REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By EDWIN B. SMITH,

REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL. D., CHIEF JUSTICE.
HON. JONAS CUTTING, LL. D.
HON. CHARLES W. WALTON.
HON. JONATHAN G. DICKERSON, LL. D.
HON. WILLIAM G. BARROWS.
HON. CHARLES DANFORTH.
HON. WM. WIRT VIRGIN.
HON. JOHN A. PETERS.

ATTORNEY-GENERAL.

HON. HARRIS M. PLAISTED.

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ERRATA.

On page 13, first line of the opinion, for "drawee," read "drawer."
" 29, eleventh line from the bottom, for "Enactments," read "Easements."
On page 37, fourteenth line from the top, for "relied," read "ruled."
" 88, fourth line from the top, for "allowed," "read "altered."
" 367, the head note of the case should read "*Bailment—degree of care requisite.*"
On page 537, fifth line from the bottom, for "parts," read "ports."
On page 596, twelfth line from the bottom, strike out the comma after the word "vessel," and insert a period; in the same line, strike out the semicolon after the figure 8, and insert a comma. The word "June" in that line begins a sentence.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

PETER O. STRANG, surviving partner, *vs.* JAMES F. HIRST.

Amendment—count upon the consideration of unaccepted bill of exchange allowed by way of amendment. Bill of exchange unaccepted—no payment of debt. Pleading—general issue admits plaintiff's capacity to sue.

In Maine a promissory note, or an accepted bill of exchange is *prima facie* evidence of payment of the debt for which it is given; *aliter*, as to an unaccepted bill.

A bill of exchange, not accepted by drawee, is not an extinguishment of the original indebtedness on account of which it was given; hence, a new count, declaring upon such debt, may be added as an amendment of plaintiff's declaration upon such bill, since it introduces no new cause of action.

Upon a debt due a partnership, one of the members of which has deceased, the action must be brought in the names of the survivors, whether for their own benefit, or under the control of the administrator of the deceased partner.

Objection to plaintiff's right to maintain suit as surviving partner, because he has not given the bond required by law, must be taken in abatement, or it will be considered as waived.

The brief statement in this case, setting up this defense, is bad for duplicity.

ON REPORT.

This action of assumpsit was originally brought in the names of Ammon Platt and Peter O. Strang, as surviving partners of the firm of George W. Ryley & Co., by writ dated July 12, 1869. Subsequently to that date, Platt died, and his death was suggested on the docket of January term, 1871. The cause came on for trial at the April term, 1871. In his declaration, as it then stood, the plaintiff counted upon two time bills of exchange drawn by defendant upon H. J. Libby & Company; alleging a presentment for acceptance of both bills, a refusal to accept, and a protest for that cause; also a presentment of one of the bills at maturity for payment, a refusal, and protest for non-payment. There were, also, the money counts, with a specification of the two drafts aforesaid as the claim to be proved. The plaintiff moved for leave to amend by annexing an account of defendant's indebtedness to Ryley & Co. for the wool for which said drafts were drawn; but the presiding judge ruled, as matter of law, that such an amendment was inadmissible, on the ground that it would introduce a new cause of action; and the plaintiffs excepted.

The defendant pleads the general issue, with the subjoined brief statement:

And defendant further says, by brief statement, that said plaintiff cannot maintain this action against him because he says the said supposed causes of action, if any there were, accrued to the firm of Geo. W. Ryley & Co., composed of Geo. W. Ryley, Ammon Platt, and Peter O. Strang, formerly doing business in Boston, as set forth in plaintiff's writ, and not to the plaintiff, nor to the plaintiff and said Ammon Platt. That before the commencement of this suit, to wit, on the day of June, A. D. 1867, the said Ryley deceased, and since the commencement of this suit, as appears by the records of this court in this action, the said Platt deceased, and that the said Platt and Strang, during the lifetime of said Platt, did not give bond to the judge of probate in and for this county, nor to any other judge of probate in any county in this State, as surviving partners, as the law requires, to authorize them to settle the partnership affairs, nor has said Strang,

since the decease of said Ryley, or of said Platt, given such bond to any judge of probate for this or any other county in this State, to enable him to reduce the assets of said firm to his possession, and settle the affairs of said partnership. He, therefore, has no right to maintain this suit as surviving partner.

By LIBBEY & MAY, his attorneys.

After the introduction of the drafts, and of testimony showing their consideration, the course adopted with relation to them, and other matters not material to the understanding of the points decided in this cause, the case was withdrawn from the jury and reported to the law court, with the agreement that if, in the opinion of the law court, the evidence offered by the plaintiffs is legally admissible and would warrant a jury in finding a verdict for the plaintiffs, then the action is to stand for trial; or if, in the opinion of the law court, the amendment asked for in the written motion to amend before referred to can legally be made, then the action is to stand for trial, and the declaration is to be amended on such terms as the judge at *nisi prius* may determine.

Frye & Cotton, with *Enos T. Luce*, for plaintiff.

1. The proposed amendment was legally admissible.

The doctrine of the courts of Maine and Massachusetts that a promissory note given for goods sold is *prima facie* evidence of payment therefor, has never been extended to unaccepted bills of exchange. *Zerano* v. *Wilson*, 8 Cush. 424; *Alcock* v. *Hopkins*, 6 Cush. 484.

The defendant's bills of exchange were refused acceptance by H. J. Libby & Co. They did not, therefore, extinguish the debt for the wool. (Cases above cited.) The amendment can therefore be legally made, as it does not introduce a new cause of action. The case of *Perrin* v. *Keen*, 19 Maine, 355, is directly in point.

2. As to plaintiff's right to sue as surviving partner without having given bond.

The objection comes too late. Being a plea to the disability of

the plaintiff, it should have been pleaded in abatement and not in bar.

The objection to the maintenance of a suit by a surviving partner because he has not qualified himself by giving bond, is analogous to the case of objection to the maintenance of a suit by an administrator, because he has never been properly appointed. In a recent case, this court has decided that the objection that the plaintiff is not administrator must be taken by abatement and not in bar, and that the plea of general issue conclusively admits the plaintiff's capacity. *Brown* v. *Nourse*, 55 Maine, 230.

A. Libby and *S. & J. W. May*, for defendants, contended,

I. That neither the original plaintiffs, nor the present plaintiff, have ever qualified themselves to sue for and reduce to possession the assets of the firm, and settle the affairs of said partnership, as required by the law of this State. R. S., c. 69.

Compliance with this statute is an essential prerequisite to the maintenance of a suit by one as surviving partner to recover upon a debt due the firm. *Cook* v. *Lewis*, 36 Maine, 345; *Putnam* v. *Parker*, 55 Maine, 235.

The Louisiana code is similar in this respect to our statute. The objection we raise has there been held fatal to the suit, though not pleaded in abatement. Civil Code of Louisiana, Arts. 1131–2. *Flowers* v. *O'Conner*, 7 Louis. 197; *Crozier* v. *Hodge*, 3 Louis. 358; *Cutler* v. *Cochran*, 13 Louis. 484.

That court holds these requirements of the law to be conditions precedent to the maintenance of suit by a surviving partner.

II. There is no allegation in the writ of any promise by defendant to the firm of Geo. W. Ryley & Co. The only allegation is of a promise by defendant to said Strang & Platt, as surviving partners of that firm; and there is no pretence, nor a particle of proof, that the defendant (Hirst) ever made any promise to said Strang & Platt, as surviving partners.

III. There was no legal presentation for acceptance, and no legal protest, nor sufficient notice to defendant of non-acceptance

of the drafts. The counsel entered into an able and elaborate discussion of this point, but as the court, under the special agreement presenting the issues to them, did not render any decision upon it, it is unnecessary to reproduce the line of argument on this branch of the case.

IV. As to the proposed amendment. It cannot be made.

First—There is a variance between the count offered and the account annexed. The count declares on a promise by defendant to Peter Strang and Ammon Platt, while the account is of an indebtment to George W. Ryley & Co.

Second—It is proved that this firm were wool brokers. Then the legal presumption is that Hirst owed their principals, and not Ryley & Co., for the wool sold him. 1 Bouv. Law Dict., Tit., Brokers; 1 Pars. Merc. Law, 161; *Titcomb* v. *Seaver*, 4 Maine, 542; *Edmond* v. *Caldwell*, 15 Maine, 340; *Pitts* v. *Mower*, 18 Maine, 361.

Third—It introduces a new cause of action. The drafts paid for the wool. *Varner* v. *Nobleboro*, 2 Greenl. 121; *Newall* v. *Hussey*, 18 Maine, 249; *Perrin* v. *Keen*, 19 Maine, 355; *Comstock* v. *Smith*, 23 Maine, 202; *Bangor* v. *Warren*, 34 Maine, 324; *Fowler* v. *Ludwig*, 34 Maine, 455; *Vancleef* v. *Therasson*, 3 Pick. 12; *Ball* v. *Claflin*, 5 Pick. 303; 2 Pars. on Notes, 154, 155, note h.

Fourth—The account was adjusted by compromise and payment.

Fifth—The account annexed is barred by the statute of limitations, if sued now; can it be introduced as an amendment so as to relate back to 1869?

DICKERSON, J. Assumpsit against the defendant as drawee of two bills of exchange. The plaintiffs seasonably filed a written motion to amend their declaration by adding a count in *indebitatus assumpsit* for the wool for which the bills were given. The parties agree that if the amendment is allowable, the action is to stand for trial. The amendment is allowable, if it do not introduce a new cause of action; and it does not present new matter unless the ac-

ceptance of the bills, under the facts presented in evidence, is to be regarded as an extinguishment of the original debts.

Ever since the decision in *Thatcher* v. *Dinsmore*, rendered in 1809, 5 Mass. 299, the acceptance of a negotiable note, or bill of exchange, by the creditor for a preëxisting debt, has been held to be payment of such debt, both in Massachusetts and this State, unless a contrary intention is shown. The reason assigned for this presumption of fact is, that a creditor may indorse such paper, and if he could compel payment of the original debt, the debtor might be afterwards obliged to pay the note to the indorsee, and thus be twice charged, without any remedy at law.

This principle, however, obtains only in these States and Vermont; the United States' courts, and the courts in England, New York, and the other States generally, holding the contrary doctrine—that the acceptance of such note or bill does not extinguish the debt, unless it is agreed that it shall operate as payment. *Peter* v. *Beverly*, 10 Pet. 532; *Ward* v. *Evans*, Ld. Raym'd, 928; *Mussen* v. *Price*, 4 East. 197; *Vail* v. *Foster*, 4 Comst. 312; *Ward* v. *Howe*, 38 N. H. 35.

Such also is the doctrine of the civil law, and of the States and countries that have adopted that system of jurisprudence. Pothier on Ob., p. 3, c. 2, art. 2; 1 Domat. B. 4, Tit. 3, § 1, p. 491; *Wallace* v. *Agry*, 4 Mason, 336 and 344.

In order to protect a debtor, who has given negotiable paper for an antecedent debt, from liability to be twice charged with the same debt, the courts that adopt this latter theory of the law upon this subject, also hold, in general, that the note or bill, must be produced, and cancelled or given up, before the creditor will be allowed to recover upon the original consideration. *Davis* v. *Dodd*, 4 Taunt. 602; *Holmes* v. *DeCamp*, 1 Johns. 34; *Hughes* v. *Wheeler*, 8 Cow. 77; *Schemmelpennich* v. *Bayard*, 4 Pet. 264; *Rangler* v. *Morton*, 4 Watts, 265.

Thus each of these different theories of the law alike protects the debtor from liability to pay the same debt twice.

While such is the law in other jurisdictions, the tendency of the

courts in Massachusetts and Maine has been to restrict rather than extend, the rule laid down in *Thatcher* v. *Dinsmore ante*, and *Varner* v. *Nobleboro*, 2 Greenl. 121; *Pomeroy* v. *Rice*, 16 Pick. 22; *Melledge* v. *Boston Iron Co.*, 5 Cush. 158; *Zerano* v. *Wilson*, 8 Cush. 424; *Perrin* v. *Keen*, 19 Maine, 355; *Paine* v. *Dwinel*, 53 Maine, 53.

The courts in these States also hold that the presumption of payment is rebutted, and the creditor may repudiate the security taken and rely upon the original contract, when there is any fraud in giving it, or it is accepted under an ignorance of the facts, or a misapprehension of the rights of the parties. *French* v. *Price*, 24 Pick. 21; *Paine* v. *Dwinel*, 53 Maine, 53.

Where a creditor accepts a note, or bill of exchange, for a debt, there is a presumption of fact that there is an agreement between the drawer and drawee that it will be accepted. The parties are presumed to act in good faith toward each other, and the tendering of such paper without such understanding is a breach of good faith. This may be done to obtain delay, or to deceive the creditor, by the delusive hope that in accepting the paper offered he gets additional security for his debt. Besides, the giving of such paper may have influenced the creditor to part with his property.

The drawees never agreed to accept the bills in suit, and on their presentment for acceptance, refused to accept them. When the plaintiffs took the bills they did so under a misapprehension of the relations existing between the defendant and the drawees—a misapprehension materially affecting the security they had a right to presume that they received. The bills having been taken by the plaintiffs in ignorance, or under a misapprehension of the facts, did not extinguish the account, which remains the same subsisting demand and may be brought in by way of amendment without introducing a new cause of action. This result follows from the principles laid down in the last two cases cited, to which may be added, *Perrin* v. *Keen*, 19 Maine, 355.

In addition to the non-acceptance and non-payment of the bills by the drawees, they remained matured and unpaid in the hands

of the plaintiffs, and were produced in court at the trial. There is, therefore, no liability on the part of the defendant to pay them, if he is held liable on the original contract; since, in that event, the plaintiffs could not maintain an action upon them; and if they should transfer them after maturity, the same equities would be open between the defendant and the indorsee as existed between the original parties. Thus the reason of the rule making the acceptance of such paper an extinguishment of the original debt does not exist, and the rule itself becomes inapplicable.

This is the view the court in Massachusetts adopted in a case less favorable to the plaintiffs in its facts than the one at bar, but otherwise almost identical with it. A master of a vessel drew a bill of exchange upon his owners, in a foreign port, for supplies furnished the vessel. The bill was not accepted nor paid, but was refused both acceptance and payment by the drawees, and was produced by the plaintiffs at the trial, and put upon the files of the court with the other papers. The court held that the bill furnished no defense to a recovery on the original account, on the ground that no action could thereafterward be maintained upon it against the defendant. *Zerano* v. *Wilson*, 8 Cush. 424.

We are not aware that the courts in this State or Massachusetts have extended the doctrine that the acceptance of negotiable paper for goods sold is *prima facie* evidence of payment therefor, to unaccepted bills of exchange. Nor do we see any valid reason why it should be thus applied. *Non constat* that the drawee will accept such bill, or that the holder or drawer will be able to maintain an action against him on account of it. While in this inchoate state such bill may be regarded in the light of a check before its presentment, which is not payment of the debt for which it is delivered, but merely evidence of a debt due from the drawer. Whether it shall operate as payment or not depends upon whether the drawee has funds in the bank to his credit upon which it is drawn, and whether the bank pays its bills and the checks duly drawn upon it, on demand. It is obvious that *certified* checks, and accepted

bills of exchange stand upon a different footing. *Taylor* v. *Wilson*, 11 Met. 44, 51.

As the case must go back for trial, it becomes unnecessary to determine the other question presented in the report.

Action to stand for trial.

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

Upon the other question presented by the report, Appleton, C. J., drew the following opinion:

APPLETON, C. J. At common law, when one partner dies, the action must be brought in the name of the survivor or survivors. The executor cannot be joined. By R. S. of 1857, c. 87, § 10, "When one of several plaintiffs or defendants, in an action that survives, dies, his death may be suggested on the record, and the action may be further prosecuted or defended by the survivors."

The act of March 11, 1870, c. 128, by which the executor or administrator of a deceased party is permitted to prosecute or defend with the surviving plaintiffs or defendants, was passed since the commencement of this suit, and does not apply. *Treat* v. *Dwinel*, 59 Maine, 341.

It is insisted that this action cannot be prosecuted without giving bond, as required by R. S., c. 69, § 1.

This suit must be prosecuted in the name of the survivors, whether for the benefit of such survivors, or subject to the control of the administrator or executor of the deceased partner.

This suit was commenced July 12, 1869. The general issue was pleaded, and at the April term, 1871, a brief statement was filed, alleging that this action could not be maintained because George W. Ryley, one of the firm of George W. Ryley & Co., deceased before the commencement of this suit, and that since, Ammon Platt, one of said firm, has deceased, and the said Platt & Strang, during the lifetime of said Platt, did not give the bond required by R. S., c. 69, as surviving partners to authorize them to

settle partnership affairs, nor has said Strang, since the decease of said Ryley, or of said Platt, given such bond, etc.

The general issue admits the plaintiff's right to sue and prosecute. When one sues as administrator or executor his capacity to prosecute a suit as such can only be questioned by plea in abatement. *Brown* v. *Nourse*, 55 Maine, 230. The objection taken to the maintenance of the suit by a surviving partner, because he may not have given the bond required by the statute, is analogous to the one that an administrator has not been properly appointed. It was not seasonably taken. The defendant should not have delayed for more than two years before making this objection.

Again, a brief statement under the statutes is a substitute for a special plea at common law. The party filing such statement is entitled to the same rights under it as he would have at common law in case of a special plea, and no more. *Williams* v. *Mallett*, 16 Maine, 84; *Chase* v. *Fish*, 16 Maine, 132. But a special plea would be bad for duplicity, and so would a brief statement. The brief statement is clearly bad for this cause.

But for aught that appears, the administrator of Ryley, or of Platt, may have given the bond required as such administrator, and in that event the action must be prosecuted in the name of the surviving partner. *Putnam* v. *Parker*, 55 Maine, 235. It could not have been prosecuted in any other name, when commenced. The brief statement may all be true, and yet this action is maintainable. *Action to stand for trial.*

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

ALBERT S. WARREN *vs.* INHABITANTS OF DURHAM.

Towns—contract with—liability upon such contract.

To recover in an action against a town, founded upon its vote, the plaintiff must bring his claim strictly within the terms of such vote.

Thus, where a town voted to pay $500 for men mustered into the U. S. service for three years and credited upon its quota, no claim arises for re-payment of a smaller sum expended in procuring a man to be so mustered and credited, by agreement between the town and the plaintiff, as whose substitute such man was mustered; the soldier having received the $500 from the town.

ON REPORT.

This is an action of assumpsit, commenced by writ dated Dec. 15, 1870, containing two counts; the first special, declaring upon votes of the town of Durham, the effect of which was that $500 was voted to be paid to each man mustered into the service of the United States, and credited upon the town's quota, for three years, the selectmen to hire the money to pay this bounty upon the credit of the town; the second count was for money had and received.

The plaintiff claimed to have lent the town three hundred dollars, to be used toward filling this quota. He had been drafted for one year and had agreed to pay $400 for a substitute to serve during that term. Three years' men could be procured for $800. The town contended that, by agreement, the plaintiff's substitute received but $300 from him, and was paid $500 more by the town, in consideration of enlisting for three years, instead of for one.

S. & J. W. May and *C. Record*, for plaintiff, cited *Concord* v. *Delany*, 58 Maine, 317.

Frye & Cotton, for defendant.

The arguments of counsel were directed to the questions of fact involved, which renders it unnecessary to report them. The opinion of the court sufficiently indicates what facts were found to exist.

KENT, J. The plaintiff makes no claim in this action for the bounty voted by the town. The town had a right to determine what bounty it would give, and to what class of soldiers. The plaintiff does not allege that he, being drafted for one year, came within the votes of the town. This action is a naked assumpsit for money loaned to the town. There is no evidence in the case of any note, memorandum, town order, or any direct promise to pay by a vote of the town, or by any of its officers authorized to bind the town.

We gather from the evidence these facts in brief: The plaintiff was drafted for one year. The town did not vote to pay any bounty for one year's men, but did for three years' men. The plaintiff had engaged a substitute for his year, and was about to pay him four hundred dollars. The town was attempting to obtain men for its quota, having voted $500 as a bounty. But men could not be readly obtained for that term of service under seven to eight hundred dollars. The town was willing to pay to or for the plaintiff the five hundred dollars to aid him in putting in a man for three years, by which he would avoid future drafts for three years.

The understanding or agreement between him and the agents of the town, seems to have been, in effect, that the town should pay the five hundred dollars bounty to him, or to a broker for him, to enable him to obtain a substitute for himself and a three years' man for the town quota, by the payment, himself, of the balance of seven or eight hundred dollars, required to secure such a substitute and volunteer. Thus the town officers paid all they were authorized to pay for any soldier, and the plaintiff escaped duty by paying the balance required over five hundred dollars—instead of paying $400 to his substitute first engaged.

This seems to have been the understanding of the plaintiff when he gave the certificate (B), in which, after stating that he had been drafted, he says that he has received of the treasurer of the town five hnndred dollars, "to pay volunteers, substitutes, or drafted men when mustered into the United States service, to fill the quota of said town."

He now insists that, instead of having the money of the town to use towards obtaining his substitute, he loaned the town the three hundred dollars, which he furnished to make out the required sum. He admits, in his testimony, that the money furnished by him "was to be paid over to the man who was furnished as a substitute for me." And afterwards he says, "it was my substitute for one year, the other two years for the town." The whole transaction relating to the money had reference, directly, to obtaining this one man, who was to stand in lieu of plaintiff, and the money paid or advanced by the plaintiff was to be applied to this single case. Now, the town had not voted any bounty for one year which the plaintiff could claim. The town was under no legal obligation to aid him in procuring a substitute. The town officers could not use any of the five hundred dollars voted for each three years' man, because it was limited to that class. The best they could do, without farther action of the town, was to go into a sort of co-partnership, by which the town would pay for two-thirds and the plaintiff one-third, of the three years' man.

The action is based simply on a promise, arising from a loan of money to the town. There seem to be several objections fatal to the plaintiff's case. 1. No money seems to have been loaned. 2. No vote of the town authorized any one to borrow money to pay any sum beyond five hundred dollars for a man, or ratified such act. 3. No promise was ever made, or contract entered into, by any authorized agent or officer of the town, by which any attempt was made to bind the town to repay this money.

It may seem hard that the plaintiff should be deprived, in fact, of the benefit of a bounty to aid him in procuring a substitute. But, as before stated, the town could designate the objects of its bounty, and if no bounty was voted to the one year's man, the plaintiff, simply, was not within the vote. If the cost of substitutes or volunteers, for three years, had not risen so rapidly and so high, the five hundred dollars might have been sufficient to obtain this man without requiring any contribution from the plaintiff.

On the whole case our opinion is, that the plaintiff on this evidence cannot recover on the grounds stated in his declaration.

Plaintiff nonsuit.

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

ISRAEL K. ESTES, appellant, *vs.* OLIVER W. WHITE.

Costs. Jurisdiction—depends on ad damnum.

In an action appealed from the Lewiston municipal court, the original *ad damnum* was thirty dollars. The plaintiff obtained a verdict in the supreme court for less than twenty dollars—judgment below having been rendered against him—and was held entitled to full costs.

ON EXCEPTIONS.

ASSUMPSIT. The action was commenced Dec. 1, 1871, by writ issued out of the municipal court for the city of Lewiston, returnable to its January, 1872, term, and was then entered therein. The plaintiff resided in Lisbon, Androscoggin county, and White at Topsham, in Sagadahoc county. The *ad damnum* was thirty dollars. The balance claimed as due on the account annexed was $17.93. The action was tried before that court, and judgment rendered for the defendant for $17.38, upon a set-off filed by him. The plaintiff appealed to this court and obtained a verdict for $16.43. The defendant then claimed that only quarter costs should be taxed, but the presiding justice ruled otherwise, and defendant excepted.

Frye & Cotton, for defendant.

The municipal court for the city of Lewiston was established by act approved February 17, 1871, Private and Special Laws of

1871, c. 636. It was granted concurrent jurisdiction with the supreme judicial court over all civil actions where the debt or damages demanded did not exceed $100, and either party resided in Androscoggin county. The plaintiff claimed a less sum than $20, as debt, although his *ad damnum* was set at $30. This was done to oust the jurisdiction of the courts of Sagadahoc county, in which it should have been brought. The verdict settles the amount for which the suit was brought. *Hervey* v. *Bangs*, 53 Maine, 514. This did not result from the set-off, for the plaintiff claimed less than twenty dollars as due him. Hence, only entitled to one-quarter costs. R. S., c. 82, § 107. By laws of 1872, c. 157, the jurisdiction of the municipal court was confined to Androscoggin county; there is no exception of pending cases. This act coming between the taking of the appeal and its entry in the appellate court, abates the action. Nor does it make any difference that the cause went to trial in the supreme court, since "consent cannot give jurisdiction." *Hatch* v. *Allen*, 27 Maine, 95; *Clark* v. *Connecticut*, 1 Munf. 160; *Fitzgerald* v. *Beebe*, 2 Eng. 305.

Record & Hutchinson, for plaintiff.

APPLETON, C. J. The Act of 1871, c. 636, establishing the municipal court for the city of Lewiston, was approved Feb. 17, 1871.

By § 2, the court has "original and concurrent jurisdiction with the supreme judicial court in all civil actions, when the debt or damages demanded do not exceed one hundred dollars, and the plaintiff or defendant resides in the county of Androscoggin," except in actions when the title to real estate is in controversy.

In the present case, the plaintiff resides in Androscoggin, and the defendant in Sagadahoc county. The damages demanded were thirty dollars, though the debt claimed was $17.93. It has been repeatedly held that the jurisdiction depends upon the damages demanded. *Hapgood* v. *Doherty*, 8 Gray, 373; *Ashuelot Bank* v. *Pearson*, 14 Gray, 521. If the defendant desired to raise

the question of jurisdiction, he should have done it at the commencement, and not at the close of litigation.

By the Act approved Feb. 27, 1872, c. 157, the original, concurrent jurisdiction of the municipal with that of the supreme judicial court, is limited to civil actions to be brought against a resident of Androscoggin county.

This suit was then pending, and was not affected by the Statute, which is prospective in its operation. R. S., c. 1, § 3.

The general rule is that the party prevailing shall recover costs. R. S., c. 82, § 104. This rule obtains except where, by some special enactment, a different one is established. But none such is shown, except that by § 15 it is provided that "costs and fees allowed to parties and attorneys in all actions before said court, in which the debt or damage recovered shall not exceed twenty dollars, shall be the same allowed in actions before trial justices, except the plaintiff, if he recover, shall be allowed one dollar for his writ, and the defendant, if he recover, shall be allowed one dollar for his pleadings; but in cases where the amount recovered exceeds twenty dollars, costs and fees shall be the same allowed in the supreme judicial court, except that the defendant, if he recover, shall be allowed two dollars for his pleadings." No provision is to be found limiting or restricting the plaintiff in a case like the present to quarter costs. It follows, therefore, that the ruling of the presiding justice at *nisi prius* was correct, and the exceptions must be overruled. *Exceptions overruled.*

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

RETIAH D. JONES *vs.* FRANCIS SKINNER and others.

Pleading. Flowage—complaint must state defendant's ownership, or occupancy, of mill-site.

A complaint for flowage under R. S., c. 92, § 1, containing no allegation of defendants' ownership of the land on which the dam causing the flowage was erected, held bad on demurrer.

ON EXCEPTIONS.

This is a complaint for flowage of complainant's land in Webster, caused by the erection of a dam, in 1869, by the defendants, on Sabattus river. The complaint, drawn under the first section of chap. 92 of the Revised Statutes, stated that Francis Skinner & Co., the defendants, erected and maintained certain water-mills, described, and a dam for the working of the same, and gave a particular description of the premises flowed, and of the damages suffered, but did not allege the mills and dam to be built or maintained upon the defendants' own land. The defendants filed a general demurrer, which was joined, and this omission was stated as the ground of demurrer. The presiding justice overruled the demurrer, and defendants excepted.

Frye & Cotton, in support of the exceptions and demurrer, called attention to the changes in the phraseology of the various statutes in this State and Massachusetts, regulating the erection of dams.

Acts of 1714, chap. 111, Ancient Laws and Charters, 404–5; Laws of Maine, A. D. 1821, c. 45; R. S. of 1841, c. 126, § 1; Acts of 1855, c. 133; R. S. of 1857, c. 92, § 1; R. S., c. 92, § 1; Washburn on Easements, 395, 403; Mass. Gen'l Statutes, c. 149; R. S. of Rhode Island, c. 88, § 1; *Bates* v. *Weymouth Iron Co.*, 8 Cush. 553; *Farrington* v. *Blish*, 14 Maine, 423; *Prescott* v. *Curtis*, 42 Maine, 64.

S. & J. W. May, for complainant. Respondent's counsel have stated the case and presented question very fairly in their argument; it is simply, whether or not, in a case like the one at bar, it is essential to allege in the complaint, that the mills and dams are erected on defendants' "own land." The second section of c. 45, Laws of 1821, limits the remedy expressly to facts stated in the first section of that Act. The fourth section of c. 92, R. S., is broader. See also R. S., c. 92, §§ 7, 12. The Act of 1821 did not take away the common-law remedy, while the existing law does. R. S., c. 92, § 23.

But we further say, that an allegation that one "erects" and "maintains" a mill and dam, raises the legal presumption that he does so upon his own land.

VIRGIN, J. At common law, any person might erect and maintain a water-mill and raise a head of water sufficient to work it by means of a dam upon his own land, so long as he kept within the salutary injunction—"*sic utere tuo ut alienum non laedas;*" but when the water raised by his dam, by force of the natural law which governs it, injured the land of the proprietors above, either by overflowing or percolation, his dam became in law a private nuisance, liable to be abated; and the owner thereof, and his agents, and servants, were subject to an action of tort, joint or several, for its erection, while successive actions on the case, for the slightest as well as the more serious injuries of this kind, were maintainable against whomsoever should continue the nuisance. *Strout* v. *Millbridge Co.*, 45 Maine, 87; Angell on Watercourses, § 330, and cases there cited; *Pixley* v. *Clark*, 35 N. Y., 520.

But the province of Massachusetts Bay, in 1714, while the country was slowly progressing from a "wilderness to cultivation," and lands were of little value compared with mills which would grind corn into meal and saw logs into boards, somewhat modified this common-law principle, by enacting c. 111 of that year (An. Chart. 404), the preamble whereof declares—"Whereas it hath been found by experience, that when some persons in this prov-

ince have been at great costs and expenses for building of mills serviceable for the public good and benefit of the town or considerable neighborhood in or near to which they have been erected, that in raising a suitable head of water for that service, it hath sometimes so happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and lawsuits have arisen, for prevention whereof, for the future

"Be it enacted, etc., that where any person or persons have already, or shall hereafter set up any water-mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills are or shall be erected or built, that then such owner shall have free liberty to continue and improve such pond for their best advantage, without molestation."

The next and only other section provided for the appraisal and recovery of the "yearly damage."

This act giving "owners free liberty to continue" their dams "for their best advantage without molestation," was followed by "An Act for the support and regulation of mills," being c. 74 of 1796, which, after declaring by way of preamble, that "whereas the erection and support of mills to accommodate the inhabitants of the several parts of the State ought not to be discouraged by doubts and disputes, and some special provisions are found necessary," provided:

"That when any person hath already erected, or shall erect, any water-mill on his own land, or on the land of any other person, by his consent legally obtained, and to the working of such mill, it shall be found necessary to raise a suitable head of water; and in so doing any lands shall be flowed not belonging to the owner of said mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner and on the terms hereinafter mentioned."

The remaining sections provided for the appraisal, security, and recovery of the annual damage.

The first section of c. 45 A. D. 1821 of the Public Laws of Maine, is an exact transcript of the first section of c. 74 of 1796, of the Act of Massachusetts, above recited.

The effect of the statute was under a certain state of facts, to take away from the land-owner his common-law remedy for the invasion of the enjoyment of his land, which would compel the mill-owner to prostrate his dam, and by reducing his head of water, destroy the benefit of his mill; to change the tort into a statute-right authorizing the mill-owner or occupant "to continue the same head of water to his best advantage;" and so far as it may operate an injury to the land-owner to substitute for the common-law remedy a mode of redress, *sui generis*—in the nature of a bill in equity—simple, plain, and certain, whereby all parties can have their past, present, and future rights adjusted. *Moore* v. *Shaw*, 47 Maine, 88. To this extent, the statute is in derogation of the common law, and courts do not seem inclined to extend its peculiar provisions by implication. *Jordan* v. *Woodward*, 40 Maine, 317; *Murdock* v. *Stickney*, 8 Cush. 113.

What, then, was the state of facts which took away the land-owner's common-law remedy for the flowing of his land, and turned him over to this statute remedy? The answer is contained in the first section of the statute—to wit, when a man erected a mill on his own land, or on the land of another, with his consent. And such has been the decision of this court upon this precise question.

Thus, in *Farrington* v. *Blish*, 14 Maine, 425, Weston, C. J., says:—"It is a process specially given, which should contain averments of all the facts made essential by the statute, to enable the complainant to avail himself of the remedy prescribed. . . . To bring the case, therefore, within the statute, it was necessary for the complainant to set forth, that the respondents had erected a water-mill on their own land, or on the land of another with his consent, etc. . . . The complaint before us contains no averment that the respondents had erected, or caused to be erected on their own land, or on the land of any other person by his consent, any water-mill whatever. . . . The complaint, then, is clearly defective in omitting averments essential to its prosecution."

In the revision of 1841, c. 126, § 1, the words, "upon his own land, or on the land of any other person, by his consent legally obtained," were omitted, and the words, "upon and across any stream not navigable," inserted. In a complaint under this last-named statute, wherein there was no allegation that the stream across which the dam was erected, was "not navigable," the omission was held fatally defective. *Bryant* v. *Glidden*, 36 Maine, 36; *Strout* v. *Millbridge Co.*, 45 Maine, 76.

In *Prescott* v. *Curtis*, 42 Maine, 64, Tenney, C. J., in his opinion upon a complaint founded on R. S. of 1841, c. 126, § 1, which contained no allegation that the dam was built on the respondents' own land, etc., says: "Such allegations are not required in terms by the statute of 1841 as they were by that of 1821, c. 45. And on examination and comparison of the statutes, the change was obviously intended."

As has been seen, c. 126 of 1841 did not require that the dam should be erected on the owner's land; but in the subsequent revision of 1857, c. 92, this provision was restored; and we are obliged to think "the change was obviously intended." For when a statute has received a judicial construction, and is afterwards reenacted in the same terms, it is to be understood that the legislature have thereby adopted the construction thus given it. *Myrick* v. *Hasey*, 27 Maine, 9; *Osgood* v. *Holyoke*, 48 Maine, 410.

And Prof. Washburn also seems to consider this an essential fact. Washburn on Enactments, 395, 403.

R. S. of 1871, c. 92, § 1, is an exact transcript of the same chapter and section of R. S. of 1857, quoted above.

But it is contended by the complainant that R. S. of 1871, c. 92, § 4, which provides the remedy sought by the complaint before us, is broader in its provisions than § 2 of the Act of 1821—that the latter act provided a remedy for damage to lands "flowed as aforesaid," i. e. by a dam erected as provided in § 1; while § 4 of the present statute furnishes a remedy for lands flowed by "a milldam," i. e. however erected, provided it be "across a stream not navigable." Or in other words, that the remedy is not limited to

damages caused by such a dam as is authorized by § 1. Such was the argument urged by the complainants' counsel in *Bryant* v. *Glidden*, 36 Maine, 41, and *Strout* v. *Millbridge Co.*, 45 Maine, 78, where the complaint omitted to allege that the stream was "not navigable." And we reply in the language of Shepley, C. J. "The language is unlimited, . . . but this must be considered in connection with other provisions of the statute, which clearly was not designed to afford this remedy, and to protect a dam from removal as a nuisance, and to decide upon the manner in which it should be used, when it could have no legal existence. The whole proceedings have reference to claims authorized by the statutes, and not to claims not authorized by it." The statute authorizes "any man" to erect and maintain a water-mill and dams to raise water for working "on his own land," etc., but it does not authorize him to do it on any other person's land; and if he does so it is a nuisance, and is not protected by c. 92.

The provisions in relation to maintaining the different processes against "an occupant" were in the Act of 1821, when *Farrington* v. *Blish* was decided. This not being a complaint against "an occupant," but against persons, who, "on the third day of February, 1869, erected, and have ever since maintained certain water-mills, and a certain dam to raise water for working said mills," etc., we have no occasion to discuss at this time that branch of the complainant's argument.

Section 5 does not profess to provide what shall constitute a full formal complaint, but simply directs that the description of the land injured, and the statement of the damage shall be full.

Exceptions sustained.

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

RUFUS P. HACKETT *vs.* BETSY LANE and others.

Poor debtor's bond. Full damages where justices had no jurisdiction of case.

To entitle a debtor to have the damages assessed under R. S., c. 113, § 52, the justices acting in the premises must be selected according to law, and have jurisdiction over that particular disclosure; otherwise the damages must be assessed according to the provisions of R. S., c. 113, § 40. *Blake* v. *Brackett*, 47 Maine, 28, affirmed. *Foss* v. *Edwards*, 47 Maine, 145, so far as relates to the question of damages, overruled.

The only bar to an action upon a poor debtor's bond, is a complete fulfilment, on the debtor's part, of one of its three alternative conditions.

Plea of performance of the conditions of such bond, according to the statute, estops the debtor from claiming it to be, by reason of its variance from the requirements of the statute, a common-law bond.

ON EXCEPTIONS.

