of a promissory note is that it must be for a sum certain. This instrument was not for a sum certain. It was a promise to pay the sum of two hundred and twenty-five dollars, and such other sums as might arise as additional premium on an insurance policy. Such an instrument, although valid, and answering well the purpose for which it was made, is not a promissory note.

To make a written instrument a valid promissory note, says Judge Story, it must be for a fixed and certain amount. Therefore, if it be for a certain sum of money, with all other sums that may be due the payee, it is not a valid promissory note, even for the sum which it specifies. So a promise to pay a specified sum of money and interest, and also the demands of the sick-list club, is not a valid promissory note. So a written promise to pay a certain sum, first deducting thereout any interest or money which a third person might owe the maker, is not a good promissory note. So a promise to pay a certain sum, and all fines according to rule; or a written promise to pay certain sums in installments, a part to go in as a set-off for an order of R. to G., and the remainder of his debt from D. to him; or a written promise to pay one thousand dollars, or what might be due after deducting all advances and expenses, fall within the same principle, and are not valid as promissory notes. Story on Notes, § 20, and authorities there cited.

All actions of assumpsit, with a few exceptions, are barred by the statute of limitations unless commenced within six years. This was an action of assumpsit, and was not commenced within six years. It was, therefore, *prima-facie*, barred. But the plaintiff sought to avoid the bar by bringing his case within one of the exceptions. That exception is that the foregoing limitation shall not apply to actions on promissory notes signed in the presence of an attesting witness. The plaintiff claimed that the instrument declared on was a promissory note signed in the presence of an attesting witness. The presiding judge ruled that it 'was not a witnessed note as required by law,' and that it was barred by the

statute of limitations. The ruling was clearly correct; for without determining whether the instrument was or was not properly witnessed, it is certain that it was not a promissory note within the meaning of the law, and for that reason alone, if for no other, it did not come within the exception named.

*Exceptions overruled.**

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

STATE OF MAINE *vs.* WILMOT E. HUSSEY.

Criminal law—pleading.

An indictment should charge an offense in the words of the statute or in language equivalent thereto.

Thus 'unlawfully and maliciously' throwing down a gate, is not equivalent to 'wilfully and maliciously' doing it.

APPLETON, C. J. The R. S. of 1871, c. 127, § 7, provide, among other things, for the punishment of 'wilfully and maliciously' throwing down a gate.

The allegation in the indictment is that the defendant 'did unlawfully and maliciously throw down a certain gate,' etc.

These words do not describe the statute offense. The indictment should charge the offense in the words of the statute, or in words equivalent thereto. The statute uses the words 'wilfully and maliciously.' It does not regard them as identical in meaning, as both are used. When the statute makes the doing of an act 'wilfully and maliciously' criminal, it will not be sufficient in the indictment to charge that it was done 'feloniously, unlawfully, and

*See also, *Dodge* v. *Emerson*, 34 Maine, 96.—REP.

wilfully.' *State* v. *Gove*, 34 N. H. 511. So, charging an offense to have been committed 'feloniously, voluntarily, and maliciously,' instead of 'feloniously, unlawfully, and maliciously,' is bad. *Rex* v. *Reader*, 19 E. C. L., 367. Unlawfully doing a thing is not synonymous with wilfully doing it. A man may do many things wilfully, which are not unlawful, and he may do things unlawfully which are not wilfully done.

It was held in *Rex* v. *Davis*, 1 Leach, 556, that 'unlawfully and maliciously' is not equivalent to wilfully and maliciously, and that as 'wilfully and maliciously' were both mentioned in the statute as descriptive of the offense, both must be stated in the indictment.

Exceptions sustained.

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

TAPLEY, J., did not concur.

T. B. Reed, Att'y Gen'l for the State.

E. F. Webb, for the defendant.

SUSAN PETTINGILL, appellant, from decree of judge of probate, *vs.* HOWARD PETTINGILL, executor.

Executor—bond of—account of. Limitations—statute of. Waiver.

Where the person nominated as executor in a will was appointed and filed a bond approved by the judge of probate at the time the will was proved, neither the fact that the bond was not such in all respects as is required by the statute, nor that the executor neglected to return an inventory or settle an account in accordance with his bond, vitiates what he has rightfully done in the discharge of his trust, unless the opposite party has been prejudiced thereby.

Where the bond thus filed and approved was conditioned for the seasonable return of a true and perfect inventory, for faithful administration according to the will, and for the rendering of a just and true account of his administration within one year,—the statute provisions respecting the conditions required must be so far considered as only directory, that the executor may have the benefit of such of his official acts in the premises as are found conformable to the law and the will, and that the account which he has bound himself to render should be considered, and, so far as it is found correct and well vouched, allowed.

Pettingill *v.* Pettingill.

A testator devised to his wife ten dollars to be paid her by his executor in addition to the provision made for her support and maintenance during her natural life by his devisees, 'agreeably to the conditions of their bond for that purpose, which was to be in lieu of dower,' and charged all his property devised 'to the faithful performance of said bond, and in the event of the non-performance thereof, enough of his estate thus devised' to be sold by his executor as will provide such support. He then devised three specified parcels of real estate in fee-simple to his sons, B. and F., subject to the foregoing charge of his wife's maintenance, in the 'proportion of two-fifths of the amount required' therefor, 'and also to the payment of his debts in the same proportion,' and the remainder of his estate to two daughters and a third son (the executor), in equal proportions, subject to the same charge 'in the proportion of three-fifths of the amount required therefor.' *Held*, That notwithstanding the bond with the performance of the conditions of which the property devised was charged, was intended to be executed on the same day with the will, but in fact was not until two months afterwards, and after the death of the testator, the provisions in the will relate to the bond, and its provisions are binding and constitute a valid charge upon the estate devised.

Also *held*, that it was the duty of the executor to see that whatever was needful for the maintenance of the testator's widow in accordance with the provisions of the will, if not furnished by the devisees, should be supplied, and the proper contribution due from any delinquent devisee enforced.

Also *held*, that the proper method of determining how far the power of sale conferred upon the executor by the provisions of the will should be exercised, is the settlement of an account in probate, wherein he should charge himself with his own fifth of all expenditures less the value of the widow's labor in his family, and with whatever has been contributed by either of the other legatees or collected from them and be allowed the cost of maintenance.

Also *held*, that the statute of limitations is not applicable to the costs of maintenance sustained by the executor in behalf of the widow of the testator.

A writing signed by the widow stipulating that 'no person shall ever call on' a certain one of the devisees of the property thus charged 'or his property for any part of' her 'support as long as there is any of the other property left,' is not a waiver of support from the estate, and is void.

Also *held*, that interest be allowed on the six annual installments of expenses next preceding the filing of the account from the time they respectively became due to the date of the decree allowing the account.

ON REPORT.

APPEAL from the decree of the judge of probate for the county of Kennebec, in allowing the account of Howard Pettingill, executor of the last will and testament of Howard Pettingill, deceased March 28, 1840.

So much of the will of the testator as is essential appears in the opinion.

The will was proved at a court of probate held May 4, 1840, when the respondent was duly appointed executor thereof and filed a bond which was approved by the judge of probate, the condition of which was as follows:

'The condition of the above obligation is such, that if the above bounden Howard Pettingill, executor of the last will and testament of Howard Pettingill, late of Augusta, deceased, do make, or cause to be made, a true and perfect inventory of all the real estate and of all the goods, chattels, rights, and credits of the said deceased, which are by law to be administered and have or shall come to the hands, possession, or knowledge of the said executor, or into the hands and possession of any other person or persons for him; and the same, so made, do exhibit, upon oath, into the registry of the court of probate for the said county of Kennebec, within three months from the date hereof; and the same goods, chattels, rights, and credits, and all other the goods, chattels, rights, and credits of the said deceased, at the time of his death, or which at any time after shall come to the hands and possession of the said executor, or into the hands and possession of any person or persons for him, do well and truly administer according to said will; and further, do make, or cause to be made, a just and true account of his proceedings thereon, upon oath, within one year from the date hereof, then the above written obligation to be void and of none effect, or else to abide and remain in full force and virtue.'

Benjamin Pettingill, Foxwell F. Pettingill, Howard Pettingill, jr., Amy Pettingill, and Mary A. Pettingill, about two months after the decease of their father, executed a bond in the penal sum of $2000 to Howard Pettingill and Amy Pettingill, wife of the said Howard, and to the survivor of them with the following conditions:

'That whereas the above-named Howard Pettingill has this day devised to the aforesaid obligors (being his children and heirs at law), all his property, real and personal, with the understanding and agreement that his said children, in the proportion of one-fifth each, are to provide for, take care of, support and maintain, in a

decent, suitable, and comfortable manner, in sickness and in health, so long as she shall live, their mother, the said Amy Pettingill. Now if said children and obligors in this bond shall, in a kind and affectionate manner, in sickness and in health, and so long as she shall live, provide for, support and maintain their mother, the said Amy Pettingill, at such place as she may from time to time choose, and in a manner suitable and comfortable in all respects, whether in relation to her house, living, or clothing (the intention being, without enumerating the specific articles of living, or the duties required to secure to the said Amy Pettingill a home, living, clothing, and all other necessaries and comforts in sickness and in health, suited to her age and condition in life), and shall also pay her annually, an amount not exceeding ten dollars, to be paid in quarterly payments, to be applied to such uses as said Amy may choose, then this bond to be void, otherwise, to remain in full force.'

The executor claimed the following sums for the maintenance of Amy Pettingill, widow of Howard Pettingill, deceased, viz.:

From March 28, 1840, to March 28, 1861, at $110 per year,	$2,310.00
To interest on twenty installments,	2,706.00
To continuing maintenance from March 28, 1861, to March 28, 1871, at $220 per year,	2,200.00
To interest on nine installments,	594.00
	$7,810.00
Less one-fifth,	1,562.00
Balance,	$6,248.00

The judge of probate allowed the several sums exclusive of interest. Whereupon Susan Pettingill appealed and seasonably filed the following reasons of appeal:

1. The said Howard Pettingill never gave such a bond as the law required to authorize him to act as executor of the will of Howard Pettingill deceased, nor did he return any inventory of the real estate, goods, chattels, rights, and credits of the testator; nor did

he render an account of his administration as required by law, and said decree of the court, allowing the account now before the court is unauthorized by law.

2. The said Howard Pettingill, if executor as claimed, has no authority under the will of Howard Pettingill, or by law, to charge the estate of Howard Pettingill with expenses incurred by him in supporting and maintaining the widow of the said Howard Pettingill after the decease of her said husband.

3. The said account for expenses in supporting and maintaining Amy Pettingill, widow of Howard Pettingill, deceased, is barred by lapse of time.

4. The provisions of the will of Howard Pettingill, deceased, attempting to charge his estate, or the legacies therein made, to his legatees, with the performance of a bond, or the conditions of a bond alleged to have been entered into by his said legatees for the support and maintenance of his wife, Amy Pettingill, during her natural life, are inoperative and void, no such bond having been entered into or signed by his said legatees or any of them, at the time of the execution of his said will, or at any time during the life of the said testator.

5. If said provisions of said will are valid and operative, and if said Howard Pettingill is the lawful executor of said will, and authorized to act as such, he is not authorized by the provisions of the will nor by law to provide the said Amy Pettingill with her support and maintenance, and then charge the expense to said estate, nor to proceed to enforce payment, or contribution from any of said legatees for the support and maintenance of said Amy Pettingill, except at her request and under her direction, and the said Amy Pettingill has not so requested or directed, but has waived her rights, if any she had, under said will, to call upon or enforce payment or contribution toward her support and maintenance, from any of the legatees named in said will, except the said Howard Pettingill and Foxwell Pettingill, and has supported herself instead, and did expressly agree with said Benjamin Pettingill in his lifetime, that no person should ever call upon said Benjamin or his

property for any part of her support, so long as there were any other of the property left.

6. The said Benjamin Pettingill, previous to his death, paid the said Amy Pettingill a large amount towards her support, for which no credit is allowed in said account or decree, and paid and contributed towards her support and maintenance all that she ever requested him to pay or contribute.

7. That said Amy Pettingill has worked for the said Howard Pettingill, in his family for thirty-one years, since the death of her said husband, and has fully paid him for her support and maintenance, above what he has himself to contribute, and he has no legal or equitable right to charge her support to the estate of her husband, nor to enforce payment for it, or any part of it, from any of the legatees named in said will.

The remaining facts appear in the opinion.

S. Lancaster, for the appellee.

E. F. Pillsbury, for the appellant.

Howard Pettingill is a residuary legatee. The bond given by him is not such as the law requires. Acts of 1830, c. 470, § 7.

Person named as executor in a will is not legally such until bond is given, as required by statute. *McKeen* v. *Frost*, 46 Maine, 239.

The legatees' bond introduced was not in existence until more than a month after the death of the testator. It is good as to Amy Pettingill, but fails as to Howard Pettingill, deceased before it was given. *Pettingill* v. *Patterson*, executor, 32 Maine, 569.

It can have no connection with the will, and is not admissible in this case.

As the provisions of the will undertake to charge the estate with the true and faithful performance of a bond not in existence at the time of making the will or during the life of the testator, they must be void for uncertainty and impossibility of performance.

The authority given to the executor to sell estate in the hands of the legatees is conditioned upon the non-performance of the conditions of a bond not in existence.

The bond made after the death of the testator and produced here, differs from the provisions of the will.

The will provides for the payment of ten dollars to the testator's wife by the executor. The bond binds the obligors to pay her annually a sum not exceeding ten dollars. The will provides that Benjamin and Foxwell shall pay two-fifths jointly, and the other children three-fifths jointly. The bond makes the obligors liable to one-fifth each.

The account is against the estate of Howard Pettingill for an alleged debt contracted after his decease, by the executor. He could neither create a debt against the estate nor bind the estate. *Davis* v. *French*, 20 Maine, 21; *Gross* v. *Howard*, 52 Maine, 195.

The will does not contemplate or require the executor to furnish the support to be repaid to him by the other devisees, but the devisees are to furnish the support to her direct. If Howard Pettingill has furnished her more than his share of her support, he stands as any other person would that trusted her, and his claim is against her.

If he has advanced the share of support that Benjamin was to furnish, he may have a personal claim against Benjamin's estate, but if so, it would be but for six years past, all prior being barred by the statute of limitations.

The will seeks to charge Benjamin and Foxwell jointly with two-fifths of her support. It is alleged that Benjamin has failed to furnish his proportion, and that one of the other devisees, the executor, has furnished it instead, and he now claims to have it allowed against the estate of the testator. Can the whole estate be charged for the failure of one devisee to furnish his joint share of two-fifths?

The support was to be furnished by the devisees directly to Amy Pettingill. The bond produced runs to her. It is independent of the executor, and she can enforce it in her own name. The matter is wholly between them and her, except the provision for selling so much of the estate, by the executor, as may be necessary for such support, in case of non-performance of the conditions of the bond, and that does not authorize the executor to enforce payment

from the other devisees of his own motion without her direction, and without regard to her wishes, much less to enforce a claim against the estate of his deceased father for support alleged to have been furnished by him for or instead of one of the other devisees.

The deposition of Amy Pettingill, introduced by the appellee, shows that she has nothing whatever to do with this proceeding and has no interest in it.

The provisions made in the will and by the bond produced for the support of Amy Pettingill are for her benefit, and she has the right to waive them or release them, and support herself by her labor, or in any other way, and the evidence shows that she has waived the claim against Benjamin by neglecting to enforce it for thirty-one years, and made a positive agreement with him, voluntarily, that no person should ever call upon him or his property for any part of her support so long as any of the other property remained, and her own testimony shows that she still desires that agreement carried out, provided she had the right to make it, and that she has no interest in this proceeding or anything to do with it. Can the executor sustain a claim against the estate of his father for Benjamin's share of her support after she has thus waived and released her claim upon him?

It would have been much easier for Benjamin to have supported her one-fifth of the time, if she had not promised and agreed to release him, than it will be now for his widow to raise the money to pay for thirty-one yearly installments with interest, as charged in the account, and to allow the executor to enforce the payment of money and interest as proposed in this proceeding, after the mother, for whose benefit and to whom the support was to be furnished, has thus induced Benjamin to neglect to furnish such support, would be to countenance a virtual fraud upon Benjamin.

The suit brought upon the bond produced, by Amy Pettingill, against the executor of Foxwell's estate, shows that she accepted this bond from the devisees of her husband's will, made after his decease. Its acceptance must be regarded as in lieu of the provisions of the will, or, in lieu of the right of dower in the estate which

she would have upon rejecting the provisions of the will or their failure for uncertainty.

BARROWS, J. The case on the part of the appellant, as reported, is deficient for want of any agreement or evidence showing the appellant to be so interested in the settlement of the executor's account, as to be entitled to an appeal. In the hearing of a probate appeal, the first duty of the appellant is to establish his right to appeal. Ordinarily, unless this is made affirmatively to appear, the appeal will be dismissed without further examination.

In the present case, however, one or two questions of some importance have been raised and commented upon by counsel, apparently with the understanding that the right was to be conceded, and, contrary to the usual course of proceeding, we will assume that it exists, and consider the questions stated in the reasons of appeal.

It is suggested, first, that the appellee never gave such a bond as the statute required, and, consequently, never was legally executor, and so not entitled to settle an account of his doings in that capacity. He gave a bond which was approved by the judge of probate when the will was proved in May, 1840, conditioned for the seasonable return of a true and perfect inventory, and for faithful administration according to the will, and for the rendering of a just and true account of his administration within one year.

When the executor nominated in a will has done thus much, and thereby secured the approval and recognition of the judge of probate for his county, we think that the statute provisions, respecting the conditions of the bond which he shall give, must be so far considered as only directory, that he may have the benefit of such of his doings in the premises, as are found conformable to law and the will of the testator, and that the account, which he has bound himself to render, should be considered, and, so far as it is found correct and well vouched, allowed.

A mistake or omission in an executor's bond, when it has been duly approved by the probate judge, ought not to be held to vitiate

what he has rightfully done in the discharge of his trust, unless the opposite party has been in some manner prejudiced thereby. The same remark applies to the objection alleged against the reception of this account, that the executor never returned an inventory and did not settle an account of his administration of the affairs of the estate within a year. This appellant, under the provisions of the will, could have no interest, share, or right whatever in the personal property, rights, or credits, and the failure to return an inventory and render a seasonable account could not, in any wise, affect her interests or liabilities unfavorably. The executor's remissness in these respects would be a proper subject of inquiry in a suit upon his bond, for the benefit of any one who had suffered by reason of these neglects, and while, under ordinary circumstances, the want of an inventory would subject an account to suspicion, and call for more careful scrutiny in its allowance, the relations which these parties sustain to each other, under this will, are such, that we cannot view these neglects as affording any reason for precluding the executor from rendering an account now.

The testator gave by his will to his 'beloved wife, Amy Pettingill, ten dollars to be paid her by my executor, in addition to the provisions made for her comfortable support and maintenance in sickness and in health during her natural life by my legatees, agreeably to the conditions of a bond entered into by them for that purpose, which is to be in lieu of her dower in my estate, and I hereby charge all my property, real and personal, hereinafter devised, to the true and faithful performance of said bond, and in the event of the non-performance of the conditions of the same, so much of my estate in the hands of my legatees is to be sold, by my executor at public or private sale, as will produce a sum necessary for the proper and comfortable support of my wife, at any and all times when said legatees fail to provide such support in conformity with the conditions of their bond.'

Then he devises three different parcels of real estate in fee-simple to his sons, Benjamin, and Foxwell F., 'subject, however, to the charge contained in this will in relation to the support and

maintenance of my beloved wife, in the proportion of two-fifths of the amount required for that purpose, and also to the payment of all debts by me owing at the time of my decease in the same proportion.'

He then gives and devises the remainder of his estate, real and personal, to a third son (this executor) and two daughters, 'in equal proportions,' charged with the support and maintenance of the wife and with the payment of debts, 'in the proportion of three-fifths of the amount required for that purpose.'

The bond of the legatees, with the performance of the conditions of which the property thus devised is charged, appears to have been designed to be executed upon the same day with the will, and it is set forth in the condition, that the property is thus devised upon 'the understanding and agreement, that his said children, in the proportion of one-fifth each, are to provide for' the support and maintenance of their mother so long as she shall live, in sickness and in health, 'at such place as she may from time to time choose,' and if they do this in the manner prescribed, and also pay her annually a sum not exceeding ten dollars 'in quarterly payments, to be applied to such uses as said Amy may choose,' the bond is to be void.

The bond was not executed until nearly two months after the date of the will, and not until after the death of the testator. Hereupon the counsel for the appellant contends that the provisions in the will having reference to a bond, cannot relate to this one, and that those provisions which charge the testator's real estate for the performance of its conditions are void. But we have no doubt, that although the conditions of the bond are not fully recited in the will, and the instrument was not executed the day the will was made as at first intended, it is nevertheless the identical bond therein referred to, valid and binding upon the obligors, capable of being enforced by suit in the name of Amy Pettingill, and constituting a valid charge upon the real estate devised by the testator, in the manner directed in his will. This seems to have been the view taken of the matter in *Pettingill* v. *Patterson,* executor of Foxwell Pettingill, 32 Maine, 569.

It seems that Amy Pettingill has always chosen to live with the executor, and that she is still living at the age of eighty-eight; that after Foxwell Pettingill's death, judgment was recovered in her name against the executor of his will at the October term, 1851, for the fifth which he was bound and failed to contribute to her support, at the rate of $22 a year from the date of the bond up to that time. Now Benjamin Pettingill has died without ever having contributed anything, so far as appears, to the support of his mother, and without having taken any steps to relieve the land devised to him, from the payment charged upon it in the will; and the executor, never having before settled an account, comes forward to settle one, apparently for the purpose of determining how much of that land must be sold, under the power given to him in the will, to cover the expense of the support and maintenance of Amy Pettingill hitherto.

The appellant, who in some way represents Benjamin Pettingill's estate, in addition to the objections already considered, claims that the executor was not authorized by the provisions of the will nor by law, to provide Amy Pettingill with support and charge it to the estate of the testator, nor to enforce contribution from any of the devisees, except under the direction of Amy Pettingill, who takes no part in this proceeding, and is asserted to have waived any claim for support so far as Benjamin's property is concerned by reason of having given to him in his lifetime a writing saying that 'no person shall ever call upon Benjamin Pettingill or his property for any part of my support as long as there is any of the other property left.'

It is hardly necessary to remark that this writing indicates nothing like a waiver of support from the estate, but the reverse, and, so far as it attempts to change the burden from Benjamin's portion to the rest of the estate, it is void of effect.

Nor do we think the other position of the appellant above stated can be maintained. The first object of the testator in his will appears to have been to secure the comfortable support and maintenance during her life of his widow, Amy Pettingill. All that he

gave in and by his will, he gave charged with a definite proportion of all the expense necessary for this purpose. And he gave a power to his executor to sell, at public or private sale, enough to produce the sum necessary if the devisee was delinquent. Here was something very like a trust over the whole estate for the benefit of Amy Pettingill.

Whenever any interest in the nature of a trust, or any person or duty implying a trust, is created by a will, and there is no special designation of the executor or any other person as trustee, it is incumbent upon the executor, as such, to administer the estate according to the provisions of the will. *Groton* v. *Ruggles*, 17 Maine, 137; *Dorr* v. *Wainwright*, 13 Pick. 328.

We think it was not only the right but the duty of the executor to see, that whatever was needful for the maintenance of Amy Pettingill in accordance with the provisions of the will, if not furnished by the legatees, should be supplied, and that the proper method of determining how far the power of sale, conferred upon him by the provisions of the will, should be exercised, is the settlement of an account in probate, wherein he should charge himself with his own fifth of all expenditures and with whatever has been contributed by either of the other legatees or collected from them, and be allowed the cost of the maintenance.

But the appellant further objects that much of the sum charged in this account is barred by lapse of time. We do not think that the statute of limitations has any application here.

'A trust or charge, created by will, upon the real estate for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime.' Williams on Executors, Pt. V, Bk. II, c. 2, p. 1840, and cases there cited. In like manner if a legacy is charged upon the land, and especially where the bequest is of this continuing character, we think nothing short of proof of its fullfilment, payment, or release will bar the claim on account of it; and that the executor, who has fulfilled the requirements of the will in relation to it, is entitled to the same remedy for his reimbursement which the will furnishes to insure

its payment to the legatee. The case seems rather to fall within the rules indicated in *Nowell* v. *Bragdon*, 14 Maine, 320, and *Nowell* v. *Nowell* (not reported) therein cited, based upon the decree passed in the probate court, in pursuance of the decision in the previous case of *Nowell* v. *Nowell*, 2 Greenl. 75.

The report provides for a hearing before a judge at *nisi prius* in this court, to determine the amount to be allowed on the account if the executor is held entitled to render one. Preparatory to that hearing, it remains for us to determine three more questions, two of which are raised by the reasons of appeal, and one is presented by the appellee.

1. Whatever Benjamin Pettingill actually paid and contributed to the support of his mother is to be accounted for. The accountant should charge himself with all that either of the legatees has paid as well as with his own fifth, thus giving credit to the full amount of their shares to those who have borne their full proportion of the expense, and, *pro tanto*, for all payments that any devisee has made towards relieving his or her share of the estate. It does not appear that any evidence of such payments by Benjamin Pettingill was offered before the judge of probate, and so far, none has been offered in this court; but under the stipulation above referred to, both parties may yet put in proof upon that point.

2. The same course is to be taken with respect to the value of Amy Pettingill's services in the executor's family. It is true that the testator gave her a right to have her maintenance from the estate without labor, but if she preferred to work, and thereby did in fact make the cost of her maintenance less, it should enure to the benefit of all those upon whose lands the cost of the maintenance was charged. That cost was just so much less than it otherwise would have been, and, in consequence, less should be allowed. From her age and from her own testimony on this point, we should infer that the deduction to be made on this account must be slight; but such testimony as either party may have to offer, at the hearing upon this point, is to be considered in making up the amount to be allowed.

3. The probate judge allowed no interest upon the annual installments of expense; and this was in accordance with the general rule and ordinary practice in probate matters of this sort, *Storer* v. *Storer*, 9 Mass. 37; for, as a general thing, the executor or administrator is deemed not entitled to interest on what is advanced by him beyond the funds of the estate in his hands, because it is in his power to reimburse himself from the estate at any time, and he is under no legal obligation to advance his own moneys for the benefit of the estate, but may supply himself from the estate as it is needed. But this rule is not of universal application; and where the advances made have been meritorious and beneficial, and the executor or administrator has not been guilty of unreasonable delay, interest is sometimes allowed. *Jennison* v. *Hapgood*, 10 Pick. 77; *Rix* v. *Smith*, 8 Verm. 365; *Dilworth* v. *Sinderling*, 1 Beavan, 488.

In the present case it would have been somewhat harsh in the executor, and needlessly burdensome to the devisees, and wasteful of the estate, if the executor had visited a merely temporary failure to contribute their proportional part by his brothers and sisters, with a sale of some small fraction of the land devised; and, under all the circumstances, we think that interest upon the six annual installments, next preceding the filing of the account, from the time they respectively became due to the date of the decree, should be allowed. *Executor's account allowed. Amount to be settled and decree entered at nisi prius.*

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

ROCKLAND WATER CO. *vs.* SAMUEL PILLSBURY.

Records of judgments—how amended.

A clerk of court has, *ex-officio*, no right, without an express order of court to that effect, to complete, alter, or amend the record kept by a predecessor in that office, whose term has expired.

If there be a failure to make record of a judgment, the party desiring to have it recorded should present a petition to the court to have this done, and give due notice to the adverse party.

78 Me. 92

ON EXCEPTIONS.

DEBT on judgment. Plea, *nul tiel record.* Plaintiff put in a copy of the record of a judgment between the parties. Defendant suggested an alteration of the record, and proved, subject to plaintiff's objection, that the sums, indicating the amounts of debt and costs recovered, were inserted by the present clerk of courts in blanks left with the rest of the record which was filled out by the gentleman who filled that office in 1862. The other facts, bearing on the issue, are stated in the opinion of the court.

Gould & Moore, for plaintiff.

1. Plaintiffs produce such a record as they declare upon, and should prevail. It is a record of the court, made by its clerks and authenticated by its clerk; the suggestion is, that it was not all made by one clerk, and that the present incumbent had no right to fill blank spaces left by his predecessor. Such a matter cannot be inquired into under the present pleadings. The record having been made by recording officer, it is conclusively presumed to have been made under proper authority. *Willard* v. *Whitney*, 49 Maine, 235, 238; *Balch* v. *Shaw*, 7 Cush. 282; *Leathers* v. *Cooley*, 49 Maine, 337, 342; *Read* v. *Sutton*, 2 Cush. 115, 123.

2. Competent for court to order that its records be made to conform to facts; and this may be done years after a mistake is made. *Balch* v. *Shaw*, 7 Cush. 284; *Hall* v. *Williams*, 10 Maine, 276, 288 *et seq.*

Court has no power over a clerk whose term has expired, and must rely on the incumbent to do all this work for the court.

3. The evidence introduced by defendant was inadmissible. The blanks could be filled from docket entries and memoranda; and this action sustained if judgment were not extended. *Longley* v. *Vose*, 27 Maine, 179.

4. Rule xxxv. inapplicable; only applies where party fails to file papers. The failure here was of clerk to tax costs; and his successor was the only person who could supply this omission.

Albert S. Rice, for defendant.

1. 'A record is a written memorial made by a public officer authorized by law to perform that function.' No other person, than the clerk then in office, is authorized to record the judgments of the supreme judicial court, except by the special authority of the court.

The power of the court to complete and amend its own records is unlimited, but must be exercised by the court, as an organized body, during term time, and not by a single member of it in vacation, nor by its recording officer, except with reference to his own records. *Longley* v. *Vose*, 27 Maine, 179; *Jay* v. *Carthage*, 48 Maine, 353.

2. By Rule xxxv. no clerk, then in office, can enter up a judgment after a lapse of three months from its rendition, except upon notice, and in accordance with that rule; *a fortiori* no subsequent clerk can do it.

APPLETON, C. J. At the May term, 1862, of this court, in a suit pending between these parties in this county, the plaintiff obtained a verdict of the jury in their favor for $57.22. The cost was then taxed by the clerk from whose taxation both parties appealed, but there was no adjudication upon the question of costs by any justice during his term of office. During all this time the bill of costs, as taxed, remained on file with a minute thereon, that an appeal had been taken by both parties. At the March term, 1868, his successor, Mr. Rose, presented the matter of these costs to Judge DANFORTH who handed the bill back to him with a request that he should tax the costs, which he did, to the approval of the presiding justice. Thereupon the present clerk completed the record by adding to what was then recorded, after the words 'sum of,' the words 'fifty-seven dollars and twenty-two cents debt or damage, and costs of suit, taxed at seventy-nine dollars and sixty-eight cents.'

The present clerk gave no notice to, nor was there any hearing

of the parties as to the taxation of costs by him or by any justice of this court.

The record was made out except the insertion of the amount of debt or damage, and of the costs. Those sums, without the insertion of which the record would be of little value, were added to the incomplete record some six years after the term at which the judgment purports to have been rendered, and by the successor to the clerk then in office.

Now it is obvious, that as long as the record remained incomplete, there was no available judgment of record.

By thirty-second rule of this court, 35 Maine, 578, 'either party dissatisfied with the taxation by the clerk, may appeal to the court or to the judge in vacation, from whose decision no appeal shall be taken.' Both parties appealed, in 1862, from the decision of the then clerk, and have neglected to the present time to present the question of costs to any judge for his adjudication. Neither party was present at the taxation of Mr. Rose, nor had an opportunity to appeal from his decision nor to be heard upon such appeal; and his taxation differed from that of his predecessor.

By the thirty-fifth rule, 35 Maine, 579, it is made the duty of the prevailing party in every suit, forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term, and, after notice to the adverse party, the court shall order it to be recorded,' etc.

Now the judgment was not recorded. The record, as left, was an incomplete record of a judgment, for there was no judgment for debt or costs. The taxation of cost had been withdrawn from the clerk by appeal. As there was no record of any judgment, the proper course, for the party desiring a valid judgment of record, was to petition the court within the spirit of this rule and have it,

after due notice to the other party, recorded. This has not been done. The former clerk not having recorded a judgment, it is not for his successor, *ex-officio*, to do it for him. Certainly, not without an order of court.

The amendment of an existing record, for the purpose of correcting its errors, may be made by the order of the court at any of its terms. But this is the completing the record of a former clerk by his successor, and without any direction or order of the court therefor. *Exceptions sustained.*

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

DICKERSON, J. The principal question reserved is, whether a clerk of the supreme judicial court has authority, by virtue of his office, to fill a blank in the record of a judgment rendered when a former clerk was in office.

We think he has no such authority. Such clerk is the recording officer of the court only while he continues in office. Both his official oath and bond require that he shall 'faithfully perform all the duties of his office.' Neither the one nor the other provides that he shall perform the duties a former clerk failed to perform; nor would his omission to do so be a violation of the one or a breach of the other. He has, by virtue of his office, no authority to affix the name of a former clerk to the record of the judgments rendered during such clerk's official term of office; and to sign his own name thereto, would be to falsify the record. As respects the memoranda for making up judgments, rendered under a former clerk, and the judgments themselves, the clerk is a stranger, and he has no authority to alter, amend, or in any way change them without special direction of the court while in actual session. R. S. of 1857, c. 79, §§ 2, 8, 11; *Longley* v. *Vose*, 27 Maine, 172.

The record of the judgment in suit, when undertaken to be made up by the then existing clerk, did not contain the amount of the verdict or the costs. Both these sums were inserted in that record, several years afterward, by another clerk, without authority from the court. Such interpolation imparted no validity to the

unfinished record of the former clerk. That record now stands, as it stood before the attempted amendment, as an incomplete record of the judgment rendered; and though it would doubtless be competent for the court to direct the clerk to bring forward the action and make up the record of the judgment, according to the facts appearing of record, yet, that not having been done, this action cannot be maintained. *Exceptions sustained.*

ELIPHALET PRAY *vs.* NATHAN O. MITCHELL.

Partner—remedy of. Joint stock company—sale of shares in—within statute of frauds.

Equity and not assumpsit is the appropriate remedy for one whose membership and consequent right to share in the profits of a partnership are denied, and to whom no portion of the profits have been set apart.

The sale of an interest or of shares in a joint stock company is within the statute of frauds.

ON MOTION to set aside a verdict as being against law and the weight of evidence.

ASSUMPSIT.

For that the said defendant at said Gardiner, to wit, at said Augusta, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of five thousand and five hundred dollars, according to the account annexed, then and there in consideration thereof, promised the said plaintiff to pay him that sum on demand. Also, for that the said Mitchell, at said Augusta, on the day of the date of this writ being indebted to the plaintiff in the sum of five thousand and five hundred dollars for so much money before that time had and received by the said defendant to the use of the said plaintiff, in consideration thereof, then and there promised the said plaintiff to pay him the same sum of money on demand.

Also, for that the said Mitchell, at said Gardiner, on the 22d day of January, A. D. 1870, in consideration that the said plaintiff would take a certain interest or share, to wit, one sixteenth part in and of a joint stock enterprise, then being got up in said Gardiner, by said Mitchell and others, for the purpose of cutting, securing, harvesting, and selling ice from the Kennebec river, then and there agreed and promised the said plaintiff to let him have, take, hold, and own a certain interest or share in said joint stock company, equal to one sixteenth part of the whole, and to retain said share, and to have the profits and dividends growing out of said business jointly with others and equal to one sixteenth part of the same, upon condition that said Pray would advance and pay to said Mitchell or to said company, when requested so to do, one sixteenth part of the assessments made and required for expenses incurred in organizing, operating, and carrying on said enterprise.

And the plaintiff avers, that, in consideration of the promises, he then and there agreed to take said interest in said enterprise, upon the terms and conditions offered by said Mitchell, and that he did thereafterwards, when requested, pay over to said Mitchell and to his order and for the use and benefit of said enterprise, his proportional part of the amount assessed and required by said Mitchell, and according to the regulations of said company, and at the times and in the manner required by said Mitchell, and that he was ready to pay and offered to pay any and all further sums assessed or required by said Mitchell and by said company, when requested so to do. Yet the said Mitchell, unmindful of his said agreement and disregarding his said promises refused, and still does refuse, to allow said plaintiff to take and hold any interest or share in said company, or to share or receive any dividends or profits growing out of said enterprise. And the plaintiff further avers that the value and net proceeds of one sixteenth part of said enterprise was and is of the value of five thousand and five hundred dollars, which said value and said sum said Mitchell has received out of and from said enterprise, and now holds and retains in his possession, which said sum, according to said agreement, is the property of and belongs

to this plaintiff, and which said sum said Mitchell declines and refuses to pay over or to account for to said plaintiff, although frequently requested so to do.

Plea, general issue, and brief statement of the statute of frauds, and alleging that he acted as agent of a company consisting of N. O. Mitchell, Benj. Clark, John T. Richards, C. A. & J. D. White, Josiah Maxy, Enoch Miller, I. A. Stanwood, W. F. Richards, and Jas. S. Barker, in carrying on the business or enterprise set forth in plaintiff's writ; and, as such agent, received any moneys paid to him to carry on the enterprise, and for the proceeds of the sales of ice; and that all contracts made by him in relation to said business or enterprise were made as the agent of said company.

It appeared that on Jan. 22, 1870, the defendant, holding a lease of land upon which this ice operation was carried on, conveyed three-fourths of his interest in the lease to Enoch Miller, C. A. & J. D. White, John T. Richards, W. A. Richards, I. A. Stanwood, J. Maxy, B. Clark, and J. S. Barker, and on the same day the defendant and those to whom he assigned the three-fourths interest in the lease entered into articles of copartnership 'for the purpose of carrying on the business of procuring ice in the town of Dresden, on the premises leased, the business to be owned in the proportion of one-fourth part by N. O. Mitchell, one-eighth by E. Miller, one-eighth by C. A. & J. D. White, one-eighth by John T. Richards, one-sixteenth by W. F. Richards, one-sixteenth by I. A. Stanwood, one-sixteenth by J. Maxy, one-sixteenth by B. Clark, and one-sixteenth by J. S. Barker.' Each to be responsible for his respective part of all expenses in the business, and to receive his share of profits, and bear his proportion of loss, etc.

The plaintiff testified, *inter alia,* substantially,

That on the 24th, two days after the articles were drawn up and signed, in consequence of information from Miller, plaintiff went to Mitchell's office and asked Mitchell if plaintiff could have some of the stock; that he wanted to put in $500 or $600; that after some conversation, Mitchell said he might have what he wanted. That it was then contemplated to put in $8,000 to $10,000; and plaintiff

told Mitchell he was going to Brighton with some cattle, and on his return he would put in some money.

That Mitchell showed him no lease or articles of copartnership, nor what shares different men had taken; that Mitchell said the Whites wanted all he could spare; that Mitchell did not say how much he would let plaintiff have; that plaintiff did not say he wanted a sixteenth, but would put in $500 to $600, which amounted to one-sixteenth of what they calculated to put in.

In regard to the money paid in by him, he testified substantially,

That on Feb. 12th, he went to Mitchell's office and told Mitchell he wanted to pay $600 for Clark, and $400 for self; handed Mitchell $800 cash, and check of $232.75, and told him to give balance of check back and left $1000. Mitchell said he would credit it to Clark, and told his clerk to give plaintiff $32.75, and he did.

That on the next Saturday plaintiff paid Mitchell $300 for Clark, and $300 for self.

The remaining facts sufficiently appear in the opinion.

A. Libbey, for the plaintiff.

E. F. Pillsbury, for the defendant.

WALTON, J. This is an action of assumpsit. The plaintiff has obtained a verdict for $4,450.74. The defendant moves to have the verdict set aside upon the ground that it is against law and against evidence. The question is, whether the verdict can be allowed to stand. We think it cannot. We fail to perceive any ground upon which it can be sustained. Certainly it cannot upon the ground that the plaintiff was a member of the firm of N. O. Mitchell & Co. That firm was created by written articles of agreement. The names of its members are not only signed at the bottom of the agreement, but they are mentioned in the body of it. The plaintiff's name is not among them. The plaintiff not only did not sign the agreement, but he admits that he never saw it; and his name is not mentioned in it. The entire capital is apportioned among the members of the firm who did sign it, and there

was no interest remaining which it was possible for any third party to own or possess. To admit the possibility of such an ownership would be in direct conflict with the express terms of the written agreement. Besides, an action of assumpsit is not the appropriate remedy for one whose right to share in the profits of a partnership is denied. If the plaintiff's membership and right to share in the profits of the partnership were admitted, and his share had actually been apportioned and set out to him, and was now in the hands of the defendant, we do not mean to say that an action of assumpsit would not lie to recover it, as so much money had and received to the plaintiff's use. But when, as in this case, the plaintiff's membership and consequent right to share in the profits of the partnership are denied, and no portion of the profits have been set apart for him, we think it is clear that no such action can be maintained. Process in equity is the appropriate remedy. *Holyoke* v. *Mayo*, 50 Maine, 385, and authorities there cited.

Assuming, therefore, that it is impossible to sustain the verdict upon the ground that the plaintiff was a member of the firm of N. O. Mitchell & Co., both because he never signed the agreement by which that copartnership was formed, and because an action of assumpsit would not be the proper remedy if he had signed it, we come to the inquiry whether it can be sustained upon the ground that the plaintiff made a contract with the defendant alone for a share of his individual interest in the capital stock of the company. We think it cannot for two reasons. The first is that the evidence, fairly construed, will not support such a conclusion. The other is that a contract for the sale of an interest or shares in a joint stock company, is within the statute of frauds; and in the absence of the other requisites of the statute, must be proved by some note or memorandum in writing. So held in *Tisdale* v. *Harris*, 20 Pick. 9, and in *North* v. *Frost*, 15 Conn. 400. In the former case the question was very fully considered, and the conclusion reached was that there was nothing in the nature of stocks, or shares in companies, which in reason or sound policy ought to exempt contracts respecting them from those reasonable restrictions, designed by the

statute to prevent frauds in the sale of other commodities; that on the contrary, joint stock companies have become so numerous, and so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of the statute to them; that the words 'goods' and 'merchandise' may properly include stock, or shares in such companies; and as contracts for the sale of such stock or shares is clearly within the mischief which the statute was designed to prevent, they ought to be held to be within its letter and spirit. And in the latter case the court say that this doctrine is not only supported by the greater weight of authority, but that it is founded upon good sense; that such contracts fall clearly within the mischiefs which the legislature intended to remedy; for there is as much danger of fraud and perjury in the parol proof of contracts for the sale of interests in joint stock companies as in contracts for the sale of any other commodities. It is true that in England it has been held in one case that a contract for the sale of shares in a joint stock banking company is not within the statute of frauds. *Humble* v. *Mitchell*, 11 Adolph. & Ellis, 207. And in another case the twelve judges were equally divided upon the question. *Pickering* v. *Appleby*, Com. Rep. 354. But in this country, and in this State as well as Massachusetts and Connecticut, the doctrine of *Tisdale* v. *Harris*, has not only been sanctioned, but it has been extended so as to include the sale of promissory notes. *Baldwin* v. *Williams*, 3 Met. 365; *Gooch* v. *Holmes*, 41 Maine, 523.

The firm of N. O. Mitchell & Co., was to all intents and purposes a joint stock company. The stock was divided into sixteenths. The defendant owned four sixteenths, which was equal to one-quarter of the whole. The plaintiff testifies that it was then contemplated to put in from eight to ten thousand dollars. A sixteenth would therefore be worth not less than five hundred dollars. The plaintiff avers in his declaration that he agreed to take a certain interest, to wit, 'one-sixteenth part in and of a joint stock enterprise.' It is true that in his testimony he denies that he ever said he was

to have a sixteenth. He says he told Mitchell (the defendant) he would take five or six hundred dollars, which amounted to one-sixteenth of what they calculated to put in at the time; that he was to have his stock in proportion to the amount he put in. This variance, if any, between the allegations in the writ and the proof, is not now material. What we wish now to show is, that if there was a contract for the sale of a portion of the defendant's stock to the plaintiff, it was for an amount exceeding thirty dollars, as it is to such sales only that the statute of frauds of this State applies. The plaintiff says, in substance, that the contract was for the purchase of five or six hundred dollars' worth. Now if we assume that this was not a contract or agreement to become a member of the firm, but a contract with the defendant alone, to purchase a share of his individual interest in the capital stock of the company, must it not, in the absence of delivery, which was impossible, and in the absence of earnest or part payment, which is not claimed, be proved by some note or memorandum in writing, signed by the party to be charged, or by his agent? Clearly so.

Our conclusion, therefore, is, that the verdict must be set aside and a new trial granted. *Motion sustained.*

Verdict set aside.

New trial granted.

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

SARAH HAGAR, administratrix, *vs.* HARRISON SPRINGER and another.

Judgment including items previously paid—remedy—review. Limitations—statute of.

Where a debtor has paid certain items of his creditor's account, and the creditor subsequently takes judgment for the full amount of the original account, the debtor cannot recover back the amount thus paid and wrongfully included in the judgment, his remedy being review.

No verbal acknowledgment or promise on the part of a debtor can take the items of an account out of the operation of the statute of limitations.

ON EXCEPTIONS, and motion to set aside the verdict for the plaintiff, as being against law and the weight of evidence.

ASSUMPSIT on an account annexed for $349.19, consisting of numerous items of labor and materials, with two items of the following tenor:

Springer's bill against ship Atlanta paid twice,	$64.20
" " " " Borneo " "	20.70

The remaining facts appear in the opinion.

J. W. Spaulding, for the plaintiff.

J. D. Brown, for the defendant.

WALTON, J. This case is before the law court on motion and exceptions.

The motion must be sustained. The plaintiff admits that the verdict is too large, and offers to remit $77.62. Her counsel thinks it is clear that the jury must have inadvertently allowed an item of interest, $63.33; and interest on that item, $14.29; which they were instructed not to allow. He is probably correct; and if this was the only error the *remittitur* might avoid a new trial. But it is not the only error. The verdict includes two other items, for which the plaintiff cannot legally recover. We refer to the two charges for money 'paid twice,'—once in payment of two bills which the defendant had against the plaintiff's intestate, and once in discharge of a judgment which the defendant recovered against the plaintiff on those bills, after, as she alleges, the bills had been paid by her husband. The two items amount to $84.90; and are charged in the plaintiff's bill of particulars as follows: 'To Springer's bill against ship Atlanta, paid twice, $64.200. To Springer's bill against ship Borneo, paid twice, 20.70.'

It appears that the defendant sued the plaintiff for the amount of those two bills, and recovered judgment against her, and that the judgment has been paid. She now claims to recover back the amount thus paid, on the ground that her husband, in his lifetime, had paid those bills to the defendant. In other words, she seeks to

nullify the judgment and recover back the amount paid to satisfy it, on the ground that it was unjustly recovered. This the law will not allow her to do. If she thinks the judgment was unjustly obtained, her proper course is to petition for a review of the action. It is well-settled that the merits of a judgment cannot be reviewed in a new action.

In *Loring* v. *Mansfield*, 17 Mass. 394. A. brought his action against B. on a promissory note, on which partial payments were indorsed. B. appeared and made a defense in the action, and judgment was finally rendered against him for the amount appearing to be due upon the note after deducting the sums indorsed. B. afterwards brought an action against A. for money had and received, on the ground that he had made certain other payments, which were not indorsed upon the note, nor allowed in the former action. The court held that he could not recover; that his remedy, if any, was by application for a review of the first action.

In *Jordon* v. *Phelps*, 3 Cush. 545, a note was sued on which a payment of $30 had been made but not indorsed. The defendant was defaulted, and the plaintiff took judgment for the full amount of the note, without deducting the payment. The defendant then brought an action to recover back the amount of such payment. It was held that he could not recover. The court said, that by the theory of the law, a default is an admission of record of the existence and amount of the debt claimed; that by such a judgment the debtor is estopped, and must, therefore, see to it, that judgment is not recovered for more than what is due; that even if he cannot command his evidence in order to prove his payment seasonably, so as to give it in reduction of the judgment, but afterwards is able to produce such evidence, he cannot maintain an original action to recover back the money paid; that he is without remedy, unless he can bring himself within some of the provisions of law relating to reviews or writs of error, by which the judgment itself can be corrected; that this principle is founded on high considerations of public policy, which requires as speedy an end to litigation as justice will permit, and prohibits circuity of action and

the multiplicity of suits, in order to determine one and the same right.

The same doctrine has been affirmed in this State. *Weeks* v. *Thomas*, 21 Maine, 465. And in England. *Marriott* v. *Hampton*, 7 T. R. 269.

Two earlier cases in Massachusetts sanction a contrary doctrine. *Fowler* v. *Shearer*, 7 Mass. 14; *Rowe* v. *Smith*, 16 Mass. 306. In the former it was held that where an attorney had a promissory note for collection, and received a partial payment of the debtor, and paid it over to the creditor without indorsing it on the note, and afterwards obtained judgment on the note, he was liable to the debtor for the amount of such partial payment, in an action for money had and received. In the latter it was held, that where A., holding B.'s promissory note, received a partial payment on account of it, which, however, was not indorsed thereon, and he afterwards recovered judgment for the whole amount apparently due, without deducting the payment, an action could be maintained against him for the sum paid, although the judgment had not been satitfied. But Mr. Rand, in his edition of the Massachusetts reports, says, 'this case cannot stand in law,' and the later decisions very clearly overrule it. It is certainly opposed to principle; for if the prevailing party in a suit, cannot accept satisfaction of his judgment without subjecting himself to a suit to recover back the amount paid him, he might as well not have a judgment.

We think the law must now be regarded as settled, both on principle and authority, that where payments have been made upon a chose in action, and the creditor afterwards takes judgment for the full amount of his debt, without deducting the payments, the debtor cannot maintain an action to recover back the amounts thus paid,—that his only remedy is by a review of the action in which the judgment was rendered.

Perhaps this objection to the verdict might also be obviated, and a new trial avoided, by a *remittitur*, but for the fact that the remaining portion of the verdict seems to rest on an erroneous ruling of the presiding judge, respecting a new promise, such as will take a cause of action out of the operation of the statute of limitations.

To some of the earlier items on the plaintiff's bill of particulars, the defendant pleaded the statute of limitations. To avoid this ground of defense, the plaintiff called a witness, who testified that the defendant looked over the account-books of the plaintiff's intestate with him, on which these items were charged; that the defendant at first demurred to one item; but finally acknowledged that the account was correct, and agreed to come in in the afternoon and settle it. The exceptions state, that upon this evidence the presiding judge instructed the jury, that if this acknowledgment was an agreement to pay the plaintiff, it would take these items out of the application of the statute of limitations, and the defendant would be liable to pay so far as these items were concerned.

This was clearly erroneous. Our statutes declare that no acknowledgment or promise shall be allowed to take the case out of the operation of the statute of limitations, unless the acknowledgment or promise is an express one, in writing, signed by the party chargeable thereby. R. S., c. 81, § 93.

There is no pretense that there was any such acknowledgment or promise in this case. *Motion and exceptions sustained.*

New trial granted.

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

WILLIAM D. ATKINSON *vs.* GEORGE RUNNELLS.

Nominal party—release of—when real party will not be protected from it.

The *bona fide* assignee of a chose in action will, in general, be protected against the release of the nominal plaintiff, executed after notice to the defendant of the assignment.

But where the payee of a negotiable promissory note fraudulently indorsed it before maturity, and without value to the plaintiff, for the purpose of excluding any inquiry into the fraudulent inception or want of consideration of the note, and by fraudulent assertions and devices concealed the true relations of the parties—in an action of *scire-facias* to obtain an *alias* execution upon the judgment recovered upon such note in favor of the indorsee against the maker; *Held*, That the court would not set aside a release from the judgment creditor to the defendant, but let it have its legitimate effect.

ON REPORT.

SCIRE-FACIAS requiring the defendant to show cause why an *alias* execution should not be issued upon a judgment recovered by the plaintiff against the defendant at the September term, 1867, of this court, upon which judgment execution issued Oct. 17, 1867, and was returned satisfied by a levy upon certain real estate in Pittsfield, because, as the plaintiff alleged, the title to the land levied on, at the time of the levy, was not in the defendant, but in one Small, and that nothing passed by the levy.

Writ dated Feb. 23, 1869.

Plea, *nul tiel record*, with brief statement alleging

1. That the judgment was satisfied by the levy; and

2. That on March 15, 1871, the plaintiff, by his deed of release, duly executed and delivered to the defendant, released and discharged the defendant from said judgment and execution.

After the plaintiff rested, the defendant introduced a deed of release to himself from the plaintiff, duly executed and dated March 15, 1871.

John C. Manson, called by the plaintiff, testified, subject to objection, substantially,

That the note upon which the original suit was brought, was his property, and always had been; that it was sued in the name of Atkinson, by him and with the consent of Atkinson; that no part of the judgment has been paid in any manner, except by the levy; that Atkinson never had any authority to release or discharge the judgment; that the defendant knew Manson was owner of the judgment before the release was executed.

On cross-examination. That witness, in February, 1871, in-

formed, indirectly informed the defendant, that witness owned the note by telling defendant he would settle it; that he told defendant at same time, he sued the note in the name of Atkinson, because a man who had tried to collect the note had informed him that defendant hesitated about paying it; that witness, in April, 1867, told defendant that Atkinson owned the note, and that Atkinson had the note and paid witness $20 on it in April, 1867, and did not know whether Atkinson got the $20 of defendant; and that he did not remember whether he told Atkinson to represent to defendant that Atkinson owned the note or not.

Defendant's counsel asked the witness the following questions, which were objected to by plaintiff's counsel and excluded by the court.

Was not the note given for a patent clothes-wringer, which was utterly worthless, and known by you to be so?

Did you not tell the defendant since the judgment was recovered, that the suit was brought in Atkinson's name, because the note was worthless in your hands, and that it was transferred to Atkinson to make it good?

Have you not frequently so stated to various persons?