DEBT on poor debtor's bond. Plea, the general issue, with a brief statement of performance of conditions, according to Chap. 113 of the Revised Statutes, and a counter brief statement denying such performance. Betsy Lane seasonably cited the plaintiff to attend her disclosure, and procured the attendance of a magistrate. Hackett was present at the time and place designated, but declined to select any justice to act in the premises. The only deputy sheriff who resided in the vicinity was temporarily absent, so that no proper officer to make a selection could be seasonably reached; and, in this dilemma, the debtor's attorney requested another disinterested magistrate to act with the one chosen by Mrs. Lane, and he complied. These two justices administered the oath and gave the certificate prescribed in R. S., c. 113. The plaintiff claimed judgment for the full amount of the execution, interest, and costs, according to section 40 of that chapter; and, though the defendant asserted the right to have the bond chancered, under R. S., c. 113, § 52, and offered evidence in reduction of damages, the presiding justice refused to admit it, and ordered such judgment to be entered as plaintiff claimed. The defendants excepted.

Record & Hutchinson, in support of exceptions.

Prior to Acts of 1848, c. 85, a failure to select the justices precisely according to the terms of the statute, caused an entire forfeiture of the bond. *Bunker* v. *Hall*, 23 Maine, 26.

This rigid rule worked so much hardship that the above statute was enacted to relieve parties from such fatal consequences on account of mere technical errors. Under that statute, the failure to select the justices precisely in accordance with the terms of the general statute; or the failure of the justices to perform their duties in exact accordance with the requirements of the law; did not, necessarily, work an entire forfeiture of the bond; but in a suit upon the bond, the defendants had a right to be heard in damages; and if no damages were proved, none were assessed. *Call* v. *Barker*, 28 Maine, 317; *Bard* v. *Wood*, 30 Maine, 155; *Sanborn* v. *Keazer*, 30 Maine, 457; *Baker* v. *Carleton*, 32 Maine, 335; *Hathaway v. Stone*, 33 Maine, 500; *Bailey* v. *McIntire*, 35 Maine, 106; *Winsor* v. *Clark*, 36 Maine, 110; *Hatch* v. *Norris*, 36 Maine, 419; *Bray* v. *Kelly*, 38 Maine, 595; *Haughton* v. *Lyford*, 39 Maine, 267.

The statute of 1848, c. 85, as modified by statute of 1856, c. 263, is incorporated in the R. S., c. 113, § 52; and the foregoing authorities are applicable to this case, as the present statute is in substance and spirit the same as that of 1848. *Foss* v. *Edwards*, 47 Maine, 145.

If it be contended, that section 52 contemplates the legal selection of the justices, then it has no conceivable legitimate meaning. If the justices be legally selected, it is a complete bar to an action on the bond. The very terms of that section contemplate errors in the selection of the magistrates.

The bond in this case is not a statute bond, either as to amount or conditions; and is, therefore, liable to be chancered. *Ross* v. *Berry*, 49 Maine, 443, and cases there cited; *Clark* v. *Metcalf*, 38 Maine, 122.

S. & J. W. May, for plaintiff.

The phrase, "having jurisdiction and legally competent to act in

the matter," as used in R. S., c. 113, § 52, means the matter of the one particular disclosure in which the magistrates are called to sit, and not the general matter of poor debtor's disclosures. Compare Acts of 1856, c. 263, and R. S. of 1857, c. 113, § 48; *Blake* v. *Brackett*, 47 Maine, 28.

After the construction given by the court in *Winsor* v. *Clark*, 36 Maine, 110, to Acts of 1848, c. 83, the legislature changed that statute by Acts of 1856, c. 263. The intention is that, before he can avail himself of the benefit of the oath and discharge, the poor debtor shall cause to be organized such a tribunal as the statute contemplates; otherwise, he shall derive no benefit from its proceedings. *Williams* v. *Burrill*, 23 Maine, 151–2; *Bunker* v. *Hall*, Ib. 27; *Burnham* v. *Howe*, Ib. 494; *Hovey* v. *Hamilton*, 24 Maine, 452.

There is no such thing as a general jurisdiction of justices over this subject; it is only a special jurisdiction over each case, as it arises, acquired by strict compliance with statute requirements.

The defendant's brief statement precludes him from claiming this as a common-law bond.

VIRGIN, J. This is an action on a bond, given by the defendants, to procure the release of Betsey Lane from arrest on an execution duly issued on a judgment in favor of the plaintiff. The question is, whether, after legally notifying the plaintiff, her taking of the poor debtor's oath before two justices of the peace and of the quorum, of the county where the arrest was made, one of which was selected by herself and the other by her attorney, brings the case within R. S., c. 113, § 52, so that the amount of damages "assessed shall be the real and actual damage."

After the enactment of c. 195 of the Pub. Laws of 1839, and prior to that of c. 85 of the Pub. Laws of 1848, a disclosure before two justices of the peace and of the quorum, not selected in the mode prescribed by the statute then in force, was considered void, as having been made before a tribunal having no authority to administer the oath and make the certificate. *Barnard* v. *Bryant*,

21 Maine, 209; *Bunker* v. *Hall*, 23 Maine, 26; *Clifford* v. *Burrill*, 23 Maine, 144; *Burnham* v. *Howe*, 23 Maine, 489.

But § 2, c. 85 of the Pub. Laws of 1848, provided that, "in all actions commenced, or which may hereafter be commenced, in the supreme judicial court or district court, upon any bond given by a debtor to obtain his release from arrest on mesne process or on execution or warrant of distress for taxes, if it shall appear that, prior to the breach of any of the conditions of such bond, the principal therein had been allowed, by two justices of the peace and of the quorum, to take and had taken before such justices, the oath prescribed in the 28th section of said c. 148 (R. S. of 1841), the damage shall be assessed by the jury, if such be the request of either party; but if no such request be made, then by the court. The amount assessed shall be the real and actual damage and no more; and any legal evidence upon that point may be introduced by either party."

This statute was followed by numerous decisions, giving a construction to it, and declaring, substantially, that whatever may be the legal incompetency of the justices selected, whenever the oath has been administered to the debtor, the amount of damages to be assessed on the bond must be the real and actual damage.

Thus, in *Bard* v. *Wood*, 30 Maine, 156, decided in 1849, the court say, "that statute includes all cases where the oath has actually been taken, although the justices had no jurisdiction."

And in *Sanborn* v. *Keazer*, 30 Maine, 457, Wells, J., speaking for the court, said, "Though there may have been a breach of the bond on account of irregularity in organizing the justices' court, still, if in fact, they administered the oath, the case falls under the Act of 1848, c. 85." To a similar purport are *Baker* v. *Carleton*, 32 Maine, 335, and *Winsor* v. *Clark*, 36 Maine, 111.

And, finally, in *Houghton* v. *Lyford*, 39 Maine, 267, where the debtor was allowed to take the oath before justices of the peace and of the quorum of a county other than that wherein the arrest was made, Tenney, J., in delivering the opinion of the court, said: "Notwithstanding the breach of the condition of the bond, the

case falls within the provisions of the statute of 1848, c. 85, § 2, which restricts the damages to the amount which shall be the real and actual damage." This case was promulgated in 1855. And the next winter, the legislature, as appears by c. 263 of the Pub. Laws of 1856, amended c. 85 of the Pub. Laws of 1848, by omitting the unnecessary verbiage, and inserting after the word "quorum," the words, "of the county where the arrest was made, having jurisdiction and legally competent to act in the matter," leaving the remainder of the section as it was originally. And c. 85 of the Act of 1848, as thus amended by c. 263 of the Act of 1856, was incorporated into the R. S. of 1871, and became § 52 of c. 113. So that since the enactment of c. 263, the fact that a debtor has been allowed to take the oath before two justices of the peace and of the quorum, will not restrict the amount of damages recoverable on the bond to the real and actual damage, unless it also appear that the justices who allowed the oath were "of the county where the arrest was made, having jurisdiction and legally competent to act in the matter."

Under c. 85 of the Act of 1848, containing no provision in relation to the jursidiction of the justices selected to hear the debtor's disclosure, the court held in the cases cited, that it was sufficient to entitle the debtor to be heard in damages, even if the justices who allowed the oath were the debtor's own blood relatives, or were not officers within the county where the arrest was made; and the amendment of 1856 was enacted to put an end to such farces, and to return to the former mode. For the court had already declared in numerous cases what constituted jurisdiction in such cases.

Thus in *Knight* v. *Norton*, 15 Maine, 339, Shepley, J., said: "The preliminary proceedings must be in conformity to the provisions of the statute, to give the justices jurisdiction and authorize them to act."

And in *Williams* v. *Burrill*, 23 Maine, 154, Tenney, J., said: "That the persons composing the tribunal should be justices of the peace and of the quorum, and should also be selected according to the statute, are equally material."

And in *Barnard* v. *Bryant*, 21 Maine, 206, Whitman, C. J., said: "It was clearly the right of the creditor to select one of the magistrates; and the debtor had no right, in any event, to select more than one. The proceeding was, therefore, wholly *coram non judice* and void. This case was re-affirmed in *Bunker* v. *Hall*, *ubi supra*. Thus the court had, at an early day, decided that justices selected otherwise than the statute-mode, had no jurisdiction in the matter, and all proceedings before them were, therefore, *coram non judice*."

Such having been the adjudged signification of the term "jurisdiction" in matters of this kind, we think the legislature intended to give to it the same meaning in the amendment of 1856. And such was substantially the decision of this court in *Blake* v. *Brackett*, 47 Maine, 33, 34, wherein the principal question involved in the case at bar was discussed and distinctly decided.

The law as laid down in *Foss* v. *Edwards*, 47 Maine, 145, being inconsistent with this decision, is overruled.

But it is contended that if the amendment of 1856 contemplates the legal selection of the justices, "it has no conceivable legitimate meaning, and that such a selection would be a complete bar to an action on the bond."

We do not so understand the statute. On the contrary, the only bar to an action on a poor debtor bond is a complete fulfilment on the part of the debtor, of one of the three alternative conditions mentioned in R. S., c. 113, § 24. If the debtor would fulfil the first condition requiring him to "cite the creditor before two justices of the peace and of the quorum, submit himself to examination, and take the oath prescribed in § 30," he must follow the statute implicitly in all of its requirements; and when he has done that, he has done all his obligation stipulated, and of course the action is barred. If, however, in attempting to do it, he follows the statute in the citation and selection of the justices, and the tribunal thus legally and fairly constituted omits some of the requirements, such, for instance, as the appraisal of the property disclosed by the debtor as contemplated in § 31, but allows him to take oath, then the

debtor would be entitled to be heard in damages under § 52. *Leighton* v. *Pearson*, 49 Maine, 100.

It is further contended that the bond in suit is not a statute bond, either as to its amount or conditions.

But we do not think either of these questions are open to the defendants. By their brief statement, they distinctly ground their defense upon the alleged fact that the principal obligor fully performed the conditions of the bond by "disclosing the state of her affairs in accordance with the provisions of the 113th chapter of the Revised Statutes," and took the oath prescribed in the 30th section; and this is as distinctly denied by the plaintiff's counter brief statement. The question thus presented was the one passed upon by the presiding justice, which, with the question of damages, was the only question relied upon by the court, and raised by the bill of exceptions.

Our conclusion is, that the justices who heard the alleged disclosure of the debtor, and allowed her to take the oath prescribed in § 30, not having been selected in the mode prescribed in § 42, had no jurisdiction of the matter, and their proceedings therein were consequently void, and would constitute no defense to this action. *Exceptions overruled.*

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

GEORGE W. LAWRENCE, in equity, *vs.* EMERSON ROKES and others.

Equity. Partnership accounts. Limitations, statute of. Account. Demand.

Where, in a bill in equity against several defendants, all of whom appear, and all but one allow the bill to be taken *pro confesso*, the existence of a common interest in property, and the transaction of a joint business is admitted, and the complainant (a partner), applies for an adjustment of the accounts respecting it, the court will not accept a general denial of indebtment on the part of the respondent, however positive, and dismiss the bill, without reference to a master for an investigation of accounts, notwithstanding such denial may be accompanied with a statement of circumstances rendering it probable that, as to such respondent, the denial may prove well founded; especially, when the respondent does not assert his full knowledge of all the details of the accounts. The master to whom the case is referred may receive proof that the partnership transactions extended over a longer period of time than that specified in the answer.

While the court, in equity, will ordinarily give full effect to the statutes of limitation, in so doing it acts in obedience to the spirit of those statutes, and "rather upon the reason and principles on which, as positive rules, they are founded, than the rules themselves;" so that, if, by the laches of the complainant, the respondents have lost their evidence, or are placed in a disadvantageous position, the court will deal with the remedy as if barred in equity, even although the full term of the statute of limitations may not have elapsed; and, on the other hand, where there has been no change in the condition and position of the parties, and peculiar circumstances appear to justify the delay, appropriate relief will not be refused, although a strict application of limitation rules might seem to require it; certainly not where the respondent admits the reception of firm assets within six years.

To operate as a bar, the benefit of the statute must be expressly claimed in the answer.

Whether actions of account at law, and the analogous remedy by bill in equity are now subject to any other than the general limitations of twenty years, *quære?*

The making, or omission to make, a demand before filing the bill, only affects the question of costs; especially where the answer shows such a difference between the parties as to indicate that a demand would be a mere fruitless formality.

BILL IN EQUITY to obtain an adjustment of partnership accounts. First heard on demurrer; see 53 Maine, 110. Subsequently all the defendants appeared, and all but Rokes allowed the bill to be taken *pro confesso*. He filed his answer, and the cause was heard

on bill, answer, and replication. The facts are stated in the opinion.

Wm. L. Putnam, complainant's solicitor.

A. P. Gould, solicitor for respondent, Rokes.

W. H. Fessenden, for the other respondents, submitted to the bill, filing no answer.

BARROWS, J. The complainant's bill in equity, commenced Feb. 5, 1864, alleges that he, with Emerson Rokes, of Rockland, in this State, Alexander Libbey, 2d, of the State of Virginia, Sanford Williams, of Boston, Massachusetts, and Bradford Oliver, of the State of New Jersey, in 1856, commenced the business of purchasing and cutting timber and lumber in Virginia, and shipping the same to market and disposing of it upon joint account, which business they continued until the fall of 1858, shipping and selling large quantities of timber and lumber, in which and the proceeds thereof they had an interest in common, each one-fifth; that in the prosecution of the business large liabilities were incurred upon joint account, and that this complainant, at the request of the respondents, and in their behalf as well as his own, has assumed and paid more than his fair proportion of these liabilities, while each of the respondents has received more than his due share of the proceeds of the joint property, so that each is thus indebted to him in a considerable sum; that he has frequently requested the respondents to come to a settlement of all the matters appertaining to the premises with him, and that they neglect and refuse so to do. Wherefore, he prays that they may be required to render a full and fair account, and pay such sums as may be found due from them respectively to the complainant, he offering to pay on his part whatever may be found due from him to them, or any of them.

Since the case was up before, upon a demurrer for alleged want of parties, which was overruled (53 Maine, 110), the respondents who were out of this State have all appeared, submitted to the jurisdiction, and allowed the bill to be taken *pro confesso* as to

them. Rokes, who then demurred, on account of the absence and non-joinder of his co-respondents, files an answer, which, if taken to be true (as it must be in the absence of any evidence to control it as to all matters where it is responsive and consistent) would seem to bring the case within the rule there laid down (p. 113) requiring all the parties interested to be before the court; but as all the respondents have now appeared, and become parties, that matter is altogether immaterial, and the question is, whether, upon the facts as stated in the answer, the bill can still be maintained, and the accounts investigated by a master in chancery, or whether the bill should now be dismissed.

And we are of opinion that there is nothing asserted in the answer which requires that the bill should be summarily dismissed without the investigation which the complainant claims.

The answer admits the transaction of a large co-partnership business by the parties, and that there has never been any adjustment among them; that there were large disbursements and receipts for the common benefit; and it appears by a comparison of the bill and the answer of Rokes, that he and the complainant differ so radically as to the actual state of the accounts, that there would seem to be no rational probability of a settlement except by the intervention of compulsory process. The respondent asserts in his answer, that "the last of said timber was shipped from Virginia to the New England States in the fall of 1857, since which time the business of cutting and selling timber by the said joint parties has ceased;" that "said business was conducted under the firm name of Lawrence, Oliver & Co.;" that no cash capital was furnished or put in by either of the parties; and that the only capital or property with which the business was commenced, consisted of certain lots of standing timber, mules, harnesses, wagons, chains, and other apparatus serviceable in the business about to be undertaken. And of this the defendant says what he furnished was of the value at least of $2500, and that which the complainant furnished, "according to the recollection and belief of this defendant," was of the value of about $1000. Rokes further asserts that he advanced in the

prosecution of the enterprise, the further sum of $2,118.65, and contributed his personal services to said firm for one year; that he received from a person to whom some of the timber was sold by Lawrence, Oliver & Co., $161, in September, 1858, and that he had of them in October, 1857, teams, wagons, and timber, for which he agreed to give them $1,710, and that this is all he ever received from the common stock, leaving, as this respondent claims, a balance due to him from the firm, of $2,747.65, besides interest; that they cut and forwarded a great quantity of timber during the season of 1856–7, which was sold by the complainant, as agent for the firm, and the pay therefor received by him to an amount exceeding the cost of production and transportation, "as this defendant is informed and believes,"—but to what precise amount he does not know, though he has repeatedly requested the complainant to inform him—that he has no knowledge of the advancement of moneys, or the payment of debts for the firm by complainant except from the allegations in the bill, and he therefore prays that complainant may be held to proof of the same, and he explicitly denies that any sum can be due from him to the complainant on that account, and asserts upon information and belief, that on the contrary, upon a full and fair adjustment, the complainant would be found indebted to him, but in what amount he cannot say, because he says complainant has the accounts and vouchers relating to the sales of timber, and other property, and the disbursements made by him, if any, in his own possession. He further asserts upon information and belief, that there are still due from the firm, debts to the amount of from $1500 to $2000, and asserts that the property of the firm was all disposed of by common consent in 1857, and that since that time no person has had authority to contract debts upon joint account. And he denies that the complainant has ever requested him to come to a settlement "when he, the said Lawrence, was willing and ready to make such settlement," or that he himself has ever refused to make a settlement, averring that he "has always been willing and ready to make a full and fair settlement of all the transactions and affairs of said company," one of

which he says was the sale and delivery of part of a ship's frame to Lawrence, Williams, and Oliver, which he is informed and believes was never paid for, although it was the duty of the complainant, as agent for Lawrence, Oliver & Company, to collect the pay for it, or pay it himself as one of the purchasers.

Upon the condition of things here presented, it is to be remarked:

1. Where, as here, the existence of a common interest in property, and the transaction of a joint business are admitted, and one of the parties applies for an adjustment of the accounts respecting it, the court will not accept a general denial of indebtment on the part of the respondent, however positive, and dismiss the bill, without referring it to a master for an investigation of the accounts, notwithstanding such denial may be accompanied with a statement of circumstances rendering it probable that as to such respondent the denial may prove well founded.

2. Especially will they not do this where the respondent does not assert a full knowledge of all the details of the accounts. The result may prove different from what the respondent honestly anticipated when making his answer.

3. Nor will the master be precluded from receiving proof that the transactions of the partnership extended over a longer period of time than that specified in the answer. The continuance, as well as the extent and amount of the partnership business, is fit matter for the master to report upon, subject to the exceptions which lie to his report.

4. While the court, in equity, will ordinarily give full effect to the statutes of limitation affecting actions at law in analogous cases, it must be remembered that in so doing it (to use the language of Shaw, C. J., in *Phillips, Judge*, v. *Rogers*, 12 Met. 411) "acts in obedience to the spirit of statutes of limitation, and rather adopts the reason and principles on which, as positive rules, they are founded, than the rules themselves."

Accordingly, if by the laches and delay of the complainant it has become doubtful whether the other parties can be in a condition to

produce the evidence necessary to a fair presentation of the case on their part, or it appears that they have been deprived of any just advantage which they might have had if the claim had been put forward before it became stale and antiquated; or if they be subjected to any hardship which might have been avoided by more prompt proceedings, although the full time may not have elapsed which would be required to bar any remedy at law, the court will deal with the remedy in equity as if barred; and, on the other hand, where it appears beyond question or dispute that lapse of time has not in fact changed the condition and position of the parties in any important particular, and there are any peculiar circumstances entitled to consideration as excusing the delay, they will not refuse the appropriate relief, although a strict and unqualified application of limitation rules might seem to require it.

In the present case, the respondent declares that no adjustment ever has been made; that he has always been ready to make a full and fair settlement of the business of the firm, claiming, however, that a large balance is due to himself upon such settlement, and he suggests nothing whatever in his answer to indicate that such settlement cannot be as well made now as at any period since the inception of the business. He does not plead the statute of limitations, and although under Rule vi, he may have the benefit of a plea in bar by inserting its substance in his answer, in the absence of any intimation in the answer that he claims exemption on the score of lapse of time, the court will not interfere to set up the bar, but will consider the respondent as waiving it, even though the facts alleged were such as to make it appear that it might be successfully interposed.

The distance of the parties from each other, one of them residing in a State, which, during a large part of the time has been in revolt against the general government, making communication with its citizens difficult, if not impracticable, and the difficulty of obtaining jurisdiction without consent of all parties interested, may well be considered as excusing the delay that has here occurred.

5. The respondent admits the reception by himself of funds be-

longing to the firm within six years previous to the filing of the bill.

6. While actions of account, and upon the case (except for slander) "other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants," were subjected to a limitation of six years by Statute of 1821, c. 72, § 7, both the provision as to actions of account, and the exception in favor of merchants' accounts disappeared in the revision of 1841, and have never since been reënacted; and it may fairly be doubted whether actions of account at law, and the analogous remedy in equity by bill to compel an account can now be considered subject to any other than the general twenty years' limitation of all personal actions on any contract.

7. The fact of a demand for a settlement by the complainant, and a refusal by this respondent, can, in no event, affect any question between these parties except that of costs, and the decision whether or not it was made may well await the coming in of the master's report and ulterior proceedings. It is plain from the answer that a demand must have been a fruitless formality, for the parties differ *toto cœlo* as to the actual condition of the accounts.

Bill sustained. Master to be appointed at nisi prius.

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

Nathaniel Dyer *vs.* David T. Libby.

Delivery. Statute of Frauds.

If it be agreed that goods sold shall be hauled by the vendor to a place specified, it does not necessarily follow that the title thereto does not pass till they reach the place designated. The property may pass so as to take the case out of the Statute of Frauds, at the time the agreement is made, if the parties so intend; and whether or not such was their intention, in any given case, is a question for the jury, to be determined from the words, acts, and conduct of the parties, and all the circumstances.

An instruction of the above purport held unexceptionable.

Motion for new trial and Exceptions.

Assumpsit on an account for hay; plea, the general issue. The plaintiff testified that he met Mr. Libby on board of the cars and agreed to sell him this hay; that the plaintiff was to haul the hay to Freeport depot and get twenty-five dollars a ton for it; "he (Libby) was to press the hay, and furnish press, and pay me twenty-five dollars a ton, and I was to haul it to Freeport. I was to furnish withes and binders." This was on the 16th of February, 1865; on the 22d the parties met in the road and rehearsed the bargain, "so that there would be no misunderstanding." On the 27th of the same month Libby sent the men who pressed the hay and baled it. The plaintiff was to haul the hay on sledding. A few days after it was pressed he told Libby that he should like to haul it immediately, but Libby replied, "I cannot get cars now, but will go to the corner (Freeport) and get a place." He went and came back and said he could get no place. The 18th of March he told Dyer he might haul the hay, but it had rained so as to make it impracticable to haul it. The plaintiff was unable to haul it, or to procure any neighbor to do it. This was Saturday; the following Monday, 20th, the parties met at town-meeting, and plaintiff asked defendant how he got along. The reply was, "I did not see you there, but I hauled my hay [purchased elsewhere] and loaded my

cars. It was all right." The plaintiff saw Libby several times after that, and L. said, "Hay will be higher, and we can get that to the depot most any time." It was not, in fact, hauled till June 19, 1865, and was then stored at a place near the depot by the plaintiff, who notified defendant. Plaintiff then called on defendant for his pay, and defendant answered: "If I were to take all the hay I have bought it would ruin me."

The hay was branded "D. T. Libby, Pownal, Maine." The defendant testified that the hay was never delivered to him, and that he never accepted it; that, at the time he asked to have it hauled in March, other hay was hauled to him upon neighboring roads; that he did not tell the men to mark the hay with his name, and that they used his stencil upon any hay pressed by them at their pleasure, whether it belonged to him or not. There was a rising market till the middle of April; after that, hay declined. The jury returned a verdict for plaintiff, which defendant moves to set aside as against law and evidence; and excepts, also, to the directions given the jury by the court. The only instruction excepted to is fully stated in the opinion.

Nathan Webb and *James D. Fessenden*, for defendant.

1. The case is within the Statute of Frauds. The contract was to deliver the hay at Freeport depot for twenty-five dollars per ton and half the expense of pressing. Dyer never performed his part of the contract, and Libby never waived performance. Defendant never saw the hay till after it was pressed. His pressmen did not know he had bargained for the hay or thought of doing so; but branded it in their usual course of defendant's business of pressing hay; putting the presser's brand on in all cases, whether he bought the hay or not.

2. The intention of the parties is insufficient to constitute such a delivery as will take a case out of the statute, unless accompanied by acts suited to effect that purpose. The acts referred to in the instruction were not sufficient; nor of the character to place the property unequivocally within the exclusive control and dominion of Mr. Libby. To constitute such a delivery and acceptance

as will take a case out of the Statute, the possession must have been parted with by the owner so as to deprive him of his lien and leave nothing further to be done by him. *Shindler* v. *Houston*, 1 Comst. 261; *Bell* v. *Bament*, 9 M. & W. 41; *Phillips* v. *Hunnewell*, 4 Maine, 376; *Baldy* v. *Parker*, 2 Barn. & Cres. 37; *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680; *Denny* v. *Williams*, 5 Allen, 1.

Vinton & Dennett, for plaintiff, cited Story on Sales, §§ 276 278; *Chapin* v. *Rogers*, 1 East. 192; *Bailey* v. *Ogden*, 3 Johns. 399; *Elmore* v. *Stone*, 1 Taunt. 458; *Vincent* v. *Germond*, 11 Johns. 83; *Davis* v. *Moore*, 13 Maine, 424; *Rice* v. *Austin*, 17 Mass. 197; *Sawyer* v. *Nichols*, 40 Maine, 212; *Pratt* v. *Chase*, 40 Maine, 269.

WALTON, J. The defendant moves to have the verdict set aside as against evidence. He contends that the evidence is insufficient to warrant the jury in finding that the hay sued for was delivered. As the action is in form for goods sold and delivered, it was essential for the plaintiff to prove an actual delivery to, and acceptance by, the defendant, or the action could not be maintained. It appears that the hay was taken from the plaintiff's mow by men employed and paid by the defendant. It was pressed, put into bands, weighed, and branded with the defendant's name. These acts were sufficient to constitute a delivery, if accompanied by the requisite intention of both parties that the property should then pass.

Was the evidence sufficient to warrant the jury in finding that it was the intention of the parties that the property should then pass? Weighing, and marking with the purchaser's name, have always been regarded as very significant facts bearing upon the question of delivery. In this case the pressing and weighing and branding was paid for by the defendant, and there does not appear to have been any arrangement by which this expense could, in any event, be charged to the plaintiff. Why should the defendant incur this expense, with no provision for reimbursement, if he did not understand that the hay was his? Why should the plaintiff

permit the hay to be branded with the purchaser's name, if he did not understand that the property had passed? All the terms and conditions of sale had been previously agreed upon. Can the proposition be maintained that the evidence was insufficient to authorize the jury to find a delivery? That a verdict finding such a delivery, is so clearly against evidence that it cannot be permitted to stand? We think not. They probably found that the capture of Richmond and the surrender of Lee caused a sudden decline in the price of hay, and that this was the true reason why the defendant sought to escape from the consequences of the bargain he had made, and not the want of a delivery.

The fact that it was one of the conditions of the sale, that the plaintiff should haul the hay to the depot, is not inconsistent with the proposition that it might have been delivered, so as to become the property of the defendant, at the barn. And whether the plaintiff had fully performed his part of the contract, or if not, whether he was prevented from so doing through the fault of the defendant, were facts to be determined by the jury, under proper instructions from the court as to the requirements of the law; and, as nothing appears to the contrary, it is to be presumed that proper instructions were given upon these points.

The presiding judge instructed the jury, that if the defendant, by himself or servant, with the knowledge and consent of the plaintiff, took the hay sued for from the plaintiff's mow, and pressed it, and branded it with his own name, and the plaintiff understood and intended that these acts should divest him of all ownership in the hay, and that the title should be thereby absolutely and unconditionally vested in the defendant; and the defendant so understood it, and intended, by these acts, to become owner of the hay, and to have the title thereby absolutely and unconditionally vested in him, then no other or further delivery was necessary to take the contract of sale out of the operation of the statute for the prevention of frauds and perjuries, and enable the plaintiff to maintain an action for goods sold and delivered; and that whether such was the understanding and intention of the parties was a question of

fact, to be determined by the jury in view of all the evidence in the case bearing upon the question.

We think these instructions were appropriate and correct.

Motion and exceptions overruled.

Verdict on the Judgment.

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

Kent, J., gave this opinion.

KENT, J., dissenting. Assuming the law of the judge (and I do not dissent from it), I am hard pressed by the objection that there was no sufficient proof of delivery, to take the case out of the statute. It is plain, from the plaintiff's own testimony, that the bargain was for a sale of the hay, and the price was twenty-five dollars a ton delivered by Dyer at Freeport depot.

But before it was to be hauled it was to be screwed, and the agreement was that the plaintiff was to do a part of this and the defendant a part. Libby was to have it screwed, to furnish a press, and Dyer was to furnish withes and binders.

All this was done; but is there in this sufficient evidence of a delivery of the property? Must there not be such a delivery a vests property fully and beyond all liens?

The marking of the bundles, without orders, by Libby's men, is, at best, a very equivocal act; and would have been, even if it had been done by defendant himself.

A sale is incomplete when anything remains to be done by either party. Here, clearly, the hay, as part of the contract, was to be hauled to Freeport, and the plaintiff had a right to retain it until the price was paid. Is there anything from which a fair inference can be drawn that he intended to divest himself of all ownership in the hay? all lien upon it for his pay, and to transfer the absolute title?

Still less is there evidence of what the ruling required as to defendant. Did he, thereby, understand and assent and intend that

the absolute title should at once vest in him, and he be at once liable to pay twenty-five dollars a ton at the barn, and before any hauling, and be left to pursue his remedy at law against Dyer for not hauling the hay, as an independent and distinct agreement.

Could it have been held, on attachment, as defendant's while in the barn? If burned up there before hauling, would it have been defendant's loss?

If the agreement had been, only, that Libby was to give, say, twenty dollars a ton for the hay in the barn and on the mow, and was to screw it there at his own expense, or take it away without screwing, as he thought best, and if he afterwards came by himself or servants and took the hay away, or screwed it there, I should have no doubt that it would have been a sufficient delivery or taking possession. But that was not this bargain. The hay was to be delivered at another place, as part of the bargain. I grant that it might probably have been delivered at the time of bargain, so as to bind the bargain. But how can it be said, that where there is a contract for a sale of hay, which, by its terms, is not, and cannot be performed until it is hauled to another place, and the buyer is to do something in conjunction with the seller to prepare it for transportation, and does that thing, leaving it for the seller to haul it to the place of delivery agreed upon, that this is such a delivery as takes the case out of the statute.

SARAH H. DELA, in equity, *vs.* EDWIN L. STANWOOD and others.

Revenue stamp. Foreclosure—description in notice of.

The assignment of a mortgage of real estate, in October, 1863, not stamped as then required by the laws of the United States, is not, therefore, void, unless it appear that the stamp was omitted with intent to defraud the revenue.

A recital that, "On the 22d day of June, 1850, Lewis Dela, of Portland, mortgaged to the undersigned certain property particularly described in the deed, situated at the corner of Fore and India streets, in said city," is not a sufficient description of the premises in a notice of foreclosure, under R. S. of 1841, c. 125, § 5. [Same as R. S., c. 90, § 5].

Prior to Acts of 1863, c. 215, incorporated into R. S., c. 103, § 6, a minor *feme covert* could not bar her right to dower by joining in the execution of her husband's deed for that purpose; such deed was voidable by her on attaining her majority.

That Act (c. 215) could not defeat the existing right of a widow to dower.

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

The bill alleges substantially, that on Nov. 5, 1850, the complainant was married to Lewis Dela, who died June 12, 1861; that at the time of marriage her husband owned the right in equity to redeem certain land on the north-westerly corner of Fore and India streets, in Portland, from a mortgage of one-half of said land in common and undivided, given by his father, John Dela, to Josiah Pennell, Oct. 23, 1844, to secure a note for $350; also from another mortgage of the whole of same premises given by her husband June 22d, 1850, to Neal Dow, to secure a note of $1200, in which property, subject to said mortgages, she, as widow of Lewis Dela, is entitled to dower.

That Dow made an ineffectual attempt to foreclose the mortgage to him, which afterwards, through several assignments, came to the respondents.

That Josiah Pennell made a pretended assignment of John Dela's mortgage to him, to one G. B. Chandler, who made a pretended assignment thereof (which was, in fact void) to the respondents.

That the two mortgages have no longer any validity, because Chandler and the respondents have been in possession for ten years, taking the rents and profits, which have amounted to more than enough to discharge them.

That the complainant demanded in writing, of the respondents, an account at a time named; that they unreasonably neglected and refused to account.

Prayer, for answer and for an account, and that she may have leave to redeem, offering to pay what is equitably due from her, that she may be let in to her dower.

The respondents, in their answer, set up a deed of warranty of the premises from Lewis Dela to Jabez C. Woodman (under whom respondents claim title), dated January 24, 1851, which purported to be executed by the complainant, to release her dower, but she denied the genuineness of the signature. This question became immaterial in the view the court took of the law, it being admitted that at the date of this deed Mrs. Dela was a minor. The answer claimed a foreclosure of both mortgages. The defendants say they have never taken rents and profits under any title accruing under either mortgage, but did so after Oct. 7, 1863, under a mortgage of the land from George A. Thayer to George B. Chandler, that day assigned to them. The Pennell mortgage was assigned to respondents Oct. 9, 1863, more than $100 being then due thereon, and the assignment only bore a twenty-cent U. S. Int. Revenue stamp, instead of the fifty-cent one, required by law. This mortgage to Pennell was foreclosed in accordance with statutory provisions on that subject.

J. D. & F. Fessenden, solicitors for complainant.

1. Plaintiff's uncontradicted testimony is that she never released her dower; but even if she joined in executing the deed to Woodman, it would be inoperative, as she was then a minor. *Adams* v. *Palmer*, 51 Maine, 480.

2. Dowress entitled to maintain bill to redeem. R. S. of 1841, c. 94, § 15. *Barbour* v. *Barbour*, 46 Maine, 9; *Campbell* v.

Knight, 27 Maine, 331; *Simonton* v. *Gray*, 34 Maine, 50; *Gibson* v. *Crehore*, 5 Pick. 158.

3. Dow's mortgage not legally foreclosed. R. S. of 1841, c. 125, § 5; *Morris* v. *Day*, 37 Maine, 386; *Stanwood* v. *Reade*, 7 Hill, 431; *Peck* v. *Hapgood*, 10 Met. 172; *Pease* v. *Benson*, 28 Maine, 352; *Storer* v. *Little*, 41 Maine, 73; *Freeman* v. *Atwood*, 50 Maine, 473.

4. Pennell's mortgage not legally foreclosed because the assignment was void for want of the proper stamp. To foreclose a mortgage, one must have the legal record title thereto. *Reed* v. *Elwell*, 46 Maine, 270; *Dwinell* v. *Perley*, 32 Maine, 197; *Smith* v. *Kelley*, 27 Maine, 337; *Stone* v. *Locke*, 46 Maine, 445; *Douglass* v. *Durin*, 51 Maine, 121.

This mortgage had been paid by perception of the rents and profits under it. *Gibson* v. *Crehore*, 5 Pick. 146, 158; *Saunders* v. *Frost*, 5 Pick. 259; *Gordan* v. *Lewis*, 2 Sumn. 146.

This extinguishes power to foreclose. Hill. on Mort., c. 16; *Cameron* v. *Erwin*, 5 Hill, 276.

Wm. L. Putnam, for respondents.

In *Adams* v. *Palmer*, 51 Maine, 481, the widow had annulled her release by action of dower brought before Act of 1863, c. 215, was passed, whereas Mrs. Dela did not avoid her deed till her demand, in 1867. 1 Pars. on Cont. 322; *Worcester* v. *Eaton*, 13 Mass. 374–5; *Chadbourne* v. *Rackleff*, 30 Maine, 361.

This act was a confirmatory statute, not merely constitutional, but just and beneficial. Dow's certificate sufficiently shows date of publication of notice to foreclose his mortgage. *Chase* v. *Savage*, 55 Maine, 543.

Chandler and respondents held premises under mortgage of Thayer to them on account of money loaned him ($8,330) on this property. Though respondents could not profit by buying incumbrances against Thayer, so long as he held the equity, they were at liberty to foreclose as to Dela and wife. *Savage* v. *Hall*, 12 Gray, 363; *Davis* v. *Witherell*, 13 Allen, 62.

DICKERSON, J. Bill in equity for the redemption of two mortgages; presented on bill, answer, and proofs.

Lewis Dela, late husband of the plaintiff, was the owner of the right in equity to redeem one-half of the described premises during coverture, from a mortgage given by his father, John Dela, to Josiah Pennell, Oct. 3, 1844, and also of the right to redeem the whole property from a mortgage given by himself to Neal Dow, June 22, 1850.