William D. Atkinson, called by the defendant, testified that he gave no consent to have the original suit brought in his name before the suit was commenced, that he did not recollect that he knew of the suit before the levy was made.

The court to draw such inferences as a jury might, and render such judgment as the law and the facts, or so much thereof as is legally admissible, require.

If the questions put by defendant's counsel and excluded by the court should have been admitted, and if the defense is not otherwise entitled to prevail, the case to come back for new trial.

George W. Whitney, for the plaintiff.

Courts will protect the rights of the real owners against the fraudulent acts of nominal parties. Negotiable paper, indorsed in blank, may be sued by the holder in the name of a third person by his consent.

Such nominal plaintiff is a mere trustee, and will not be permitted to violate his trust to the injury of the real party in interest. *Jones* v. *Witter*, 13 Mass. 304; *Peabody* v. *Tarbell*, 2 Cush. 226; *Riley* v. *Taber*, 9 Gray, 372; *Stevens* v. *Parker*, 3 Allen, 256; *Hackett* v. *Martin*, 8 Maine, 77; *Portland* v. *Ins. Co.*, 42 Maine, 221; *Pratt* v. *Dow*, 56 Maine, 81.

D. D. Stewart, for the defendant, cited upon the validity of release, *Gibson* v. *Winter*, 5 B. & Ad. 96; *Banerman* v. *Radenius*, 7 T. R. 663; *Wilkinson* v. *Lindo*, 7 Mees. & Wels., 87; *Herbert* v. *Piggot*, 2 Cres. & M. 384; *Phillips* v. *Claggett*, 11 Mees. & Wels., 84, 91, 92.

WALTON, J. It appears that one John C. Manson had obtained of the defendant a note, which, in his own hands, he feared he could not collect. He says a man told him that the defendant hesitated about paying it. He declines to tell what the note was given for. Being a witness upon the stand, he was asked if it was not given for a patent clothes-wringer, known by him to be worthless. He declined to answer. The court is authorized to draw inferences. The inference is not difficult. A suit in his name could be defended on the ground of fraud. Want or failure of consideration would also be a defense. A suit in the name of some confidential friend might shut out such inquiries. Such would be the effect if the defendant or the court could be cheated into the belief that the plaintiff was a *bona fide* holder for value. The note was payable on time. Such a cheat was not, therefore, difficult. Thereupon the note was indorsed and delivered to William D. Atkinson, the plaintiff. To give the transaction the appearance of a *bona fide* sale, the indorsement was made special, 'without recourse.' A suit was commenced in the name of this confidential friend, and, after a delay of over two years, judgment was obtained. Manson confesses that while that suit was pending he told the defendant that Atkinson owned the note. If it had become necessary to a successful prosecution of the suit, can any one acquainted with such trials doubt that he would have sworn to it? An execution was

issued and levied upon the defendant's real estate. This is a writ of *scire facias* requiring the defendant to show cause why an alias execution should not issue. The defendant says an alias execution should not issue for two reasons. First, because the first execution was satisfied by the levy. Second, because he has a release of the judgment under the hand and seal of the plaintiff. Manson asks us to set that release aside. Why the plaintiff gave such a release,—whether it was because he did not longer want to be the fraudulent agent of Manson, or whether it was on account of a quarrel between them, thus verifying the old maxim, that when rogues fall out and disagree honest men get their dues,—does not appear. It is not important. The release being under seal, a sufficient consideration is conclusively presumed.

That such a release will sometimes be set aside is undoubtedly true. The *bona fide* assignee of a chose in action, will, in general be protected against the release of the nominal plaintiff executed after notice to the defendant of the assignment.

But how is it when the court is asked to set aside a release in order to give effect to a secret, covinous agreement, entered into for the express purpose of cheating the defendant out of his defense? An arrangement by which fraud is to be made easy and a defense difficult? An arrangement originating in moral turpitude, and likely to end in positive perjury? An arrangement, which, if sustained by the court, will aid rogues and multiply their victims?

The answer is plain. The law never lends its aid to enforce covinous agreements—agreements between two or more persons designed to prejudice the rights of a third.

The holder of a negotiable note may lawfully sue it in the name of another, provided there is no fraudulent concealment of the true relations of the parties. The defendant will not thereby suffer any legal prejudice. He will be allowed to make precisely the same defense as if the action were brought in the name of the payee. But when the true relations of the parties are concealed, and the defendant, by fraudulent assertions and devices is cheated into the belief that the plaintiff is a *bona fide* holder for value, and this is

done for the purpose of shutting out all inquiry into the consideration, and depriving the defendant of a free and full defense, the law is otherwise. Such an arrangement not only partakes of champerty and maintenance, but it is worse. Maintenance is simply the support of another's quarrel. It does not imply that the defendant is thereby deprived of any just ground of defense. It simply implies that he is vexed and put to expense in defending a lawsuit, which otherwise might have been avoided. So in champerty. But when there is a secret, covinous agreement, by virtue of which one man is to carry on another's lawsuit, and is to do it under such false and fraudulent pretenses as will deprive the defendant of a just defense, the agreement not only partakes of champerty and maintenance, but it is worse. One more pernicious, one less likely to meet with favor in a court of justice, cannot well be conceived. It is the right of every one to have a fair trial. Whether prosecuting or defending—whether endeavoring to enforce a right or resist a wrong—he is entitled to have his case heard and passed upon by the court; and all secret, covinous agreements, by which he is to be deprived of such a trial, are against public policy, and will not be enforced.

The fraud, says Mr. Kerr, consists in a man's assuming to do one thing, while he really does another. 'If a man assign nominally only, retaining the beneficial enjoyment, it is fraudulent; because while he assumes to do one thing, he really does another. He retains the benefit, and, by a false act, endeavors to get rid of the burden. But if he assigns really, getting rid of the burden, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act.' (Kerr on Fraud and Mistake, 277). We again repeat, in order that our position may not be misunderstood, that the fraud in this case did not consist in bringing a suit in the name of one who did not own the note, for that the law allows; but in pretending that the plaintiff was the owner of the note, thus getting rid of the defense of fraud, or want or failure of consideration, when in fact he was not the owner; thus, in the language of Mr. Kerr, getting rid of the burdens, while retaining the benefit,—falsely assuming to do one thing while in reality doing another.

Randall v. *Howard*, 2 Black, 285, is a strong illustration of this doctrine. In that case, as in this, there had been a pretended sale, when none in reality was intended; and this 'friendly arrangement' had been entered into, as the plaintiff averred, to defeat the fraudulent claim of a third party. The court held that the averment that the claim of such third party was fraudulent did not change the character of the agreement, or 'friendly arrangement,' as it was called; that it was manifestly an agreement entered into to prejudice the rights of a third party, and was, therefore, in contemplation of law and in fact, a fraudulent arrangement, and the court would not aid either party to enforce it. See also, 1 Story's Eq., § 333, and authorities there cited.

We are not prepared to say the plaintiff did wrong in giving the defendant a release. It was the only way in which complete amends for the fraud that had been practiced upon him could be made. More than eight years had elapsed since the original fraud, if any, had been committed upon him by Manson in obtaining the note. An action for deceit was therefore barred by the statute of limitations. More than three years had elapsed since the judgment was obtained. A review would, therefore, be difficult, if not impossible. A release of the judgment was certainly the most direct and efficient mode of making amends. It would certainly be a strange principle in law, as well as morals, that would require the plaintiff, because he had engaged in the fraud, to go on and complete it. We think the law would not compel him to do so; and we think the release must be allowed to have its legitimate effect.

Giving effect to the release renders it unnecessary to consider the other questions raised in the case.

Judgment for defendant.

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

APPLETON, C. J., and BARROWS, J., concurred in the result.

Betsey Stilphen *vs.* Milton Houdlette.

Dower—right of, defeated by divorce of husband.

A judgment of divorce, *a vinculo*, obtained by the husband on his libel, is no bar to the granting, by the same court, of a like divorce to the wife on her libel.

But the former judgment defeats the wife's right of dower, although her divorce was granted 'for the fault of her husband.'

On exceptions.

In a plea of dower, wherein the plaintiff demands against the defendant, her dower or just third part of and in a certain piece of land, with the buildings thereon, situated in Dresden, in said county of Lincoln, and bounded as described in a deed from Francis Stilphen to the defendant, dated the 4th day of October, A. D. 1864.

Whereupon she complains and says that said Francis Stilphen, formerly her husband, was seized in fee of said premises, during his coverture with the plaintiff; that she has been divorced from said Stilphen from the bonds of matrimony for his fault; and that since said divorce was had, to wit, on the 12th day of June, 1871, more than a month before the purchase of this writ, she demanded of the defendant, then and ever since tenant in possession, and having the immediate estate of inheritance in the premises, to assign and set out to her, her reasonable dower in the premises, which defendant refused to do, but has kept her out and still keeps her out of the same. The plaintiff also claims to recover in this suit reasonable damages for the retention of her dower, from the time of demand to the rendition of judgment in this suit, which the plaintiff alleges amounts to one hundred dollars, all which is to the damage of the said plaintiff (as she says) the sum of eight hundred dollars.

The defendant filed the following pleas:

1. And now the said defendant comes and says that the plaintiff

ought not to have her dower of the said tenements with their appurtenances, because he says the said Francis Stilphen, from whose endowment she claims dower, etc., is alive and in full life, to wit, at said Dresden, and he says that the plaintiff has not been divorced from the said Francis Stilphen, from the bonds of matrimony, for his fault, as is set forth and alleged in her writ and declaration. And this he is ready to verify in whatever manner the court shall think fit. Wherefore he prays judgment, if the plaintiff ought to have her dower of the said tenements, with the appurtenances, whereof, etc., of the endowment of the said Francis Stilphen, formerly her husband, and for his costs.

2. And for further plea the said defendant comes and says that the plaintiff ought not to have dower of the said tenements with their appurtenances, because he says, that the said Francis Stilphen, from whose endowment she claims dower, etc., and who is still alive, has been divorced from the plaintiff from the bonds of matrimony, to wit: At the supreme judicial court begun and holden at Wiscasset, within and for the county of Lincoln, on the second Tuesday of May, A. D. 1865, being on the ninth day of said month; wherein and at which time the said Francis Stilphen impleaded the said Betsey Stilphen in a petition and libel for divorce from the bonds of matrimony, in his own favor and against the said Betsey,—which libel was filed in said court on the 24th day of December, A. D. 1864, and a summons thereon to the said Betsey issued, and said libel and summons were duly and legally served upon the said Betsey on the 26th day of said December; which bonds of matrimony and coverture are and were the same identical bonds in the plaintiff's writ above mentioned; and thereupon said libel was continued in said court from term to term, and such proceedings were had that afterwards, to wit, at the same term of said court, as is above set forth, the said Francis Stilphen by the consideration of the same court, was divorced from the said Betsey; and it was by said court then and there considered and decreed, that the bonds of matrimony theretofore entered into, and existing by and between the said Francis and Betsey, for the cause of de-

sertion and other causes set forth by the said Francis in his said libel, be and the same were thereby dissolved, as by the record and proceedings thereof, now remaining in said court, more fully appears; which judgment and decree still remains in full force and unreversed; and this he is ready to verify. Wherefore he prays judgment, if the plaintiff ought to have her dower of the said tenements, with the appurtenances, whereof, etc., of the endowment of the said Francis Stilphen, formerly her husband, and for his costs.

3. And for further plea the said defendant comes and says that the plaintiff ought not to have her dower in the said tenements with their appurtenances, because he says that at the time of her supposed divorce from the said Francis Stilphen, as is in her writ and declaration alleged, the bonds of matrimony did not exist between the plaintiff and the said Francis Stilphen, and the plaintiff was not then the wife of the said Francis, and that the bonds of matrimony theretofore existing between the plaintiff and the said Francis, had long before that time been dissolved, and the said Francis had long before that time been legally divorced from the plaintiff, from the bonds of matrimony, to wit, at the term of our supreme judicial court begun and holden at Wiscasset, within and for the county of Lincoln, on the second Tuesday of May, A. D. 1865, being the ninth day of said month, the said Francis Stilphen impleaded the said Betsey Stilphen in a petition and libel for divorce from the bonds of matrimony in his own favor and against the said Betsey, which libel was entered in said court, on the 24th day of December, A. D. 1864, and duly and legally served upon the said Betsey on the 26th day of the same December, and was thence continued in said court from term to term, to the May term thereof, above mentioned; and thereupon such proceedings were had, that thereafterwards, to wit, at the same term of said court, as is above set forth, the said Francis Stilphen, by the consideration of the same court, was divorced from the said Betsey; and it was by said court then and there considered and adjudged, that the bonds of matrimony, theretofore entered into, and existing by and between the said Francis and the said Betsey, for the cause of de-

sertion and other causes set forth by the said Francis in his said libel, be and the same were thereby dissolved, as by the record and proceedings thereof now remaining in said court, more fully appears, which bonds of matrimony and coverture are and were the same identical bonds in the plaintiff's writ and declaration above mentioned; which judgment and decree still remains in full force and unreversed; and this he is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her dower of the said tenements, with the appurtenances, whereof, etc., of the endowment of the said Francis Stilphen, formerly her husband, and for his costs.

4. And for further plea the said defendant comes and says that the plaintiff has not demanded of the defendant to assign and set out to her, her reasonable dower in the said premises, and did not demand her dower of the defendant more than one month, and less than a year, before the purchase of said writ, as is in said writ alleged, and this he prays may be inquired of by the country.

The plaintiff joined the issue raised by this plea.

The plaintiff filed the following replication, which was joined by the defendant:

And now the plaintiff, as to the first plea of the defendant by him pleaded, says she ought not to be precluded from having her dower in the premises described in her writ, with the appurtenances because she says she was divorced from the bonds of matrimony formerly existing between her and the said defendant, for his fault, to wit, at the supreme judicial court, begun and held at Wiscasset, within and for the county of Lincoln, on the fourth Tuesday of April, A. D. 1871, by a judgment of said court, rendered of the 7th day of June, A. D. 1871, as will more fully appear by the record of said judgment now remaining in said court, which has not been reversed or annulled, but is still in force, and this she prays may be enquired of by the country.

The plaintiff demurred to the second and third pleas, to which defendant filed a joinder as follows:

And the said defendant says that the several second and third

pleas aforesaid by him, the said defendant, in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law to bar the said plaintiff from having her said action against him the said defendant, above in pleading alleged, which he is ready to verify, which said matter the said plaintiff has not denied, nor in any manner answered to the same, and has wholly refused to admit that averment, as before, prays judgment, and that the said plaintiff may be precluded from having her dower and action aforesaid against him, and for his costs.

To sustain the issue on her part, the plaintiff introduced, subject to the seasonable objection of the defendant, the record of a divorce, *a vinculo*, from Francis Stilphen for his fault, decreed June 7, 1871, on her libel entered at the October term, 1864; a written demand of dower in the premises, admitted to have been served on the defendant on June 12, 1871; and a deed of the premises in which dower is demanded from Francis Stilphen to the defendant, dated October 4, 1864, and duly recorded.

To maintain the issue on his part, the defendant introduced a record of a divorce, *a vinculo*, of Francis Stilphen from the plaintiff, decreed at the May term, 1865, on his libel entered at the January term, 1865.

The presiding justice overruled the demurrer, adjudged the second and third pleas good, and ruled that the action could not be sustained; and thereupon the plaintiff alleged exceptions.

J. Baker, for the plaintiff.

Gould & Moore, for the defendant.

DANFORTH, J. The plaintiff claims dower in the real estate of her late husband, Francis Stilphen.

To sustain her action she introduces the records of this court for Lincoln county, by which it appears that she was divorced from her husband, for his fault, in June 1871. Seisin during coverture is admitted.

To overcome this *prima-facie* case, the defendant shows by the

records of the same court, that the plaintiff's husband obtained a divorce from her at the May term, in Lincoln county, for the year 1865. It is, however, contended that the earlier decree is not admissible to impeach the later. The soundness of this position need not be questioned. The decree is not offered for any such purpose, but simply to show the *status* of the parties at the date of the last judgment. The two may stand together. Both are judgments of the same court, between the same parties, and equally binding upon them; each to the extent of the rights settled by it. In the later case, reported in 58 Maine, 508, in the opinion of the court, it is said, 'The fact must not be overlooked, that a second divorce in no way impugns the first. In declaring the bonds of matrimony dissolved, the second decree is in harmony with and confirms the first.' What then are the rights of the plaintiff, respecting dower, growing out of these two equally valid judgments? Her claim must rest solely upon the provision of the statute, as found in the revision of 1871, c. 60, § 7. A wife divorced for the fault of her husband, 'shall have dower in his real estate, to be recovered and assigned to her as if he was dead.' It will be noticed that by this statute a divorce from a husband, for his fault, affects the right of dower precisely as would the husband's death, at common law. *Davol* v. *Howland,* 14 Mass. 219.

At common law, to entitle a widow to dower the coverture must continue up to the death of the husband, and a divorce, for the fault of either party, is a sufficient interruption of the marriage relation to defeat that right. 1 Wash. on Real Prop., 3 ed. 228 and authorities there cited. After the first decree the plaintiff had no right of dower inchoate or otherwise. In this respect her legal condition was precisely the same as if the coverture, thus dissolved, had never existed. Under the second she acquires no rights, except such as the statute gives. This confers such dower, and such only, as would accrue to her by the husband's death. It does not restore any lost rights, it simply saves such as already exist, at least in embryo. The second decree may be of importance as affecting the rights of the parties between themselves, as laying the

foundation for a decree of alimony, but it cannot be extended so as to affect the rights of other persons.

If the plaintiff's husband had died at the date of the second divorce, the one which was decreed to her, she would not have been entitled to dower. The divorce previously granted, would have put an end to any such claim. So the divorce decreed to her, having, under the statute, the same effect upon her dower as her husband's death, can give her no greater rights, but must, in this respect, leave her in the same condition. *Exceptions overruled.*

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

EUROPEAN & NORTH AMERICAN RAILWAY COMPANY *vs.* E. G. DUNN.

Reservation. Conveyance—construction of.

By a resolve approved March 22, 1864, the legislature directed the land agent, after advertising for proposals in the manner therein prescribed, 'to sell the timber and lumber' in controversy, and pay the proceeds thereof, not exceeding $10,000, to the trustees of the Maine Wesleyan Seminary and Female College, the purchaser to have ten years to take it off. The land agent sold without strictly observing the law in relation thereto. In May, 1868, the State conveyed the land, containing the timber, to the plaintiffs, 'subject to all the reservations in' a certain act approved March 24, 1864, one of which reservations included 'all timber, and lumber, and lands, granted and voted by the present or any preceding legislature.' In an action against the defendant to recover the stumpage of the timber in question, which was cut by him, *Held*, That the timber was 'voted' by the resolve of March 22, within the meaning of that term as used in the act of March 24, and was, therefore, excepted from the operation of the deed to the plaintiffs.

Also *held*, that the reservation in the deed to the plaintiffs was absolute, and not dependent upon a valid sale by the land agent.

ON REPORT.

ASSUMPSIT to recover the price of certain stumpage of timber, cut by the defendant on the N. W. & S. E. quarters of T. No. 8,

R. 4, W. E. S. L., in the county of Aroostook, in the winter of 1870–71.

Writ dated Sept. 25, 1871.

The liability of the defendant was admitted; the only question being as to the right of the plaintiffs to receive the money.

The title of the land was admitted to have been in the State under whom both parties claimed.

The plaintiffs introduced in evidence, chapters 401, 146, and 604 of the Special Laws of 1864, 1866, and 1868 respectively; deed from the State to the plaintiffs dated May 13, 1868.

The defendant introduced c. 330, of the resolves of 1864, approved March 22.*

The following record of the doings of the governor and council, dated June 28, 1864.

'The committee of the whole council to whom was referred the communication of the trustees of the Maine Wesleyan Seminary and Female College, and also the communication of Stephen Allen, treasurer of said institution, have had the same under consideration, and report:

*CHAP. 330, RESOLVES, APPROVED MARCH 22, 1864. *Resolved*, That the land agent, under the instructions of the governor and council, be and he is hereby directed to sell the timber and lumber upon any one-half township of land belonging to the State, not already selected for the permanent school fund, and not otherwise appropriated, after advertising for six months in the State paper, and Bangor Daily Whig, and the paper nearest to where the land is situated; to receive sealed proposals for the timber and lumber on said one-half township of land, in one-eighth sections, and the purchasers to have ten years to take off the said timber and lumber, and no longer. A record of the proposals shall be made and kept in the land office, which shall be open to any one after the day of sale. The proceeds of said sale not exceeding ten thousand dollars net, shall be paid to the trustees of Maine Wesleyan Seminary and Female College; *provided*, that the said trustees shall safely invest the sums so received as a permanent fund for the use and benefit of said seminary and college, the interest only to be annually expended; *and provided further*, that in consideration of this grant, the trustees shall place at the disposal of the governor and council, five perpetual scholarships, giving free tuition in said seminary and college to such persons as may be designated by the governor and council, preference to be given to returned soldiers or their children, or the children of such as have fallen in defense of their country, and always to the indigent and meritorious; *and provided further*, that the trustees of said seminary and college shall raise for the use and benefit of the same, the sum of five thousand dollars.

'That it appears from the communication of said trustees, that at a special meeting of said board, the following vote was passed, to wit: Whereas, by a resolve of the legislature, passed March 22, 1864, and approved the same date, the timber and lumber on one-half township of land was granted to the Maine Wesleyan Seminary and Female College, therefore, voted:

'That the trustees accept the said grant, together with all the conditions of said resolve. It further appears from the communication of said Allen, that five thousand dollars and more has been raised by the trustees of said seminary and college, for the use and benefit of said institution, by donation and subscription, with a view to meeting the condition of said resolve. It therefore appears that the said seminary and college have accepted said grant, with the conditions imposed in the resolve, and it further satisfactorily appears that said seminary and college has raised the sum of five thousand dollars, one of the conditions contained in the grant. We therefore report that said seminary and college has complied with the conditions specified in the resolve making the grant, and that we recommend that the land agent proceed to make the location, advertise and take such further action in the premises as will secure to said institution the amount secured to it by the terms and conditions of said resolve.'

Also, copies of the proper newspapers containing the following advertisement:

'LAND OFFICE, BANGOR, Oct. 1, 1864.

'In pursuance of a resolve entitled "resolve in favor Maine Wesleyan Seminary and Female College," approved March 22, 1864, and order of council, June, 25, 1864:

'Sealed proposals will be received at the land office, until the twentieth day of April, 1865, at twelve o'clock noon, for the purchase in one-eighth section of the "timber and lumber, for the term of ten years from date hereof, growing upon the northwest and southeast quarters of township numbered eight, in the fourth range of townships, west from the east line of the State, in the county of Aroostook."

'The aggregate sum of all proposals made must produce at least the minimum price of fifty cents per acre, or five thousand five hundred ten dollars for the tracts advertised. Terms cash or approved security.

(Signed) ISAAC R. CLARK, *Land Agent.*'

And the following report:

'LAND OFFICE, BANGOR, April 21, 1865.

'In pursuance of the resolve referred to in the advertisement contained severally in the Kennebec Journal, Bangor Whig and Courier, and Aroostook Pioneer, sealed proposals have been made and deposited in the land office for the purchase of the timber and lumber upon the northwest quarter and southeast quarter of township numbered eight, range four, west of the east line of the State, for the benefit of the Maine Wesleyan Seminary and Female College, and opened this twenty-first day of April, at 1 o'clock, P. M. (the day advertised being the annual fast), with the following result, viz., E. H. Hayden, southeast one fourth, sixty-three cents per acre; northwest one-fourth, fifty-five cents per acre; Samuel H. Dale, thirty-five cents per acre for the northeast and southwest quarters; Stephen Allen, agent for and in behalf of the Maine Wesleyan Seminary and Female College, seven thousand five hundred dollars, for all timber and lumber growing upon said quarter townships, and is the largest sums offered, and said Allen as agent, for and in behalf of the trustees of said seminary and female college, is, therefore, declared to be the purchaser, to whom or to said trustees the requisite conveyance or lease for removing the "timber and lumber," shall be made for the term of time stipulated in said resolve.

(Signed) ISAAC R. CLARK, *Land Agent.*'

Chapter 401 of the Special Laws of 1864, approved March 24, 1864, authorized among other things, a transfer to the plaintiffs of 'all the public lands' (among which is that containing the timber in question) 'lying on waters of the Penobscot and St. John rivers, for the uses and purposes set forth in this act' (upon certain con-

ditions which were not performed), '*provided, however*, that there shall be excepted from said conveyance and from the operations of this act, all timber, and lumber, and lands, granted or voted by the present or any preceding legislature,' etc.

The conditions not having been performed by the plaintiffs, the legislature of 1868, by c. 604 of Special Laws, authorized among other things, the governor to execute a deed of the same premises to the plaintiffs, according to the previous c. 401 of 1864, waiving the conditions previously imposed but 'subject to all reservations contained in said act.' And the deed of the governor executed May 13, 1868, in accordance with the act of 1868, conveyed to the plaintiffs, 'all the timber and lands belonging to said State, situated upon the waters of the Penobscot and St. John rivers, to be used by said company to aid in the construction of its contemplated line of railway, as contemplated and provided for in an act entitled, "an act to provide means for the defense of the north-eastern frontier," approved March the twenty-fourth, in the year of our Lord one thousand eight hundred sixty-four, and an act approved February twenty-first, in the year of our Lord eighteen hundred and sixty-six, and subject to all the reservations in, and obligations imposed by said acts, except as therein provided; and reservations of land required by law for public uses.'

If the plaintiffs did not receive the title by this deed, they were to be nonsuit.

J. W. Emery & Chas. P. Stetson, for plaintiffs.

There are no words of grant in the resolve, a naked power or authority only was conferred upon the land agent to sell, he was made the agent of the State for that purpose, with specific instructions how he was to proceed in making the sale.

In such cases the forms imposed by the power or authority must be strictly complied with, cannot be dispensed with, and are incapable of admitting of any substitution or receiving any equivalent. Sug. on Powers, 206-7-8 and 9. *Holmes* v. *Coghill*, 7 Ves. Jr., 506. *Hawkins* v. *Kempt*, 3 East, 410, 440. *Cary* v. *Whitney*, 48 Maine, 525-527.

Where a party acts under a delegated authority the authority must be strictly pursued. *Sargent* v. *Simpson*, 8 Maine 154.

This rule has been applied in a great variety of cases. *Veazie* v. *Mayo*, 45 Maine, 560; *Day* v. *Green*, 4 Cush. 433; *State* v. *Baring*, 8 Maine, 135; *Small* v. *Small*, 136 Maine, 400; *Long* v. *Hopkins*, 50 Maine, 318; *Lebanon* v. *Griffin*, 45 N. H. 563; *Smith* v. *Gates*, 21 Pick. 55; *Cate* v. *Cate*, 44 N. H. 213; *Morse* v. *Reed*, 28 Maine, 481; *Grosvenor* v. *Little*, 7 Grant, 376; *Russell* v. *Dyer*, 40 N. H. 173; same case, 43 do. 396.

When a party derives a title to property under a particular statute, he must show a rigid compliance with all its provisions. *Brown* v. *Smith*, 1 N. H. 36; *Tho. King* v. *Newcomb*, 4 D. & E. R. 368; *Macy* v. *Raymond*, 9 Pick. 285.

Where lands have been conveyed by an agent or under an authority given by law, and the title thus derived is set up against the former owner or his assigns, it must be shown that the authority has been strictly pursued. *Thompson* v. *Carr*, 5 N. H. 510.

According to these principles above, it must be held that the doings of the land agent in 1864-5 were not in accordance with the provisions and requirements of the resolve of 1864, and no title to the timber and lumber on the land in question passed from the State by those proceedings.

1. Because it does not appear that the land agent acted under the instructions of the governor and council as provided by act of Feb. 26, 1863, c. 5, § 5.

2. The sale was not for cash, as required by the resolve, but was bid off by Allen, as agent for the female college; no money was paid, no conveyance was made, the pretended sale was a sham.

3. As no conveyance was made, no title whatever passed from the State to Allen or the college. The doings of the land agent and Allen, if of any account, cannot amount to anything more than a verbal understanding which can avail nothing. *Brown* v. *Dodge*, 32 Maine 167.

The sale authorized by the resolve, was of the timber and lumber upon the half township, with the right to have ten years, with-

in which time to take it off, this includes a right in so much of the soil as is necessary to sustain the timber until taken off, or during that time, this right partakes of the nature of real property, and the rules which govern the title and transfer of such property apply to the sale thereof. A deed was therefore necessary from the agent to Allen, or the college, in order to enable them to take any interest in the property. *Howard* v. *Lincoln*, 13 Maine, 122; *Adams* v. *Briggs*, Iron Co., 7 Cash 367; *White* v. *Foster*, 102 Mass. 378; *State* v. *Patten*, 49 Maine, 383; *Rogers* v. *McPhetres*, 40 Maine, 114.

By the attempted sale by the land agent in 1864-5, nothing passed to Allen, or the college, but the title remained in the State.

The title of the township in question, remaining in the State to the year 1868, passed by the act of March, 1868, and the deed of the governor and council, made in pursuance of the acts of 1864, c. 401, and 1868, c. 604, to the plaintiffs, free from any incumbrance on its timber.

Unless it can be brought within the exception of the act of 1864. 'All timber, lumber, and lands granted and voted by the present or preceding legislature, reserving to the State the right to locate such grants within the present year of our Lord, eighteen hundred and sixty-four, or within the time or times limited therefor in the several acts and resolves granting the same.'

The land now in question was not embraced in that exception, because,

1. There was no grant of any land; there was no grantee named to take the title; the college were not to have or take any interest in the land; it was to have only the whole or a portion of the proceeds, arising from the sale of the timber and lumber on the half township. There is no location required by the resolve; only a sale of the timber and lumber upon some half township not selected for the school fund. The soil was to remain, and did remain, in the State. The exception was intended to apply only to cases where all the preliminaries had been performed, and there remained only a location on the face of the earth, to make the grant perfect.

The word grant implies a conveyance by deed or writing, or something equivalent thereto. Bouvier's Dic., Tit. Grant.

2. The land agent was not authorized to select, or set apart, or locate the timber and lumber on a half township, for the benefit of the college; but only to sell the same, and, from the proceeds, pay over to the college a portion of the money received for the same. As he did not follow the authority given, and the attempted sale was never completed, so as to pass any title to the timber and lumber, all the doings of the land agent were null and void, and the half township, and the title thereto, was left as though no action had been taken by him.

3. To bring the lumber and timber in this case within the meaning and terms of the exception, the acts of the land agent, necessary for that purpose, should all have been done in 1864, as no time for doing the same was fixed in the resolve. The only act required of the land agent was a sale. There was time enough to have given the notices required by the resolve, and to have made the sale in 1864. All that was necessary to be done by him, to perfect and pass the title should have been done that year. Having failed to do so, the exception does not apply, and the title remained in the State, and passed to the plaintiff company.

A. W. Paine, for the defendant.

WALTON, J. The plaintiffs have failed to satisfy us of their right to recover. We think the timber sued for never became their property.

The conveyance to them was made 'subject to all the reservations' contained in the act of March 24, 1864; and one of the reservations contained in that act was of 'all timber and lumber and lands, granted or voted' by that or any previous legislature; and we think the timber in question had been 'voted' within the meaning of that term as there used, and was, therefore, excepted out of the operation of the plaintiffs' deed.

The resolve of March 22, 1864, in favor of the Maine Wesleyan

Seminary and Female College, authorized the land agent to sell the timber and lumber upon any one-half township of land belonging to the State, and not already otherwise appropriated, and to pay the proceeds of the sale, not exceeding $10,000, to the trustees of said institution; in consideration of which, the trustees were to place at the disposal of the governor and council, five perpetual scholarships, free of tuition, to be given to returned soldiers, or their children, or to the children of such as had fallen in defense of their country. This sum, together with the sum of $5,000 to be raised by the trustees of the seminary and college, was to be permanently invested, the interest only to be expended.

The act of March 24, 1864 (two days later than the above resolve), authorized a transfer to the European & North American Railway Company, in a certain contingency, all the public lands lying on the waters of the Penobscot and St. John rivers, for the uses and purposes therein set forth; providing, however, that there should be excepted from said conveyance, and from the operation of that act, 'all timber and lumber and lands, granted or voted' by that or any preceding legislature.

Can any one doubt, that by the term, all timber and lumber, 'granted or voted' by that or any preceding legislature, it was intended to except from that conveyance, and from the operation of that act, the timber and lumber, which, only two days before, the legislature had authorized to be sold for the benefit of the seminary and college, and to secure a certain number of free scholarships for returned soldiers, or their children, or the children of such as had fallen in defense of their country? Is it possible that an object so worthy had been so soon forgotten? We think not. We think the words, 'all timber and lumber voted,' were intended to include the timber and lumber, which, by a vote of the same legislature, was to be sold for the purposes named, and that the same was thereby excepted, or reserved out of the timber or lumber or lands which, by virtue of the act named, was to be conveyed to the plaintiffs.

The learned counsel for the plaintiffs contends that the land

agent did not proceed according to law in selling the timber in question; that for this reason the title never vested in the pretended purchaser; that it remained in the State till the conveyance to them, and then passed to them under their deed of the sale on which it stood.

The argument would be sound if the reservation was made to depend upon a valid sale by the land agent. But such is not the fact. The reservation in the plaintiffs' deed is absolute—not dependent upon any such contingency. The grant to the college is indeed conditional, but the reservation in the conveyance to the plaintiffs is absolute, and a failure to appropriate the timber to the object which the legislature had in view when they reserved it, would not operate as a conveyance of it to the plaintiffs.

It is for the State alone, in its discretion, to take advantage of any forfeiture or error or failure in the proceedings subsequent to the grant.

This conclusion renders it unnecessary to examine critically to see whether the sale was strictly according to law or not. That the timber has, in fact, been sold, and the proceeds applied to the benefit of the college, thereby securing to returned soldiers, or their children, or the children of such as have fallen in defense of their country, five perpetual scholarships, free of tuition, is certain; and it must be a result gratifying to every one, to know that any mere informalities in carrying into effect so laudable an object will not defeat it. *Plaintiffs nonsuit.*

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

David D. Thorn *vs.* Merrill W. Mosher.

Frivolous exceptions. Superior court.

Section 21, c. 77, R. S., providing that exceptions deemed frivolous and intended for delay, may be transmitted to the chief justice and argued in writing as therein required, relates exclusively to exceptions in the supreme judicial court.

On exceptions to the ruling of Symonds, J., of the superior court for this county.

Assumpsit on a promissory note, dated May 1, 1871, for $2,500, given by the defendant to the plaintiff, payable in one year, with interest at ten per cent.

The writ was dated August 3, 1872, *ad damnum*, four thousand dollars.

The defendant filed a general demurrer, and the plaintiff joined the demurrer.

The presiding justice overruled the demurrer and adjudged the declaration good; thereupon the defendant alleged exceptions.

The presiding justice, deeming the exceptions frivolous and intended for delay, on motion of plaintiff, so certified, and transmitted them at once to the chief justice and directed them to be argued in writing on both sides within thirty days, in accordance with R. S.. c. 77, § 21.

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

Howard & Cleaves, for the defendant.

Appleton, C. J. This suit is upon a note for twenty-five hundred dollars. The *ad damnum* in the writ is four thousand dollars.

The superior court for the county of Cumberland, has exclusive jurisdiction 'when the damages demanded do not exceed five hundred dollars.' Statutes of 1865, c. 151, § 5.

By § 7, 'exceptions may be alleged as in the supreme judicial court, and entered, heard, and determined at the law term held in

the western district, provided, that when the next law term happens to be held in either of the other districts, the justice of the superior court may, on motion of the party not excepting, certify the exception to said next law term if, in his opinion, they are alleged mainly for delay; but the party so moving shall be deemed to waive his right to be heard in opposition to said exceptions, which shall be entered and determined at said next law term, without argument by said party and upon the oral or written argument of the party excepting. Cases certified upon agreed statement of facts, reports, and motions for new trial shall be entered, heard, and determined at the next law term in the western district; but any case for the law court may, on agreement of parties, be entered at the next law term in either district. And all exceptions, arising in cases within the exclusive jurisdiction of said superior court, may be certified at once by said justice to the chief justice of the supreme judicial court, and shall, when so certified, be argued in writing on both sides within thirty days thereafter, unless the justice of said superior court, shall for good reasons enlarge the time, and exceptions so certified shall be considered and determined by the justices of the supreme judicial court as soon as may be.'

By § 10, 'the provisions of law, relative to the jurisdiction of the supreme judicial court in said county over parties, the arrest of persons, attachment of property, the time and mode of service of precepts, proceedings in court, the taxation of costs, the rendition of judgments, the issuing, services, return of executions, and all other subjects are hereby made applicable, and extended to said superior court in all respects, except so far as they are modified by the provisions of this act.'

Now by § 7, when the next law term happens to be held in either of the other districts, 'the justice of the superior court is authorized to certify exceptions to the next law term if, in his opinion, they are alleged mainly for delay.' But these are not so certified.

The only authority given to certify directly to the chief justice, by § 7, is in 'cases arising within the exclusive jurisdiction of the superior court,' which this is not.

The case is not before us under the provisions of R. S., c. 77, § 21, for that applies only to proceedings in the supreme judicial court. Besides proceedings as to exceptions in the superior court are specially set forth in the act establishing the court, and so far as they are variant from those of the supreme judicial court, they must be regarded as modifications of the same. If the legislature had intended a change in the mode of certifying exceptions in the superior court, some language would have been used indicating such intention. The exceptions are not before us in accordance with any statutory enactment. If the demurrer was intended for delay, that would not affect in any way the jurisdiction of the court.

The case must, therefore, be remanded to the superior court for entry at the next law term in the western district, as provided by § 7. *Case remanded to the superior court.*

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

EZEKIEL S. BELL *vs.* N. M. WOODMAN and others.

Evidence—inadmissable to any subsequent written contract—or to contradict statement of collateral facts drawn from witness on cross-examination.

Evidence that the defendants contracted with another person to do the same work, to recover pay for which plaintiff sues, is no defense. In a suit between persons not party to a written contract, it cannot be varied by parol testimony of a different parol agreement previously made; for such agreement is merged in the writing.

If a statement of a fact, collateral to the issue, be drawn from a witness upon cross-examination, the party eliciting the testimony cannot contradict it.

ON EXCEPTIONS to the rulings of LANE, J., of the superior court.

ASSUMPSIT for labor and materials; tried by the justice without the intervention of a jury, subject to exceptions in matters of law. Plea, the general issue, with brief statement that the question at issue was whether there was a contract between the plaintiff and

defendants to do the work and furnish the materials sued for in the writ.

The defendants made a written contract with one Coffin, to build a paper-mill for them.

It was contended by defendants that the account sued for in plaintiff's writ was for labor and materials included in the contract with Coffin. The presiding justice found as matter of fact:

1. That whether it was included in the Coffin contract or not, the defendants did make a contract with the plaintiff to perform the labor and furnish the materials charged in his account.

2. That the plaintiff performed the labor and furnished the materials according to the contract.

Defendants offered to prove, by parol testimony, an agreement between Woodman, one of the defendants, and the said Coffin, to do the work and furnish the materials sued for by plaintiff in this writ; but it appearing that the contract for the building of the mill between Woodman and Coffin, subsequently to the parol agreement, was reduced to writing, the court excluded it on the ground that parol testimony was inadmissible to vary the written contract.

Counsel for defendants then offered the same testimony for the purpose of contradicting Coffin, who on his cross-examination said that there was no such parol agreement between himself and defendants, and the court excluded it.

Wm. H. Clifford, for plaintiff.

Mattocks & Fox, for defendants.

The justice did not find that matters offered to be proved were embraced in the written contract. We say they were not. Evidence on independent, collateral, or contemporaneous oral agreement may be shown between parties to written instrument; *a fortiori*, between one party and a stranger. *Davenport* v. *Mason*, 15 Mass. 85; *Joannes* v. *Mudge* 6 Allen, 245. The rule that parol evidence is inadmissable to contradict written instrument, applies only to suits between parties to it. 1 Greenl. on Ev. § 279; *Badger* v. *Jones*, 12 Pick. 371; *Champlin* v. *Butler*, 18 Johns. 169.

Woodman's testimony admissible to contradict Coffin. 1 Greenl. on Ev. § 462; 2 Phillips on Ev. (4th Am. ed.) 901, 905, 958, c. 10, § 3: *Tucker* v. *Welch*, 17 Mass. 160.

APPLETON, C. J. This is an action of assumpsit for work and labor done and materials furnished.

It seems that the defendants on Sept. 12, 1870, entered into a written contract with one John E. Coffin, to build a paper mill for them. The defense was, that Coffin, by virtue of a parol agreement prior to the written one, was to do the work and furnish the materials sued for in this action.

The presiding judge, to whom the case was referred, found, whether the work and materials in controversy were included in the contract made by the defendants with Coffin or not, that they did contract with the plaintiff to perform the labor and furnish the materials as charged in his account. The finding of the judge as to any matter of fact is conclusive. As the work was done by the plaintiff for the defendants, and under a contract with them, they are legally as well as equitably liable.

The defendants offered to prove, by parol testimony, an agreement between Woodman, one of the defendants, and said Coffin, to do the work and furnish the materials sued for, but, it appearing that the parol agreement was subsequently reduced to writing, the court excluded it.

This exclusion was correct. The previous conversations having been reduced to a written contract, that contract, in the absence of fraud, is the best proof of their agreement, and it cannot be varied or contradicted by parol evidence. *McLellan* v. *Cumberland Bank*, 24 Maine, 566; 1 Greenl. on Ev. § 275. Further, it was no answer to the plaintiffs' claim for work done and for materials furnished the defendants under a contract with them, that they had contracted with some other person to do the work and furnish the materials, which had not been done nor furnished.

As the prior parol agreement had been merged in a written contract, the parol agreement ceased to have any validity. As the

defendants contracted with the plaintiff to do certain things which he had done, it was nothing to him what bargains they might have made with others.

The defendants having cross-examined Coffin upon what was immaterial must be concluded by his answers.

Exceptions overruled.

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

CHARLES R. FROST and another *vs.* CHARLES J. WALKER and others.

Unincorporated joint-stock companies—who are members—their liabilities.

Every member of an unincorporated joint-stock company is personally liable for all of its debts.

It is sufficient to authorize a finding that persons are members of such company, if it be proved that their names are signed to the subscription papers for its capital-stock, and that they paid, without objection, assessments for the number of shares set against their respective names, even though it be not shown by whom their names were so subscribed.

By thus contributing to the working capital, the subscribers became entitled to share in the profits of the company, and liable, as co-partners, for its debts.

It seems that there is no distinction, in respect to their liability, between a subscriber for stock and a stockholder; however this may be, an actual payment of assessments, upon shares subscribed for, will create such liability.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed for labor and materials furnished the New England Express Company, an unincorporated, joint-stock association. Upon one of the original subscription papers to its stock were the names of the defendants; but, as to several of them, there was no direct proof of genuineness, nor how they came there. It was shown, however, that they subsequently

paid assessments upon the number of shares set against their respective names. The labor and materials were supplied at the request of the President of the company, to fit up its office in Portland, which was done under a vote of its executive committee, of which the president was a member. To the admission of this testimony defendants objected, and asked the court to rule it insufficient to prove the defendants members of the New England Express Company, or jointly liable, or that the president was authorized to contract for the company. This the judge refused to do, but did instruct the jury that, if they were satisfied the labor and materials were furnished by plaintiffs at the request of the New England Express Company, or its duly authorized agent, and that defendants were then members of the company, their verdict should be for the plaintiffs.

The verdict was for the plaintiffs and the defendants filed exceptions.

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

The New England Express was a joint-stock association, a partnership, as appears by its 'Articles of Association,' which have been so construed by the court in Massachusetts in *Taft* v. *Ward*, Mass.

Its contracts are those of its individual members, who are each liable thereon. Defendants paid assessments on stock, which establishes their membership.

S. C. Strout, *Wm. L. Putnam*, and *A. A. Strout*, for defendants.

Facts not being disputed, the question of liability is one of purely legal inference. Plaintiffs' remedy is against the president. They did not do the work with any idea that either of these defendants would be personally liable to them.

There is a difference between a subscriber for stock, who thereby simply agrees that he will take some stock in the future, and one who is already a stockholder. These defendants had not been admitted to 'a community of interest.' *Fox* v. *Clifton*, 6 Bing. 776 *Tyrrell* v. *Washburn*, 6 Allen, 473; Collyer on Part. § 1086.

Question of membership not entirely one of fact, but partly, if not wholly, of law. Its submission to the jury, with that of whether or not the articles were furnished at the request of the company, or its authorized agent, without more specific instructions, was erroneous. *Veazie* v. *Chester,* 53 Maine, 34, 35.

WALTON. J. An unincorporated joint-stock company is a mere partnership, and each member is personally liable for all its debts. 'It is important for the public to know, that if persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it.' Chief Justice *Abbott* in *Keasley* v. *Codd,* 2 C. & P. 408. See also to the same effect, *Tappan* v. *Bailey,* 4 Met. 535, and *Tyrrel* v. *Washburn,* 6 Allen, 466.

The New England Express Company was never incorporated. It was, therefore, a mere partnership, and each member was personally liable for all its debts. This is not denied.

But it is insisted that the evidence was not sufficient to warrant the jury in finding that these defendants were members of the company.

We think it was. The defendants' names are signed to what purports to be a subscription to the capital stock of the company, and they allowed themselves to be assessed for the precise number of shares set against their names, and paid the assessments without objection; and we think it is a reasonable inference that they would not have done this, if they had not either signed the paper in person, or authorized some one to sign it for them, or ratified the signing after it was made. And by thus contributing to the actual working capital of the company, we think they became entitled to share in the profits of the business, in case profits should be realized; and that this, by operation of law, made them co-partners, and liable for the co-partnership debts.

It is stated by an English author, as the result of a very full examination of the English cases, that shareholders and subscribers alike embark together in a concern of which they expect to share

the profits or losses; and that 'they are liable as partners, whenever they have agreed, unconditionally, to become shareholders.' Smith's Law of Contracts, 262, 3d Am. ed.

And it was held in *Spear* v. *Crawford*, 14 Wend. 20, that a subscription in these words, 'We, the subscribers, do severally agree to take the shares, by us severally subscribed, in the Harlaem Canal Company,' made the subscriber liable as a stockholder to the creditors of the company, although he had paid no part of his subscription, and had never done any act whatever as a stockholder. There, as here, the point was distinctly taken, that a mere subscription for stock did not make the subscriber a stockholder; but the court held otherwise; and we are not aware that the correctness of the decision has ever been questioned.

But it is not necessary, in this case, to decide whether an unconditional subscription for shares will, alone, make the subscriber liable as a partner; for these defendants not only subscribed for shares, but actually paid one or more assessments upon them; and we cannot doubt that, by thus contributing to the actual working capital of the company, they became entitled to share in its profits, if any should be made, and, as a legal consequence, became partners in the concern, and liable, as such, to its creditors.

Our conclusion, therefore, is that the requested instruction, that the evidence was not sufficient to authorize a verdict for the plaintiffs, was properly withheld, and that the instructions given were correct. *Exceptions overruled.*

Judgment on the verdict.

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

Inhabitants of Farmington *vs.* Sylvester Stanley and others.

Official bond. Powers of selectmen. Their neglect no discharge of sureties.

The failure of the selectmen to examine the accounts of a town treasurer, as directed by R. S., c. 6, § 152, will not affect the liability of the sureties upon his bond.

Nor will a surety be released if the selectmen, failing to detect an error in addition, certify the treasurer's account to be correct, when, in fact, there is a deficit; even if this certificate be made known to the surety soon after its entry upon the treasurer's books, and while the treasurer has attachable assets enough to cover the deficit, though he subsequently dies insolvent.

On report.

Debt on bond given by Leonard Keith, as treasurer of the town of Farmington, for the year 1863-4, with the defendants as sureties, conditioned that he 'shall faithfully discharge all the duties of said office.' Keith's actual receipts as treasurer, during the municipal year aforesaid, were $12,320.85; but, from an error in adding up the items, the footing up on the books was only $10,230.85, being $2,090 less than the true amount. He credited himself with $8,165.90 paid out for the town and with a balance in the treasury March 4, 1864, carried to his next account, of $2,064.95, making $10,230.85, balancing his apparent indebtedness as shown by the false addition. The selectmen, on March 4, 1864, not knowing or discovering this error in addition, certified that they had examined the accounts, and that they 'finding the same correct, allow the same,' which certificate was entered upon the treasurer's book, and soon afterward seen by Stanley, one of the sureties. At that time Keith had a large stock of goods exposed to attachment, amply sufficient to secure Stanley had he then known of the defalcation, which was not discovered till after Keith had died insolvent.

The selectmen did not make the quarterly examinations of the treasurer's accounts required by R. S., c. 6, § 152.

Keith was treasurer for several years prior to his death Jan. 22, 1866, and for each year after 1861 there was a defalcation.

The plaintiffs claimed that the difference between the amount in the treasury at beginning of the municipal year 1863-4, $1,556.72, and the balance there at the end of same year, $2,064.95—being $508.23—should be added to the $2,090 error in footing, to ascertain the whole amount of his defalcation, making it $2,598.23.

Keith, in 1865-6, as treasurer, deposited monies with the Sandy River National Bank, and there was deposited to the credit of the treasurer, at the time of his death, $3,650, which was paid to his successor in office. It was claimed that this sum was derived from the sale of certain bonds of the town, issued in 1865 for a specific purpose, and admitted that $1,000 of it came from this source.

After Keith's death, there was found among his papers evidences of town indebtedness paid by him, after his election as treasurer in 1865, to the amount of $15,519.34, which had not been entered upon the treasurer's book; but, with the deposit aforesaid, this was allowed upon his liabilities for the years 1865-6, in a settlement made between the selectmen and Keith's administrator, without the knowledge or consent of the defendants. Some of Keith's bondsmen for the several years during which defalcations occurred, had deposited with the town treasurer a sum sufficient to pay about forty-five per cent of the defalcation of each year, under an agreement that this was in nowise to operate as a release.

S. Belcher, for plaintiffs.

E. F. Pillsbury, for defendants.

The claim for the $508.23 difference between the amounts in the treasury at the beginning and close of the year, as by the treasurer's book, is based upon the assumption that there was, in fact, no money in the treasury, of which assumption there is no evidence, but the contrary appears by the treasurer's books, the correctness of which is certified by the selectmen, and must be considered correct except where proved to be erroneous.

The bank deposit was unappropriated funds in Keith's hands at

the time of his death, even if he and the selectmen intended to apply it to the payment of a particular debt. It had not been so applied, but could have been drawn out by Keith at any time, and applied as he pleased.

The application by the selectmen and Keith's administrator of this deposit, and the $15,519.34 payments made by Keith for the town after March 1, 1865, to the diminution of his liabilities for the year 1865-6, was not consented to by the defendants, and was unauthorized by law, which directs its application to the oldest debt. *Milliken* v. *Tufts*, 31 Maine, 497; *Goss* v. *Stinson*, 3 Sumn. 98; *Readfield* v. *Shaver*, 50 Maine, 37; *Parker* v. *Green*, 8 Met. 144; *Sandwich* v. *Fish*, 2 Gray, 299.

The amount so applied was much larger than the whole indebtment claimed for the four preceding years.

The defendants are discharged from liability by the laches of the municipal officers, who did not make the examination required by law, nor kept any account with the treasurer, but settled wholly by his books, which they assumed and certified to be correct, and allowed his accounts without even verifying the footings.

The law requiring examinations was designed to protect the sureties as well as towns; and the former sign the bonds under the implied promise that this duty will be performed, and their interests protected to this extent.

The settlement with, and certificate of the selectmen, made March 4, 1864, discharged the sureties. It was notice to them of payment by the principal, which, even if erroneous, will discharge the surety, if by relying upon it he lose the opportunity of securing himself. *Baker* v. *Briggs*, 8 Pick. 122; *Carpenter* v. *King*, 9 Met. 511; *Harris* v. *Brooks*, 21 Pick. 195.

Appleton, C. J. This is an action of debt against the sureties of Leonard Keith upon a bond dated March 3, 1863, and given by him as treasurer of the plaintiff town, for the year ensuing. The evidence shows that Keith was a defaulter.

The defendants resist liability on various grounds.

By R. S. of 1857, c. 6, § 135, reënacted by R. S. of 1871, c. 6, § 152, every treasurer is required to render an account of the state of the finances of the town, and to exhibit all books and accounts pertaining to his office, to the municipal officers of the town when required, and the officers are required to examine such treasurer's account as often as once in three months. But this has not been done. The sureties, however, are not thereby released. They covenanted that their principal should faithfully discharge the duties of his office. They are not released because other officers failed to do their duty. However negligent the selectmen might have been, the obligation was none the less stringent upon the treasurer that he should do his duty irrespective of the negligence of other town officers.

When the selectmen of Farmington examined the accounts of their treasurer, there was a mistake in his addition, which they failed to discover. They thereupon gave the following certificate:

'FARMINGTON, MARCH 4, 1864.

'We have examined the accounts of Leonard Keith, treasurer of Farmington for 1863-4, and finding the same correct, allow the same.

ALVAN CURRIER,
HIRAM RUSS,
H. B. STOYELL,
Selectmen of Farmington.'

The selectmen are agents of the town with limited powers. Without special authority given them, they have no right to release a witness who is liable to the town in case a judgment is recovered against it. *Carlton* v. *Bath*, 2 Foster 559. In *Horn* v. *Whittier*, 6 N. H. 94, an action was brought upon a bond given by the collector to the selectmen, for the faithful performance of his duty as collector, and one of the selectmen undertook to release the action. But the court held the release of no effect; that no one of the selectmen could release without authority from the town. The decision does not rest on the ground that the release was by one alone, but that no effectual release could be given without the authority of the town by vote. Here was a mistake in the treasurer

in addition. It was not perceived by the selectmen. 'It is admitted,' observes Story, J., in *U. S.* v. *Kirkpatrick*, 9 Wheaton 720, referring to a bond given to the United States, 'that mere laches, unaccompanied with fraud, forms no discharge of a contract of the nature between private individuals. Such is the clear result of the authorities.' The selectmen had no right to discharge the treasurer nor his sureties from these liabilities under their bond in case of a breach. If they could not do this directly, without authority from the town, still less could they do it indirectly. It was the neglect of the treasurer in his addition of the amount received that his defalcation was not then perceived. In *Porter* v. *Stanley*, 47 Maine, 515, there was a settlement made with the collector, by the selectmen, but it was held to bind neither the town nor the sureties of the collector, inasmuch as their settlement was not in accordance with the legal rights of the parties.