The plaintiff, by this bill, seeks to redeem both these mortgages, or her interest therein, in order that she may have her dower in the premises.

The defendants claim that both these mortgages were foreclosed before the filing of this bill. The case finds that there was a foreclosure of the Pennell mortgage, for breach of conditions, by public advertisement, in accordance with the requirements of the statute, on the 29th day of October, 1863, if the assignee of the mortgage, who instituted the proceedings, had a valid assignment of it. The assignment to him appears to have been given for a valuable consideration, and was stamped with a twenty-cent U. S. Internal Revenue stamp, duly cancelled.

The value of the property sought to be conveyed by the assignment of the mortgage, exceeded a hundred dollars, and, by the laws of the United States, a fifty-cent stamp, at least, should have been affixed to the assignment. Chap. 119 of the Laws of the United States, §§ 94, 95, and schedule B. But as there does not appear to have been any intent to defraud the government by the use of an insufficient stamp, the assignment was not rendered invalid on that account. *Greene* v. *Holway*, 101 Mass. 244.

The attempted foreclosure of the Dow mortgage was by advertising in a public newspaper, on the 22d day of June, 1850, under R. S. of 1841, c. 125, § 5.

The description of the premises in the notice of foreclosure, is as follows: "On the 22d day of June, 1850, Lewis Dela, of Portland, mortgaged to the undersigned, certain property particularly described in the deed, situated at the corner of Fore and India streets,

in said city." We do not think that this description is sufficient. It does not state what corner of the streets named is intended; nor does it refer to any record in which the premises are more particularly described, or by which they may be identified. In order to make the notice of any service to those who may be interested to know what premises the mortgage covers, it should afford them the information necessary to enable them to identify the property with reasonable certainty. We think that the notice under consideration is not sufficient for this purpose.

The position of the plaintiff's counsel that the Pennell mortgage had been extinguished by the rents and profits, received before the assignment and proceedings for foreclosure, does not appear to be supported by the evidence and the law applicable thereto.

From the view we have taken of this case, it is unnecessary to decide the question of the genuineness of the plaintiff's alleged signature to the deed of the premises conveyed by her husband, January 24, 1851, since she was then a minor, and the deed would be voidable as to her, if she signed it. She acquired an inchoate right of dower in the premises, previous to the Act of 1863, c. 215, and cannot be divested of such preëxistent right by that statute. *Adams* v. *Palmer*, 51 Maine, 496.

The defendants must account for the rents and profits received by them on the Dow mortgage, and the case must go to a master in chancery for a hearing and statement of account.

Bill sustained with costs for plaintiff. Pennell mortgage foreclosed. Dow mortgage not foreclosed. Complainant held entitled to redeem Dow mortgage. Master to be appointed.

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

State of Maine *vs.* Francis Murphy.

Manslaughter.

Immaterial instructions are no ground for exceptions.

In this case the jury were instructed that, if the respondent, "in the heat of blood, and upon sufficient provocation," threw the deceased down stairs, the offense was manslaughter; subsequent instructions showed that this word "sufficient" was used as equivalent to the words "great and sudden;" *held*, that the prisoner had no cause for exceptions.

On Exceptions to the ruling of Goddard, J., of the superior court.

The respondent was indicted for the murder of one Patrick Murray, at Portland, on the third day of September, 1869, by throwing him down the stairs of the defendant's hotel, where the deceased had created a disturbance, persisting in attempts to enter the rooms of some female guests of the house and resisting removal. The respondent testified that Murray tried to throw him (Murphy) down stairs; and that when his hold upon the prisoner's coat was broken, Murray fell down the stairs. The jury convicted the prisoner of manslaughter; and, together with other exceptions, upon which the court express no opinion, and which, therefore, need not be stated,—his counsel excepted to the use of this language in the charge to the jury: "If Murphy, in the heat of blood, upon sufficient provocation, after reaching the head of the stairs, threw Murray down, then this offense is reduced to manslaughter."

The cause was presented to the jury by *Wm. P. Frye, Esq.*, then attorney-general, and *Nathan Webb, Esq.*, county-attorney for the government; and by *George F. Shepley, Esq.*, for defendant.

The exceptions were argued by *A. A. Strout, Esq.*, for the respondent, and by *Thos. B. Reed, Esq.*, attorney-general, for the State.

APPLETON, C. J. The respondent, upon an indictment for murder, was found guilty of manslaughter. It is unnecessary to consider the instructions as to murder, or the distinctions taken as to different offenses; as between murder in the first or second degree, or between those offenses and manslaughter, inasmuch as the jury have acquitted the respondent of the graver charge. Whether they were right or wrong, the result has rendered them immaterial. If right, there is no cause of complaint. If wrong, the prisoner, having been acquitted of murder, was not harmed thereby; and, consequently, not having, in the result, been aggrieved, he cannot have any valid exceptions to rulings which did him no injury.

The only remaining inquiry is, whether the instructions as to manslaughter were correct. Upon this branch of the charge, the only exceptions taken is to these words: "If Murphy, in the heat of blood, upon sufficient provocation, after reaching the head of the stairs, threw Murray down, then this offense is reduced to manslaughter, which is punishable with fine, confinement in jail, or imprisonment in the State's prison."

The law on the subject is thus stated in 2 Archbold, Cr. Pleading, 226: "No provocation will justify a man in killing another, nor will it excuse him. Killing on provocation, therefore, must be manslaughter or murder." The presiding judge, after stating the distinction between murder in the first and second degree, then proceeds as follows: "To reduce the offense to manslaughter the jury must be satisfied, from the facts proved, that the assault was not the result of preconceived anger, but upon great and sudden provocation, given at the time in mutual combat. In other words, although Murphy had a right to remove Murray with or without the assistance of Shea, if, in removing him down the stairway, he used a greater degree of force than he had reason at the time to suppose was necessary and reasonable, and thereby Murray was killed, Murphy is guilty of unlawful homicide." In another portion of the charge he adds: "If the preponderance of the evidence satisfies you that he had a sedate, deliberate, fixed purpose

to take the life of Murray, then, I say, it is murder in the first degree, even though that purpose had been entertained but for a moment. If you find that, in the heat of blood, under sudden provocation, he was thrown down stairs, then the law reduces it to manslaughter."

Taking all the instructions relating to the offense of manslaughter together, it is impossible that the jury could have misconceived their meaning. The sentence first quoted is all to which the learned counsel for the prisoner objects, and that is so clearly qualified by what follows that the jury could not have misunderstood it. No mere provocation is sufficient to justify a homicide. The word "sufficient," as subsequently was fully and clearly explained, meant only "great and sudden" provocation.

In another portion of the charge, the jury had been instructed to acquit the prisoner, if they believed his account of the transaction. The verdict shows they did not. The defendant, not being aggrieved by the instructions given on the subject of manslaughter, the exceptions must be overruled. *Exceptions overruled.*

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

ELIZABETH P. CROCKER, in equity, *vs.* LEWIS PIERCE, Adm'r.

Trustee—settlement between, and the cestui que trust.

Where by the terms of a marriage settlement the trustee under it is to change the investment of the trust-funds upon the joint request in writing of the *cestui que trust* and her husband, such written request is essential to relieve the trustee from liability for loss arising from any change of investment made by him.

If, after the determination of the trust by the death of the husband, in an adjustment, between the trustee and the beneficiary, of the matters of the trust, there be, in the property conveyed to her as the consideration of her release to the trustee, an "inadequacy of price, and inequality of advantages in the bargain," equity will set aside the release so obtained and afford relief.

Upon the facts of the present case, that principle applied; an adjustment set aside, and the administrator of the trustee held to account in cash for the trust funds, and interest. APPLETON, C. J., KENT and BARROWS, JJ., dissenting.

BILL IN EQUITY.

Heard on bill, answer and proofs. The complainant, as appears from the statement of facts contained in the opinion, was the beneficiary of trust funds under a marriage settlement, the terms of which, so far as necessary to an understanding of the issue, are stated by the court. Ira Crocker, brother to the complainant's husband, Samuel E. Crocker, succeeded the original trustee, by substitution, and held the trust unsettled after the death of Samuel, and up to the time of his own decease. Ira was appointed trustee Feb. 21, 1853, and died Dec. 20, 1863. Eight thousand dollars of her trust funds Ira invested in the purchase of an estate in Newton, Mass., upon which Samuel and his wife resided, the title thereto being conveyed May 20, 1857, by said Samuel, the former owner, to "Ira Crocker, trustee for Samuel E. Crocker and wife," so that, upon the death of Samuel, the title was not available to the complainant absolutely and in her own right, as it should have been, according to the marriage settlement. Samuel E. Crocker died in September, 1860, and Ira was appointed administrator of his estate and received all his papers from the widow, who, in the fall of that year, went to visit her friends in South Carolina, and was detained there by the outbreak and continuance of hostilities till June 8, 1865, when she returned to Newton. She says she received two letters from Ira Crocker while she was in the South, but both were destroyed by the sack of her sister's house in Columbia, S. C., by the soldiers of Gen. Sherman's army. Soon after coming North she received a letter from Ira C. Kimball, of Bethel, Me., saying he had some papers of importance to her, formerly left with Ira Crocker; that there was business needing her immediate attention, and requesting her to come to Portland to see him about it. Subsequently he wrote her that his health would preclude him from going to Portland, but said he had sent his papers to his counsel, Edward Fox, Esq., who would act for him. Kimball was administrator of the estate of Ira Crocker, though this fact was not stated in his letters to Mrs. E. P. Crocker, nor did he intimate the nature of the papers or the business to which he invited her atten-

tion; but she alleged in her bill that she supposed it referred to the title-deeds of her house in Newton, which it had become necessary, or desirable, for her to sell; hence, she was anxious to have a clear understanding of the title, and to have the papers relative thereto in her possession. Wishing also to confer with Kimball, whom she understood to be executor of Ira Crocker, relative to her trust funds, immediately upon the receipt of his second letter, she proceeded directly to Bethel, without stopping at Portland. Inquiring for her house papers, she was told they had been sent to Mr. Fox. Asking about her money, she says Kimball told her, shortly, that it was put into a slate quarry, at Brownville, Maine, which, she says, was the first she ever knew of such a disposition of her property, although she knew her husband had been engaged in such a speculation, and that it was not a suitable place for her funds. She says she expressed her surprise and dissatisfaction, but got no further information from Kimball. Arriving in Portland, she called upon Mr. Fox. As to this interview, her recollection differed from his; but it is agreed that, owing to the absence of requisite papers, it became necessary to appoint another meeting; so it was arranged that he should meet her at the United States Hotel, Boston, with whatever was required, on the 17th of July, 1865. She met him, according to agreement, but there was a discrepancy as to what occurred there, beyond the fact that she did sign the receipt and release, fully set out in the opinion, discharging all claim against the estate of Ira Crocker in consideration of receiving her husband's note secured by 3000 shares of slate stock, pledged as collateral, being the property in which her trustee had invested nine thousand dollars of her funds. It was contended that she knew and approved of this disposal of her money at the time the note was given. And Mr. Fox testified that the matter was fully explained to her when she signed the release; but she said she had taken no counsel; thought of nothing but the house matter; did not read the document she signed, and knew nothing of its purport or effect, but supposed it connected with the house transaction, and that any explanation of it made to her did not

reach her understanding. The testimony upon both sides was voluminous concerning the circumstances and value of the stock purchased, and whether or not Ira Crocker considered it Mrs. Crocker's absolute property, or whether he recognized his continuing liability to her for the $9000 used in this purchase. Ira C. Kimball having died, Lewis Pierce appears as administrator *de bonis non*, and defends this action.

P. Barnes, for complainant.

Law regards marriage settlements as under its protection, to be strictly enforced. Peachy on Mar. Sett. 592; 2 Kent's Com. 173; Atherly on Mar. Sett. 174.

Its terms cannot be changed by her consent while a *feme covert*. *Richards* v. *Chambers*, 10 Vesey, 580.

They are strictly construed. *McDonald* v. *Hesihigg*, 15 Eng. L. and Eq. 587; *Neves* v. *Scott*, 9 How. 196; *Wormley* v. *Wormley*, 8 Wheat. 421; *Greenwood* v. *Wakefield*, 1 Beavan, 576; *Kellaway* v. *Johnson*, 5 Beavan, 319; *Hughes* v. *Wills*, 9 Hare, 749; *Cooke* v. *LaMotte*, 15 Beavan, 239; *Mara* v. *Manning*, 2 Jones v. LaTouche, 311; *Wilkinson* v. *Stafford*, 1 Vesey, jr., 41; 11 Foster (N. Y.), 352, and other cases.

Pierce pro se, and *S. C. Strout*, for defendant.

Cutting, J. It appears that Elizabeth P. Chisholm, on the 6th day of June, 1849, then single and a resident of Charleston, in the State of South Carolina, being possessed in her own right of interest-bearing bonds to the amount of eighteen thousand dollars, in contemplation of marriage with Samuel E. Crocker, conveyed her bonds to one James M. Wilson, to be held in trust for herself and contemplated husband.

In that marriage settlement was the following provision, viz.: "And it is further agreed, that in case the said Elizabeth and the said Samuel shall at any time hereafter, during their joint lives, or the said Samuel, according to the respective estates hereinbefore limited to them, think it beneficial to their or his interest to have

the aforesaid bonds, or any or either of them, sold, disposed of, invested in, or exchanged for other property, real or personal, and the sale money invested in any other property whatever, or placed at interest, that then the said James M. Wilson, on being thereto requested in writing, by the said Elizabeth and Samuel, jointly, or the said Samuel, survivor, shall sell, dispose of, transfer, invest, or exchange the same or any part thereof, as the case may be, and invest the purchase money in such other property, real or personal, or vest it at interest, as may be required by them, the said Elizabeth and Samuel, jointly, or by the said Samuel, survivor. And such purchased, or exchanged, or substituted property, or invested funds, stocks, or choses in action, shall be held by the said Wilson, trustee, his heirs, etc., subject to the same uses and trusts as are hereinbefore limited and declared, and to and for no others."

Subsequently, the marriage was consummated, and Mr. Wilson executed the duties of trustee until Feb. 21, 1853, when he resigned his trust under the deed of the marriage settlement, and on the same day Ira Crocker, of Portland, was appointed, and under his hand and seal accepted the trust "under the settlement and appointment." So that Ira, the brother of Samuel E. Crocker, was substituted to all intents and purposes for, and took the place of, the original trustee. And having received the funds of the wife, the first inquiry is, has he performed his duty in their subsequent investment?

It is unnecessary to trace the history of the investment, at present, until we come down to May 20, 1858, when from the exhibits the following note of that date appears:

"For value received, I promise to pay Ira Crocker, trustee, or order, nine thousand dollars on demand, with interest.

S. E. Crocker."

"Left as collateral security for the above note, three thousand shares of the stock of the Bangor and Piscataquis Slate Company, which stand in the name of Ira Crocker, trustee."

Here, then, appears to be an investment of nine thousand dollars,

without "the written consent" of the *cestui que trust*, and in violation of the trust deed. But it is contended that she was cognizant of the transaction, and verbally, or by her silence, waived her remedy. Such evidence, if admissible, must be accompanied with the trustee's assurances to her, that the investment was safe, and that he would guarantee it, or words to that effect.

Subsequently, Samuel E. Crocker, deceased, as also Ira Crocker, the trustee, whose estate was administered by Mr. Ira C. Kimball, executor.

In the meantime, certain controversies had arisen in relation to certain real estate in the town of Newton, Mass., which had been purchased with the trust funds, and it seems that Mr. Kimball referred the settlement of the plaintiff's claim against the estate to his counsel in Portland, and it is contended that the same was settled and discharged, and for proof her receipt is produced, dated July 17, 1865, which reads as follows:

"Received of Ira C. Kimball, executor and trustee under the last will and testament of Ira Crocker, late of Portland, deceased, and trustee by substitution in place of James M. Wilson, under a marriage settlement entered into on the 6th day of June, 1849, between the subscriber and Samuel E. Crocker, deceased, a release to me of all said Ira Crocker's interest as trustee in and to the real estate and household furniture at Newton Corner, conveyed by S. E. Crocker to Ira Crocker, in trust, May 20, 1857; also, a note of S. E. Crocker to Ira Crocker, as trustee, for nine thousand dollars, dated May 20, 1858, with three thousand shares in slate quarry, as collateral security for payment of said note; the same being received in full release and satisfaction of all claims or demands in my behalf, against said Ira Crocker's estate, for all money or property received by said Ira Crocker, as trustee under and by virtue of said marriage settlement, and for his management and disposal thereof. E. P. Crocker. [L. S.]"

This release, if understandingly executed, would operate to bar the plaintiff of all claim in law and equity against the estate of Ira

Crocker. Was it so made and executed? To prove the contrary, the burden is on the plaintiff; and it is no light matter to plead ignorance of the contents, force, and effect of an instrument of so high a nature; but, notwithstanding, this she attempts to do, and with how much success remains to be seen.

The plaintiff substantially testifies, that, after she returned to Newton from the South, in 1865, she found her real estate there, and other property, which had been purchased with her trust funds, to be in the name of Ira Crocker, trustee; and being desirous of obtaining the record title in her own name, had correspondence with the executor of Ira Crocker's estate, who referred her to his counsel in Portland, who would have all the papers in his possession relating to the trust property in Newton, and would, if necessary, transfer to her the title; that thereupon, and in pursuance thereof, she repaired to the place appointed; that her title to the Newton estate was confirmed, and her discharge before stated was executed by her, without her knowledge of its more comprehensive contents, as relates to the nine thousand dollar note and the collateral security; that she read the discharge, or that it was read to her, the preponderance of the evidence is clearly in the affirmative, but whether she understood its import and meaning may be more doubtful. Her statement to the contrary is against the legal presumption. But, considering the nature of the relations between the parties, is not that presumption overcome? We speak now as to her knowledge of the value of the transferred security.

We have already seen that before the discharge, the estate of Ira Crocker was legally responsible to her for the nine thousand dollars. Was the note of her husband, with what is termed the collateral security, an equivalent? and as such did she receive it? If so, was it an equivalent? This leads us to the last inquiry which is as to the security.

It seems that Samuel E. Crocker, some time previously, had purchased one or two hundred acres of land, in the town of Brownville, in Piscataquis county, for what consideration it does not appear. Upon that tract was supposed to be a valuable slate quarry.

It was divided into eight thousand shares, estimated at twenty-five dollars per share, amounting to two hundred thousand dollars as the capital stock, which have been afloat in the market at some price ever since. The quarry has been operated at times, but with no particular income to the proprietors at large. It may embody "the human form divine," but no Michael Angelo has as yet appeared to uncover or disclose it.

Now, what was the consideration of the release? First, the note of Samuel E. Crocker, who was then deceased, and his estate rendered insolvent by his brother, Ira Crocker, but subsequently the debts against the estate were paid by each creditor receiving stock at its par value. It was that or nothing.

The three thousand shares at the time of the alleged transfer had been assessed to pay a debt to Ira Crocker, at two dollars and fifty cents per share. The reversionary interest was subsequently sold for two dollars for the taxes, at public auction—for only the taxes and expenses. This shows that the stock, both by the public and the parties concerned, was considered only of nominal value.

Here, then, assuming the discharge to have been executed as alleged, the facts show "inadequacy of price and inequality of advantages in the bargain," in which event equity affords relief.

Judgment for plaintiff for nine thousand dollars and interest on that sum from December 1, 1860, and costs. Decreed accordingly.

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

APPLETON, C. J.; KENT and BARROWS, JJ., did not concur.

BARROWS, J., dissenting. I agree in holding that Ira Crocker, not having taken the precaution to fortify himself with the written request of this plaintiff and her husband to invest a portion of the trust fund in the note of the husband, secured by the mortgage of the slate stock, was responsible for the goodness of the investment.

But I do not see how we can, with propriety, set aside the settlement and release, which I cannot doubt were deliberately and understandingly made by the plaintiff after her coverture had ceased—she at the time being aware of the uncertain character of the slate stock which she was receiving.

I concur with Judge Cutting in holding that "this release, if understandingly executed, would operate to bar the plaintiff of all claim in law and equity against the estate of Ira Crocker."

And it seems to me that the uncontradicted testimony on page 45 of the report, given by the honorable counsel who conducted this settlement on the part of Ira Crocker's executor, establishes the fact that it was so executed. How can the remark made by the plaintiff to the counsel of the executor in the progress of the negotiation, that she "ought to have had the whole quarry instead of a part of it," etc., be interpreted except upon the hypothesis that she understood the character of the adjustment she was making, and that she had doubts about the value of the security she was receiving?

But there is another and distinct view of this matter, which seems to me entirely conclusive.

I cannot but put some faith in the estimate placed by the plaintiff's witness, Charles B. Abbott, upon the actual value of the stock at the time of that settlement. See his answer on page 30 of the report. "My judgment is that the shares in the B. & P. Slate Co., in the summer of 1865" (which was the time of the settlement), "were then worth the original $12.50 per share, and the assessment."

Can this plaintiff be allowed to take a stock, which, at the appraisal of her own witness, was, at the time she took it, worth much more than enough to pay her claim, and then, when she has allowed it to be sacrificed by her own improvidence, again have recourse to the estate of her deceased trustee, from which she received it in full satisfaction and discharge of all claims against him as such trustee?

She ought, at least, to return the stock, if she would rescind the contract of adjustment and release.

It does not seem to me that "the inadequacy of price, or the inequality of advantages in the bargain," is made out, but only that this plaintiff was so unfortunate as to allow her stock to be thrown away after she had received it in discharge of her claim against the trustee's estate.

In this dissenting opinion of BARROWS, J., APPLETON, C. J., and KENT, J., concur.

PHANELA S. WILLIAMS *vs.* PHŒNIX FIRE INS. CO.

Insurance—over-valuation, as a badge of fraud.

Whether an over-valuation and proof of loss were fraudulent or not, is a question of fact for the jury; and where there is "much conflict of testimony," and that adduced by the plaintiff is sufficient, if believed, to justify a verdict in her favor, such a verdict will not be set aside, if the discrepancy between the value of the property as found by the jury and the amount insured thereon be not so great as to make it incredible that the over-valuation in the application, and over-estimate in the proof of loss, could have occurred without positive dishonesty or fraudulent intent on the part of the plaintiff.

MOTION FOR NEW TRIAL, because the verdict for the plaintiff was against law and evidence and the weight of evidence in the cause. The amount of the verdict was $1,202.48. The action was upon two policies of insurance issued to plaintiff by the defendants; one for $1,000, on a stock of goods, and the other for $500 on household furniture, piano, etc. Upon the merchandise there were three policies, to wit: the one in suit; one in the Hartford for 1,000, and one in the Manhattan for $500; making $2,500 in all. The Phœnix was bound to pay only its proportionate part, or two-fifths, of the loss on this property. The other policy in suit was the only one issued covering the furniture, etc.

The ground taken by *Nathan Webb, Esq.*, for the defendants, was that, by the terms and conditions of the policies in suit, any fraud, or attempt at fraud, or false swearing, deprives the insured of all right to recover; and that the plaintiff had been guilty of a fraudulent over-valuation, and of false swearing to support her claim for loss, and therefore could not recover.

The counsel showed by mathematical computation that the jury must have found for the plaintiff on both policies; and argued that if the jury gave the full sum insured by the smaller policy ($500), they must have found the stock of goods, which Mrs. Williams swore to be worth $3,000, worth only $1,500 or $1,600; while, if they gave the full insurance upon the stock, they must have found the furniture, etc., which she testified to be worth $700, worth less than $200, if they added interest after sixty days from proof of loss, to whatever valuation they fixed on the property, as they doubtless did.

"As we move from either of these assumptions towards the other, the difficulty of sustaining the verdict only changes position. It nowhere disappears. *Levy* v. *Baillie*, 7 Bingham, 349; *Wall* v. *Howard Ins. Co.*, 51 Maine, 32.

James O'Donnell, Esq., contra.

BARROWS, J. The defense set up in this case was, that there was a fraudulent over-valuation of the goods insured, and fraud and false swearing in the proofs of loss. Many witnesses were examined on both sides, and the result is a voluminous report of testimony laid before us upon a motion to set aside the verdict, as against law and evidence and against the weight of evidence in the case. The defendants do not now claim that the verdict was in violation of any rule of law, or that the plaintiff did not produce evidence sufficient, if it were believed by the jury, to justify the verdict. There is much conflict of testimony; but it was for the jury who heard the witnesses to determine how far their respective statements were to be credited.

The amount of the verdict demonstrates that, in the judgment of the jury, there was an over-valuation in one or both of the policies; but it negatives the charge that it was fraudulently made, or that there was fraud or false swearing in the claim of loss.

The discrepancy, between the value of the goods as found by the jury, and the amount insured, is not so great as to make it absolutely incredible that the over-valuation, and the over-estimate in the proofs of loss, may have occurred without positive dishonesty or fraudulent intent on the part of the plaintiff. The owner of goods may fairly be expected to set a higher value on them than anybody else would, and whatever might be the suspicions excited by a perusal of the testimony here, we cannot say that it is demonstrated that the jury erred in relieving the plaintiff from the imputation of fraudulent intent.

The remedy in this disagreeably numerous class of cases is to be found, not in granting new trials and protracting litigation, even in suspicious cases, but in greater vigilance on the part of the agents of insurance companies to ascertain, beforehand, what it is that they insure and its value, and the true character of the party effecting the insurance.

Motion overruled.

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

TURNER H. SMITH and another *vs.* DAVID B. BROWN and others.

Poor debtor's bond.

A poor debtor's bond, approved by two justices not selected agreeably to R. S., c. 113, §§ 24, 42, is only good at common law.

It is a compliance with the conditions of such a bond to take the oath mentioned therein, though this differ from the one that poor debtors are required to take under the statutes in force at the time it is administered.

If such bond provide for notice to the creditors of debtor's disclosure, but fail to state how it shall be given, service upon one of the creditors is sufficient.

No appraisal of demands, disclosed upon a disclosure under a common-law bond, is necessary, unless required by the terms of the obligation.

The record of the justices hearing such a disclosure held sufficient, though not showing that they were disinterested, or why the creditor did not select one of them, nor where they met, nor that any disclosure was had.

EXCEPTIONS to ruling of Lane, J., of the superior court.

DEBT on poor debtor's bond, given while R. S. of 1857 were in force, but the citation was issued, and disclosure had, after the revision of 1871 went into operation. The plea was the general issue, with brief statement of performance of one of the alternative conditions of the instrument within the time limited therefor. The bond did not state from what court the execution issued, and there was a discrepancy between it and the execution in the amount stated as costs. There was no evidence that the two justices who approved the bond were selected for that purpose, as directed by R. S. of 1857, c. 113, §§ 22, 40 (R. S. of 1871, c. 113, §§ 24, 42). The debtor disclosed before two justices who allowed him to take the oath, without having appraised certain notes and demands disclosed by him, some outlawed and others worthless, and all of little or no value.

No other record of the justices was put into the case, than the filling up by them of the blank usually printed at the bottom of a citation. This was thus filled:

CUMBERLAND, ss. March 21, A. D. 1871.

Samuel Clark and Ezekiel W. Mitchell having examined the

above notification and return, and duly cautioned the said David B. Brown, we have administered to him the oath or affirmation allowed in the statute above referred to; and made out a certificate thereof in the form therein prescribed.

SAMUEL CLARK,
Justice of the Peace and of the Quorum, selected by the debtor.
E. W. MITCHELL,
Justice of the Peace and of the Quorum, selected by the officer.

The execution, return thereon, citation and proof of service on Gay, one of the creditors, and the justices certificate of discharge in the form prescribed by law, were also put into the case.

Lane, J., ruled that it was a common-law bond, and that one of its alternative conditions had been performed by the debtor taking the oath nominated in the bond, and the plaintiffs excepted.

T. H. Haskell, for plaintiffs, argued that if this were a statute bond, the debtor did not take the proper oath, and that the demands disclosed should have been appraised; if only good at common law, then in order to comply with the condition to "cite the creditors," all should have had notice of the citation; that statute service under a common-law bond was not enough. He made also the other objections answered in the opinion.

Henry C. Peabody, contra.

WALTON, J. This is an action on a poor debtor's bond. It was tried by the judge of the superior court for the county of Cumberland, without the aid of a jury. The judge ruled as matter of law, first, that the bond was good at common law; second, that one of the alternative conditions of the bond was fulfilled by the debtor's taking the oath therein nominated. To these rulings the plaintiff excepted.

1. It is claimed that the bond should be treated as a good statute bond. We think not. It was held in *Guilford* v. *Delaney*, 57 Maine, 589, that if the approval of a poor debtor's bond does not show that the justices approving it were selected according to law,

the bond is good only at common law. In this case the bond does not show that the justices were selected according to law. It does not, in fact, show how or by whom either of them was selected. The bond was, therefore, good only at common law, and the ruling to that effect was correct.

2. It is claimed that notwithstanding the bond was given while the Revised Statutes of 1857 were in force, yet, inasmuch as the disclosure did not take place till after the Revised Statutes of 1871 went into effect, the oath and other proceedings should have been under the latter. We think not. If the bond had been strictly a statute bond this claim would be well founded. But it was held in *Randall* v. *Bowen*, 48 Maine, 37, that where a debtor gives a bond which does not conform to the statute, and is, therefore, good only at common law, a forfeiture is saved if he takes the oath therein named, notwithstanding a new statute, changing the form of the oath, is in force before the oath is taken.

3. It is claimed that notice to the creditors of the time and place of the disclosure was not sufficient, because the citation was served on only one of them. We think the notice was sufficient. It was in accordance with the requirements of the statutes in force when the bond was given; and also of the statutes in force at the time the citation was served; for, in this particular, no change in the statutes has taken place. Under either, a service upon one of the creditors, if there be more than one, is sufficient. R. S. of 1857, c. 113, § 24; R. S. of 1871, c. 113, § 27. We think it is immaterial, so far as the service of citation is concerned, whether the bond is a valid statute bond, or a bond good only at common law. The bond being silent as to how the creditors were to be notified, notice according to the statute in force at the time the bond was given, and also according to the statutes in force at the time the citation was served, was, in our judgment, sufficient.

4. It is claimed that the conditions of the bond have not been fulfilled, because the debtor disclosed notes and accounts which were not appraised and secured to the creditors, as required by the statute. This claim would be well founded if the bond in suit

could be regarded as a valid statute bond. But it was held in *Clark* v. *Metcalf*, 38 Maine, 122, that in fulfilling the conditions of a poor debtor's bond, which is good only at common law, the debtor is under no obligation to perform any other of the statutory provisions than those named in the bond; and that a disclosure of notes which are not appraised and secured to the creditor, as required by the statute, does not constitute a breach of the bond, where no such appraisal and assignment are therein provided for. No such appraisal or assignment is provided for in this bond. None were therefore required in order to fulfill its conditions.

5. It is claimed that the record of the justices does not show that they were disinterested, nor why the creditors did not select one of them, nor where the disclosure was had, nor that any disclosure was had. The record is in all these particulars as full as the record in *Randall* v. *Bowen*, before cited; and as the record was there held sufficient, we perceive no reason why this record should not be held sufficient. We think it must be.

We have now examined all the objections to the rulings of the judge of the superior court to which our attention has been called. We think none of them are valid. *Exceptions overruled.*

Judgment for defendant.

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

JONATHAN NICKERSON and others *vs.* DAVID S. MILLS.

Where a cause was brought before this court from the superior court of Cumberland county, under an agreement that if the jury would be authorized to find a verdict for the plaintiff upon the testimony reported, the defendant was to be defaulted ; otherwise the action to stand for trial; and the evidence showed a conflict upon several questions of fact; this court refused to determine the case and discharged the report. APPLETON, C. J.; CUTTING, and DICKERSON, JJ., dissenting.

Whether or not it is proper to invoke the decision of this court in such cases, where there has been no action of the superior court, and the report does not present the rights of the parties, *quœre?*

ON REPORT from the superior court of Cumberland county.

As this court declined to act upon the report, any statement of facts other than that contained in the dissenting opinion is unnecessary.

Thomas B. Reed, for plaintiffs.

Wm. L. Putnam, for defendants.

KENT, J. If this case had been before us on report, with full authority to determine it, with right to draw inferences, we might have hesitated before giving a final judgment for either party. But the agreement is that if we determine that the jury would be authorized to find for the plaintiffs upon the evidence reported, the defendant is to be defaulted; otherwise, to stand for trial. Taken literally, this would seem to mean, that, if a verdict had been rendered for the plaintiff and we should not have set it aside as against evidence, then the defendant is to be defaulted. We might not do this, although we might be clearly of opinion that we should have given a different verdict on the evidence, or a different judgment if the case had been before us on report with jury powers. We cannot think that the parties intended anything more than that, unless we were satisfied that there was no possible case

for defendant, and nothing proper for a jury, the case should stand for trial. The agreement looks very one-sided, for if we were clearly of opinion that the defendant was on the evidence entitled to judgment, we could not render it, but the case must be sent back for trial. But if we find that a jury would be authorized to find a verdict for the plaintiffs, then defendant is to be defaulted without any further hearing.

On examination of the evidence we find very considerable conflict of testimony. Several questions of fact are somewhat in doubt.

1. Whether or not the defendant ordered a seine, which was delivered to him or his agent, so as to make him a vendee, and liable for goods sold and delivered. There seems but little doubt of the fact that he did order the seine. 2. If an original bargain, was it rescinded by plaintiffs, and defendant released from liability. 3. Was it finally sold on a new bargain to Appley. 4. If sold to Appley, was he then, as he says, a partner with Mills; and there being no plea in abatement, may he not be held in this suit, even if Appley, his partner, bought it. We indicate no opinion on these points, because we do not think it our duty under the peculiar aspect of the report to determine them. We have serious doubts whether it is within the spirit and intent of the law regulating the transfer of actions from the superior court to this court, to require us to pass upon a case like this, where there is no action by that court, and no report of the case presenting the rights of both parties for our decision. We think that justice requires us to discharge this report. *Report discharged.*

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

WALTON, J., concurred in discharging the report.

APPLETON, C. J.; CUTTING and DICKERSON, JJ., dissented.

The Chief Justice drew the following dissenting opinion with the assent of the other non-concurring justices.

APPLETON, C. J. This is an action of assumpsit on account annexed for seine sold the defendant.

It appears, there was a firm of Appley & Mills, of which the defendant was a member. As no plea in abatement has been filed, the suit may be maintained against the defendant.

By the testimony of Appley the seine was to be furnished by Mills. Appley testifies that he had the seine before receiving the letters of his partner of July 14, 1870, and that it went into the possession of Mills. As there was a firm, and the books were kept in the name of Appley & Mills, and the seine was in their hands and used by them, no reason is perceived why they should not pay for it.

The defendant is not a witness. If he could controvert the statements of his partner, it is to be presumed he would have done so.

The case is submitted under the agreement that the defendant is to be defaulted, if on the foregoing evidence the jury would be authorized to find a verdict for plaintiffs; otherwise, to stand for trial.

The parties had a right to make their own agreement. In the one made there is nothing unusual or peculiar.

If the plaintiff has made out a case, a default is to be entered. We think he has, and that a default should be entered.

Defendant defaulted.

CUTTING and DICKERSON, JJ., concurred.

THOMAS QUINBY, in equity, *vs.* JOHN FROST and another.

Will, construction of. When real estate is to be applied in payment of debts.

Ordinarily, the personal estate of a decedent is to be first applied in payment of his debts before resort is had to the realty; but real estate may be sold for this purpose without having used any part of the personal, where this course is evidently necessary in order to carry out the intent of the testator, as gathered from the whole of his will, though such sale be not expressly directed by any of its particular provisions.

IN EQUITY.

This is an amicable bill in equity, brought by Thomas Quinby, executor of the will of late George Frost, to determine the true construction of that instrument. The testator left real estate valued at nearly $20,000, its value consisting mainly of the wood and timber thereon, being the premises upon which he resided with his brother and sisters up to the time of his death. He and they were unmarried. He made his will July 8, 1859, and died August 13, 1865, aged eighty years. His sister Joanna was then 82, Abigail was 65, and his brother John (since deceased), 58. After the death of George Frost, it was found that his personal estate was barely sufficient to pay his debts, and that it was inadequate to the payment of debts and administration expenses. The particular question which the parties desired to have determined was, whether or not the executor should apply the personal estate to the payment of debts, or whether it should be kept intact, and its income applied to the use of the *cestuis que trust* named in the first and second clauses of the will, and the real estate be sold to pay debts, etc. Samuel Jordan was originally named as executor and trustee, but upon his declination the complainant succeeded to those trusts.

The first and second items of the will are these:

"First. My will is, that all my just debts and funeral charges shall, by my executor hereinafter named, be paid out of my estate, as soon after my decease as shall by him be found convenient.

"Second. I give, devise, and bequeath, to Samuel Jordan, of Westbrook, aforesaid, now the Post-master of the city of Portland, Esquire, and his heirs, all my estate, both real, personal, and mixed, upon and for the trusts, intents, and purposes, and with and subject to the powers and provisions hereinafter mentioned and expressed of or concerning the same; that is to say, upon trust to pay the interest money, growing, arising, and by him (said trustee) received from the personal property and securities I may leave at my death in equal third parts to my two sisters, Joanna Frost and Abigail Frost, and my brother, John Frost, said interest to be paid them annually, share and share alike, during their natural lives, and upon the death of either of them, his or her share is to be paid to the survivors, and upon the death of two of them the whole interest money is to be paid to the survivor during his or her natural life, in manner above provided. Any and all the real estate of which I may be seized or possessed as my property at the time of my death, I order my said trustee, and authorize him to sell, dispose of, and convey, when and as soon as he shall deem proper for the interest of all concerned, at his sole discretion, and according to his own best judgment, and on credit with security, or for money, as he shall deem best. The proceeds of said sale I will and order my said trustee to dispose of and pay over in the following manner, to wit: to the children of my cousin, Nancy Seal, namely: Ellen Ward, Eunice Quinby Jordan, Mary Jane Porter, Thomas Seal, and William F. Seal, one thousand dollars each, and to John S. Seal and his wife the interest of one thousand dollars during their lives and during the life of the survivor of them; said interest to be paid annually, and on the decease of both husband and wife, I will and order my said trustee to pay the principal sum of one thousand dollars to their children.

"I further will and order my said trustee to pay to Elizabeth S. Bennett, wife of Moses Bennett, Susan L. Hooper, wife of Robert Hooper, Catherine M. Rolfe, wife of Benjamin Rolfe, Andrew T. Clark, Thomas S. Clark, John M. Clark, and Charles Henry Clark, all children of my cousin, Elenor Clark, Sarah Norris,

daughter of my late cousin, Catherine Mahan, Jane S. Quinby, wife of Thomas Quinby, Emeline Hunt, wife of Henry Hunt, Frances E. Hobson, wife of Isaac Hobson, and Henry M. Brewer, all children of my late cousin, Jane Brewer, the sum of one thousand dollars to each and all of them; provided always, that said legacies of one thousand dollars each are not to be paid until the death of my said two sisters and brother, one and all of them.

"Until the aforesaid real estate shall be sold by my said trustee, as aforesaid, in the manner herein provided, I will and order him, my said trustee, to pay the income of said real estate to my two sisters and brother, in equal shares, and upon the death of one or more of them, to the survivors or survivor. Or should my said sisters or brother elect or prefer, I will and order him, the said trustee, to permit them or either of them to possess and occupy, reside upon, cultivate, and enjoy the same during their natural lives, and the natural life of the survivor or survivors; provided said real estate should so long remain unsold, and provided no strip or waste be made thereon.

"And upon the sale as aforesaid of said real estate, I will and order said trustee to pay my said sisters and brother, during their natural lives, and to each of them annually, the sum of three hundred dollars.

"I further will and order my said trustee, after the death of my said sisters and brother, and after the payment of all said legacies, and after paying him a full, generous, and ample compensation, both as trustee and executor of this my will, the rest of my estate remaining undisposed of to the trustees of the Westbrook Seminary, for the use of said Seminary."

Nathan Webb, for complainant, submitted the case without argument.

Howard & Cleaves, for respondents.

The complainant asks the aid of the court, by construction of the will of George Frost, to enable him to execute the trusts committed to him, as executor and trustee, by such will.

The intention of the testator must govern in the construction of his will, and should be the guide to his testamentary trustee and executor in executing the trusts.

The payment of the debts of the testator and funeral charges is enjoined in the first item of the will: To "be paid out of my estate," as soon after the decease of the testator as the executor might find it convenient.

But as these debts and charges were found to amount to as much or more than the personal property, the plaintiff, executor, seems to doubt as to from what portion of the estate he shall raise the funds to pay such debts, etc.

It is evident that the testator intended that his debts and funeral charges should not be a charge on his personal property, for that he designed in specific terms to be kept during the lives of his sisters and brother, as a fund of which they were to receive the annual income, in the manner and order as stated in the will.

Were it otherwise, and if the executor could appropriate the personal property and securities to the payment of such debts and charges, then he could defeat the intentions of the testator, in respect to the all-important and vital trust for the benefit of his sisters and brother.

These, it may be remarked, were all quite aged, poor, penniless, and with no ability to support themselves, and dependent upon the estate of the testator for support, after his death.

The testator was an aged man, and never married, but was regarded as wealthy, owning property to the amount of $25,000 to $30,000. The sisters were never married, and always resided with their brother, the testator. John Frost, their brother, married late in life, had no child, had lived with the testator most of his life, and was in feeble health, and has since died. The real estate was the old paternal homestead. It yielded no income, consisting of an old worn-out farm, and adjoining pine timber land—the timber constituting the principal value, and in fact being very valuable, but yielding no income.

The provision made by the testator respecting the income of the

personal property in trust, for the benefit of his sisters and brother, was, therefore, dominant and imperative, and left nothing to the discretion of the executor and trustee which might by possibility defeat or impair it.

It was the duty, therefore, of the executor to appropriate a portion of the real estate to the payment of the debts and charges, in order to sustain the first and most important trust for the benefit of the sisters and brother.

KENT, J. A testator may order his debts and the expenses of administration to be paid out of his personal, or out of his real estate, or out of both, or out of any particular piece or parcel. When he makes no distinct provision as to the specific kind of property, the general rule is understood to be that the debts shall be paid out of the personal property. But this rule is subject to the other well-established rule, that the will of the testator must govern, and that this will, or intention, may be gathered from the provisions of the whole testament, and may be inferred from the nature of the legacies, or devises, and the manifest object and purpose of the testator, and from all the circumstances of the case.

In this case, it is evident that the leading and controlling idea, purpose, and will of the testator, was to make sure and certain provisions for his two sisters and his brother, who lived with him on the farm, the real estate devised, and all the real estate of the testator. His first item is this: "First—My will is that all my just debts and funeral charges shall, by my executor hereinafter named, be paid out of my estate, as soon after my decease as shall by him be found convenient."

He then devises and bequeaths to a trustee (the executor also) all of his estate, real, personal, and mixed, without limitation or qualification, and without any allusion to the payment of his debts. He directs his trustee to pay to his two sisters and brother, in equal third parts, the interest money received "from the personal property and securities I may leave at my death, during their lives, and the life of the survivor or survivors." We have here a clearly

manifested intent, that these relatives should have the income of all the personal property during their lives. It turns out that the debts are nearly equal to the whole value of the personal property. Must the debts be paid from this property thus in the will devoted to the support of his aged relatives, and his sisters and brother? Was this the intention of the testator when he provided that his debts should be "paid out of his estate?"

The provisions of the will in relation to the real estate lead to the same conviction as to the intent of the testator. The trustee has the whole estate devised to him, with power at his pleasure, and according to his best judgment to sell it all for cash or on credit. Out of the proceeds he orders a number of legacies of one thousand dollars each to be paid. But he has here carefully provided for the same three relatives, as first to be considered. Until a sale of the real estate, the whole income from it is to be paid to the brother and sisters. Or, if they prefer, they are to occupy and enjoy the same real estate, without charge. In case of sale, before any of the legacies of one thousand dollars can be paid, after a sale of the real estate, the same brother and sisters are to be paid each three hundred dollars annually, out of the money realized from the sale of the land.

The Westbrook Seminary is made residuary legatee.

On a full consideration of the whole tenor and spirit of this will, we are satisfied that it was the intention of this testator to place the whole of his personal property as a fund for the support of his aged near relatives, and that the whole should remain intact and undiminished, for that purpose. We think the estate named in the first item, from which the debts were to be paid, was the real estate, and that it should be charged to such real estate, or to the fund created by its sale. We refer to the case of *Fenwick* v. *Chapman*, 9 Peters, 471, in which is found the principles of law before alluded to, and numerous cases cited. The decree, therefore, is, that the true construction of the will of George Frost on the point presented in the bill is, that the debts and funeral expenses named in the first item of the will are to be wholly paid out

of the real estate, or from the proceeds of the sale thereof, and that the personal estate is to be retained and the income thereof applied to the use of the *cestuis que trust* named.

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

JAMES C. SHERIDAN and another *vs.* DAN. CARPENTER.

Note, construction of. Money had and received, when it lies.

A note signed "A. B., Treas. for St. Paul's Parish," is the note of the parish. A material alteration of a note, in the hands of an indorsee, without the knowledge of the indorser, discharges the latter.

An indorser, ignorant of facts accruing subsequently to his transfer of the indorsed note which operate to discharge him from liability thereon, paying its amount to the holder, upon discovery of such facts, can recover the sum so paid in an action for money had and received.

An offer to return the note to the defendant, made at the trial, is sufficient.

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

Assumpsit, to recover $372 paid defendant under mistake of facts. Plaintiffs were indorsers of a note by them transferred to defendant, which, at the time of such transfer was signed thus: "John T. Hull, Treasurer of St. Paul's Parish."

Some time after its purchase by defendant, but before its maturity, Mr. Hull called at defendant's office and asked to see the note, which was handed him. Hull swears that, looking at it, he remarked to defendant: "I understand, the way this is written, it is not a parish note; if you will allow me to alter it, to make it as it should be, I will do so." That defendant replied, "I want it right;" and thereupon Hull altered it by making the word "of" in the signature into the word "for," and adding at the end of the

word "parish" the words "duly authorized," so that the signature was thus made to read, "John T. Hull, Treasurer for St. Paul's Parish, duly authorized."

Carpenter testified that Hull, after taking the note, said nothing, but altered it without his knowledge or consent. At maturity the note was dishonored, the parish being insolvent, and suit was brought by Carpenter against plaintiffs, by writ from this court, 1870, which was settled Nov. 28, 1870, by payment of $372 for note, interest, and costs, by plaintiffs to defendant's attorneys. At the trial plaintiffs' attorneys tendered defendant the altered note, which they had not done before.

Touching controverted questions of facts, the judge of the superior court found as follows:

That defendant never informed plaintiffs, or either of them, of the alteration made by Hull, and that plaintiffs paid defendant the $372 Nov. 28, 1870, without any knowledge or suspicion that any alteration had been made.

That St. Paul's Parish was, at the time of the alteration, hopelessly insolvent and bankrupt, and that its condition was at that time well known to Hull, the treasurer, but was unknown to plaintiffs, or to Carpenter.

"And the evidence in the case, and particularly that of Hull, satisfies me that after Hull signed the note in question, and before he altered it, he had ascertained that he was in danger of being held personally liable at law on notes similar in form to the one in question (whereof he had put large numbers in circulation); that his sole design in calling on defendant was to effect an escape from such danger; that his language to defendant was carefully contrived so as to awaken defendant's apprehensions that there might be a technical defect in the note, or signature, which was liable to defeat the defendant's security, and thereby to induce defendant to consent to the change therein proposed by Hull for the ostensible purpose of strengthening defendant's security, but which had the precise effect desired and contemplated by Hull, and studiously concealed by him from defendant, viz.: Hull's exoneration from

the legal risk apprehended by him; that Hull well knew that defendant's consent could not be obtained except by a concealment of his (Hull's) main purpose, and for that reason, and with that design, the more effectually concealed that purpose, by the profession of an anxiety on his part to render defendant more secure; that by said concealment, contrivance, and misrepresentation, Hull did obtain defendant's consent to said alteration, neither defendant, nor either of the plaintiffs, having at that time any knowledge or suspicion of Hull's real purpose."

That at the time of the negotiation of the note by plaintiffs to defendants, neither of them knew of the insolvency of St. Paul's Parish, and all supposed it was a parish note, good only against the parish, and Hull so supposed when he gave it; "but I do not find whether, at the time Hull gave the note, he knew of the insolvency of the parish, although I am strongly inclined to that opinion."

"And I find that the consent of the defendant to the alteration of the note was fraudulently obtained by Hull, so far as it is a question of fact, that is to say, I find that Hull's conduct, in my opinion, so far as the question is one of fact, amounted to fraud in this, that while Hull so skillfully framed his language as to avoid the statement of any direct falsehood, it being literally and exactly true that he understood that the note as written was not good against the parish, and that he wished to alter it so as to make it good against the parish, he deceived and misled defendant, who confided in him, in that he did not state the material truth that he understood the note as written was good against him, Hull, thereby persuading defendant to consent to a change whereby he lost security against Hull, who was well known to defendant to be perfectly responsible, and to substitute therefor a paper security against a corporation known by Hull to be utterly worthless, besides obtaining temporarily with defendant the credit of that disinterested benevolence and self-abnegation which, so far as my observation has extended, has unhappily hitherto proved as rare in the official financial operations of officers of parishes, as it is consistent with the doctrines said corporations are designed to inculcate and illustrate."

And the justice of the superior court ruled, as matter of law, on the foregoing findings of fact:

I. That the alteration of the note was material, and changed the note from a personal note of Hull to a mere parish note.

II. That Hull's conduct amounted, on the facts and findings, to legal fraud, so far as it is a question of law.

III. That defendant's consent to said material alteration having been obtained from him by fraud of Hull is void as between defendant and Hull, and would afford Hull no defense to a suit by defendant against him on the note.

IV. That inasmuch as defendant did not communicate the fact of such material alteration to plaintiffs, and plaintiffs never, in fact, had any knowledge thereof until after payment of the $372, Nov. 28, 1870, plaintiffs were thereby allowed by defendants to pay the same under a mistake of material facts, which were known to defendant and unknown to plaintiffs.

V. That the alteration and the fraud both being unknown to plaintiffs when they paid defendant's attorney the $372, plaintiffs are entitled to receive back the same in this action with interest from the date of the writ.

VI. And I ruled at the trial, at defendant's request, that evidence offered by plaintiffs to the effect that a suit had been commenced by them against Hull since the payment of the $372 by plaintiffs to defendant's attorneys, and before the bringing of this suit upon the note in question, had been entered "Neither party no further action to be commenced for the same cause" on the docket of this court after the discovery of the facts disclosed in this suit, prior to the bringing of this action, was inadmissible, and it was excluded. And upon the requests desired by defendant's attorney in matter of law, I rule, (1) That the note was originally, and before alteration, the personal note of John T. Hull. (2) That as altered it expresses no personal liability of Hull, but only a parish liability. (3) That although Carpenter, by proof of fraud on Hull's part in obtaining defendant's consent to the alteration, may, in a suit against Hull on said note, be able to defeat the

effect which Hull designed, viz., Hull's release from personal liability thereon, yet this fact does not of itself constitute a defense to this action. (See rulings III and IV.) (4) That a previous return or tender of the note was not essential to the commencement of this suit. (5) That plaintiffs are entitled to recover back the entire amount which they were required to pay defendant's attorney Nov. 28, 1870, including the $12.00 costs. (See ruling V.)

"After hearing the evidence and arguments of each party, and considering the same, I decide that said defendant did promise in manner and form as said plaintiffs have declared against him, and I award damages in the sum of $384.96."

To the foregoing rulings in matters of law, numbered I, IV, and V, and 1, 2, 3, 4, and 5, the defendant excepted.

Thomas B. Reed, for plaintiffs.

The alteration of the note was material, changing it from the personal note of Hull, to a mere parish note. *Sturdivant* v. *Hull*, 59 Maine, 172; *Ballou* v. *Talbot*, 16 Mass. 461. This action proper to recover back money paid under ignorance of facts, suppressed by payee. 1 Chitty on Pleading, 355; *Morton* v. *Marden*, 15 Maine, 46.

Josiah H. Drummond, for defendant.

The costs of suit paid by Sheridan should not have been included in the damages.

The change of note, made without plaintiff's consent, did not affect Hull's liability to them, if paid by them, and was, therefore, as to them, immaterial.

The note continued to be that of Hull, the change not affecting his liability at all. *Morell* v. *Codding*, 4 Allen, 403; *Long* v. *Colburn*, 11 Mass. 97; *Packard* v. *Nye*, 2 Met. 47; *Bradley* v. *Boston Glass Manf.* 16 Pick. 347.

The note should have been returned to defendant before suit brought. *Martin* v. *Roberts*, 5 Cush. 126; *Tisdale* v. *Buckmore*, 33 Maine, 461.

APPLETON, C. J. Upon the note, as originally signed, the maker, Hull, was personally liable. *Sturdivant* v. *Hull*, 59 Maine, 172.

The note, while in the hands of the indorsee, was allowed, with his consent, by the maker. But the presiding justice found that such consent was obtained by the fraud of the maker. It seems that the holder of a bill cancelled by mistake can recover against prior indorsers. So, if the cashier of a bank, through mistake, cancel a note due to the bank, it does not affect the right of the bank to recover. 2 Parsons on Notes and Bills, 564. So, if the alteration were fraudulently made, the party committing such fraud will not be permitted to take advantage of it to the injury of the holder.

But the alteration of a note by the maker, after its indorsement, if material, and without the consent of the indorsee, discharges him. *Waterman* v. *Vose*, 43 Maine, 504.

The alteration in this case was material. As the note was, when indorsed, the maker was personally liable. The note as altered was signed by John T. Hull, treasurer for St. Paul's Parish, duly authorized. The meaning of the parties is to be gathered from the note itself. The note is signed by the treasurer, for St. Paul's Parish. To do this, he was duly authorized. The parish must be bound by the act of its treasurer, which was duly authorized and which was for the parish. Signing for the parish, he contracts in their behalf. In *Morell* v. *Codding*, 4 Allen, 403, the note was signed by certain individuals without their describing themselves as committee, or that their signature was for the Baptist Church in Lee. The signers in the body of the note say "we the prudential committee for and in behalf of the Baptist church in Lee, agree to pay," etc. "We are brought to the single inquiry," says Dewey, J., "whether the words 'for and in behalf of the Baptist church in Lee,' found in the body of the note, change its character. Had these words immediately preceded or followed the names of the signers, with the 'by' or 'for,' it would have been the promise of the Baptist church in Lee." In the present case

the altered note is signed "for St. Paul's Parish," and so to sign the treasurer was "duly authorized." The signing binds the parish.

The alteration, being material and without the knowledge or consent of the indorser, he is absolved from liability. As indorser, he paid the amount for which he was liable in entire ignorance of facts operating as his discharge. The money in the present case was paid under a mistake of facts and can be recovered back, for the plaintiff was in no fault. *Norton* v. *Marden*, 15 Maine, 45. The finding of the facts by the justice presiding is conclusive on the parties.

It is not necessary to consider or discuss the sixth ruling of the justice presiding, inasmuch as the counsel for the defendant has taken no exception thereto.

This is not the case of a rescision of a contract. It is simply to recover money paid under a mistake of facts and of legal right. It was enough that the plaintiff offered to return the note of Hull at the time of the trial. *Exceptions overruled.*

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

ELIZABETH W. STEVENS, administratrix, etc., in equity, *vs.* ALEXANDER BURGESS and others.

Trusts under a will—construction of.

Where the income of all real estate is devised to the widow, she is entitled to that accruing from subsequently purchased land; this going to her under such devise instead of to the residuary legatees.

If land of which the income is devised be unproductive, the executor will not be authorized to expend any of the funds devised to the residuary legatees in an attempt to make it produce an income.

The executor, having no special authority by the will to sell the real estate, cannot make sale of it without the consent of the residuary legatees, or license from this court, which will not be granted where the personal assets are amply sufficient to pay the debts and meet all the calls of the will.

A bequest is payable presently unless some other time be specially fixed for payment. The executor has no authority to pay from the general funds of the estate the expenses of taxes, repairs, etc., upon real estate devised in trust and in the occupancy of the widow as *cestui que trust;* nor is any part of such expenditures to be borne by the trust to which the proceeds of such real estate are eventually to be devoted. The occupant must pay them..

A person to whom a specific sum, being not more than one-seventh of the whole estate, is devised for particular purposes, must give the bond required of testamentary trustees by R. S., c. 68, § 1, before he can receive such sum; though he be charged with no other trust than its reception and expenditure, to accomplish the desired end, "at his discretion."

A bequest evidently incomplete is void.

A bequest of "one-third of the personal property" conveys that fraction of it in gross, without any deduction for payment of debts, etc.

BILL IN EQUITY.

This is an amicable bill brought to obtain a construction of the will of late J. Ignatius Stevens, by his widow and administratrix, with the will annexed, the executor named therein declining the trust.

The widow is in the occupancy of the two parcels of real estate named in the third clause of the will. Counsel stated that the Ring farm was probably purchased after the will was made. The case was heard upon the statements of the bill without answer, and no other proofs than the will and codicil, the material parts of which are below stated. By the inventory of the estate as returned to the probate court, the property and assets appear to be as follows:

Real estate—	
Dwelling-house and lot, Gorham,	$2,500 00
Lot "opposite" the house,	1,000 00
Ring farm in Gorham,	2,000 00
Total real estate,	$5,500 00
Personal estate—	
Goods and chattels,	684 05
Rights and credits available,	17,831 56
	$18,515 61

The general administration of the estate was commenced in the year 1869, after the determination of an appeal taken upon a contestation of the will.

The complainant further states that the dwelling-house and appurtenant buildings on the dwelling-house lot are quite old, and have required since the decease of the testator large outlays for repairs; and that the amount likely to be required hereafter to be expended annually for repairs, insurance, and taxes on the same, is more than the current use and value of the premises to a life-tenant.

She further states that the lot opposite the house is a parcel of orchard and tillage land, of about ——— acres only, and is of very small annual value for any purposes to which it can be devoted under the testamentary conditions now in question.

The complainant supposes, according to her present information and belief, that all the direct money bequests and specific legacies of the will can be fully paid out of the personal property, or out of real estate specifically applicable thereto, without any other resort to the realty, and that the Ring farm will eventually fall to the residuary legatees. But she says that this cannot certainly be known in the present stage of the administration and during the pendency of the questions sought to be solved in the present proceeding. Meanwhile she says that the Ring farm is of such character as to soil, and in such unimproved condition that it cannot, without much difficulty and expense, be made to yield any net returns in the present state of the title,—it appearing, as the complainant is advised, that the eventual right of the residuary legatees may be subject to an intervening life-estate in the widow. And the complainant alleges that it will be for the interest of all concerned that the Ring farm be sold under a decree of this court in the present proceeding, if the same can lawfully be done, and she prays that the court will inquire thereon and make such decree, and order the proceeds of the sale of the same to be held and applied as the interests of the several parties who may be entitled therein shall require.

And thereupon, as she is advised, the complainant respectfully states the following inquiries, for interpretation and instructions to be given by the court.

1. Whether under the third and fourth clauses of the will, and the third clause of the codicil, the widow, as such, takes any interest in the Ring farm, or is entitled to any income from the same?

2. Whether the plaintiff, in her capacity as administratrix, is entitled and required to make any expenditures from the general funds of the estate, for the purpose of carrying on or improving the Ring farm, or in attempting to obtain productive income from the same, whether for the use of the widow, or for the use of those entitled in the residuary?

3. Whether, pending the settlement of the estate, the objects and purposes of the will, in respect to the persons who may be determined to be beneficially interested in the Ring farm, can be effected and carried out by a sale of the farm, and the investment of the proceeds for the use of those entitled? And whether the court can effect such objects by a decree in the present cause, with or without the consent of the residuary legatees?

4. Whether the bequest of $3,500 made in the fourth clause of the codicil, to the Rev. Alexander Burgess (who is also a residuary legatee, and one of the defendants), is payable presently out of the general money funds of the estate, or is only to be realized and paid hereafter out of the sale of the real estate mentioned in the third clause?

5. Whether the administrator of the will is authorized, under the third clause of the codicil, to provide out of the general funds of the estate for the payment of taxes, repairs, and insurance on the real estate, mentioned and devised in trust by that clause, or for any part of the same?—the plaintiff praying, that if it shall be so held, the court will advise and instruct her how much may be so applied, and what part of the capital of the estate may be set aside and held as a trust fund to supply the means of defraying such charges?

6. Whether, under the true construction of the will, any part of

such charges can be required to be borne by the trust, to which the proceeds of the said real estate are eventually to be devoted?

7. Whether in case it shall be adjudged that the said legacy of $3,500 to Rev. Alexander Burgess is payable presently, the plaintiff will be authorized to pay the same to him, until by proceedings in the probate court he shall be qualified as a trustee to accept the same?

8. Whether the second clause of the codicil is of any effect? And if any, what is the legal interpretation of the same?

9. Whether, under the third clause of the will, the widow is entitled to one-third of the gross personal property which the testator owned at the time of his decease, or only to one-third of the net personal, after the payment of debts and charges of administration? And whether, in either case, one-third of the chattel property or one-third of its money value is to be taken, to make the whole third given to the widow?

COPY AND ABSTRACT OF THE WILL.

[Parts within quotation marks are literal copies.]

PREAMBLE.

1. . . . "I will my body to be buried in my own lot, in the grave-yard in the town of Gorham." . . .

2. Directs payment of debts. "And I desire my executor to have erected and placed in my lot and over my body, a monument of as large a size as can be procured for five hundred dollars, and I hereby bequeath that sum to him for that purpose. A design for this monument, with inscription and epitaph, will be found with my effects in the iron safe. I desire that after my burial in my own lot, and my wife, if she shall so desire, no other person may be there buried forever after."

3. "To my wife, Lizzie W. Stevens, I give and bequeath one-third of all the personal property of which I may die possessed, and the income of one-third of all the real estate which I may own at the time of my decease, except as specified in the next article."

4. "To my wife, Lizzie W. Stevens, I devise and bequeath the use of my house and the lot on which it stands, and the use of the furniture, pictures, curiosities, glass, tools, nautical instruments, charts, maps, books, chronometers, watches, silver plate, diplomas, family records, liquors, stuffed birds, urns, vases, clocks, and all other things belonging to me, in the house at the time of my death, except the iron safe with its contents, so long as she shall remain a widow, any of which articles can be used at her discretion, but not to remove any of them from the house, and leave the house and things in the good order in which they now are, except such articles as are hereinafter mentioned."

5. Relates to a previously deceased son.

6. *Revoked.* Devise to executor in trust, of a lot of land, part of lot "opposite my house," and a sum of money, for the objects of a church to be there erected.

7. *Revoked.* Devise to executors his dwelling-house and lot in trust, first for his wife during widowhood, as above provided; second, then to convey it to a religious society to be formed, and if no such society, to rent it, and apply the income to charitable and religious objects named.

8. *Revoked.* "For the purpose of carrying out my intentions, as expressed in the preceding articles," gives to executor two thousand dollars in trust. "1st, to keep the iron fence around my grave-yard lot in good repair, and the monument and grave-stones in their proper places, and the lot and graves therein from being desecrated forever. 2d, to pay the taxes on my house and lot, to keep the house insured properly, and tightly shingled, painted, and the underpinning painted, the windows glazed and blinded, in fine, to keep the house in the same general state of repair in which it now is, and the fences also in good order." 3d, provides for rebuilding if the house shall be burned, and when the house shall be conveyed, as provided in article seventh. The fund of two thousand dollars, as provided in this article ("except the sum of five hundred dollars") shall be paid over to a parish named. "But said sum of five hundred dollars shall be retained and held by my

executor in trust for the purpose named in the first item of this article."

9. *Revoked.* In case no society shall be formed as contemplated in the sixth article, the executors to sell the lot and pay over the proceeds to a parish named.

Clauses from 10 to 15 were bequests to charitable and scientific societies, and to several individuals, of money and chattels; the eleventh being for the support of a school at Hull's Cove, Mount Desert.

16. If the executor shall decline or resign, "and at his death, I desire that his successor shall be appointed by the judge of probate for the county of Cumberland, and so on forever, when any vacancy happens in the execution of said trust."

17. *Revoked.* Bequest of residuary.

18. Appoints William Hammond "the executor of this will, and trustee under its provisions," with a personal legacy to him.

In testimony whereof, etc., Aug. 24, 1866.

COPY AND ABSTRACT OF THE CODICIL.

[Parts within quotation marks are literal copies.]

PREAMBLE.

1. Revokes articles six, seven, eight, nine, so much of article fifteen as relates to an individual legatee there named, and article seventeen, of the will.

2. "I bequeath to my executor, and his successor as a trustee, the sum of five hundred dollars, the income to be applied to keep the iron fence around my" (so ends in the original).

3. "I give and bequeath to my executor the house in which I live, and the lot on which it stands, and the lot of land opposite my house, extending to Fort Hill road, to him and his successor, to be held in trust for the use of my wife, Lizzie W. Stevens, in lieu of dower, as long as she shall remain my widow, and then to be sold to the best advantage by him, and the proceeds disposed of as provided in the next article."

4. "I bequeath to Rev. Alexander Burgess, D. D., late pastor of Saint Luke's Parish, in Portland, the sum of three thousand five hundred dollars, for the following purposes:

"First. One thousand dollars to be invested by him, the income of which to be applied in alms to the poor of St. Luke's Parish aforesaid.

"Second. One thousand dollars to be paid over by him to the Bishop of the Diocese of Maine (Episcopal), to be held by him and his successor, and the income applied at his discretion for some Episcopal clergyman to perform divine services in the school-house erected and presented by me to Hull's Cove school district, Mount Desert, at such times in the year as may be practicable and desirable.

"Third. The residue, together with the proceeds of the sale of my house and the lot named in the preceding article, which my executor is hereby directed to pay over to said Burgess for the purpose, to be applied by said Alexander Burgess at his discretion, to commemorate in Maine the name, virtues, and exalted character of his noble brother, the late Bishop George Burgess, of the Diocese of Maine, in such manner as he thinks would have been in accordance with the desire of the good Bishop."

5. "All the rest and residue of my property of every nature I devise and bequeath, in equal shares, to my wife Lizzie W. Stevens, Alexander Burgess aforesaid, Arthur M. Benson, Fred. W. Chadbourne, Leonard J. Thomas, and Orient H. Carpenter, of Mount Desert, and to"—

In testimony whereof, etc., February 21, 1867.

Josiah H. Drummond, solicitor for complainant.

Bradbury & Bradbury, for L. J. Thomas.

Howard & Cleaves, for Alex. Burgess and others.

WALTON, J. To the several inquiries propounded in the plaintiff's bill we answer:

1. That the widow is entitled to the income of one-third of the Ring farm. The third clause of her husband's will gives it to her, and there is nothing in any other clause of the will or codicil which nullifies the gift.

2. That the administratrix is not required nor authorized to expend the funds of the estate, which would otherwise go to the residuary legatees, for the purpose of carrying on or improving the Ring farm, or in attempting to obtain productive income from the same.

3. That, in the present condition of the estate, the personal assets being apparently amply sufficient to meet all the calls in the will, the court declines to give the administratrix authority to sell the Ring farm, without the consent of the other residuary legatees; and the court is of opinion that she cannot sell it without such authority or consent.

4. That the bequest of $3,500 to the Rev. Alexander Burgess is payable presently, or as soon as he is qualified to receive it.

5. That the administratrix is not authorized under the third clause of the codicil, nor under any other clause of the codicil or will, to provide out of the general funds of the estate for the payment of the future taxes, repairs, and insurance, on the real estate devised in trust by the third clause of the codicil, or for any part of the same, while it is occupied by the widow for her own use and benefit, as *cestui que trust* or beneficiary. It is clear that the testator did not intend to charge his estate with such an incumbrance, for he expressly revoked that clause of his will in which such a provision was made. We think the court would not be justified in inserting in the testator's will by construction what he expressly expunged. The court, therefore, declines to authorize any sum to be set apart for these purposes.

6. That no part of such charges can be required to be borne by the trust to which the proceeds of the said real estate are eventually to be devoted. While the widow occupies as beneficiary she must pay the taxes and keep the premises in repair at her own expense; and there seems to be no doubt that her share of her hus-

band's estate under the will, will furnish her with means amply sufficient to enable her to do so without inconvenience.

7. That the Rev. Alexander Burgess will not be authorized to receive the $3,500 bequeathed to him in trust until he has given the bond required of testamentary trustees by the laws of this State. R. S., c. 68, § 1.

8. That the second clause of the codicil is void, for incompleteness and uncertainty.

9. That under the third clause of the will the widow is entitled to one-third of the gross amount of the personal property of which her husband died possessed; that she is not limited to one-third of what will remain after payment of the debts and charges of administration. She is entitled to one-third of the goods and chattels, and to one-third of what shall be realized from the rights and credits. *Bardwell* v. *Bardwell*, 10 Pick. 17.

Such, in our judgment, is the true construction of the will, and the parties are entitled to a decree accordingly.

In our judgment this is not a case where either party should recover costs.

Bill sustained. Decree to be entered as stated in the opinion. No costs for either party.

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

STEPHEN A. EMERY and another *vs.* THOMAS RICHARDSON.

Contract, construction and effect of—how discharged.

If a surety give the creditor his individual notes under an agreement between them, not known to the principal that these notes when paid shall be in full satisfaction and discharge of the original contract, and part only of the notes are paid; this does not discharge the principal, who may be sued upon the original contract and held for so much as remains due thereon after deducting the amounts paid by the surety.

ON REPORT.

ASSUMPSIT, to which the general issue was pleaded, on a contract of which the following is a copy:

"Whereas, Stephen A. Emery and Frederic H. Prince have this day conveyed to Thomas Richardson two third parts, being all their remaining interest in a certain invention, entitled 'A Safety Switch for preventing Railroad Cars and Engines from running off their tracks,' and in and to the letters patent issued therefor, dated (No. 53,593) the third day of April, A. D. 1866. Now in consideration thereof, and of one dollar, the receipt whereof is acknowledged, we, Thomas Richardson as principal, and James E. Fernald, of Portland, as surety, jointly and severally promise and agree with said Emery and Prince, to pay them the sum of seven thousand dollars on or before the eighth day of January next, or to re-convey and re-vest in them all the title and interest in said two thirds, as fully and perfectly as the same now are or were before said conveyance was made.

Rev. Stamp, cancelled Oct. 2, 1866.

"Witness our hands at Portland, this second day of October, A. D. 1866.

"Witness: THOMAS RICHARDSON,

GEORGE F. EMERY. JAMES E. FERNALD."

The eight day of January, 1867, having passed without payment of the $7,000, the plaintiffs wrote defendant requesting immediate payment, to which he replied on the 31st of that month, saying he expected to be in Portland between the 9th and 15th of February "prepared to settle all matters of business between Messrs. Emery & Prince and myself;" adding, "Please don't understand that I repudiate the payment of the money with interest." . . . "The delay in the payment to Messrs. Emery & Prince can not be more annoying to them than to myself. Had I anticipated the inconvenience to those gentlemen or the annoyance it has been to Mr. Fernald and myself, I should have returned the switch to them on the 8th day of January, and I am now willing to return them the entire interest in the switch, if they will reimburse me for my time and expenses. I presume they want their money, and that they shall have, and with many regrets that I have placed myself in the position which I occupy, and with the assurance that they shall receive the money at the earliest possible moment that I can give it to them, I am," etc., etc.

The defendant failing to pay, plaintiffs made demand of the surety, Fernald, who, after repeated calls for the money, paid $1,000, April 13, 1867, and promised to pay the balance, but did nothing more till August 13, 1867, when he gave his personal notes for the balance and interest and received from them a receipt of this tenor:

PORTLAND, Aug. 13, 1867.

Received of J. E. Fernald eleven notes of five hundred dollars each, and one of seven hundred thirty-three dollars and four cents. The first payable on the fifteenth of September next, and the rest monthly thereafter, respectively, which notes, when paid, with what said Fernald has previously paid, is to be regarded as full payment and satisfaction of our contract with Thomas Richardson, on which said Fernald is security, dated Oct. 2, 1866.

STEPHEN A. EMERY,
FREDERIC A. PRINCE.

Fernald made seven payments, aggregating $1,429.82 on these notes, the last being on March 17, 1869, but was unable to pay any more, and died utterly insolvent. No extension or modification of the terms of the original contract were ever made. At the time Fernald gave his notes of August 13, 1867, something was said about their being indorsed by Richardson, but plaintiffs' attorney said it would be difficult notifying him in New York, and that it was sufficient that he was bound by the original contract. All the business between the parties had been transacted through the same attorney, and it was under directions from the plaintiffs to look after their interests and their claim against Richardson (after Fernald's death), that he instituted this suit. When the writ was served the defendant went with the officer to that attorney's office to have his bond approved. While there he complained of having been arrested.

The counsel replied: "You have been in the city a week, and well knew I was expecting an adjustment of this contract, and that I have your letter promising to pay the contract sum and interest, on which there is a balance still due," or words to that effect. He rejoined, "I know that, and I don't repudiate any of my obligations, and if you had only addressed me a note it would have saved all this," or words to that effect. There was some other conversation, but nothing material to the issue.

The defendant testified that the notes so given by said Fernald were given and accepted by the plaintiffs without said Richardson's knowledge or consent, and he protested to said Fernald against his having given them, as soon as informed by Fernald of the fact, and that the plaintiffs, in person or by counsel, never called or demanded payment of the notes and, accordingly, he had never paid the same.

On the seventh of January, 1867, defendant wrote Emery & Prince requesting thirty days' extension on the contract, which was refused unless security satisfactory to George F. Emery was furnished, which was never done. The case was reported under an agreement that if, upon the foregoing facts, plaintiffs are entitled

to recover, the defendant is to be defaulted and judgment entered for said sum of $7,000, with interest, less the aforesaid payments; or, if not so entitled, plaintiffs are to become nonsuit.

George F. Emery, for plaintiffs.

This is a contract of sale or return. Not being returned Jan. 8, 1867, the sale became absolute. 1 Parsons on Contracts, 539; *Dearborn* v. *Turner*, 16 Maine, 17.

Fernald's notes did not discharge him from original contract. *Fowler* v. *Ludwig*, 34 Maine, 461; *Millidge* v. *Boston Iron Co.*, 5 Cush., 170. Certainly, then, it didn't discharge Richardson.

Bradbury & Bradbury, for defendant, argued that the new contract with Fernald was substituted for that of October 2, 1866, which was thereby discharged. It irrevocably fixed different times, terms, and amounts of payments, without defendant's consent; extending the time so as to prevent earlier collection. *Andrews* v. *Marrett*, 58 Maine, 539, and cases there cited.