Nothing in the case indicates any error in the settlement made by the selectmen with the administrator of Keith's estate, adverse to the defendants.

Some of the bondsmen of Keith for the several years during which his defalcation occurred, have deposited $3,600 to meet these liabilities. This amount, which pays about forty-five per cent of the defalcation of each year, is to be divided *pro rata*. The defendants are entitled to a reduction accordingly, from the amount of their liability.

Judgment for plaintiffs for $2,090, with interest from March 4, 1864, less the defendants' proportion of $3,600 paid by the bondsmen of Keith, as stated in the report.

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

J. A. SKINNER *vs.* HALL and others, co-partners under name of EASTERN EXPRESS COMPANY.

Carriers—liability of beyond their route.

A carrier is not liable for goods lost beyond the end of his route, unless by special contract.

ON FACTS AGREED.

ASSUMPSIT for a package of money belonging to the plaintiff and forwarded through the defendants as common carriers, March 21, 1872, as by the following receipt of that date, signed by the defendants' agent.

Received of J. A. Skinner, two hundred and fifty dollars, directed Ayres, Mithoff, Damm & Co., Columbus, Ohio, which the Eastern Express Company agree to forward and deliver at destination, if within their route, and if not to deliver to the connecting express, stage, or other means of conveyance at their most convenient point, and to be responsible for such delivery to the amount of fifty dollars only, unless value is stated above. It is further agreed, that they shall not be held responsible for any loss occasioned by fire or the dangers of railroad, steam or river navigation, or for the breakage of glass or other fragile goods, or for money put inside a box or bundle.

It was admitted that the defendants were common carriers at the date of the receipt, doing express business; that their line extended no further west than Boston, Mass.; that the money named in the receipt did not reach its destination; that it was carried from Lewiston, where it was received, to Boston, by the defendants, there re-counted by them, sealed up and delivered by them to the American Merchants' Union Express Company, a responsible connecting express company between Boston and Columbus, Ohio; that the defendants took from American Merchants' Union Express Company, a receipt for the money; that the package was

lost somewhere between Boston and Columbus, Ohio; that the money was enclosed, by the defendants' agent at Lewiston, in a common express envelope which went to Columbus, but had been broken open and the money abstracted therefrom before its arrival there; and that the money was duly demanded of the defendants before the commencement of this action.

If the action was not maintainable, the plaintiff to be nonsuited.

M. T. Ludden, for the plaintiff.

W. P. Frye & J. B. Cotton, for the defendants.

DANFORTH, J. Unless by special contract, a common carrier is not liable for goods lost beyond the end of his route. *Nutting* v. *Conn. River Railroad Company*, 1 Gray, 502; *Perkins* v. *P. S. & P. Railroad Company*, 47 Maine, 589 and cases cited.

In this case there was a special contract, evidenced by the receipt given, limiting the defendants' liability to the end of their own route, and the delivery of the money to a 'connecting express company,' etc. The case shows that their contract was fully performed by the defendants. They have, therefore, discharged all the obligations resting upon them, either by law or by contract. *Pendergrast* v. *Adams Express Co.*, 101 Mass. 120.

Plaintiff nonsuit.

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

EVERETT E. READ and another *vs.* NATHAN L. FOGG.
EVERETT E. READ and another *vs.* CHARLES H. WHITTEMORE.

Life-estate. Contingent remainder. Estoppel. Real action.

A father, by deed of warranty, conveyed certain land to his daughter by name, 'for her use and benefit during her lifetime, and after her decease, to her legal heirs, to them and their heirs and assigns forever.' *Held*, That the daughter named took (by R. S., c. 73, § 6), a life-estate in the premises, the remainder in which was contingent until her death, when it vested in those who were then her heirs at law.

Where the contingent remainder man, prior to the decease of the tenant for life, conveyed the estate by deed of general warranty; *Held*, That the title which vested when the contingency ceased, enured to the benefit of such grantee, and the grantor was estopped by his deed.

Where the contingent remainder man, prior to the decease of the tenant for life, conveys his right, title, and interest to the estate, by deed of quit-claim, with the only covenant that the will 'warrant and defend the premises to the granter, his heirs and assigns against the lawful claims of all persons claiming by, through, or under' the grantor, the remainder vesting at the decease of the tenant for life, will not enure to the benefit of the grantor, nor will the grantor be estopped from maintaining a real action therefor.

A joint real action cannot be maintained when one of the plaintiffs is estopped by his deed to set up the title.

ON REPORT.

REAL ACTIONS brought by Everett E. Read and Margaret J. Randall.

The facts sufficiently appear in the opinion.

W. W. Bolster, for the plaintiffs.

Record & Hutchinson, for the defendant.

APPLETON, C J. On March 20, 1845, John Randall conveyed by deed of warranty, to his daughter, Margaret Read, 'for her use and benefit during her lifetime, and after her decease, to her legal heirs, to them and their heirs and assigns forever,' certain real estate, of which the demanded premises constitute a portion.

Margaret Read, at the date of the deed from her father, had two children, Margaret J. Read and Alvah J. Read.

Margaret J. Read married Oliver E. Randall, and is one of the plaintiffs in this suit.

Alvah J. Read died on May 27, 1861, leaving one son, Everett E. Read, who is the other plaintiff.

On Feb. 11, 1861, Margaret Read, Margaret J. Randall, and Alvah J. Read, conveyed, by deed of warranty, the demanded premises to John Carvill, from whom the tenant derives title by various mesne conveyances.

By the terms of the deed, a life-estate is given to Margaret Read. 'After her decease' the remainder goes 'to her legal heirs.' No one is the heir of the living. The heirs are those who shall be such at the decease of the person holding the life estate. They may be different individuals at different periods of time during the continuance of the intermediate estate, as they were in the case under consideration. The remainder, therefore, is contingent. The fee vests when the contingency ceases. Such has been the uniform decision in this State and in Massachusetts, in cases almost identical with the present one. *Hunt* v. *Hall*, 37 Maine, 366; *Richardson* v. *Wheatland*, 7 Met. 171; *Putnam* v. *Gleason*, 99 Mass. 454. It follows, therefore, that the title to half of the demanded premises vested in Everett E. Read, on the decease of his grandmother.

But one of these demandants, Margaret J. Randall, by deed of warranty, with general covenants, conveyed the demanded premises to John Carvill. Although at that time, she had no title, her mother being then alive, yet now having acquired one on her mother's decease, it enures to the benefit of her grantee. She is estopped by her deed.

As one of the demandants is estopped by her deed, the action is not maintainable by them jointly. *Plaintiffs nonsuit.*

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

APPLETON, C. J. The parties in this case claim title derived under the deed from John Randall to Margaret Read, dated March 20, 1845, and referred in *Read* v. *Fogg*.

It was there held that Margaret Read took only a life-estate in the premises conveyed, and that by the terms of the deed the fee vested in the demandants, her heirs at law, at the time of her decease.

The tenants claim, under a deed of release dated March 1, 1858, from Alvah J. Read, the father of one of the demandants, and from Margaret J. Randall, the daughter of Margaret Read, and the other demandant, in which, for the consideration of one dollar, they released, remissed, bargained, sold, conveyed, and forever quit-claimed, to James Lowell, his heirs and assigns forever, all their (our) right, title, and interest in and to a certain piece or parcel of land, of which the demanded premises constitute a portion.

At the date of this deed, the tenant for life was living. The grantees had only an expectant estate. The fee had not then vested in them. It might never so vest. In fact it never did vest in Alvah J. Read, who died before his mother.

In their deed to Lowell, it is true they covenant with him that they will warrant and defend the premises to him, the said Lowell, his heirs and assigns against the lawful claims of all persons claiming by, through or under them. In *Pike* v. *Galvin*, 29 Maine, 183, it was held that a deed of release, when the releasor or grantor has no right, passes nothing, and will not carry an after-acquired title, unless it contains covenants of warranty. The covenant of non-claim asserts nothing respecting the past or the present. It relates only to the future. The same view of the law was held in *Harriman* v. *Gray*, 49 Maine, 537. The deed of Margaret J. Randall creates no estoppel to prevent her maintaining this suit as one of the demandants. *Judgment for plaintiffs.*

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

William Farris *vs.* John Ware.

Assumpsit—when maintainable. Contract—rescission of for fault of defendant.

Where the fraudulent representations of the seller of property, whereby the purchaser was induced to buy, were such as give the latter the right to rescind, and he does rescind the sale and surrender possession to the vender, the law implies a promise, on the part of the seller, to pay the purchaser for labor and materials in making reasonable repairs upon the property.

Thus the defendant fraudulently represented the water-power connected with his tannery, to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises and relying upon the representations, was thereby induced to purchase the tannery, and thereupon, after taking a bond thereof and giving his notes for the price, the plaintiff entered into possession, and, under the advice of the defendant, expended large sums in repairs; but the water failing, the plaintiff abandoned the property and notified the defendant that he considered the contract of purchase rescinded, whereupon the defendant took possession of the premises, and had the benefit of the repairs. In assumpsit to recover for the labor and materials in making the repairs. *Held*, that the action was maintainable.

Also *held*, that a surrender of the bond was not essential to a rescision of the contract.

On exceptions.

Assumpsit to recover for the labor and materials, amounting to $1,599.28, expended by the plaintiff in repairing the 'Ware Tannery' in Athens in this State. The writ was dated Aug. 30, 1869, and contained a special count, count on an account annexed, count for money laid out and expended, and a count for labor and materials furnished.

Plea general issue.

The plaintiff introduced a bond dated May 4, 1869, in the penal sum of $9,000, given by the defendant to the plaintiff, obligating himself to convey to the plaintiff the 'Ware Tannery' and certain land-rights, water-rights, and privileges therein described, upon the plaintiff's paying to the defendant eight promissory notes, given by the plaintiff to the defendant, according to their tenor,

amounting to the sum of $4,500, and performing certain other stipulations mentioned but not necessary to the decision of this case.

The plaintiff offered to prove the facts recited in the opinion. The defendant objected to the introduction of the testimony offered, contending that the proof would not authorize a recovery in this action, but that the action should have been an action on the case for deceit, and the presiding judge sustained the objection and excluded the proposed evidence and ordered a nonsuit; whereupon the plaintiff alleged exceptions.

J. J. Perry, for the plaintiff.

W. P. Frye & J. B. Cotton, for the defendant.

WALTON, J. The plaintiff was nonsuited at *nisi prius* upon the ground that the facts which he offered to prove, though sufficient to maintain an action on the case for deceit, were not sufficient to support an action of assumpsit.

The plaintiff's case, as he offered to prove it, is substantially this: He says that the defendant was possessed of a tannery which he was anxious to sell to him; that to induce him to buy it, the defendant represented that the water-power connected with it was sufficient to work it continuously throughout the year; that having no knowledge of the capacity of the water-power himself, he was obliged to rely, and did, in fact, rely, upon the statements of the defendant; that he was thereby induced to enter into a contract for the purchase of the tannery; that he took a bond of it, and gave his notes for the price; that he entered into possession of the tannery, and under the advice of the defendant, expended nearly sixteen hundred dollars in repairs and improvements upon it; that when summer came there was no water to operate it; that he then discovered that what the defendant had told him was false, and that the defendant knew the statements were false when he made them; that, thereupon, he abandoned the property, and notified the defendant that he should consider the contract for its purchase

rescinded; that the defendant then took possession of the tannery, and had the benefit of the repairs and improvements.

Such in substance is the plaintiff's case, as he offers to prove it. Whether he can, in fact, make out such a case against the defendant is not now the question. The only question before us is whether, upon such a state of facts, if proved, an action of assumpsit can be maintained. We think it can. It was so held in *Wright* v. *Haskell*, 45 Maine, 489.

In that case the court held, that where the plaintiff had contracted for the purchase of a house, which he put in repair, with the defendant's knowledge, and without objection from him, and the contract was afterwards abandoned by the plaintiff, for the fault of the defendant, he might recover in an action of assumpsit, upon the common counts, not only for labor which he had performed in part-payment for the house, but also for the repairs made upon it. The decision rests upon the principle, that where the conduct of the seller is such as to give the purchaser a right to consider the contract as rescinded, the law implies a promise on the part of the seller, to pay the purchaser for his labor and materials in making repairs upon the property. The court say this principle is well sustained by authority, and is not inequitable, as the seller has the benefit of the repairs. See also, to the same effect, *Canada* v. *Canada*, 6 Cush, 15, and authorities there cited.

In this case the plaintiff offered to prove, that, on account of the defendant's fraud, he had a right to rescind the contract for the sale of the tannery, and that he exercised the right, and informed the defendant that he should treat the contract as rescinded. He also offered to prove that he had restored to the defendant the possession of the tannery. This was all that the law required him to do in order to rescind the contract. He was not obliged to surrender his bond, which was the evidenee of his contract, and might be useful to him in case of litigation. He offers to prove that he restored all the property which he received under the contract, and that the defendant took possession of it, and thus had the benefit of the repairs and improvements which had been put upon it. We

think this was all which the law required of the plaintiff in order to rescind the contract. And the contract being rescinded for the fault of the defendant, the law seems to be well settled that the plaintiff may recover for those repairs and improvements in an action of assumpsit. *Exceptions sustained.*

New trial granted.

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

DAVID F. PAGE and another *vs.* WASHINGTON GILBERT.

Indorser—notice to—what sufficient.

A notice to an indorser merely informing him of the non-payment of the note and demanding payment of him, without stating in substance that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is insufficient to charge the indorser.

A statement in the official certificate of the notary that he 'delivered notice of the non-payment of said note to' the indorser, naming him, 'demanding payment of him,' is insufficient to charge the indorser.

ON REPORT.

ASSUMPSIT against the indorser of a negotiable promissory note, of the following tenor:

$1,650. BATH, April 1, 1867.

Four months after date, I promise to pay to the order of Washington Gilbert, sixteen hundred and fifty dollars, value received, payable at my counting-room, in Bath.

(Signed) B. C. SEWALL.

Indorsed: W. GILBERT.

Protested for non-payment. Notice to indorser, Aug. 3, 1867.

JOHN SHAW, *N. P.*

The indorsement and death of John Shaw, notary public, were admitted.

The plaintiff introduced in evidence subject to objection, a copy of the notarial protest, duly signed, as follows:

NOTARIAL COPY.

$1,650. BATH, April 1, 1867.

Four months after date, I promise to pay to the order of Washington Gilbert, sixteen hundred and fifty dollars, value received, payable at my counting-room, in Bath. B. C. SEWALL.

Indorsed: W. GILBERT. . . .

STATE OF MAINE.

Sagadahoc, ss. City of Bath. On this third day of August, A. D. 1867, I, John Shaw, notary public, by legal authority, admitted and sworn, and dwelling in the city of Bath, at the request of Henry Eames, cashier, went with the original note, of which the foregoing is a true copy, the time limited and grace having elapsed (to-morrow being the Lord's day) to the counting-room of B. C. Sewall (could not find him, he being out of the city) and presented said note to his clerk, and demanded payment, which he refused for want of funds. Delivered notice of the non-payment of said note to Washington Gilbert, demanding payment of him.

Also delivered notice of the non-payment of said note to the other indorsers, Henry Eames, esq., cashier of Sagadahoc bank, requiring payment of them.

Wherefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest against the drawer of said note, and all others concerned therein, for exchange, re-exchange, and all costs, charges, damages, and interest suffered and sustained, or to be suffered and sustained, by reason or in consequence of the non-payment of said note, etc.

(Signed) * * * *

STATE OF MAINE.

Sagadahoc, ss. Supreme Judicial Court. Clerk's Office, Bath.

I hereby certify that the foregoing is a true copy from the records of the late John Shaw, esq., a notary public, now on file in this office.

Witness my hand and the seal of the supreme judicial court, at Bath, this twenty-seventh day of November, A. D. 1871.

[L. S.] JOS. M. HAYES, *Clerk.*

Plaintiffs rested.

The defendant, called by his counsel, testified *inter alia*. That he indorsed the note in suit, for the accommodation of the maker, having no interest in the transaction, and made memorandum thereof in his note-book; and that he cannot testify that he was notified on the note.

On cross-examination: Sewall lived in Bath in 1867; was in business and had a counting-room there. Cannot state from recollection that he was notified, but supposed until his return to Bath the other day, that he had never been notified; and that he resided in Bath Aug. 3, 1867.

The full court to render judgment upon the law and legal evidence.

L. Clay, for the plaintiffs.

Legitimate inference from the notary's statement that he 'delivered notice,' etc., is, that the notice was in writing; but whether verbal or written, it is *prima-facie* sufficient.

The defendant does not absolutely deny, but testifies that he cannot state from recollection that he was notified.

Verbal notice is sufficient to an indorser residing in the town when the note is payable. *Bank* v. *Stackpole*, 41 Maine, 321; *Bank* v. *Wood*, 49 Maine, 26.

The facts stated in the notarial protest are sufficient to charge the defendant. *Bank* v. *Leonard*, 43 Maine, 144; *Pattee* v. *McCrillis*, 53 Maine, 410; Story on Prom. Notes, 373, 374.

The certificate of the notary under his hand and seal, is legal ev-

idence of the facts therein contained. R. S., c. 32, § 4; *Pattee* v. *McCrillis*, *Sup.*

Gilbert, pro se.

1. The defendant is bound to no more than he undertook; and his contingent liability is to be made absolute only by method of the law.

2. The notarial protest is fatally defective. It does not specify presentment within hours. Nor at the proper place; does not state where the counting-room was.

3. Does not show proper notice. No averment of time of notice. Does not identify the defendant as notified. Does not convey information as to the dishonor of the note. *Tindal* v. *Brown*, 1 T. R. 169; *Hartley* v. *Case*, 4 Barn. & Cres. 339; *Solarte* v. *Palmer*, 7 Bing. 530; *Bolton* v. *Welsh*, 3 Bing. N. C. 688; *Phillips* v. *Gould*, 8 C. & P. 355; *Strange* v. *Price*, 10 Adolph. & Ellis, 125; *Messenger* v. *Southey*, 1 Man. & Go. 76; *Gilbert* v. *Dennis*, 3 Met. 495; *Pinkham* v. *Macy*, 9 Met. 174; *Ransom* v. *Mack*, 2 Hill. 588; *Wynn* v. *Alden*, 4 Denio. 163; *Dole* v. *Gold*, 5 Barb. 490; *Van Hausen* v. *Alslyne*, 3 Wend. 75; *Bank of Utica* v. *Webster*, 21 Wend. 643; *Remer* v. *Downer*, 23 Wend. 620; *Spencer* v. *Bank of Salina*, 3 Hill. 520; Story on Prom. Notes, §§ 348, 351; *Mills* v. *Bank of U. S.*, 11 Wheaton, 431; Story on Prom. Notes, § 350.

Walton, J. A notice to the indorser of a note, which merely informs him of the non-payment of the note, and demands payment of him, without stating that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is not sufficient to charge the indorser. *Littlehale* v. *Mayberry*, 43 Maine, 264; *Union Bank* v. *Humphreys*, 48 Maine, 172; *Pinkham* v. *Macy*, 9 Met. 174; *Gilbert* v. *Dennis*, 3 Met. 495.

The notice should state whether or not the note has been presented to the maker for payment; and if not, why not. The indorser has a right to be informed of those facts on which his liability depends, to the end that he may judge for himself whether or

not it is his duty to pay the note. A notice, which merely states that the note has not been paid, without stating whether or not it has been presented for payment, or giving any excuse for not presenting it, is not sufficient; for such a notice may be strictly true in every particular, and yet the indorser not be liable. When the official certificate of a notary public states that he 'duly' notified the indorser, it is sufficient *prima-facie*, to charge the indorser; because the notary could not properly say he had 'duly' notified him, unless he had given him notice of a demand as well as of non-payment of the note. *Bank* v. *Leonard*, 43 Maine, 144; *Pattee* v. *McCrillis*, 53 Maine, 410.

But when the certificate does not use the words 'duly notified,' nor any equivalent words, but simply states the naked fact that the indorser was notified of the non-payment of the note, without stating whether or not it had been presented for payment, and gives no excuse for not presenting it, there is no ground for inference, and the court cannot properly decide that the indorser was notified of any other fact than that stated in the certificate.

In the case now before us, the only evidence of notice to the indorser is the statement of the notary that he 'delivered notice of the non-payment of said note to Washington Gilbert, demanding payment of him.' He does not state whether or not the note had been presented for payment. Nor does he give any excuse for not thus presenting it. Nor does he say that he 'duly' notified the indorser. Nor does he use any equivalent word or phrase. There is nothing from which the court can find that the indorser was notified of any other fact than the non-payment of the note, and that he was looked to for payment. Such a notice would be clearly insufficient. Every word of it might be true, and yet the indorser not be liable. *Judgment for defendant.*

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

STATE OF MAINE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Statute—construction of.

The remedy, by indictment, for the life of any person, in the exercise of due care and diligence, lost by the negligence or carelessness of any railroad corporation, or by that of its servants or agents while employed in its business, is limited to cases where the person injured dies immediately, and is not applicable in any case to the employees of the road.

INDICTMENT alleging that the Maine Central Railroad Company, a corporation duly and legally established in this State, in said county of Kennebec, on the 27th day of June, A. D. 1871, at Farmingdale, in said county, over, upon, and along a certain railroad called the Portland & Kennebec Railroad, managed, operated, and controlled by said Maine Central Railroad Company, running and extending from Augusta, in said county, to Portland, in the county of Cumberland, did, by their agents and servants, run, conduct, and drive a certain locomotive steam-engine and train of cars attached, and by their agents and servants, then and there had the care, custody, management, and control of said engine and cars; upon which said engine was one Wilson Cavill, a servant of said company, then and there acting in the capacity of fireman, and being then in the exercise of due care and diligence; that by the gross negligence and carelessness of the agents and servants of said Maine Central Railroad Company, other than the said Wilson Cavill, the said locomotive steam engine, with train of cars attached, was then and there permitted and suffered to strike and run into and against, and to be with great force and violence driven and dashed into, upon, and against a certain other locomotive steam-engine, and one car attached, called the Gardiner and Augusta accommodation train, which said accommodation train was then and there lawfully traveling and being propelled on and along said railroad, by means of which the aforesaid engine, upon which was the said Wilson Cavill, was thrown with great violence from

the track of said railroad and broken in pieces; whereby divers mortal injuries, bruises, scalds and wounds were inflicted upon the head, body, and limbs of the said Wilson Cavill, of which said mortal injuries, bruises, scalds, and wounds the said Wilson Cavill, on the twenty-ninth day of said June, A. D. one thousand eight hundred and seventy-one, at said Augusta, died.

And so the jurors aforesaid upon their oaths aforesaid, do say that the life of said Wilson Cavill, he being then and there a person in the exercise of due care and diligence, was then and there lost by reason of the gross negligence and carelessness of the aforesaid agents and servants of said company, other than the said Wilson Cavill, in manner and form aforesaid; whereby the said Maine Central Railroad Company have become liable to forfeit not less than five hundred nor more than five thousand dollars, to be recovered by indictment, wholly to the use of, etc.

To this indictment the defendants filed a demurrer, which was joined.

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

Bradbury & Bradbury, for the defendants.

WALTON, J. The statutes of this State declare, in effect, that, when the life of a person is lost though the carelessness of a railroad corporation, or its servants, compensation shall be made to the heirs of the deceased, to be recovered by indictment. R. S., c. 51, § 36.

1. One question presented is, whether the remedy by indictment is not limited to cases where the person injured dies immediately. We think it is. If he does not die immediately a right of action accrues to him, which will survive to his personal representatives, and no other remedy is needed. R. S., c. 87, § 8. But if he does die immediately, no right of action will accrue to him, and, of course, none will survive to his heirs, or to his personal representatives, for their benefit. Several distressing cases of this kind are mentioned by Chief Justice Shaw. *Kearney* v. *Railroad*, 9 Cush. 108; *Hallenbeck* v. *Railroad*, 9 Cush. 478.

We think the remedy by indictment was intended to apply to the latter class of cases alone. To hold otherwise would involve the legislature in the absurdity of creating two independent, and, to some extent, conflicting remedies, for one and the same injury. We think the remedy by indictment was intended to apply to a class of cases where none would otherwise exist. If the person injured dies immediately, the remedy is by indictment. For such cases no other remedy exists. But if the injured person does not die immediately, then the remedy is by a civil action. The remedy by indictment ends where the remedy by a civil suit begins.

Thus construed the statutes are in harmony, and the absurdity of supposing that the legislature intended to create two independent and conflicting remedies, for one and the same injury, is avoided.

In Massachusetts, a statute similar to ours has been differently construed. It is there held that the remedy by indictment is not limited to cases where the death is instantaneous,—that the purpose of their statute was to inflict punishment as well as to secure compensation to the family of the deceased. *Com.* v. *Metropolitan Railroad Co.*, 107 Mass. 236. Such may have been the purpose of their legislature. It may there be necessary to provide some other means than a civil suit for punishing delinquent and grossly careless railroad companies. But in this State, where the rule that in a civil suit against a railroad company the jury may inflict punitive damages (if the case is one calling for punishment) is in full force, no such motive can be presumed to have influenced the legislature in passing our statute, and none such can influence the court in construing it. See *Goddard* v. *Railroad*, 57 Maine, 202. Besides, we have already held, in another case (*State* v. *Railroad*, 58 Maine, 176), that the intention of our legislature was no more than to do away with the rule, that all claim for damages must stop at the grave; that when damages are sought to be recovered upon indictment, the same rules of evidence, and the same principles of law, apply, as when redress is sought by a civil suit; and we cannot now resist the conviction that the sole purpose of our legislature

was to provide for the family of the deceased a means of redress where none would otherwise exist; and that it was no part of their purpose to punish the corporation as for a criminal offense. Influenced by these considerations, we think the remedy by indictment ceases when the remedy by civil suit accrues; that neither punishment nor the redress of grievances requires an overlapping of the two remedies.

2. Another question is, whether the statute under consideration is applicable to a case where the person killed was, at the time, an employee of the road. We think this question must also be answered in the negative. It is certain that the act of 1855, which is the basis of the existing law, did not apply to the employees of the corporation. The first section of the act applied only to passengers. The second section of the act applied to persons other than passengers, but expressly excluded the employees of the road. In the revised statutes, these several provisions are crowded into one section of only seven lines, and the language employed is more general. But there is nothing to lead us to believe that a change of the law was intended. Our conclusion, therefore, is that the existing statute is not applicable to the employees of the road. To hold otherwise, would endanger the safety of travelers. Their safety requires that the persons in charge of a train of cars should be regarded as a unit; that each should feel responsible, not only for his own conduct, but also for the conduct of all the others. They should be made to feel that it is their duty, not only to be watchful of themselves, but to be watchful of each other. And this end will be best secured by making them the insurers of their own safety. Such was the opinion of Chief Justice Shaw. He says that where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each of the others performs his appropriate duty, each is an observer of the conduct of the others, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of

the whole party requires; that, by these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. *Farwell* v. *Railroad*, 4 Met. 59.

Our conclusion, therefore, is, that the remedy by indictment is limited to cases where the person injured dies immediately, and to persons other than the employees of the road.

Demurrer sustained.

Indictment adjudged bad.

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

JAMES ALLEN, petitioner for increase of damages, *vs.* ANDROSCOGGIN RAILROAD COMPANY.

Practice. Damages—increase of.

By R. S., c. 18, § 12, it is made the duty of the person presiding at the view and hearing by a jury, in the assessment of damages for land taken for a railroad, to 'certify to the court, with the verdict, the substance of any decision or instruction by him given, when any party shall request it.'

When a party does not request the person presiding to certify his rulings, he thereby waives all right of exception, and cannot prove the rulings by calling, as a witness, the person who presided.

ON EXCEXTIONS.

THIS case came before this court on the return of the proceedings had before a jury impannelled to assess damages for land taken by the defendants for their railroad, with the report of the evidence and the verdict of the jury.

The report, signed by the presiding officer, certifies no party requested him to certify any rulings made by him.

The respondents offered to prove, by the presiding officer, what rulings he gave the jury; but the presiding justice excluded the offered testimony, and thereupon the defendants alleged exceptions.

H. L. Whitcomb, for the petitioner.

Belcher & Belcher, for the respondents.

APPLETON, C. J. It is made the duty of the person presiding, 'to instruct the jury upon any question of law when requested by either party; and certify to the court, with the verdict, the substance of any decision or instruction by him given, when either party shall request it.' R. S., c. 18, § 12. But without request he is not obliged to do it. Nor can the petitioner prove his decisions or instructions, subsequently, by calling him as a witness. The petitioner not having, at the hearing, requested the decisions or instructions given to be certified, has waived all right of exception. *Exceptions overruled.*

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

JAMES YATES *vs.* CYRUS WORMELL.

Confusion of goods. Attachment. Trespass.

An action of trespass lies against an officer who attaches the goods of a stranger, notwithstanding they are so intermingled with those of the debtor that the officer cannot distinguish them, if the owner is present and offers to select his, and is prevented from so doing by the officer.

ON EXCEPTIONS AND MOTION.

TRESPASS.

D. Hammons, for the plaintiff.

S. F. Gibson, for the defendant, cited *Smith* v. *Morrill*, 56 Maine, 564, 568; *Hesseltine* v. *Stockwell*, 30 Maine, 237; *Bryant* v. *Ware*, 30 Maine, 295.

WALTON, J. This is an action of trespass against the sheriff of the county of Oxford, for the alleged misdoings of his deputy in attaching the plaintiff's goods on a writ against one Artemas Felt.

The principal ground of defense was that the plaintiff's title was fraudulent as against the creditors of Felt. But the defendant's counsel also made the point that there was such an intermingling of the plaintiff's goods with those of Felt, that the officer could not distinguish them; and that the officer was, therefore, justified in taking the whole into his possession; and that for such a taking this form of action (trespass) could not be maintained against him; and requested the presiding judge so to instruct the jury.

The presiding judge instructed the jury that if they should find such an intermingling as was contended for by the defendant's counsel, they should find for the defendant, 'unless the plaintiff offered to designate his goods; and if he did, and the officer prevented him, that the officer was not justified, and this form of action could be maintained against him.'

To the qualification commencing with 'unless,' the defendant excepts. He says it is in conflict with the law as laid down by the same judge in *Smith* v. *Morrill*, 56 Maine, 566; that it is there said to have been repeatedly held that an officer has a right to attach the goods of another, negligently or fraudulently intermixed with those of the debtor, and hold them until they were identified by the owner, and a re-delivery demanded; that he could not be treated as a trespasser for doing what he had a right to do; and that if after identification, and a demand for re-delivery, he refused to give up the goods, he would be liable for their value in trover, but that trespass could not be maintained for the original taking.

The defendant's counsel contends that the law is plain and positive that trespass cannot be maintained against an attaching officer where there is such an intermingling of goods, even if an offer is made by the plaintiff to point out or designate the part belonging to him.

We think this proposition cannot be maintained. It is evident that in *Smith* v. *Morrill*, the chief justice was not speaking of a

taking where the owner is present and offers to point out his goods. Nor does he say that an officer may not be made a trespasser *ab initio*, by relation, where the owner subsequent to the attachment offers to point out his goods, and demands a re-delivery of them. He simply says that he will not be a trespasser for the original taking, which is undoubtedly true.

It is said in *Shumway* v. *Rutter*, 8 Pick. 447, that the officer is obliged to attach the goods of the debtor, notwithstanding they may be mixed with the goods of another; that it is the business of the owner, who has allowed them to be so confused, to separate his own from the debtor's. But the court also say, that if the owner can distinguish, and does point out to the officer the goods which belong to him, the officer will be a trespasser if he takes them. See also *Taylor* v. *Jones*, 42 N. H. 36. And in *Carlton* v. *Davis*, 8 Allen, 94, and in *Smith* v. *Sanborn*, 6 Gray, 134, the court say that if there is such an intermingling of goods, it is the duty of the officer to ascertain, if he can, what portion of the goods belongs to each, and that he will not be justified in attaching the whole without first making such an effort.

We think there can be no doubt that an action of trespass will lie against an officer who attaches the goods of a stranger, notwithstanding they are so intermingled with the goods of the debtor that he cannot distinguish them, if the owner is present and offers to select them, and is prevented from so doing by the officer. As the ruling of the presiding judge, which is excepted to, went no further than this, the exceptions must be overruled.

The defendant also files a motion to have the verdict set aside as against evidence. The motion cannot be sustained. The verdict may not indeed be such an one as we might have rendered, but we think it is not one which is so clearly erroneous, that it should be set aside.

Motion and exceptions overruled.

Judgment on the verdict.

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

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

Pleading. Special demurrer—judgment on—practice.

When a special demurrer to a replication, setting out all the facts necessary to maintain the plaintiff's case, is overruled and the replication adjudged good, final judgment follows.

But under R. S., c. 82, § 19, judgment is not rendered on demurrer until the term following the certificate of the decision.

Nor then, if the costs are paid and new pleadings are filed on the second day of the term.

If the costs are not paid and new pleadings filed on the second day of the term succeeding the decision, the right to pay and file them is waived.

When the replication to a plea of performance of the conditions of a bond for the performance of covenants and agreements, sets forth the precise amount of money received by the principal and unaccounted for, and is adjudged good on special demurrer, the sum named is a fact admitted by the demurrer, and judgment must go for that amount.

A plea of *puis darrein continuance* may be filed after issue joined, but not after that issue has been decided.

ON EXCEPTIONS.

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

Writ dated March 23, 1861.

At the April term, 1868, the defendants pleaded full performance of the covenants and condition of the bond. To which the plaintiff replied, that the principal defendant was treasurer of the State from Jan. 13, 1858, to Feb. 4, 1859, and that on Jan. 14, 1858, and divers other days and times between that day and Feb. 4, 1859, the said Peck, as said treasurer, received divers sums, amounting to $39,231.19, belonging to the State of Maine, and hath not accounted for any part of it. To this replication the defendants filed a special demurrer, which was joined.

(The pleadings may be found 58 Maine, 123.)

May 30, 1871, the certificate of the decision of the law court was received by the clerk overruling the demurrer and adjudging

the replication good. On the 13th day of the succeeding October term, 1871, the defendants moved for leave to withdraw the demurrer without the consent of the plaintiff and plead to the issue, tendering therewith a rejoinder alleging, substantially, that Peck did account for and pay to the plaintiff the said sums of money by the replication alleged not to have been paid, and tendered an issue to the country. But the presiding judge overruled the motion and declined to receive the rejoinder, and ordered judgment to be entered for the plaintiff for $150,000, the penalty of the bond.

Thereupon the defendants moved to be heard in chancery, and that execution may not issue for more than is due in equity and good conscience pursuant to the statute; and the presiding judge allowed the motion, and ruled, as matter of law, that it is incumbent upon the defendants to show that relief from the forfeiture of the penalty, named in the bond, ought in equity and good conscience to be granted. And in the absence of any evidence, other than that found in the pleadings, and the attorney-general signifying his willingness to accept the sum named in the replication, the presiding justice directed execution to issue for the sum of $39,231.19, with interest on that sum from the date of the writ. And the defendants alleged exceptions.

On the 22d day of the April term, 1872, four of the defendants filed a plea *puis darrein continuance*, alleging, substantially, that the action ought not to be further maintained against them, because that after the last continuance, to wit, on May 3, 1872, the plaintiff, by his writing of discharge and release, did release and discharge one Cummings from all liability as surety upon the bond in suit. But the presiding justice ruled the plea inadmissible at that stage of the cause; and the defendants alleged exceptions.

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

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

The defendants had a right to rejoin.

Not proper to enter a final judgment for the plaintiff, upon overruling a special demurrer to a replication.

The bond in suit is not one for performance of contracts, but one with a condition of defeasance. *Philbrook* v. *Burgess*, 52 Maine, 272.

A special demurrer does not admit the truth of all facts well pleaded, as is the case with general demurrer.

Even general demurrer does not admit damages,—an averment that defendant owes plaintiff a stated sum as damages. *Willard* v. *Baldwin*, 3 Gray, 484.

Nothing in R. S., c. 82, § 19, deprives defendants of right to rejoin; but only declares that a demurrer once filed shall be ruled upon unless withdrawn by consent before ruling.

Court having allowed defendants to be heard in chancery, the burden was upon the plaintiff to show amount due. *Gowen* v. *Nowell*, 2 Greenl. 13.

If the proceedings in entering judgment were proper, plea *puis darrien continuance* too late, otherwise not.

DANFORTH, J. This case has once been before the law court upon a special demurrer to the plaintiff's replication, 58 Maine, 123.

The demurrer was overruled, the replication held good, and the case sent back for final judgment, unless the defendants were permitted to withdraw their demurrer and plead anew under the provisions of the R. S., c. 82, § 19. At the term subsequent to the announcement of the decision, the defendants' counsel moved for leave to withdraw said demurrer, without the consent of the plaintiff and without complying with the provisions of the statute, and to plead to the issue. This motion was denied and judgment ordered for the plaintiff. To this the defendants except, and now claim the allowance of the motion as of right. If the judgment upon the issue, as made up, should have been *respondeat ouster*, the defendants are right in their claim, otherwise not.

Previous to the several acts embodied in the revision above cited, on a general demurrer, final judgment would have been ordered by the law court, and entered as of the preceding, instead of at the following term. The demurrer was not to a plea in abate-

ment but to a replication, which presented the full merits of the case. The party had his option to plead or demur. By electing the latter 'he shall be taken to admit that he has no ground for denial or traverse.' Stephen on Pl. 143.

The result of this principle is the well-established rule, 'that a demurrer admits all such matters of fact as are sufficiently pleaded.' It must be conceded that the replication contains all the facts necessary to maintain the plaintiffs' case, and the court have decided that it is sufficient in form. Hence a final judgment must necessarily follow. The authorities are to the same effect. Stephen, in his work on pleading, treating of judgments for the plaintiff says, on pages 104, 105, 'If it be an issue in law, arising on a dilatory plea, the judgment is only, that the defendant answer over. . . . Upon all other issues in law, and in general all issues of fact, the judgment is, that the plaintiff recover.' Also in note on page 144, 'On demurrer to any pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleading and found in favor of the same party.' *Clearwater* v. *Meredith*, 1 Wallace, 25, 43; *McKeen* v. *Parker*, 51 Maine, 389; *McAllister* v. *Clark*, 33 Conn. 258, and in *Parlin* v. *Macomber*, 5 Maine, 413; *Inhabitants of Washington* v. *Eames*, 6 Allen, 417, final judgment was ordered by the law court. But without denying the correctness of these principles when applied to a general demurrer, it is contended that they are not applicable to a special one, and it is said that none of the authorities so lay down the law. While this may be true, it is also true that in *Parlin* v. *Macomber* above cited, the court applied the law to a special demurrer, and also in *Washington* v. *Eames*, though in Massachusetts, under their practice act, all demurrers must be special. No authority has been cited, or fallen under notice, in which any distinction between the two kinds of demurrer, in respect to the judgment, has been alluded to, which, to say the least, is a little singular if any such difference exists.

Nor are we able to perceive any such distinction from the principles involved.

Every special demurrer includes a general one, for under the former 'the party may, on the argument, not only take advantage of the faults which his demurrer specifies, but, also, of all such objections in substance, as regarding the very right of the cause, as the law does not require to be particularly set down.' Stephen on Pl. 141, 142; Bouvier's Law Dict., 'Demurrer.' In the one just as much as in the other the party has his option to plead or demur, and must be equally bound by his election. But one answer, unless by leave of court, can be made to the plea, and if that is overruled, it must stand as true. A special demurrer raises a question of law just as much as a general one, and there is no exception to the rule as laid down, that where there is an issue of law upon a plea 'which goes to the action' the judgment will be final.

To these principles of law the statute adds its mandate. R. S., c. 82, § 19, requires more than that the court shall rule upon the demurrer unless withdrawn. After providing for amendments or new pleadings as the case may require, it declares that, 'at the next term of the court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the district to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the amendment or new pleadings filed on the second day of the term.' The statute gives the parties some rights which did not previously exist, and for the purpose of enabling them to secure those rights, the action is to stand upon the docket until the term following the certificate of decision.

But these rights must be asserted within the time and in the manner specified, otherwise they are waived, and the case ended. No distinction is made between a special and general demurrer, but the word used comprehends both. In this case the new pleadings were not filed on the second day of the term, nor do the costs appear to have been paid. Hence, in accordance with the statute, judgment must be entered.

The other question, raised upon the first bill of exceptions, relates to the burden of proof in fixing the amount of damages.

Whether the ruling upon this point is correct or otherwise, seems to be immaterial in this case, for the judgment to be entered must include the sum to be recovered as well as the right to recover. It may be, and undoubtedly is, true, that a demurrer to a declaration, alleging damages as the result of a wrong or an injury to property, damages technically so called, or as a conclusion of law from facts stated, would not admit the amount claimed. In such case it would be necessary to fix the amount by a subsequent inquiry by the proper tribunal. But the rule is otherwise when the action is to recover a specific sum, as upon a promissory note, account annexed or for money received. Stephen on Pl. 105.

In the latter case the sum named is as much a fact pleaded and admitted by the demurrer as any other stated in the declaration. *McAlister* v. *Clark*, before cited.

In this case the replication set forth the precise amount of money received by the principal in the bond, and unaccounted for.

That fact having been admitted by the demurrer, the judgment must go for that amount. The result is that the first bill of exceptions must be overruled.

This disposes of the second also. It is conceded by the defenddants' counsel, that if the proceedings first excepted to were legal and proper, the plea of *puis darrein continuance* was filed too late. This would seem to be a self-evident proposition. Although the plea may be filed after issue joined, it has never been allowed after that issue has been decided. When a cause is ended it can hardly be revived in this way. *Exceptions overruled.*

APPLETON, C. J.; CUTTING, WALTON, and DICKERSON, JJ., concurred. TAPLEY did not concur.

STATE OF MAINE *vs.* HUGH DOHERTY.

Superior court—criminal jurisdiction of. . Constitutional law.

The criminal jurisdiction of the superior court for the county of Cumberland was repealed by Pub. Laws of 1870, c. 174, which took effect Feb. 1, 1871; and was restored by Pub. Laws of 1872, c. 1,* which took effect Jan. 13, 1872.

An indictment found at the May term, 1872, of said court, by a grand jury drawn on venires, issued by the clerk thereof, on July 22, 1871, and impaneled and sworn at the following September term, was void.

And such indictment was not made valid by Pub. Laws of 1872, c. 1.

So much of Pub. Laws of 1872, c. 1, as purported to confirm and make valid the doings of said court in relation to indictments found by that grand jury, is in contravention of the constitution of the U. S., Art. XIV, § 1, and of the constitution of this State, Art. I, § 6.

ON REPORT.

INDICTMENT for maintaining a nuisance.

The respondent submitted the following motion in writing, verified by oath.

That the grand jurors by whom the indictment was found and returned, were not lawfully selected, impaneled, and sworn, and duly qualified to act as such grand jurors in this.

That chapter 216 of the Pub. Laws of the State of Maine, of the year 1868, entitled 'an act to enlarge the jurisdiction of the superior court in the county of Cumberland,' which said act was the only law that conferred criminal jurisdiction upon said superior court, prior to Jan. 13, 1872, was repealed by act of the legisla-

*PUB. LAWS 1872, c. 1, SECT. 1. Chapter 216 of Pub. Laws of 1868, entitled 'an act to enlarge the jurisdiction of the superior court in the county of Cumberland,' is hereby reënacted and declared to be in full force and effect; and the criminal jurisdiction conferred upon the superior court for the county of Cumberland, by the above-named act, is hereby affirmed, and all its doings in criminal cases, which have been in accordance with the provisions of said act, are hereby confirmed and declared to be legal and valid.

SECT. 2. This act shall take effect when approved.

(Approved Jan. 13, 1872.)

ture of said State of Maine, approved March 24, 1870, entitled 'an act to repeal the acts consolidated in the Revised Statutes of the year one thousand eight hundred and seventy;' which said last-named act took effect on and after Feb. 1, 1871, prior to the day when the only pretended venires for said grand jurors, issued out of the clerk's office of said superior court, and prior to the term of said superior court, which was held on the first Tuesday of September, 1871. At which said September term of said court, all the pretended venires for said grand jurors were returnable, and said grand jurors were pretended to be impaneled and sworn, and have not been impaneled and sworn from that day hitherto. And during all the said time, from said first day of February, 1871, to the thirteenth day of January, 1872, said superior court had no criminal jurisdiction, and no lawful authority to issue venires, for said grand jurors, and impanel and swear said pretended grand jury, nor have any other venires, issued from said superior court for grand jurors, nor has any other grand jury been impaneled and sworn from said first day of February, 1871, hitherto.

And it was by a pretended grand jury, thus selected, impaneled, and sworn at said September term of said superior court, that said indictment was found.

And the act of the legislature of said State approved Jan. 13, 1872, entitled 'an act relating to the superior court for Cumberland county,' so far as it was intended to apply to said jurors, was in violation of § 7, Art. I, of the constitution of Maine, and of other provisions of said constitution.

And said act of Jan. 13, 1872, so far as it was intended to legalize and make valid the selection, impaneling and swearing said grand jurors, and doings of said pretended grand jury, was in violation of the constitution of the United States, Art. I, § 9, p. 3, and Art. of Amendment XIV, p. 1, and further provisions of said constitution.

And this he is ready to verify, by the record of this court, and by a certified copy of said act of the legislature.

To sustain the allegation that c. 216 of the Pub. Laws of 1868,

which conferred criminal jurisdiction upon superior court, was repealed, the respondent introduced, without objection, a copy, certified by the secretary of State, of 'an act to repeal the acts consolidated in the Revised Statutes of the year 1870,' the essential part of which was as follows:

'1868. Chapters numbered 159 to 226, inclusive, except chapters 170, 173, 195, and 225.'

It appeared that all the venires for the grand jurors, who found the indictment, were issued from the office of the clerk of said court, July 22, 1871, returnable to the next September term of said court. That at said September term, 1871, said grand jurors were sworn and impaneled, and have never been sworn and impaneled at any other time or term of said court; that it was by this grand jury, thus selected, sworn, and impaneled, that said indictment was found at this term of said court.

The question raised and submitted to the law court for decision is as follows:

Shall said indictment be quashed for the reasons set forth in said motion, or shall it stand for trial?

Deeming it important that this question of law should be determined before the action is tried, it is reserved for the consideration of the full court, as provided in R. S., c. 134, § 26, at the request of the county-attorney, and on motion of the respondent's counsel.

T. H. Haskell, in support of the motion, cited *State* v. *Maher*, 49 Maine, 569; R. S., c. 134, § 26; Pub. Laws, 1868, c. 216; Pub. Laws, 1870, c. 174; Pub. Laws, 1872, c. 1; *State* v. *Symonds*, 36 Maine, 128; *State* v. *Lightbody*, 38 Maine, 200; Const. of Maine, Art. I, § 7; Const. U. S., Art. XIV. § 1; *Taylor* v. *Porter*, 4 Hill, 147; *Green* v. *Briggs*, 1 Curtis C. C. 311; 18 How. 272; 4 Dev. N. C. 15; 5 Watts & Sergt. 193; 2 Kent's Com. 13; 13 N. Y. 393.

T. B. Reed, attorney-general, *contra*, in addition to the statutes, cited *Walter* v. *Bacon*, 8 Mass. 472; *Locke* v. *Dane*, 9 Mass. 363; *Davidson* v. *Johannot*, 7 Met. 388, 396; *Underwood* v. *Libby*, 10 Serg. & Rawle, 97, 106.

DICKERSON, J. This case comes before us from the superior court for the county of Cumberland, on a motion to quash the indictment, duly verified and filed before the respondent pleaded. The motion alleges that the grand jurors, by whom the indictment was found and restored, were not lawfully selected, impaneled, sworn, and qualified to act as grand jurors; and the question to be determined is, shall the indictment be quashed for the reasons set forth in the motion, or shall the case stand for trial?

The criminal jurisdiction of the supreme judicial court for the county of Cumberland, was transferred from that court to the superior court of that county, by c. 216 of the Pub. Laws of 1868. That act was repealed by the act of 1870, which took effect from and after the first day of February, 1871. Jurisdiction in criminal cases was restored to the superior court by the act of 1872, which took effect Jan. 13, 1872. This indictment was found at the May term of the superior court, 1872, and the persons who found and returned it, as grand jurors, were drawn, as such, in obedience to venires issued by the clerk of the superior court, on July 22, 1871, and were sworn and impaneled at the September term of that court next following, and were not sworn or impaneled at any other term of said court.

The repeal of the act of 1868, which alone gave the superior court criminal jurisdiction, divested that court of such jurisdiction, and carried with it, also, the repeal of the authority given in that act to the clerk of the superior court to issue venires for grand jurors to serve at the criminal terms of said court. When, therefore, the persons who acted as grand jurors in finding this indictment were drawn and impaneled as grand jurors, for the superior court, there was no law authorizing such proceedings. Though the superior court is a court of common law, it derives its jurisdiction from the statute, and its proceedings, though conducted in accordance with the forms, will not be upheld when they lack the substance of legality. The drawing, swearing, and impaneling of the persons as grand jurors, who found this indictment, were, therefore, *coram non judice*, and void. Nor is this objection obviated by

the fact that the superior court had jurisdiction in criminal cases when this indictment was found, as that court cannot confirm and make valid what it undertook to do when it had no jurisdiction over the subject-matter, after it has become vested with such jurisdiction.

This difficulty, moreover, is not remedied by force of Art. I, § 7 of the constitution, which provides 'that the legislature shall provide by law, a suitable and impartial mode of selecting jurors.' The omission of the legislature to comply with this requirement of the constitution, in respect to the selection of grand jurors for the county of Cumberland from the repeal of the act of 1868 in 1871, to its reënactment in 1872, cannot be supplied or cured by the court. This court has no power to execute a requirement of the constitution that is exclusively devolved upon the legislature.

It is argued by the attorney-general, that the act of 1872, which restored the criminal jurisdiction of the superior court, also confirms, and makes legal and valid 'the doings' of that court in criminal cases when it had no criminal jurisdiction. In order to determine this question, it is necessary to consider the nature of those 'doings,' the power of the legislature to confirm them and make them legal and valid, and the intendment of the alleged act of confirmation.

We have seen that the infirmity of 'the doings' complained of in this case, consists in a want of compliance with the established course of judicial proceedings in criminal cases, both in respect to the jurisdiction of the superior court over the subject-matter, and also in drawing, swearing, and impaneling the persons, as grand jurors, who found the indictment.

If the legislature has the constitutional power to legalize and make valid 'the doings' of the superior court, notwithstanding these objections, and intended to do so by the act of 1872, the motion to quash the indictment must be overruled; otherwise it must be sustained.

The constitution of the United States, Art. XIV, § 1, provides that 'no State shall deprive any person of life, liberty, or property,

without due process of law;' and the constitution of this State, Art. I, § 6, also provides that 'the accused shall not be deprived of his life, liberty, property, or privileges, but by judgment of his peers, or the law of the land.' The expressions 'due process of law' and 'law of the land' have the same meaning. These provisions have their origin in *Magna Charta*, the keystone of the arch of the British constitution. They were wrested from the king as restraints upon the prerogatives of the crown, and were incorporated into the constitution of the United States, and the constitutions of many of the Federal States, as a safeguard against the encroachment upon these inherent rights of the people by congress or the State legislatures. When applied to proceedings in criminal cases, the expression 'due process of law,' or 'the law of the land,' means that no person shall be deprived of life, liberty, property, or privileges, without indictment or presentment by good and lawful men, selected, organized, and qualified, in accordance with some preëxisting law, and a trial by a court of justice, according to the regular and established course of judicial proceedings. Coke, 2 Inst. 46; 2 Kent, Com. 13; Story on Const. 661.

But what 'law' is meant? Is it statute law, or the common law? If it be the former, what protection do these provisions afford the people against legislative usurpation and wrong? The legislature might enact a law, and provide a regular course of judicial proceedings for its administration, the direct effect of which might be to deprive persons of the rights these provisions were intended to protect, if statutory law was intended by these provisions. In that case, the meaning of these constitutional provisions would be that no person should be deprived of any of the rights specified, unless the legislature should pass an act authorizing it; instead of being a restraint upon legislative power, they would thus afford it unlimited scope and license. The framers of the constitution do not rest under the imputation of having committed any such absurdity.

The 'law' intended by the constitution is the common law that had come down to us from our forefathers, as it existed and was

understood and administered when that instrument was framed and adopted. The framers of the constitution, and the people who adopted it, appreciated the protection afforded to life, liberty, property, and privileges, by the common law, and determined to perpetuate that protection by making its benign provisions in this respect the corner-stone principle of the fundamental law.

This construction is sustained by authority as well as principle. Judge Story says, 'The clause "by law of the land," in effect, affirms the right of trial according to the process and proceedings of the common law.' 3 Com. on Const. U. S. 1783. Tenny, J., in *Saco* v. *Wentworth*, 37 Maine, 171, says, 'The "law of the land," as used in the constitution, has long had an interpretation which is well understood and practically adhered to. It does not mean an act of the legislature.'

In *Taylor* v. *Porter*, 4 Hill, 145, Chief Justice Bronson says, 'The words "law of the land," as here used, do not mean a statute. . . . The meaning of the section seems to be that no member of the State shall be disfranchised of any of his rights and privileges, unless the matter be adjudged against him upon trial had according to the course of the common law. . . . It cannot be done by legislation.'

So in *Norman* v. *Heist*, 5 Watts & Serg. 193, Chief Justice Gibson, in considering a similar provision in the constitution of Pennsylvania, asks, 'What "law?" Undoubtedly a preëxisting rule of conduct, not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government, and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute.'

So the court in North Carolina say, 'The term "law of the land" does not mean merely an act of the assembly. If it did, every restriction upon the legislative authority would be at once abrogated.' *Hoke* v. *Henderson*, 4 Dev. 15.

The usages of the common law, in criminal cases, require that there should be a court having jurisdiction of the offense when the

venires are issued for drawing the grand jurors, and that the persons thus drawn should be sworn before such a court. It is not sufficient that the person issuing the venires claims to be clerk of such court, or that the tribunal which causes those who have been drawn as grand jurors to be sworn and impaneled as such claims to be a court; both these persons must actually be of the capacity they purport to be for these purposes. It is not enough that the mere forms of law are observed; there must, also, be present the actual essence of judicial right and authority. If such void claims and empty forms could impart legality to criminal proceedings, it is plain to see that the law might be perverted for the purposes of wrong and oppression. *State* v. *Plummer*, 50 Maine, 217; *State* v. *Hanscom*, 39 Maine, 337; *State* v. *Furlong*, 26 Maine, 69.

Both these requirements of the constitution were wanting in the case before us. The clerk had no authority to issue the venires for drawing grand jurors to attend before the criminal term of the superior court, and that court had no criminal jurisdiction when it undertook to cause the persons thus drawn as grand jurors to be sworn and impaneled as such. If the respondent had been tried, convicted, sentenced, and imprisoned, under this indictment, it is clear that he 'would have been deprived of his liberty' 'without due process of law,' and contrary to 'the law of the land.'

The legislature has no authority to authorize or confirm an infraction of the constitution; and if the act of 1872 was intended 'to confirm and make legal and valid' the 'doings' of the superior court under consideration, it cannot be permitted to have that effect, but must be held to be unconstitutional, and, therefore, null and void.

This court will not pass upon the constitutionality of an act of the legislature, unless that is necessary for the decision of the case, and, in that event, it will not declare an act of the legislature unconstitutional unless the question is free from all rational doubt. It will, also, presume that the legislature understood and pursued its constitutional authority, and that it did not misapprehend or exceed it.

Keeping these principles of construction steadily in view, we cannot doubt that that clause in the act of 1872, which undertakes to confirm and make legal and valid the doings of the superior court in criminal cases, which had been in accordance with the provisions of that act, when that court had no criminal jurisdiction, is unconstitutional and void. It assumes retroactively to invest with the authority, force, and effect of law proceedings, trials, judgments, sentences, and punishments in criminal cases, which, up to the time of its enactment were illegal and void, and which, but for it, would have remained so to this day. It is clearly within the class of subjects, inhibited by the national and State constitutions, as topics of legislation, and is included in the provision against passing any law to deprive any person of life, liberty, or property, 'without due process of law,' or 'but by the law of the land.'

Motion sustained.

Indictment quashed.

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

JOHN DRYDEN *vs.* GRAND TRUNK RAILWAY OF CANADA.

Railroad tickets—good six years in this State.

The Grand Trunk Railway of Canada is a foreign corporation, and its charter creates no obligations and imposes no restraints upon the legislative authority of this State.

Under the lease of the At. & St. L. Railroad Company, the Grand Trunk Railway Company hold the property therein demised, subject not only to all the laws then in force, but to such also as the legislature might thereafter enact.

Special Laws of 1853, approved March 29, which authorized the At. & St. L. Railroad Company to lease its road to the Grand Trunk Railway Company, provided that nothing therein contained should in any manner limit or circumscribe any power of the legislature of this State, to enact laws affecting the rights, privileges, or duties of the latter company.

Chapter 223* of Pub. Laws of 1871 is obligatory upon the Grand Trunk Railway Company.

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*See opinion.

ON FACTS AGREED.

WRIT dated March 16, 1871. Plea, general issue and joinder.

On the 12th day of March, 1871, the plaintiff purchased of the defendants at their ticket office at their station in Portland a first-class passenger ticket from Portland to Island Pond, in Vermont, of which ticket the following is a copy:

MCH. 12, 71.

GRAND TRUNK RAILWAY.

GOOD FOR THIS DAY ONLY.

PORTLAND TO ISLAND POND.

FIRST CLASS.

6141.

Paying therefor the regular and established price for tickets from Portland to that place, and the plaintiff could have traveled the whole distance from Portland to Island Pond on the day he purchased his ticket.

Leaving Portland at 1 P. M. on March 12th, the plaintiff proceeded, by virtue of his aforesaid ticket, in the cars of defendant corporation, on his way towards Island Pond until he arrived about 3 P. M. at Paris, where he left the train. He remained at Paris until the afternoon of March 15th, when, upon the arrival at that place of the train of that day from Portland for Island Pond, he entered the car and resumed his journey toward Island Pond.

Soon after leaving Paris, the conductor of the train (being a servant and agent of the defendant corporation for that purpose) called upon plaintiff for his fare; and in answer to such call plaintiff stated that he was then going from Paris to Island Pond, and exhibited and offered to said conductor the aforesaid passenger ticket dated March 12th, which the conductor refused to receive in settlement of the fare, informing the plaintiff that by its terms and rules of the road it was not good for that day, and again demanded of the plaintiff payment of his fare at the established rate from Paris to Island Pond. The plaintiff refused to pay the same in any other manner than by his ticket aforesaid, and in conse-

quence thereof, the conductor, upon the arrival of the train at the next station (West Paris) forcibly ejected plaintiff from the train, using no more force than was reasonably necessary for that purpose.

By the rules of the defendant corporation regulating the transportation of passengers, tickets are good only for the day they are issued and dated, in the absence of any agreement otherwise, marked on the ticket.

If the plaintiff was entitled to recover, judgment to be entered in his favor, and his damages to be assessed by the court.

N. Webb, for the plaintiff.

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

The plaintiff had no right to ride on the 15th from Paris to Island Pond, upon a ticket for the 12th, from Portland to Island Pond.

Ticket was a contract (and a special contract) between plaintiff and defendants, by which defendants agreed to carry plaintiff from Portland to Island Pond on March 12th, for a specified sum paid.

The right and power of railroad companies to make special contracts for transportation of passengers, would seem to be unquestionable, both upon principles of law and of common sense.

Judicial decisions upon this matter, recognizing the right of railroad companies to issue tickets, and to declare them upon their face good only for a limited period, and void thereafter; to require passengers, purchasing tickets for any given place, to go through on the same train, or forfeit the unused part of the ticket; to discriminate between way fares and through fares. *Cheney* v. *B. & M. R. Co.*, 11 Met. 121; *B. & L. R. Co.* v. *Proctor*, 1 Allen, 267; 1 Redfield on Railways (3 ed.), 99, 100, etc.; *Beebe* v. *Ayres*, 28 Barb. 275.

Upon the principles laid down in these cases, plaintiff cannot recover; upon his refusal to pay the fare on the 15th, the conductor was justified in removing him from cars.

The legislature cannot apply Pub. Laws, 1871, c. 223, to de-

fendant corporation; defendants are not in any respect bound to regard it.

Defendants are not a corporation created by this State; in this State they are only lessees of the At. & St. Lawrence R. Co., and as such lessees operate said road under the same powers and privileges, and subject to the same liabilities conferred or imposed upon the At. & St. Lawrence R. Co.

The At. & St. Lawrence Co. was incorporated by legislature of Maine, Feb, 10, 1845. Its charter, drawn with special reference to the then existing laws of the State, among other powers and privileges, expressly authorized the corporation to make and establish all necessary by-laws and regulations, consistent with the laws of the State, for managing its property and affairs. And the directors were expressly authorized to exercise all the powers granted to the corporation for the transportation of persons and property upon said road, and all such power and authority for the management of its affairs, as should be necessary and proper to carry into effect the objects of the grant. A toll was granted and established, for the sole benefit of the corporation, upon all passengers and property transported upon said road, at such rates as should be established by the directors. And the transportation of persons and property was in every respect made subject to such regulations as the directors should from time to time prescribe.

These provisions of the charter would seem of themselves, necessarily, to have given to the corporation the sole and exclusive management of its affairs, and particularly of the transportation of persons and property, free from any further legislative regulation. But, as if to place the matter beyond all question, section 18 of the charter declared what power and control was reserved by the legislature; what the legislature might do, and what it should not do; giving it the power to inquire into the manner in which the corporation had used its powers and privileges, to correct any abuses, and to compel it to observe its liabilities and duties; but it was expressly prohibited to 'impose any other or further duties, liabilities, or obligations,' or to 'revoke, annul, alter, limit, or re-

strain the charter,' without the consent of the corporation, except by due process of law.

The rights and powers before mentioned were thus secured to the company; and no subsequent statute could or can revoke, alter, or impair them, or impose any new duties, liabilities, or obligations without the consent of the company, or by process of law. The right was secured to the directors to regulate, among other things, the transportation of passengers according to their own judgment, without any interference of the legislature, unless the company should in some way abuse the privilege. And whether their privilege had been abused would be determined only 'by due process of law.'

It cannot be pretended that the power and privilege of regulating the transportation of passengers has been abused in any manner. Their rules are adapted and intended to secure the safety of the traveling public, and at the same time protect the interests of the corporation. 1 Redfield on Railways (3d ed.), 88, etc.

By the statute of Feb. 25, 1871, entitled 'An act regulating railroad corporations,' the legislature attempts to modify and change the regulations of the corporation touching the transportation of passengers, by giving to ticket-holders rights and privileges inconsistent with said regulations.

This statute is clearly inconsistent with the power conferred upon the directors in the sixth section of their charter.

The power of the legislature to impose new burdens or restrictions upon existing corporations has, on several occasions, been under judicial consideration. 2 Redfield on Railways (3d ed.), 428, c. 32, § 2, and cases there cited.

In this State, the subject was fully considered in *State* v. *Noyes*, 47 Maine, 189. The legislature passed an act regulating the transportation of persons and property over the Penobscot & Kennebec railroad. Sections 4, 5, 6, and 17 of the P. & K. charter are precisely like sections 4, 5, 6, and 18 of the A. & St. L. charter. The act of the legislature was held to be in violation of the rights secured to the company in their charter, and not binding upon the corporation.

That case involved the same questions and principles as the one at bar, and would seem to be conclusive.

The power and right of the legislature under R. S., c. 46, § 17, without any reservation of such power in the charter, to amend or alter acts of incorporation, is restricted to cases where charter contains no express limitation.

But section 18 of A. & St. L. charter, contains such express limitation.

A statute intended and adapted solely to secure the safety of passengers, and based solely upon the principle of public safety, might be binding upon the A. & St. L. Company and their lessees. But such an act as that of Feb. 25, 1871, can hardly be pretended to fall within that class; it is intended and adapted solely to promote what is called the public convenience; and we submit that is beyond the power either expressly or impliedly reserved by the legislature in the A. & St. L. charter. *State* v. *Noyes*, above cited; 2 Redfield on Railways, as above.

If such a statute can be enforced upon the A. & St. L. Co. and its lessees, it is difficult to perceive any limitation to the power of the legislature upon this subject.

WALTON, J. The doctrine that the charter of a private corporation creates a contract between the corporators and the government, which cannot be impaired by subsequent legislation, can never be invoked by foreign corporations. Their charters may create contracts between them and the governments by which they are granted, but not between them and other governments. No State or government can create a corporation and confer upon it the right to do business in another State, or within another jurisdiction, in violation of the local law. Not only their manner of doing business, but the kinds of business which they may do, are entirely and unrestrictedly under the control of the local legislative authority. *Bank of Augusta* v. *Earle*, 13 Peters, 586; *Paul* v. *Virginia*, 8 Wallace, 168.

The Grand Trunk Railway Company of Canada is a foreign cor-

poration. Its charter imposes no restrictions upon the legislative authority of this State. This the learned counsel for the company will probably concede.

But it is claimed that as lessees of the Atlantic & St. Lawrence Railroad Company, they 'operate said road under the same powers and privileges, and subject to the same liabilities,' as those con ferrred or imposed upon that road.

Their lease undoubtedly secures to them many of the privileges, and subjects them to many of the liabilities of that company; but not to all of them. For an abuse of their charter they are amenable only to their own government,—they cannot be proceeded against for the purpose of having it annulled in the courts of this State; nor can the legislature of this State amend, alter, or revoke it.

Nor can they claim the same immunity against hostile legislation. Their charter is the act of a foreign government. It creates no obligations, imposes no restraints upon the legislative authority of this State.

Nor does their lease. For without stopping to consider whether it would be competent for two corporations, by an agreement between themselves, to deprive the State of its legislative authority over one of them, it is enough to know that in this case no attempt of the kind has been made. On the contrary, the lease declares in express terms that the lessees are to have and to hold the property, and the rights and privileges, thereby demised, subject not only to all the laws then in force, but to such also as the legislature might thereafter enact. And the act granting the Atlantic & St. Lawrence company permission to lease its road, is equally explicit. It declares that nothing therein contained shall in any manner limit or circumscribe the power of the legislature to enact such laws affecting the rights, privileges, or duties of said company, as it might deem proper.

We fail to discover any ground on which the Grand Trunk Railway Company of Canada can claim the right to do business in this State exempt from legislative control. Certainly not by virtue of

their charter, for that is the act of a foreign government, and has no force in this State. Not by virtue of their lease, nor by virtue of the act granting the Atlantic & St. Lawrence Railroad Company permission to make it, for they both expressly negative any such right. In short, we fail to discover any ground on which such a claim can be supported.

Our conclusion, therefore, is, that the act of 1871, c. 223, which declares that no railroad company shall limit the right of a ticket-holder to any given train; but that such ticket-holder shall have the right to travel on any train, whether regular or express train, and to stop at any of the stations at which such train stops, and that such ticket shall be good for a passage as above for six years from the day it is first used, is obligatory upon the defendants; and that it is their duty, when doing business in this State, to conform to it.

The plaintiff was wrongfully ejected from the defendants' cars, and, upon the agreed statement of facts, is entitled to recover.

Judgment for plaintiff.

Damages, $200.

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

ADNA T. DENISON, in error, *vs.* THE PORTLAND COMPANY.

Error—writ of—when it will not lie.

A writ of error will not lie to reverse a judgment of the superior court founded upon the award of referees, upon the ground that they 'consulted and called into said reference a third person, whose advice and opinion they adopted and followed.'

WRIT OF ERROR, dated May 6, 1871.

In a plea of error, whereas the said A. T. Denison alleges that

in the process, proceedings, and judgment had before the superior court of the county of Cumberland, and held at Portland on the first Tuesday of April, A. D. 1871, wherein the said Portland Company were plaintiffs, and the said A. T. Denison, defendant, there occurred the errors hereinafter specified, by which the present plaintiff was injured, and for which he therefore seeks that said judgment may be reversed, recalled, or corrected, as law and justice require; that is to say, the following errors:—Because that after the said cause was entered in the said superior court, to wit, on the first Tuesday of April, 1870, at the October term of said court, the said cause was by rule of court referred to two referees without any power to the said referees to call in a third person in case of disagreement, that Wm. Atwood and Charles Staples, jr., were agreed upon as such referees. That after the hearing of such cause, the said referees disagreed and were unable to agree upon the determination of said cause, and notified the counsel of the parties in said cause to that effect, and requested to be empowered to call in a third person as additional referee in said cause. That the counsel for the defense declined to consent to such enlargement of the power of the referees, and moved the said superior court and entered the same motion upon the docket of said court, that the reference be declared dissolved, that thereafter, and after the said disagreement, and after the said refusal to enlarge the power of said referees, and after the said motion to the superior court, the said referees did in fact consult and call into said reference a third person, whose advice and opinion they adopted and followed, and made up a report without authority of court, and returned the same to the said court. That the defendant had valid objections to the acceptance of said report which he intended to urge, but was unable so to do, because he was not notified of the return or acceptance of said report, but supposed the said reference dissolved, that said report was received, accepted, and judgment issued thereon without notice to said defendant as by said record in said cause fully appears. Said report was accepted on the eighth day of April, A. D. 1871. Judgment rendered on the same day for

$439.96 debt, and $95.74 costs. Execution was issued April 22, 1871.

The defendants pleaded

1. *In nullo est erratum;* and

2. A special traverse of the allegations of fact.

The issue of fact was tried by the presiding justice, with leave to except.

The presiding judge found as matter of fact, that the allegations contained in the plaintiff's writ, with respect to the alleged misconduct of the referees, are true; and ruled, *pro forma*, as matter of law that they constituted error.

Thereupon the defendants alleged exceptions.

Wm. Henry Clifford, for the plaintiff.

Symonds & Libbey, for the defendants.

APPLETON, C. J. The writ of error may be brought for error in law or matter of fact.

When the error is error in law it must appear of record. Nothing will be error in law that does not appear of record, for matters not so appearing are not supposed to have entered into the consideration of the court. Evidence extraneous to the record is not received. The court on error in law examine the whole record, and nothing more, and if judgment appears to have been given for one of the parties, when it should have been for the other, they will adjudge it error in law.

In the case before us, the writ alleges 'that in the process, proceedings, and judgment had before the superior court of the county of Cumberland, held at Portland on the first Tuesday of April, A. D. 1871, wherein the said Portland Company were plaintiffs, and the said A. T. Denison, defendant, there occurred the errors hereinafter specified,' etc. Now if this is to be regarded as a writ for the correction of an error in law, it is clear there is no such error. The record of the judgment, which is made part of the case, is in the usual form. It discloses no error upon its face; the judgment was rendered as it should have been.

'When an issue in fact has been decided, there is no appeal in the English law from its decision, except in the way of motion for a new trial, and its being wrongly decided is not error in the technical sense to which a writ of error refers. So if a matter of fact should exist which was not brought into issue, but which, if brought into issue would have led to a different judgment, the existence of such fact does not, after judgment, amount to error in the proceedings. . . . But there are certain facts which affect the validity and regularity of the legal decision itself; such as that the defendant, while under age, appeared in a suit by attorney and not by guardian, or the plaintiff or defendant having been a married woman when the suit was commenced. Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon writ of error.' To such cases the writ of error *coram nobis* applies 'because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment.' Stephen on Pl. 142. Thus a judgment against an infant, without first appointing a guardian *ad litem*, is erroneous, and may be reversed on error. *Swan* v. *Horton*, 14 Gray, 179; *Crockett* v. *Drew*, 5 Gray, 399. So, if judgment be rendered against one *non compos* or insane, by default, it will be reversed. *Leach* v. *Marsh*, 47 Maine, 549. Insanity of a defendant, at the time of the service of the original process, and until judgment rendered, whether the defendant appears personally, by attorney, or not at all, is good cause to reverse a judgment. *Lamprey* v. *Nudd*, 9 Foster, 299.

Irregularities in the conduct of the jury in the court below cannot be assigned for error. *U. S.* v. *Gillies*, 1 Pet. 159. Nor can mistakes of the jury in the computation of interest. *Lovell* v. *Kelley*, 48 Maine, 263.

Nothing of which the party could have taken advantage in the court below, can be assigned for error in fact. *Wetmore* v. *Plant*, 5 Conn. 541. Nor where he might have appealed. *Savage* v. *Gulliver*, 4 Mass. 171. Nor where exceptions might have been taken. *Howard* v. *Hill*, 31 Maine, 420. So, upon the principles upon which these cases rest, when the party could have his review, no writ of error can be maintained.

Wherever a party seeks to reverse a judgment rendered on a report of referees for error in law, the error must appear in the report of the referees or in the record. In *Kauffman* v. *Cofran's Ex'r*, 16 Wend. 478, where the supreme court refused to set aside a report of referees, and the party aggrieved is desirous of suing out a writ of error, he must obtain a special or supplemental report from the referees in the nature of a bill of exceptions or special verdict, and have the same entered of record. The decision is upon the ground that the court can only reverse the judgment for some error in law arising upon the facts placed upon the record.

In *Short* v. *Pratt*, 6 Mass. 496, the error was one of law, and apparent of record. The reference was a statute submission. 'A judgment on a report made under the statute is not legal,' observes Parsons, C. J., 'unless it appears on the record that the report was made pursuant to the provisions of the statute which authorizes the judgment. But it does not appear on this record, that all the referees heard the parties; and this is error, for which the judgment ought to be reversed. . . . It is indispensable in the proceedings under this statute, that the referees should hear the parties, on the matters submitted, and this fact should appear on the record. It does not appear on this record, and for this cause the judgment must be reversed.' But the record before us discloses no error of omission or commission.

The error of fact, as alleged, is the misconduct of the referees in consulting and calling into said reference a third person, whose advice and opinion they adopted and followed. This is not an error in fact for which a writ of error is maintainable.

It would hardly do to hold that a report of referees should be set aside, where there is neither fraud, corruption, nor partiality, because the referees may have consulted some individual in reference to questions of law about which doubts may have arisen. But if the alleged misconduct of the referees in the case under consideration was to be deemed such as would justify the setting aside their report, the party thereby aggrieved would have his remedy by exceptions, if the report should be accepted. If the facts relied up-

on are not known when the report is accepted, but are subsequently discovered, the case will stand like any other case of newly discovered evidence. The remedy of the party will be by petition for review. But in such event there can be no writ of error any more than when there is other or similar misconduct on the part of the jury, and not apparent of record. The law affords an ample remedy by writ of review. *Gooding* v. *Baker*. 53 Me. 52

The neglect of the counsel for the plaintiff in error to be present at the acceptance of the report, of itself affords no ground for relief. *Crooker* v. *Randall*, 53 Maine, 355.

Exceptions sustained.

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

JAMES L. MARRETT and another *vs.* ISAAC BRACKETT.

Check as payment. Usage.

The taking of a check for an existing debt is not, *ipso facto*, payment of the debt.

The acceptance of a check implies an undertaking on the part of the holder to use due diligence in presenting it for payment.

The holder is in the exercise of due diligence when he presents it for payment in accordance with the usage of the banks where payable, and of the persons having accounts with such banks—provided the usage is well established, reasonable and lawful, and recognized by the mercantile community and the parties to the check.

And it makes no difference that the check is that of the agent of the debtor.

ON FACTS AGREED in the superior court for this county.

ASSUMPSIT on a promissory note given by the defendant to the plaintiffs.

Just before Aug. 19, 1871, the plaintiffs, resident in Portland, sent the defendant, residing in Springvale, in the county of York, a statement showing $236.44 due them. Thereupon, on Saturday, Aug. 19, 1871, the defendant remitted to O'Brion, Pierce & Co., merchants of Portland (friends of the defendant, but in nowise

agents of the plaintiffs), funds to pay the plaintiffs and others. About 4 o'clock on Saturday afternoon, Aug. 19, 1871, after banks in Portland were closed, O'B., P. & Co. sent the plaintiffs their check on the First National Bank of Portland, for the amount of the plaintiffs' claim against the defendant, and took a receipt 'from O'Brion, Pierce & Co., two hundred and thirty-six dollars and forty-four cents, on account of Isaac Brackett, Springvale,' but did not deliver up their note, or receipt their account.

On Monday morning, during usual banking hours at Portland, plaintiffs deposited with their usual deposit, the check for collection at the Casco Bank in said Portland, where plaintiffs then kept their account and made their deposits.

By a well-established usage of the banks in Portland, well known to the whole mercantile and trading community, and to said O'Brion, Pierce & Co., all checks are exchanged at a 'clearing-house' held every morning by the clerks representing each bank, said exchange including only checks held by each bank at the close of the previous day's business, and each bank, receiving at its counter, through its clerk, checks from the 'clearing-house,' by usage has the right immediately to return any of said checks which they have not funds to cover. It is also the settled usage at Portland with persons having bank accounts to deposit in their own banks checks received by them on any bank, said deposit being made either the day or the next day after the check is received, according as it is received before or after the banks are closed. And this usage is of long standing and well known at all the banks of Portland, and among all those keeping accounts at such banks, and was well known to O'Brion, Pierce & Co., and such had long been also the practice of O'Brion, Pierce & Co. Said check passed through the clearing-house on Tuesday morning, at the usual hour and in the usual manner, and reached the First National Bank that morning at the usual hour, and was then thrown out for want of funds, said O'Brion, Pierce & Co. having then failed, and said check was immediately returned to plaintiffs by the Casco Bank, and by plaintiffs to O'Brion, Pierce & Co., and plaintiffs in a day or two afterwards called on defendant for payment.

Had the check been presented to the First National Bank on Monday or Tuesday, before 11 A. M., it would have been paid, as O'Brion, Pierce & Co. then had funds there.

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

W. L. Putnam, for the plaintiffs, cited *Taylor* v. *Wilson*, 11 Met. 53, 54; *Wyatt* v. *Marquis of Hertford*, 3 East, 147; *Strong* v. *Hart*, 6 B. & C. 160; Chit. on Cont. 663; *Marsh* v. *Pedder*, 4 Campbell, 257; 2 Pars. on Cont. 623, note *m*; *Everett* v. *Collins*, 2 Campbell, 515; *Winthrop* v. *Carleton*, 12 Mass. 4.

Ira T. Drew, for the defendant, contended that a check on a bank is in substance a bill of exchange payable on demand and governed by the same rules. *Salt Spring Bank* v. *Syracuse Sav. Bank*, 62 Barb.

It was received as payment, as evidenced by the receipt.

Plaintiffs guilty of laches.

DICKERSON, J. Assumpsit on a promissory note and account. The defendant claims that the note was paid by a check, drawn on the First National Bank of Portland, by O'Brion, Pierce & Co., in favor of, and received by the plaintiffs. Previous to the delivery of the check, the defendant remitted the amount due the plaintiffs to O'Brion, Pierce & Co., for the purpose of paying the plaintiffs' claim. O'Brion, Pierce & Co. were friends of the defendant, but were not agents of the plaintiffs.

The case calls for an adjudication upon the legal effect of taking a check for a previous debt, and also of a usage of the banks in Portland, whereby, at a 'clearing-house' held every morning by the clerks representing each bank, all checks held by each bank at the close of the previous day's business are exchanged, with the right of each bank immediately to return any check drawn upon it, and thus received from the 'clearing-house,' which it has not funds to cover, and the further usage, immediately connected with the foregoing, of persons having bank accounts in Portland, to deposit, in their own banks, checks received by them on any bank, on the

day or day after they are received, according as they are received before or after the banks are closed.

It is well settled that taking a check for an existing debt is not, *ipso facto*, payment of the debt. *Taylor* v. *Wilson*, 11 Met. 44; not even if it be given for a note which is surrendered; *Olcott* v. *Rathburne*, 5 Wend. 490; nor where a receipt is given for the old debt upon the delivery of the check. *Bradford* v. *Fox*, 38 N. Y. 289; nor if, on presentment of one check the holder receives from the drawer a check for the amount of his check. *Kelly* v. *Second Nat. Bank of Erie*, 52 Barb. 328.

But it is held in these and numerous cases, that the acceptance of a check implies an undertaking on the part of the holder to use due diligence in presenting it for payment, and if the drawer sustains loss for want of such diligence, it will be held to operate as payment of the original debt.

The holder of a check is in the exercise of due diligence when he presents it for payment in accordance with the usage of the banks in the place where it is made payable, and of the persons who have accounts with such banks, provided such usages is well established, lawful, and reasonable in its character, uniform and general in its application, known and recognized by the mercantile and trading community, and by the parties to the check. When such a usage exists, those who make contracts within its purview are presumed to have made them with reference to it; and it is deemed to form a part of their contracts; as much so as though it was actually incorporated into them. *Williams* v. *Gilman*, 3 Maine, 281; *Leach* v. *Perkins*, 17 Maine, 465.

The case shows that a usage upon this subject, having all the necessary characteristics as such, existed among the banks in Portland, and the persons who had accounts with them; and that in presenting the check for payment, the plaintiffs strictly conformed to that usage. In doing so he complied with the contract he made with the defendant's agents when he took the check; and the defendant can gain nothing by the check having been given by his agents instead of himself. The taking of the check was not a

payment of the note, and the plaintiffs cannot be guilty of laches for presenting it according to the agreement of the parties, as interpreted by the usage; nor should they suffer for the misfortune or fault of the defendant's agents.

Besides, the presumptions of law, with respect to the intention of the parties, arising from the usage, are in harmony with the inference to be drawn from the other facts in the case. The plaintiffs did not surrender the note, nor receipt their account when they took the check; nor does it appear that the drawers requested them to do so. If the plaintiffs, by taking the check, intended to take O'Brion, Pierce & Co., as paymaster, according to the usual course of business, the defendant would have been released. But this was not done.

The conclusion is irresistible that neither the drawers nor the holder of the check required it as payment of the note, and that the parties are remitted to their rights under the implications of law arising from the usage of the banks in Portland, and of the persons who have accounts with them.

Judgment for plaintiffs for amount of note and account.

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

WILLIAM PARKER *vs.* F. LATNER.

Lord's Day.

An action will not lie to recover damages, arising from the immoderate driving of a horse during a pleasure drive on the Lord's day, for which he was hired.

ON REPORT from the superior court for this county.

CASE in tort, to recover damages to the plaintiff's horse and

carriage, by the careless, negligent, and unskilful driving of the defendant, while in possession of them under a contract for a pleasure drive on Sunday, to the Atlantic House, Scarborough, the injury complained of having occurred on Sunday, during such drive.

The substantive allegations in the declaration were:

For that the said defendant, at said Portland, on the twenty-fifth day of June, A. D. 1871, being in the lawful possession of the plaintiff's horse, carriage, and harness, then and there negligently and carelessly drove the said horse, by reason whereof the said carriage was overturned, the top thereof torn and destroyed, the body of said carriage completely broken to pieces, the springs thereof broken, and said carriage otherwise greatly damaged and injured, the said harness broken and damaged, the said horse bruised, strained, and lamed, etc.

The defendant claimed, as matter of law, that the plaintiff could not recover upon proof of all the facts alleged, because the damages resulted from the letting of the horse on Sunday.

Thereupon the parties submitted the case to the full court; and if, upon proof of the allegations, he was not entitled to recover, he was to be nonsuit.

S. C. Strout & H. W. Gage, for the plaintiff, contended that the plaintiff did not invoke aid from the contract of bailment to establish his case and could recover, and cited *Morton* v. *Gloucester*, 46 Maine, 520; *Gregg* v. *Wyman*, 4 Cush. 322; *Woodman* v. *Hubbard*, 5 Foster (N. H.), 67; *Tillock* v. *Webb*, 56 Maine, 100.

Howard & Cleaves, for the defendant.

APPLETON, C. J. This is an action of the case to recover damages for injuries to the plaintiff's horse and carriage, arising from the defendant's negligent and careless driving.

The plaintiff let his horse and carriage to the defendant, on Sunday, for a pleasure drive to the Atlantic House in Scarborough. The injuries complained of arose during such drive.

A contract made on Sunday, for hiring horses on a pleasure ex-

cursion on that day, is void. *Burrill* v. *Smith*, 2 Miles, 402. A person traveling on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him, while so traveling, by reason of a defect in a highway, which the town is bound to keep in repair. *Bosworth* v. *Swansey*, 10 Met. 363; *Hinckley* v. *Penobscot*, 42 Maine, 90.

The case finds that the contract between the parties was one of bailment. The defendant's possession was under and by virtue of such contract. His liability arose under it. His possession was obtained by virtue of it. As a bailee the defendant was bound to pay the stipulated price for the use of the property loaned, and to use it with ordinary care and diligence. In case of a negligent or careless use thereof, he would be liable, upon his contract, for the damages arising from such negligence and carelessness. Such is the general rule. But in this case the contract was illegal. Had the plaintiff sued for the hire of the articles loaned, he could not have recovered. Suing for damages arising from the violation of his contract, he can be in no better condition. The defendant could not have recovered against the town for any injuries arising from defects in the highway, because he was traveling in violation of law. If he could not against the town, much more cannot the plaintiff recover against him, inasmuch as he was a party to the illegal contract, by which the defendant had possession of the horse and carriage.

It is said that the case, as charged in the declaration, is one of simple wrong, outside of and independent of any contract. That may be so, but it does not affect the question, when the facts are shown, for it appears from the report that the defendant was not 'in the lawful possession of the plaintiff's horse and carriage,' but, on the contrary, he was in possession of the same by virtue of a contract made in violation of law.

In *Woodman* v. *Hubbard*, 5 Foster, 67, and in *Morton* v. *Gloster*, 46 Maine, 520, the contract between the parties was at an end. The suits were for the conversion of the property bailed after the bailment had terminated. They were for acts after the

expiration of the hiring. Here, the injury arose during the continuance of the bailment, and in carrying out the very purpose for which the property injured was bailed. The bailee of a horse and carriage, for a pleasure drive on the Lord's day, by his careless and negligent driving, injures the property bailed. It matters not whether the fact is proved by the one side or the other; being proved, the legal result of the fact must follow.

If the contract had been a valid contract, the defendant would have been liable upon the implied promise to use ordinary and common care of the property bailed, which the case finds he did not. Being a contract illegal and void, his liability upon the contract is at an end. There is nothing done or proved to be done outside of the contract. The negligent and careless acts complained of, are admitted to have been done during the drive and during the contract of bailment. *Plaintiff nonsuit.*

CUTTING, KENT, WALTON, and DANFORTH. JJ., concurred.
DICKERSON, J., dissented.

FESSENDEN F. MARTIN *vs.* CHARLES P. JORDAN, JR.

Deceit—what will support an action for.

A fraudulent affirmation, made by the defendant to the plaintiff, respecting the quantity of hay cut the previous year on a farm, which the former was about to sell to the latter, will support an action for deceit.

Thus, where the parties were on the farm, in the winter while covered with snow, examining it with a view to the sale and a short time before the conveyance was made, and the defendant, in answer to a question by the plaintiff, said the farm cut twenty-five tons of hay the preceding year; and the defendant knew the statement was false when he made it; and the plaintiff, relying upon it, was thereby induced to purchase and was thereby deceived and injured; *Held*, That the defendant was guilty of an actionable fraud.

On exceptions.

Case, for deceit in the sale of a farm. The verdict was for the plaintiff.

The case is stated in the opinion.

Clarence C. Frost, for the plaintiff.

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

Walton, J. The only question is, whether a false affirmation respecting the quantity of hay cut on a farm, made by the seller to the buyer, will support an action for deceit.

The distinction between those allegations, which, if false, will support an action on the case for deceit, and those which will not, was carefully examined in *Long* v. *Woodman*, 58 Maine, 49. It is there said, that,

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

It is undoubtedly true, as the chief justice there states, that an

action for deceit in the sale of real estate, cannot be sustaiued by proof of fraudulent misrepresentations as to the price paid by the vendor. The proposition is not only sustained by the case cited by the chief justice (*Hemmer* v. *Cooper*, 8 Allen, 334), but by many other cases.

In *Van Epps* v. *Harrison*, 5 Hill, 63, Judge Bronson says, that an affirmation concerning the cost of property is of no importance; that it is only another mode of asserting that the property is worth so much; that all the books agree that no action will lie if such an affirmation prove false; that it is folly for a purchaser to rely upon such statements; that an affirmation, as to the price paid, amounts indeed to less than a direct assertion of value; that it is no more than an affirmation that the parties agreed that such was its value; that it would lead to great mischief to allow men to annul their contracts upon such a ground.

So in *Medbury* v. *Watson*, 6 Met. 259, that court say with regard to affirmations and representations in relation to real estate, that the maxim *caveat emptor* (let the purchaser beware), has ever been held to apply; that 'when, therefore, a vendor of real estate affirms to the vendee, that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable.'

And Mr. Kerr (a late English writer), in his work on Fraud and Mistake, page 88, says that 'the representations of a vendor of real estate to the vendee, as to the price he paid for it, are in respect to the reliance to be placed on them, to be regarded generally in the same light as representations respecting its value, or the offers which have been made for it; that a purchaser is not justified in placing confidence in them.'

Numerous cases, both English and American affirm the same principle. It is said in *Mooney* v. *Miller*, 102 Mass. 220, that the representations of the vendor in regard to the price he paid for the land, are not actionable.

It is also true, as stated by the chief justice in the foregoing opinion, that an action for deceit, in the sale of real estate, will not lie for false representations concerning the profits that may be made from it in the future. But upon this point it is important to distinguish between the future and the past; for while it seems to be perfectly well settled that affirmations, concerning the future profits or productiveness of land, made by the seller to the buyer, although known by the party making them to be false, will not support a claim for damages, either in an action on the case for deceit, or by way of recoupment in an action to recover the purchase-money; it is equally well settled, that such affirmations with respect to its past profits or productiveness, will support such a claim.

Thus, in *Mooney v. Miller*, 102 Mass. 217, it was held that false representations, by the seller to the buyer of a lot of land, as to the quantity of wood and hay that could be cut upon it, was not actionable; while in *Coon* v. *Atwell*, 46 N. H. 510, it was held that a representation, that the farm had cut seventy-five tons of hay that year, when in fact it had not cut more than thirty-five tons, was actionable. In the latter case, the court say that the foundation of the action is the fraud and deceit of the defendant; that if in making sale of the farm, he fraudulently represented that it cut seventy-five tons of hay a year, when he knew it did not, and the plaintiffs were thereby deceived and induced to buy the farm, and so were injured, the action might be maintained; that it was not a case where it was folly or negligence to confide in such representations; nor was it at all like the mere expression of an opinion as to value; that it was the statement of a fact, that would in general be peculiarly within the knowledge of the vendor; and that to hold that it would be folly to confide in it, would greatly tend to impair all future fair dealing.

In this case there was evidence, that when the parties were on the farm examining it, with a view to the sale, a short time before the conveyance was made, the plaintiff asked the defendant how much hay the farm cut the previous year, and he replied that it cut twenty-five tons; that this was in the winter, when the farm

was covered with snow, and the plaintiff had no opportunity to examine the soil, and was, therefore, obliged to rely upon the defendant's statements in relation to its productiveness.

The presiding judge instructed the jury, that if they were satisfied, from the evidence in the case, that such a representation was made by the defendant; that he made it not merely as matter of opinion, but as a fact; and he knew when he made the statement, that it was false; and that the plaintiff relied upon it, believing it to be true, so that he was thereby deceived, and was led to believe that there was that amount of hay cut, when in fact there was not; and was thereby injured; the defendant was guilty of an actionable fraud, an actionable deceit, and the plaintiff would be entitled to recover.

We think these instructions were correct.

Motion and exceptions overruled.

Judgment on the verdict.

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

INHABITANTS OF BETHEL, petitioners for *certiorari*, *vs.* COUNTY COMMISSIONERS OF OXFORD COUNTY.

Certiorari—when not issued. Regular session of county commissioners.

The selectmen of a town, after due proceedings, laid out a town way, and awarded to one of the land-owners an under-pass for his cattle, in addition to a specific sum as damages, and the town refused to accept the road. Thereupon the county commissioners, upon petition seasonably presented, laid out the road, omitting the under-pass. *Held*, That a writ of *certiorari* will not be granted on a petition of the town to quash the proceedings of the commissioners.

79 me 78 .

Inhabitants of Bethel *v.* County Commissioners of Oxford County,

A petition presented at a session of the county commissioners held by adjournment from a regular session, is a presentation 'at a regular session' within the meaning of R. S., c. 18, §§ 23 and 24, although the cause of action set forth in the petition did not occur until after the time fixed by the statute for the commencement of the regular session.

A petition to the county commissioners setting forth all the essential jurisdictional facts, but addressed to a court of county commissioners 'next to be holden on the —— day of November, 1866, by adjournment from,' etc., was entered at a session held on a certain day in the succeeding March, by adjournment from the regular session of the previous September, and was acted upon. *Held*, That jurisdiction attached.

Where it appears by the record that the selectmen filed on Sept. 1st, a return of their proceedings in laying out the way, and on the same day issued their warrant for a town meeting, containing an article to see if the town will accept the 'road as laid out' by them,—a writ of *certiorari* will not be issued to quash the proceedings of the commissioners in a subsequent laying out by them, on the ground that it does not appear that the warrant for town meeting was issued after the filing of the return of the selectmen.

PETITION FOR CERTIORARI.

D. Hammons, for the petitioners, contended,

That the selectmen had no authority to award 'an under-pass,' and hence the town could not lawfully accept the road.

That R. S. of 1857, c. 78, § 9, establishes two regular sessions of the county commissioners in this county—first Tuesdays of May and September. First Tuesday of September, 1866, was Sept. 4th; that town meeting when the town refused to accept the road was Sept. 10th; that the petition to the commissioners was first acted on at a court held March 19, 1867, six months after Sept. 4, 1866; that the action of town was six days after the session to which the town appealed. That the appeal should have been entered at the regular May session.

Counsel cited *Inhabitants of Pownal*, petitioners, 8 Maine, 271; *City of Bangor* v. *Co. Commrs. of Penobscot Co.* 30 Maine, 270; *Parsonsfield* v. *Lord*, 23 Maine, 511.

That there was no session in November.

There is no evidence that the town meeting was called after the return of the selectmen was filed,—both done same day.

E. Foster, jr., for the respondents.

VIRGIN, J. On Sept. 1, 1866, E. M. Carter, S. R. Hutchins, and D. F. Brown, as selectmen of Bethel, filed with the town clerk a written return of their proceedings in locating a certain town-way, on the petition of John S. Swan and others, containing the bounds and admeasurements of the way, and the damages allowed to each person for land taken. The only irregularity suggested in their proceedings is that the selectmen awarded to Joseph Holt, one of the land-owners, 'an under-pass for his cattle,' in addition to a certain sum of money as damages.

At a legal meeting of the town called by a warrant issued by the same selectmen, on the same day on which they filed their written return of the location, to be held on the 10th day of the same September, 'To see if the town will accept of a road as laid out by the selectmen, on the petition of John S. Swan and others,' the town voted not to accept the road.

On Oct. 22, 1866, Swan and others made a petition 'To the court of county commisssioners next to be holden at Paris, within and for the county of Oxford, on the ——— day of November, 1866, by adjournment of the regular term of said court, held on the first Tuesday of September, 1866,' therein stating all the facts necessary to carry the matter before the county commissioners, in accordance with R. S. of 1857, c. 18, §§ 22 and 23, alleging that the petitioners were aggrieved by the unreasonable refusal of the town to accept the road located by the selectmen, and requesting the commissioners, after due preliminary proceedings, to view and locate the non-accepted road.

At a session of the commissioners held on March 19, 1867, by adjournment from their stated September session, 1866, they ordered notice on said petition; and, in pursuance of said notice, met at Swan's dwelling-house, on June 11, 1867, and thereupon proceeded to view the route, hear the parties, locate the way substantially as located by the selectmen, award the same sum as damages to the same persons respectively, as did the selectmen, omitting the 'under-pass,' and to direct their proceedings to be recorded by their own and by the town clerk.

And now the inhabitants of Bethel, by their selectmen, come and ask for a writ of *certiorari*, to bring up the record of the county commissioners that the same may be quashed upon the following alleged grounds:

1. Because Swan and others did not present their petition at the May session, 1867, which, it is contended, was the first 'regular session' of the commissioners after the refusal to accept by the town.

R. S. of 1857, c. 18, §§ 22 and 23, require such a petition to be presented 'within one year' after such refusal, 'at a regular session.' And this court, as long ago as 1844, decided that a session of the commissioners' court includes all its adjournments, which are but parts of its session. *Parsonsfield* v. *Lord*, 23 Maine, 511. And subsequently the court declared that a petition presented at any period of the session is presented 'at a regular session.' *Harkness* v. *Co. Commrs. of Waldo Co.*, 26 Maine, 353. And finally, in *Waterville* v. *Co. Commrs. of Ken. Co.*, 59 Maine, 80, it was held, substantially, that a petition presented at a session held by adjournment from a regular session, was a presentation 'at a regular session,' within the meaning of the statute on ways, although the cause of action set forth in the petition did not arise until after the time fixed by the statute for the commencement of the 'regular session.' Viewed in the light of these cases, it is evident that the petition of Swan and others, was presented 'within a year' after the refusal of the town to accept the road, and 'at a regular session' of the commissioners in compliance with the statute.

2. It is further urged that the petition being addressed to a court next to be holden 'on the —— day of November, by adjournment,' etc., could not be received and acted on at the succeeding March session, held by adjournment from the stated September session, 1866. The case shows, however, that the petition was otherwise sufficient, and was acted upon within the year, 'at a regular session.' And being sufficient, and it having been acted upon within the time limited, jurisdiction attached. *Gay* v. *Bradstreet*, 49 Maine, 585. Again, petitions for writs of *certiorari* being addressed to the

discretion of the court, it has been the uniform practice to refuse to grant them when sufficient appears to show that the commissioners had jurisdiction of the subject-matter upon which they had acted, and that substantial justice had been done, though their records may not show that their proceedings had been in all respects, technically correct. *West Bath pet'rs*, 36 Maine, 76. And neither will the writ be granted on account of errors in mere matters of form, if the commissioners had jurisdiction. *North Berwick* v. *Co. Commrs. of York Co.* 25 Maine, 69; nor for the correction of mere harmless errors. *Furbush* v. *Cunningham*, 56 Maine, 184.

3. Again it is contended that it does not affirmatively appear that the selectmen issued the warrant for the town meeting after they filed the return of their proceedings with the town clerk. But it does appear that the same selectmen who made return of their proceedings on Sept. 1, did on the same day issue their warrant for the meeting therein mentioning the 'road as laid out' by them; and the decisions in almost every State in the Union demonstrate that the maxim '*Omnia præsumuntur rite esse acta*,' is of almost daily application to every diversity of official action. *Shorey* v. *Hussey*, 32 Maine, 579; as that acts when done will be presumed to have been done in the order required by statute. *Booth* v. *Booth*, 7 Conn. 367-8. *Payne* v. *Barnes*, 5 Barb. (Sup. Ct.), 465.

4. But it is again said that the writ should issue because the selectmen did what they had no authority to do, to wit, awarded to Joseph Holt 'an under-pass.' The answer is, that the inhabitants of Bethel, in their petition to us, pray that the proceedings of the commissioners, and not those of their own selectmen, may be quashed. To be sure the selectmen awarded the 'under-pass,' but the commissioners declined to do it.

And if a town can prevent the commissioners from establishing a road over which they have jurisdiction, upon the ground that their selectmen exceeded their authority in the premises, few town roads would be built which a majority of the town, including a majority of its municipal officers, did not desire, how heavily soever the necessity of their construction might bear upon the other citizens of the town.

Moreover there is no necessity of issuing the writ to quash the proceedings of the selectmen; for they were quashed by the town when it voted not to accept the road. And when the subject-matter came within the jurisdiction of the commissioners on a petition to them, their authority was not limited by R. S. of 1857, c. 18, § 23, as under R. S. of 1841, c. 25, § 34, to the simple power of 'affirming and approving the way as laid out by the selectmen,' but they were authorized to do what they did do, viz., 'proceed to act thereon as is provided respecting highways,' that is, lay out the way as if it were a county way, and 'state in their return the names of the persons to whom damages are allowed, and the amount allowed to each,' etc. R. S. of 1857, c. 18, §§ 4 and 23. *Orrington* v. *Co. Commrs. of Pen. Co.*, 51 Maine, 570.

Writ denied.

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

ENOS L. JORDAN, petitioner, *vs.* SCHOOL DISTRICT NO. 8, IN CAPE ELIZABETH.

School-house—location of.

The phrase 'location of the lot' as used in R. S., c. 11, § 34, refers to the laying out of a school-house lot mentioned in § 33, and not to 'where the school-house shall be placed' mentioned in § 32.

Under R. S., c. 11, § 34, a jury has no authority to designate the place on which the school-house shall stand, but to fix the boundaries and price of the lot.

When the location has been legally designated, by the municipal officers, upon the land of a certain person, a jury, summoned under R. S., c. 11, § 34, on petition of the owner, cannot change the location to the land of another or to that of the district.

Jordan *v.* School District No. 8 in Cape Elizabeth.

ON EXCEPTIONS.

MOTION to set aside the verdict of a jury summoned under R. S., c. 11, § 34, by the petitioner, upon the alleged ground that he was aggrieved on account of the location of a school-house upon his land in school-district, No. 8, in Cape Elizabeth, by the municipal officers of Cape Elizabeth, and on account of the damages awarded therefor.

So much of the report of Hon. J. H. Drummond, appointed to preside at the view and hearing, as is essential to this case, was as follows:

'The petitioner offered evidence tending to show that the location of the lot should be changed by the jury, from the petitioner's land to land owned by another person within the district. The counsel for the respondents objected, that it was not admissible, because the jury, under the statute, had no power to change the location from land owned by the petitioner to land owned by any one else; and I sustained the objection and excluded the evidence.

'The petitioner then offered evidence tending to show that the location should be changed from the land of the petitioner to the site owned by said district, and upon which the school-house in said district now stands. The respondents interposed the same objection and I excluded the evidence.'

At the April term, 1872, of this court, the petitioner moved the verdict be set aside because of the exclusion of the evidence offered. But the presiding judge overruled the motion and ordered the verdict to be confirmed; and the petitioner alleged exceptions.

A. A. Strout, for the petitioner.

——— for the respondents, cited in addition to the statutes, *Merrill* v. *Berkshire Commrs.*, 11 Pick. 269; *Lanesboro* v. *Same*, 22 Pick. 278; *Gloucester* v. *Essex Commrs.*, 3 Met. 375; *School District* v. *Copeland*, 2 Gray, 414; and *Harris* v. *Marblehead*, 10 Gray, 40.

DANFORTH, J. This case involves the extent of the powers of a jury summoned under R. S., c. 11, § 34, to revise the doings of the municipal officers in locating a school-house lot, and assessing damages therefor.

The petitioner offered evidence before the jury, tending to show that the location should be changed from his own, to land of another party within the district, and the presiding officer excluded it. He then offered evidence tending to show that the location should be changed to land owned by the district and 'upon which the school-house now stands.' This was also excluded. These are the only rulings complained of. It is evident the two must stand or fall together, and may therefore be treated as one. There is nothing in the statute limiting the right of the jury to change the location to land of the district. If they can go beyond the land of the petitioner, they may locate anywhere within the limits of the district. To settle the right of the juries in such cases as the present, the section of the statute, under which they are summoned and from which they receive their authority, must be construed in connection with other sections of the same statute, relating to the location of school-houses. They are all found in R. S., c. 11. By § 24, the districts are to determine where their school-houses shall be located.' By § 32, 'if more than one-third of the voters present and voting object, the municipal officers,' upon certain conditions therein named, 'may decide where the school-house shall be placed.' It will be noticed that under this provision the officers simply decide upon the place where the house is to be, and do not fix the boundaries of the lot, or determine its size or shape. They place the school-house, but do not and cannot lay out the lot. This is left to be done by the district upon an agreement with the owner of the land. By § 33, other and distinct powers are conferred upon the municipal officers, viz., to lay out a school-house lot, not exceeding forty square rods, and appraise the damages,' etc. As a necessary condition, precedent to this power, it must appear as provided in the same section, that 'a location for the erection or removal of a school-house and necessary buildings has been legally

designated, and the owner thereof refuses to sell,' etc. This legal designation can be no other than that made by the district itself, or by the municipal officers on application from a minority of the voters. It would seem necessarily to follow, that the designation, having been legally made, could not be changed; that the laying out contemplated by § 33 must be in the same place as that before determined upon, and authorizes only a fixing of the boundaries, shape, and size of the lot, with the price to be paid for it. The municipal officers, then, may, in certain contingencies, be called upon to do two separate and distinct things; first, to designate the place where the house is to be built; and, second, to lay out the lot and appraise damages. *Harris* v. *Marblehead*, 10 Gray, 40. These are not necessarily connected. The first may be done by the district, and when so done is final, unless an appeal is made by the minority, and if so, the action of the municipal officers is final and no appeal lies therefrom. The second must be done by the municipal officers, and from this there is an appeal as provided in § 34. By this section, 'if the owner is aggrieved at the location of the lot, or the damages awarded, he may, within one year, apply to the county commissioners, and have the matter tried by a jury, who may change the location and assess the damages.' Now the whole question depends upon the meaning of the word 'location' as used in this section. Does it refer to the place decided upon as in § 32, or to the laying out referred to in § 33? If to the former, the whole matter of location is for them, and they may place the lot anywhere within the district. If to the latter, they are not only confined to the land of the petitioner, but must lay out the lot at the place designated by the municipal officers, and, in this respect, their duties are confined to such changes as may, in their judgment, render the location less inconvenient to the petitioner, having due regard to the interests of the district. If we are correct in our construction of the preceding sections, that the fixing of the place, by the district or on appeal by the municipal officers is final, then the language of § 34 must necessarily refer to what is done under § 33, and we have no authority for carrying the

appellate beyond the original jurisdiction. Bnt there are other reasons which lead us to the same conclusion. The language used, 'aggrieved at the location of the lot,' applies with more fitness to the laying out under § 33, than to the place designated under § 32. The lot, as already seen under § 32, is left indefinite and uncertain as to its boundaries and shape. In the next section it is made definite and certain in all particulars, and the word location, connected with lot in § 34, would seem to imply a definite lot, certain in its bounds. But what is of still greater force, in this process only the owner of the land, on which the lot is located, and the district are parties, and if the jury are to change this location to land of other persons, then the rights of such persons are to be settled in a process to which they are not parties, and of which they have not and cannot have legal notice. The officer is only authorized to notify such as are parties, while the statute, by its reference to the proceedings in case of damages in laying out highways, requires not only that all interested shall be notified, but by necessary implication all such shall be parties to the process. It is true private property may be taken for public purposes without special notice, but damages can be assessed only after notice and hearing, and in this case the same process and notice is required to authorize the jury to change the location, as to assess the damages. The same doctrine is laid down in *Merrill* v. *Berkshire Commrs.*, 11 Pick. 269, and *Lanesboro* v. *Same*, 22 Pick. 278, cited by respondent's counsel.

It would seem, too, to be quite clear from the statute, that in all cases, before the jury can be called, the municipal officers must 'lay out a school-house lot, appraise the damages,' etc.