F. O. J. Smith, also appeared for defendant.

Dickerson, J. On the second day of October, A. D. 1866, the defendant, as principal, and James E. Fernald, as surety, in consideration that the plaintiffs had conveyed to the defendant the balance of their interest in a certain invention, entitled "A safety switch for preventing railroad cars and engines from running off their tracks," together with their interest in the letters patent issued therefor, and of the receipt of one dollar, jointly and severally promised and agreed with the plaintiffs to pay them the sum of seven thousand dollars, on or before the eighth day of January then next, or to reconvey and revest in the plaintiffs all the property and rights they had received from them by virtue of said conveyance.

On April 13, 1867, the surety paid the plaintiffs $1,000, and on the 13th day of the following August he gave them eleven notes of five hundred dollars each, and one of seven hundred and thirty-three dollars and four cents. The first note was payable Sept. 15, 1867, and the others monthly thereafter, respectively. It was

stipulated between the plaintiffs and the surety that "the notes, when paid, with what the surety had previously paid were to be regarded as full payment and satisfaction of the contract of Oct. 2, 1866."

Neither alternative of the contract of Oct. 2, 1866, has ever been complied with; and the only defense relied upon is the aforesaid arrangement entered into between the plaintiffs and the surety.

It is argued by the counsel for the defendant that that transaction constituted a new contract superseding the contract of Oct. 2, 1866, and discharging the defendant from all liability thereon. It appears that the defendant was not a party to that contract, and that he never assented to it. It was a contract exclusively between the surety of the contractor and the contractee. In the contemplation of the parties to it, the notes were not to be regarded as payment and satisfaction of the prior contract unless they were paid, a contingency that has never occurred. If, therefore, the taking of the notes operated in law as a discharge of the defendant from his liability on his contract, it has an effect contrary to the intention of the parties to it.

The case is clearly distinguishable from that class of cases where, for a valid consideration, the contractee agrees with the contractor without the knowledge or consent of the surety to extend the time of payment. In such cases, a new contract is made materially differing from the old one. The surety not being a party to the new contract cannot be held under it, nor is he liable under the old one, since that has been superseded by the new one; the right of action of the contractee against the surety is not simply suspended by the new arrangement, but it is lost. Besides, by the extension of the time of payment the surety might lose his claim against his principal for indemnity if he should pay the debt.

In the case at bar the surety undoubtedly made a new contract with the plaintiffs in respect to his liability on the prior contract. But this new contract, by its terms, only relieved him from that one conditionally; and if, as the counsel for the defendant contends,

the new contract suspended the plaintiff's remedy against the surety on the original contract, during the time fixed for the payment of the notes, the defendant has no cause of complaint; he was not damaged by this suspension; nor would he have been damaged if the surety had fulfilled his new contract with the plaintiffs. It was immaterial to the defendant whether he paid his debt to the plaintiffs or reimbursed his surety for paying it. And even if the new arrangement suspended the plaintiffs' right of action against the defendant for the time being, what cause of complaint would he have? How was he damaged? He might have paid his debt at any time, and if he had done so pending the provisional arrangement between the plaintiffs and his surety, the latter would have been relieved from his liability to pay the notes to the plaintiffs. But the contract with the surety did not suspend the plaintiffs' right of action against the defendant; that was another form of security given by the surety to which the defendant was a stranger, and by which he lost no rights, was not damaged, nor discharged from liability on the original contract.

According to the provisions of the report, the entry must be,

Judgment for plaintiffs, for the sum of seven thousand dollars and interest from Jan. 31, 1867, *less the payments specified in the report, and the interest thereon from the time they are respectively made.*

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

ANNIE M. HENRY *vs.* JAMES F. MILLER, administrator.

Costs.

An heir-at-law appealing from the allowance of a claim by commissioners of insolvency, under R. S., c. 66, § 11, is liable to have costs awarded against him if the creditor recover, though the amount finally allowed may be less than that awarded by the commissioners.

In such case the claimant is the prevailing party.

ON EXCEPTIONS.

The plaintiff presented to the commissioners of insolvency upon the estate of late Rose Landers, of which defendant was administrator, a claim which was allowed by them. Frederic P. Maher and Dennis Maher appeared as heirs-at-law agreeably to R. S., c. 66, § 11, and claimed an appeal from this decision. The claimant seasonably brought her action for money had and received, in the supreme judicial court for this county, where a less sum than that allowed by the commissioners was awarded her. The court allowed costs in her favor against the heirs-at-law, who excepted to this ruling.

T. M. Giveen, for heirs-at-law.

Butler & Fessenden, for plaintiff.

DANFORTH, J. An heir appealing from an allowance by commissioners of insolvency is liable under R. S., c. 66, § 11, to have costs awarded against him if the creditor recover, though the amount may be less than that awarded by the commissioners.

In such case the claimant is the prevailing party.

Exceptions overruled.

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

ALICE ANN MAXWELL *vs.* WILLIAM A. MITCHELL and another.

Deed—delivery of. Exceptions—only facts stated therein considered.

In an action of *trespass quare clausum*, evidence is admissible to show that the deed by which plaintiff claims title to the *locus in quo*, though executed and recorded prior to the date of the writ, was not delivered till after suit brought.

Evidence reported upon a motion for a new trial, which has been overruled by consent, cannot be considered in a hearing upon exceptions, when such evidence is not referred to in, or made part of, the exceptions.

ON EXCEPTIONS to the ruling of the justice of the superior court for this county.

This is an action of *trespass quare clausum*, commenced by writ dated June 13, 1871. Plea, general issue, with a brief statement of justification and title in the defendant. The plaintiff put in a deed of the *locus in quo*, dated and recorded Nov. 19, 1866, proved the acts alleged to be trespass, and stopped. The defendant offered to prove a demand against her grantor, existing prior to the date of such deed, and a judgment recovered thereon in favor of defendant, on which execution issued, which was levied upon the premises in question, and thereby the defendant claimed title thereto. And the defendant offered to prove that said deed to the plaintiff was not in fact delivered to her, or to any person for her, till long after the commencement of this action. But the justice presiding excluded this testimony upon the ground that a creditor levying on lands alleged to have been conveyed in fraud of creditors, cannot oust the tenant in possession, nor justify a trespass by impeaching the title of the grantee in the conveyance alleged to be fraudulent; that such levy only gives the creditor a momentary seizin, sufficient to enable him to maintain a writ of entry. To this ruling the defendant excepts.

Howard & Cleaves, for defendant.

No question of fraudulent conveyance arises in this case. The plaintiff relied solely upon her title to the premises, by deed.

There is nothing in the case to show that the plaintiff had either title to premises, possession, or the right of possession, when she instituted this action.

The rulings of the presiding judge were based upon an assumed state of facts which did not exist, and were, therefore, erroneous.

The provisions of the Revised Statutes, c. 76, § 13, relied upon by the plaintiff, do not apply to this case, where no conveyance had been made by the debtor, in fact, to her, when this suit was brought.

Henry Orr, for plaintiff.

Defendant filed a motion for a new trial, which after entry of the case in the law court was abandoned and overruled by consent. On this motion all the testimony was reported. A reference to this report will show that the plaintiff entered into actual possession of the premises under her deed, long before commencing this action.

APPLETON, C. J. This is an action of trespass *quare clausum*, in which the plaintiff may recover by showing title to or possession of the premises upon which the trespass was committed.

The plaintiff produced a deed bearing date and recorded prior to the time of the alleged trespass. The defendant offered to show that the deed was not delivered until after the date of the writ. This evidence was rejected.

The plaintiff's title accrued only upon the delivery of the deed to her, and if this was after the date of the writ (as we must now assume it to be), then the action was not maintainable. The evidence was, therefore, improperly rejected.

But it is urged that possession is enough to support a suit of this description. That is true. The exceptions, however, disclose no evidence of possession on the part of the plaintiff.

It is said that proof of that fact is to be found in the report of the evidence on the motion for a new trial. But that is not referred to in, or made a part of, the exceptions. The defendant does not

rely upon it, and it is overruled by consent. It is not, therefore, before us.

Had a reference been made to the report in, or had it been made a part of, the exceptions, or had the exceptions disclosed that the plaintiff was in possession of the premises in controversy, and that that fact had been passed upon by the jury in her favor, she would have been entitled to the benefit of such possession. Upon the exceptions, as before us, the fact of the possession of the plaintiff at the time of the trespass of the premises in question, is not in proof.

Exceptions sustained.

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

CHARLES F. BRYANT *vs.* WILLIAM L. PENNELL.

Accession, what accrues to mortgagee by.

Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession.

ON EXCEPTIONS to the ruling of the justice.

This was an action against the defendant, a deputy sheriff, for trespass in so negligently caring for certain plants attached by him upon a writ in favor of Warren Sparrow, that they were greatly injured. Sparrow had a mortgage of part of the plaintiff's stock of plants and shrubs, etc., in his green-house, and one Deering also had a mortgage of a portion of the same property. The officer only attached upon the writ aforesaid "so much of the stock of plants and shrubs as were not covered by the mortgages;" hence, it became material to determine what was included in the mortgages.

The defendant contended that cuttings from the plants mortgaged passed also by the mortgage; but the justice instructed the

jury that plants and shrubs raised by Bryant, in his green-house, subsequent to the date of the mortgages, from cuttings made by him from the original plants and shrubs included in the mortgages, were not covered by the mortgages and they conveyed no title thereto.

The defendant excepted.

Butler & Fessendens, in support of exceptions.

The cuttings passed; 1. On the principle of accession. 2 Kent's Com. 360; 1 Bouv. Law Dict. Tit. "Accession;" *Farwell* v. *Smith*, 12 Pick. 83.

2. By way of reparation, or keeping good the stock mortgaged. *Noyes* v. *Morrill*, 56 Maine, 458.

A. A. Strout & M. P. Frank, for plaintiff.

The maxim, "*Partus sequitur ventrem*," does not apply here. It might as well be contended that trees raised from the seed of apples picked from a mortgaged tree passed under the mortgage, as to say these cuttings did. They had become entirely independent plants.

APPLETON, C. J. On May 25, 1865, William Sparrow leased certain premises for the term of ten years to the plaintiff. In the lease it was agreed that the lessee was "to have permission at the end of his term to remove all buildings erected by him upon the premises, and also all plants, shrubs, and trees set and planted by him for the purposes of his business as nursery man and florist."

On the 16th June, 1869, the plaintiff mortgaged to said Sparrow "the green-house and shed attached, the whole adjoining the green-house now occupied by me under a lease from said Sparrow; also, a new propagating house about 10 feet by 90, situate in front of the above-mentioned green-houses, and all other glass and frame structures and out-buildings belonging to the said Bryant, situate upon the ground held under said lease; together with all the stock of Elmwood nursery, consisting principally of plants, shrubs, and trees and all the tools, implements, and materials belonging to said nursery."

By virtue of his mortgage, Sparrow acquired a title to the property mortgaged. The plants and trees were included in it. The cuttings are from the plants. The portions severed, before severance were subject to the mortgage. They are none the less so after severance. The mortgagee loses no rights, because after severance they remained in the same green-house in a condition for further growth and development.

This view is in accordance with all the analogies of the law. The hirer of sheep or cattle for a limited period is entitled to the increase of the flock during the term. The increase belongs to the usufructuary. But the mortgagor is not the usufructuary. As between the mortgagor and the mortgagee, the title of the mortgagee is the better title. *Allen* v. *Delano*, 55 Maine, 113. Where the mortgagor in January mortgaged "all the hay and grain of every kind that grows on the farm on which I now live the present year," it was held that the rye and rye-straw from the sowing of the fall previous belonged to the mortgagee. *Cadworth* v. *Scott*, 41 N. H., 456. A mortgage of leather cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor. *Putnam* v. *Cushing*, 10 Gray, 334. In the opinion of the court, "the property still remained in the mortgagee, notwithstanding the change by the completion of the work as originally designated; the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property not held by the mortgagor at the time of making the mortgage; but merely of labor performed upon materials and stock of the plaintiff acquired by his mortgage. In such case, the accession will pass to the mortgagee."

The ruling, therefore, that the plants and shrubs raised by Bryant in the green-house from cuttings made by him from the original plants and shrubs included in the mortgage, were not covered by the mortgage and that no title thereto passed to the mortgagee, was erroneous. *Exceptions sustained.*

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

Hiram J. Rand *vs.* Isaac C. Nesmith.

Rule of damages in action for money had and received.

In an action for money had and received, the plaintiff is entitled to recover no more than the sum actually received for his use by the defendant. An instruction that he can recover so much as his property converted by the defendant into money was reasonably worth, is erroneous.

On exceptions.

Assumpsit to recover for land sold by defendant, the title to which he held in trust for plaintiff. That the defendant originally acquired an interest in the premises, to be held for some period in trust, either for the plaintiff or for his father (Bradbury Rand), was not denied, though it was contended the trust had determined and the estate become absolute in Nesmith. Bradbury Rand conveyed to the plaintiff in 1856, by quit-claim deed, all his interest in the property, to be held according to the trust, of which there was no written declaration, but which was implied from the payment by the plaintiff of the consideration money for the purchase of the portion of the estate transferred by said deed. The land belonged to the Houston heirs, of whom there were five or six, at least; and Rand had acquired only the title of two or three of them when he conveyed to Nesmith. The defendant subsequently, several years later, bought up a tax title of one King, from whom he took a conveyance. In 1866 he sold the land, by deed of warranty, to Weston F. Milliken, for $800, which the plaintiff said was far below its real value. The defendant contended that if liable at all, he could only be held for such a proportion of the sum received ($800) as the fractional interest passing to him by Rand's deed bore to the whole estate; but the presiding justice ruled that if the value of the undivided share conveyed by Rand to Nesmith amounted to $800 the jury could give that amount, or such portion

of it as they found equal to the actual value of such share, but could not exceed the gross sum received by Nesmith from Milliken for the land; and the defendant excepted.

J. H. Drummond, for defendant.

A. Merrill, for plaintiff.

APPLETON, C. J. It appears from the evidence that the plaintiff and defendant entered into an agreement by virtue of which the plaintiff was to procure title to certain real estate, the defendant was to advance the funds for its purchase, the estate purchased was to be conveyed to the defendant to hold the same as security for advances made in its purchase, and for other claims which he held against the plaintiff and interest thereon; the defendant was to hold the estate (subject to his claims thereon) in trust for the plaintiff, and if sold, to account to him for the proceeds thereof, after deducting what might be due him.

In pursuance of this arrangement, the plaintiff procured the title to the whole or to a portion of the lot in question, and on the 22d August, 1856, conveyed all his "right, title, and interest" therein by deed of quit claim, and for the consideration of two hundred dollars, to the defendant.

On September 6, 1866, the defendant conveyed the lot in question by deed of warranty to Weston F. Milliken for the consideration of eight hundred dollars. In the deed the land is described as the "same lot I purchased of Marquis F. King, July 15, 1861," etc.

There is evidence tending to show that there were at least five co-tenants in the estate. The plaintiff claims that he procured the title to the whole estate, while the defendant denies that he acquired from him title to more than four shares.

There was likewise evidence tending to show that the lot was worth much more than the amount for which it was sold.

The writ is assumpsit for money had and received. The plaintiff's specification of the claim to be proved under the money count is as follows:

1866.	ISAAC C. NESMITH TO H. J. RAND,	Dr.
	To proceeds of sale of land, corner of Washington and Walnut streets, in Portland,	$800.00
	To interest on same to demand,	200.00
		$1,000.00

There are certain deductions for credits which it is immaterial to consider.

The only exceptions presented relate entirely to the charge of the justice presiding, which was as follows:

"It has been contended by the defendant that if you should come to the question of damages, you cannot give the plaintiff as damages for the land the whole $800, being the amount in gross for which Nesmith sold it, but only a certain portion of the $800, on the ground that Nesmith received from the plaintiff only a certain undivided portion of the whole title. But for the purposes of this trial, I rule that if you find that Nesmith received from the plaintiff a certain proportion of the title, you will not necessarily be limited to awarding the plaintiff the same proportion of the $800, but you may give such damages not exceeding $800 as you shall find the title actually received from the plaintiff is reasonably worth."

The instruction thus given was erroneous in two respects.

In an action for money had and received, the plaintiff is limited to the amount thus had and received.

The defendant is only to account for the proceeds of land conveyed to him from the plaintiff, not for the proceeds of land the title to which he acquired from some other source. He only holds in trust what he has received from the plaintiff, and he is only to account for what he has thus received. The instruction compels him to account to the plaintiff for land he never owned.

There is no estoppel as against the defendant by reason of his deed of warranty to Milliken. The deed is not between the parties to this suit, nor does it purport to pass any title derived from the plaintiff, but it specifically refers to the lot conveyed by King.

Nor was the value of the lot a question for the consideration of the jury. The suit is not for its reasonable worth. The money received from its sale is the limitation of the plaintiff's right to recover—a limitation imposed on the plaintiff by the remedy adopted.

That the defendant might and ought to have sold for a larger price is not a matter for our consideration, as he is not sued for any act of omission or commission in the discharge of his trust, but on the contrary, the suit affirms what has been done, and is to recover the proceeds of the sale as made.

The instructions, to which no exceptions have been taken, must be presumed to be correct. The degree of credit to be given to the witnesses on the one side and the other was for the consideration of the jury, and no reason is perceived for disturbing the verdict as against evidence. But as the instructions reported were erroneous, a new trial must be granted.

Exceptions sustained.

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

STATE OF MAINE *vs.* GRAND TRUNK RAILWAY.

Railroads—liability for causing death.

Where a statute declares that railroads, by whose negligence the life of a person is lost, forfeit not less than five hundred nor more than five thousand dollars, to be recovered by indictment to the use of the heirs of the deceased; *held*, that to bring a case within this statute the killing must be instantaneous.

INDICTMENT against defendant corporation for causing the death of one David P. Pullen. The only essential fact is stated in the opinion. A verdict had been rendered against the company and a motion for new trial filed.

T. H. Haskell, acting county attorney, for the State.

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

WALTON, J. When one is injured through the carelessness of a railroad corporation, but the injury is not such as to produce immediate death, a right of action accrues to such person, which in case of his subsequent death, survives to his personal representatives; and in such a case, an indictment will not lie. *State* v. *Maine Central Railroad Company*, 60 Maine, 490.

In this case the evidence shows clearly and beyond a reasonable doubt, that Pullen, the person injured, did not die immediately. He not only survived several hours, but during most of the time was conscious, and able to converse intelligently. A right of action, therefore, accrued to him, which, upon his subsequent death, descended to his personal representatives; provided he was himself in the exercise of due care at the time of the injury, and the carelessness of the railroad company, or its servants, was the sole cause of it. This is not, therefore, a case where an indictment can be maintained. The verdict is not only against evidence, but it is also contrary to law; and the motion to set it aside must be sustained and a new trial granted.

This view of the law renders it unnecessary to consider whether the deceased was or was not in the exercise of due care at the time of the injury; or whether there was or was not carelessness on the part of the railroad company, or that of its employees.

Motion sustained. Verdict set aside, and new trial granted.

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

STATE OF MAINE *vs.* CORNELIUS MCCANN.

Search and seizure.

Upon a complaint in the form prescribed by statute alleging that intoxicating liquors were kept by the defendant for unlawful sale in a shop which is particularly described, a general verdict of guilty is sufficient.

That the officer proceeded illegally in making search for and seizure of the liquors so kept is no defense to the prosecution of the person keeping them.

In the prosecution against the person upon such complaint, it is immaterial what was done with the liquors; the proceedings are distinct.

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f94 134 ON EXCEPTIONS to the rulings of Symonds, J., of the superior court.

This was an appeal from the municipal court of the city of Portland upon a search and seizure process, on which certain liquors were seized and this defendant arrested as the keeper thereof. The search and seizure were made by the sheriff without a warrant, and subsequently a complaint was made by him for the purpose of obtaining a search warrant, alleging that the premises to be searched were a dwelling-house, "part of which was used as a shop or for purposes of traffic," and that intoxicating liquors were therein kept for unlawful sale by this defendant. A warrant was thereupon issued upon which the sheriff made return of the seizure and arrest. Upon his trial the respondent was found guilty and appealed. The judge, upon the trial in the superior court, instructed the jury that the search and seizure were authorized by R. S., c. 27, § 34, and that the proceedings under that section should be *in personam* as well as *in rem*.

The jury returned a general verdict of guilty, and the respondent's counsel moved in arrest of judgment, alleging as his reasons:

I. That the jury found a general verdict of guilty.

II. That the proceedings should have been solely *in rem*, and not *in personam*.

III. That the case finds that the search and seizure were made by the sheriff without a warrant.

The judge overruled the motion and the respondent excepted.

H. M. Plaisted, attorney-general, for the government.

J. H. Williams, for the respondent.

APPLETON, C. J. This is an appeal from the municipal court of Portland on a search and seizure process.

In *State* v. *Miller*, 48 Maine, 576, it was held after the liquors seized and the alleged keeper were brought before the magistrate issuing the warrant, that the proceedings against the person charged with the offense of keeping the liquors for unlawful sale, and against the liquors so kept, are separate and distinct, that they are to be treated as distinct cases, and that the judgment in one case does not affect that in the other.

In the case before us the defendant was on trial for having intoxicating liquors kept and deposited in a shop, and intended for sale in violation of law. Of this offense the jury found him guilty.

The jury found a general verdict. To this an exception is taken because it is not special. By R. S., c. 27, § 47, the jury are required to "find specially, under the direction of the court, on all facts necessary to determine the adjudication of the court." The complaint is in the form prescribed by the statute. It alleges that spirituous liquors were kept by the defendant in a shop, which is particularly described, for unlawful sale. The jury find the defendant guilty of the facts set forth in the complaint. No fact necessary for the determination of the court seems to be wanting.

It is objected that the seizure was illegal, the officer having proceeded to search without any warrant. Suppose it was so, that is no defense for the defendant's violation of law. If the sheriff has violated any law he is responsible for such violation, but that will not constitute any justification or excuse for the defendant.

The objection that the proceeding should have been solely *in rem* is not available. The proceedings originally were against the

person and the thing. A severance is made by law and in the proceedings against the person, it is immaterial what has been done with the thing.

The jury have found the person charged guilty of a violation of law. No ruling material to the defendant and against law is perceived. *Exceptions overruled.*

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

ENOCH WINSHIP *vs.* EZEKIEL SMITH and others.

Construction of contracts.

In construing a contract, to determine whether the signers intended to bind themselves personally or merely executed it as agents for another party, the intention is to be gathered from the whole instrument and not from any particular collocation of words or form of expression used in signing.

Some inquiries tending to aid in ascertaining the real parties liable in such cases, suggested.

ON REPORT.

The plaintiff sues the defendants to recover pay for building a meeting-house in Phillips, under a contract executed by him and them, entitled, "Agreement between Enoch Winship, contractor, and the building committee." The opening clause is: "I, Enoch Winship, of Phillips, do hereby agree, covenant, and bargain with the trustees and building committee of the new Methodist church society of Phillips, viz.: That I will construct and complete a meeting-house for said trustees and building committee," according to certain "plans and specifications signed by the parties," which are made part of the contract. After the recital of the specifications, the first part of the contract concludes thus: "All parts of the work to be under the inspection of the committee, and the whole to be finished and ready for occupation on or before the 1st of

November, 1867, for the sum of $3000 and the old Methodist meeting-house and lot; and failing to fulfill the above agreement, I do hereby agree to forfeit five hundred dollars to be recovered by said trustees for the use and benefit of the M. E. church in Phillips." (signed) "Enoch Winship."

The second part then commences: "In consideration of the above agreement, we, the trustees and building committee do agree to pay said Winship,

"1. All our right and title, as trustees and building committee of the new Methodist church society of Phillips, to the M. E. brick house and lot," and goes on to state the times when in the progress of the work the several installments of the cash payment of $3,000 shall be payable.

The six defendants sign this contract with their individual names, against which are written the words, "trustees of the new Methodist church society and building committee."

The only question determined by the court was whether the new Methodist church society or the defendants personally were liable to the plaintiff on this contract. There was a controversy relative to some lien claims and suits, but it is not material to state it. The court were to order a nonsuit or that the action stand for trial, as the law upon the facts reported might require.

H. L. Whitcomb, for plaintiff.

The contract was with defendants as individuals. The words written against their names were simply *descriptio personarum.* They are to receive forfeiture, to convey the old house and lot, and the plaintiff agrees with them to build the new house for these trustees and not for the society, according to a plan and specifications (made part of the contract) "signed by the parties," *i. e.*, the parties contracting; and then the plaintiff and these defendants sign it! The first cash installment of $500 was payable "when this instrument is signed by the contracting parties." Nothing is done in the name of any society, or of any other person than the defendants. *Stinchfield* v. *Little*, 1 Maine, 231; *Fogg* v. *Virgin*, 19 Maine, 352; *Chick* v. *Trevitt*, 20 Maine, 462; *Tippets* v. *Walk-*

er, 4 Mass. 595; *Foster* v. *Fuller*, 6 Mass. 58; *Simonds* v. *Heard*, 23 Pick. 120; *Packard* v. *Nye*, 2 Met. 47; *Stone* v. *Wood*, 7 Cowen, 453.

R. S., c. 73, § 15, does not apply, because this contract shows no purpose to bind any principal, or any one other than those who execute it. The original of this statute was c. 220, Acts of 1823. The cases cited from 19 Maine, 352, and 20 Maine, 462, were decided long since its passage. This last case (*Chick* v. *Trevitt*) is exactly parallel with the one at bar. *Andrews* v. *Estes*, 11 Maine, 267, 270.

A. C. Phillips and *S. & J. W. May*, for defendants.

The record of the meeting of the new Methodist church society, holden Aug. 13, 1866, shows that it was the intention of the society to contract for a new Methodist church. The society was duly incorporated, as the records show. R. S., c. 12, §§ 1, 2. It elected nine "trustees," six of whom signed this contract (2 Pick. 345), intending thereby to bind the organization and not the individuals. *Rogers* v. *March*, 33 Maine, 111. This is not a voluntary association; therefore cases cited from 19th and 20th of Maine do not apply.

Whitcomb, in reply.

The so-called records are so defective as to fail to prove an organization. It could not delegate the power to contract. *Female Orphan Asylum* v. *Johnson*, 43 Maine, 180.

Dickerson, J. Assumpsit for labor and materials in erecting a meeting-house in the town of Phillips.

It appears that the proprietors and owners of pews in the Methodist meeting-house in Phillips were duly incorporated into a parish by the name of "the new Methodist church society of Phillips;" that the defendants were duly elected trustees of that parish, and authorized to act in behalf of the corporation upon the subject-matter in controversy.

Previously to the commencement of the work a written agree-

ment was entered into, and the question arises whether the plaintiff contracted with the defendants individually, or in their capacity as trustees and building committee of "the new Methodist church and society of Phillips."

This question is to be determined rather by the meaning to be collected from the whole instrument than that derived from any particular collocation of words, or form of expression. If the object and intent of the parties thus deduced were to bind the principal, such will be the construction given to the contract, however inartificially these may have been expressed. Story's Agency, §§ 154, 261, 263. *Rogers* v. *March*, 33 Maine, 111.

In construing contracts of this description, with respect to the party liable, several questions oftentimes arise; as, for instance: From whom did the consideration move? For whose benefit was the contract entered into? To whom did the plaintiff look for security when he made the contract? Had the party sued authority to bind his principals? Did he name his principal in the contract? Did he intend to bind his principal or himself individually? The legal rights of the parties depend upon the answers to these questions in a given case, presented for consideration.

The written instrument is entitled, "Agreement between Enoch Winship, contractor, and the building committee," and is signed by the defendants, with the addition, "Trustees of the new Methodist church society and building committee." It begins as follows: "I, Enoch Winship, of Phillips, do hereby agree, covenant, and bargain with the trustees and building committee of the new Methodist church society of Phillips." While the names of the defendants are not mentioned in the body of the agreement, their capacity "as trustees and building committee" is mentioned five times, and the style of the party whose "trustees and building committee" they are, appears three times. In the operative part of the "agreement" the plaintiff stipulates, not with the defendants individually, but with "the same trustees and building committee to construct and complete a house for them."

The plaintiff himself was one of the committee. If the con-

tract were with the individual members of the committee its execution would literally call for the name and signature of the plaintiff, both as a contractor and also as a member of such committee. This would place the plaintiff on both sides of the contract, thus making him appear as contracting with himself. It cannot be supposed that such could be the intention of the parties, or that such can be the construction of the contract.

The old Methodist meeting-house and lot were a part of the consideration for building the house. In providing for the fulfilment of this provision, the agreement stipulates that "the trustees and building committee shall pay said Winship all their right and title, as trustees and building committee of the new Methodist church society of Phillips," to the same premises. The balance of the consideration was to be paid by "the trustees and building committee," described as aforesaid.

Upon failure to fulfil his part of the agreement, the plaintiff agrees to forfeit five hundred dollars to be recovered by said trustees for the use and benefit of the M. E. church in Phillips.

It is apparent from this analysis of the agreement that the defendants intended to bind their principal, and not themselves; that the consideration moved from the defendants' principal to the plaintiff; that the contract was for the principal's benefit, and that the plaintiff looked to the principal for security when he entered into the contract. The defendants, moreover, had authority to contract for "the new Methodist church society of Phillips;" named their principal in the contract; and, according to well-established rules of interpretation, rendered their principals and not themselves responsible. *Mann* v. *Chandler*, 9 Mass. 335; *Rogers* v. *March*, 33 Maine, 111; R. S. of 1857, c. 73, § 15; *Andrews* v. *Estes*, 11 Maine, 268.

If there were nothing in the contract to indicate the capacity in which the defendants acted but the designation of their style or office, as in the cases of *Chick* v. *Trevitt*, and *Fogg* v. *Virgin*, and like cases cited by the plaintiff's counsel, the result would be otherwise. But the contract in the case at bar, as we have seen, is re-

plete with evidence that the defendants acted in behalf of the corporation. While, in order to bind the principal, it is necessary that it should appear that the agent acted for or in behalf of his principal, it is by no means necessary that these identical words be used. It is sufficient if such fact appear by any words apt to show it. The law in such cases makes no particular form of words the exclusive medium of conveying this idea. The question whether in a particular case a person acts as agent is to be determined from an examination of the whole instrument, and not from any prescribed form of language.

Inasmuch as this action cannot be maintained, it is unnecessary for us to consider the other question presented.

Plaintiff nonsuit.

CUTTING, BARROWS, TAPLEY, and PETERS, JJ., concurred.

DANFORTH, J., did not concur.

ABNER TOOTHAKER *vs.* HEZEKIAH WINSLOW.

Charter—construction of. Action on the case—when maintainable.

The Richardson Lake Dam Company, under its charter, c. 104 of the Private and Special Laws of 1853, has the right to maintain its dams and to keep its gates closed, although the natural flow of the water from the lake may thereby be impeded and diminished.

The remedy for an illegal hoisting of these gates is not confined to the corporation, but may be sought in an action brought by any individual injured thereby, in his own name and for his own benefit, declaring upon the particular and special injury done to him.

ON DEMURRER.

Action on the case, alleging that the plaintiff had a large number of logs in Mooselukmaguntic and Richardson lakes and waters connected therewith, which were to be driven across those lakes and into the Androscoggin river; that he had arranged with the Richardson Lake Dam Company to hold back sufficient water to enable him to conveniently float his drive until it should reach the dams of that company at the outlets of these lakes; and that the defendant wrongfully hoisted the gates of said dams, whereby the water was let out and lowered, so that the plaintiff's logs were stranded and dispersed, and he was prevented from getting them into the river that season, and thereby many of them were lost and the rest greatly depreciated in value. The defendant demurred to the declaration, not as mere matter of pleading, but to determine whether or not the plaintiff could maintain his action if all the facts stated were assumed to be set out with technical accuracy. By agreement the case was presented to this court without any ruling upon the demurrer at *nisi prius*, so far as the report shows. The opinion of the court more fully states all material facts.

J. H. Drummond, in support of demurrer.

We desire to present no merely technical objection, but seek a result decisive of this suit and of the rights of the parties, raising two questions. 1st, Can the plaintiff maintain suit in his own name, or should it be in that of the Richardson Lake Dam Co.? And, 2d, Has that corporation the right to diminish the natural flow of the water? The first question arises under both counts, and the second only under the first count, the second being so framed as to avoid it. The company was chartered by act approved March 22, 1853, for purposes therein specifically stated. They can impose a toll of four cents on every log passing their dam at the outlet of Mooselukmaguntic Lake, and three cents more for each one passing the dam at the outlet of Richardson Lake, by section 4 of said Act. Reference is made to this section to identi-

fy the lakes, as on the State map the upper lake is called Moosetocunaguntic, or Great Lake; the next one Richardson, or Molechunkemunk Lake, and the lower one Welskenebacook, or Richardson Lake. The first one is that designated in the charter as Mooselukmaguntic, and the last is there (and generally) called Richardson Lake. The dam referred to in the plaintiff's declaration is at the outlet of the last (or lower) lake, and is in the plantation next east of the town of Upton, in Oxford county.

The Androscoggin river is a natural highway of which the court takes judicial notice. Richardson lake lies above Umbagog, and the dam in controversy is in the river between these two lakes. As the toll is payable so soon as a log passes the dam it is evident they were built to benefit the river above and not below them; the charter never contemplated holding the water back to facilitate driving the logs below the dam. The plaintiff can only recover for logs detained above the dam, and which he could not float across the lake, if he prevail in this suit.

The Richardson Lake Dam Company, as the declaration alleges, built the dam and own it; if there be discretion vested anywhere as to holding back and letting out the water, it is in the company, and in nobody else.

The presumption is that the water of the river ought to flow in its natural channel, in its usual quantities, without let or hindrance. The plaintiff cannot maintain this action. 1. It is not alleged that he owns or has any interest in the dam; only that he had contracted with the company to run his logs through it, etc. Upon this allegation plaintiff claims to have water retained for his logs, without regard to the rights of other log-owners above and below the dam; and that he, therefore, has a right of action against any one for interfering with the dam and using the water. The charter for improving a natural highway and imposing tolls upon those using it confers no exclusive right to its use. Nor can any preference be shown as to its use; no contract with plaintiff can give such preference. *N. E. Express Co.* v. *M. C. R. R.*, 57 Maine, 188. In his second count plaintiff says the company authorized

and directed him to keep the gates closed and the water back till his drive reached the dam, etc. If he were the company's agent for this purpose, he cannot maintain suit in his own name; if he were not, they could give him no such authority, as a privilege peculiar to him. *Veazie* v. *Dwinel*, 50 Maine, 479; *Gerrish* v. *Brown*, 51 Maine, 256; *Davis* v. *Winslow*, 51 Maine, 264; *Lancy* v. *Clifford*, 54 Maine, 487.

The water is held back by the company for such of the public as choose to use it, paying tolls. Can any individual who wishes to avail himself of this reserved water maintain suit against any one who tortiously draws it off, leaving the river no worse off than if the dam had never been put there?

There was no legal right in plaintiff to have the water reserved; the corporation could have let it off at its discretion, and the defendant only did what the company might have done. All plaintiff had a legal right to was so much water as naturally flowed in the river, and that was left him. One can have no legal right in what lies in the discretion of another; hence, exceptions do not lie to the ruling of a judge in discretionary matters.

II. The Dam Co. were bound to allow the usual flow of water to pass. By the first count it is claimed they had a right to use their dam as a reservoir dam; and by the second that the usual quantity of water was flowing over the dam. It is an important question to the company, but still more so to log-owners below the dam, whether or no they are rightfully subject to have their logs left in the dry bed of the river at one time, and then swept out on the banks at another, by the sudden letting out of the water by this corporation. The grant of a right to use such an obstruction of a natural highway should be construed strictly. It must be so exercised as to preserve the rights of others. 50 Maine, 479; *Parks* v. *Morse*, 52 Maine, 260. The legislature did not intend that the rights of all owners below the dam from Lake Umbagog to Merrymeeting Bay should depend upon the discretion of this company. Their charter says nothing about reservoir dams, but speaks of dams with sluices, etc. *Clark* v. *Rockland Water Power*

Co., 52 Maine, 68, 78; *Knox* v. *Chaloner*, 42 Maine, 150; *Pillsbury* v. *Moore*, 44 Maine, 154; *Davis* v. *Getchell*, 50 Maine, 602; *Davis* v. *Winslow*, 51 Maine, 264.

H. L. Whitcomb, for plaintiff, *contra.*

There was a large quantity of lumber around the lakes from which the Androscoggin takes its rise and the streams flowing into these lakes, but previous to 1853 it was valueless because of the difficulty of marketing it. The outlets from one lake to another were of such character that it was impossible to float logs into the river profitably. Hence the necessity for the dam about which this controversy arises. The gates in these outlet dams are closed in the fall and by the melting snows and freshets of spring the water is raised from twelve to fifteen feet, and that quantity is preserved while the logs are being taken across the lakes in booms, the natural quantity of water at the same time passing through the sluices so that no one below can be injured in the least. The necessary result of erecting the dams was to flow large areas of circumjacent land; hence the charter (Acts of 1853, c. 104) was procured. These dams have opened to the market a vast supply of lumber, adding largely to the wealth of those regions and to the property of the defendant in that vicinity. To attain these ends the legislature had a right to grant this charter.