The district may determine the place, but if they cannot agree with the owner, the next and necessary step is to call on the municipal officers to lay out. But if the jury can go upon other land and locate anew, this provision of the statute is entirely disregarded. Still further, the statute, § 32, provides that if more than a third of the voters object to the place designated by the district, they may be heard upon an appeal to the municipal officers. But if the jury are to disregard the place thus fixed, then this provis-

ion is nullified, for it is very evident that a hearing of the minority before the jury is not contemplated. Hence, it clearly appears that the doctrine contended for by the petitioner, would not only subject parties to the injustice of having their rights settled in a process to which they are strangers, but involves the statute in numerous inconsistencies and irreconcilable contradictions. While if we confine the doings of the jury toa revision of the laying out of the lot and assessing damages, as contemplated in § 33, we give to the statute and all its parts that force and effect which its language requires, and render it consistent with well-settled principles of law, adopted to secure the rights of all parties. With this construction, the rulings complained of were sufficiently favorable to the petitioner, and the entry must be *Exceptions overruled.*

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

ANDREW FOLAN *vs.* JEDEDIAH G. LARY.

Practice. Former suit.

The phrase 'former suit,' as used in R. S., c. 82, § 111, applies to a suit in this State and not to one in another jurisdiction.

Thus, where, in the State of New Hampshire, the defendant had on nonsuit recovered judgment for costs against the plaintiff, in an action by the latter against the former, and then the plaintiff brought this suit for the same cause of action; *Held*, That proceedings would not be stayed until the costs in the former suit were paid.

ON EXCEPTIONS.

ASSUMPSIT on an account annexed.

At the September term, 1872, the defendant filed a motion to stay the proceedings (under R. S., c. 82, § 111), upon the ground that in Coos county, New Hampshire, in an action for the same

cause, brought by the plaintiff against the defendant, the latter recovered judgment against the former on nonsuit, for costs which had never been paid.

The copy of the record of the judgment in New Hampshire was in the name of this plaintiff against this defendant and certain persons as trustees.

The presiding judge sustained the motion, and the plaintiff alleged exceptions.

William P. Frye & John B. Cotton, for the plaintiff.

M. T. Ludden, for the defendant, contended

That R. S., c. 82, § 111, is a declaratory statute, reënacting and proclaiming the common law. *Hoare* v. *Dickson*, 62 E. C. L., 164, and cases cited.

Any other rule would be 'vexatious and oppressive.'

A judgment conclusive in one State is conclusive in every other. *Sweet* v. *Brackley*, 53 Maine, 346.

The judgment in New Hampshire between these parties is the same as though rendered here. U. S. Const. Art. IV, § 1. The presumption is in favor of the jurisdiction. *Buffum* v. *Stimpson*, 5 Allen, 591. Counsel also cited *Mowry* v. *Cheeseman*, 6 Gray, 515, as analogous.

APPLETON, C. J. The R. S., c. 82, relate to 'proceedings in court.' 'The proceedings in court' are proceedings in the courts in this State, not in those of other States or of foreign nations. Like all legislation, it has reference to what may arise within the jurisdictional limits of the State.

In this chapter are various provisions in relation to costs. Among others is found § 111, which is in these words: 'When costs have been allowed against a plaintiff on nonsuit or discontinuance, and a second suit is brought for the same cause, before the costs of the former suit are paid, further proceedings shall be stayed, till such costs are paid, and the writ may be dismissed, unless they are paid at such time as the court appoint.'

Now the word 'costs,' in every section from § 104 to § 123, relates to costs as established by the statutes of this State, and as taxed under its provisions. It has no relation to costs existing under other jurisdictions, and which are to be taxed and allowed by the judicial tribunals of other governments. Nothing indicates a change of the meaning of the word in § 111, or that while in other sections the word refers to costs as established by our laws that in this section there is a changed meaning, and the word here is enlarged to mean costs as provided by the law of all other States as well as of this.

Further, the section reads, 'when costs have been allowed.' But who is to allow them? By § 123 provision is made for the court in certain cases to pass upon 'costs recoverable.' The allowance is by the courts of this State, not by those of foreign jurisdictions. The word 'allowed' refers to what is here done, as in § 107.

The costs of a preceding suit, in which the plaintiff has been nonsuited, 'when a second suit is brought for the same case, must be paid at such time as the court appoints,' else 'further proceedings shall be stayed.' Where is the second suit to be brought? Obviously, when the first had been brought, in this State. The statute does not say the costs are to be allowed, nor the suit to be brought in this State,—but the bringing a new suit, and the allowing past costs equally and alike are to take place within this jurisdiction, and not elsewhere. The court are to allow the costs and fix the time of their payment.

It is enough that costs have accrued. The statute does not require the issuing of an execution. Now if there is a nonsuit in England, or in any of our States, is the allowance to be by courts of this State, or is the allowance by one of the judges of another jurisdiction duly certified the allowance within the meaning of this section. If the costs are to be allowed by a judge of this State, then, when the suit was in another jurisdiction, the judges of this are to determine upon the correctness of the taxation of costs in other jurisdictions.

No one reading the section under consideration can doubt that

the word costs has the same jurisdictional limitation as in the preceding and succeeding sections, which relate to this subject-matter. The obvious purpose of this legislature was to prevent a multiplicity of suits for the same cause of action in the courts of this State.

But it is said that by the constitution of the United States, Art. IV, § 1, 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.' But it does not provide that they shall have in other States the same effect,—if it did, an execution issued in our State might run in another. Full faith and credit are given when the judgments of another State are the basis of a judgment in this.

But it does not necessarily follow that because a judgment has been recovered in another State, that it is valid. In an action on a judgment recovered in another State for costs against a plaintiff in a suit commenced there, he may defend by showing that he gave no authority to institute such suit, and had no knowledge thereof until judgment was rendered therein. *Watson* v. *N. E. Bank*, 4 Met. 343. To require the payment of costs as a preliminary to the plaintiff's proceeding, might be the requiring of the payment of what is not due, and of what when paid, the party paying cannot recover back.

But it is argued that the power to stay proceedings in a second suit until the costs of a former suit for the same cause of action are paid, exists under the rules of the common law. This is so in certain cases. As in ejectment, because one recovery in ejectment cannot be pleaded in bar to another ejectment for the same lands. So where the nonsuit is upon the merits of the case, the court will interfere, otherwise not. As in *Bass* v. *Firemen*, 1 Ld. Raym. 697.

Because the merits did not come in question in the trial upon which the plaintiff was nonsuit, the court refused to stay proceedings. But 'it seems to me,' remarks Lord Ch. Justice DeGrey, in *Melchart* v. *Halsey*, 3 Wils. 152, 'the court would then have interposed, if the plaintiff had been nonsuited upon the merits at the trial.' So in *Hoare* v. *Dickson*, 62 E. C. L. 164, the proceedings

were stayed because the nonsuit had been ordered upon the merits. This seems to be the rule as recognized in the English courts.

Further, in all the cases on the subject the suits were both brought in the same jurisdiction. In no instance has a plaintiff been compelled to pay costs accruing in a foreign government as a preliminary to enable him to enforce his rights in the English courts. Indeed, the reason upon which the action of the court is based precludes the very idea of interference in such a case. Their interference is to prevent the vexatious abuse of its own process. The abuse of the process arises only in the second suit. This implies the previous use of the process of the court. The process of the court is not abused by its first use. It is the second only which is vexatious. A person indicted in this State for the selling of spirituous liquors cannot be punished as a second offender by proof of a previous conviction for the same offence in another jurisdiction. So the vexation, to which the courts refer, is the vexation which arises from two civil actions in the same jurisdiction for one and the same cause of action,—the second being after a nonsuit has been ordered on the first on the merits.

The question to be determined is the intention of the legislature. The word 'costs,' in every other section, means 'costs' as determined by our legislature, not 'costs' which may be established by a foreign State. The allowance of costs is to be by the judges appointed under our law. The suits are to be brought in our courts. The proceedings when stayed, are to be stayed by our judges. The act in § 111, as in other sections, relates to what has been, or is to be, done within the limits of this State.

Exceptions sustained.

KENT, DICKERSON, DANFORTH, and VIRGIN, JJ., concurred. CUTTING, J., did not concur.

STATE OF MAINE *vs.* ELBRIDGE W. REED.

Evidence—hearsay.

In the trial of one Reed for the murder of one John Ray, it became a material question, as to the manner in which the defendant hurt his hand, which was found swollen on the morning after the murder. The defendant testified that he hurt it in a fall while getting over a pair of bars with a bunch of shingles on his shoulder, and that it was an old sprain and had swollen several times. One Vance, called by the defendant, to impeach certain government witnesses, testified on cross-examination, that the defendant told him what the defendant told one Elder Ray about injuring his hand,—that he could not testify, positively, what it was, it was so long ago,—that it was something about 'getting over a pair of bars,' but whether it happened when the defendant was after a cow, he did not know. Subsequently one Hale, called by the government, was permitted to testify against seasonable objection, that Vance told witness that defendant told Elder Ray that he hurt his hand 'when after a cow, and struck his hand against a log, or something;' *Held*, That the testimony of Hale had no tendency to impeach the testimony of Vance upon anything material to the issue, and was not admissible.

ON EXCEPTIONS.

INDICTMENT for the murder of John Ray, on Sept. 20, 1870, tried at the August term, 1871.

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

W. H. McCrillis, for the defendant.

BARROWS, J. Reed was on trial, charged with the murder of John Ray, and the evidence against him was of a purely circumstantial character. Such evidence, when there are many circumstances which point to the accused as the guilty party, so directly as to exclude every reasonable hypothesis, save that of his guilt, furnishes the most satisfactory and conclusive proof which can be adduced. The prisoner is rightfully held to abide the effect of all the matters and things tending to show his guilt, that can be legitimately proved. But it is his right to require that every circumstance offered, whether tending more or less directly to prove his guilt, unless its existence can be established by legitimate testimony, shall be thrown out of the account.

Mere hearsay, offered to establish an inculpatory circumstance, should be rigorously excluded. It is not admissible even for the purpose of fixing the slightest pecuniary liability upon a party in a civil suit.

In this case the State called one Hale, who against the prisoner's seasonable objection, was allowed to testify that one Vance, a witness called in defense, once said that 'he saw Elbridge's (the prisoner's) hand and asked him how he hurt it, and he said he hurt it when he was after a cow—that he struck it upon a log, or something.' If this was allowed to pass, as it was very likely to do in most minds, as proof that Reed had actually made this statement to Vance, it might be productive of dire injustice. Reed's hand was hurt the day that Ray disappeared. It was seen to be swollen the next morning. Reed had just testified upon this trial, that he hurt it in a fall, when he was getting over a pair of bars with a bunch of shingles on his shoulder that evening; and that it was an old sprain, originally received in a quarrel ten or fifteen years before, and had swollen up several times. If the jury believed that he told Vance that he hurt it 'when he was after a cow,—struck it upon a log or something,' he was convicted, in their minds, of giving a false explanation of a suspicious circumstance, and this is universally conceded to be evidential of guilt on the part of the accused. But Vance's statement to Hale was no evidence of this fact, though it was altogether likely to be received as such. Vance testified to no such thing.. Nobody testified to anything of the kind. Hale said, on cross-examination, 'I never heard Mr. Reed say anything about it; that is what Vance told me that Reed told him.' It seems to be conceded, that, whatever it was that Vance heard Reed say, Reed said it in reply to Elder Ray at Hayford & Webster's store. Elder Ray is called by the government and all he says about the conversation is this: 'he stated how he received the injury; he said he fell and knocked his knuckles back in this way (witness indicating); there was nothing said about shingles; I cannot recollect definitely whether he described the way it was done or not.' At the time of testifying, it seems the story of the

cow was not present in Elder Ray's recollection any more than it was in Vance's.

It is claimed that Hale's testimony was admissible to contradict and impeach Vance; let us place their testimony side by side and see whether Vance gave any testimony on this topic material to the issue, and whether there is a contradiction upon any material point. Premising that Vance was called by the defense to testify to the bad character for truth of one Butler, a witness for the government, and to a statement made by another government witness out of court, and that his testimony, upon his examination in chief, was exceedingly brief, and not specially important, and that what he said, relative to the conversation of Reed with Elder Ray, was drawn out on cross-examination by the prosecuting officer, we must compare it with that which was offered and admitted, it is said, for the purpose of contradicting and impeaching it.

VANCE.

'He (the prisoner) told me what he said to Elder Ray; but I will not tell you what he said to him, because I cannot state positively; it was quite a while ago.

Ques. Did Reed say he hurt his hand jumping over a pair of bars after a cow?

Ans. He was talking to Mr. Ray; he said something about getting over a pair of bars, but whether he was after a cow or not, I do not know.

Ques. Did you tell anybody that he said so?

Ans. I do not know but that I might have told some folks so.'

HALE.

'He (Vance, the witness) said he saw Elbridge's hand and asked him how he hurt it and he said he hurt it when he was after a cow—struck it upon a log, or something.

I never heard Mr. Reed say anything about it; that is what Vance told me Reed told him.

It is undoubtedly true, that our rules and practice permit counsel, who expect to be able to prove an independent fact by a witness called by the opposite party to some other point, to call out that fact upon cross-examination, and in case of failure, through the false or erroneous reply of the witness, whenever the fact is material to the issue, to proceed to prove it *aliunde*, and to impeach and nullify the witness's statement respecting it, by showing any contradictory or conflicting statements made by him elsewhere, and to do this, either with or without a previous inquiry of the witness whether he has made such statements. But evidence of what the witness has said, is admissible only to invalidate the testimony which he gives, and is not competent as substantive evidence of the fact proposed to be proved. To make such statements admissible, the witness must have testified to something that requires to be impeached, in order to make proof of the fact, and mere want of recollection can seldom, if ever, be of that character. Does it even remotely tend to impeach the testimony of a witness who declines to give the details of a conversation which occurred a twelvemonth before, on the ground that he cannot state positively what was said, and who fails to recall those details when suggested by specific inquiry, to prove that, at some former period (probably about the time the conversation occurred), he rehearsed the details to a third person?

Has he, in fact, said anything, material to the issue, to be impeached?

To repeat a little in a condensed form, Vance swears, 'I can't state, positively, what Reed said to Elder Ray, it is so long ago; he said something about getting over a pair of bars, but whether he was after a cow I don't know.' It does not seem to me to have any tendency to impeach Vance, to prove that once on a time he reported Reed as saying that he hurt his hand 'when he was after a cow,—struck it on a log, or something.' If this impeaches Vance, it impeaches to the same extent the government witness, Elder Ray, who 'cannot recollect definitely, whether he described the way it was done or not.' There is no discrepancy between Vance and Elder Ray, unless we deem it a discrepancy that the pair of bars, as well as the cow, had departed from the memory of Elder

Ray, leaving nothing but the fall to account for the condition of the hand; and the pair of bars were, figuratively speaking, put into the witness's mouth by the prosecuting officer. It would be hard to make even a tolerable conjecture whether the cow chase was a figment of the brain of Hale or that of Vance, or whether Reed actually said what was imputed to him. There is not a word of competent evidence from any witness to prove that he did say it; and yet Hale's statement of what Vance said he said would be almost sure to be accepted and used by the jury as evidence of the fact. It was a vital matter to this prisoner, not to have any such hearsay accounts of his conversation brought in to contradict the statement which he made upon the stand, as to the mode in which his hand was hurt.

I do not think that the ruling of Baron Parke in *Crowley* v. *Page*, 7 C. & P. 789, while it is clearly sound, is applicable to a case like this. There the question was, whether certain hay was 'of good quality,' such as no reasonable person would object to. B. swore it was not. He was first confronted with a certificate, signed by himself and others, flatly contradicting his testimony in the case. He was then asked whether he had not said to one of the parties in the presence of J. B., that the hay was of good quality, and he said he did not recollect. This is the specific want of recollection which is held not to preclude contradiction. When counsel proposed to call J. B. to prove that he did say so, Parke, B., ruled that he might, remarking, in substance, that it was competent to impeach the testimony of a witness, by showing that he had made contradictory statements elsewhere, and that, in order to lay the foundation for the introduction of those contradictory statements, and to enable the witness to explain them, and for no other purpose, 'the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence, he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion; if the witness admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recol-

lect, that is not an admission, and you may prove that the witness did say what is imputed to him, if it is material to the issue.

The quality of the hay was of the substance of the issue. A. swore it was not good, and, being inquired of, said he did not recollect that he had said, in the presence of B., that it was good. B. was very properly allowed to testify, that he had said so because it contradicted and impeached testimony, material to the issue, which A. had given. But in the case at bar, the prosecuting officer sought to prove by Vance that Reed, the defendant, had made a different statement from that which he made upon the stand, and failed, Vance saying, that after this lapse of time, he could not undertake to say positively what Reed did say. But Vance gave no testimony material to the issue. He only said he could not give any. He did not utter a word which needed to be impeached, in order to give free course to any proof that the government might offer, of what Reed said to Elder Ray. And he admitted that he might have given the account of the conversation, which the inquiry imputed to him 'to some folks.' What was there here to contradict or to impeach, that was in the slightest degree material to the issue? Unless this hearsay was to be used to contradict Reed (which is not pretended), it was of no value whatever, and should have been excluded. Its admission seems dangerous as a precedent. By this spurious kind of evidence, any fact which does not exist may nevertheless be proved, without any false testimony, to the reasonable satisfaction of most jurors. A party has only to procure some one to assert the facts essential to his case, out of court, in the presence of others, call him as a witness, and when he refuses to confirm his assertions under oath, call those who heard him make them, to impeach his denial or want of recollection,—Q. E. D. The witness is fairly proved by reputable witnesses to have lied when he told the truth, in court, and the ready inference is, that he told the truth out of court when in fact, he lied.

In each one of the cases, cited to sustain the ruling, it will be found that the witness had given testimony material to the issue, and the want of recollection related only to his having said any-

thing tending to contradict it, and there was not, as in this case, a failure to give expected testimony by reason of alleged want of recollection.

Thus in *Nute* v. *Nute*, 41 N. H. 60, the existence or non-existence of a certain paper was essential to determine which party had the title. A witness, who at a former trial had testified that he thought he received that paper with others, now swore that he thought he did not, and that he did not recollect ever having stated otherwise. And in *Gregg Township* v. *Jamieson*, 55 Penn. 472, R., one of the supervisors of the plaintiff township, was called specially to testify that he had not consented to the payment of bounties, and being asked, on cross-examination, whether he had not stated that he had assented in the presence of N. and others, replied that he did not remember. Whereupon N. was called to prove the conversation, and it was objected that it was not competent to contradict R., and was immaterial and irrelevant. But Agnew, J., giving the opinion of the court, first decides that it went directly to the vital question in the case, whether the supervisors had offered a certain bounty, and then that a witness cannot escape contradiction by proof of his former statements, because he has forgotten that he made them. Doubtless the point was correctly decided in these cases, but they furnish no authority for holding that a witness, who gives no testimony at all upon the topic by reason of forgetfulness, can be contradicted by proof that he once remembered, or said he did. Nothing that Vance said upon the stand would have been in the slightest degree conflicting with any testimony that the government might offer, as to what the prisoner said to Elder Ray. If Elder Ray, or anybody else in Hayford & Webster's store, had remembered that Reed said he hurt his hand when he was after a cow, the fact that Vance did not remember it would have been purely immaterial. It was erroneous to permit Hale to testify to what Vance said the prisoner said.

Exceptions sustained.

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

Samuel James *vs.* William Tibbetts.

Fence-viewers. Partition fence.

The time limited by fence-viewers within which each adjacent owner shall build his part of the partition fence must be definitely fixed.

A recital in the written assignment that a certain owner named shall build the portion of fence assigned to him 'within twelve days from the date of receiving notice of this assignment,' is not sufficiently definite.

And parol testimony is not competent to remedy the defect in this particular.

To give any person a statute right to a partition fence, the land of the adjacent owner must be inclosed or improved.

And the fact that a part of the land of the adjacent owner is improved does not require him to maintain any part of a partition fence along that part which is not improved.

Fence-viewers have no authority to determine the right of adjacent owners to a partition fence.

On report.

Case to recover double the value of thirty-eight rods of partition fence assigned to the defendant by the fence-viewers, and upon his neglect to build the same, built by the plaintiff, with the fees of the fence-viewers and interest at the rate of one per cent a month, under R. S., c. 22, § 4.

The court to enter the legal judgment.

The case is stated in the opinion.

J. H. Webster, for the plaintiff.

S. D. Lindsey, for the defendant.

Danforth, J. To sustain his action, the plaintiff offers in evidence a division of the line fence by fence-viewers, between the defendant and himself, dated July 24, 1869, made under R. S. of 1857, c. 22, § 5. To this several objections are made, among others that there is no definite time allowed the defendant in which to build that part of the fence assigned to him. The section referred to requires the fence-viewers in writing to assign to each his share

thereof, 'and limit the time in which each shall build or repair his part of the fence, not exceeding thirty days.' It is evident that this provision as to time must be strictly complied with, in order to lay the foundation of an action of this kind. The time limited must be definite, and as it is required to be in writing, parol testimony would not be admissible to remedy any defect in this particular. *Abbott* v. *Wood*, 22 Maine, 546.

The paper offered shows the part of the fence set out to each party, adjudges a portion of it to be sufficient, and provides 'that said Tibbetts shall, within twelve days from the date of receiving notice of this assignment, build such a fence on the other part of said line,' etc. It will readily be seen that from this paper alone, and we have no other writing in relation to this point, we are unable to determine the commencement of the twelve days. This can only be done by the aid of parol testimony. Even if we hold him bound to take notice on the date of the record, it would not render the time definite. As the law fixes no period for the record, the time would be longer or shorter, as that date might be sooner or later, and the thirty days might expire before notice given.

This is a fatal defect in the foundation of the action, and one which cannot be remedied if the report should be discharged.

But there is another objection to the maintenance of this action, which goes to the merits of the case, independent of any error or want of error in the proceedings of the fence-viewers. Is the defendant under any legal obligation to build any part of the fence on the line in question?

It appears from the report that the parties were, at the time of this division, owners of two adjacent farms, bounded on the west by a town road. How far the land extends back from the road does not appear. The whole line was not divided by the fence-viewers, but only one hundred and fifty rods running from the road. The fence in controversy is the thirty-eight rods farthest from the road, and commences at a rock. The plaintiff occupies his land adjacent to this fence as a pasture, and beyond the pasture is bog and woodland. The defendant improved his land up to a point about seven-

teen rods west of the rock. The remainder, including that adjacent to the disputed fence, is woodland not under cultivation, and never has been, nor was it inclosed with fences, so far as the testimony shows. The small plan attached to plaintiff's argument appears to be correct.

The question of prescription is not raised here, but the plaintiff's counsel, in a very ingenious argument, rests the defendant's obligation to assist in maintaining this division fence upon two grounds, the assignment and R. S. of 1857, c. 22, § 5. He contends that the adjudication of the fence-viewers upon this point is conclusive.

There need be no question as to the binding effect of the judgment of the fence-viewers in any matter submitted to them by the law. But as all their powers are conferred upon them by statute, their adjudication beyond the matters for their consideration therein found can have no force whatever. Under the statute so far as it relates to this question, the only duty imposed upon the fence-viewers, is to assign to each party his share in partition fences about which disagreement has arisen, and limit the time in which such fence shall be built. Whether or not the parties, or either of them, are entitled to a partition fence to be supported equally, is a matter which the fence-viewers are not called upon to consider, but must be settled, in the absence of any agreement or right by prescription, by the provisions of the statute applicable to the facts of each case. *Longley* v. *Hilton*, 34 Maine, 332.

Nor does § 5, under which the proceedings in this case were had, determine the right of either party to a division of the fence. Such was not the purpose of the legislature in enacting it. The sole object of this section is to establish a method of proceeding by which a duty already existing may be legally divided, so that each may know the part he is to perform. Unless there is a legal right to a partition fence already existing, this section is not applicable, and the tribunal established by it have no duties to perform. In such a case there would be no 'rights in partition fences, and their obligations to maintain them,' respecting which to disagree. We must, then, look to some other part of the statute to ascertain the extent

of this right and this obligation, and we shall find it plainly set out in § 2: 'The occupants of lands inclosed with fences shall maintain partition fences, . . . in equal shares, while both parties continue to improve them.'

By § 10, a party ceasing to improve, or laying open his inclosure, though he may not take away his partition fence if the adjacent owner will purchase, is no longer under any obligation to support such fence.

Sect. 11 recognizes the same limitation, that only when the owner or occupant begins to improve his land, his liability to support a partition fence begins. Sect. 13 is to the same effect.

Owners of improved lands must maintain fences according to a legal division, but by giving notice as therein required, shall not be required to maintain such fence while his lands so lie common and unimproved.' It would seem to be clear that to give any party a statute right to a partition fence, the land of the adjacent owner must be either inclosed with fences or improved. The land of the defendant adjacent to the fence in controversy was at the time of the division neither inclosed nor improved. Nor does it change the fact that at some distance away, and adjacent to another part of the same line, it adjoins a piece that is cultivated. This still remains in the same condition as though it were not thus joined. As held in *Abbott* v. *Wood,* before cited, the statute is penal as well as remedial, and must be strictly construed.

If this construction is hard for the plaintiff it is only so because he owns land adjacent to other land unimproved, and in such case the law gives him no assistance in building his line fence.

Judgment for defendant.

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

BELFAST & MOOSEHEAD LAKE RAILWAY CO. *vs.* CALVIN MOORE.

Stock—subscription for. Agreement not affected by charter—or subsequent statute. Condition precedent.

The defendant, with numerous others, signed a subscription of the following tenor: 'We, the undersigned, agree and bind ourselves to take the amount of shares set against our respective names, in the stock of the Belfast & Moosehead Lake Railway Company agreeably to the foregoing conditions.' *Held*, That the simple agreement to 'take' imposed no personal obligation to pay for the shares.

Also *held*, That the 'conditions' which contained no words of promise, did not change the force of such agreement, in this particular.

And the construction of such an agreement is not affected by a provision in the charter purporting to render the subscriber liable for the balance remaining due after a sale of his shares.

Neither does c. 206 * of the Special Laws of 1869 affect the contract made before its enactment, even though viewed as an amendment of the charter.

The defendant agreed in writing, that on the execution and delivery to him by the directors of the railroad of certain mortgage bonds mentioned in said agreement, he would pay the assessments theretofore made to the amount of the par value of the stock previously subscribed by him. *Held*, That the delivery of the bonds was a condition precedent to the payment of the assessments.

ON REPORT.

ASSUMPSIT to recover assessments on five shares of the plaintiff company, amounting in all to the par value—$500.

The subscription contract was as follows:

1. Every person or corporation subscribing to said stock shall be required to pay or secure to the acceptance of the treasurer of said

* SPEC. LAWS OF 1869, c. 206. The Belfast & Moosehead Lake Railroad Company, in addition to the remedy already provided for the collection of the subscriptions to its capital stock and assessments made by said company, shall have the right to maintain an action of special assumpsit in the name of said company to enforce payment of such subscription or assessment. And such action shall be maintained if the terms and conditions of the subscription to the capital stock of said company and the assessments upon it have been substantially complied with, and shall not be defeated by any mere informality in organizing said company, or in electing its officers, or other merely informal act of the company or of any of its officers.

66 Me. 167.

company, and at the option and under the direction of said committee, the sum of ten dollars ($10) on each share so subscribed,—said money to be paid or security given to said treasurer, whenever required.

2. If more stock shall have been subscribed for than is required to construct said road, at the estimated cost or more than allowed by the charter, the shares shall be apportioned *pro rata* among all the subscribers *bona fide*, who have complied with rule first as above named, and who have thereby become members of this corporation.

3. Said books shall remain open until said stock is all so subscribed for, and fully taken, or until said directors may think proper to close the same. Said committee shall advise the directors from time to time of their progress in obtaining subscriptions to said stock.

4. No assessment whatever, except for a preliminary survey and location of said road, shall be made upon any share or shares so as above subscribed; nor shall any work upon said road be commenced until the full amount be secured for its completion to Newport, thereby avoiding the necessity of any mortgage or incumbrance being ever contracted by this corporation.

Resolved, That said committee be instructed to canvass at an early day, not only the city of Belfast, but all the towns on the line of said road, or interested in its construction; and if they shall fail to obtain the required sum, that then they shall, at once, report the same to this board, together with the objections in detail to subscribing, in order that the same may be laid before the corporation, and such action taken thereon as the circumstances may require.

We the undersigned do hereby agree and bind ourselves to take the amount of shares set against our respective names in the stock of the 'Belfast & Moosehead Lake Railway Company,' agreeably to the foregoing conditions.

Said shares to be of the preferred stock of said company.

The defendant subscribed for five shares at $100 each.

The second contract was as follows:

Whereas, as the undersigned have heretofore subscribed to take shares in the capital stock of the Belfast & Moosehead Lake Railroad company, to the number and amount specified in the book of subscription in which their names appear, upon which shares assessments have been made, and remain unpaid; and whereas said company by its directors has agreed and hereby agree, so soon as the required authority so to do can be obtained, to issue to each subscriber stock certificates to the amount of his subscription, and bonds and mortgage as collateral to the same, subject to a prior mortgage which may be given to raise the amount of money required to complete said road, to the limit of one hundred and fifty thousand dollars, said bonds bearing interest as provided in the 18th article of the by-laws of said company.

In consideration thereof, said undersigned agree that in the execution and delivery of said mortgage bonds, they will pay the assessment heretofore made to the amount of the par value of said stock, and in ratification of this agreement will pay, within five days from date hereof, the first assessment heretofore made, namely, 15 per centum.

Signed by the defendant and others.

Belfast, Dec. 17, 1869.

The case having turned upon the construction of these two contracts, no further report of the evidence is essential, other than what is found in the opinion.

A. G. Jewett & W. H. McLellan, for the plaintiffs.

1. A subscription for shares is equivalent to a promise to pay calls. 1 Redf. on Railways, 162, and cases on 163, 164, and 165; Angell & Ames on Corp. 490 and 492, and cases cited; *Spear* v. *Crawford*, 14 Wend. 20; 12 Conn. 507.

The subscriber for stock is 'held liable' by the charter.

2. By the first condition he agrees that he may be required to pay or secure the sum of $10.00 on each share so subscribed, and that the money is to be paid whenever required.

3. By the 4th condition, he agrees that calls may be made upon his shares when the full amount is secured for the completion of the road to Newport. In the judgment of the directors, the amount was secured by the amount of stock subscribed for, also by the contract with Willson, Tennant & Co., July 8, 1868, after which, calls were made for the full amount of defendant's subscription.

The directors were the tribunal to settle questions whether enough had been secured to build the road to Newport. 1 Redf. on Railways, 65, note; 21 Wend. 211; 41 Maine, 512; 16 Gray, 414.

4. The plaintiff is entitled to recover under chapter 206 Special Laws of 1869, which is substantially an amendment of the charter.

This creates no new or additional liability, as before this act the stock could be sold and the balance collected.

By R. S. of 1857, c. 46, § 17, the charter is liable to be amended, altered, or repealed, etc. The defendant became a member of the corporation and has no defense, even if the legislature subsequently did increase his liability. 1 Redf. on Railways, 199; 30 Maine, 547; 4 Kern. (N. Y.), 336.

N. Abbott & Jos. Williamson, for the defendant.

DANFORTH, J. This is an action to recover the assessments made upon five shares of the stock of the plaintiff company. The plaintiff has declared and relies upon two separate written contracts entered into by the defendant. The first is an agreement simply to take five shares of the stock. In the writing we find no words showing a promise to pay for the shares, other than is implied in the word 'take,' either in the contract or the conditions annexed to it. The fourth resolve referred to in the argument of counsel, and annexed to the contract, does not in any degree change the force of the agreement so far as it imposes or fails to impose a personal liability. In this resolution are no words of promise; it is at most an assent that assessments may be made under the condition therein expressed.

This contract, like all others, is to be construed so as to give effect to the intention of the parties to it. Upon this point there is no conflict of authorities so far as we are aware, either in this country or in England, though there is a difference of opinion as to the inference to be drawn from the language in certain forms of subscription.

It is held by many courts that a subscription to stock like the one signed by the defendant, or indeed any subscription, creates an obligation of actual payment, unless such an obligation is excluded by its terms. *Troy & Boston R.* v. *Tibbitts*, 18 Barb. 297. On the other hand, by a series of decisions commencing as early as the case of *Andover & Medford Turnpike Corporation* v. *Gould*, 6 Mass. 40, when this State was a part of Massachusetts and continuing through our own reports down to the present time, it has been uniformly held that such a subscription as the present imposes no personal obligation to pay, and that the only remedy for the collection of assessments is that provided by the charter. Many of these decisions, and sufficient for our purpose, are referred to in the case of *K. & P. R. R. Co.* v. *Kendall*, 31 Maine, 470. The same principle is also recognized in *P. & K. R. R.* v. *Dunn*, 39 Maine, 594, and in many other cases, both in this and other States, which it is unnecessary to cite.

The language of the contract now before us so nearly conforms to many of those which have received a judicial construction in our own courts as almost inevitably to lead us to the conclusion that it was made with express reference to those decisions.

The parties must have known of those decisions, and the meaning then given to the language they have used. There is here no question as to any principle of the law of contracts; it is only as to the meaning of words. Those used by the parties had been distinctly defined by the proper authority. We must assume, then, that they used these words with express reference to such definition, and as expressing the meaning there given to them. To now overrule those cases, and hold that the words of their agreement do not mean what the law as authoritatively expounded at the time of

making it declared they did, would be to make a new contract for the parties, one to which they have not assented, and thereby violate one of the fundamental principles of law as well as justice, and add another reason for the prevailing belief in the uncertainties of the law.

Whatever, therefore, might have been our opinion of this question, were it a new one, we see no sufficient reason for overruling a series of decisions so numerous and so uniform as those under which this contract was made.

But it is contended that those cases rest very much upon the particular charters under which the questions at issue had their origin. It is true that in many instances at least, the charters provided for a forfeiture of the stock only, and not for any personal liability, while the charter in this case provides that the subscriber shall be liable for the balance remaining due after a sale of his shares. But how does this affect the construction to be given to the contract? The charter does not purport to make a contract between the parties; it simply provides a remedy for the corporation against a delinquent stockholder. In subscribing for stock the subscriber inserts just such terms and conditions as he sees fit, and he can be holden to no others. If the contract provides for a personal liability, that liability may be enforced by an action, as in any other contract. If it contains no promise of payment, as in this case, the only remedy is that provided by the charter. The liability by the contract is one thing, that by the charter is another, and is separate and distinct from the former. If the plaintiff would enforce a claim under a promise on the part of the defendant, he must have the proper evidence of that promise. If he would pursue the remedy provided by the charter, it must be followed according to its terms. In this case, as we have seen, the subscription paper contains no promise whatever. It is simply an assent on the part of the defendant to become a stockholder, and, as such, imposes no personal liability. As, then, the parties did not choose to impose any personal liability by their contract, none exists except that imposed by the charter. In that we find none except for the balance

after a sale of the shares. Such a claim is not asserted in this action.

Nor can we assume, as contended, that by an assent to a partial or conditional liability, the defendant is to be holden to an absolute one. Nor will the law under such an assent hold him for the whole. If he is to be holden under his contract, we must take that contract as it is; if under the charter, we must take that as we find it. At the time this charter was granted, it was well known that by the law as administered in this State, no obligation to pay was imposed upon the owner of stock without an express provision therefor. It is unaccountable, then, that the legislature should have imposed a limited liability when an unlimited one was intended. This provision in the charter would seem to be against rather than in favor of the plaintiff's position. It follows that this action cannot be maintained upon the contract alone, or in connection with the charter.

Nor can it be sustained under chapter 206 of the Special Laws of 1869. That act does not purport to change or modify any contract to which the company is a party, but only to give an additional remedy. Now if this statute is to have the force claimed for it as against this defendant, it imposes a full liability to pay all the assessment when his contract imposed none, or under the charter only a limited one. As the act was passed subsequent to the contract it cannot thus affect it. Nor does it alter the case if we view it as an amendment to the charter. Whatever effect an amendment of the charter may have upon the company, it cannot affect its contracts already made.

A member of the company can contract with it the same as any other persons, and such contracts are governed and protected by law as other contracts are. If, then, the act imposes upon the defendant any liability under his contract which did not exist at the time it was made, it is so far void. If it does not, it affords no aid to the plaintiff in this case.

In the second contract relied upon by the plaintiff, the defendant's promise to pay the assessments, is expressly made to depend

upon the execution and delivery of certain bonds therein described. This is a condition precedent, the performance of which on the part of the plaintiff is necessary to the maintenance of the action. The testimony fails to show that any such bond has been delivered or tendered to the defendant, but such delivery or tender is denied by him. *Plaintiffs nonsuit.*

APPLETON, C. J.; CUTTING, BARROWS, VIRGIN, and PETERS, JJ., concurred.

BELFAST & MOOSEHEAD LAKE R. R. CO. *vs.* INHABITANTS OF BROOKS.

Warrant for town-meeting—sufficient article in. Selectmen—authority of under vote. Condition subsequent—subscription of stock on. Assessment on stock —when valid.

An article in a warrant for a town-meeting is sufficient, if it gives notice, with reasonable certainty, of the subject-matter to be acted upon.

Thus, where the only mode provided in the charter of a railroad, by which towns interested therein may aid in its construction, is a subscription for its stock, an article in a warrant for a town-meeting 'to see if the town will loan its credit to aid in the construction of the' railroad named, gives reasonable notice, that a proposition to subscribe for stock will be acted upon, and will authorize such action.

Where, under such an article, the town authorized its selectmen to subscribe, in behalf of the town, for stock in the railroad named to the amount of sum specified, without designating the kind of stock, and the selectmen subscribe for the 'non-preferred stock,' the town is bound by the selection made.

Where the persons who subscribed for the stock, signed the subscription as selectmen, therein referring to the vote under which they acted, and were the same persons who called the town-meeting at which the vote was passed, it will be presumed, in the absence of any evidence, that any other persons had been elected or had acted as selectmen, that they were the selectmen.

63 Me. 276-8

64 " 330

Belfast & Moosehead Lake Railway Co. *v.* Inhabitants of Brooks.

Where railroad stock is subscribed for, in behalf of a town, upon the condition that the road 'shall be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public,'—such a condition is a condition subsequent, and will not defeat an action for the amount subscribed, although the condition had not been performed when the action was commenced.

The by-laws of a railroad company provided that no assessment shall be made upon any shares until the full amount of the estimated cost of the road shall first have been subscribed by responsible parties. It appeared that the estimated cost was subscribed; and the directors, acting in good faith, decided that the estimated cost had been subscribed by responsible parties, and thereupon proceeded to make the assessments; *Held*, That the assessments were valid; and that they could not be rendered invalid by showing, as matter of fact, that some of the subscribers were not responsible.

ON REPORT.

ASSUMPSIT to recover balance of amount subscribed by the defendants in the plaintiff railroad company's stock.

So much of the plaintiffs' charter as is essential will be found in the opinion.

At a legal meeting of the defendants, held April 25, 1867, called by a warrant signed by 'J. G. Morse, J. T. Collier, and A. G. Rose, selectmen of Brooks,' in which was an article—'To see if the town will loan its credit to aid in the construction of the Belfast & Moosehead Lake Railroad'—the following resolve was passed on a vote taken by yeas and nays,—102 voting yes, and 30 no:

Resolved, That the Selectmen be authorized to subscribe for stock in the Belfast & Moosehead Lake Railroad in behalf of the town, to the amount of 20,000 dollars, provided the location of said road, the terms of payment and all matters relating to the same, shall be satisfactory to them and to Ebenezer Page, Eben Littlefield, Jos. Ellis, jr., A. J. Roberts, J. M. Dow, who are hereby appointed a committee to consult and advise with the selectmen for that purpose.

The subscription was as follows:

'In accordance with the foregoing resolve passed at a legal meeting held at Brooks, April 25, 1867, we the subscribers, with the consent and advice of the committee therein named, do sub-

scribe for the twenty thousand dollars stock named in the resolve, being the non-preferred stock, on the following conditions, namely: That the railroad as proposed to be built from Belfast to Moosehead Lake shall be built through the town of Brooks on the track as run by Col. Wildes, or within fifty rods of the four corners of the road in Brooks village, with a suitable depot or station for the convenience of the public; and that no further assessment shall be made on the town of Brooks, above the sum named in the resolve.

Dated at Brooks, alias Belfast, this 25th day of February, A. D. 1868.

Signed,	L. T. COLLIER,	Selectmen	Shares at
		of	$100 each
	A. G. ROSE.	Brooks.	200.'

Said subscription was made with the consent and approval of a majority of the committee named in the foregoing resolve, to wit, four of them, the other, Eben Littlefield being absent from town.

The sum voted and subscribed did not exceed twenty per cent of the valuation of the town.

Assessments on all the shares in the capital stock of said Company were made, and notice given as provided in section 5, of the Act of Incorporation, and the By-Laws of said company, as follows:

15	per cent,	July 20, 1868.
5	" "	March 27, 1869.
10	" "	June 2, 1869.
70	" "	August 2, 1869.

February 3, 1869, James G. Morse and M. Chase, two of the selectmen of Brooks, paid to the Treasurer of the company $1500, on account of the first assessment on the shares subscribed for, acting under no authority other than the vote of April 25, 1867.

The remaining facts sufficiently appear in the opinion.

If the action was maintainable, the plaintiffs were to have judgment.

A. G. Jewett, for the plaintiffs.

A. P. Gould, for the defendants.

1. By Pub. Laws of 1867, c. 119, the defendants might do just what was proposed by the article in their warrant—'to loan its credit' to aid in the construction of the plaintiffs' road. This method was familiar to the people of the State when the plaintiffs voted.

The subscription for stock was of more recent origin. The language employed by the defendants, is in the Act of Aug. 17, 1850, and numerous other private acts before 1867.

The purpose of the meeting was to see if the town would do a particular thing authorized by the laws of the State.

Under the charter, the defendants might have called a meeting to see whether the town would subscribe for stock.

R. S. of 1857, c. 3, § 5, requires the business to be stated 'in distinct articles,' etc. This is more explicit than the statute of Massachusetts, which requires only the 'subject-matter' to be stated.

The Pub. Laws permitted towns to aid in construction of railroads by 'loan,' and the charter by 'subscribing for stock.'

This warrant was to see if the town would do what the public law authorized it to do—loan its credit.

Loaning credit and subscribing for stock, are radically different in every essential.

The inhabitants may have been willing to risk a loan, but not to invest in stock.

The meeting disregarded the article in the warrant.

The meeting was not 'legally called therefor.'

The Massachusetts cases are under their statutes and do not support this vote.

2. The payment of $1,500 by Morse & Chase was no ratification, as they had no authority to pay, but it was a misappropriation.

3. It does not appear that Collier and Rose were, in fact, selectmen of the town. Their assumption does not prove them selectmen *de facto*; undisputed instances of exercising the office are necessary. The only other instance in which they assume to act for the

town, was in calling the meeting of April, 25th, and their authority is in controversy. No record showing that they were ever elected, at a meeting legal or illegal, was produced, hence the case is not like *Cushing* v. *Frankfort*, 57 Maine, 541.

4. If the vote gave any authority to subscribe for stock, the fair implication would be that they were to subscribe for the best class of stock, in the absence of authority to subscribe for that of less value.

5. The condition of the subscription was a condition precedent, and must be fulfilled before payment. *Portland & O. C. R. R. Co.* v. *Hartford*, 58 Maine, 23.

An essential element in the subscription was, that the road should be built from Belfast to Moosehead Lake, this was of great interest to the defendants.

Another condition was, that a suitable depot should be built in Brooks for the convenience of the public. The conditions are not incidental to the main design, so far as the defendants are concerned, but they were important elements in the consideration of the agreement to take stock. They became conditions precedent. At the time of the commencement of the action, no depot had been built and the road not completed through the town.

6. It does not appear that the condition of Art. 17 of the by-laws, was in all respects fulfilled to enable the assessments to be made.

It does not appear that the amount was subscribed by 'responsible parties.' Half of them may be of no value. It was just as important to the responsible subscriber, that subscriptions, to the amount required, should be made by responsible parties, as that the subscription should be to the required amount.

It does not appear that the preferred stock, and the conditional subscriptions were not embraced in the 'amount subscribed for in the books of said company.' *Lewey's Island R. R. Co.* v. *Bolton*, 48 Maine, 451, 455.

WALTON, J. The charter of the Belfast & Moosehead Lake Railroad Company, provides that cities and towns, interested in its construction, may, by a two-thirds vote, subscribe for stock therein; and that such vote shall be obligatory upon such cities and towns, for the payment of the amount so subscribed. Special Laws of 1867, c. 380, § 19.

It will be noticed, that by the terms of this act, the obligation resting upon towns and cities to pay the amount subscribed by them is absolute; that the language of the charter is, that 'such vote shall be obligatory on said city or town for the payment of the amount so subscribed;' that no conditions whatever are annexed.

The town of Brooks voted by the requisite majority to subscribe for stock in the above-named railroad to the amount of $20,000. Only $1,500 of the amount has been paid, and this is a suit to recover the balance.

The right to recover is resisted upon several grounds, which we will consider in the order they are presented in the brief of the learned counsel for the town.

1. It is said that the vote was not authorized by the article in the warrant.

It is undoubtedly true that the warrant for a town-meeting must specify, in distinct articles, the business to be acted upon; and that no other business can properly be acted upon at such meeting; but technical precision, in the wording of the articles is not required. It was long ago found, that to require entire technical accuracy in the wording of such articles, would be to impose upon town officers a duty which, in many cases, they could not perform.

The rule running through all the decisions is that an article, in a warrant for a town-meeting, is sufficient if it gives notice with reasonable certainty of the subject-matter to be acted upon. *Grover* v. *Pembroke*, 11 Allen, 89; *School District* v. *Blakeslee*, 13 Conn. 234.

It is said in the first of these cases, that a warrant for a town-

meeting is not to be construed with the same strictness as a power of attorney or a penal statute; that it is sufficient if it gives intelligent notice of the subjects to he acted upon; and in the second, that it is not necessary that the notification should be drawn up with all the formality of a special plea; that all that is required is, that the inhabitants may fairly understand the purpose for which they are to be convened.

The article in the warrant now under consideration is as follows:

'To see if the town will loan its credit to aid in the construction of the Belfast & Moosehead Lake Railroad.'

In determining whether this article was sufficient to give notice, with reasonable certainty, that the town would be required to vote upon the proposition, whether or not they would subscribe for stock in the road, it is necessary to take notice of the provisions of the charter of the road, which, being a public act, every one is presumed to have had notice of. The charter declares, that cities and towns interested in the construction of the road, may subscribe for stock therein; and this is the only mode provided in the charter, by which towns and cities could aid in the construction of the road. Now when the meeting was called to see if the town would loan its credit to aid in the construction of the road, could there have been any doubt, in the mind of any one, as to the mode by which the aid would be furnished? Could any one have doubted that if the town should vote to use or loan its credit to aid in the construction of the road, the manner of granting the required aid would be by a subscription for stock? Can there be any doubt that the article gave notice with reasonable certainty, that such a proposition would be acted upon? We think not. The great and leading purpose of the meeting was to see if the town would aid in building the road. A subscription for stock was not only a lawful mode, but it was the only mode authorized by the charter, by which such aid could be furnished. A 'loan' of credit is a 'use' of credit. It is so defined in the later editions of Webster's dictionary. And such, we have no doubt, is the meaning universally attached to the term in this community. Towns are said to loan

their credit to railroads, when they use their credit to aid in building them. And this is oftener done in this community by subscribing for stock, and then issuing their bonds to raise the money to pay for the stock, than in any other mode. And this is almost universally spoken of as loaning the credit of the towns. And when the only article in a warrant for a town-meeting is 'to see if the town will loan its credit to aid in the construction of a railroad,' and the only mode provided in the charter of the road, by which such aid can lawfully be given, is a subscription for its stock, we cannot doubt that the article is sufficient to give the inhabitants reasonable notice that a proposition to subscribe for stock will be acted upon.

And we are strengthened in this conclusion by the fact that no one of the voters of the town of Brooks appears to have objected to the sufficiency of the article in the warrant. Subsequent meetings were called to see if the town would not rescind its vote, and undoubtedly much discussion was had as to the propriety of it; but nothing appears to show that it ever entered into the mind of any one that the article in the warrant was not sufficient to authorize it. We think it was sufficient.

2. It is said that the fact that the railroad company accepted the subscription in good faith, and the fact that the selectmen of the town of Brooks paid $1,500 of the amount subscribed, should not be regarded as a ratification by the town of the act of the selectmen in subscribing for the stock, so as to bar the town of the right to object to the sufficiency of the article in the warrant. As we hold that the article was sufficient, this question becomes immaterial, and need not be discussed.

3. It is said that the subscription by the selectmen should have been for the best kind of stock, not for the non-preferred stock. The answer to this objection is, that the vote of the town did not direct the selectmen to subscribe for the best kind of stock. The vote is silent as to the kind of stock to be subscribed for. And when we consider the purpose of the town in authorizing the subscription,—that it was to aid in building the road, and to make the

enterprise a success,—it seems to us more than probable that it was the non-preferred stock which the town expected their selectmen to subscribe for, as such a course would be most advantageous to the road, and most likely to secure its completion. But however this may be, as the town did not choose to designate the kind of stock to be subscribed for, but left the selection to their selectmen, we think they must be bound by the selection which the selectmen made.

4. It is said that the case does not show that the subscription for stock was made by the acting selectmen of the town. We think it does. They certainly acted for the town in making the subscription. But this is not all. It appears that they called the town meeting at which the vote was passed authorizing the subscription. In the absence of any evidence or suggestion that any other persons had been elected, or had acted, as selectmen of the town, we think it may very properly be presumed that these men were not usurpers,—that they were in fact what their acts indicate, not only the acting selectmen of the town, but the persons actually chosen to that office.

5. Another objection is that the stock was subscribed for upon condition that the road should be built through the town of Brooks, on the line run by Col. Wildes, and that a suitable depot should be erected for the convenience of the public. This is true. But the case shows that the road has been built on the line indicated. The case also shows that a convenient depot has been built. It is true that the work had not been completed when this suit was commenced; nor was it necessary that it should be, unless its performance is held to be a condition precedent. We hold that it was not. The object of the subscription was to furnish the means for building the road. Unless the means were first furnished the road could not be built. It would be unreasonable to suppose that it was within the contemplation of the parties that the road should be built first and the means furnished afterwards. The performance of the work was not, therefore, a condition precedent, but a condition subsequent. It is well settled that such a condition will

not defeat an action for the recovery of the money, notwithstanding it had not been performed when the action was commenced.

6. It is said that the by-laws of the railroad company provided that no assessments should be made until the full amount of the estimated cost of the road should be subscribed by responsible parties, and that it is obligatory upon the plaintiffs to show affirmatively that this condition has been complied with. The plaintiffs do show affirmatively that the estimated cost of the road was subscribed before the assessments in question were made; and there is no evidence before us that the parties who made the subscriptions were not responsible. In the absence of proof to the contrary, we think it but reasonable to presume that in the judgment of the directors they were responsible (otherwise they would not have made the assessments), and this is all that the law requires. If the directors, acting in good faith, came to the conclusion that the subscriptions were made by responsible parties, and thereupon proceeded to make the assessments required to carry forward the enterprise, the assessments would not be rendered invalid by proof that they erred, and that some of the subscribers were not in fact responsible. Whether or not the requisite amount had been subscribed by responsible parties must necessarily be decided by the board of directors, for there was no other person or persons, or tribunal, by whom the question could be determined at that stage of the proceedings; and if they, acting in good faith, came to the conclusion that the estimated cost of the road had been subscribed by responsible parties, and thereupon proceeded to make the assessments, we think the assessments would be legal, and that they could not be rendered invalid by showing, as matter of fact, that some of the subscribers were not responsible. To hold otherwise would be a dangerous doctrine. It would probably destroy nine-tenths of all the assessments made in similar enterprises, and throw the business of the companies into chaotic and inextricable confusion. We think this objection is not sustained.

We have now considered all the objections raised by the learned

counsel for the defendants. None of them, in our judgment, are sufficient to defeat the action.

And in conclusion it may not be improper to add that while, in the judgment of the court, towns and cities cannot be too careful how they engage in such enterprises; yet when they have engaged in them, and large expenditures have been made on the faith of their subscriptions, and the loss, if they escape, must fall upon other parties, they must not expect the court to strain the law to relieve them.

Judgment for plaintiffs for the balance due upon the assessments made upon the shares subscribed for by the defendants, with interest from the time when the assessments should have been paid—the amount of interest, in case of disagreement, to be determined by a judge at nisi prius.

CUTTING, BARROWS, VIRGIN, and PETERS, JJ., concurred. DICKERSON, J., took no part.

RICHARD G. HOLBROOK *vs.* JAMES F. CONNOR and another.

Fraudulent misrepresentations—what are not actionable—what are matters of opinion.

An action of tort for deceit in the sale of real estate, does not lie for the fraudulent misrepresentations of the vendor as to the price which he paid therefor. KENT and DICKERSON, JJ., dissenting.

False and fraudulent affirmations by the vendor of lands that 'said lands had large deposits of oil in them, and were of great value for the purpose of digging, boring for, and manufacturing oil,' accompanied with the statement that the lands had not been tested, are matters of opinion, and not actionable.

ON EXCEPTIONS AND MOTION to set aside the verdict as against

law, and the weight of evidence, and because the allegations do not support it.

CASE for deceit in the sale of land.

The defendant Lancey, claimed to be the owner of two hundred acres of land in Canada.

The other defendant, acting as the agent of Lancey, came to Maine for the purpose of getting up an association of individuals to whom he might sell the land for the purpose of manufacturing oil. A paper was drawn and signed by Connor, for Lancey, therein stipulating, among other things, that Lancey would put fifty acres of the land into five hundred and sixty shares, of twenty-five dollars each; and when the shares were all subscribed and paid for, the subscribers were to be the equitable owners of the real estate, in proportion to the number of shares subscribed and paid for by each.

All the shares were taken, the plaintiff having subscribed for twenty, for which he paid five hundred dollars.

Subsequently the land was conveyed in trust for the benefit of the subscribers.

The plaintiff, in his declaration, alleged that the defendants conspired to cheat and defraud him, and that in subscribing and paying for his shares, he relied upon representations of the defendants,— 'that the said lands had large deposits of oil in them, and were of great value for the purposes of digging, boring for, and manufacturing oil; and that said Lancey and said Connor had actually paid the sum of $14,000 therefor.'

There was testimony tending to prove that these representations were false and fraudulent, and that the defendants actually paid a much less sum for the land thus sold.

The remainder of the case, so far as actually decided, sufficiently appears in the opinion.

The verdict was for the plaintiff.

D. D. Stewart, for the plaintiff.

A. Libbey & G. W. Whitney, for the defendants.

DANFORTH, J. The declaration in the writ in this case, after some preliminary allegations, sets out that the plaintiff, 'relying upon the aforesaid representations of the said defendants, that said lands had large deposits of oil in them, and were of great value for the purposes of digging, boring for, and manufacturing oil, and that said Lancey and said Connor had actually paid the sum of $14,000 therefor, was induced to enter into a joint stock company, with other persons, and to subscribe for and buy of said defendants, twenty shares in said alleged oil lands and oil well, and for which he then and there paid the sum of five hundred dollars in money.' That these representations were false, and were fraudulently made is also alleged. Upon these two allegations the plaintiff's action rests, and if neither of them, or the testimony offered to prove them is sufficient to sustain the suit it must fail.

In regard to the first allegation, 'that the lands had large deposits of oil in them,' etc., it is contended that the instruction to the jury is erroneous, inasmuch as it was left to them to find whether the statement was understood as a matter of opinion or the representation of a fact as with the knowledge of the defendants. It is not claimed that the law as given is incorrect, but that it is not applicable to the case as proved. This objection, we think, rests upon a valid basis.

It is true that the language of the beginning of the allegation is the statement of a fact. It is a fact, however, which, unconnected with the other part of the sentence, is of but little consequence. For the lands were sold and purchased for the purpose of making profit in obtaining oil from them.

Assuming, then, that they had large deposits of oil, we have made but little progress in ascertaining their value for the purpose of 'digging, boring for, and manufacturing oil.' This would depend very materially upon the facilities of getting to the lands, the expense of sinking wells, getting the oil to market, and many other things affecting the cost of production and the market price of the oil.

The whole sentence, then, seems to be but the expression of an

opinion that the land is valuable for the purposes indicated, containing but one fact out of many upon which a correct judgment must be founded. It is but an opinion of the value or quality of the land. On recurring to the testimony we find that the statement was and must necessarily have been only an opinion, and was taken as such by the plaintiff. It was in proof that up to the time of the trial, the lands had not been tested, and it was entirely unknown to both parties whether the land was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and the single well upon the land in question.

The plaintiff himself testified that Connor, one of the defendants, 'said the fifty acres was good oil land, and pointed to these wells not a great way off in proof of his statement.'

On cross-examination he says, 'I understood the two hundred acres had not been tested, and that operations upon it might be unsuccessful. I understood I was making a speculation which might be unsuccessful. . . . I expected to suffer loss if we did not find oil, or if oil went down.' This, corroborated by other testimony and uncontradicted, shows conclusively that the statement was made and understood as a matter of opinion. It may be true that the statements made in relation to the neighboring wells in support of this opinion were false and fraudulent, but that is not the fraud complained of in this action. It is clear that the verdict cannot be sustained under this allegation. Even if sufficient in other respects there is no testimony to show the falsehood of the allegation, so far certainly as it refers to the deposits of oil. On the other hand, the case shows that up to the trial the land had not been tested, and for aught that appears there may be oil enough in it to supply the world for an indefinite period.

The only other allegation on which the plaintiff rests his action, is that which relates to the price paid for the land.

We think that such a statement though false, is not sufficient to sustain an action.

It was early decided that no action would lie against a man for falsely declaring that a third person would have given him so much for his land. Roberts on Frauds, 524, and cases cited.

This was recognized as good law in *Cross* v. *Peters*, 1 Maine, 389, and, so far as we are aware, has never since been questioned.

In *Medbury* v. *Watson*, 6 Met. 246–260, it was held that a false statement by a third person as to what the owner paid, is actionable. But in the same case in the opinion, on p. 259, it is said that 'in regard to affirmations and representations respecting real estate, the maxim of *caveat emptor* has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable.'

In *Hemmer* v. *Cooper*, 8 Allen, 334, in the opinion, it is said, 'The representations of a vendor of real estate to the vendee, as to the price paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false, and uttered with a view to deceive, they furnish no ground of action.' And that was the only point raised in the case.

In *Manning* v. *Albee*, 11 Allen, 622, Gray, J., says, 'This court has repeatedly recognized and acted upon the rule of common law, by which the mere statements of the vendor, either of real or personal property, not being in the form of a warranty, as to its value, or the price which he has given, or been offered for it, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive.'

As late as *Cooper* v. *Lovering*, 106 Mass. on p. 79, Ames, J., in the opinion, says, 'It has been repeatedly decided that representations of a vendor, as to the value or cost of the property to be sold, or as to offers for it made by others, even though false, are not representations upon which a purchaser ought to rely, and are not sufficient to furnish any ground of action.'

In *Mooney* v. *Miller*, 102 Mass. 220, the same doctrine is recognized.

The same doctrine has been held in our own State, so far as the question has been discussed.

In *Long* v. *Woodman*, 58 Maine, 52, *Hemmer* v. *Cooper* is recognized as good law, and the principle is still more fully discussed in *Martin* v. *Jordan*, 60 Maine, *ante*.

In a late English work of good authority, representations by the vendor, as to price paid by him for land, are regarded in the same light as representations respecting its value, or the offers which have been made for it. It is there said, 'a purchaser is not justified in placing confidence on them.' Kerr on Fraud and Mistake, 88.

This view seems to have been considered as well-settled law by all the authorities bearing upon the question, so far as we have been able to ascertain, with the exception of *Sanford* v. *Handy*, 23 Wend. 260, and *Van Epps* v. *Harrison*, 5 Hill. 63. In the latter of these cases Bronson, J., says: 'In *Sanford* v. *Handy*, it was intimated that a vendor would be liable for misrepresentations as to cost, but the point was not decided.' He then states his own convictions as decidedly the other way. And after giving his reasons for his own views with much force, he closes by saying, 'the majority of the court think otherwise.'

This case, decided by a bare majority, with the reasons given all against the decision, is the only case directly in point, in conflict with the authorities before cited.

The other cases cited in the argument for the plaintiff are decided upon different principles, and are not in conflict with those relied upon in defense. Some of them were decided on the ground that a confidential relation existed between the vendor and vendee. This was the case in *Bagshaw* v. *Seymour*, 93 Eng. Com. Law, 373, and *Clark* v. *Dixon*, 95 Eng. Com. Law, 452, where the defendants acted in behalf of, and as agents for the plaintiffs. In *Bradley* v. *Poole*, 98 Mass. 169, and many of the cases cited, the representations were as to the condition of the company and the amount actually paid in, facts upon which the value of the shares sold, materially depended. Other cases rest upon statements of the amount paid for bonds in the market, or rents actually paid for

lands under lease, showing the actual market value of the property sold. All these cases are widely distinguishable from the one at bar. What a person may have paid for land is one thing, its actual market value another, and often a very different thing. The purchaser of land for a company, though not especially appointed as agent therefor, would not be permitted to deceive, or even make a profit out of those for whom he assumed to act, and who subsequently adopt or ratify what he has done. In the case at bar, the defendants, in making the purchase of the land, were not the agents of the association, nor did they assume to act for or in their behalf. The purchase was made before the company was formed, and, so far as appears, before its organization was contemplated. The contract of the parties does not refer to the original purchase. So far as the land is referred to it provides simply for a sale, which is completed by a deed subsequently given. True it was sold for the purpose of forming a joint stock company, of which the defendants were to be members; still it was but a sale, and the parties to this case stand to each other in the relation of grantor and grantee and no other, and in the writ are so declared to be. Viewing the authorities then, as bearing upon the admitted facts of this case, they would seem to be nearly all one way, very clearly showing, that a false representation, by the vendor, of the price paid for land, will not lay the foundation for an action. And if we add to these the long list of cases in which it has uniformly been held, that misrepresentations as to value and quality, and even of offers made by third persons, though fraudulent, are not actionable, it would seem that the law upon the question we are now considering must be free from doubt. If we examine the question upon principle the result must be the same. The statement of the vendor, that he paid a certain price for his land, if true, can be no more than an indication of his opinion of its value, and when we consider the various motives which may, and often do actuate men in making their purchases, and especially when it is done for the purposes of speculation, it is but the slightest proof of such an opinion. It is certainly of no more value than the offer of a third per-

son, and this is considered of so little worth, that it is not legal testimony in a case where the market price is in issue.

It is, however, claimed that the price paid is a definite fact, the truth or falsity of which is susceptible of satisfactory proof, while assertions of quality and value are necessarily matters of opinion which are too uncertain for judicial cognizance. This may be true, and the same may be said of offers made as well as many other representations not actionable. But it should also be remembered, that a misrepresentation, to be the foundation of an action, must relate, not only to an existing fact, but to a material one; one which will enable the purchaser more intelligently to form his own opinion of the value of the property. Now, as we have already seen, the price paid, if correctly stated, is but an uncertain indication of the vendor's opinion. It gives no light whatever as to any inherent fixed quality, or description which goes to make up the value, and, in this respect, is not distinguishable from an offer made, except that it is even more unreliable, as an indication of value. The instructions of the presiding justice not being in conformity with these views, and being inapplicable to the case as presented by the testimony, the exceptions must be sustained, and it is unnecessary to consider the various other points raised.

Exceptions sustained.

CUTTING, WALTON, BARROWS, and VIRGIN, JJ., concurred.

The following dissenting opinion was delivered by

DICKERSON, J. The exceptions present the question, whether a false representation, fraudulently made, as to the cost of the property, is an element of fraud in an action of deceit to recover damages for the injury sustained, on account of such representation. Though the authorities are not in perfect accord upon this question, yet we think that the weight of authority, as well as the better opinion, is decidedly in favor of the affirmative.

While misrepresentation of the cost of property does not ordinarily increase its value, it is a material fact, and naturally calculated to mislead the purchaser by its tending to enhance its value,

and give it an attractiveness and firmness beyond that given by the force of mere opinion. Especially is this the case when the vendee reposes confidence in the knowledge, sagacity, and integrity of the vendor, who has himself alone examined the property.

When the property is to be put into a joint stock company, the cost price is the basis for fixing the capital stock, and the price value of the share; and when the owner becomes a member of the company his investment is equalized with that of the other members of the company, though the per centage actually paid in by him may fall far short of that paid in by them. It is easy to see how the fact, that a man of known sagacity in matters of business, with favored opportunities for examining the property and judging of the prospects of the enterprise to be projected upon it, is willing to pay a large sum for such property, put it into a joint stock company at cost, and share his profits in common with the other shareholders, is calculated to increase other persons' estimate of the value of the stock, and induce them to become its purchasers. Does the law hold a vendor harmless, who makes use of the confidence which these considerations awaken among his friends and acquaintances to obtain from them their money or other property for a moiety of its value?

Representation of cost is different from representation of value. The one is the statement of a fact, while the other is the expression of an opinion. Value is a matter of judgment and estimation, about which men may differ. The question of value, too, is one open alike to the vendee and vendor for inquiry, examination, and proof; the vendee, by the exercise of common prudence, may ascertain the truth of a representation of value, and save himself from loss. Not so with a representation of cost. This is not an opinion, but a fact, specially confided to the knowledge of the owner and his vendor; and they may sustain such confidential relations toward each other, that no prudence can discover the falsity of the representation. The same distinction between the assertion of a fact and the expression of an opinion or judgment is recognized in actions of warranty or deceit founded on representations

concerning the essential condition or qualities of the property offered for sale and exchange. This distinction is, moreover, expressly recognized in the decisions of courts of the highest authority, upon the identical question under consideration. The general principle is, that though the vendor need not speak, yet if he does, he should speak the truth.

If we pass from general principles to the authorities, we find that the English cases present an unbroken chain of decisions in harmony with these views. In *Elkins* v. *Kesham*, 1 Lev. 102, it was held that a false statement, that the property was rented for a higher sum than was actually paid, whereby the plaintiff was deceived and induced to pay a high price for the property, afforded good cause of action. The same principle has been affirmed and applied in subsequent cases, the courts assigning as a reason for distinguishing between such cases and a false representation of value, that 'the value of the rents is a hard thing to be known, and secret, known to none but the landlord and the tenant, and they might be in confederacy together.' *Risney* v. *Selby*, 1 Salk. 214.

In *Bagshaw* v. *Seymour*, 4 C. B. (N. S.) 873, the common bench held the chairman of the directors of an Australian gold mining company responsible, for causing its stock to be put on the stock exchange list, by a false representation as to the amount of money paid, by which the plaintiff was induced to buy some of its shares.

The same court in *Clarke* v. *Dickson*, 6 C. B. (N. S.) 453, held a director of a lead and copper mining company, liable to a party who had been induced to purchase stock in that company, because of the false representation, fraudulently made, that the property had been purchased at a much greater price than was actually paid.

That case is very similar to the case at bar, in its facts and principles, and the decision of the court is directly in point. The same doctrine was held by the court of exchequer in *Bedford* v. *Bagshaw*, 4 H. & N. 538.

The court of errors of New York, in *Sanford* v. *Handy*, 23

Wend. 268, held that misrepresentation of the cost of land, rendered the vendor liable; and this decision was subsequently affirmed by that court in *Van Epps* v. *Harrison*, 5 Hill, 70.

In *Page* v. *Parker*, 43 N. H. 369, the court held the same doctrine, and in commenting upon the case of *Van Epps* v. *Harrison*, say, 'we think the holding of the court was right.'

The court in this State held that false and fraudulent representations of the value and amount of the income of real estate, by which a party was induced to take a lease of the premises, rendered the lease void, on the ground, as stated by Shepley, J., who delivered the opinion of the court, that a representation relating to the income or rent of an estate does not come within the rule, that the seller is not bound by representations of the value of the property sold, because the knowledge of the value of the income in such case may be, and actually is, confined to one party, and the other can be presumed to ascertain it accurately only from him, or from those standing in a confidential relation to him. *Irving* v. *Thomas*, 18 Maine, 424.

The principle upon which that decision is thus put, applies, at least, with as great force to misrepresentations as to the cost of property; for it is obvious that the means of ascertaining the truth of representations in regard to income are quite as accessible as the means of determining the truth of representations of cost. While the value of the income may ordinarily be obtained from inquiry and on examination of the premises, a knowledge of the cost price must be sought for in more recondite quarters.

Chief Justice Shaw, in *Hazard* v. *Irwin*, 18 Pick. 105, recognizes the distinction between a false averment in matters of fact, and a like falsehood in matters of judgment, opinion, and estimate, and thus illustrates the difference: 'If the owner of an estate affirm that it will let or sell for a given sum, when in fact such sum cannot be obtained from it, it is in its own nature matter of judgment and estimate, and so the parties must have considered it; but if an owner falsely affirm that the estate is let for £30, when in fact it is let for £20, it is fraud, because the owner knows the fact, and

on inquiry by the vendee, the tenant might refuse to inform him, or give him false information.'

Mr. Justice Metcalf, also, in *Brown* v. *Cottles*, 11 Cush. 348, makes the same distinction, and cites the New York cases, which hold that false and fraudulent representations, in respect to cost, are actionable as coming within the rule applicable to misrepresentations in matters of fact, and as distinguishable from representations of value, former offers, probability, and like matters of opinion.

So the court in *Medbury* v. *Watson*, 6 Met. 246, held a third party responsible for falsely and fraudulently representing to the plaintiff that the owner of certain real estate paid a larger sum for it than he actually paid, whereby the plaintiff was induced to pay the same sum therefor, and was greatly damaged. But the court, in deciding that case, say that the averments in the declaration would not have been sustained, if the false representations had been made by the vendor to the vendee, thus for the first time in the history of jurisprudence upon this subject, as it is believed, distinguishing between representations made by the owner, and those made by a third party, and holding the latter alone actionable, when the representations relate to the cost of the property. There was nothing in the case that called for this remark; nor do the authorities cited warrant it, and the reasoning by which it is sought to be fortified, fails to convince us that it is good law, sound philosophy, or consistent with enlightened views of human nature. We are not quite prepared to say that persons are naturally more inclined to tell the truth about their neighbor's property than they are about their own, or that the statements of a third party in respect to another's property is more likely to deceive a purchaser than those made by the owner himself. Besides, the *dictum* in that case is in direct conflict with the then uninterrupted series of decisions of the courts in England and in this country, and as it seems to us, repugnant to reason and public policy.

The court in Massachusetts, however, recognized the distinction suggested in *Medbury* v. *Watson*, as law, and, in a very brief opinion, drawn by the learned member of the court, who was counsel

for the defendant in that case, without citing any other authorities than were there cited, held that fraudulent misrepresentations as to the price paid for real estate by the vendor, will not support an action for deceit in the sale of it. *Hemmer* v. *Cooper*, 8 Allen, 334.

Our objections to these two cases in Massachusetts may be thus stated: both reason and authority seem to us to be opposed to the distinction set up in the former case, and to recognize the distinction denied in the latter case. In view of these considerations, it is, perhaps, not too much to say that these cases, for some cause, failed to receive that thorough examination and careful consideration which have generally marked the decisions of the learned court in Massachusetts.

That court already seems to have felt the embarrassment which those cases present in more recent decisions. It held in *Manning* v. *Albee*, 11 Allen, 522, that false and fraudulent representations as to the market value of certain railroad bonds entitle the purchaser to rescind the contract. In delivering the opinion of the court in that case, Mr. Justice Gray felt constrained to say that the utmost limit of the rule which does not recognize a false representation of value as an element of fraud have been reached in *Hemmer* v. *Cooper*, in applying it to statements of the price paid by the person making them.

Again the court in Massachusetts enunciate principles and cite authorities in *Bradbury* v. *Poole*, 98 Mass. 182, which seem to us irreconcilable with the doctrine of *Hemmer* v. *Cooper*. In view of the great weight of authority upon this subject, and the later decisions in Massachusetts, the *dictum* in *Medbury* v. *Watson*, which ripened into law in *Hemmer* v. *Cooper*, can hardly be said to be regarded as law in that State at the present time.

The rule of law upon this subject we now consider as settled, that where a vendor makes a false and fraudulent representation as to the cost of the property, and the vendee reposes confidence in such representation, and is deceived and injured thereby, he may maintain an action for the deceit against the vendor, to re-

cover the damages for the injury he has sustained. Such representation is not to be excluded from the consideration of the jury, either on the ground that it is a mere matter of opinion, or is so commonly made by property-holders that any purchaser who confides in it is to be considered too careless of his interests to be entitled to relief; but it is a fact proper to be submitted to the consideration of the jury in an action of deceit upon the question whether a fraud has actually been committed, and an injury sustained.

The instructions of the presiding justice, in the case at bar, were in substantial compliance with this rule of law. They were, at least, quite as favorable to the defendants as they had a right to require. He instructed the jury that the representation, as to cost, was important only as it was connected with the agreement, if any such there was, to put the lands into the company at cost, and that the jury were to judge of the materiality of the representation, both with respect to its effect upon the interests of the plaintiff in the subject-matter of the purchase, and as an inducement for him to enter into the contract. The instructions upon this branch of the case were clear, explicit, and full, and afford the defendants no cause of complaint.

The general rule for estimating the damages laid down by the presiding judge furnishes the defendants no legal ground for exceptions, as it is quite as favorable to them as the law allows.

The other exceptions to the judge's charge do not seem to be very much relied upon in the argument, and are in substantial accordance with the rules of law. Nor do we see any objections to his rulings during the progress of the trial. The motion for a new trial cannot be sustained. It was a question of fraud. There was a mass of conflicting evidence, and the jury were the proper judges of the credibility of the witnesses, and the weight of evidence. We think the entry should be *Motion and exceptions overruled.*

Judgment on the verdict.

KENT, J., concurred.

ARTHUR LOVEGROVE *vs.* JOHN B. BROWN.

Stockholder—liability of, for corporation debts. Remedy.

In R. S., c. 46, § 25, the phrase, 'return of an execution,' means 'return upon an execution.'

Such return may be made whenever, within the life of the excution, the facts will warrant it.

The 'six months,' mentioned in § 25, begin whenever the officer makes such return, and end before the expiration of six months from the date of the rendition of the judgment against the corporation.

Hence to enable an execution creditor of a corporation to recover any part of his debt of a stockholder individually liable therefor, R. S. of 1857, c. 46, §§ 25 and 26 require, (1) That the officer holding the creditor's execution against the corporation make a return thereon, that it is unsatisfied in whole or in part for want of attachable property of the corporation; (2) That within six months after such return is made, and before the expiration of six months after the date of the rendition of judgment against the corporation, the creditor make demand of the stockholder to disclose and show to the officer, having such execution, attachable property of such corporation sufficient to satisfy the execution; and (3) That after such demand and within six months after the date of the rendition of judgment against the corporation, to sue the stockholder in case.

ON REPORT.

THE CASE is sufficiently stated in the opinion.

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

The 'return' mentioned in R. S. of 1847, c. 46, § 25, is not the same as the return in cases of trustee and bail. It is not the final return of the precept into the clerk's office on its return day, but the indorsement or certificate of the fact that the execution remains in the officer's hands 'unsatisfied,' etc.

Before making such return the officer must use reasonable efforts to find attachable property of the corporation; he makes it under his official oath, and if false, is subject to action.

'Unsatisfied for want of attachable property' is, in legal effect, the same as 'cannot find attachable property to satisfy the execution' in § 24.

This construction is shown,

1. By a reasonable interpretation of §§ 25 and 26 together; and

2. By reference to prior legislation on the subject.

Both sections 25 and 26 should have effect if possible. By the plaintiff's construction, the creditor can have six months, less twenty-four hours, in which to make his demand; while, by the defendant's, the time for demand is restricted to three months.

The general intent of this statute is to give the creditor six months after rendition of judgment against the corporation, in which to commence his action, and that at 'any time' within the same six months he make the demand whereon to found his action. To do this the demand must be made on the first execution before return day. The words 'such execution' and 'the execution' have a significance. The statute manifestly contemplates that the demand may be made on the same execution upon which the return of 'unsatisfied' is made.

The amendment in 1858, providing thatthe defendant was 'to show and disclose to the officer having such execution or any *alias* executions,' etc., shows by the use of the alternative, that the demand might be on the first execution while alive.

In 1859, the amendment striking out 'to the officer having such execution' and 'any *alias* execution,' etc., did not change the meaning of 'after the return of an execution unsatisfied.' After this change, the creditor was to make demand both before and after the amendment, but the officer need not be present. It was only necessary that the creditor must make the demand with a live execution, not for payment but for property.

Therefore the statute, as amended, required the plaintiff in such execution (*i. e.* the execution upon which the officer has made his return of unsatisfied) may make demand on the stockholder to show and disclose attachable property of such corporation, sufficient to satisfy the (*i. e.* the same) execution. *Davis* v. *Whitehead*, 1 Allen, 276.

2. Before 1836, the remedy of the creditor against stockholder was upon the execution issued on judgment against the corporation.

The action of the case was introduced by Statute 1836, c. 200, §§ 3 and 4, incorporated into R. S. of 1841, c. 76, §§ 18 and 19.

After the same demand and notice as was required in order to enforce the execution recovered against the corporation, against the stockholder individually, the action of the case as a concurrent remedy could be brought against the stockholders; consequently the action might be commenced before the return day of the execution. The demand and notice were necessarily upon the execution. This continued the practice till 1855, and there are numerous suits reported under this statute.

In 1855, the legislature struck out the provisions by which the execution against the corporation could be levied on the stockholders' property, and also by which the action of the case could be maintained, and *scire-facias* was substituted for both. Statute, 1855, c. 169. Under this statute (c. 169), even in *scire-facias*, the action could be maintained before the return day of the execution. *Whitney* v. *Hammond*, 44 Maine, 305.

In this c. 169 first occurred the phrase, 'the return of the execution unsatisfied.' The plaintiff claims the same construction now as was given equivalent words in *Whitney* v. *Hammond*.

The remark of Davis, J., in *Whitney* v. *Hammond*, *in arguendo*, that the statute of 1855 and 1856 are different in this respect, can have no binding effect, the statute of 1856 not being then before the court.

These provisions of acts of 1856, which contemplate that the proceedings may be had against the stockholders, before the return day of the execution, are not the result of inadvertency, although the statute may be inartificially drawn, but carry out the system and policy in regard to the mode of procedure which had obtained from the time the remedy by action of the case was given. The action of the case having been introduced as a concurrent remedy to that enforced by the execution recovered against the corporation, and consequently capable of being brought before the return day of the execution, has always retained this characteristic of its origin.

The action of *Hathorn* v. *Calef*, was commenced soon after the Statute of 1856. The copy of the declaration in that case shows

that the proceedings therein were based upon a similar construction to ours. Those proceedings were expressly sanctioned by the court. The question is no longer an open one.

Defendant's counsel makes some objection to the return of the second execution. The return on that is of no consequence, inasmuch as the liability of the stockholder is fixed and made absolute by the demand. Besides the return day of the second execution is after the six months, within which the action must be brought.

The demand on the stockholder may be made on the *alias* execution. *Whitney* v. *Hammond.*

Although it may be made on the first execution before its return day, yet this is not imperative.

'At any time' within six months after the return is made, and of course within the time limited for the commencement of the action, the demand may be made.

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

The manner of enforcing the stockholder's individual liability under R. S. of 1857, c. 46, §§ 25 and 26 is

1. Execution against the company is to be returned unsatisfied, for want of attachable property of company;

2. Within six months after such return, plaintiff to demand upon stockholder; and

3. After such demand, and within six months after judgment against the company, to commence action against the stockholder.

An execution cannot legally be returned unsatisfied, if at all, certainly not to affect third persons, even privies, until the return day. *Niles* v. *Field*, 2 Met. 327; *Rowland* v. *Seymour*, 2 Met. 590; *Roberts* v. *Knight*, 48 Maine, 171; *Austin* v. *Goodale*, 58 Maine, 109; *Adams* v. *Crummisky*, 4 Cush. 420.

Words of c. 86, § 67, authorizing *sci. fac.* against trustee, are similar to those in c. 46, § 25.

'Within three months' mean 'in or at the end of three months,' when applied to return of executions. *Adams* v. *Crummisky*, *sup.*

The first execution was returned before the return day; and there having been no legal action upon it, there could be no legal

demand upon stockholder, and consequently this action cannot be maintained.

Same objection applicable to return on *alias* execution, with the additional objection, that this action was commenced before the return day of that execution.

Proceedings under *alias* execution not available to plaintiff,—he must proceed under first execution.

Cole v. *Butler*, 43 Maine, 401; *Whitney* v. *Hammond*, 44 Maine, 305; *Milliken* v. *Whitehouse*, 49 Maine, 527; and *Hathorn* v. *Calef*, 53 Maine, 471, arose under R. S. of 1841, c. 76, § 18, which provisions are materially different, from c. 46, § 24,—the former authorizing seizure of individual property upon execution against the corporation.

DICKERSON, J. Case against the defendant as a stockholder in Portland Shovel Manufacturing Company, upon an alleged liability as such for a debt of the corporation.

It is admitted that the defendant was a stockholder in that corporation, as set forth in the writ; and it appears from the evidence that said corporation had exceeded the limitations prescribed in R. S. of 1857, c. 48, § 9, and thereby rendered its stockholders individually liable for its debts, as provided in c. 46, § 24, of the same statute. *Lovegrove* v. *Hunt*, 58 Maine, 22.

The plaintiff recovered judgment against the corporation Oct. 28, 1867, and execution was issued thereon Nov. 5, 1867. On Jan. 1, 1868, the officer having the execution returned it satisfied in part. An *alias* execution was issued for the balance, March 5, 1868. On March 28, 1868, the officer having that execution returned it in no part satisfied, and further certified thereon that the attorney for the creditor, in his presence, and while he had the execution in his hands for collection and service, on March 6, 1868, made demand upon John B. Brown, a stockholder in Portland Shovel Manufacturing Company, to disclose and show attachable property of said corporation sufficient to satisfy the execution, and that said Brown neglected and refused to disclose and show sufficient attachable property of said corporation. The attorney for

the plaintiff testified that he made the demand upon the defendant as set forth in the officer's return. The plaintiff brought this action April 1, 1868.

The question presented for our decision is whether the plaintiff is in a situation to enforce upon the defendant the provisional liability imposed upon him by the statute. This depends upon the construction to be put upon R. S. of 1857, c. 46, § 25, as amended by c. 76 of the Public Laws of 1859, and § 26 of the same revision. These sections are as follows:

'Sec. 25. At any time within six months after the return of an execution against a corporation recovered on a debt for which any stockholder is liable under the preceding section, unsatisfied in whole or in part, for want of attachable property of the corporation, the plaintiff in such execution may demand of any stockholder of such corporation to disclose and show attachable property of such corporation, sufficient to satisfy the execution.

'Sec. 26. After demand as aforesaid, the execution creditor may have an action of the case against such stockholder, to recover of him individually the amount of his execution and costs, or the deficiency thereof, not exceeding the amount for which said stockholder is liable by section 24. Such action must be commenced within six months after the date of the rendition of judgment against the corporation.'

The difficulty in giving construction to these sections of the statute arises partly from their apparently inconsistent provisions, and partly from the meaning to be given to the word 'return' in Sec. 25. That section, in terms, allows six months for making the demand 'after the return of the execution,' but section 26 requires that 'the action be commenced within six months after the date of the rendition of judgment.' As by the general law, an execution cannot issue until twenty-four hours after the rendition of judgment, the execution creditor cannot have the entire six months mentioned in section 25, in which to make the demand. This provision of the general law probably escaped the attention of the framers of these sections.

If the execution creditor has not six entire months for making

the demand, what time has he? When does the time for making the demand commence to run? The plaintiff claims that it commences from the time the officer makes his return upon the execution that it is unsatisfied, etc.; the defendant that it commences from the return day of the execution. The plaintiff's theory allows six months for making the demand, less twenty-four hours, while the defendant limits the time to three months less the same time. Does the statute make the remedy of the execution creditor available immediately upon obtaining his execution against the corporation, and the officer's return thereon that it is unsatisfied, or does it give the stockholder the benefit of a delay of three months therefrom? In other words, is section 25 to have the same construction, in this respect, as it would have if the time for making the demand had been fixed at three instead of 'six months after the return of the execution?' The construction contended for by the learned counsel for the defendant, calls upon us to hold, not only that the legislature meant what it did not say, in terms, but that it meant what is inconsistent with what it did say; for what consistency or reason can there be in saying that a demand may be made at any time within six months after a particular event, and meaning that it must be made within three months thereafterward, in order to make it available? If the legislature intended to allow only three months for making the demand, it has certainly used words very inapt to express its meaning, when there was no difficulty in saying what was intended in express terms. It is obvious that such an unnatural and forced construction of the statute cannot be sustained unless it is supported by the most conclusive reasons.

The object of the statute is to enable an execution creditor of a corporation to collect his debt, or a part thereof, of its stockholders in a specified contingency. Where this contingency occurs, the statute requires two things to be done in order to perfect the creditor's remedy against the stockholders.

1. That the officer holding the execution shall make return upon it that 'it is unsatisfied in whole or in part for want of attachable

property of the corporation.' The officer has the right to make such return, if the facts warrant it, on any day during the life of the execution, be it the first, or the ninetieth, or any intermediate day. He may or may not return the execution to court on the day he makes such return; this is not necessary in order to perfect the creditor's right to take the next step for enforcing his claim against the stockholder. That right is complete when the officer has made the required return upon the execution, that act alone, and not the return of the execution to court, being the necessary prerequisite for taking the next step in the process.

2. The next thing required to be done by the 'plaintiff, in such execution,' is to make 'demand upon the stockholder to disclose and show attachable property of such corporation sufficient to satisfy the execution.'

This demand must be made during the life of the execution in order that the property of the corporation, if any, disclosed and shown to the creditor may be taken upon it. It is obvious, too, from the phraseology, 'plaintiff in such execution,' and 'to satisfy the execution,' that the demand may be made upon the same execution on which the officer has made his return that it is unsatisfied. But if no demand can be made until after the return day of the execution, then no demand can be made on the first execution, though the officer has made the necessary return upon it. The statute does not restrict the time for making the demand to six months after the return day of the execution, but to six months after the return of the execution, if so long a time shall remain from the date of the return upon the execution, to the expiration of the six months after the day of the rendition of judgment, otherwise to so long a time as shall thus remain. The misapprehension arises from interjecting the word day after 'return,' and then assuming that 'return' has reference to time only and not to the certificate of the officer. That the latter construction is the true one is confirmed by the consideration that the section in which this word is used prescribes the requisites of 'the return' upon the execution as follows: 'unsatisfied in whole or in part for want of attachable

property of the corporation.' A certificate that does not conform to this requirement is not a 'return.' The 'return of the execution' means the return upon the execution; the meaning of section 25 in this respect is the same as though it read, 'at any time within six months after the return upon the execution, the plaintiff in such execution may make demand of any stockholder, etc.'

This construction gives effect to the express language of the statute, as nearly as can be done, and substantially reconciles the apparently conflicting provisions of sections 25 and 26. It also facilitates the accomplishment of the purpose of the statute by preventing the useless and prejudicial delay which the contrary construction necessitates.

It is, too, the more reasonable construction, since no beneficial purpose would be subserved by excluding from the time fixed for making the demand the interval between the date of the officer's return and the return day of the execution, while the execution creditor by such delay might be deprived of the opportunity to collect his debt. In cases of doubt the legislature is always presumed to have intended the most beneficial construction of its acts. Besides, the view we have taken of the statute under consideration is strengthened by the history of the previous legislature upon this subject, and the decisions thereon, as appears by the argument and citations of the learned counsel for the plaintiff.

The case finds that the defendant was an original stockholder in the Portland Shovel Manufacturing Company, to the amount of twenty shares, at the par value of one hundred dollars each, and that he continued to own that amount of stock up to the time of the commencement of this action.

Judgment for the plaintiff in the sum of two thousand dollars and interest from the date of the writ.

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

INDEX.

ACCEPTANCE.

See CHECK, 2.

ACKNOWLEDGMENT OF DEEDS.

See DEED, 2.

ACTION.

1. Where it is a custom among commission flour merchants that a vendee may rescind the sale and return the flour within ten days, if it proves unsound or damaged, the commission merchant, to whom the damaged flour is returned in accordance with the custom, and who afterwards sells it as unsound at its full real value, without laches on his part, may recover from his consignor the amount of the actual loss by such sale. *Randall* v. *Kehlor*, 37.

2. On Nov. 27, 1860, the plaintiff conveyed with covenants of warranty, certain real estate to one J.; but some doubt having been thrown upon the title by a levy of a creditor of the plaintiff's husband, the plaintiff, in accordance with a written agreement with her grantee, deposited with the defendant the consideration money, 'to remain with him as collateral to said warranty for a reasonable and satisfactory time.' On June 27, 1870, the grantee having deceased, and the premises passed to his devisee, the plaintiff demanded the money of the defendant, and, upon refusal to deliver it up, sued him in an action for money had and received; *Held*, that the action was not maintainable; but that a suit in equity was the proper remedy. *Randall* v. *Butler*, 216.

3. The abandonment of an attachment of property in a suit against one surety on a note, constitutes no bar to the maintenance of a subsequent suit against the co-surety. *Chipman* v. *Todd*, 282.

4. To an action on a common-law award based upon the breach of a written contract, it is no defense that the contract before the referees was not identified so long as they had the right one. *Sanborn* v. *Paul*, 325.

See ASSIGNMENT, 1, 2. ASSUMPSIT. CONDITION, 1, 2. ESTOPPEL, 1, 2, 3. INTOXICATING LIQUORS. PLEADING, 3. RECOGNIZANCE, 2.

ADJOURNMENT.

See SCHOOL DISTRICT TAX, 4.

INDEX.

ADULTERY.

See EVIDENCE, 9.

ADVERSE PARTY.

See CLERK OF COURT, 2.

AGENT.

See CHECK, 4. COMMISSION MERCHANT.

AGREED STATEMENT.

See PRACTICE, 3.

AGREEMENT.

See CASE, 1, 3. EVIDENCE, 14. PLEADING, 10. RAILROAD STOCK, 1, 2, 3, 4.

AMENDMENT.

1. A writ sued out in the name of 'Charity Griffin, to wit, Charity Pinkham,' may be amended by striking out the words —' to wit, Charity Pinkham.'
Griffin v. *Pinkham*, 123.

2. In assumpsit on an account annexed for a certain number of tons of hay at a specified rate per ton, wherein the only dispute relates to the quantity, an amendment adding a count on a parol submission and award, of the specific question in controversy introduces no new cause of action, and is allowable.
Holmes v. *Robinson Manufacturing Company*, 201.

3. But an amendment, adding a count on a parol submission and award, not of the quantity of hay, but 'of divers controversies' between the parties, does introduce a new cause of action; and still if it is certain that no testimony was introduced in support of such an amendment, and the jury only considered the testimony under the other counts, exceptions will not be sustained for allowing the amendment. *Ib.*

4. And it seems such an amendment may, under such circumstances, be stricken out after verdict. *Ib.*

5. Neither the common law, nor the statutes of this State, allows the plaintiff, in an action of trover, to amend his writ by inserting the names of other plaintiffs.
Ayer v. *Gleason*, 207.

6. Thus, where the defendant was summoned in action of trover to answer to 'James C. Ayer and ——, of,' etc. 'copartners under the style and firm name of James C. Ayer & Co.,' an amendment by inserting the names of the other members of the firm, is not allowable. *Ib.*

7. In an action by one town against another, to recover the value of supplies furnished a pauper, a declaration alleging that the pauper fell into distress in the plaintiff town 'on Dec. 2, 1868,' and the plaintiffs furnished the pauper with supplies from that time to Nov. 24, 1869, 'to the amount in all of $469,' may be amended by substituting 1867 for '1868.' *Ripley* v. *Hebron*, 379.

APPEAL.

See COSTS, 1, 2. SCHOOL DISTRICT. SCHOOL DISTRICT TAX, 2.

APPROPRIATION OF PAYMENT.

See TRUSTEE PROCESS, 9.

ARBITRATION AND AWARD.

1. If a submission contain no provision in relation to the rules of evidence that shall govern the referees, they are not restricted to the rules of the common law, but may receive the statements of parties without requiring them to be first sworn. *Sanborn* v. *Paul*, 325.

2. To an action on a common-law award based upon the breach of a written contract, it is no defense that the contract before the referees was not identified so long as they had the right one. *Ib.*

See AMENDMENT, 2. ERROR. PRACTICE, 1.

ASSESSMENT.

See CONDITION, 1. INTEREST, 2. JOINT STOCK ASSOCIATION, 4. LAND DAMAGES. RAILROAD STOCK, 8.

ASSIGNMENT.

1. At a legal meeting held Jan. 28, 1865, the defendant town voted a bounty of $300 to each person regularly mustered into the military service of the U. S., as a substitute for an enrolled man, and counted on the town's quota; and at a meeting held February, 1865, the vote was reconsidered. At a meeting held March, 1865, they voted a bounty of $300 to any enrolled man who should furnish a substitute. The plaintiff, thereupon, in accordance with a parol agreement with one Clark, in consideration of $600, entered the service as his substitute, Clark to have all the plaintiff's bounties. The last two meetings having been decided by the full court to be illegal, one Treat procured a written assignment of the plaintiff's claim to a bounty from the town, with full knowledge of the parol assignment to Clark, and brought this action to recover the bounty under vote of January, 1865. *Held*, That the parol assignment was valid; and that the action could not be maintained.
Sprague v. *Frankfort*, 253.

2. The *bona fide* assignee of a chose in action will, in general, be protected against the release of the nominal plaintiff, executed after notice to the defendant of the assignment; but where the payee of a negotiable promissory note fraudulently indorsed it before maturity, and without value to the plaintiff, for the purpose of excluding any inquiry into the fraudulent inception or want of consideration of the note, and by fraudulent assertions and devices concealed the true relations of the parties—in an action of *scire-facias* to obtain an *alias* execution upon the judgment recovered upon such note in favor of the indorsee against the maker; *Held*, That the court would not set aside a release from the judgment creditor to the defendant, but let it have its legitimate effect.

Atkinson v. *Runnells*, 440.

See FENCE, 4. TRUST, 3, 4.

ASSUMPSIT.

1. The plaintiff and defendant being joint tenants of a certain parcel of land, agreed to cut the wood and timber therefrom, and to share equally the expenses and proceeds of the operation. The defendant's expenses amounted to $3,033.58, and the defendant's to $421. In their settlement, the plaintiff paid the defendant $1,727.29, a sum equal to one-half of the whole expense. *Held*, That the plaintiff paid the defendant too much by $421, and that it may be recovered back in action of assumpsit. *Millett* v. *Holt*, 169.

2. On Nov. 27, 1860, the plaintiff conveyed with covenants of warranty, certain real estate to one J.; but some doubt having been thrown upon the title by a levy of a creditor of the plaintiff's husband, the plaintiff, in accordance with a written agreement with her grantee, deposited with the defendant the consideration money, 'to remain with him as collateral to said warranty for a reasonable and satisfactory time.' On June 27, 1870, the grantee having deceased, and the premises passed to his devisee, the plaintiff demanded the money of the defendant, and, upon refusal to deliver it up, sued him in an action for money had and received; *Held*, that the action was not maintainable; but that a suit in equity was the proper remedy. *Ramsdell* v. *Butler*, 216.

3. A mechanic cannot maintain assumpsit against the guardian of a minor for labor performed upon the ward's buildings. *Robinson* v. *Hersey*, 225.

4. The defendant conveyed a farm to the plaintiff by a deed containing the condition, that if the plaintiff or his heirs shall pay the defendant certain notes at maturity, 'the deed shall become of full force, otherwise shall be null and void and of no force or effect.' The first note not being paid at maturity, the defendant took possession of the premises and leased them. Subsequently the plaintiff having paid the notes, entered into possession, and brought this action of assumpsit to recover the rent received by the defendant. *Held*, that in the absence of any express promise, on the part of the defendant, to pay the plaintiff, the action would not lie, and that no promise was implied from the facts. *Bartlett* v. *Jones*, 246.

5. Where the fraudulent representations of the seller of property, whereby the purchaser was induced to buy, were such as give the latter the right to rescind, and he does rescind the sale and surrender possession to the vender, the law implies a promise, on the part of the seller, to pay the purchaser for labor and materials in making reasonable repairs upon the property. *Farris* v. *Ware*, 482.

6. Thus the defendant fraudulently represented the water-power connected with his tannery, to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises and relying upon the representations, was thereby induced to purchase the tannery, and thereupon, after taking a bond thereof and giving his notes for the price, the plaintiff entered into possession, and, under the advice of the defendant, expended large sums in repairs; but the water failing, the plaintiff abandoned the property and notified the defendant that he considered the contract of purchase rescinded, whereupon the defendant took possession of the premises, and had the benefit of the repairs. In assumpsit to recover for the labor and materials in making the repairs. *Held*, that the action was maintainable. *Ib.*

See ATTACHMENT, 3. EQUITY, 10.

ATLANTIC & ST. LAWRENCE RAILROAD COMPANY.

See GRAND TRUNK RAILWAY OF CANADA, 3.

ATTACHMENT.

1. The maxim that in law there are no fractions of a day does not apply to proceedings in bankruptcy, where the exact time when the event occurred is made certain by record; therefore, where a debtor's property was attached at seven o'clock in the afternoon of March 8, and his petition in bankruptcy under the U. S. Bankruptcy Act of 1867, was filed at two o'clock and fifty minutes in the afternoon of the 8th of July next succeeding; *Held*, that under § 14, the attachment was dissolved, the time between the two events falling short of four months by four hours and ten minutes.
Westbrook Manufacturing Company v. *Grant*, 88.

2. The plaintiff, as an officer, having on July 13th attached a debtor's personal property, took from the present defendant an alternative receipt to pay a certain sum or re-deliver the goods attached on demand, whereupon the goods went back into the debtor's possession. On Sept. 2d, the debtor filed his petition in bankruptcy, and on the succeeding 27th was adjudged a bankrupt. In an action on the receipt in the name of the officer for the benefit of the assignee of the debtor, *Held*, That the attachment was dissolved by the taking of the receipt. *Mitchell* v. *Gooch*, 110.

3. No attachment of real estate can be made on a writ containing simply a count for money had and received, without any specification of the claim to be proved under it. *Shaw* v. *Nickerson*, 249.

See ACTION, 3. EVIDENCE, 3, 4. SCIRE-FACIAS, 1. TRUSTEE PROCESS, 6, 7, 8.

AUCTION SALE.

See MORTGAGE, 2, 3.

BAILMENT.

See COMMON CARRIER. EQUITY, 6.

BANKRUPTCY.

See ATTACHMENT, 1, 2. PLEADING, 3.

BILL OF SALE.

See CONTRACT, 2. SALE, 2.

BY-LAWS.

See RAILROAD STOCK, 8.

BOND.

1. An obligor in a bond cannot defend an action thereon, upon the ground of a want of consideration, or that the consideration had failed.
Valkenburg v. *Smith*, 97.

2. Thus, in order to obtain the discharge of a suit for services by the plaintiff against the P. & O. C. Railroad Company, the defendants gave the plaintiff their bond, conditioned that one of the defendants should, within thirty days, deliver to the plaintiff four notes payable for the sums and at the times, and indorsed as therein mentioned. In debt on the bond, *Held*, that it is not competent to set up in defense that the plaintiff's services, instead of being of any value to the railroad company, were injurious through his mismanagement and incompetency; and that the bond was given through misapprehension of the facts, and that the consideration had failed. *Ib.*

See CONTRACT, 4, 5. PLEADING, 10.

BURDEN OF PROOF.

See EVIDENCE, 7.

CASE.

1. An agreement between a railroad corporation and an adjoining proprietor not to require them to fence but one side of their road across his land until notified by him, will not relieve them from any liability they may thereby incur to any person not cognizant of or assenting to it. *Gilman* v. *E. & N. A. R. Co.*, 235.

2. If, in an action against a railroad company for the value of the plaintiff's ox killed by their train, the defendants would have their exceptions sustained upon the ground that the ruling complained of is in conflict with the well-established principle that a railroad company is not bound to fence against cattle wrongfully upon the adjoining close, it must appear from the exceptions that there was testimony tending to show that the plaintiff's ox was wrongfully there. *Ib.*

3. The plaintiff's lot and those adjoining on the north and south, were crossed by the defendants' road, and bounded on the east by a river, the division fence between so much of the plaintiff's and the south lot as lay between the railroad and river (being the plaintiff's pasture) being defective. The railroad fence extended on both sides of the road across the plaintiff's lot; that on the river side of the road, across the north lot setting several feet further from the track did not form a continuous line with that across the plaintiff's; while pursuant to an agreement between the defendants and the proprietor thereof, there was no railroad fence on the south lot on the river side of the road. The plaintiff's pasture was also fenced on the river bank above high-water mark. An ox of the plaintiff escaped from his owner's pasture through the gap of the defendants' fence, occasioned by want of continuity upon the track, was driven thence by the defendants' employee upon the north lot, whence during the next six hours, the ox wandered along the river bank across his owner's land outside of its inclosure, to and upon the south lot and thence upon the track, where he was killed by the defendants' locomotive while being managed with proper care on their part. *Held*, That the gap in the defendants' fence on the plaintiff's land through which the animal escaped from his pasture was the efficient procuring cause of the accident, and that the maxim '*causa proxima*,' etc., had no proper application to the case. *Ib.*

4. Also, *held*, that the omission of the plaintiff to erect a sufficient fence between his pasture and the south lot cannot be imputed to him as contributory negligence. *Ib.*

See NEGLIGENCE, 1, 2.

CASES RE-EXAMINED, &c.

Thompson v. *Pittston*, 59 Maine, 545, re-examined and reaffirmed.
Moulton v. *Raymond*, 121.

CAUSA PROXIMA.

See CASE, 3.

CERTIORARI.

1. The granting of a writ of *certiorari* is a matter of judicial discretion; and it should never issue to quash the disclosure of a poor debtor for merely trivial or formal error, or when it is apparent that no injustice will be done by refusing the writ. *Hopkins* v. *Fogler*, 266.

2. Thus, where a debtor has been imprisoned on execution, and released upon giving a bond approved in writing, by two disinterested justices of the peace and of the quorum, one of whom was chosen by the jailer for the creditor, and the other by the debtor, and it is apparent from the debtor's answers made before a tribunal formally organized to hear his disclosure, that, having no real or personal estate, the poor debtor's oath was properly administered to him; this court, in the absence of all proof upon the subject, will not, for the purpose of quashing proceedings otherwise regular, assume that the jailer chose the justice for the creditor before the latter had refused, or unreasonably neglected to choose one. *Ib.*

3. The selectmen of a town, after due proceedings, laid out a town way, and awarded to one of the land-owners an under-pass for his cattle, in addition to a specific sum as damages, and the town refused to accept the road. Thereupon the county commissioners, upon petition seasonably presented, laid out the road, omitting the under-pass. *Held*, That a writ of *certiorari* will not be granted on a petition of the town to quash the proceedings of the commissioners. *Bethel* v. *Oxford County Commissioners*, 535.

4. Where it appears by the record that the selectmen filed on Sept. 1st, a return of their proceedings in laying out the way, and on the same day issued their warrant for a town meeting, containing an article to see if the town will accept the 'road as laid out' by them,—a writ of *certiorari* will not be issued to quash the proceedings of the commissioners in a subsequent laying out by them, on the ground that it does not appear that the warrant for town meeting was issued after the filing of the return of the selectmen. *Ib.*

CHARGE UPON AN ESTATE.

See WILL, 1.

CHECK.

1. The taking of a check for an existing debt is not, *ipso facto*, payment of the debt. *Marrett* v. *Brackett*, 524.

2. The acceptance of a check implies an undertaking on the part of the holder to use due diligence in presenting it for payment. *Ib.*

3. The holder is in the exercise of due diligence when he presents it for payment in accordance with the usage of the banks where payable, and of the persons having accounts with such banks—provided the usage is well established, reasonable, and lawful, and recognized by the mercantile community and the parties to the check. *Ib.*

4. And it makes no difference that the check is that of the agent of the debtor. *Ib.*

CLERK OF COURT.

1. A clerk of court has, *ex-officio*, no right, without an express order of court to that effect, to complete, alter, or amend the record kept by a predecessor in that office, whose term has expired. *Rockland W. P. Co.* v. *Pillsbury*, 425.

2. If there be a failure to make record of a judgment, the party desiring to have it recorded should present a petition to the court to have this done, and give due notice to the adverse party. *Ib.*

COERCION.

See HUSBAND AND WIFE.

COLLATERAL SECURITY.

See ASSUMPSIT, 2.

COMMERCIAL BROKER.

To entitle a plaintiff to recover compensation for 'negotiating freights for the owner of vessels' within the meaning of the U. S. Statute of 1864, c. 173, § 179, cl. xiv, it is incumbent upon him to prove that he was licensed as a commercial broker. *Harding* v. *Hagar*, 340.

COMMISSION MERCHANT.

It seems, that in the absence of restrictions from his consignor, a commission flour merchant has the authority to warrant the quality and condition of flour sold by him. *Randall* v. *Kehlor*, 37.

COMMON CARRIER.

A carrier is not liable for goods lost beyond the end of his route, unless by special contract. *Skinner* v. *Hall*, 477.

COMMUTATION.

See CONSTITUTIONAL LAW, 2.

Condition

1. The defendant agreed in writing, that on the execution and delivery to him by the directors of the railroad of certain mortgage bonds mentioned in said agreement, he would pay the assessments theretofore made to the amount of the par value of the stock previously subscribed by him. *Held*, That the delivery of the bonds was a condition precedent to the payment of the assessments. *Belfast & M. L. R. Co.* v. *Moore*, 561.

2. Where railroad stock is subscribed for, in behalf of a town, upon the condition that the road 'shall be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public,'—such a condition is a condition subsequent, and will not defeat an action for the amount subscribed, although the condition had not been performed when the action was commenced. *Belfast & M. L. R. Co.* v. *Brooks*, 568.

See ASSUMPSIT, 4. MORTGAGE, 4. RECOGNIZANCE, 2, 3. SALE, 1. SKOWHEGAN, 5, 8. TELEGRAPH, 1.

CONDITION PRECEDENT.

See CONDITION, 1.

CONDITION SUBSEQUENT.

See CONDITION, 2.

CONSIDERATION.

See BOND, 1, 2. CONTRACT, 2.

CONSIGNOR.

See COMMISSION MERCHANT.

CONSTITUTIONAL LAW.

1. Pub. Laws of 1868, c. 151, § 6, providing that 'the party demanding a jury shall pay the jury fee, and tax the same in his costs, if he prevail,' is not in contravention of Art. I, § 20, of the constitution of this State. *Randall* v. *Kehlor*, 37.

2. A town cannot constitutionally raise money to reimburse one of its citizens for the amount paid by him as commutation under the act of congress of March 3, 1863, c. 75, § 13. *Moulton* v. *Raymond*, 121.

3. The legislature cannot constitutionally authorize towns to loan their credit to such persons as, in consideration thereof, will engage therein in manufacturing for their private emolument. *Allen* v. *Jay*, 124.

4. Thus the defendant town, at a meeting legally called therefor, voted to loan its credit to Hutchings & Lane, to the amount of ten thousand dollars, at six per cent annually, issue its bonds therefor, and exempt H. & L.'s mill and lumber from taxation for ten years, provided H. & L. would invest twelve to thirteen thousand dollars, at or near Jay Bridge, in building a steam saw-mill with box machinery, and in putting in one run of stones for grinding meal; keep the same in good repair, and amply insured; secure the town by mortgage on the property, at the rate of one dollar for every seventy-five cents thus loaned and pay all interest, and ten per cent on the principal annually, after three years; and carry on said manufacturing business not less than ten years.