The second count alleges that the usual quantity of water was passing into the river by the sluices; that Winslow "wilfully" hoisted three of the gates; these facts the demurrer admits, while nothing in the case shows that he, or anybody else was at all injured by such obstruction as the dam occasioned. After the company had expended $100,000, and plaintiff had cut, hauled, boomed, and driven 9,650,000 feet of lumber, costing, say $50,000 more, one man, at his own caprice, claims the right to hoist the gates, drain off the water, and thus frustrate and render abortive the whole object and purpose of the corporation, and destroy, or greatly depreciate in value the logs of the plaintiff, while it does not appear that this man ever had a log in the river, or was ever inter-

ested one cent in the gates being kept open or closed! If he can hoist these gates in 1870 he can at any and all other times of his own good will and pleasure do the same, and thwart the whole object for which the legislature granted the charter. It was obvious that the exercise of the rights conferred would to some extent impede navigation of the stream by logs or rafts, and the legislature could properly permit this. *Parker* v. *Cutler Mill Dam Co.*, 20 Maine, 353.

But can the plaintiff maintain this action in his own name? We think so, because he is the party injured by the tortious acts of defendant. The plaintiff was constructively in possession of the dam for his purposes, by authority of and contract with the company; and it was only because he relied on this arrangement for retaining the water, that he incurred the great expense we have mentioned. The loss to the Dam Company might be trifling, as the logs would mostly pass through and pay toll another season; but to plaintiff it would be very great. The court cannot "take judicial notice" that the river was navigable at this point within the definition given in *Brown* v. *Chadbourne*, 31 Maine, 9; *Treat* v. *Lord*, 42 Maine, 552, and *Brown* v. *Black*, 43 Maine, 443.

Why should a charter be granted and tolls be imposed to maintain dams "at the outlets" of these lakes that were not to raise the water by acting as "reservoir dams?"

The plaintiff had same right to have his logs pass unmolested that he would to ride uninterrupted along a turnpike, paying toll.

BARROWS, J. The facts alleged in the declaration and admitted by the demurrer are substantially as follows: The Richardson Lake Dam Company, incorporated by special act of the legislature in 1853, for the purpose of making such improvements on the Androscoggin river and its tributaries as would facilitate the floating of logs, timber, masts, and spars to a market, and authorized to remove obstructions, build dams and wing-dams, gates, piers, booms, etc., with the various rights and privileges enjoyed by other similar corporations under the laws of this State, and empowered to take

such lands as might be necessary for the sites of their dams, booms, and sluices, and to demand a certain toll upon every log passing their dam at the outlet of Mooselukmaguntic Lake, and another certain toll upon every log passing their dam at the outlet of the Richardson Lake, had erected costly dams, sluices, gates, etc., at the outlet of each of said lakes, and expended large sums in removing the obstructions in those waters, and greatly facilitated the running of logs and timber through those lakes and their outlets, and at last into the Androscoggin river, by preserving and holding back the water for that purpose; and in the season of 1869–70 the plaintiff had cut and landed on the tributary waters above these dams a large quantity (exceeding nine millions of feet) of logs and timber, and had contracted with the corporation that he should run the same through their dams and sluices upon payment of the required toll, and in the spring of 1870 had driven the logs through the Mooselukmaguntic, and into the Richardson Lake; and the gates of the dam at the outlet of Richardson Lake were closed for the purpose of saving the water to facilitate the driving of the logs. Defendant knew these facts and knew the necessity of keeping the gates closed till plaintiff's logs arrived there, but on the 1st day of June, 1870, wilfully hoisted three of the gates before the plaintiff's logs arrived, and kept them open a long time though requested by plaintiff to desist, and so reduced the water in the lake as greatly to hinder and delay the plaintiff in getting his logs across the lake, and prevented him from getting them out that season, by which means they were greatly depreciated in value, a portion of them lost, and the plaintiff was put to great expense.

A second count in the writ sets forth the same facts, with the additional allegation that the plaintiff had been authorized and directed by the corporation to keep the gates closed until he should get there with his drive, and be ready to have them pass through the sluices, and that defendant wilfully hoisted the gates and kept them up, although before he did this as much water was running from the Richardson Lake to the lake below as would have run had there been no dam there.

Waiving all objections that may be readily cured by amendment, the defendant seeks now a decision of two questions only: 1. Whether the plaintiff can maintain any action against the defendant upon the foregoing facts? 2. Whether the Richardson Lake Dam Company has the right under its charter to stop all the water flowing there, or is bound at all times to let the usual flow of water pass after its dams are once filled?

The defendant contends that for any wrong he has done by intermeddling with the property of the Richardson Lake Dam Company, the remedy is to be sought by suit in the name of that corporation; that if the charter of that company confers upon any one the right to diminish the natural flow of the water at one time, and increase its volume at another, it is only a discretionary power vested in the company alone; that no individual citizen having a contract with the company to run his logs through their dams, has a right to have the water retained for his logs regardless of the convenience of those who have occasion to use the river as a highway or the water for other purposes; that any attempt on the part of the company to confer special, or greater, or exclusive rights and privileges upon any individual, would be in violation of the rights of other citizens, and therefore void; that if plaintiff asserts a right as agent of the company under the authority given him to keep the gates closed, any suit for the violation of that right must necessarily be in the name of the company; that as one of the public, the plaintiff had no legal right to have the reserved water retained to float his logs, his only legal right being to the water as it was wont to run in a state of nature; that at best his rights to the reserved water were subject to the discretion of the company, and so the defendant has not been guilty of depriving the plaintiff of any legal right, and consequently no action can be maintained by the plaintiff against him. And whether these positions are found correct or not, he contends that at all events no action can be maintained upon the first count for want of an averment that the natural and usual flow of water was passing the dam at the time the defendant did the acts complained of; that the Dam Com-

pany, after completing and filling their dams are bound at all times to allow the usual flow of the stream to pass their dam, and if they do not, the dam is so far a nuisance which defendant had a right to abate.

It is quite apparent that a part of the questions which the defendant proposes to raise do not properly come before us on a demurrer to the declaration, but will arise, if at all, when his justification comes to be heard.

If the chartered rights of the Dam Co. are so abused as to make the dam a nuisance, still only those whose rights and privileges were injured or abridged thereby would have a right to abate it; and in this stage of the case it does not appear that the defendant is in a position to set up such a defense.

A mere intermeddler, who has no occasion to intervene for the protection of substantial rights of his own, and cannot justify as the servant of one who had such rights requiring protection, could not be heard to assert a justification of that sort.

For aught that appears here the defendant was a mere volunteer to redress grievances which, whether real or imaginary, did not in any manner affect him, or any one for whom he was authorized to act. If it shall appear at the trial of the cause that the defendant may rightfully enter upon such an inquiry, it will be in season then to determine in the light of the testimony offered by both parties whether the defendant's acts can be justified as the abatement of a nuisance specially prejudicial to himself or those for whom he acted.

We therefore pass this part of the case at the present time with the single remark, that while it is doubtless true that in the exercise of any and all chartered privileges and powers which are in derogation or restriction of common rights, all due and reasonable care must be used to avoid any unnecessary or unreasonable abridgment of the public right, or injury to those who have occasion to exercise it, it must not be expected that such a construction of the act will be adopted as will make the legislative grant nugatory, or deprive the privilege conferred thereby of its substantial value.

Reasonable mutual regard for the convenience and interest of all other parties liable to be unfavorably affected, and due care to avoid needless injury or hindrance to them, must be the rule of action on all hands.

Whether either party to this suit has been guilty of a breach of this rule, and if so, which, are not questions that can be intelligently decided upon a demurrer to this declaration or to either of the counts in it.

All that can be said at present is that the legislature in the legitimate exercise of their power of eminent domain have granted powers and privileges to the Richardson Lake Dam Company which must necessarily, to some extent, affect the use of the water below, and the common rights of all citizens to the use of the stream as a public highway; yet the powers thus granted are to be exercised in a reasonably discreet manner, for the accomplishment of the purpose for which the grant was made, with as slight disturbance or abridgment of the public rights as may be.

The principal matter for us to settle now is whether, upon the facts alleged in these counts, remitting the consideration of all questions properly arising upon the defense foreshadowed to the time when the defense is shown, the plaintiff can maintain his action against the defendant.

In the absence of any matter tending to establish a defense we see no reason to doubt his right to do so upon either of the counts, assuming such amendments made as the defendant concedes may be made according to the understanding of the parties, if the points which the defendant makes against the maintenance of any suit by plaintiff are not tenable.

There is a want of any direct averment that the defendant did the acts complained of "without right" as well as "wilfully," which the plaintiff will do well to amend; but the defendant concedes in argument that as this case is presented, the drawing off of the water is to be considered as tortiously done.

We do not think that any legal inference can be drawn from the facts as here set forth that any contract of the Dam Company with

the plaintiff that he should be permitted to run his logs through the dams and have the water retained to facilitate his so doing, or any authority that the Dam Company might have given him to keep the gates shut to further that design, was void upon any such ground as was held to vacate the exclusive privileges attempted to be conferred on the Eastern Express Company by the Railroad Company in the case of *The New England Express Co.* v. *The Maine Central R. R. Co.*, 57 Maine, 188.

We are dealing now only with the facts as alleged by the plaintiff, and cannot take cognizance here of possibilities which might change their aspect. Neither do we think it can be maintained that the plaintiff had no right to anything beyond the natural flow of the water as it was before the improvements made by the Dam Company.

Unless there were an illegal abuse of the powers conferred by the charter, of which assuredly we have now no evidence, so far as any matter or thing that is made to appear in this case goes, he had a right to that improved condition of the water to effect which the Dam Company was created—a right according to the allegations in this writ not dependent at all upon the discretion of the Dam Company—a right which, independent of any contract or agency, would rest in the plaintiff until he was deprived of it in the exercise of a sound, legal discretion of parties having the right to do it under all the circumstances and necessities of the case. It is not a right resting in the mere discretion of anybody, but one for any tortious interference with which the plaintiff may maintain suit to recover the damages he has thereby sustained.

And it illustrates well the indirect injury for the infliction of which the special action on the case was deemed long ago the appropriate remedy.

A wrong-doer may expose himself to as many suits as there are parties whose rights and interests are injuriously affected by his wrongful acts.

The Dam Company might have their action for any wrongful intermeddling with their franchises and property; but this would

not preclude the plaintiff, or any other party whose pecuniary interests were directly and injuriously affected, from maintaining suit for the special damage he might also sustain. Nor can it be said, admitting the truth of the averments in this writ, that the plaintiff sustained no special damage which was the direct and natural consequence of the defendant's acts.

He in common with any other party similarly situated, had a legal right to the use of the water in the improved condition in which it had been placed by the operations of the Dam Company to float his drive of logs to the market, for aught that appears here.

For any interference with that right which the defendant cannot justify, he must respond in damages.

The man who is traveling upon a turnpike has as much right to maintain an action against him whose tortious digging of a ditch or placing of an obstruction in the path occasions him an injury, as if he were traveling upon a common highway.

Demurrer overruled.

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

CALVIN W. KENNEY *vs.* JOHN A. BURKE and others.

Bond on review—forfeiture of.

After denial of a petition for review, suit can be maintained on a bond filed with such petition, given to obtain stay of execution on the judgment recovered in the action sought to be reviewed; although, before suit brought, a new petition to review such action, and a new bond for the same purpose as the previous one had been filed, and a stay of execution ordered.

ON EXCEPTIONS.

Debt on a bond given by defendants to obtain a stay of execution on filing a petition for review of an action in which judgment was recovered in favor of Kenney against Burke. The review

was denied at the March Term, 1872, and on the last day of the same term a new petition for review of the cause aforesaid was presented, and a new bond filed and execution stayed as before. This last petition is pending in court, undetermined. After the filing of the last-named petition and bond this suit was instituted. At the March Term, 1873, of court for this county, this action was submitted to the presiding justice, who decided that the plaintiff was entitled to recover the amount of the original judgment, with interest at the rate of six per cent up to the time of filing the bond in suit, and twelve per cent thereafterwards; to which ruling the defendant excepted.

S. Belcher, for plaintiff.

H. L. Whitcomb, for defendant.

DANFORTH, J. The condition of the bond in suit has been broken, and the judgment of the court to which exceptions are taken is in exact conformity with its terms. A further stay of execution in the original suit does not affect or purport to affect the suit on the bond.

The defendants do not offer any defense to the present action, and they must abide their covenant voluntarily entered into.

Exceptions overruled.

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

ROBERT MCKENZIE *vs.* WILLIAM WARDWELL.

Foreign statutes, if not proved, presumed same as our own. Attorney's lien.

The laws of other States can only be recognized by our courts when proved as facts. In the absence of such proof their law will be assumed to be the same as our own.

An attorney's lien is not defeated by payment of the execution to the judgment creditor by the debtor, without the consent of the attorney.

ON EXCEPTIONS.

Action of debt upon a judgment of the superior court of Middlesex county, Massachusetts, in favor of McKenzie against Wardwell, for $21.50 debt and $14.34 costs, entered up October 21, 1861. The declaration was in the ordinary form, alleging the judgment to be in full force and not reversed, annulled, or satisfied, so that the plaintiff was entitled to recover "the several sums" (restating them) "being in the whole" $35.34 with interest, etc. The defendant pleaded *nul record, tiel* with a brief statement alleging payment and satisfaction of the judgment in full in 1862. The original debt due from Wardwell to McKenzie was for clothing. The account was sued before a justice of the peace of Middlesex county, defaulted, and taken by appeal to the superior court where the above-described judgment was obtained. A. V. Lynde, Esq., was the attorney who sued the account for the plaintiff, and A. B. Coffin, Esq., was said to be the attorney for the defendant, though McKenzie testified, without contradiction, that Coffin did not appear before the magistrate, but that Wardwell was personally present and took his appeal, and Coffin himself testified that he did not enter the appeal in the superior court, but that it was there entered and the justice's judgment affirmed upon the plaintiff's petition. Between the time of taking the appeal and the sitting of the appellate court, Wardwell had removed from Stoneham, Mass., where both parties lived when the debt was incurred, to Oxford in this

State. The defendant testified that in1861 or 1862, after he came to Maine, he sent thirteen dollars in a letter "to A. B. Coffin, Esq., who was my attorney in said suit originally, to pay this demand, and subsequently, soon after, received a letter from him enclosing a receipt in full. I have lost said receipt; have made diligent search for it two or three different times and have been unable to find it." Mr. Coffin testified that he received the letter, enclosing the money spoken of, dated Sept. 14, 1862, and settled the claim with the plaintiff in person; and thought he took a receipt therefor and sent it to his client by mail; adding that, since he gave a former deposition in the cause, June 18, 1870, he had found his correspondence with Wardwell, which enabled him to recollect the circumstances. Robert McKenzie, the plaintiff, deposed that the judgment had never been paid or settled, and no overtures for a settlement made to him; that A. V. Lynde, Esq., was his attorney in that and a number of other suits and that he had paid him "considerable sums of money, but no final settlement," since the services in this case were rendered; and that he (McK.) was the party in interest in the present suit. Mr. Lynde denied all recollection of any adjustment, made or proposed, of the judgment, and said: "I have a claim for the costs in said suit, which costs and expenses of the suit in Massachusetts have not been paid. I have no other lien or interest [in this action pending in Maine] than that which is the usual lien."

The presiding justice, among other things not excepted to, instructed the jury that if there were a settlement made as testified, yet if done without the knowledge of the plaintiff's attorney, it would not discharge the lien of that attorney upon the judgment to the amount of the costs in the former suit, and that the plaintiff would be entitled to recover such costs in the present action. The defendant requested an instruction that if it appear that the plaintiff and his attorney (Lynde) had a running, unsettled account, since the recovery of the original judgment, on which McKenzie had paid sums of money from time to time, the jury would have a right to find such payments an extinguishment of the costs of the

former suit; but the judge declined to give it, "not being of the opinion that the evidence in the case would warrant the inference that the costs had been paid, or the lien discharged." The defendant excepted to the instruction given and to the refusal to instruct. The verdict of the jury was for $24.12, being the amount of the costs of the judgment with interest accrued thereon. There was no evidence offered to show what the statutes of Massachusetts were relative to attorney's liens.

John J. Perry, for defendant.

This action was not brought to enforce an attorney's lien, as the plaintiff's writ plainly shows, since it contains no such statement. The plaintiff's declaration must allege and set out every material fact which constitutes the ground of his action, "so as to apprise the defendant what the plaintiff means to prove, and what must be met." *Drown* v. *Stimpson*, 2 Mass. 441; *Colt* v. *Root*, 17 Mass. 229; *Baker* v. *Fuller*, 21 Pick. 520; *Fairbanks* v. *Stanley*, 18 Maine, 296; *Berry* v. *Stinson*, 23 Maine, 140; *Eustis* v. *Kidder*, 26 Maine, 96; *Herrick* v. *Osborn*, 39 Maine, 231; Story on Pl. 34.

The plaintiff sues to recover a judgment which he alleges to be unsatisfied; and he claims to recover the several sums named, as well the $21.50 debt as the $14.24 costs.

The instruction was to find a verdict in favor of a person not named in the writ and who had no standing in court. "The parties should be ascertained in the declaration; in order to show that the plaintiff is the party entitled to recover." Story on Pl. (2d ed.) 34, 35.

To recover an attorney's lien it must be declared upon in the writ. The cause of action must be so stated that the record may show what is passed upon. *Ib.*

An attorney's lien is purely a creature of statute. *Getchell* v. *Clark*, 5 Mass. 309; *Baker* v. *Cook*, 11 Mass. 236; *Stone* v. *Hyde*, 22 Maine, 318.

To enforce statute liens, "the nature of the claim must appear in the writ itself. *Bath* v. *Freeport*, 5 Mass. 325; *Soper* v. *Harvard*

College, 1 Pick. 177; *Hall* v. *Bumstead*, 20 Pick. 2; *McNally* v. *Kerswell*, 37 Maine, 550; *Perkins* v. *Pike*, 42 Maine, 141.

The attorney's lien in the present case accrued in Massachusetts and the judgment was settled there. Hence its law governs. That law is that the lien shall not prevent payment of the execution to the judgment creditor without notice of the lien. Gen'l Stats. of Mass. c. 121, § 37; 1 Greenl. on Ev. pp. 537–539. A lien given by a Massachusetts statute is not enforceable here. *Lovejoy* v. *Albee*, 33 Maine, 414. Our statute giving an attorney a lien is confined to judgments recovered here. R. S. of 1857, c. 84, § 27; *Gammon* v. *Chandler*, 30 Maine, 152; *Hobson* v. *Watson*, 34 Maine, 20; *Cooley* v. *Patterson*, 52 Maine, 472.

McKenzie testified that he was the party in interest in the present action.

After the judge had instructed the jury, as matter of law, that Lynde had a lien, he also passed upon the fact, and refused to let the jury say whether or not it had been settled, "being of opinion that the evidence would not warrant the inference that the costs had been paid or the lien discharged." This was a question for the jury. The "considerable sums" paid since it accrued would discharge the lien, and must be so appropriated. *Milliken* v. *Tufts*, 31 Maine, 497; *Thurlow* v. *Gilman*, 40 Maine, 378; *Cushing* v. *Wyman*, 44 Maine, 121; *Lambert* v. *Winslow*, 48 Maine, 196.

S. C. Andrews, for plaintiff, cited *Baker* v. *Cook*, 11 Mass. 236; *Duncklee* v. *Locke*, 13 Mass. 525; *Stone* v. *Hyde*, 22 Maine, 318; *Gammon* v. *Chandler*, 30 Maine, 152; *Ocean Insurance Co.* v. *Rider*, 22 Pick. 210; *Woods* v. *Verry*, 4 Gray, 357.

DANFORTH, J. It is a well-settled principle that the laws of other States can be recognized by our courts only when proved as a matter of fact. In the absence of such proof the law will be assumed to be the same as our own.

The attorney who recovered the original judgment in the action at bar, testifies that he had a lien thereon for his costs.

This lien could not be defeated by a payment to and discharge by the plaintiff in the suit. *Newbert* v. *Cunningham*, 50 Maine, 231.

The ruling of the presiding justice was in accordance with the law of this State, and no testimony was offered to show that any different rule prevailed in Massachusetts.

Exceptions overruled.

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

JOSEPH B. DAVIS *vs.* ELIZABETH EMERY.

Sale of goods—to be removed.

A building was sold and paid for, to be removed by a day designated, but was not so removed: *held*, that the vendee did not thereby forfeit his title thereto, but only became liable to his vendor for the damages occasioned by its continuance upon the land after the date fixed and in moving it susequently, to the time agreed upon therefor. WALTON, BARROWS and DANFORTH, dissenting.

ON EXCEPTIONS.

The case sufficiently appears by the opinions.

S. K. & B. F. Hamilton, for plaintiff.

The building is personal property, for which trover is maintainable. *Osgood* v. *Howard*, 6 Maine, 452; *Russell* v. *Richards*, 10 Maine, 429, and 11 Maine, 371; *Hillborn* v. *Brown*, 12 Maine, 162.

There was an absolute sale of the property, and the provision for its removal was an independent stipulation. *Haines* v. *Hayward*, 41 Maine, 488.

Title did not revest after time fixed for removal expired. Long on Sales, 181; 38 N. H. 432; *Greaves* v. *Ashland*, 3 Camp. 426; 1 Hy. Bla. 20.

Chas. E. Clifford, for defendant.

Plaintiff's title was defeated by his failure to remove the barn by May 1st. *Pease* v. *Gibson*, 6 Maine, 81; *Davis* v. *Buffam*, 51 Maine, 160; *Reed* v. *Merrifield*, 10 Met. 155.

APPLETON, C. J. This is an action of trover to recover the value of a building to which the plaintiff claims title by a bill of sale in the following words:

"NEWFIELD, Nov. 6, 1865.

$40.00

J. B. Davis bought of Elizabeth Emery one building 23 feet wide and 50 feet long, now standing west of my house and barn. Said building is to be moved off from where it now stands by the first of May next. Price forty dollars. Received pay.

ELIZABETH EMERY."

The building was not removed within the time specified. Upon the foregoing writing the justice presiding instructed the jury that if they found that the term limited in said writing was not extended prior to the first of May, A. D. 1866, by the defendant, that the title to the building would revest in the defendant, and that the plaintiff would not have a right to go on and remove the same.

The plaintiff bought the barn and paid for it. As between the parties to this suit it must be deemed personal property. The defendant having sold it as such and received the price agreed upon cannot claim it as a part of the realty. It stands precisely as if it had been a sale of a cart or a wagon, which was to be stored by the seller for a specific time, and which was not removed by the buyer within that time. The title to the article sold and paid for would not be changed by the neglect of the purchaser to remove it at the stipulated day.

The phrase "said building is to be moved off from where it now

stands by the first of May next" being included in the bill of sale to the purchaser, he must be regarded as having assented thereto and thereby impliedly to have agreed to remove it in accordance with this provision, and is liable in damages for its non-removal within the time specified. *Newell* v. *Hill*, 2 Met. 180; *Pike* v. *Brown*, 7 Cush. 133; *Maine* v. *Cumston*, 98 Mass. 317. There is nothing in the language indicating that the building would be forfeited and the title revest in the seller if a removal was not made by the first day of May then next.

If it is to be regarded as a license within which time the purchaser might remove the building, still the neglect to remove would not constitute a forfeiture. The purchaser might be liable in trespass for all damage done by him to the owner of the land in removing the building, but not for the value of the property removed. *Dame* v. *Dame*, 38 N. H. 429. The title to the property sold was in the purchaser. *Nelson* v. *Nelson*, 6 Gray, 385; *Nettleton* v. *Sikes*, 8 Met. 34.

The law relating to fixtures, whether as between grantor and grantee, mortgager and mortgagee, or landlord and tenant, has no bearing upon the question under consideration. As between the buyer and seller the building was a personal chattel, which the purchaser was to remove in a given time, and until that time it was to remain on the seller's land. It was the simple case of a merchant storing goods for a limited time for the purchaser, who had paid the price therefor.

The cases cited by the counsel for the defendant are inapplicable. In *Pease* v. *Gibson*, 6 Greenl. 81, the sale was not of a specific article but only of so much timber as the vendee might take off within the time limited in his contract. To the same effect are the cases of *Reed* v. *Merrifield*, 10 Met. 155, and *Howard* v. *Lincoln*, 13 Maine, 122.

In *Vincent* v. *Cornell*, 13 Pick. 294, oxen were sold, the title to be perfect upon payment within a stipulated time, and the price not being paid, the title was held to remain in the vendor. So, the case of *Fairbanks* v. *Phelps*, 22 Pick. 535, was one of a condition-

al sale, the title to become perfect in the vendee when the purchase-money was paid. But in this case there was no sale on condition and there was nothing due the seller, the price having been paid at the time of the purchase. *Exceptions sustained.*

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

BARROWS, J., dissenting. The barn or building for the conversion of which the plaintiff here claims to recover damages of the defendant, was originally the property of the defendant, attached to her farm as part of the realty. If she ever conveyed it to the defendant it was by the following instrument, unsealed, unwitnessed:

$40.00 NEWFIELD, Nov. 6, 1865.

J. B. Davis bought of Elizabeth Emery one building 23 feet wide and 50 feet long now standing west of my house and barn. Said building is to be moved off from where it now stands by the first of May next. Price forty dollars. Received pay.

ELIZABETH EMERY.

It is clear that this instrument was not designed to convey an interest in real estate. The object was to sever the building from the realty, provided the vendee observed the condition inserted in the bill of sale for a removal of it in a time specified.

It is impossible to distinguish the case in principle from *Pease* v. *Gibson*, 6 Maine, 81. In that case there was a sale by a sealed instrument of all the timber standing on a certain parcel of the vendor's land. "Said (vendee) to have two years from date to take off said timber." It was not, as claimed in argument here, in terms a grant "of only so much timber as the vendee might take off within the time limited," but the court held, in an opinion the sound reason and good sense of which are manifest, that it was equivalent only to a sale of so much as should be thus severed and removed and that it was only a conditional sale of all the timber, the vendee's rights therein depending upon his performance of the condition inserted in the instrument under which he claimed. A like

construction was approved and followed in *Howard* v. *Lincoln*, 13 Maine, 122. As between the buyer and seller here, the building was not a personal chattel unless the buyer performed the condition for removal. When a sale is made upon such a condition it is not necessary to have an express stipulation for a forfeiture in case the condition is not complied with. The title depends upon the performance of the condition. The instrument is to be construed as a whole. The sale was a conditional one. *Judevine* v. *Goodrich*, 35 Vt. 21; Washburn on R. P. vol. 3, p. 376. The building was real estate and remained so until severed, and if not severed by the time fixed the grantee in the bill of sale had no title unless the time for removal was extended. That these parties so understood their contract is perfectly clear from the testimony of the plaintiff. "She said her husband would buy it of me. I told her that was probably all right provided he did so, but the time would be out soon and something must be done about it," etc. To guard against the forfeiture he made the memorandum upon the bill,—"The time of removal of this building is indefinitely postponed," which she declined to sign.

It is unnecessary for us to determine whether this was a condition precedent or subsequent, or whether the language of the instruction was technically correct, if the same results followed so far as the rights of the parties were concerned. Whether the title to the building revested in the defendant or never passed from her, makes no difference. The real question was whether there was an extension of the time, and to that point the plaintiff and defendant both directed their evidence. That evidence was contradictory. The jury have settled the question in favor of the defendant upon testimony so conflicting that it is impossible for us to say peremptorily that the decision was erroneous.

Motion and exceptions overruled.

WALTON and DANFORTH, JJ., concurred in the foregoing opinion.

W. Taylor Rice *vs.* Eben N. Perry.

Fraudulent sale. Testimony—admissibility of.

The defendant, seeking to avoid a sale as fraudulent, relied upon a series of occurrences happening before and after the sale to prove the fraud, and the judge instructed the jury that "it was primarily important to consider the state of facts existing with the knowledge of the plaintiff, on the 16th day of June, when he made the purchase," and separately called the attention of the jury to subsequent occurrences; it was *held*, that exceptions would not lie to this method of presenting the case unless the defendant had requested more specific instructions.

To avoid a sale there must have been an accomplished purpose by means of it, to defraud, hinder, or delay the creditors of the vendor. The fraudulent intent alone is not sufficient.

The defendant called one of the vendors to a sale which he sought to avoid as fraudulent, and argued in support of his position upon the inherent falsity and improbability of the testimony given by this vendor. The judge repeatedly invited attention to the fact that this witness had been called by the defense; that his statement disproved the alleged insolvency of his firm at the time of sale, saying as to their solvency, "the defendant has proved it if you believe his witness;" and by other similar expressions several times presented the idea that the testimony must be taken more strongly against the defendant because given by his witness; this was held no ground for exception.

One of plaintiff's witnesses testified that the plaintiff and one Marshal O. Warren, unloaded, on its arrival at the depot, the superphosphate, for the value of which plaintiff brings this suit as sole owner, and that all arrangements in regard to unloading it had been made with plaintiff and Warren, and witnesses for the defense testified that Warren had requested them to unload it or to procure some one to do so, and in answer to an inquiry made in the presence of the plaintiff as to "how he (W.) came to buy that phosphate at that season of the year," Warren had answered that he had "bought it at a bargain;" *held*, that this testimony did not sufficiently connect Warren with the plaintiff in the ownership of the phosphate to render testimony as to Warren's declarations in regard to its purchase admissible.

On exceptions and motion for new trial.

This was an action of trespass against the sheriff of Cumberland county for the alleged misfeasance of his deputy in attaching twenty tons of superphosphate as the property of the firm of Whitehouse & Goodwin, July 22, 1869, on a writ in favor of Wattson and

Clark, sued out upon an indebtedness of $5,833.00, of which $5,200.00 were due upon a note given to Wattson & Clark, which matured upon the 18th day of June, 1869.

Plaintiff claimed the property attached by virtue of a purchase made by him on the 14th day of June, 1869, under which he took possession on the 16th of the same month.

Defendant contended that this sale was void, and introduced testimony as to occurrences prior to, upon and after the 16th of June, tending to show an intent on the part of the plaintiff and Whitehouse & Goodwin to defraud their creditors, Wattson & Clark, in making this conveyance, and introduced other testimony tending to show that Whitehouse & Goodwin were insolvent, having dispossessed themselves of all attachable property before June 18, 1869.

Samuel R. Whitehouse, of the firm of Whitehouse & Goodwin, called as a witness by the defendants, testified among other things, that on the day when Wattson & Clark's note fell due he came to Saco to pay it, and while passing from the stable to the bank his pocket-book, containing $5,200.00 in bills, was lost from his pocket. The defendant's counsel argued that this testimony was improbable and false as shown by other facts, and from the story itself as told by witness.

One of the plaintiff's witnesses testified among other things, that he was station agent at Gorham where the phosphate attached was sent; that the plaintiff and one Marshal O. Warren unloaded it, and that all the arrangements were made with Rice and Warren, who were both there together.

A witness for the defense testified that he saw Rice and Warren at Gorham when the first load of superphosphate came; that Warren requested him to unload it and on his refusal asked him to get a man to do it, and that in answer to witness' inquiry "how he came to buy that phosphate at that season of the year," Warren replied that he bought it at a bargain, Rice being present at this conversation. Substantially the same facts were testified to by other witnesses, whereupon the defendant called Freeman Pugsley

and interrogated him in regard to a conversation with Marshal O. Warren in relation to purchasing these twenty tons of superphosphate, but the testimony was excluded by the court, subject to the defendant's exceptions.

The presiding justice among other things, charged as follows:— "It is primarily important that you consider the state of the facts existing with the knowledge of the plaintiff on the 16th day of June, when he made the purchase." . . . And in regard to the perpetration of a fraud upon Wattson & Clark, he said: "If he [plaintiff] with a knowledge that their [Whitehouse & Goodwin's] purpose was, in this sale, to defraud, hinder, or delay their creditors, negotiated the sale, knowing that to be their purpose, and if such was the effect of the transfer, then he too would be legally guilty of fraud, and the sale would be void." . . . As to the insolvency of Whitehouse & Goodwin when they made the alleged sale, he said: "Your attention has been called to other testimony, which has been introduced by the defendant, which it is said very much conflicts with this theory of insolvency of Messrs. Whitehouse & Goodwin at that time, and of their purpose of defrauding their creditors by this sale. It is testimony coming from Mr. Whitehouse himself that he had the $5,200 in his pocket-book and lost it. The defendant has proved it [the firm's solvency] if you believe his witness." . . . "Well, now, was that [the loss of the pocket-book] a misfortune? Why, if it was, gentlemen, if it was a misfortune, as would seem by the testimony of this Mr. Whitehouse, if you believe him, he is introduced by these defendants, if it was a misfortune, then can it be said on the 16th day of June, when this plaintiff purchased this phosphate, that these men, who had collected this money for this purpose, intended to perpetrate fraud upon their creditors by selling this phosphate to him to enable them to raise money to pay this very debt; this testimony, gentlemen, has been introduced by the defense and it is for you to consider it. The argument is, I believe, that this was all false, all got up, and superadds to the fraudulent and corrupt purpose of Goodwin & Whitehouse, the perjury of Whitehouse himself."

The verdict was for the plaintiff for $1,248.50 and the defendant

excepted and filed a motion for a new trial. A former verdict for the plaintiff had been set aside as against the evidence.

The defendant contended in support of his exceptions:

I. That the presiding justice in his charge directed the attention of the jury to what transpired before and on June 16th, disconnected from subsequent occurrences, whereas they all constituted one transaction—all tended to accomplish the single purpose of defrauding Wattson & Clark. Fraud is a conclusion deduced not merely from events but from their relation to each other. To separate and segregate them is to deprive them of their legitimate effect. *Castle* v. *Bullard*, 23 How. 187; *Blake* v. *White*, 13 N. H. 270; *Story* v. *N. & W. R. R.*, 24 Conn. 94; The Short Staple, 1 Gall. 106; *La Negreda*, 8 Wheat. 173.

II. The instruction that to avoid the sale it must not only be designed to defraud Wattson & Clark, but that "such" must be "the effect of the transfer," was erroneous.

Fraud consists in the intent. *Moss* v. *Riddle*, 5 Cranch. 351. If the purpose be to cheat, it is immaterial whether it be fully accomplished or not. *True* v. *Congdon*, 44 N. H. 55.

III. Undue stress was laid upon the fact that defendant called Whitehouse as a witness, as the jury were thereby led to believe that he was estopped to argue the improbability of Whitehouse's story; the rule being simply that a party cannot prove the general bad character of his witness. 1 Phil. on Ev. (5th Am. ed.) 309. But may contradict him as to particular facts. *Brown* v. *Bellows*, 4 Pick. 194; *Melluish* v. *Collier*, 15 Ad. & El. N. S. 878, in 69 Eng. Com. L. R.

IV. The testimony of Freeman Pugsley offered by defendant should have been admitted, as Warren participated in the common design to defraud the creditors of Whitehouse & Goodwin, claimed title to the property, exercised rights of ownership over it, and actually took possession of it, as shown by the testimony.

Ayer & Clifford, *S. K. and B. F. Hamilton*, for the plaintiff.

Ira T. Drew, *John A. Waterman*, *Edwin B. Smith*, for the defendant.

DICKERSON, J. Trespass against the defendant, as a sheriff, for the alleged misfeasance of one of his deputies in attaching twenty tons of superphosphate, the property of the plaintiff, as the property of Messrs. Whitehouse & Goodwin, on a writ in favor of their creditors, Messrs. Wattson & Clark.

The plaintiff claims to have purchased the property attached of Whitehouse & Goodwin on the 14th day of June, A. D. 1869, and to have taken possession of it on the 16th day of the same month; and the principal question raised at the trial was, whether the property at the time of the taking, July 22, 1869, was the property of the plaintiff, or of Whitehouse & Goodwin.

The verdict was for the plaintiff, and the defendant filed exceptions, and also a motion to have the verdict set aside as against evidence and the weight of evidence.

The exceptions relied upon in the argument are:

1. That the judge in his charge directed the attention of the jury to what transpired before and on the day the plaintiff received a bill of sale of the property, as disconnected with the subsequent evidence; whereas, it is claimed that both of these parts of the evidence constituted one transaction, and shew the purpose to defraud the creditors of the plaintiff's vendors.

In summing up the evidence the judge naturally and properly proceeded in chronological order. This necessarily required him to refer to the evidence of what transpired prior to, and at the sale, before he commented upon the evidence of what subsequently occurred. We do not perceive that either in the statement or analysis of the evidence he denied to every part of it the force and effect it was properly entitled to. On the contrary, so far from being open to the objection raised, the charge specially calls the attention of the jury to the evidence of the transactions subsequent to the sale, with a view to interpret the motives and conduct of the parties prior to that time. If the defendant desired more specific instructions upon this point he should have requested the judge to give them.

2. The instruction of the judge that in order to avoid the sale,

there must have been an accomplished purpose by means of the sale to defraud, hinder, or delay the creditors of the vendor, is excepted to and relied upon in the argument. This objection is placed upon the ground that fraud consists in the intent, and that if it is the purpose of the parties to the sale to defraud the creditors of the vendor, the sale will be void whether that purpose be accomplished or not. We do not entertain this view of the law. The only ground upon which the creditors in this case can impeach the validity of the sale is that they were thereby defrauded, hindered, or delayed in the collection of their debt. If they were not thus defrauded, hindered, or delayed, they were not damaged by the sale, and if not damaged they could not interpose any legal objection to the validity of the sale. A fraudulent purpose is an important element in the case, but it is not the only one; there must be superadded to it in addition to the sale, actual fraud, hindrance, or delay resulting therefrom to the creditors. The sale will be upheld unless the fraudulent purpose is actually accomplished. Thus, if, notwithstanding the sale, Whitehouse & Goodwin retained and held at the time of the attachment on the original writ other personal property sufficient to pay the debt of Wattson & Clark, and equally open, known, and accessible to them with that sold, the sale would not be void, whatever may have been the secret purpose of the parties to it. The reason for considering the sale void in this class of cases is that creditors are damaged thereby; and when the reason is wanting the rule itself becomes inapplicable. The instructions of the judge upon this branch of the case contained an accurate statement of the law, and afford no ground for objection.