Thereupon the legislature enacted, that, whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchings & Lane, in accordance with a vote taken by said town for the encouragement of manufactures in said town. On petition for injunction, *Held*, that the act of the legislature is unconstitutional; and that the respondents be perpetually enjoined from issuing the bonds.

Allen v. *Jay*, 124.

5. It is for the court, and not the legislature, to determine whether the use for which private property is taken, in a given case, is or is not a public use. *Ib.*

6. So much of Pub. Laws of 1872, c. 1, as purported to confirm and make valid the doings of said court in relation to indictments found by that grand jury, is in contravention of the constitution of the U. S., Art. XIV, § 1, and of the constitution of this State, Art. I, § 6. *State* v. *Doherty*, 504.

See SKOWHEGAN, 3.

CONTINGENT REMAINDER.

See DEED, 1.

CONTRACT.

1. On Nov. 13, 1869, A. contracted with the plaintiff bridge company, to furnish materials and build two granite piers of Hallowell granite, according to certain specifications, for fourteen dollars per cubic yard, five hundred dollars to be paid down, and five hundred dollars monthly, until the piers shall be completed and accepted, when the balance is to be paid, and all to be completed before the following spring freshets. Thereupon A. procured the blocks of granite, hauled them upon land leased by him near the contemplated location of the bridge, and commenced dressing and fashioning them. The plaintiffs duly paid the first four installments, and before the next one became due, and before any of the granite was placed in the piers, it was attached by A.'s creditor. In replevin by the bridge company, *Held*, That the plaintiffs acquired no title by virtue of the contract and the payments made, or any rights or interest in the granite as against the attaching creditor. *Fairfield B. Co.* v. *Nye*, 372.

2. Also *held*, That the bridge company could not hold the stone as against the attaching creditor by virtue of an absolute bill of sale thereof from A. to the company, the consideration of which was the four payments made in accordance with the terms of the original contract. *Ib.*

3. Where the fraudulent representations of the seller of property, whereby the purchaser was induced to buy, were such as give the latter the right to rescind, and he does rescind the sale and surrender possession to the vender, the law implies a promise, on the part of the seller, to pay the purchaser for labor and materials in making reasonable repairs upon the property. *Farris* v. *Ware*, 482.

4. Thus the defendant fraudulently represented the water-power connected with his tannery, to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises and relying upon the representations, was thereby induced to purchase the tannery, and thereupon, after taking a bond thereof and giving his notes for the price, the plaintiff entered into possession, and, under the advice of the defendant, expended large sums in repairs; but the water failing, the plaintiff abandoned the property and notified the defendant that he considered the contract of purchase rescinded, whereupon the defendant took possession of the premises, and had the benefit of the repairs. In assumpsit to recover for the labor and materials in making the repairs. *Held*, that the action was maintainable. *Ib.*

5. Also *held*, that a surrender of the bond was not essential to a rescision of the contract. *Ib.*

See ARBITRATION, &c., 2. COMMISSION MERCHANT. EVIDENCE, 14.

CONTRIBUTORY NEGLIGENCE.

See CASE, 4.

CONVERSION.

The abuse of a lawful possession may constitute a conversion.
Neal v. *Hanson*, 84.

CO-PARTNERS.

See JOINT STOCK ASSOCIATION, 3.

CORPORATION.

1. In R. S., c. 46, § 25, the phrase, 'return of an execution,' means 'return upon an execution.' *Lovegrove* v. *Brown*, 592.

2. Such return may be made whenever, within the life of the execution, the facts will warrant it. *Ib.*

3. The 'six months,' mentioned in § 25, begin whenever the officer makes such return, and end before the expiration of six months from the date of the rendition of the judgment against the corporation. *Ib.*

4. Hence to enable an execution creditor of a corporation to recover any part of his debt of a stockholder individually liable therefor, R. S. of 1857, c. 46, §§ 25 and 26 require, (1) That the officer holding the creditor's execution against the corporation make a return thereon, that it is unsatisfied in whole or in part for want of attachable property of the corporation; (2) That within six months after such return is made, and before the expiration of six months after the date of the rendition of judgment against the corporation, the creditor make demand of the stockholder to disclose and show to the officer, having such execution, attachable property of such corporation sufficient to satisfy the execution; and (3) That after such demand and within six months after the date of the rendition of judgment against the corporation, to sue the stockholder in case.
Lovegrove v. *Brown*, 592.

See RAILROAD STOCK.

COSTS.

1. R. S., c. 51, § 8, provides that when an appeal is taken from the county commissioners' estimation of damages for land taken by a railroad corporation, 'the losing party is to pay the cost thereon.'
B. & P. R. R. Co. v. *Chamberlain*, 285.

2. On the written application of a railroad corporation, the county commissioners estimated the damages for the defendant's land taken, at $650; and on appeal by the corporation, the jury estimated them at $435. *Held*, that the corporation was the losing party, and liable for costs. *Ib.*

See PLEADING, 8, 9. SCIRE-FACIAS, 1.

COUNTY ATTORNEY.

See PROHIBITION, 1.

COUNTY COMMISSIONERS.

1. The authority to locate roads through public lands selected for settlement is by R. S., c. 18, § 32, vested in the county commissioners. *Burns* v. *Annas*, 288.

2. To confer on the county commissioners jurisdiction of the laying out of a town-way leading from land under improvement to a town or highway, founded upon the unreasonable refusal of the municipal officers, the petition to the commissioners must distinctly set out all the jurisdictional facts, and among them that the refusal on the part of the municipal officers was 'unreasonable.'
Goodwin v. *County Com. of Sagadahoc*, 328.

3. And the want of jurisdiction of the commissioners resulting from the omission of such an allegation, may be taken advantage of in the supreme judicial court when the report of the committee of appeal from the decision of the county commissioners comes up for acceptance; and the proceedings may be quashed. *Ib.*

4. A petition presented at a session of the county commissioners held by adjournment from a regular session, is a presentation 'at a regular session' within the meaning of R. S., c. 18, §§ 23 and 24, although the cause of action set forth in the petition did not occur until after the time fixed by the statute for the commencement of the regular session. *Bethel* v. *Oxford Co. Com.*, 535.

5. A petition to the county commissioners setting forth all the essential jurisdictional facts, but addressed to a court of county commissioners 'next to be holden on the —— day of November, 1866, by adjournment from,' etc., was entered at a session held on a certain day in the succeeding March, by adjournment from the regular session of the previous September, and was acted upon. *Held*, That jurisdiction attached. *Ib.*

See CERTIORARI, 3, 4. COSTS, 1, 2. SKOWHEGAN, 1, 4, 7.

COVENANT.

See DEED, 7. PLEADING, 10.

CUSTOM.

See EVIDENCE, 1.

DAMAGES.

See LAND DAMAGES. TELEGRAPH, 2.

DECEIT.

See FRAUD. INTOXICATING LIQUORS.

DEDICATION.

See LAND AGENT, 2.

DEED.

1. A tenant in tail under her grandfather's will, by her deed of June 3, 1796, duly executed before two witnesses, and for a valuable consideration therein expressed, and duly acknowledged and recorded, did 'bargain, sell, and confirm unto' the defendant's predecessor in title, 'all my [her] right and title to the estate of my [her] grandfather,' situate in Kittery, 'that is to say, all which by his last will and testament he bequeathed to me [her] as may appear from his will, it being the half of his real estate, which property I warrant to defend against the claims of any person or persons to said estate.' In a writ of entry by an heir-at-law of the tenant in tail, *Held*, that the estate tail was barred under the provisions of Mass. Statute of March 8, 1792, § 1.

Willey v. *Haley*, 176.

2. A sheriff's deed of an equity of redemption, executed at the time of the sale on execution, conveys to the purchaser all the judgment debtor's right, title, and interest in the premises, as against the debtor having legal notice of the sale, although the deed was not acknowledged, delivered or recorded until three months and fourteen days after the sale. *Hobbs* v. *Walker*, 184.

3. By a resolve approved March 22, 1864, the legislature directed the land agent, after advertising for proposals in the manner therein prescribed, 'to sell the timber and lumber' in controversy, and pay the proceeds thereof, not exceeding $10,000, to the trustees of the Maine Wesleyan Seminary and Female College, the purchaser to have ten years to take it off. The land agent sold without strictly observing the law in relation thereto. In May, 1868, the State conveyed the land, containing the timber, to the plaintiffs, 'subject to all the reservations in a certain act approved March 24, 1864, one of which reservations included 'all timber, and lumber, and lands, granted and voted by the present or any preceding legislature.' In an action against the defendant to recover the stumpage of the timber in question, which was cut by him, *Held*, That the timber was 'voted' by the resolve of March 22, within the meaning of that term as used in the act of March 24, and was, therefore, excepted from the operation of the deed to the plaintiffs. *E. & N. A. R. Co.* v. *Dunn*, 453.

4. Also *held*, that the reservation in the deed to the plaintiffs was absolute, and not dependent upon a valid sale by the land agent. *Ib.*

5. A father, by deed of warranty, conveyed certain land to his daughter by name, 'for her use and benefit during her lifetime, and after her decease, to her legal heirs, to them and their heirs and assigns forever.' *Held*, That the daughter named took (by R. S., c. 73, § 6), a life-estate in the premises, the remainder in which was contingent until her death, when it vested in those who were then her heirs at law. *Reed* v. *Fogg*, 481.

6. Where the contingent remainder man, prior to the decease of the tenant for life, conveyed the estate by deed of general warranty; *Held*, That the title which vested when the contingency ceased, enured to the benefit of such grantee, and the grantor was estopped by his deed. *Ib.*

7. Where the contingent remainder man, prior to the decease of the tenant for life, conveys his right, title, and interest to the estate, by deed of quitclaim, with the only covenant that the will 'warrant and defend the premises to the granter, his heirs and assigns against the lawful claims of all persons claiming by, through, or under' the grantor, the remainder vesting at the decease of the tenant for life, will not enure to the benefit of the grantor, nor will the grantor be estopped from maintaining a real action therefor. *Reed* v. *Whittemore*, 481.

See ASSUMPSIT, 4.

DEED OF QUITCLAIM.

See DEED, 7.

DEFICIT.

See SELECTMEN, 1.

DEMAND.

See CORPORATION, 4. EQUITY, 8.

DEMURRER.

See PLEADING, 1, 2, 6, 7, 10.

DESCENT.

1. By virtue of R. S. of 1857, c. 75, § 1, cl. 6, when a minor dies without having been married, the property which he inherited from his father descends in equal shares to his father's other surviving children, and to the issue of deceased children by right of representation. *Benson* v. *Swan*, 160.

2. Thus a father died leaving a widow and one child by a former wife. Thirteen days after his death, a posthumous child was born and died twenty-four days after its birth. *Held*, that the real estate which the deceased infant inherited from his father, descended to the surviving child to the exclusion of the mother. *Ib.*

3. R. S., 1857, c. 75, § 1, cl. 6, is not restricted to those cases only where the parent 'leaves a child or children and the issue of one or more deceased children.' *Ib.*

DISAFFIRMANCE OF SALE.

See MORTGAGE, 2. 3.

DIVORCE.

A judgment of divorce, *a vinculo*, obtained by the husband on his libel, is no bar to the granting, by the same court, of a like divorce to the wife on her libel. *Stilphen* v. *Houdlette*, 447.

See DOWER, 2.

DOWER.

1. Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein, and the wife of such grantee has a right of dower in the premises. *Gerry* v. *Stimson*, 186.

2. A judgment of divorce, *a vinculo*, obtained by the husband on his libel, is no bar to the granting, by the same court, of a like divorce to the wife on her libel, but the former judgment defeats the wife's right of dower, although her divorce was granted 'for the fault of her husband.' *Stilphen* v. *Houdlette*, 447.

See INJUNCTION, 2.

DUE DILIGENCE.

See CHECK, 2, 3,

EMPLOYEE.

See NEGLIGENCE, 2.

ENLISTMENT.

See EVIDENCE, 10, 11.

EQUITY.

1. The trustees appointed under Special Laws of 1867, c. 384, accepting the surrender of the charter of the Piscataqua Fire and Marine Insurance Company, cannot maintain a bill in equity in their name and that of the corporation in behalf of the creditors or stockholders of the corporation as such.
Pis. F. & M. Ins. Co. v. *Hill*, 178.

2. In case of alleged misconduct of the corporation or its officers, creditors or stockholders must pursue their remedy in their own names. *Ib.*

3. R. S., c. 46, § 19, confers upon the court no new equity jurisdiction for the collection of debts, or in relation to injuries to the property of the corporation. *Ib.*

4. The treasurer of the corporation is not a trustee in any such sense as to give the court equity jurisdiction in controversies between him and the corporation. *Ib.*

5. When compensation in damages is the only relief that can be given in case of an alleged fraud, the court has no jurisdiction in equity. *Ib.*

6. On Nov. 27, 1860, the plaintiff conveyed with covenants of warranty, certain real estate to one J.; but some doubt having been thrown upon the title by a levy of a creditor of the plaintiff's husband, the plaintiff, in accordance with a written agreement with her grantee, deposited with the defendant the consideration money, 'to remain with him as collateral to said warranty for a reasonable and satisfactory time.' On June 27, 1870, the grantee having deceased, and the premises passed to his devisee, the plaintiff demanded the money of the defendant, and, upon refusal to deliver it up, sued him in an action for money had and received; *Held*, that the action was not maintainable; but that a suit in equity was the proper remedy. *Ramsdell* v. *Butler*, 216.

7. If the husband never had any legal title to land paid for by him but conveyed to his wife, the remedy of a judgment creditor of the husband is in equity and not by a levy. *Warner* v. *Moran*, 227.

8. In a bill seeking the inforcement of an alleged trust in relation to real estate held by a deed absolute in form, but as security for certain loans, no allegation of a demand for an account, or of a tender of the amount due is necessary, as in a bill for the redemption of a statutory mortgage.
Chamberlain v. *Lancey*, 230.

9. Such a bill, brought in the name of one who is one of the heirs of the deceased *cestui que trust*, and also administrator of the estate, for the benefit of the estate and of himself and the other heirs, cannot be maintained ; but all the heirs must be made parties, although all of them except the complainant reside without the jurisdiction. *Ib.*

10. Equity and not assumpsit is the appropriate remedy for one whose membership and consequent right to share in the profits of a partnership are denied, and to whom no portion of the profits have been set apart. *Pray* v. *Mitchell*, 430.

See INJUNCTION.

EQUITY OF REDEMPTION.

See DEED, 2.

ERROR.

A writ of error will not lie to reverse a judgment of the superior court founded upon the award of referees, upon the ground that they 'consulted and called into said reference a third person, whose advice and opinion they adopted and followed.' *Dennison* v. *Portland Co.*, 519.

ESTATE TAIL.

A tenant in tail under her grandfather's will, by her deed of June 3, 1796, duly executed before two witnesses, and for a valuable consideration therein expressed, and duly acknowledged and recorded, did 'bargain, sell, and confirm unto' the defendant's predecessor in title, 'all my [her] right and title to the estate of my [her] grandfather,' situate in Kittery, 'that is to say, all which by his last will and testament he bequeathed to me [her] as may appear from his will, it being the half of his real estate, which property I warrant to defend against the claims of any person or persons to said estate.' In a writ of entry by an heir-at-law of the tenant in tail, *Held*, That the estate tail was barred under the provisions of Mass. Statute of March 8, 1792, § 1.

Willey v. *Haley*, 176.

ESTOPPEL.

1. A judgment in an action of trover against the defendants' warrantee, rendered upon a trial involving only the defendants' title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendants themselves, involving the same issue, and to be supported by the same testimony.

Atkinson v. *White*, 396.

2. Thus, the owner of a lot of logs conveyed them to the defendants by a mortgage bill of sale, and subsequently, by an absolute bill of sale, to the plaintiff's intestate. Still later, the defendants sold a portion of the logs and warranted the title to one Conner, who converted them; whereupon the plaintiff sued him in trover for their value. At the trial, the only question tried was the strength of the defendants' title under the mortgage as against that of the plaintiff's intestate under the absolute bill, and the defendant recovered judgment. In this action, involving precisely the same question, and depending upon the same testimony; *Held*, That the judgment in favor of Conner was a bar. *Ib.*

3. Where a debtor has paid certain items of his creditor's account, and the creditor subsequently takes judgment for the full amount of the original account, the debtor cannot recover back the amount thus paid and wrongfully included in the judgment, his remedy being review. *Hagar* v. *Springer*, 436.

See DEED, 6, 7. REAL ACTION.

EVIDENCE.

1. Parol evidence is admissible to prove a custom among flour merchants in the place where it is sold on commission, whereby the vendee may rescind the sale and return the flour within ten days, if it prove to be unsound or damaged. *Randall* v. *Kehlor*, 37.

2. In the trial of an indictment charging the 'misconduct in his office' of a register of deeds, by knowingly issuing a false certificate of a certain person's title to a particular lot of land, evidence comprising substantially the history of the certificate, and of the uses made of it in obtaining a loan by the person to whom it was issued, is admissible on the part of the prosecution under a count charging the offense done with an intent to defraud. *State* v. *Leach*, 58.

3. So is the writ on which the alleged attachment was made, together with a certified copy of the judgment thereon, the execution, levy, and of the record of the levy. *Ib.*

4. So is the record of the attachment, although the middle initial letter of the attaching creditor therein is 'W.' instead of 'M.,' as in the writ. *Ib.*

5. Parol evidence to establish the identity of personal chattels embraced in a mortgage, but not particularly described therein, is admissible. *Elder* v. *Miller*, 118.

6. Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein. *Gerry* v. *Stimson*, 186.

7. In an action by a railroad corporation against a town to recover back money paid for taxes assessed upon wood, upon the ground that its place of business was not in the defendant town, the *onus* is upon the plaintiffs to show where it was. *P. S. & P. R. R. Co.* v. *Saco*, 196.

8. Such an action pending before the full court upon an agreed statement will fail unless it appear that its place of business was not in the defendant town. *Ib.*

9. In an action of slander for charging one with adultery, a preponderance of testimony will support a plea of justification. *Ellis* v. *Buzzell*, 209.

10. Parol evidence of a person's enlistment into the military service of the United States is not admissible. *Atwood* v. *Winterport*, 250.

11. Nor is a certificate officially signed by the provost-marshal of the district, that the plaintiff 'has this day been credited as a recruit in the navy, to the' defendant town, 'by order of the A. A. Pro. Mar. Gen. of Maine,' legal evidence of his enlistment. *Ib.*

12. Nor is such a certificate sufficient evidence that the plaintiff has been 'duly accepted as a soldier of the United States for the term of one year.' *Ib.*

13. Parol evidence is admissible to show the division of a line fence made more than forty years before. *Harlow* v. *Stinson*, 351.

14. Evidence that the defendants contracted with another person to do the same work, to recover pay for which plaintiff sues, is no defense. In a suit between persons not party to a written contract, it cannot be varied by parol testimony of a different parol agreement previously made; for such agreement is merged in the writing. *Bell* v. *Woodman*, 465.

15. In an action by one town against another, to recover the value of supplies furnished a pauper, a declaration alleging that the pauper fell into distress in the plaintiff town 'on Dec. 2, 1868,' and the plaintiffs furnished the pauper with supplies from that time to Nov. 24, 1869, 'to the amount in all of $469,' may be amended by substituting 1867 for '1868.' *Ripley* v. *Hebron*, 379.

16. Where, in a pauper case, upon the issue, whether the pauper had had his home five consecutive years, between March, 1860, and December, 1867, in the plaintiff town, the question turned mainly on the facts connected with an undisputed absence of three weeks, in March, 1863, in another town, where he went and resided with one K. and of another of a few days in September, 1863, it is competent for the plaintiffs to show, that the pauper came to the witness's house in the plaintiff town and wanted to stay a spell, but that the witness declined to allow him to stay but a short time, stating to the pauper the condition of the witness's family as the reason for thus declining; and also to show that when the pauper came, he brought nothing except the clothes he had on. *Ib.*

17. *Held*, That such conversation tended to show the character of the residence and was not mere declarations. *Ib.*

18. *Held*, also, that it was competent for such witness to testify that while the pauper was thus stopping at his house in March, 1863, he heard K. propose to the pauper to go and live with him in D.,—that he would give him a home there as long as he wanted one; that the pauper replied he would think of it; that two days afterwards K. came and renewed his proposition, when the pauper said he would go, and did go the next morning. *Ib.*

19. Also *held*, that it was competent for such witnesses to testify whether or not, at the time the pauper thus left the witness's house, there was any understanding between the witness and the pauper, or any authority given by the witness to the pauper, that the latter might return to the witness's house. *Ib.*

20. But *held*, also, that it was not competent to prove the declarations of K. (who was not a witness) as to his understanding of the nature of the pauper's residence with him. *Ib.*

21. When a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period. *Ib.*

22. Nor does the law presume that he has no such intention. *Ib.*

23. But it leaves it to the jury to determine upon all the evidential circumstances and probabilities in the case, what his intention in fact was. *Ib.*

24. It is not necessary that there should be any distinct declaration of intention proved; but it may be latent in the mind of the pauper. *Ib.*

25. In the trial of one Reed for the murder of one John Ray, it became a material question, as to the manner in which the defendant hurt his hand, which was found swollen on the morning after the murder. The defendant testified that he hurt it in a fall while getting over a pair of bars with a bunch of shingles on his shoulder, and that it was an old sprain and had swollen several times. One Vance, called by the defendant, to impeach certain government witnesses, testified on cross-examination, that the defendant told him what

the defendant told one Elder Ray about injuring his hand,—that he could not testify, positively, what it was, it was so long ago,—that it was something about 'getting over a pair of bars,' but whether it happened when the defendant was after a cow, he did not know. Subsequently one Hale, called by the government, was permitted to testify against seasonable objection, that Vance told witness that defendant told Elder Ray that he hurt his hand 'when after a cow, and struck his hand against a log, or something;' *Held*, That the testimony of Hale had no tendency to impeach the testimony of Vance upon anything material to the issue, and was not admissible. *State* v. *Reed*, 550.

Sea FENCE, 5. HUSBAND AND WIFE. JOINT STOCK ASSOCIATION, 2.

EXCEPTIONS.

See CASE, 2. PRACTICE, 14, 21. PROHIBITION, 2. RAILROAD, 3. TRUSTEE PROCESS, 12.

EXCESSIVE DAMAGES.

See PRACTICE, 5.

EXECUTION.

See CORPORATION, 1, 2, 3, 4. EVIDENCE, 3. PRACTICE, 12, 13. SHERIFF'S SALE. SCIRE-FACIAS, 2.

EXECUTOR AND ADMINISTRATOR.

1. Where the person nominated as executor in a will was appointed and filed a bond approved by the judge of probate at the time the will was proved, neither the fact that the bond was not such in all respects as is required by the statute, nor that the executor neglected to return an inventory or settle an account in accordance with his bond, vitiates what he has rightfully done in the discharge of his trust, unless the opposite party has been prejudiced thereby.
Pettingill v. *Pettingill*, 411.

2. Where the bond thus filed and approved was conditioned for the seasonable return of a true and perfect inventory, for faithful administration according to the will, and for the rendering of a just and true account of his administration within one year,—the statute provisions respecting the conditions required must be so far considered as only directory, that the executor may have the benefit of such of his official acts in the premises as are found conformable to the law and the will, and that the account which he has bound himself to render should be considered, and, so far as it is found correct and well vouched, allowed. *Ib.*

See WILL, 2.

FALSE CERTIFICATE.

See EVIDENCE, 2.

FENCE.

1. The respective owners of adjacent lands may become bound by prescription, to maintain specific portions of their partition fence. *Harlow* v. *Stimson*, 347.
2. Thus, in replevin for the plaintiff's oxen, which escaped from his land to the adjoining land of the defendant, and by the latter taken up and impounded, the jury were instructed that if they should find that the owners of the adjacent lands, or their grantors or persons from whom they respectively derived title, severally maintained and supported well defined and specific portions of the line fence for twenty consecutive years, each repairing his own part, recognizing his obligation to do so, it would be a division of such fence by prescription; and thereafter, it would be obligatory upon such owners, to keep in repair such portions as they had so severally maintained for twenty years; and that if the jury find that the cattle escaped from the plaintiff's close to the adjoining close of the defendant, over that part of the line fence, which the defendant, under the foregoing rule had become liable to keep in repair, which was out of repair, then the restraining and impounding of the cattle by the defendant was unlawful. *Held*, that the instruction was unexceptionable. *Ib.*
3. The time limited by fence-viewers within which each adjacent owner shall build his part of the partition fence must be definitely fixed. *James* v. *Tibbetts*, 557.
4. A recital in the written assignment that a certain owner named shall build the portion of fence assigned to him 'within twelve days from the date of receiving notice of this assignment,' is not sufficiently definite. *Ib.*
5. And parol testimony is not competent to remedy the defect in this particular. *Ib.*
6. To give any person a statute right to a partition fence, the land of the adjacent owner must be inclosed or improved. *Ib.*
7. And the fact that a part of the land of the adjacent owner is improved does not require him to maintain any part of a partition fence along that part which is not improved. *Ib.*
8. Fence-viewers have no authority to determine the right of adjacent owners to a partition fence. *Ib.*

See CASE, 1, 2, 3. EVIDENCE, 13.

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FORFEITURE.

See INDICTMENT, 6.

FRACTIONS OF A DAY.

See ATTACHMENT, 1.

FRAUD.

1. Where the fraudulent representations of the seller of property, whereby the purchaser was induced to buy, were such as to give the latter the right to rescind, and he does rescind the sale and surrender possession to the vender, the law implies a promise, on the part of the seller, to pay the purchaser for labor and materials in making reasonable repairs upon the property.

Farris v. *Ware*, 482.

2. Thus, the defendant fraudulently represented the water-power connected with his tannery, to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises, and relying upon the representations, was thereby induced to purchase the tannery, and thereupon, after taking a bond thereof, and giving his notes for the price, the plaintiff entered into possession, and, under the advice of the defendant, expended large sums in repairs; but the water failing, the plaintiff abandoned the property and notified the defendant that he considered the contract of purchase rescinded, whereupon the defendant took possession of the premises, and had the benefit of the repairs. In assumpsit to recover for the labor and materials in making the repairs, *Held*, that the action was maintainable. *Ib.*

3. Also *held*, that a surrender of the bond was not essential to a rescision of the contract. *Ib.*

4. A fraudulent affirmation, made by the defendant to the plaintiff, respecting the quantity of hay cut the previous year on a farm, which the former was about to sell to the latter, will support an action for deceit. *Martin* v. *Jordan*, 531.

5. Thus, where the parties were on the farm, in the winter while covered with snow, examining it with a view to the sale and a short time before the conveyance was made, and the defendant, in answer to a question by the plaintiff, said the farm cut twenty-five tons of hay the preceding year; and the defendant knew the statement was false when he made it; and the plaintiff, relying upon it, was thereby induced to purchase and was thereby deceived and injured; *Held*, That the defendant was guilty of an actionable fraud. *Ib.*

6. An action of tort for deceit in the sale of real estate, does not lie for the fraudulent misrepresentations of the vendor as to the price which he paid therefor. KENT and DICKERSON, JJ., dissenting. *Holbrook* v. *Connor*, 578.

7. False and fraudulent affirmations by the vendor of lands that 'said lands had large deposits of oil in them, and were of great value for the purpose of digging, boring for, and manufacturing oil,' accompanied with the statement that the lands had not been tested, are matters of opinion, and not actionable. *Ib.*

FRAUDS, STATUTE OF.

1. On April 2d, the owner of a large quantity of bark situated on his wharf, billed it to his creditor as security for indebtedness and delivered it to the defendant as his creditor's agent. On April 19th, the bark remaining on the owner's wharf, he bargained it to the defendant for $650, but made no written memorandum of the bargain, received nothing in payment and made no delivery of any portion of it, although the defendant subsequently went and measured it of his own motion. On April 28, the original owner sold, and gave a bill of

the bark to the plaintiff who paid for it; and while the bark was being measured the defendant interfered and claimed it by an alleged sale on April 19th, whereupon the plaintiff replevied it. *Held*, that the bargain to the defendant was within the statute of frauds, there having been no delivery or acceptance of the bark; and that the plaintiff's knowledge of the facts would not affect the sale. *Young* v. *Blaisdell*, 272.

2. The sale of an interest or of shares in a joint stock company is within the statute of frauds. *Pray* v. *Mitchell*, 430.

FRAUDULENT REPRESENTATIONS.

See FRAUD.

FRAUDULENT TRANSFER.

See HUSBAND AND WIFE.

FRIVOLOUS EXCEPTIONS.

See PRACTICE, 14.

GRAND TRUNK RAILWAY OF CANADA.

1. The Grand Trunk Railway of Canada is a foreign corporation, and its charter creates no obligations and imposes no restraints upon the legislative authority of this State. *Dryden* v. *G. T. R. of Canada*, 512.

2. Under the lease of the At. & St. L. Railroad Company, the Grand Trunk Railway Company hold the property therein demised, subject not only to all the laws then in force, but to such also as the legislature might thereafter enact. *Ib.*

3. Special Laws of 1853, approved March 29, which authorized the At. & St. L. Railroad Company to lease its road to the Grand Trunk Railway Company, provided that nothing therein contained should in any manner limit or circumscribe any power of the legislature of this State, to enact laws affecting the rights, privileges, or duties of the latter company. *Ib.*

4. Chapter 223 of Pub. Laws of 1871 is obligatory upon the Grand Trunk Railway Company. *Ib.*

GUARDIAN.

See ASSUMPSIT, 3.

HIGH WATER MARK.

See WAY, 7.

HUSBAND AND WIFE.

If a wife, in the presence of her husband, knowingly aids him in a fraudulent transfer of his real estate to her, the *prima facie* presumption is that she acted under coercion; but this presumption may be rebutted.

Warner v. *Moran*, 227.

See EQUITY, 7.

ILLEGAL PURPOSE.

See INJUNCTION, 7, 8.

ILLEGITIMATE CHILDREN.

See PAUPER, 1.

IMMODERATE DRIVING.

See LORD'S DAY.

INDICTMENT.

1. An indictment charging a register of deeds with 'misconduct in his office,' by knowingly issuing a certificate, that he had examined a certain person's title to a particular lot of land, and that he found no incumbrance thereon, when, in fact, he knew there was an incumbrance by attachment, need not particularly set out the writ of attachment and the other succeeding matters of record. *State* v. *Leach*, 58.

2. An allegation in such indictment that when said certificate was made and delivered as aforesaid, there was a valid and existing attachment for an amount specified, on said real estate named in said certificate, by virtue of a writ against the owner named in the certificate, 'all of which then and there appeared by the records of said registry of deeds,' sufficiently sets out the fact that the attachment had been recorded in said registry. *Ib.*

3. R. S., c. 51, § 36, provides that any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents which are employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred, nor more than five thousand dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally. *State* v. *G. T. R. Co. of Canada*, 145.

4. An indictment on this section, must aver that the person whose life was lost left a widow or heirs or both, as the case may be; and an averment that he 'then and there having a lawful wife and child alive' is not sufficient. *Ib.*

5. Nor is the averment 'that there is now living a widow and one child.' *Ib.*

6. And the indictment must set out the names of the persons who are to receive the forfeiture; an averment that 'their names are to the jurors unknown,' not being sufficient. *Ib.*

7. An indictment should charge an offense in the words of the statute or in language equivalent thereto. *State* v. *Hussey*, 410.

8. Thus 'unlawfully and maliciously' throwing down a gate, is not equivalent to 'wilfully and maliciously' doing it. *Ib.*

9. The remedy, by indictment, for the life of any person, in the exercise of due care and diligence, lost by the negligence or carelessness of any railroad corporation, or by that of its servants or agents while employed in its business, is limited to cases where the person injured dies immediately, and is not applicable in any case to the employees of the road. *State* v. *M. C. R. R. Co.*, 490.

See CONSTITUTIONAL LAW, 6.

INDORSER.

See PROMISSORY NOTE, 2, 3.

INFANT.

1. An infant may repudiate his contract and recover from his employer what his services were reasonably worth under all the circumstances of the case. *Vehue* v. *Pinkham*, 142.

2. Thus, in assumpsit for the recovery of such services, where it appeared that the plaintiff, contrary to orders, harnessed the defendant's colt to the defendant's wagon whereupon the bit broke, the colt became unmanageable and the wagon was injured, the jury may consider those circumstances in estimating the value of the plaintiff's services. *Ib.*

See ASSUMPSIT, 3. DESCENT, 1, 2, 3.

INFORMATION.

See PROHIBITION, 2.

INJUNCTION.

1. The administrator of an intestate estate may be enjoined from casting a cloud, by means of a fictitious sale, upon the title of property once held, but subsequently *bona fide* sold by his intestate. *Gerry* v. *Stimson*, 184.

2. When the wife of the grantor in a deed which has been delivered, receives it for the avowed purpose and with the agreement to join her husband therein, and release her right of dower in the premises, and subsequently refuses to surrender the deed or the consideration for her release, the grantee is the proper party to seek redress, although he has conveyed the premises to another. *Ib.*

3. An injunction will not be granted to stay or prevent a nuisance under R. S., c 17, unless an indictment, complaint, or action for the nuisance be pending in court. *Varney* v. *Pope*, 192.

4. An injunction will not be granted, under the general equity powers of the court, to restrain a nuisance, unless the complainant's rights have been settled in a suit at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage. *Ib.*

5. In cases of petition by 'ten taxable inhabitants' of certain *quasi* corporations for injunction, the common practice of continuing the temporary injunction from term to term until the case is ready for final hearing, unless it is sooner dissolved on motion, is not in contravention of R. S. of 1857, c. 77, § 10. *Marble* v. *McKenney*, 332.

6. And where, in such case, the docket showed the special entry, 'temporary injunction to continue to end of next term, and time of taking testimony extended to same time' followed the next term by the entry—'continued as before,' the latter entry has the same effect as the former. *Ib.*

7. Money raised for the erection of a school-house upon a lot other than the one legally designated by the municipal officers of a town, upon a proper appeal from the action of a school district, is deemed to be raised for an illegal purpose. *Ib.*

8. On a petition by 'ten taxable inhabitants' of a school district, praying that the town treasurer be enjoined from paying out money raised for the purpose of erecting a school-house upon a lot other than that legally designated by the municipal officers on appeal from the action of the district, the court will make the injunction perpetual when the only error pointed out is the omission of the notification of the school-district meeting, to state that the public and conspicuous places in which the notices were posted, were within the district, especially when such is the real fact and the notice of the meeting, at which the money was raised, so states. *Ib.*

See CONSTITUTIONAL LAW, 4.

INSURANCE,

The plaintiff chartered his vessel to sail from New York to San Francisco, thence with convenient dispatch to Callao, thence to the Chincha Islands, and there to take on a cargo of guano for Hamburgh or Rotterdam. The defendants, thereupon, caused the plaintiff to be 'insured, lost or not lost,' several sums respectively, on charter, primage, and property on board, 'at and from New York to San Francisco.' The vessel sailed in accordance with the charter, and was wrecked between New York and San Francisco, and condemned and sold. In an action upon the policy, *Held*, That the plaintiff's interest in the guano charter, commenced when his vessel left New York for San Francisco, and that the defendants were liable; and the fact that the plaintiff had, also, with the knowledge of the defendants, chartered his vessel to others from New York to San Francisco, and effected an insurance thereon with another company, constitutes no defense, in the absence of any evidence that the defendants were injuriously affected thereby. *Melcher* v. *Ocean Ins. Co.*, 77.

INTENTION.

See EVIDENCE, 21, 22, 23, 24.

INTEREST.

1. Interest is allowed on amount found due for damages and costs in actions on judgments recovered before any justice of the peace, without proof that payment had ever been demanded of the judgment debtor.

Edwards v. *Moody*, 255.

2. The owner of land taken for the location of a railroad is entitled to interest on the amount of the damages, from the time of the taking to the time of the assessment. *B. & P. R. R. Co.* v. *McComb*, 290.

See WILL, 6.

INTOXICATING LIQUOR.

Neither by the common law, nor by any statute in this State, can a person who has purchased intoxicating liquors of one not licensed to sell them, and who has paid for and received them, recover back the money paid therefor, when no element of oppression or deceit enters into the case.

Mudgett v. *Morton*, 260.

IRREPARABLE DAMAGES.

See NUISANCE, 2.

ITEM OF ACCOUNT.

See LIMITATIONS, STATUTE OF.

ITEM OF PROPERTY.

See POOR DEBTOR.

JOB.

See TRUSTEE PROCESS, 6.

JOINT STOCK ASSOCIATION.

1. Every member of an unincorporated joint-stock company is personally liable for all of its debts. *Frost* v. *Walker*, 468.

2. It is sufficient to authorize a finding that persons are members of such company, if it be proved that their names are signed to the subscription papers for its capital-stock, and that they paid, without objection, assessments for the number of shares set against their respective names, even though it be not shown by whom their names were so subscribed. *Ib.*

3. By thus contributing to the working capital, the subscribers became entitled to share in the profits of the company, and liable, as co-partners, for its debts. *Ib.*

4. It seems that there is no distinction, in respect to their liability, between a subscriber for stock and a stockholder; however this may be, an actual payment of assessments, upon shares subscribed for, will create such liability. *Ib.*

JUDICIAL DISCRETION.

See CERTIORARI, 1.

JUDGMENT.

See CORPORATION, 3, 4. DOWER, 2. ERROR. ESTOPPEL, 1, 2, 3. EVIDENCE, 3. INTEREST, 1. PLEADING, 6, 7, 8, 10.

JURISDICTION.

See COUNTY COMMISSIONERS, 1, 2, 3, 5. EQUITY, 3, 5, 9. SCHOOL DISTRICT TAX, 4.

JURY.

See CONSTITUTIONAL LAW, 1.

JUSTICE OF THE PEACE.

See INTEREST, 1.

LAND AGENT.

1. The land agent has no authority to locate roads through public lands selected for settlement, but only to 'cause such roads to be located as the public interest and the accommodation of the future settlement require.' R. S., c. 5, § 29. *Burns* v. *Annas*, 288.

2. Neither can the land agent establish such road by dedication. *Ib.*

LAND DAMAGES.

1. In estimating the damages of a land-owner, for the taking of a strip of his land across his lot for the location of a railroad, the award must be restricted to the direct injuries to the lot in question. *B. & P. R. R. Co.* v. *McComb*, 290.

2. Thus a sheriff's jury may consider the value of the land taken; and if the remainder of the lot is rendered less valuable by reason of being severed, or disfigured on account of the strip taken and the use made of it, they may allow such sum as they find the injury to be: and in determining the consequent depreciation of the lot, they may consider the use to which the strip taken is appropriated; the character, situation, present and probable use of the remainder of the lot; the distance of the owner's buildings from the location of the railroad; and any facts which the jury, from a view and the testimony, shall find injure the value of the premises by a proper and legal use of the road. *Ib.*

3. So, also, they may consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, and from smoke, so far as they severally arose from the use of the strip taken and upon it, excluding all common and indirect damages. *Ib.*

4. So, also, if they find that the real value of the remainder of the lot and of the erections thereon was actually diminished, by exposure to fire from the company's locomotives, they may assess such sum as will be a just compensation for such diminution, taking into consideration, at the same time, that by the statute if property is injured by fire communicated by a locomotive engine, the company using it is absolutely responsible for such injury. *Ib.*

5. In impanelling a sheriff's jury, summoned to assess damages for land taken for the location of a railroad, the parties are not entitled to have the names of all the jurors summoned placed separately in a box, and the jury drawn in accordance with the provisions of R. S., c. 82, § 66.
Davis v. *B. & P. R. R. Co.*, 303.

6. Nor have they the right peremptorily to challenge two jurors. *Ib.*

7. By R. S., c. 18, § 12, it is made the duty of the person presiding at the view and hearing by a jury, in the assessment of damages for land taken for a railroad, to 'certify to the court, with the verdict, the substance of any decision or instruction by him given, when any party shall request it.'
Allen v. *Androscoggin R. R. Co.*, 494.

8. When a party does not request the person presiding to certify his rulings, he thereby waives all right of exception, and cannot prove the rulings by calling, as a witness, the person who presided. *Ib.*

See Costs, 1, 2. Way, 8.

LEASE.

See G. T. R. of Canada, 2, 3.

LEVY.

See EQUITY, 7.

LIBEL.

See DIVORCE.

LICENSE.

See COMMERCIAL BROKER.

LIFE ESTATE.

See DEED, 5, 6, 7.

LIMITATIONS, STATUTE OF.

No verbal acknowledgment or promise on the part of a debtor can take the items of an account out of the operation of the statute of limitations.

Hagar v. *Springer*, 436.

See PROMISSORY NOTE, 1. WILL, 4.

LORD'S DAY.

An action will not lie to recover damages, arising from the immoderate driving of a horse during a pleasure drive on the Lord's day, for which he was hired.

Parker v. *Latner*, 528.

MAINE WESLEYAN SEMINARY AND FEMALE COLLEGE.

See DEED, 3.

MALICIOUS PROSECUTION.

See POOR DEBTOR.

MANDAMUS.

1. The writ of mandamus should expressly state the duty required of the defendant. *Hartshorn* v. *Ellsworth*, 276.

2. A mandate requiring the defendant to assess a school district tax 'according to law,' being a requirement to look beyond the writ, is erroneous. *Ib.*

3. Where, on a petition for mandamus, by the terms of the exceptions, 'if the petitioners were not entitled to have the writ as prayed for, the petition was to be dismissed, and the prayer was that the defendants should 'assess said district tax according to law, to wit, on the personal estate within the district of non-residents of the district,' and the defendants could not lawfully assess such property unless such 'owners should occupy,' as is provided in the first clause of R. S., c. 6, § 14, a mandate cannot legally issue as prayed for. *Ib.*

MECHANIC.

See ASSUMPSIT, 3.

MISCONDUCT IN OFFICE.

See EVIDENCE, 2. PISCATAQUIS F. & M. INS. CO., 4.

MISTAKE.

See ASSUMPSIT, 1.

MORTGAGE.

1. A duly recorded chattel mortgage of a livery stock, describing the horses as 'eight horses,' 'being the same now in stable No. 19, Silver street,' is sufficient as against a subsequent purchaser of two of the horses, although at the time the mortgage was executed, for some time previous and subsequent thereto, many other horses not owned by the mortgagor were constantly boarded there. *Elder* v. *Miller*, 118.

2. If the indorser of a note, secured by a mortgage containing a power of sale can disaffirm an auction sale of the premises to the assignee of the mortgage, he must do so within a reasonable time. *Patten* v. *Pearson*, 220.

3. Where a sale was made in Aug., 1859, and no disaffirmance attempted until Dec., 1861, when the indorser was sued on the note, and the property had passed to third persons, it was held too late. *Ib.*

4. To render a mortgage or pledge of personal property valid as against attaching creditors of the mortgagor or pledgor, there must be, at least, a distinct and specific condition that can be clearly stated, on performance of which the property would be released. *Fairfield B. Co.* v. *Nye*, 372.

5. By virtue of R. S., c. 81, § 42, a mortgagee or pledgee of property attached, cannot replevy it from the attaching officer, until he has given the officer 'at least forty-eight hours' written notice of the claim and the true amount thereof.' *Ib.*

See EVIDENCE, 5.

MUNICIPAL OFFICERS.

See SCHOOL DISTRICT TAX, 2, 3, 4. SELECTMEN. SCHOOL HOUSE, 5.

NEGLIGENCE.

1. R. S., c. 51, § 36, provides that any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents which are employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally. *State* v. *G. T. R. Co.*, 145.

2. The remedy, by indictment, for the life of any person, in the exercise of due care and diligence, lost by the negligence or carelessness of any railroad corporation, or by that of its servants or agents while employed in its business, is limited to cases where the person injured dies immediately, and is not applicable in any case, to the employees of the road. *State* v. *M. C. R. R. Co.*, 490.

See CASE, 1, 2, 3, 4.

NON-PREFERRED STOCK.

See RAILROAD STOCK, 7.

NONSUIT.

See PRACTICE, 2.

NOTICE.

See CLERK OF COURT, 2. FENCE, 4. MORTGAGE, 5. PROMISSORY NOTE, 2, 3. SALE, 3, 4. SCIRE-FACIAS, 2. SHERIFF'S SALE.

NUISANCE.

1. An injunction will not be granted to stay or prevent a nuisance under R. S., c. 17, unless an indictment, complaint, or action for the nuisance be pending in court. *Varney* v. *Pope*, 192.

2. An injunction will not be granted, under the general equity powers of the court, to restrain a nuisance, unless the complainant's rights have been settled in a suit at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage. *Ib.*

OFFICIAL CERTIFICATE.

See PROMISSORY NOTE, 3.

PARTNERSHIP.

The plaintiff and defendant being joint tenants of a certain parcel of land, agreed to cut the wood and timber therefrom, and to share equally the expenses and proceeds of the operation. The defendant's expenses amounted to $3,033.58, and the defendant's to $421. In their settlement, the plaintiff paid the defendant $1,727.29, a sum equal to one-half of the whole expense. *Held*, That that there was no partnership. *Millett* v. *Holt*, 169.

See JOINT STOCK ASSOCIATION.

PAUPER.

1. Under Pub. Laws of 1821, c. 122, § 2, illegitimate children followed, and had the settlement of their mother at the time of their birth.
Raymond v. *North Berwick*, 114.

2. An unemancipated, illegitimate, minor child, who lived with its mother on March 21, 1821, did not follow the new settlement thus gained by its mother, but retained the one derived from its mother at its birth. *Ib.*

3. The younger of the two towns adjoining a place not incorporated cannot furnish pauper supplies to a person living in such place, and then recover the value of them from the older adjoining town. notwithstanding the pauper's settlement was in the latter town. *Newry* v. *Gilead*, 154.

4. In an action by one town against another, to recover the value of supplies furnished a pauper, a declaration alleging that the pauper fell into distress in the plaintiff town 'on Dec. 2, 1868,' and the plaintiffs furnished the pauper with supplies from that time to Nov. 24, 1869, 'to the amount in all of $469,' may be amended by substituting 1867 for '1868.' *Ripley* v. *Hebron*, 379.

5. Where, in a pauper case, upon the issue, whether the pauper had had his home five consecutive years, between March, 1860, and December, 1867, in the plaintiff town, the question turned mainly on the facts connected with an undisputed absence of three weeks, in March, 1863, in another town, where he went and resided with one K. and of another of a few days in September, 1863, it is competent for the plaintiffs to show, that the pauper came to the witness's house in the plaintiff town and wanted to stay a spell, but that the witness declined to allow him to stay but a short time, stating to the pauper the condition of the witness's family as the reason for thus declining; and also to show that when the pauper came, he brought nothing except the clothes he had on. *Ib.*

6. *Held*, That such conversation tended to show the character of the residence and was not mere declarations. *Ib.*

7. *Held*, also, that it was competent for such witness to testify that while the pauper was thus stopping at his house in March, 1863, he heard K. propose to the pauper to go and live with him in D.,—that he would give him a home there as long as he wanted one; that the pauper replied he would think of it; that two days afterwards K. came and renewed his proposition, when the pauper said he would go, and did go the next morning. *Ib.*

8. Also *held*, that it was competent for such witnesses to testify whether or not, at the time the pauper thus left the witness's house, there was any understanding between the witness and the pauper, or any authority given by the witness to the pauper, that the latter might return to the witness's house. *Ib.*

9. But *held*, also, that it was not competent to prove the declarations of K. (who was not a witness) as to his understanding of the nature of the pauper's residence with him. *Ib.*

10. When a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period. *Ripley* v. *Hebron*, 379.

11. Nor does the law presume that he has no such intention. *Ib.*

12. But it leaves it to the jury to determine upon all the evidential circumstances and probabilities in the case, what his intention in fact was. *Ib.*

13. It is not necessary that there should be any distinct declaration of intention proved; but it may be latent in the mind of the pauper. *Ib.*

14. Where the original settlement of a pauper is admitted to have been in the defendant town, and in setting up a subsequent five years' continuous residence, between the years of 1860 and 1867, in another town, a personal absence of three weeks in March, 1863, appears, it is incumbent upon the defendants to satisfy the jury, from all the circumstances and probabilities in the case, that when he left he did not intend to abandon it as his home, but did intend to retain his connection with the town as his home during his absence, and to return to it, as such, after accomplishing the purpose of his absence. *Ib.*

PAYMENT.

See CHECK, 1. TRUSTEE PROCESS, 9.

PEREMPTORY CHALLENGE.

See LAND DAMAGES, 6.

PERJURY.

See SLANDER, 1, 2, 3.

PERSONAL LABOR.

See TRUSTEE PROCESS, 6, 7.

PISCATAQUA F. & M. INS. CO.

1. By c. 384 of the Special Laws of 1867, the charter of the Piscataqua Fire and Marine Insurance Company was repealed, and the existence of the Company terminated. *Bowker* v. *Hill*, 172.

2. By the operation of that act and of c. 46 of the R. S. (1857), all attachments in cases against that company, pending when that act took effect, were dissolved. *Ib.*

3. The trustees appointed under Special Laws of 1867, c. 384, accepting the surrender of the charter of the Piscataqua Fire and Marine Insurance Company, cannot maintain a bill in equity in their name and that of the corporation in behalf of the creditors or stockholders of the corporation as such.
Pis. F. & M. Ins. Co. v. *Hill*, 178.

4. In case of alleged misconduct of the corporation or its officers, creditors or stockholders must pursue their remedy in their own names. *Ib.*

PLEA OF JUSTIFICATION.

See EVIDENCE, 9.

PLEADING.

1. Under a general demurrer no advantage can be taken of purely formal defects in pleading. *Neal* v. *Hanson*, 84.

2. Thus, in trover for a promissory note signed by the plaintiff and made payable by its terms to the defendant, the objection that the declaration does not allege that the plaintiff was possessed of the note as of his own proper goods and chattels; or that it does not allege the value of the note, being purely formal, cannot be taken advantage of by general demurrer. *Ib.*

3. An account payable to one who has since gone into bankruptcy, may be sued in the bankrupt's name, notwithstanding his assignee sold it to another, for whose benefit the action was brought. *Foster* v. *Wylie*, 109.

4. A judgment in an action of trover against the defendants' warrantee, rendered upon a trial involving only the defendants' title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendants themselves, involving the same issue, and to be supported by the same testimony.
Atkinson v. *White*, 396.

5. Thus, the owner of a lot of logs conveyed them to the defendants by a mortgage bill of sale, and subsequently, by an absolute bill of sale, to the plaintiff's intestate. Still later, the defendants sold a portion of the logs and warranted the title to one Conner, who converted them; whereupon the plaintiff sued him in trover for their value. At the trial, the only question tried was the strength of the defendants' title under the mortgage as against that of the plaintiff's intestate under the absolute bill, and the defendant recovered judgment. In this action, involving precisely the same question, and depending upon the same testimony; *Held*, That the judgment in favor of Conner was a bar. *Ib.*

6. When a special demurrer to a replication, setting out all the facts necessary to maintain the plaintiff's case, is overruled and the replication adjudged good, final judgment follows. *State* v. *Peck*, 498.

7. But under R. S., c. 82, § 19, judgment is not rendered on demurrer until the term following the certificate of the decision. *Ib.*

8. Nor then, if the costs are paid and new pleadings are filed on the second day of the term. *Ib.*

9. If the costs are not paid and new pleadings filed on the second day of the term succeeding the decision, the right to pay and file them is waived. *Ib.*

10. When the replication to a plea of performance of the conditions of a bond for the performance of covenants and agreements, sets forth the precise amount of money received by the principal and unaccounted for, and is adjudged good on special demurrer, the sum named is a fact admitted by the demurrer, and judgment must go for that amount. *Ib.*

11. A plea of *puis darrein continuance* may be filed after issue joined, but not after that issue has been decided. *Ib.*

See PROHIBITION, 1. RECOGNIZANCE, 2, 3. SLANDER, 1, 2, 3.

PLEASURE DRIVE.

See LORD'S DAY.

PLEDGE.

See MORTGAGE, 4, 5.

POOR DEBTOR.

An action for damages for a malicious prosecution, prior to rendition of judgment thereon, is not an item of property within the meaning of R. S., c. 113, § 31, which should be appraised and set off to the creditor as provided in said section. *Hopkins* v. *Fogler*, 266.

See CERTIORARI, 1, 2.

PORTLAND CITY CHARTER.

See WAY, 1.

POSTHUMOUS CHILD.

See DESCENT, 2.

PRACTICE.

1. A report of referees made under a statute submission stipulating that the report shall be made to the January term, 1871, cannot be made to and accepted at the January term, 1872, although the parties, on Jan. 26, 1871, indorsed upon the submission that 'in case the court should adjourn before the referees should make up their report, when it is made up, it is to be entered on the docket at the term at which it is made returnable.' *Berry* v. *Sands*, 99.

2. In an action by a railroad corporation against a town to recover back money paid for taxes assessed upon wood, upon the ground that its place of business was not in the defendant town, the *onus* is upon the plaintiffs to show where it was. *P. S. & P. R. R. Co.* v. *Saco*, 196.

3. Such an action pending before the full court upon an agreed statement will fail unless it appear that its place of business was not in the defendant town. *Ib.*

4. On motion by the petitioners to set aside the verdict of a sheriff's jury for damages for land taken for the location of a railroad, the presiding judge declined to hear witnesses known to the petitioners and obtainable at the trial before the jury, or which by ordinary diligence might have been known to and had by them at the trial; *Held*, to be no ground for exceptions. *B. & P. R. R. Co.* v. *McComb*, 290.

5. This court will not set aside the verdict of a sheriff's jury upon the ground of excessive damages, when the chief evidence relating thereto was derived by the jury from a view of the premises. *Ib.*

6. The owner of land taken for the location of a railroad is entitled to interest on the amount of the damages, from the time of the taking to the time of the assessment. *Ib.*

7. In impanelling a sheriff's jury, summoned to assess damages for land taken for the location of a railroad, the parties are not entitled to have the names of all the jurors summoned placed separately in a box, and the jury drawn in accordance with the provisions of R. S., c. 82, § 66. *Davis* v. *B. & P. R. R. Co.*, 303.