3. The third alleged error commented upon by the counsel is that the judge in his charge attached undue importance to the fact that the defendant called Whitehouse as a witness. It is the right and often becomes the duty of the judge to state, analyze, compare, and comment upon the evidence, and to suggest to the jury the tests for determining the credibility of the witnesses and the weight of the evidence. One of the choicest fruits of judicial experience is

the insight which it gives a judge into human motives and character, and the skill he thus acquires in detecting falsehood and eliciting the truth, oftentimes from a seemingly crude, inconsistent, and unintelligible mass of evidence. The rights and interests of the parties, and the administration of justice, especially in cases of alleged fraud, not unfrequently invoke the judge to give the jury the benefit of his judicial experience in this respect. To deny this right to the judge is at the same time to deny, also, to the jury one of the most efficient instrumentalities for discovering the truth. The witness Whitehouse was a member of the firm of Whitehouse & Goodwin. He testified, upon direct examination, that he accidentally lost the pocket-book containing the money the firm had provided, before and after and by means of the sale to the plaintiff, to pay the debt of the creditors who contest the validity of that sale. It is obvious that if this testimony is true, it is a conclusive answer to the defendant's charge of fraud; and it is further obvious that the defendant elicited this testimony as false testimony, and for the purpose of inducing the jury to find fraud, not only against the testimony, but from the perjury of his own witness. In other words, the defendant sought to establish a material point in his defense through the infamy of his own witness. The charge shows that the defendant's counsel treated Whitehouse's testimony as perjured testimony, and that he sought to do indirectly what he could not do directly, to establish the infamy of his own witness from the inherent falsity of his testimony, when the law would not permit him to do it by introducing evidence of his general bad reputation for truth.

This is not a case where a party is surprised at the testimony of his own witness, nor where he is compelled *ex necessitate rei* to introduce a particular witness, or go out of court. It was entirely optional with the defendant whether he would call Whitehouse as a witness or not, and he introduced him because he was expected to testify as he did upon the subject to which that part of the charge complained of relates. Has a party who ventures upon such an experiment legal cause to complain that the judge called

such witness his witness? We think not. It was certainly proper for the judge to remind the jury that Whitehouse was called by the defendant, and to suggest to them, as he did interrogatively, that if the loss of the pocket-book was a misfortune, as would seem by the testimony of Whitehouse if they should believe him, and Whitehouse & Goodwin sold the superphosphate to the plaintiff, and collected the money lost with the pocket-book (as Whitehouse testified) to pay their note to Wattson & Clark, whether it could be said that Whitehouse & Goodwin intended to commit a fraud upon their creditors by the sale to the plaintiff? This instruction was simply an intimation to the jury, that if they believed the testimony of Whitehouse there was no fraud in the sale, a conclusion to which every intelligent juror must have arrived without any intimation from the judge. The judge nowhere intimated an opinion that the testimony of Whitehouse was to be believed, but specially called the attention of the jury to the argument of the defendant's counsel charging that it was false, corrupt, and perjured. The relation of Whitehouse to the parties was so obvious that the jury could not fail to consider it, and if counsel desired that their attention should be more particularly directed to it, they should have signified their wishes to the court. We see nothing objectionable in this part of the charge.

4. The judge properly excluded the testimony of Freeman Pugsley in relation to the alleged declarations of Marshall O. Warren. Warren was not a party or a witness. The testimony offered was clearly *inter alios*, and not admissible in any view of the case.

The other exceptions taken at the trial are not relied upon in the argument, and afford no ground for disturbing the verdict.

THE MOTION.

This case has been twice submitted to a jury by able counsel on both sides, with the same result. It is a case of alleged fraud, and the evidence is conflicting. The verdict cannot be set aside as against evidence; and the court will not set a verdict aside as

against the weight of evidence unless it is manifestly so. We do not find this to be so. Nor do we think there is cause to set aside the verdict on the ground that the jury mistook or disregarded the evidence, or were influenced in their verdict by any bias, prejudice, or other improper motive.

Exceptions and motion overruled.

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

SYLVESTER MCINTIRE, in equity, *vs.* GEORGE BOWDEN and others.

Specific performance.

Specific performance of a contract not signed by all the persons named as parties thereto, and of which the claimant obtained possession without the consent of him who did sign it, will not be decreed; especially where the complainant has not fully performed on his part the conditions precedent of the instrument.

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

The bill is brought to obtain a conveyance of certain property in York in which McIntire claims to have an equitable interest; the record title being in Joseph S. Grant, one of the defendants, who received it from Bowden and Francis Plaisted, the other defendants.

The complainant alleges that on Nov. 19, 1844, he was the owner, seized in fee, and in possession of the premises, and on that day conveyed them to Charles O. Emerson to secure a debt due from himself to E., and received from Emerson a written agreement for a re-conveyance upon payment of the debt. This agreement McIntire assigned May 3, 1849, to Nathaniel G. Marshall, taking his contract to reassign on payment of a sum due from Mc-

Intire to him. Subsequently, Nov. 5, 1851, Marshall paid McIntire's debt to Emerson, at the request of McIntire, and took the title to the land, at the same time contracting for a conveyance of it to the complainant whenever he fully paid Marshall all that should be due him from McIntire when the latter demanded his deed. The bill further stated that "on the 19th day of August, A. D. 1858, through the aid of said George Bowden, the complainant fully paid and cancelled his indebtedness to said Marshall, who, thereupon, at the suggestion of the complainant conveyed the premises to said Bowden to secure the indebtedness existing from the complainant to Bowden, and Bowden thereupon made an agreement in writing to convey the premises to the complainant upon the payment of all sums of money which then were or should be thereafter due from the complainant to said Bowden." On the 20th day of August, A. D. 1858, Bowden quit-claimed half of the premises to Plaisted who, it is charged, then well knew the terms of the agreement between McIntire and Bowden. On the 20th day of April, 1860, Bowden and Plaisted conveyed the estate to Grant, who is declared to have known the nature of their title and to have had notice of McIntire's interest; and on the 24th of that month Bowden and Plaisted notified McIntire to quit the premises for non-payment of rent, and removed him therefrom May 13, 1860. Upon the 15th day of August, 1860, complainant tendered Bowden and Plaisted $978 in gold, and demanded his deed, claiming that sum to be in full of all debts for which the land was held as security, but they refused the tender or to make conveyance. The complainant offers to perform all that is on his part to be performed and prays that defendants be ordered to convey to him the premises aforesaid.

Bowden and Plaisted in their answers say that in July, 1858, McIntire called on them and said that Marshall was the owner of these premises and had demanded possession; and he (McIntire) wanted them to purchase the property of Marshall and allow the complainant to live upon it and occupy it as their tenant, which request they did not then accede to, but the next month (August,

1858) they agreed to do it if he would provide $75 of the money to be paid Marshall, and on the nineteenth of the month last named the deed from Marshall to Bowden was made and delivered at the office of Hon. John N. Goodwin in South Berwick. Bowden denies that, on said 19th of August, 1858, he "either made, signed, sealed, or delivered to said complainant, or in consideration of having purchased said premises as aforesaid agreed to convey said premises to said complainant in manner set forth in said bill, or that he (Bowden) requested any such agreement to be reduced to writing;" and Plaisted affirmed his belief of the truth of Bowden's denial. They say, however, that though Bowden requested no such writing as the bill states to be made at Mr. Goodwin's office, Aug. 19, 1858, he did propose in the following September or October the terms of an agreement to be executed in triplicate, and accordingly signed such an instrument and left it with Plaisted; but that it was never signed by Plaisted, nor were the other two parts ever signed by anybody; that the copy signed by Bowden was never delivered to McIntire, "but that he wrongfully and fraudulently obtained possession thereof." This agreement, as put in evidence by the complainant, was as follows:

"Know all men by these presents that we, George Bowden and Francis Plaisted, of York, in the county of York and State of Maine, Gentlemen, do hereby agree with Sylvester McIntire, of said York, Esquire, to let him have the use of the property which the said George Bowden purchased of Nathaniel G. Marshall, of South Berwick, on the nineteenth day of August, A. D. 1858, and being the same which the said Sylvester McIntire now occupies; if the said Sylvester McIntire shall pay to the said Bowden and Plaisted jointly, the interest every six months on eight hundred and sixty-five dollars, and also all taxes that may be assessed on said property, and also all insurance money or moneys that may arise from the insurance on the buildings belonging to said property. And we further agree with the said McIntire, that if he will pay to the said Bowden and Plaisted, or their heirs, executors, administrators, or assigns, the sum of eight hundred and sixty-five dollars and interest that may

be due at the time of payment, and also to pay all insurance moneys and taxes that may then be due, that we will give to him a quit-claim deed of said property. And it is further agreed that so long as said McIntire shall remain on and have the use of said property, before purchasing of said Bowden and Plaisted, that he shall pay at least seventy-five dollars yearly, and more if he pleases, of the principal, besides paying all interest semi-annually and taxes and insurance moneys as they may become due. And it is further agreed that when the said Bowden and Plaisted shall order the said Sylvester McIntire to move, leave, and entirely quit the said premises, the said Sylvester McIntire shall have four months to redeem said premises if he shall pay all sums which shall be then due within the four months. And if he does not redeem the premises within four months from the time he is notified, he must then leave and quit entirely from the premises. And it is further agreed that each man named in this agreement shall have a copy of this agreement, and that all moneys which the said McIntire may pay to the said Bowden and Plaisted shall be indorsed on each man's agreement, and if not indorsed on each agreement, then such indorsement shall be deemed null and void. And it is further agreed that if said McIntire shall fulfil this agreement, that he shall have a quit-claim deed, otherwise not. GEORGE BOWDEN.

Dated at York, this——, A. D. 1858.

Signed in the presence of GEORGE F. PLAISTED."

They say that the complainant remained in possession of the premises and took the profits thereof during 1858–9 and part of 1860, but refused to pay any rent, or anything toward the purchase of the same; consequently they notified him to quit in November, 1859, offering to convey to him for the same sum they had paid Marshall, repeating this offer in the next winter and in the succeeding spring.

Grant alleged a purchase in good faith by him upon full consideration and without notice of any adverse claim.

To overcome the legal effect of these answers, and to sustain the allegation in his bill that when the estate was conveyed to him,

August 19, 1858, Bowden "thereupon made an agreement in writing to convey the premises," etc., the complainant introduced his own deposition and those of Messrs. Marshall and Goodwin, the only persons, beside Bowden, present when the deed from Marshall to Bowden was delivered. Each of these witnesses testified that Bowden took up the deed and directed Mr. Goodwin to prepare for them the agreement he was to give McIntire, telling him (G.) to make it like the one McIntire had theretofore held from Marshall, which was then surrendered. Bowden added that he had an errand out in the village, but said he would return by the time Mr. Goodwin had written it and would then sign it. He took the deed to him, and went out and did not return, nor did he ever sign the paper so prepared for his signature. This document was annexed by Mr. Goodwin to his deposition, and is as follows:

"Whereas, I, George Bowden, of York, in the county of York and State of Maine, have this day taken a conveyance to me of a certain lot of land in said York, being the homestead farm of Sylvester McIntire of said York, from Nathaniel G. Marshall of South Berwick, which deed dated this day is hereby referred to for a more particular description thereof, I hereby agree with the said Sylvester McIntire to convey to him by a good and sufficient deed, all said property included in the deed of said Marshall to me on demand, after said McIntire shall pay to me all sums of money which now are or may hereafter be due from him to me.

Sealed with my seal. Dated this nineteenth day of August, A. D. 1858." { SEAL. }

In his bill the complainant did not specifically charge that Bowden's conduct in taking the deed and refusing to sign the agreement was fraudulent, but treated the agreement as if signed, and claimed in his argument that if it were proven that Bowden agreed to sign the instrument drawn by the attorney at his request, it should be considered in equity as if fully executed. Bowden, by his deposition, contradicted the statement of McIntire and his witnesses with reference to this matter; and it will be seen that the

court express no opinion on the point sought to be raised by complainant's solicitor thereon, probably deeming his position untenable.

Edwin B. Smith, for complainant. *Taylor* v. *Luther*, 2 Sumner, 228; *Jenkins* v. *Eldredge*, 3 Story, 181.

In equity, that which one is proved to have agreed to do must have the same effect as against him as if it were done. Home's Principles of Equity.

The writing drawn by Hon. John N. Goodwin as attorney for Bowden, and at his request, must be treated as if executed by him; he having procured its preparation, promised to sign it, and by that promise obtained conveyance of the estate.

Ira T. Drew, for respondents.

DICKERSON, J. This case is presented on bill, answers, and proofs. The prayer is for a decree compelling the defendants to make a conveyance of the premises described in the bill according to the terms and conditions of a certain instrument in writing signed by George Bowden in September or October, 1858, and running to the plaintiff.

When that instrument was signed, the signer, George Bowden, and Francis Plaisted were joint owners of the premises, and both of their names appear in the body of the instrument as joint contracting parties. The instrument upon its face appears to be incomplete, wanting the signature of the joint contracting party of the first part.

Bowden and Plaisted set forth in their answer that in September or October, 1858, after consulting the plaintiff as to the terms and conditions on which he might occupy the premises or purchase them, Bowden proposed an agreement in three parts, setting forth these terms and conditions, and signed and left with Plaisted the writing described in the bill, and that neither Bowden nor Plaisted ever delivered it to the plaintiff; nor was it signed by Plaisted or the plaintiff, but that it was wrongfully and fraudulently obtained

by him. The plaintiff testifies that the instrument was delivered to him by the son of Francis Plaisted, that it was not what it should have been and not satisfactory to him, but was the best he could do.

In view of the improbability that Bowden would contract to give a deed of the whole of premises that he owned only half of, and of the incomplete execution of the writing in controversy, as well as the testimony touching its inception and procurement by the plaintiff, we are satisfied that the plaintiff can take nothing by it, as a completed contract, either against Bowden severally or jointly with Plaisted.

But if it had been duly executed and delivered, the plaintiff could not make it available to him in this bill, as he failed to perform the condition in respect to the payment of rent, to say nothing of other alleged laches on his part.

It is to be observed that the bill does not set forth a trust in Bowden on account of taking a deed from Marshall, nor does it allege that Bowden obtained that deed by fraud. As it does not pray for relief upon either of these grounds, we are not called upon to determine whether upon proper allegations the bill might be sustained. *Bill dismissed without costs or prejudice.*

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

JOSEPH DANE and another, in equity, *vs.* WILLIAM M. YOUNG and others.

Liability of stockholders.

Holders of stock in a bank when its charter expires, are liable, under R. S. of 1857, c. 47, § 46, to contribute for the redemption and payment of all bills issued by the bank, and remaining unpaid, in the proportion that the number of shares held by them respectively bears to the aggregate number of shares held by all the stockholders.

Under that statute the charter of a bank expires by operation of law when an injunction restraining it from doing business is made perpetual.

A provision in the by-laws of a bank that its "shares shall be transferable by indorsement in writing by the holder in presence of the cashier or two other witnesses," requires that the cashier or two other witnesses shall in writing attest the signature of the holder in order to render the transfer valid between the parties.

Such provision is consistent with the laws of the State and the charter of the Sanford Bank.

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

This bill was brought by the complainants, as receivers of the Sanford Bank, against thirty-six persons alleged to be stockholders of that bank on the eighteenth day of May, 1861, when an injunction against it was made perpetual.

The bank was then found to be utterly insolvent, and after the amount of deficiency was ascertained, this proceeding was instituted to compel a contribution for the purpose of meeting the claims of bill-holders and other creditors, under the provisions of R. S. of 1857, c. 47, §§ 46, 73.

Several of the defendants had assigned their stock in this bank, but the bill charged "that said several assignments not having been made *bona fide* for a valuable consideration, but being colorable, were not effective to transfer such shares of stock so as to relieve said several pretended assignors from the liability aforesaid of those who were stockholders on the eighteenth day of May, A. D.

1861, so that, notwithstanding said supposed transfers, the said several pretended assignors continued to be, and in fact then were, the owners and holders of said shares of stock pretended to be transferred, and held them subject to all the liabilities of the owners and holders of stock in said bank on that day." A great deal of testimony was taken to establish the fraudulent character of these transfers, and the point was elaborately argued, but the decision of the court turned upon their invalidity for other defects, so this became immaterial. The presentation of this cause was delayed till after the decision of that brought by the bank of Mutual Redemption against the directors of Sanford Bank, 56 Maine, 385, as the sum received from the defendants in that case went to diminish the liability of the stockholders.

It was afterwards supposed that this suit would be arranged out of court, which accounts for the tardiness of the determination of the matter—the postponement being by the desire of all the parties litigant.

Dane & Bourne, for complainants.

After stating the grounds of the bill and its several allegations and the evidence in support of them, most of which is identical with that in the *Bank of Mutual Redemption* v. *Hill*, 56 Maine, 385, the complainants' solicitors said: "All the defendants who have answered allege that the Mousam River Bank (the name of which was afterward changed to Sanford Bank) had lost 75 per cent of its capital; in other words that its stock had been reduced in value from $50 to $12.50 per share. The truth of this allegation we are not disposed to deny. Indeed, it was on account of such loss that an injunction was issued against that bank Nov. 13, 1857, and continued in force till Aug. 29, 1859, as appears by page 29 of the report. It however appears that about Aug. 29, 1859, some of the defendants, being possessed of a speculative turn of mind and disposed to better their fortunes by a new system of banking, conceived a plan by which to resuscitate the bank and carry their purposes into effect. Accordingly they undertook to

make new stock, or "to make the stock good," as it is expressed; or, more accurately speaking, make it appear to be so. This had to be done to remove the injunction resting upon the bank. Tompson, Emery, Mills, Vose, and Hill put their heads together in council to accomplish this object. Tompson undertook to carry $7,500, Emery $4,000, Mills $7,000 to $10,000, Vose $8,400, and Hill nearly $9,000. They proposed to pay in on the "old stock," so called, *i. e.*, their own shares and that of such stockholders as would surrender them, 75 per cent and thus make the original capital whole. Many of the old stockholders assented to the surrender, and others refused; so it was agreed between the holders of "old stock" and of that "made good" that the latter should be deemed worth the original par value of $50 per share, and the former worth $12.50 per share, and the earnings apportioned on this basis. New certificates were issued to those who had "made good" their stock to mark this distinction. But if honestly conceived and executed in good faith, this arrangement could not relieve the old stockholders of any part of their liability to creditors of the bank, though the answers assume that it had such effect. The parties contemplating the resuscitation of the bank provided themselves with funds, carried the money before Judge Goodenow Aug. 29, 1859, and made it appear to him that they had paid in on this "old stock" $37,500 ($28,191.67 on their own shares and $9,308.33 on those of others who surrendered their old certificates), being the amount necessary to make up the seventy-five per cent loss on the whole capital of the bank, which was $50,000. Having thus obtained a dissolution of the injunction, on their return they took the money immediately from the bank, leaving in place of it their own checks, and then let the bank sleep till May, 1860, because, as Emery expresses it, "they were not ready to let the notes run through the bank till then." These notes were substituted for the money withdrawn upon their checks, after it was deposited "to make the stock good," were "run through the bank," and others substituted for them till such as had the names of these parties on them as indorsers thereon were withdrawn and the bogus

notes only which came into the hands of the receivers were left in the bank, with certificates of the stock of the bank lodged as collateral. R. S. of 1857, c. 47, § 14. "The whole object of certain parties interested is obvious:" *First.* Nothing lost by paying in and then withdrawing the same money upon checks or notes.

Second. By the use of notes of "porters, street laborers, and back-shop men" in Boston, and paying the same when due for a while as they matured in Boston, it was thought easy to get up and manufacture a fictitious reputation for such persons, by means of which to protect the home officers of the bank.

Third. To substitute the notes of such irresponsible persons for all those in the bank having the name of any of "the ring" on them, so that there should be left in the bank only bogus notes to represent its capital and the money which had been paid in as capital and to make its capital stock good, including the $12,500 assets of the old stock.

Fourth. To take out the bills of the bank upon just such bogus notes. Ceasing to take care of these worthless notes would leave the bills as net profits of the speculation, care being exercised that the bills should be in the hands of other persons when the notes fell due and the bank failed by reason of their non-payment.

The timely injunction of the court, before a very large circulation was afloat, somewhat marred the beauty of this speculation. When this was apprehended some of these defendants transferred their stock. For a characterization of the notes discounted and of the directors who permitted the discount of them, see 56 Maine, 388, 9.

Counsel also argued that, as to three of the defendants, they acted as directors in disposing of the funds of the bank after the alleged transfers of their stock, and were thereby estopped to deny their liability as stockholders. R. S. of 1857, c. 47, § 2.

But all the pretended transfers were invalid upon their face. Not one of them made by Tompson, Mills, and Emery, is executed as required by the by-laws, which also require the surrender of the old and an issue of a new certificate to complete the transfer.

As to the invalidity of the transfer, we cite same cases cited by us in *The Bank of Mutual Redemption* v. *Hill*, 56 Maine, 385, and that case; *Fowler* v. *Ludwig*, 34 Maine, 455; *Fisher* v. *Essex Bank*, 5 Gray, 381; *Union Bank* v. *Laird*, 2 Wheat. 390.

Counsel then argued the fraudulent character of these transfers.

T. H. Hubbard, for Justin B. Merrill.

Increase S. Kimball, for Samuel B. Emery, William L. Emery, and George Gowen, 2d.

Howard & Cleaves, for Samuel Tompson.

Those portions of the argument of the learned counsel for the plaintiffs which seem to dwell with a touch of acrimony on the assumed objects and motives "of certain parties interested" may be based upon things fabulous or true without materially affecting the real issue in this suit. Samuel Tompson was a stockholder; the sole inquiry is whether he owned sixty shares or only ten. He transferred fifty shares March 12, 1861, to Charlotte H. Tompson, *bona fide*, as he swears. The testimony of Samuel B. Emery, put in by complainants, shows this transfer executed in the presence of the cashier. It was not required that the cashier should attest it, or that two other witnesses should do so; it only provided that it should be done "in the presence" of the cashier or of two other persons.

There is neither allegation nor proof that the charter of the bank had expired.

Samuel B. Emery's transfer was made at the bank; presumptively, then, it was made in the presence of the cashier; if not, it was for plaintiffs to prove it, as a contract will be presumed to be properly executed till the contrary appear. *Mussey* v. *White*, 3 Maine, 290. Its bills do not remain unredeemed "by reason of the expiration of the charter of said bank;" it has not expired. W. L. Emery's answer shows he never owned but two shares of this stock. Being uncontradicted, his answer must be taken as true. *Alford* v. *McNarrin*, 44 Maine, 90.

Dane & Bourne, in reply. If "these things" to which we refer in our opening argument be "fabulous" they do not affect the case; if "true" they do; for they show a design on the part of some of the defendants to absorb the assets of the bank and then to evade their liability as stockholders by turning over to the receivers not only a lot of worthless notes but a list of non-resident and bankrupt stockholders. No one of the counsel have attempted to deny the validity of the by-law relative to transfers; each tries to show a compliance with it on the part of his client. This none of them can do, because the meaning of the by-law is that every transfer shall be attested by the cashier, or by two other witnesses. The bill states the facts which in law effect the expiry of the charter. *Wiswell* v. *Starr*, 48 Maine, 404.

DICKERSON, J. This is a bill in equity, brought by the plaintiffs as receivers of Sanford Bank, under R. S. of 1857, c. 47, § 73, against the defendants as stockholders of said bank, to compel them to contribute to the payment of its debts.

An injunction granted against the bank May 17, 1861, was made perpetual on May 18, 1861, and receivers were appointed on the twenty-first day of the same month. The receivers made their report to the court in January, 1864, which shows an aggregate indebtedness of eleven thousand two hundred and thirteen dollars and eleven cents, three hundred and sixty-seven dollars and fifty cents thereof being due on account, and the balance upon the bills of the bank. The amount and value of the assets of the bank, as reported by the receivers, were two thousand and sixty-eight dollars and seventy cents. That report was accepted by the court, and the amount of indebtedness was determined in accordance therewith. It thus appearing to the court that the assets of the bank were insufficient to pay its indebtedness it became the duty of the receivers to bring a bill in equity, in behalf of the claimants, against the persons liable as stockholders of the bank to compel them to contribute to the payment of its debts. R. S. of 1857, c. 47, § 73.

The statute creating the liability of stockholders in such cases is as follows: "The holders of stock in any bank at the expiration of its charter, whether a person or corporation, shall be liable in their individual capacities for the redemption and payment of all bills issued by said bank and remaining unpaid, in proportion to the stock they then hold; but such liability shall continue only two years after notice of such expiration has been given in the State paper." R. S., 1857, c. 47, § 46.

It is substantially alleged in the bill that the charter of the bank expired on the 18th day of May, 1861, when the injunction was made perpetual. In order to give effect to the foregoing provision of the statute it is not necessary that the charter of a bank should have expired by limitation. It is sufficient if it has expired by operation of law. Such expiration takes place when an injunction against the bank is made perpetual. *Wiswell* v. *Starr*, 48 Maine, 404.

In the case at bar the injunction was made perpetual, and the charter of the bank expired on the 18th day of May, 1861; and all holders of stock on that day are liable to contribute for the redemption and payment of all bills issued by the bank and remaining unpaid, in the proportion that the number of shares held by them respectively bears to the number of shares held by all the stockholders.

The capital stock of the bank was $50,000, which was divided into shares of fifty dollars each.

Of the thirty-six persons alleged in the bill to be liable as stockholders, only nineteen are now claimed to be liable. Of these seven have been defaulted and twelve have demurred. Of the latter number nine have answered.

The alleged causes of demurrer having been presented, considered, and found to be insufficient in *Bank of Mutual Redemption* v. *Hill*, 56 Maine, 388, the several demurrers in this case must be overruled.

Of the defendants who have filed answers to the bill, Samuel Tompson appears by the stock ledger to have owned sixty shares

on March 3, 1860, but he claims that he assigned fifty of those shares to Charlotte H. Tompson on March 12, 1861, as appears by the records of the bank. The plaintiffs deny the validity of that assignment on the ground, 1st, That it was not made in conformity with the requirements of the by-laws, and 2d, That it was not made in good faith.

The by-laws of the corporation provide "that shares shall be transferable by indorsement in writing and subscribed by the holder in presence of the cashier, or two other witnesses, . . . and in every case of transfer the former certificate shall be delivered up to the cashier to be cancelled and a new certificate shall be issued in favor of the transferee."

The statute provides that corporations "may make by-laws consistent with the laws of the State and their charter." We see nothing in these provisions of the by-laws inconsistent with the laws of the State or the charter of the bank. When not thus inconsistent their substantial observance is necessary to the validity of the transfer of the stock between the parties. As by-laws are established by the stockholders they are presumed to understand them. The provisions of the by-laws in question were designed as checks upon fictitious transfers of stock. As stockholders are made liable for the debts of the bank to the amount of their shares, it is important for them to know whether their associates are responsible or worthless. The frequency of the transfers of bank stock and the character of the sellers and purchasers, are oftentimes indicative of the standing of the bank. The requirement that transfers of stock shall be by indorsement of the certificate of stock "subscribed by the holder in the presence of the cashier or two other witnesses," furnishes the other stockholders, and if need be the public, with the means of ascertaining as far as may be the nature of the transaction and the standing of the parties to it. A stock ledger kept in accordance with these provisions of the by-laws affords the most reliable evidence of the condition of the bank ordinarily available to the stockholders; being both lawful and salutary their substantial observance must be upheld.

It is obvious that the actual and mute presence of "the cashier or two other witnesses" at a transfer of stock to be proved by parol, does not answer the purpose of this provision of the by-laws. In such case the stock ledger furnishes the inquiring stockholder with no evidence that the transfer was made "in presence of the cashier or two other witnesses," as required by the by-laws. As the record affords him no means of ascertaining how this fact was, he has a right to presume that the transfer of stock was not duly witnessed. The meaning of this provision of the by-laws is, not only that the holder of the stock shall indorse the certificate of stock when either the cashier or two other witnesses are present, but that he or they shall subscribe their names thereto in attestation of that fact. Otherwise the requirement of the by-laws would be a nullity. When this is not done the property in the stock pretended to be transferred as between the parties still remains in the original holder.

All the transfers of stock made by Samuel Tompson, either in his own right or as attorney of Mary A. Tompson, Charlotte H. Tompson, or George Gowen, 2d, and those made by Samuel B. Emery, not having been duly attested by the cashier of the bank, or two other witnesses, as between the parties, were null and void; nor was it competent for the bank to ratify and make valid such pretended transfers of stock made in violation of its by-laws.

As fifty of the shares alleged in the bill to be owned by Charlotte H. Tompson actually belonged to Samuel Tompson, she could not be chargeable as owner of them also; the inclusion of him as owner is the exclusion of her.

William L. Emery admits in his answer that he was the owner of two shares on the 18th day of March, 1861, but denies that he was then or ever had been the owner of the other twenty shares alleged in the bill. It appears from his answer and proof that the said twenty shares were originally paid for by D. T. Mills, that the original certificate of stock was made out in the name of Emery, and that he receipted for the dividends, though Mills actually received them up to the time of the formal transfer of the

shares to him in March, 1861. It further appears that said Emery made an assignment of the twenty shares in blank when he received his certificate of stock.

The formal transfer of the twenty shares from Emery to Mills was made in accordance with the requirement of the by-laws.

We think that Emery cannot be held as owner of the twenty shares on the 18th day of May, 1861, upon this evidence; though the shares were held in his name he never paid anything for them, and he transferred them to the party who did pay for them when they were issued, before the charter of the bank expired by operation of law. If he had continued to be the nominal holder of the stock when the injunction was made perpetual he would have been estopped from denying his ownership. He would not be permitted to contribute to the furtherance of the scheme of the other managers of the bank for defrauding the public and plundering the stockholders, by allowing them the benefit of the influence of his name as owner of the twenty shares, and then shield himself from liability as owner by denying his ownership when the hour of retribution had come, if he still remained the nominal owner of these shares. As those stockholders only are liable in this suit who were holders of stock on the 18th day of May, 1861, William L. Emery cannot be held liable as owner of more than two shares.

Ivory Brooks, William Ham, and F. H. Butler admit in their several answers to the bill that they owned the number of shares respectively charged therein, but claim to have their liability reduced because of the previous losses of the bank, and the reduction of the value of the shares to twelve and a half dollars each, by a vote of the stockholders passed Aug. 29, 1859.

The par value of the shares was fixed in the charter at $50 each. The fact that the capital stock of the bank had been reduced by losses to twelve and a half dollars each, and that the stockholders so voted, does not change the legal status of these or any other defendants who rely upon this ground of defense. They received and retained their certificates of stock, predicated upon the par value of $50 for each share; and whether the shares were worth

one dollar or fifty dollars each cannot affect their liability as stockholders. The amount of their liability depends not upon the actual market value of the shares or their value as declared by a vote of the stockholders, but upon the number of shares they severally owned, and the amount of the indebtedness of the bank. If a vote of the stockholders reducing the par value of the stock on account of the losses of a bank, whether occasioned by unavoidable misfortune or the culpable mismanagement of the directors, could defeat or diminish their liability in such cases, it might not be difficult, under the manipulations of such men as the managing directors of the Sanford Bank appear to have been, entirely to defeat the security the statute was intended to provide.

It appearing that George Gowen, 2d, and Moses W. Emery never purchased or owned any stock in the Sanford Bank, or received any dividends on such stock or acted as stockholders of the bank, this bill cannot be sustained against them.

The proofs in the case show that the late Hon. Nathan D. Appleton transferred his shares in the bank prior to the 18th day of May, 1861, in accordance with the requirements of the by-laws and in good faith; consequently Julia H. Appleton, the administratrix of his estate, is not liable in this bill.

From the view we have taken of the case it becomes unnecessary to pass upon the question of bad faith in the transfer of stock by some of the defendants, which has been so elaborately and ably argued by the learned counsel for the plaintiffs.

Demurrers overruled. Bill sustained with costs against Samuel Tompson as owner of sixty shares, Samuel B. Emery as owner of fifty shares, William L. Emery as owner of two shares, and Ivory Brooks, William Ham, and F. H. Butler, as charged in the bill. Bill not sustained against George Gowen, 2d, Moses W. Emery, and Julia H. Appleton, administratrix, who are respectively entitled to costs.

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

NOTE BY DANFORTH, J. I concur in the result to which the opinion arrives, but I prefer to hold the transfers of stock contested invalid on the ground of fraud, rather than from their non-conformity to the requirements of the by-laws of the bank. See *Sargent* v. *Railway Co.*, 9 Pick. 205.

STATE OF MAINE *vs.* WILLIAM H. BOWE.

Testimony—waiver of objections to. Confession. Marriage—proof of.

Objections to the admission of testimony, which is apparently relevant and competent, will be considered as waived unless the ground of objection be specifically set forth when the objection is made.

The record of the committing magistrate, showing that the respondent in a criminal process pleaded guilty to the complaint, is admissible in evidence upon the final trial. Oral testimony in regard to such plea is also admissible.

Testimony of the *particeps criminis* that she was "married two years ago by C. L., at his house;" it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons married, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion.

John S. Derby, for respondent.

I. The record was inadmissible, because:

1. There must be antecedent proof of the identity of the parties and of the examination. 1 Greenl. on Ev. §§ 520, 224; *Com.* v. *French*, Thacher's Crim. Cases, 82; Starkie on Ev. 324 (Sharswood); 2 Russ. on Crimes, 659; *Com.* v. *Briggs*, 5 Pick. 429; 3 Dane's Ab. 338.

Identity of parties must be proved to render even a marriage record admissible. *Reg.* v. *Hawes*, 1 Den. Crim. Cases, 270;

Damon's Case, 6 Maine, 148; Wedgwood's Case, 8 Maine, 75; Ham's Case, 11 Maine, 391; *Com.* v. *Norcross*, 9 Mass. 492; *Root* v. *Fellows*, 6 Cush. 30.

A fortiori, of a record which seeks to prove both a marriage and crim. con.

2. Prosecution must show affirmatively that an alleged confession is voluntary and without improper inducement. *Reg.* v. *Warringham*, 2 Den. Crim. Cases, 447; Davis' Crim. Just. 130.

3. A confession must be "full and given all together." 3 Dane's Ab. 336, 338, 340; 1 Greenl. Ev., § 218; *Wailing* v. *Toll*, 9 Johns. 141; Wharton's Crim. Law, 188, and *passim*.

Hence, plea of guilty before justice held inadmissible in *Com.* v. *Steward*, Leach's Cases, 286; *Com.* v. *Bennett*, Leach's Cases, 627. See 3 Dane's Ab. 338.

II. Instructions erroneous.

1. A marriage in fact—not one inferable from circumstances—must be proved. 2 Greenl. Ev., § 49; *State* v. *Hodgskins*, 19 Maine, 155; Damon's Case, 6 Maine, 148; Cayford's Case, 7 Maine, 57.

Only modification of this rule is in the confession of prisoner as to his own marriage, directly, explicitly, deliberately and understandingly made. *State* v. *Hodgskins*, *supra*; Cayford's Case, *supra*; Ham's Case, *supra*.

A confession must be voluntary and "with a knowledge of the use subsequently to be made of it and adverse results that will ensue from it." Appleton on Ev. 174; See also 1 Phil. on Ev. 118.

The technical plea of guilty before an inferior court and "with a motive and reason" therefor, certainly is not "direct or explicit" acknowledgment of a legal marriage; and the subsequent plea of not guilty and assertion of innocence clearly shows that it was not "understandingly made," and "with a knowledge of adverse results that would ensue."

2. Hannah A. Littlefield's testimony insufficient. *State* v. *Hodgskins*, *supra*.

Instructions, that it was competent for jury to find "a legal marriage there by this testimony given by this woman, connected with the admission of the defendant that he was guilty of the offense charged in the complaint;" were clearly erroneous as the complaint contained no allegation of her marriage.

George C. Yeaton, county attorney, for the State.

I. The record of the examination below, containing his confession of guilt, by deliberate plea of "guilty," was rightly admitted. Rosc. Crim. Ev. 37; Russell's Crimes, 824; Whar. Am. Crim. Law, 683; Davis' Crim. Just. c. 13; *State* v. *Libby*, 44 Maine, 469.

II. A plea of "guilty" is a solemn admission of every fact legally necessary to be proved to sustain the charge.

The marriage of Bowe was one such fact, which his plea thus admitted.

This marriage was also alleged in the indictment, and proof of this marriage only sufficient in law to sustain the conviction.

His confession being competent evidence of this, of course, its weight and conclusiveness was solely for the jury. R. S., c. 124, § 1; *Commonwealth* v. *Reardon*, 6 Cush. 78, 80.

Hence, this conviction should be sustained without regard to the requested ruling as to the marriage of Hannah A. Littlefield.

III. But the marriage of Hannah A. Littlefield was sufficiently proved. No evidence of the authority of Charles Littlefield to solemnize marriages, other than that being a citizen of this State, he assumed to possess and exercise such authority; and the parties believed that he had it.

1. Upon principle. 1 Bish. Mar. and Div. 495, 496.

"No other proof need in the first instance be produced." *State* v. *Libby*, 44 Maine, 469.

There is a *double* presumption in favor of the authority of the magistrate. (*a*) Personal innocence. (*b*) Official qualification. *Pratt* v. *Pierce*, 36 Maine, 454.

The evidence of Hannah A. Littlefield sufficiently proved "the fact" of marriage.

2. R. S., c. 59, § 17, obviates the necessity, if any otherwise existed, of any evidence of official character of Charles Littlefield.