8. Nor have they the right peremptorily to challenge two jurors. *Ib.*

9. In an action founded on contract against a sole defendant, the plaintiff cannot, under R. S., c. 82, § 11, summon in, as additional defendants, joint promisors unless he intends to prosecute his action against the party originally sued, or in case of his death, then against his personal representative. *Duly* v. *Hogan*, 351.

10. If the original party sued die before the joint promisors are summoned in, the plaintiff may, under R. S., c. 82, § 23, pursue his remedy either against the survivors, or the estate of the deceased, or against both, in separate suits. *Ib.*

11. Prior to the passage of Pub. Laws of 1870, c. 128, there could be no summoning in any surviving joint promisors as additional defendants, when the only original defendant was the personal representative of a deceased party. *Ib.*

12. Since the passage of that statute, re-enacted in R. S., c. 87, § 10, the summoning in of survivors, with the personal representative of a deceased joint promisors is not authorized, except in cases where, if the plaintiff prevail, a joint execution can issue without violating other statute provisions.
Duly v. *Hogan*, 351.

13. A joint execution cannot issue without contravening R. S., c. 66, §§ 16, 17, when the estate of the deceased defendant is represented insolvent. *Ib.*

14. Section 21, c. 77, R. S., providing that exceptions deemed frivolous and intended for delay, may be transmitted to the chief justice and argued in writing as therein required, relates exclusively to exceptions in the supreme judicial court.
Thorn v. *Mosher*, 463.

15. If a statement of a fact, collateral to the issue, be drawn from a witness upon cross-examination, the party eliciting the testimony cannot contradict it.
Bell v. *Woodman*, 465.

16. When a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period. *Ripley* v. *Hebron*, 379.

17. Nor does the law presume that he has no such intention. *Ib.*

18. But it leaves it to the jury to determine upon all the evidential circumstances and probabilities in the case, what his intention in fact was. *Ib.*

19. It is not necessary that there should be any distinct declaration of intention proved; but it may be latent in the mind of the pauper. *Ib.*

20. Where the original settlement of a pauper is admitted to have been in the defendant town, and in setting up a subsequent five years' continuous residence, between the years of 1860 and 1867, in another town, a personal absence of three weeks in March, 1863, appears, it is incumbent upon the defendants to satisfy the jury, from all the circumstances and probabilities in the case, that when he left he did not intend to abandon it as his home, but did intend to retain his connection with the town as his home during his absence, and to return to it, as such, after accomplishing the purpose of his absence. *Ib.*

21. Exceptions will not be sustained for declining to give certain requested instructions as matters of law, when in effect they would decide questions properly belonging to the jury. *Ib.*

22. A clerk of court has, *ex-officio*, no right, without an express order of court to that effect, to complete, alter, or amend the record kept by a predecessor in that office, whose term has expired. *Rockland W. P. Co.* v. *Pillsbury*, 425.

23. If there be a failure to make record of a judgment, the party desiring to have it recorded should present a petition to the court to have this done, and give due notice to the adverse party. *Ib.*

24. By R. S., c. 18, § 12, it is made the duty of the person presiding at the view and hearing by a jury, in the assessment of damages for land taken for a railroad, to 'certify to the court, with the verdict, the substance of any decision or instruction by him given, when any party shall request it.'
Allen v. *Androscoggin R. R. Co.*, 494.

25. When a party does not request the person presiding to certify his rulings, he thereby waives all right of exception, and cannot prove the rulings by calling, as a witness, the person who presided. *Ib.*

26. The phrase 'former suit,' as used in R. S., c. 82, § 111, applies to a suit in this State and not to one in another jurisdiction. *Folan* v. *Lary*, 545.

27. Thus, where, in the State of New Hampshire, the defendant had on nonsuit recovered judgment for costs against the plaintiff, in an action by the latter against the former, and then the plaintiff brought this suit for the same cause of action; *Held*, That proceedings would not be stayed until the costs in the former suit were paid. *Ib.*

See AMENDMENT. BOND, 1, 2. CASE, 2. COMMERCIAL BROKER. COUNTY COMMISSIONERS, 3. EVIDENCE, 9. MANDAMUS. PLEADING, 5, 6, 7, 8, 9, 10, 11. PROHIBITION, 1, 2. RAILROAD, 3. RECOGNIZANCE, 3. TRUSTEE PROCESS.

PREDECESSOR.

See CLERK OF COURT, 1.

PRESCRIPTION.

See EVIDENCE, 13. FENCE, 1, 2.

PROBATE LAW.

See EXECUTOR, &c., 1, 2.

PROHIBITION.

1. By virtue of Pub. Laws of 1872, c. 8, § 3, the previous sections thereof (changing the place of holding the supreme judicial court from Norridgewock to Skowhegan, and authorizing the county commissioners to erect a court-house in the latter place), were to be void, unless the town or citizens of Skowhegan should, on or before March 1, 1872, without expense to the county, provide suitable room and other accommodations for the court and officers, to the acceptance of a majority of the county commissioners; and secure to the county the use thereof for the purposes, and during the time therein specified, and the conveyance of a suitable site in Skowhegan for the county buildings. By § 4, when such room and accommodations had been provided, the county commissioners should cause the records in all the county offices, with the records and files of all the courts, to be removed to the places prepared in Skowhegan, and cause notice of the facts to be published as therein directed. On petition praying that a writ of prohibition may issue against the county

commissioners, prohibiting them from ordering such removal or publishing such notice; *Held* (1) That the county attorney had no right to institute this process in his official capacity, or in behalf of the county; and, (2) That the town of Skowhegan should have been made a party.

Walton v. *Greenwood*, 356.

2. Also *held*, That exceptions do not lie to revise the decision of the presiding judge upon the question whether the facts alleged in the information as the foundation for the writ, are substantialy true as alleged. *Ib.*

PROMISSORY NOTE.

1. A written promise to pay the plaintiff insurance company, at a time specified 'the sum of two hundred and twenty-five dollars, and such other sums as may arise as additional premium' on an insurance policy, is not a promissory note within the meaning of R. S., c. 81, § 83, which excepts from the six years' limitations 'actions on promissory notes signed in the presence of an attesting witness.' *Lime Rock F. & M. Ins. Co.* v. *Hewett*, 407.

2. A notice to an indorser merely informing him of the non-payment of the note and demanding payment of him, without stating in substance that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is insufficient to charge the indorser. *Page* v. *Gilbert*, 485.

3. A statement in the official certificate of the notary that he 'delivered notice of the non-payment of said note to' the indorser, naming him, 'demanding payment of him,' is insufficient to charge the indorser. *Ib.*

See ASSIGNMENT, 2.

PUBLIC LANDS.

See LAND AGENT, 1.

PUBLIC USE.

See CONSTITUTIONAL LAW, 5.

RAILROAD

1. By the requirements of R. S., c. 51, § 20, legal and sufficient fences are to be made on each side of land taken for a railroad, where it passes through inclosed or improved land or woodlots belonging to a farm, before a construction of the road is commenced, and they are to be kept in good repair by the corporation. *Gilman* v. *E. & N. A. R. Co.*, 235.

2. An agreement between a railroad corporation and an adjoining proprietor not to require them to fence but one side of their road across his land until notified by him, will not relieve them from any liability they may thereby incur to any person not cognizant of or assenting to it. *Ib.*

3. If in an action against a railroad company for the value of the plaintiff's ox killed by their train, the defendants would have their exceptions sustained upon the ground that the ruling complained of is in conflict with the well-established principle that a railroad company is not bound to fence against cattle wrongfully upon the adjoining close, it must appear from the exceptions that there was testimony tending to show that the plaintiff's ox was wrongfully there. *Gilman* v. *E. & N. A. R. Co.* 235.

4. The plaintiff's lot and those adjoining on the north and south, were crossed by the defendants' road, and bounded on the east by a river, the division fence between so much of the plaintiff's and the south lot as lay between the railroad and river (being the plaintiff's pasture) being defective. The railroad fence extended on both sides of the road across the plaintiff's lot; that on the river side of the road, across the north lot setting several feet further from the track did not form a continuous line with that across the plaintiff's; while pursuant to an agreement between the defendants and the proprietor thereof, there was no railroad fence on the south lot on the river side of the road. The plaintiff's pasture was also fenced on the river bank above high-water mark. An ox of the plaintiff escaped from his owner's pasture through the gap of the defendants' fence, occasioned by want of continuity upon the track, was driven thence by the defendants' employee upon the north lot, whence, during the next six hours, the ox wandered along the river bank across his owner's land outside of its inclosure, to and upon the south lot, and thence upon the track, where he was killed by the defendants' locomotive while being managed with proper care on their part. *Held*, That the gap in the defendants' fence on the plaintiff's land through which the animal escaped from his pasture was the efficient procuring cause of the accident, and that the maxim '*causa proxima*,' etc., had no proper application to the case. *Ib.*

5. Also *held*, that the omission of the plaintiff to erect a sufficient fence between his pasture and the south lot cannot be imputed to him as contributory negligence. *Ib.*

See Costs, 1, 2.

RAILROAD STOCK.

1. The defendant, with numerous others, signed a subscription of the following tenor: 'We, the undersigned, agree and bind ourselves to take the amount of shares set against our respective names, in the stock of the Belfast & Moosehead Lake Railway Company agreeably to the foregoing conditions.' *Held*, That the simple agreement to 'take' imposed no personal obligation to pay for the shares. *Belfast & M. L. R. R. Co.* v. *Moore*, 561.

2. Also *held*, That the 'conditions' which contained no words of promise, did not change the force of such agreement, in this particular. *Ib.*

3. And the construction of such an agreement is not affected by a provision in the charter purporting to render the subscriber liable for the balance remaining due after a sale of his shares. *Ib.*

4. Neither does c. 206 of the Special Laws of 1869 affect the contract made before its enactment, even though viewed as an amendment of the charter. *Ib.*

5. Where the only mode provided in the charter of a railroad, by which towns interested therein may aid in its construction, is a subscription for its stock, an article in a warrant for a town-meeting 'to see if the town will loan its credit to aid in the construction of the' railroad named, gives reasonable notice, that a proposition to subscribe for stock will be acted upon, and will authorize such action. *Belfast & M. L. R. R. Co.* v. *Brooks*, 568.

6. Where, under such an article, the town authorized its selectmen to subscribe, in behalf of the town, for stock in the railroad named to the amount of sum specified, without designating the kind of stock, and the selectmen subscribe for the 'non-preferred stock,' the town is bound by the selection made. *Ib.*

7. Where the persons who subscribed for the stock, signed the subscription as selectmen, therein referring to the vote under which they acted, and were the same persons who called the town-meeting at which the vote was passed, it will be presumed, in the absence of any evidence, that any other persons had been elected or had acted as selectmen, that they were the selectmen. *Ib.*

8. The by-laws of a railroad company provided that no assessment shall be made upon any shares until the full amount of the estimated cost of the road shall first have been subscribed by responsible parties. It appeared that the estimated cost was subscribed; and the directors, acting in good faith, decided that the estimated cost had been subscribed by responsible parties, and thereupon proceeded to make the assessments; *Held*, That the assessments were valid; and that they could not be rendered invalid by showing, as matter of fact, that some of the subscribers were not responsible. *Ib.*

See CONDITION, 1, 2.

RAILROAD TICKETS.

See G. T. R. OF CANADA, 4.

REAL ACTION.

A joint real action cannot be maintained when one of the plaintiffs is estopped by his deed to set up the title. *Read* v. *Whittemore*, 481.

See DEED, 7.

REASONABLE CONDITION

See TELEGRAPH, 1.

REASONABLE TIME.

See ASSUMPSIT, 2. MORTGAGE, 2, 3.

RECEIPT.

See ATTACHMENT, 2.

RECEIPTOR.

The plaintiff, as an officer, having on July 13th attached a debtor's personal property, took from the present defendant an alternative receipt to pay a certain sum or re-deliver the goods attached on demand, whereupon the goods went back into the debtor's possession. On Sept. 2d, the debtor filed his petition in bankruptcy, and on the succeeding 27th was adjudged a bankrupt. In an action on the receipt in the name of the officer for the benefit of the assignee of the debtor, *Held*, That the attachment was dissolved by the taking of the receipt. *Mitchell* v. *Gooch*, 110.

RECOGNIZANCE.

1. Section 24, c. 33 of Pub. Laws of 1858, which provides that no surety in any recognizance 'taken by virtue of the provisions of this act,' shall be discharged from his liability therein by a surrender of his principal in court after he has been defaulted upon his recognizance, applies to those recognizances only mentioned in the preceding clause of the section; and does not apply to recognizances taken in the supreme judicial court 'in proceedings under this act,' and in conformity with Pub. Laws of 1867, c. 130, § 6, which latter act is 'additional to, and amendatory of' the former. *State* v. *Crowley*, 103.

2. When, from the tenor of a recognizance in a criminal prosecution it can be sufficiently understood 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, an action upon the recognizance cannot be defeated upon the ground that it contains conditions additional to those authorized by the statute. *Ib.*

3. Thus, in a recognizance taken in the supreme judicial court, under Pub. Laws of 1867, c. 130, § 6, the condition provided not only that the party respondent shall appear and answer to the complaint at the court designated, but also that he 'shall abide and perform the order and judgment of the court that may be rendered therein, and shall not depart without license;' *Held*, that the recognizance is sufficient, and that the extra-statutory conditions may be rejected as surplusage. *Ib.*

RECORD.

See CLERK OF COURT, 1, 2.

REFEREES.

1. If a submission contain no provision in relation to the rules of evidence that shall govern the referees, they are not restricted to the rules of the common law, but may receive the statements of parties without requiring them to be first sworn. *Sanborn* v. *Paul*, 325.
2. To an action on a common-law award based upon the breach of a written contract, it is no defense that the contract before the referees was not identified so long as they had the right one. *Ib.*

See ERROR. ARBITRATION, &c. PRACTICE, 1.

REGISTER OF DEEDS.

1. 'Misconduct in his office,' as used in R. S. of 1857, c. 7, § 15, is not limited to such acts as the law requires or expressly authorizes a register of deeds to perform *State* v. *Leach*, 58.
2. Thus, where a register of deeds, over his official signature, knowingly, purposely, and designedly, but neither corruptly nor with intent to defraud, made and delivered to another a certificate that he had examined the title of an individual therein named to a particular lot of land, and found no incumbrance on the same whatever,—when the register then well knew that the registry contained the record of an incumbrance by an attachment, and that the certificate was false,—he was *held* to be guilty of 'misconduct in his office,' although it was no part of his official duty to make such examination, or issue such certificate. *Ib.*
3. In such case, the fact that the certificate filed by the officer in the registry of deeds, and the record thereof, mention the middle initial letter of the attaching creditor as 'W.' instead of 'M.,' as in the writ will not exonerate the register. *Ib.*

REGISTRATION OF DEED.

See DEED, 2.

REGULAR SESSION.

See COUNTY COMMISSIONERS, 4.

RELEASE.

See SCIRE-FACIAS, 2.

REPAIRS.

See CONTRACT, 3, 4.

REPLEVIN.

1. By virtue of R. S., c. 81, § 42, a mortgagee or pledgee of property attached, cannot replevy it from the attaching officer, until he has given the officer 'at least forty-eight hours' written notice of the claim and the true amount thereof.'
Fairfield B. Co. v. *Nye*, 372.

RESCISSION.

See ASSUMPSIT, 5, 6.

REVIEW.

1 The supreme judicial court, held by one justice, may grant a review of a judgment rendered in the superior court, upon a report of referees in an action referred to them by rule of the latter court, although no other matters in dispute between the parties were included in the rule. *Gooding* v. *Baker*, 52.

2. Where a debtor has paid certain items of his creditor's account, and the creditor subsequently takes judgment for the full amount of the original account, the debtor cannot recover back the amount thus paid and wrongfully included in the judgment, his remedy being review. *Hagar* v. *Springer*, 436.

RIPARIAN PROPRIETOR.

See WAY, 7.

SALE.

1. The plaintiffs, merchants in Boston, through a broker, on July 5th, sold for cash a lot of flour which they shipped to the vendees in Portland two days after, and on the 8th July forwarded a bill with 'terms cash' printed thereon. On the 10th July, one of the plaintiffs went to Portland, and ascertaining the vendees had failed, and that the flour had been attached, replevied it from the attaching officer. *Held*, that by the *lex loci*, the sale was upon the condition of payment on cash upon delivery; and that the action was maintainable without previous demand. *Stone* v. *Perry*, 48.

2. A husband, having purchased some neat stock with money lent him by his wife for the purpose, and put it upon a farm carried on by him and on which she resided with him, thereupon, for the purpose of repaying her for the money conveyed to her the stock by an absolute bill of sale which he delivered to her and which she ever after retained. No other delivery of the stock was made, and it remained and was used on the farm as before. Three months thereafter, the defendant, as an officer, attached some of the stock on a writ against the husband. In replevin by the wife, *Held*, That there was no sufficient delivery of the stock from the husband to the wife.
McKee v. *Garcelon*, 165.

3. Also, held, that notice of the sale to the officer holding the writ, before service, uncommunicated to the attaching creditor is not notice to the latter. *Ib.*

4. The sale, by the master, of such parts of a vessel as belong to part-owners who were not, but might have been, notified by telegraph in season to act in the premises before the sale, is void. *Miller* v. *Thompson*, 322.

5. Thus a vessel went ashore on one of the 'Wolves' in the Province of New Brunswick, on the morning of July 6, and the master, leaving her in charge of the mate, arrived at noon of the same day in Eastport. Between Eastport and New York there was constant telegraphic communication, and a telegram sent by the master on his arrival in Eastport, to the plaintiffs resident in New York, would, in the usual course of business, have received an answer several hours before the sale, which took place in the afternoon of the next day. *Held*, that the sale was void. *Ib.*

6. On Nov. 13, 1869, A. contracted with the plaintiff bridge company, to furnish materials and build two granite piers of Hallowell granite, according to certain specifications, for fourteen dollars per cubic yard, five hundred dollars to be paid down, and five hundred dollars monthly, until the piers shall be completed and accepted, when the balance is to be paid, and all to be completed before the following spring freshets. Thereupon A. procured the blocks of granite, hauled them upon land leased by him near the contemplated location of the bridge, and commenced dressing and fashioning them. The plaintiffs duly paid the first four installments, and before the next one became due, and before any of the granite was placed in the piers, it was attached by A.'s creditor. In replevin by the bridge company, *Held*, That the plaintiffs acquired no title by virtue of the contract and the payments made, or any rights or interest in the granite as against the attaching creditor. *Fairfield B. Co.* v. *Nye*, 372.

7. Also *held*, That the bridge company could not hold the stone as against the attaching creditor by virtue of an absolute bill of sale thereof from A. to the company, the consideration of which was the four payments made in accordance with the terms of the original contract. *Ib.*

8. As between a vendee of a quantity of granite and an attaching creditor of the vendor, an actual or symbolical delivery is necessary. *Ib.*

See COMMISSION MERCHANT. CONTRACT, 3, 4, 5. SHERIFF'S SALE.

SCHOOL DISTRICT.

When a meeting of a school district has been legally called, notified and held for the purpose of locating a school-house, the clerk thereof cannot so destroy the effect of the action of the district as to prevent an appeal therefrom, by refusing to record the application, warrant and return thereon, for the next meeting, so long as clear proof of the facts can be made *aliunde*. *Marble* v. *McKenney*, 322.

See INJUNCTION, 7, 8. SCHOOL DISTRICT TAX.

SCHOOL DISTRICT TAX.

1. By virtue of Pub. Laws of 1869, c. 42, § 1 (R. S., c. 11, § 44), when a school district votes to raise money for any legal purpose, not only residents are to be assessed as heretofore, but also persons who at the time of raising said money own therein the class of property mentioned in the first clause of R. S., c. 6, § 14, are liable to be assessed therefor.
Hartshorn v. *Ellsworth*, 276.

2. Money raised for the erection of a school-house upon a lot other than the one legally designated by the municipal officers of a town, upon a proper appeal from the action of a school district, is deemed to be raised for an illegal purpose. *Marble* v. *McKenney*, 332.

3. The municipal officers of a town have no authority to 'decide where a school-house shall be placed,' until 'more than one third of the voters present and voting' at a district meeting, legally called for the purpose, shall have objected to the place voted by the majority. *Goodwin* v. *Nye*, 402.

4. The simple adjournment for one month of a district meeting, called for the purpose of locating a school-house, lays no foundation for the jurisdiction of the municipal officers in the premises. *Ib.*

See MANDAMUS.

SCHOOL-HOUSE.

1. The municipal officers of a town have no authority to decide where a school-house shall be placed,' until 'more than one-third of the voters present and voting' at a district meeting, legally called for the purpose, shall have objected to the place voted by the majority. *Goodwin* v. *Nye*, 402.

2. The simple adjournment for one month of a district meeting, called for the purpose of locating a school-house, lays no foundation for the jurisdiction of the municipal officers in the premises. *Ib.*

3. The phrase 'location of the lot' as used in R. S., c. 11, § 34, refers to the laying out of a school-house lot mentioned in § 33, and not to 'where the school-house shall be placed' mentioned in § 32. *Jordan* v. *School Dist.* 8 *in Cape Elizabeth*, 540.

4. Under R. S., c. 11, § 34, a jury has no authority to designate the place on which the school-house shall stand, but to fix the boundaries and price of the lot. *Ib.*

5. When the location has been legally designated, by the municipal officers, upon the land of a certain person, a jury, summoned under R. S., c. 11, § 34, on petition of the owner, cannot change the location to the land of another or to that of the district. *Ib.*

See INJUNCTION, 7.

SCIRE-FACIAS.

1. If an alleged trustee does not disclose in the original action, he is liable to costs on *scire facias*, although the attachment is dissolved before judgment is recovered in the original action. *Bowker* v. *Hill*, 172.

2. The *bona fide* assignee of a chose in action will, in general, be protected against the release of the nominal plaintiff, executed after notice to the defendant of the assignment; but where the payee of a negotiable promissory note fraudulently indorsed it before maturity, and without value to the plaintiff, for the purpose of excluding any inquiry into the fraudulent inception or want of consideration of the note, and by fraudulent assertions and devices concealed the true relations of the parties—in an action of *scire-facias* to obtain an *alias* execution upon the judgment recovered upon such note in favor of the indorsee against the maker; *Held*, That the court would not set aside a release from the judgment creditor to the defendant, but let it have its legitimate effect. *Atkinson* v. *Runnells*, 440.

See TRUSTEE PROCESS, 10, 12, 13.

SELECTMEN.

1. The failure of the selectmen to examine the accounts of a town treasurer, as directed by R. S., c. 6, § 152, will not affect the liability of the sureties upon his bond. *Farmington* v. *Stanley*, 472.

2. Nor will a surety be released if the selectmen, failing to detect an error in addition certify the treasurer's account to be correct, when, in fact, there is a deficit; even if this certificate be made known to the surety soon after its entry upon the treasurer's books, and while the treasurer has attachable assets enough to cover the deficit, though he subsequently dies insolvent. *Ib.*

See CERTIORARI, 3, 4. RAILROAD STOCK, 6, 7. SKOWHEGAN, 6. TOWN MEETING, 3, 4.

SHERIFF'S DEED.

See DEED, 2.

SHERIFF'S JURY.

See LAND DAMAGES, 2, 5. PRACTICE, 4, 5, 6, 7, 8.

SHERIFF'S SALE.

If an officer sell on execution the personal property of the execution debtor, at an adjourned sale, without having posted up public notice of the time and place of such sale, forty-eight hours prior thereto, in two or more public places in the town or place of sale, as required by R. S., c. 84, §§ 4 and 5, the sale will be void and the officer a trespasser *ab initio*. *Hayes* v. *Butzell*, 205.

SHIPPING.

1. The sale, by the master, of such parts of a vessel as belong to part-owners who were not, but might have been, notified by telegraph in season to act in the premises before the sale, is void. *Miller* v. *Thompson*, 322.

2. Thus a vessel went ashore on one of the 'Wolves,' in the Province of New Brunswick, on the morning of July 6, and the master, leaving her in charge of the mate, arrived at noon of the same day in Eastport. Between Eastport and New York there was constant telegraphic communication, and a telegram sent by the master on his arrival in Eastport, to the plaintiffs resident in New York, would, in the usual course of business, have received an answer several hours before the sale, which took place in the afternoon of the next day. *Held*, that the sale was void. *Ib.*

See INSURANCE.

SKOWHEGAN,—SHIRE TOWN.

1. By virtue of Pub. Laws of 1872, c. 8, § 3, the previous sections thereof (changing the place of holding the supreme judicial court from Norridgewock to Skowhegan, and authorizing the county commissioners to erect a court-house in the latter place), were to be void, unless the town or citizens of Skowhegan should, on or before March 1, 1872, without expense to the county, provide suitable room and other accommodations for the court and officers, to the acceptance of a majority of the county commissioners; and secure to the county the use thereof for the purposes, and during the time therein specified, and the conveyance of a suitable site in Skowhegan for the county buildings. By § 4, when such room and accommodations had been provided, the county commissioners should cause the records in all the county offices, with the records and files of all the courts, to be removed to the places prepared in Skowhegan, and cause notice of the facts to be published as therein directed. On petition praying that a writ of prohibition may issue against the county commissioners, prohibiting them from ordering such removal or publishing such notice; *Held*, (1) That the county attorney had no right to institute this process in his official capacity, or in behalf of the county; and, (2) That the town of Skowhegan should have been made a party.
Walton v. *Greenwood*, 356.

2. Also *held*, That exceptions do not lie to revise the decision of the presiding judge upon the question whether the facts alleged in the information as the foundation for the writ, are substantially true as alleged. *Ib.*

3. Also *held*, That the act is not unconstitutional for the reason that by the provisions of § 3, the previous sections were to be void, unless the town or citizens of Skowhegan should perform the conditions therein mentioned. *Ib.*

4. Also *held*, That, in the absence of proof of fraudulent connivance, the judgment of the county commissioners, of the suitableness of the accommodations furnished, and of the sufficiency of the securities given was conclusive. *Ib.*

5. Also *held*, That the conditions provided in § 3 did not require the town or its citizens to furnish a jail. *Ib.*

6. Also *held*, That the town of Skowhegan had authority under the act to hire the apartments to be leased to the county, and through their selectmen specially authorized by vote to lease them for the purposes indicated in the act. *Ib.*

7. Also *held*, That a bond of 'the town of Skowhegan, and the inhabitants thereof,' to the county and the county commissioners of the county, executed in behalf of the town by the selectmen in their official capacity, and acting also as a committee specially authorized therefor, agreeing 'to convey to said county, in such form and at such time within five years of this date as they may require, a suitable site for county buildings in said Skowhegan . . . to the acceptance of the county commissioners of said county,' is a sufficient obligation to secure the conveyance of a suitable site for the county buildings, when a majority of the county commissioners shall see fit to exercise the power conferred in § 2. *Ib.*

8. Also *held*, That the legislature did not intend to make the selection of a site on or before March 1, 1872, mentioned in § 2, an indispensable prerequisite to the taking effect of the act. *Ib.*

SLANDER.

1. In an action of slander, where the words 'you swore to a lie, and I can prove it,' are relied on as imputing to the plaintiff the crime of perjury, there must be an averment in the declaration that the words were spoken with reference to some proceeding before some specified court, tribunal, or officer created by law, or in relation to some specified matter or thing where an oath is authorized by law; and the allegation must be supported by proof or the action is not maintainable. *Small* v. *Clewley*, 262.

2. In such case the general averment, that the defendant intended thereby to charge the plaintiff with the crime of perjury is not sufficient. *Ib.*

3. An allegation 'you have committed the crime of perjury,' when supported by proof will sustain an action of slander. *Ib.*

SOLDIER.

None of 'the soldiers who enlisted or were drafted and went any time during the war' are entitled to any of the surplus reimbursed by the State, above the amount paid out by the town in which they resided, unless they represented their town in the army.

Pearson v. *Hamlin's Grant Plantation*, 157.

See EVIDENCE, 10, 11, 12.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATION.

See LIMITATIONS, STATUTE OF.

STATUTES.

See CONSTITUTIONAL LAW, 1, 2, 6. CORPORATION, 1, 3, 4. COSTS, 1. CO. COMMISSIONERS, 1, 4. DEED, 1, 2, 3, 5. DESCENT, 1, 2, 3. EQUITY, 1, 3. G. T. R. OF CANADA, 3, 4. INDICTMENT, 3, 7, 8, 9. INJUNCTION, 3, 5. LAND AGENT, 1. LAND DAMAGES, 5, 6, 7. LIMITATIONS, STATUTE OF. MANDAMUS, 3. MORTGAGE, 5. NEGLIGENCE, 1, 2. NUISANCE. PAUPER, 1, 2, 3. PIS. F. & M. INS. CO., 1, 2, 3. PLEADING, 7. POOR DEBTOR. PRACTICE, 7, 9, 10, 11, 12, 13, 14, 24, 26. PROHIBITION, 1. PROMISSORY NOTE, 1. RAILROAD, 1. RAILROAD STOCK, 4. RECOGNIZANCE, 1, 3. REGISTER OF DEEDS, 1, 2. REPLEVIN. SCHOOL DISTRICT TAX, 1. SCHOOL HOUSE, 3, 4, 5. SELECTMEN, 1. SKOWHEGAN, 1, 3, 5, 7, 8. SUPERIOR COURT, 4, 5, 6. TAX, 1. TIME. TRUSTEE PROCESS, 3, 6.

STATUTES CITED, EXPOUNDED, &c.

ENGLISH STATUTES.

18 Eliz., c. 14,	Amendment,	87

CONSTITUTION OF THE UNITED STATES.

Art. XIV, § 1,	Civil Rights,	508
Art. IV, § 1,	Judicial Records,	548

STATUTES OF THE UNITED STATES.

1863, c. 75, § 13,	Commutation,	122
c. 75, § 13,	Commutation,	159
1864, c. 173, §§ 73, 79,	Commercial Broker,	341

CONSTITUTION OF MAINE.

Art. I, § 6,	Civil Rights,	509
Art. I, § 7,	Selecting Jurors,	508, 509
Art. I, § 20,	Jury Trial,	37, 43
Art. IX, § 5,	Impeachment,	67
Art. II,	Amendment. Equalization,	158

STATUTES OF THE STATE.—REVISED STATUTES.

1841,	c. 93, § 1,	Descent,	162
	c. 114, § 4,	Judgment,	257
	c. 115, § 23,	Proceedings in Court,	353
	c. 115, § 23,	" "	257, 258
	c. 120, §§ 19, 20,	Administrators, &c.,	353
	c. 123,	Review,	53
	c. 146, §§ 1, 25,	Limitations,	257
1857,	c. 6, §§ 2, 3, 4, 10, 11,	Tax,	198, 199, 200
	c. 6, § 135,	Town Treasurer,	475
	c. 7, § 15,	Register of Deeds,	66
	c. 11, §§ 27, 29, 39,	School-house,	280, 334, 335
	c. 18, §§ 22, 23, 30,	Way,	289, 537, 538
	c. 22, §§ 2, 5, 11, 13,	Fence,	557, 559, 560
	c. 24, § 22,	Pauper,	155
	c. 46, §§ 24, 25, 26,	Corporations,	596, 597, 600
	c. 48, § 9,	"	596
	c. 51, § 23,	Railroad,	244
	c. 75, § 1,	Descent,	162
	c. 76, § 33,	Sheriff's Deed,	185
	c. 77, § 10,	S. J. C.,	336
	c. 79, §§ 2, 8, 11,	Clerk of Court,	429
	c. 81, § 31,	Attachment,	249
	c. 82, §§ 23, 101, 116,	Proceedings in Court,	252, 258, 533
	c. 83, § 20,	Justice of the Peace,	258
	c. 86, § 7,	Trustee Process,	173
	c. 87, § 10,	Administrator, &c.,	353
	c. 89, § 1,	Review,	53
	c. 108, §§ 1, 3, 9,	Submission,	100, 101, 102
	c. 111, § 5,	Statute of Frauds,	273
	c. 133, §§ 19, 20,	Recognizance,	106, 107, 108
1871,	c. 5, § 29,	Public Lands,	289
	c. 6, § 14,	Tax,	282
	c. 6, § 152.	Town Treasurer,	475
	c. 11, §§ 24, 32, 33,	School House,	405
	c. 11, §§ 24, 32, 33, 34,	"	542, 543, 544, 545
	c. 11, § 28,	"	403, 404
	c. 11, § 44,	School District Tax,	280
	c. 17, § 5,	Nuisance,	194
	c. 18, §§ 12, 23, 32,	Way. Damages,	289, 330, 495
	c. 46, §§ 17, 19, 20,	Corporation,	173, 174
	c. 51, §§ 8, 20, 36,	Railroad,	150, 286, 244, 491
	c. 53, §§ 1, 3.	Telegraph,	29, 33
	c. 60, § 7,	Dower,	452
	c. 66, §§ 16, 17,	Insolvent Estates,	355
	c. 73, § 11,	Trust,	188
	c. 75, § 1,	Descent,	163
	c. 77, §§ 5, 21,	S. J. C.,	127, 194, 465
	c. 78, § 10,	Co. Com.,	363

1871, c. 81, § 2,	Commencement of Actions,	352
c. 81, §§ 41, 42, 43,	Attachment,	378
c. 81, § 93,	Limitation,	440
c. 82, § 11,	Proceedings in Court,	208, 352
c. 82, § 19,	Demurrer,	500, 502
c. 82, § 28,	Interest,	256, 257
c. 82, § 66,	Impaneling Jury,	304, 305
c. 82, §§ 104–123,	Proceedings in Court,	546, 547, 548, 549
c. 82, § 129,	Interest,	256, 257
c. 83, § 27,	Trial Justice,	258
c. 84, §§ 4, 5,	Officer's Sale,	206
c. 86, §§ 52, 55, 79,	Trustee Process,	175, 344, 346
c. 87, §§ 8, 10,	Administrator, &c.	491, 354
c. 88, § 11,	Pet. for Part.,	208
c. 89, § 1,	Review,	52
c. 90, § 17,	Mortgage,	233
c. 113, § 51,	Fraudulent Transfer,	228
c. 113, §§ 24, 42,	Poor Debtor,	268
c. 127, § 7,	Malicious Mischief,	410

PUBLIC LAWS OF MAINE.

1821, c. 38, § 17,	Descent,	162
c. 52, § 25,	Amendment,	353
c. 57, §§ 1, 2,	Review,	52
c. 59, §§ 34, 35, 36,	Interest,	256
1835, c. 178, § 4,	Amendment.	208
1836, c. 250,	Interest,	258
1838, c. 344,	Attachment,	249
1850, c. 206, §§ 2, 4,	Way,	289
1852, c. 276,	Evidence,	257, 258
1857, c. —,	Gen. Repealing Act,	101
1858, c. 33, § 24,	Drinking Houses, &c.,	105, 106
1859, c. 76,	Corporations,	597
1860, c. 107,	Review,	54
1864, c. 239,	Injunction,	335
1867, c. 130, § 6,	Recognizance,	107
1868, c. 151, §§ 5, 6, 7, 10,	Superior Court,	37, 43, 463, 464
1868, c. 216,	Superior Court,	507
c. 219,	Pauper,	155
c. 225, § 6,	Equalization,	158
1869, c. 42, § 12,	School District Tax,	280
1870, c. 113, § 26,	Descent,	163
c. 128,	Proceedings in Court,	354
c. 174,	Repealing Act,	507
1871, c. 223,	R. R. Tickets,	519
1872, c. 1,	Superior Court,	507
c. 8, §§ 2, 3, 4,	Som. County,	363, 366, 367, 370

SPECIAL LAWS OF MAINE,

1863, c. 275, § 9,	Portland City Charter,	56
1864, c. 321,	Pen. R. R. Co.,	309
c. 401,	Pub. Lands,	461
1867, c. 380, § 19,	Belfast & M. L. R. R. Co.,	513
1867, c. 384, §§ 1, 2, 19,	Pis. F. & M. Ins. Co.,	173, 174, 182, 183
1869, c. 206,	Belfast & M. L. R. R. Co.,	567
1871, c. 716,	Manufactures,	127

RESOLVES OF MAINE.

1864, c. 330,	Pub. Lands, M. W. Sem.,	460

MASSACHUSETTS STATUTES.

1792, Mar. 8, § 1,	Estate Tail,	177

STOCKHOLDER.

See CORPORATION, 4. EQUITY, 1, 2. JOINT STOCK ASSOCIATION, 4.

SUBMISSION.

See ARBITRATION, &c., 1.

SUBSCRIPTION PAPER.

See JOINT STOCK ASSOCIATION, 2.

SUPERIOR COURT.

1. When a defendant in the superior court has demanded a jury, but declines to pay the jury fee, he thereby waives his right to a jury trial.

Randall v. *Kehlor*, 37.

2. When a case in the superior court is tried by the presiding justice without the intervention of a jury, his findings of fact are conclusive. *Ib.*

3. Section 21, c. 77, R. S., providing that exceptions deemed frivolous and intended for delay, may be transmitted to the chief justice, and argued in writing as therein required, relates exclusively to exceptions in the supreme judicial court.

Thorn v. *Mosher*, 463.

4. The criminal jurisdiction of the superior court for the county of Cumberland was repealed by Pub. Laws of 1870, c. 174, which took effect Feb. 1, 1871; and was restored by Pub. Laws of 1872, c. 1, which took effect Jan. 13, 1872.
State v. *Doherty*, 504.

5. An indictment found at the May term, 1872, of said court, by a grand jury drawn on venires, issued by the clerk thereof, on July 22, 1871, and impaneled and sworn at the following September term, was void. *Ib.*

6. And such indictment was not made valid by Pub. Laws of 1872, c. 1. *Ib.*

See ERROR.

SURETY.

1. The abandonment of an attachment of property in a suit against one surety on a note, constitutes no bar to the maintenance of a subsequent suit against the co-surety. *Chipman* v. *Todd*, 282.

2. The failure of the selectmen to examine the accounts of a town treasurer, as directed by R. S., c. 6, § 152, will not affect the liability of the sureties upon his bond. *Farmington* v. *Stanley*, 472.

3. Nor will a surety be released if the selectmen, failing to detect an error in addition, certify the treasurer's account to be correct, when, in fact, there is a deficit; even if this certificate be made known to the surety soon after its entry upon the treasurer's books, and while the treasurer has attachable assets enough to cover the deficit, though he subsequently dies insolvent. *Ib.*

See RECOGNIZANCE, 1.

SURPLUSAGE.

See RECOGNIZANCE, 3.

SURVIVORS.

See PRACTICE, 11.

TAX.

1. R. S., 1857, c. 6, § 4, providing 'that the track of the road and the land on which it is constructed, shall not,' for the purpose of taxation, 'be deemed real estate,' does not apply to, and exempt from taxation, depots and other erections of railroad corporations upon land owned by them.

P. S. & P. R. R. Co. v. *Saco*, 196.

2. Personal property belonging to a railroad corporation, but not composing any part of its capital stock, is liable to be taxed where the corporation has its place of business. *Ib.*

3. In the sale of land for non-payment of taxes, the land assessed and sold must be accurately described. *Griffin* v. *Creppin*, 270.

4. Thus in the notice of the State treasurer's annual sale of lands in places not incorporated, and forfeited for state and county taxes, certain land, situated in township No. 8, South Division, in Hancock county, consisting of twenty thousand acres, was advertised and described as follows: 'Track No. 8, S. D. Advertised 4197; *Held*, That the description was too vague to pass the title. *Ib.*

See EVIDENCE, 7. PRACTICE, 2. SCHOOL DISTRICT TAX.

TELEGRAPH.

1. The defendant company transmitted messages during the night, known as night messages, at about one-half of the usual rates charged for day messages. And the plaintiffs having received a telegram offering them a cargo of corn, at ninety cents per bushel, went to the defendants' office, and, calling for one of their 'night-message blanks,' on which was printed, 'It is agreed between the sender of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message beyond the amount received by said company for sending the same,'—'send the following message subject to the above terms, which are agreed to,' replied by writing thereon a message, properly addressed, of the following tenor: 'Ship cargo named at ninety, if you can secure freight at ten—wire us the result,' and paid forty-eight cents, the rate for night message. The message was sent but not delivered, by reason whereof, the plaintiffs failed to obtain the corn at the terms offered, and the price of corn and freight immediately advanced. The defendants admitted their liability to the extent of sum paid. *Held*, That the terms of the foregoing condition are not reasonable, and do not exonerate the company from liability beyond the sum paid for the transmission of the message. APPLETON, C. J., *dissenting*. *True* v. *Int. Tel. Co.*, 9.

2. *Held*, also, that the rule of damages in such case is the difference between the price named, and that which the plaintiff would have been obliged to pay at the same place, in order by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, with the same rule in relation to the freight. *Ib.*

3. In the absence of any statutory restriction, a telegraph company may, before sending dispatches, prescribe the terms upon which alone it will send them. APPLETON, C. J. *True v. Int. Tel. Co.*, 9.

4. If the terms are assented to, they constitute a contract between the sender and the company. APPLETON, C. J. *Ib.*

5. The rule of a telegraph company, understandingly assented to by the sender, that the company will not be liable for the non-delivery of any night message beyond the amount received by the company, not being inconsistent with R. S., c. 53, § 1, will exonerate the company from liability beyond that amount APPLETON, C. J. *Ib.*

See SALE, 4, 5.

TENANT FOR LIFE.

See DEED, 7.

TENANT IN TAIL.

See DEED, 1.

TIME.

1. The maxim that in law there are no fractions of a day does not apply to proceedings in bankruptcy, where the exact time when the event occurred is made certain by record. *Westbrook Manufacturing Company* v. *Grant*, 88.

2. Thus, where a debtor's property was attached at seven o'clock in the afternoon of March 8, and his petition in bankruptcy under the U. S. Bankruptcy Act of 1867, was filed at two o'clock and fifty minutes in the afternoon of the 8th of July next succeeding; *Held*, that under § 14, the attachment was dissolved, the time between the two events falling short of four months by four hours and ten minutes. *Ib.*

See CERTIORARI, 4. FENCE, 4.

TOWN.

See RAILROAD STOCK, 5, 6. WAY, 6.

TOWN, AUTHORITY OF.

See CONSTITUTIONAL LAW, 2, 3, 4.

TOWN MEETING.

1. An article in a warrant for a town-meeting is sufficient, if it gives notice, with reasonable certainty, of the subject-matter to be acted upon.
Belfast & M. L. R. Co. v. *Brooks*, 568.

2. Thus, where the only mode provided in the charter of a railroad, by which towns interested therein may aid in its construction, is a subscription for its stock, an article in a warrant for a town-meeting 'to see if the town will loan its credit to aid in the construction of the' railroad named, gives reasonable notice, that a proposition to subscribe for stock will be acted upon, and will authorize such action. *Belfast & M. L. R. Co.* v. *Brooks*, 568.

3. Where, under such an article, the town authorized its selectmen to subscribe, in behalf of the town, for stock in the railroad named to the amount of sum specified, without designating the kind of stock, and the selectmen subscribe for the 'non-preferred stock,' the town is bound by the selection made. *Ib.*

4. Where the persons who subscribed for the stock, signed the subscription as selectmen, therein referring to the vote under which they acted, and were the same persons who called the town-meeting at which the vote was passed, it will be presumed, in the absence of any evidence, that any other persons had been elected or had acted as selectmen, that they were the selectmen. *Ib.*

See CERTIORARI, 4.

TOWN TREASURER.

1. The failure of the selectmen to examine the accounts of a town treasurer, as directed by R. S., c. 6, § 152, will not affect the liability of the sureties upon his bond. *Farmington* v. *Stanley*, 472.

2. Nor will a surety be released if the selectmen, failing to detect an error in addition certify the treasurer's account to be correct, when, in fact, there is a deficit; even if this certificate be made known to the surety soon after its entry upon the treasurer's books, and while the treasurer has attachable assets enough to cover the deficit, though he subsequently dies insolvent. *Ib.*

TOWN WAY.

See CERTIORARI, 3, 4. COUNTY COMMISSIONERS, 1, 2, 3, 4.

TRESPASS.

1. In *trespass quare clausum*, the possession is presumed to be in the owner of the legal title, in the absence of all other evidence. *Griffin* v. *Creppin*, 270.

2. An action of trespass lies against an officer who attaches the goods of a stranger, notwithstanding they are so intermingled with those of the debtor that the officer cannot distinguish them, if the owner is present and offers to select his, and is prevented from so doing by the officer. *Yates* v. *Wormell*, 495.

TRIVIAL ERROR.

See CERTIORARI, 1, 2.

TROVER.

One of the defendants bid off a vessel at a sale thereof by the master, which was void for want of notice of the disaster to the plaintiffs who were part-owners The other defendant paid part of the purchase-money, the expenses of fitting her for sea, insured her in his own name, participated in her earnings, and refused to recognize the plaintiffs as owners of any part of her. *Held*, that trover would lie. *Miller* v. *Thompson*, 322.

See AMENDMENT, 5, 6. CONVERSION. ESTOPPEL, 1, 2. PLEADING, 2.

TRUST.

1. Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein. *Gerry* v. *Stimson*, 186.

2. Where such a conveyance was intended to be in trust for the grantor and his wife, but the trust was not expressed in the deed, no resulting trust can arise from the subsequent payment of money by the children of the grantor. *Ib.*

3. If a *cestui que trust* be induced by fraud to discharge the trust, it must be considered as extinguished so far as an innocent purchaser of the trust-property, who buys relying upon the discharge, is concerned. *Pen. R. R. Co.* v. *Mayo*, 306.

4. But if a person whose own note is deposited in trust for others, among whom its proceeds are to be divided, obtain possession of it without the consent of the *cestuis que trust*, an action for money had and received brought against him, in the name of the depositary, by and for the benefit of one of those entitled to a share of the amount due on the note, is maintainable ; nor can the suit be discontinued by the nominal plaintiff, or his assignee without the assent of the party in interest. *Ib.*

See ASSIGNMENT, 1, 2. EQUITY, 8, 9. MORTGAGE, 2, 3.

TRUSTEE.

See EQUITY, 4.

TRUSTEE PROCESS.

1. The treasurer of a corporation cannot be charged as its trustee for funds held by him officially. *Bowker* v. *Hill*, 172.

2. Nor can he be charged as trustee for such funds pledged to him to secure an indebtment of the company to him. *Ib.*

3. An alleged trustee cannot be charged for promissory notes and stocks pledged to secure them, originally given to the principal defendant, and afterwards transferred to him; and § 52 of c. 81 of the R. S. (1857) does not apply in such a case. *Ib.*

4. An alleged trustee is not chargeable for city and railroad bonds held by him, belonging to the principal defendant. *Ib.*

5. If an alleged trustee does not disclose in the original action, he is liable to costs on *scire facias*, although the attachment is dissolved before judgment is recovered in the original action.

Pettingill v. *Pettingill*, 411.

6. R. S., c. 86, § 55, exempting from the process of foreign attachment a sum not exceeding twenty dollars as wages for personal labor, does not apply to that which is due from the alleged trustee, for the wages or work of other men employed by the principal defendant, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, enter to prove the price he is to receive, even though the amount thus due at the time of the service of the process does not exceed the amount of his wages for his personal labor during the month next preceding.

Brainard v. *Shannon*, 342.

7. It must appear by the disclosure, that the money is due as the wages of personal labor in order to bring it within the statute exemption. *Ib.*

8. Under a *bona fide* contract that the principal defendant, in a process of foreign attachment was to receive a certain sum *per diem* for his own wages, and pay for the work of others employed by him at a fixed rate, the wages of the principal defendant's personal labor, so far as can be ascertained from the accounts, not exceeding the statute amount during the preceding month, may be exempted. *Ib.*

9. Payments under such a contract, in the absence of any specific appropriation by the parties, would be appropriated to the earliest items of debit in the account. *Ib.*

10. In a disclosure on *scire facias*, all doubtful or uncertain statements are construed against the trustee having it in his power to make them positive. *Ib.*

11. Thus, where a trustee disclosed that at a time specified, the principal defendant in the original action was 'nearly paid up,' it is incumbent upon the trustee to show how nearly, and why any portion of the balance should be taken as due for personal wages, if he would have a further deduction upon that score. *Ib.*

12. Where in *scire facias* against a trustee, the exceptions state that the trustee was discharged on said disclosure, it cannot be contended that he was discharged because of the failure on the part of the plaintiff to exhibit the record alleged in the writ, unless such failure appear in the disclosure. *Ib.*

13. A respondent in *scire facias* against a trustee, will not be relieved from the payment of costs under R. S., c. 86, § 78, on the ground that the officer who served the original writ upon him, told him in the street that he had such a writ, but did not read it to him, or give him a copy, and that he did not know that it was necessary for him to appear and disclose, especially when the office made return of legal service. *Ib.*

UNDER-PASS.

See CERTIORARI, 3, 4.

USAGE.

See CHECK, 3.

USER.

See WAY, 5.

VERBAL ACKNOWLEDGMENT.

See LIMITATIONS, STAT. OF.

VERDICT.

See LAND DAMAGES, 7.

WAGES.

See TRUSTEE PROCESS, 6, 7, 8.

WAIVER.

LAND DAMAGES, 8. PLEADING, 9. WILL, 5.

WARRANT.

See TOWN MEETING, 1, 2.

WAY.

1. In 1870, the city council of Portland, under § 9 of their charter, laid out a street across the petitioners' land for which they awarded no damages, and from their adjudication as to damages this appeal was taken. After the appeal the city council discontinued a portion of the street. *Held*, That the petitioners may abandon their appeal with costs, or pursue it and have the damages assessed for so much of the located street as is not discontinued.
Curtis v. *Portland*, 55.
2. The land agent has no authority to locate roads through public lands selected for settlement, but only to 'cause such roads to be located as the public interest and the accommodation of the future settlement require.' R. S., c. 5, § 29.
Burns v. *Annas*, 288.
3. The authority to locate such roads is, by R. S., c. 18, § 32, vested in the county commissioners. *Ib.*
4. Neither can the land agent establish such road by dedication. *Ib.*
5. A road by user cannot be established in less than twenty years. *Ib.*
6. It is not competent for a town to establish a way across the private land of one of its citizens, by a simple vote of acceptance, without any previous location by its selectmen. *Ib.*

7. Where riparian proprietors have laid out and sold their land in lots as delineated upon a plan having streets indicated thereon, terminating upon a navigable stream, such streets will be considered as dedicated to the use of purchasers of such lots and of the public, down to the water at all stages of the tide, unless there be some express reservation of the flats, although the lines upon such plan, indicating the boundary of the tier of lots nearest the river, be drawn at high-water mark. *Stetson* v. *Bangor*, 313.

8. The conversion of a way dedicated to the use of purchasers of adjoining lots into a public way does not authorize the award of more than nominal damages. *Ib.*

9. To confer on the county commissioners jurisdiction of the laying out of a town-way leading from land under improvement to a town or highway, founded upon the unreasonable refusal of the municipal officers, the petition to the commissioners must distinctly set out all the jurisdictional facts, and among them that the refusal on the part of the municipal officers was 'unreasonable.' *Goodwin* v. *County Com. of Sagadahoc*, 328.

10. And the want of jurisdiction of the commissioners resulting from the omission of such an allegation, may be taken advantage of in the supreme judicial court when the report of the committee of appeal from the decision of the county commissioners comes up for acceptance; and the proceedings may be quashed. *Ib.*

See CERTIORARI, 3, 4.

WILL.

1. A testator devised to his wife ten dollars tobe paid her by his executor in addition to the provision made for her support and maintenance during her natural life by his devisees, 'agreeably to the conditions of their bond for that purpose, which was to be in lieu of dower,' and charged all his property devised 'to the faithful performance of said bond, and in the event of the non-performance thereof, enough of his estate thus devised' to be sold by his executor as will provide such support. He then devised three specified parcels of real estate in fee-simple to his sons, B. and F., subject to the foregoing charge of his wife's maintenance, in the 'proportion of two-fifths of the amount required' therefor, 'and also to the payment of his debts in the same proportion,' and the remainder of his estate to two daughters and a third son (the executor), in equal proportions subject to the same charge 'in the proportion of three-fifths of the amount required therefor.' *Held*, That notwithstanding the bond with the performance of the conditions of which the property devised was charged, was intended to be executed on the same day with the will, but in fact was not until two months afterwards, and after the death of the testator, the provisions in the will relate to the bond, and its provisions are binding and constitute a valid charge upon the estate devised. *Pettingill* v. *Pettingill*, 411.

2. Also *held*, that it was the duty of the executor to see that whatever was needful for the maintenance of the testator's widow in accordance with the provisions of the will, if not furnished by the devisees, should be supplied, and the proper contribution due from any delinquent devisee enforced. *Ib.*

3. Also *held*, that the proper method of determining how far the power of sale conferred upon the executor by the provisions of the will should be exercised, is the settlement of an account in probate, wherein he should charge himself with his own fifth of all expenditures less the value of the widow's labor in his family, and with whatever has been contributed by either of the other legatees or collected from them and be allowed the cost of maintenance.

Pettingill v. *Pettingill*, 411.

4. Also *held*, that the statute of limitations is not applicable to the costs of maintenance sustained by the executor in behalf of the widow of the testator. *Ib.*

5. A writing signed by the widow stipulating that 'no person shall ever call on' a certain one of the devisees of the property thus charged 'or his property for any part of' her 'support as long as there is any of the other property left,' is not a waiver of support from the estate, and is void. *Ib.*

6. Also *held*, that interest be allowed on the six annual installments of expenses next preceding the filing of the account from the time they respectively became due to the date of the decree allowing the account. *Ib.*

See DEED, 1.

WORDS.

See CORPORATION, 1. COSTS, 1, 2. COUNTY COMMISSIONERS, 4. INDICTMENT, 8. SCHOOL-HOUSE, 3.