IV. The instructions, if erroneous, were too favorable to the respondent.

BARROWS, J. Bowe was charged with the commission of adultery at Saco on the 1st day of August, 1872, with Hannah A. Littlefield. The indictment alleged a lawful marriage both on his own part and on that of his paramour, respectively, to other living parties.

The only direct proof adduced at the trial of the marriage of either, was in the testimony of Hannah A. Littlefield, as follows: "I was married to Seth Littlefield two years ago by Charles Littlefield, at his house in Saco. I have not seen my husband since I married him." Bowe pleaded guilty on the 19th of May, 1873, upon his examination before the municipal court at Saco, upon a complaint charging him with the commission of adultery with one Hannah Littlefield, at Saco, August 1, 1872, and containing an allegation of his own marriage, but no allegation of the marriage of Hannah Littlefield. He was thereupon bound over to the term of this court at which this indictment was found and tried.

He complains now that the record of the municipal court exhibiting his confession of guilt was admitted in evidence against his objection. The chief objection, which is now for the first time specified, is that there was no antecedent proof of the identity of the parties and the case.

Had such a suggestion been made when the objection was interposed at the trial, it could have been instantly obviated, and the requisite proof of identity which appears abundantly even in these exceptions, would have been made before the record was introduced. The complaint is an idle one. The defendant suffered no wrong by the introduction of the record, which did in fact relate to him and to this case, or by reason of the deficiency of merely formal proof of an identity which the defendant knew he could not successfully dispute, and as to which he was, therefore, prudently silent.

Not having disclosed the character and ground of his objection at the time when, if it had any substance, he should have done so, he cannot be permitted to lie in wait with it as a cause for new trial. Honest dealing with the court and the opposite party in any case, civil or criminal, requires that when an objection is made to a piece of testimony apparently relevant and competent upon any ground which is capable of being covered by proof of that which, so long as it is undisputed, might be readily taken for granted, the objection should be specifically set forth, so that it may not only be brought to the notice of the presiding judge, but be met by the opposite party. Unless it is thus specified it is justly considered as waived. Having no foundation in fact, this objection is totally devoid of merit. Had the defendant no better cause of complaint his exceptions would be overruled.

It will not be presumed without evidence or suggestion to that effect, that the confession in the court below was procured by threats or promises. On the contrary, under such circumstances the presumption would be that no improper inducement was held out.

The magistrate, taking the examination of a person charged with crime, is required by statute to certify and return it together with the recognizances of the witnesses to the court at which the accused is to appear. R. S., c. 133, § 17.

The reason of this requirement which is in conformity with the New England practice from time immemorial is found in Davis' Criminal Justice, c. XIII, p. 224 of Heard's ed. as follows: "The record or order of the justice is generally of no use except in cases where the defendant has made a voluntary confession of the crime charged upon him, and a record of such confession is duly made by the justice. Such a confession may be given in evidence against the culprit either before the grand jury or on his trial."

"The record of the examination before a justice is evidence on the trial of the prisoner, even if it show no confession, but only refusals to answer." Roscoe's Criminal Evidence, Note to p. 37, citing *People* v. *Banker*, 2 Parker's Crim. Rep. 26.

In some of the cases touching the admissibility of confessions made by prisoners at their examinations before magistrates, the question has been whether any evidence of such confessions aside from the magistrates record could be allowed. With us the practice has constantly been to admit both the record and oral evidence. To this there seems no objection in principle. What is there said by the prisoner does not constitute a plenary judicial confession because not made before a court competent to try the case. Hence it is not conclusive upon him, as such a plea in this court would be, unless for cause shown he had leave to withdraw it. But, disregarding his plea before the magistrate, he has the right to plead anew in the court having jurisdiction to determiue the cause, and his former confession is simply regarded as evidence for the consideration of the jury.

Doubtless the simple record of a plea of guilty before the magistrate, especially when it includes the admission of independent facts necessary to constitute the offense charged, would have less probative force than a detailed statement by the prisoner of the facts themselves. Justice requires that oral evidence also should be admitted either to complete or, if it so tends, to limit the effect of the plea, and then the jury are to pass upon the whole as they do upon any other piece of evidence.

But here the jury were told that they might consider the fact of the plea to the complaint in the court below, to supplement the proof offered to establish a legal marriage on the part of Hannah A. Littlefield. Doubtless the presiding judge assumed that inasmuch as the marriage of the woman was alleged in the indictment, it was alleged in the complaint also. But it was not, and the defendant's plea of guilty to the complaint afforded no evidence whatever of an existing legal marriage on the part of the woman, Littlefield.

It was error in the judge to tell the jury that they might consider it as evidence upon that point. The exception to this misuse of the record is well taken.

It is no answer to this complaint to say that the confession in the

court below covered the whole offense, and included all the essential points in the proof. It was not with a view to this inquiry that the jury were instructed to regard it. The course of evidence at the trial and the instruction given by the judge, indicate that the government relied upon proof of the marriage of the woman who was the *particeps*. We cannot certainly know that the jury would have convicted, if they had been instructed to consider whether the plea to the complaint was made so deliberately and with such a due and thorough sense of its meaning and such an understanding of the facts necessary to constitute the crime, as to satisfy them that the defendant was himself a married man, having a lawful wife alive other than the said Hannah Littlefield.

Even if it could be said that the bald and imperfect statement made by the government witness, as to her own alleged marriage, might be accepted as sufficient proof of the fact, it would still remain uncertain how far it was credited by the jury, or how far they based their conclusion upon the supposed admission of the defendant which the instruction authorized them to consider on that point, when in fact it had no tendency to prove it.

But we do not think the few words uttered by Hannah A. Littlefield amount to proof of a legal marriage on her part. It does not even appear that this marriage was solemnized by any one "professing" to be either "a justice of the peace or an ordained or licensed minister of the gospel," or that it was "consummated with a full belief on the part of either of the persons married that they were lawfully married," so as to bring it within the operation of R. S., c. 59, § 17.

In short, the maxim, "*Habes optimum testem, confitentem reum*," seems to have induced an amount of carelessness on the part, both of the prosecuting officer and the presiding judge, in the preparation and trial of the case, which must not be permitted to harden into a precedent.

It is to be hoped that not only ample but exact justice may be done the defendant at the next term. *Exceptions sustained.*

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

STATE OF MAINE *vs.* LOUIS H. F. WAGNER.

Evidence in capital cases.

All parts of the State are included within the body of one or another of the several counties into which the State is divided.

When murder has been done in an unincorporated place, publicly and commonly known by name, in any one of these counties, the venue is well laid, and the place sufficiently described, if the crime charged in the indictment as having been committed at (insert the name by which the place is commonly known) a place within the county of (name of county) aforesaid, in the absence of anything tending to show that the prisoner would be embarrassed in the preparation of his defense for want of a more particular description.

When there is no controversy as to the precise spot on the face of the earth where the crime was committed, and it appears by ancient charters, legislative enactments, and judicial records that the political authorities and courts have heretofore claimed and exercised jurisdiction over the locality in question, the question of jurisdiction is one of law—for the court, and the defendant cannot in any stage or form of pleading rightfully claim to have it submitted to the jury as one of fact, for their determination.

Upon such a question the presiding judge in addition to the matters of which he will take judicial notice, such as legislative enactments, ancient charters, and geographical position, may refresh his recollection and guide his judgment by reference to the records of the courts in the county where he sits, general histories of deceased authors of established reputation, and the records of the census of the inhabitants of the county taken under the laws of the United States by its officers.

It is competent for the Assistant United States Marshal who took the census for the district, and made the return to the office of the clerk of the courts for the county, when the record does not show the specific locality where the individuals enumerated resided, to testify as to their place of residence.

When the political authorities of a State have actually claimed and exercised jurisdiction over a particular locality, the courts of the State are thereby concluded, and will respect such decision, and act accordingly without questioning the validity of such claim.

The prisoner was not wronged by the instructions given in this case that proof that the crime was committed on the island called Smutty Nose is equivalent to proof that it was committed within the county of York, and would make the crime properly cognizable by the court sitting in this county. That instruction was correct.

The outcries of a person deceased made during the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a party charged with the murder of such person, and may be considered by the jury with other circumstances and testimony upon the question of the identity of the accused.

The outcries of another person who was murdered by the same party a few minutes previously during the perpetration of one and the same burglary, but on another part of the premises, are admissible under like circumstances for the same purposes upon such trial.

Such exclamations are competent as part of the *res gestæ*.

Moreover their admission may be distinctly justified for the same reasons which are held to justify the admission of dying declarations.

The contents of the prisoner's pockets found when he is arrested may be put in evidence when there is testimony tending to show that they or a portion of them came from the recent possession of the deceased or from the locality of the crime.

Articles which a witness identifies as the property of the prisoner, and in his possession shortly before the crime was committed, when found shortly after its perpetration, at the house where the crime was committed, may be offered in evidence.

On exceptions.

Indictment for the murder of Anethe M. Christensen, on the sixth day of March, 1872, "at an island called 'Smutty Nose,' a place within the county of York." This island is one of the cluster of islets known as the Isles of Shoals; part of the group lying in Maine, and part in New Hampshire. The indictment stated the place where the crime was committed in the language above quoted, and the prisoner's counsel moved to quash the indictment on account of the asserted indefiniteness of this allegation; and, subsequently to the rendition of a verdict of guilty, moved in arrest of judgment for the same reason. The presiding judge overruled these motions and the respondent alleged exceptions to these and other rulings of the court, as fully appears by the opinion.

The respondent denied that the spot where the offense was committed was within the body of the county of York and claimed to have this issue passed upon by the jury as a question of fact; but this claim was not allowed, the presiding justice determining it, as matter for the exclusive cognizance of the court, by reference to histories, ancient records and charters, and other documentary evidence, as well as by oral testimony. The defendant objected to the admission of a large portion of this evidence, as appears by the opinion. The house at which the murder was committed was the only one on that island then inhabited, and was on that night occu-

pied only by three women, viz.: Mrs. Mary S. Hontvet, wife of John C. Hontvet, Karen Christensen, sister to Mrs. Hontvet, and Anethe M. Christensen, wife of Evan Christensen, who was brother to Karen and Mrs. Hontvet. Karen was sleeping upon a lounge in the kitchen directly under a bracket upon which stood a clock. The first blow aimed at her knocked down and stopped the clock at seven minutes past one in the morning; thus, as Choate once said: "Though the dial spoke not, it gave most manifest sign, and pointed to the stroke of murder." At this hour of that night the moon was shining brightly, but its beams were excluded from the kitchen by the curtains being let down, so that when Karen awakened from sleep, confused by the assault, she did not recognize her assailant, but called out, "John is scaring me; John scared me," evidently supposing it to be John Hontvet. Anethe, alarmed by the outcry, jumped from the bedroom window and was met by the prisoner near the end of the house, he having passed out after beating Karen, probably having heard the noise made by raising the window. As he approached her Anethe discovered who her assailant was, and called out several times, "Louis, Louis, Louis." Mrs. Hontvet testified to these exclamations of Anethe and Karen, her statement of them being admitted against the defendant's objection; one argument brought to sustain the objection being that it might be taken as proof of a defendant's identity with the murderer, and given too great weight by a jury, though made under circumstances that were not favorable to accuracy of knowledge or statement on the part of the exclaimer. Karen had a silver half-dollar, some coppers, and a button with a peculiarly corrugated edge in her pocket the day before her death; similar coins and just such a button were found in Wagner's pocket when arrested; but to the admission of proof of this fact the prisoner's counsel objected. A pencil with the end marked in a particular way was found on the entry floor of the house the afternoon of the day of the murder; and a witness testified, against defendant's objection, to having seen a pencil so marked in Wagner's possession a short time before the murder.

R. P. Tapley, and *Max Fischacher*, for respondent.

Jurisdiction, like all other facts of the case, is for the jury; at any rate, the testimony adduced to establish it was incompetent. *U. S.* v. *Jackalow*, 1 Black, 484.

Geo. C. Yeaton, county attorney, and *H. M. Plaisted*, attorney-general, for the State.

BARROWS, J. The prisoner denies the jurisdiction of the court in which his trial took place, and complains in several respects of the manner in which the presiding judge dealt with the questions which he sought to raise touching that branch of his defense.

I. He made a motion in the outset to quash the indictment, alleging that the place where the murder was committed is not therein set forth with sufficient distinctness to enable him to plead properly. The motion was overruled. After verdict he filed a motion in arrest of judgment for substantially the same alleged cause.

This motion also was overruled, and to this he excepts.

The allegation in the indictment is that the crime was committed "at an island called 'Smutty Nose,' a place within the county of York aforesaid." It is insisted for the prisoner that such an allegation fails to demonstrate York County as the proper venue. He suggests no amendment by which it could be made more certain, and still conform to facts.

We do not see how in the nature of things the allegation could be made more precise without tedious and useless prolixity.

We recognize in its fullest reasonable extent the substantial right of a party charged with crime to have the accusation against him formally, fully, and precisely set forth, with such circumstances of place and time as shall not only indicate the jurisdiction of the court before which he is called to plead, but shall also enable him to prepare his defense understandingly. We cannot see that this right has been infringed in the indictment before us.

The objection seems to be founded upon the idea that Smutty Nose Island is not a place which has been recognized by that name

in any statute of the State, and that, therefore, the allegation that it is in the county of York cannot be verified by reference to the public laws, and hence arises a necessity for further and extrinsic allegations. But the conclusion does not follow from the premises. The averment is distinct and positive that the crime was committed at a place within the county of York, and that place is identified with a particularity even greater than it would be likely to be if the island belonged to any of the municipal subdivisions of the State, existing by virtue of specific statutory enactments. While an act of incorporation, had any such existed, might have furnished a more ready means of verifying the accuracy of the averment, it is not perceived how the want of it can make any extrinsic allegations necessary, nor how they would subserve any useful purpose. The waves of the sea define the place as distinctly as an Act of the Legislature could possibly do, and there are abundant means, as we shall hereafter see, to verify the allegation which is essential to the maintenance of the jurisdiction.

In Brown's case, tried before the full court of this State in 1837, the crime was alleged to have been committed "at an unincorporated place in said county (of Cumberland) called the Eighty Rod Strip, between Poland in said county and Raymond in said county." The accused had been described in the indictment as "Jesse Brown of Poland in said county, Esquire, otherwise called Jesse Brown, of an unincorporated place in said county called the Eighty Rod Strip," etc. There seems to have been a doubt whether the place where the crime was alleged to have been committed was or was not a part of the town of Poland. But apparently the court considered the allegation that it was within the county sufficient, so far as the laying of the venue was concerned. And why not?

In Kirby's case, tried in Washington county, at the October Term, 1872, the crime was charged to have been committed "at an unincorporated place called Forest City, in the county of Washington." The name Forest City had been applied to a little settlement which had grown up in the wilderness about a large tannery; and the dwelling-houses were partly in the county of Wash-

ington and partly in a British Province. Yet able and vigilant counsel made no objection to the sufficiency of the allegation, and no practical difficulty jeopardizing any of the defendant's rights was developed in the trial.

We think the mode of allegation adopted in the case at bar appropriate in all cases where the place is unincorporated, but has nevertheless a name and limits known and recognized by the people of the county; and that it is sufficient to guard well all the substantial rights of the accused. The motion in arrest was properly overruled.

II. The prisoner complains of the instruction which took from the jury the decision of the question, whether Smutty Nose Island is in the county of York. The instruction was, "that proof that the crime was committed on Smutty Nose Island is equivalent to proof that it was committed in the county of York, and would make the crime properly cognizable by the court sitting in this county."

The instruction was prefaced by a partial statement of the reasons upon which it was based, and it may not be amiss to recur to them.

Before stating the legal proposition above recited the presiding judge remarked as follows: "It is incumbent on the government to prove the commission of the crime in the county of York. The allegation is that it was committed on an island called Smutty Nose in the county of York. All the testimony in the case goes to show that that island was the scene of the transaction. It is a piece of territory of definite limits, known by name, and over which the political authorities of this State and their predecessors have exercised jurisdiction. There is no dispute as to the precise spot upon the face of the earth where the crime was committed if committed at all. It was on the island called Smutty Nose and at the house of John C. Hontvet. I see no evidence tending to show that a part of the island is in one jurisdiction, and a part in another; the whole or none of the island would seem to be in Maine and in this county."

The whole case which is before us shows that the foregoing statement was indisputably correct. The question of jurisdiction in this case turned entirely upon the construction of the ancient charters and grants, and the legal effect of the actual exercise of jurisdiction by the political authorities of this State and their predecessors, as shown by the records drawn from their archives, over the island which was the scene of the crime.

Under this condition of things the presiding judge assumed to decide the question as one of law for the court; and therein we think he did right. Neither the construction of charters or grants, nor the effect of previous acts of jurisdiction as shown by records, can be a matter for the jury to determine. The force and effect of charters, grants, and records are for the court. Wherever the question of jurisdiction depends upon their construction and effect, it is purely a question of law for the court. And in cases where the political authorities of the State have actually claimed and exercised jurisdiction over particular localities, the doctrine of the law seems to be that the courts are thereby concluded, and have only to declare the fact and govern themselves accordingly, without undertaking to pass upon the validity of such claim. *Foster & Elam* v. *Neilson*, 2 Pet. 254; *State* v. *Dunnell*, 3 R. I. 127.

How can a court of this State sitting for York county refuse the protection afforded by our laws and tribunals to the inhabitants of islands classed and reckoned by our legislature, in the apportionment of representatives to that county, as composing part of its territory and population? And with what semblance of propriety, after such legislative recognition, could the judge of such court submit it to the jury in every case that arose in a poor and sparsely populated locality, to determine whether the dwellers there should any longer receive the protection of the laws and the courts which the representatives of their predecesors may have helped to frame and establish?

Obviously, under such circumstances there is nothing for a jury to pass upon, and a party charged with crime cannot claim under any form of pleading to have such a question submitted to the jury

for determination, nor complain if his request that it should be so submitted is overruled. Such a request is merely one of those stumbling blocks in the way of justice which it is the business of the court to remove.

Nor is there anything inconsistent with the view which we have here taken in Jackalow's case, 1 Black, 484. There the crime was alleged to have been committed on board a vessel at sea—the place where she lay being the subject of doubt and testimony. The locality where she was situated was necessarily previously without occupants. No jurisdiction had ever there been exercised or claimed by the State authorities, and, therefore, it became necessary for the jury to determine not only the precise point where the offense was committed, but also whether it fell within the boundaries of the State, because there were no proceedings of the State to conclude the court, and no previous exercise of jurisdiction over the watery waste. Such a case bears no analogy to a case arising upon an island settled two hundred and fifty years ago, formerly populous and important, respecting which an abundance of jurisdictional facts appear of record among the files of the court whose jurisdiction the prisoner was denying.

Even in the absence of a distinct legislative recognition as part of our own State and of a particular county in it, we think questions whether the numerous islands along our coast lie within our borders and within county lines and are subject to the jurisdiction of our courts, are properly questions for the decision of the court, and once settled must be deemed settled forever, and not subject to the varying verdicts of successive juries whenever a person charged with crime sees fit to claim to throw in a denial of jurisdiction as a makeweight to raise a doubt in a case otherwise clear. A criminal might as well call for the opinion of the jury upon the regularity of the judge's commission, or the validity of the election of the governor by whom he was appointed. The administration of justice becomes possible only by assuming that certain things have been regularly and definitively settled and are so to remain.

The court is bound to take notice of public facts and geographi-

cal positions. *Peyroux* v. *Howard*, 7 Peters, 342, 343; *The Apollon*, 9 Wheat. 374.

In respect to all such matters, if the memory of the judge is at fault, or his information not sufficiently full and precise to induce him to act, "he resorts to such documents of reference as may be at hand and he may deem worthy of confidence." 1 Greenleaf's Evidence, § 6.

Nor does the fact that the information thus sought by the judge has been laid before him in the presence of the jury without any distinct ruling that it was designed for the court alone, give a party the right to insist that the jury shall pass upon it. We think that the presiding judge was right in holding that upon the case here disclosed, the question of jurisdiction was one of law, which he was called upon to decide for the purposes of that hearing, his decision being subject to revision by the full court on exceptions.

III. But in case it should be held that the questions arising under his denial of the jurisdiction were for the court to determine, still the prisoner complains that testimony which was legally inadmissible was let in to influence the judge's decision. An objection of that sort cannot be deemed available when the case shows that there was that before the court which was absolutely conclusive against the position taken by the prisoner. Of what consequence can it be if it turns out that some item which was received by the judge to inform his mind upon the matter in question, did not come through a legal channel and ought to have been excluded, if there still remains that which imperatively required him to hold adversely to the prisoner? The defendant cannot possibly suffer by such a mistake, if there were one.

As we have already seen by the cases above cited, the court has nothing to do but to recognize the boundaries claimed by the political authorities of the State under which it acts. Where there has been an actual claim and exercise of jurisdiction by these authorities, the courts are bound thereby. The remark of Chief Justice Marshall in *Foster* v. *Neilson*, *ubi supra*, applies also to the boundaries and courts of the different States of our Union. "A ques-

tion like this, respecting the boundaries of nations is as has been truly said more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the Legislature."

The case discloses irrefragable evidence of the practical construction of the ancient charters and grants adopted by the political authorities of this State, and it mattered little what else was or was not offered or admitted in evidence.

But we do not wish to be understood as holding that any of the evidence received was not admissible.

We have no hesitation in declaring the admissibility of the records produced from the office of the clerk of the courts for York county. Their antiquity and genuineness were unquestionable, and they proved conclusively that the legislative act passed "att a Generall Courte of Elections held at Boston the 16th of May, 1653," and entitled "The Grant to Kittery," whereby in consideration that they had "acknowledged themselves subject to the Government of the Massachusetts Bay," and, "for the settling of Government amongst them and the Rest within the bounds of these charters," etc., it is provided, "1st, that the whole tract of land beyond the River of Piscataq, together with the Ile of Shoales within our said bounds is and shal be henceforth a County or Shire called by the name of Yorkshire," was no mere *brutum fulmen*, but was followed by the actual exercise of jurisdiction, civil and criminal, over the territory in question, to which end courts were held under the political authority of the Massachusetts Bay upon "the island called Smutty Nose," the records of which courts are preserved to this day in the proper repository of the records of York county.

The objections urged against their admissibility are that it does not appear that Yorkshire and York county are identical, nor that the jurisdiction thus exercised was legal, the question not being raised, and no adjudication having been made with regard to it so far as these records show.

The obvious answers are, 1. To the first objection. Whatever

changes have been made in the boundaries of York county or Shire must appear in subsequent legislation, an examination of which shows that the western and southern boundaries have always remained the same (with the exception of a single brief interval hereafter to be noticed), the new counties having been created from the easterly and northerly portions of Yorkshire.

See Provincial Act of 1760—establishing two new counties (Cumberland and Lincoln), in the easterly part of the county of York. Appendix to R. S., p. 943. Massachusetts Act of March 4, 1805, entitled "an Act to incorporate a part of the counties of York and Cumberland into a separate county by the name of Oxford." Appendix to R. S., p. 947.

2. To the second objection. We do not sit in judgment upon the legality of the acquisition of political and civil jurisdiction by the predecessors of our own political authorities who have received by regular course of transmission, and now hold the power once exercised by "The Government of the Massachusetts Bay" over the province of Maine. If we did, the fact that that jurisdiction was exercised unquestioned would certainly be no argument against its legality, but rather the reverse. The submission to the jurisdiction so far as the records show was universal. "It has been sometimes said," remarked Lord Ellenborough, *communis error facit jus;* but I say *communis opinio* is evidence of what the law is, not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice."

General histories of painstaking authors long since deceased, and of established reputation, like those of Williamson and Belknap, are competent evidence upon a question of this nature. No one claims them as conclusive or infallible, but carefully used as aids and guides, and accepted as true where their statements are uniform and consistent with the evidence of original records and admitted or well-known facts, they will be found of great service in arriving at a satisfactory conclusion.

The case of *Evans* v. *Getting*, 6 Car. & P. 586, which was cited

at the trial against their admission, and which seems also to be the basis of the remark in Greenleaf's Evidence, vol. 1, § 497, to the effect that in regard to the boundaries of a county they are not admissible, would be found on examination, by implication to favor the admissibility of general histories of States, like those of Williamson and Belknap. In that case it was a history of Brecknockshire that was offered to prove the boundary between that county and Glamorgan, and Alderson, B., rejected it with the remark:— "The writer of this history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales."

Counsel misapprehend the testimony of Mr. Allen, the clerk of the courts, if they suppose that the census returns were not produced from the proper repository in his custody. They were kept by him with other files pertaining to the office of the clerk of the courts, in an office in the rear of the treasurer's office, to which the clerk had a key. Mr. Safford testified without objection that he was an Assistant U. S. Marshal for Maine, and took part of the census. The law of the United States under which it was taken required the making of the returns by the marshals and their assistants in the several districts and the deposit of duplicates in the office of the clerk of the courts for the county in which the district was situated. The return was identified by the assistant marshal who made it and made the enumeration of which it was the rec ord, and it was plainly competent to prove by him the fact that certain persons whose names were borne thereon lived upon the island of Smutty Nose—the name of the island not being given in the return, but only that of the group. It was reliable evidence that Smutty Nose Island had been recognized by officials acting under the authority of the government of the United States, as part of the State of Maine, and of the county of York; and this fact had some probative force, though not conclusive upon the court as were the acts of the political authorities of our own State.

IV. But again it is claimed that if the question of jurisdiction was for the court to decide, and the testimony received was com-

petent, still it was not established that Smutty Nose Island is within the county of York, and the presiding judge erred in so holding.

The claim will not bear examination.

Upon what was the ruling based? Besides the Legislative Acts and record evidence to which we have referred in discussing the previous points, we find that the Legislature of this State—before the progress of decay had left those of the Isles of Shoals which lie within our bounds entirely without voters—in apportioning representatives to the county of York, assigned one to "Kittery and the Isles of Shoals." Resolve of 1852, c. 448.

Nor are we left in doubt which of the Isles of Shoals were here intended. In chap. 29, Resolves of 1829, we have the report of the commissioners appointed to ascertain, survey, and mark the boundary line between the States of Maine and New Hampshire. This report, and the line marked and designated as the true boundary line of said States therein set forth, were established and confirmed by Legislative Resolves, approved Feb. 28, 1829.

This report commences with the following significant recital:

"The report of the commissioners appointed by his Majesty's order in council of February 22, 1735, and confirmed by the order of the fifth of August, 1740, having established 'that the dividing line shall run up through the mouth of Piscataqua Harbor and up the middle of the River of Newichawannoch, part of which is now called the Salmon Falls, and through the middle of the same to the farthest head thereof, &c.,' and that 'the dividing line shall part the Isles of Shoals, and run through the middle of the harbor between the Islands to the Sea on the Southerly side, &c.,' we have not deemed it necessary to commence our survey until we arrived North at the head of Salmon Falls River."

Going back to the report of the commissioners thus referred to and adopted, we find that the previously existing and well-known partition of the Isles of Shoals between the provinces of New Hampshire and Massachusetts Bay is affirmed in these terms: "And that the dividing line shall part the Isles of Shoals and run through the middle of the harbor between the islands to the sea on

the Southerly side; and that the South Westerly part of said islands shall lie in and be accounted part of the Province of New Hampshire; and that the North Easterly part thereof shall lie in and be accounted part of the Province of Massachusetts Bay; and be held and enjoyed by the said Provinces respectively in the same manner as they now do, and have heretofore held and enjoyed the same."

This division is traceable through various Ancient Charters and Grants, as will be seen by referring to the charter of 1629 to Mason; the Royal Charter of 1639 to Gorges; and the charter of William and Mary in 1691 (Ancient Charters, p. 26), in all which the north half of the Isles of Shoals is treated as belonging to the grant to Gorges and to the province of Maine, and the south half to New Hampshire; and it is to this division, based on the agreement between Mason and Gorges in 1624 for a partition of the lands granted to them jointly by the Council of Plymouth that allusion is made when the commissioners say, in 1737, that these islands shall be "held and enjoyed by the said provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same."

Now, taking notice as we are bound to do of the geographical position of these islands, and of the uncontradicted testimony in the case, there is no room left for doubt that the line follows the ship channel between Star and Cedar Islands, "through the middle of the harbor between the islands to the sea on the southerly side," leaving Appledore or Hog Island and Smutty Nose still farther within the borders of Maine.

Indeed, it is not now even pretended that Smutty Nose does not lie in the "North half" or "North Easterly part" of the Isles of Shoals; but the ingenuity of counsel is directed to the substantiation of the somewhat fanciful hypothesis that even if it must be conceded that this portion of the islands has long pertained, first to the province, then to the district, and now to the State of Maine, still it never was restored to the county of York since it was ordered in 1672, that all those islands "be adjoined unto the

same county to which Star Island belongs," *i. e.* to the county of Dover and Portsmouth.

The whole group had been, previously, in 1661, "allowed to be a township called Apledoore," and to "have aequall power to regulate theire towne affaires as other townes of this jurisdiction have," by an Act of the Massachusetts General Court in which it is said that they "do lye partly in the County of Yorke, and the other parte in the jurisdiction of Dover and Portsmouth."

But it was only for a very brief interval that jurisdiction of the north half of the Isles of Shoals was withdrawn from the county of York by the Act of 1672. That Act was passed while the government of Massachusetts Bay was claiming to extend its jurisdiction over Mason's part of Laconia, as well as that of Gorges. But in July, 1679, the Massachusetts colony was notified of the king's intention to disallow this claim as to New Hampshire, and required to revoke all commissions which they had granted there, which were all declared null and void, and in September a commission for the government of New Hampshire was issued which "inhibits and restrains the jurisdiction exercised by the colony of Massachusetts over the towns of Portsmouth, Dover, Exeter, and Hampton, and all other lands extending from three miles to the Northward of the river Merrimack and of any and every part thereof to the Province of Maine."

Thus the attempted annexation was effectually annulled. The York County records show abundant subsequent evidence of the exercise of jurisdiction over the north half, which was represented in the Massachusetts General Court in 1692, by Roger Kelley and William Lakeman; and "the south half" is again particularly mentioned in the commissions for the government of New Hampshire.

But it is needless to multiply the historical proofs.

Chapter 448 of our legislative resolves, passed in 1852, assigning these islands to constitute part of one of the representative districts of York County would suffice to destroy the ingenious fabric which counsel have created. We simply follow the Legislature of

our State in declaring the north half of the Isles of Shoals, including Smutty Nose, to be a part of the county of York, as well as of the State of Maine.

V. Was there error in permitting Mrs. Hontvet to rehearse to the jury the outcries which were made by Karen and Anethe, respectively, upon the approach of the murderer?

It might perhaps be said that since Mrs. Hontvet testifies positively that the man who was there and murdered these women was Wagner, the prisoner, he cannot complain of the admission of all that was said in his presence.

It may be that it would not be unreasonable to say that inasmuch as the judge in his instructions to the jury made use of the circumstance which alone could be deemed unfavorable to the prisoner, only to caution the jury not to rely too confidently upon Mrs. Hontvet's testimony identifying Wagner on the spot, lest she might have mistaken some other person for him, because she was expecting, by reason of Anethe's exclamation, to see him, the defendant could not have been prejudiced by the testimony.

But we prefer to place its admission upon a different ground.

Looking at all the circumstances attending these outcries, and especially the fact that Anethe's recognition of the prisoner was in the open air and in the bright moonlight, we cannot doubt that what she said did have not a little weight in the minds of the jury against him upon the question of identity. We think it might legitimately be used for that purpose.

The court in Massachusetts went farther in the case of *Commonwealth* v. *McPike*, 3 Cush. 181, in admitting the statement of the injured person made shortly after the infliction of the wound, and while she was lying on the floor bleeding profusely, "that John (meaning the defendant) had stabbed her." The statement was made when the accused was not present, and the testimony was admitted against the objection of the defendant without proof that the wounded person had given up all hope of recovery so as to make it competent as a dying declaration. The statement was accompanied by a request to the witness to go for a physician, bu

very clearly the sole use to which it was to be put in the trial, was to identify the defendant as the person who inflicted the injury. And the court held that "the period of time at which these acts and statements took place was so recent after the receiving of the injury as to justify the admission of the evidence as a part of the *res gestæ*."

The testimony in the case at bar, the competency of which we are considering, was let in by the presiding judge with a similar remark. This is criticised in argument, on the ground that here was no act of the deceased which it was necessary or desirable to explain, and that declarations, to be competent as part of the *res gestæ*, must accompany such an act on the part of the declarant.

It is a matter of very little consequence whether a reason assigned by a judge at *nisi prius* for his ruling is or is not technically accurate and sound. Doubtless what may be denominated a sound legal instinct produces many correct rulings upon the admissibility of testimony when the judge who made them might not be ready to state the true reason with precision, or even with a perfect comprehension of the proper grounds upon which the admission or exclusion should be placed. Compendious phrases, used in similar connections, are very apt to suggest themselves to the mind on such occasions, when they do not in fact express the true principle upon which the action of the court is founded. The same formula may have an application, more or less suitable and exact, to a considerable variety of cases; and the all-embracing phrase, *res gestæ*, is very apt to come up when we are contemplating any of the facts and circumstances that accompanied the principal transaction which is the subject of investigation in any aspect of them.

The question before us is not whether the presiding judge placed the admission of the testimony upon exactly the true ground, but whether it is competent testimony upon the question of identity.

We are clearly of opinion that it is. The doctrine which we hold is this: The outcries of a person deceased during the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a

party charged with the murder of such person, and may be considered by the jury with other circumstances and testimony upon the question of the identity of the accused. The outcries of another person who was murdered by the same party a few minutes previously during the perpetration of one and the same burglary, but on another part of the premises, are admissible under like circum stances for the same purpose upon such trial.

Such outcries certainly partake much of the nature of *res gestæ*, more distinctly so than the statement in *Commonwealth* v. *McPike*, *ubi supra*, which accompanied the sending for a physician; but we think that the precise ground upon which their admission should be placed in a case like this, is substantially the same as that upon which dying declarations are declared admissible.

Speaking of dying declarations, Roscoe says (Crim. Ev. p. 30): "Evidence of this kind which is peculiar to the case of homicide has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye witness to the fact, and the usual witness in other felonies, viz., the party injured himself is got rid of; but it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted is that it is of declarations made in extremity, when the party is at the point of death, . . . when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court." Roscoe adds: "Probably it is the concurrence of both these reasons which led to the admission of this species of evidence."

Both these conditions exist in the case at bar. There is as truly a necessity to corroborate the testimony of a surviving witness, whose testimony to the identity of the murderer and the accused may be attacked on the ground that in the darkness and excitement she was liable to mistake, as there is to furnish evidence when no person who witnessed the assault remains alive. Moreover, it is the danger that no surviving witness can be found, which operates

to establish the rule, which is of general application, and the fact that in the particular case one did survive would not abrogate it.

And as to the second condition, no one can doubt that the exclamations of these two women embodied the truth as it appeared to each, and that the cries of alarm or supplication uttered by any and all human beings under similar circumstances, would express their perceptions of existing facts as truly as if backed by the sanction of all the oaths known in christendom. To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with uplifted weapon, when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darkened and dimmed by the mists and shadows of approaching dissolution, would be, we think, but a bad sample of "the perfection of human reason." It is not to such exclamations that any of the substantial objections to hearsay testimony can be held to apply. Those outcries were as plainly circumstances proper for the consideration of the jury in the attempt to ascertain whether the prisoner was guilty of that crime, as any other portion of the circumstantial evidence in the case. Manifestly, the tendency of Karen's exclamation, John scared me, John killed me, was to exculpate the defendant and to direct suspicion towards John Hontvet, the head of the family. If it had been withheld by the government, and the defendant had offered to prove it, should we have felt justified in excluding a fact from which, if uncontrolled, such a pregnant inference could be drawn? Certainly, as in every case of proof drawn from circumstances, caution is required to avoid drawing rash or unfounded inferences, and the declarations are liable to be controlled by other proved facts, as Karen's were in the present instance; but the liability to mistake and error inherent in all descriptions of human testimony is not so great in this as to justify its exclusion.

We think that the reception of this testimony is justified both on principle and authority. It is the fact of a contemporaneous recognition or non-recognition of the accused by the deceased which

possesses any probative force, and any declarations made at the time, evincive of that fact, may fairly be said to come within the principle which regulates and permits the admission of declarations of third persons when they form a part of the *res gestæ*. It would justify their reception even if that were the sole ground upon which it could be placed. Nor do we think that anything in the learned and able discussion of that principle by Fletcher, J., in *Lund* v. *Tyngsborough*, 9 Cush. 36, can justly be said to militate against their admission. We do not wish to be understood as holding that the dread of immediate death is indispensable to the admission of contemporaneous exclamations of recognition like these, in cases of homicide.

We merely say that whatever force is given to dying declarations as the utterances of those who, on account of their peculiar situation, may be relied on to tell the exact truth as it appears to them, must needs be accorded also to the exclamations of mortal terror caused by a deadly assault.

VI. The objection to the admission of package marked B., which consisted of the contents of Wagner's pockets when he was searched by the officers in Boston the evening after the murder, is still insisted on, mainly upon the ground that the articles had not been identified except as having been found in Wagner's possession. It is not easy to see how they could have been in any respect prejudicial to the prisoner's case if they had not been substantially proved to have come from the house which was the scene of the murder and robbery. It is true that the articles were none of them such as were likely to be positively identified. But there was evidence that the day before the murder Karen had placed in her purse which contained a silver half-dollar and "a lot of coppers," a single small white porcelain button.

The following evening among the contents of the prisoner's pockets appeared a silver half-dollar, "a lot of coppers," and a single small white button, of the same description as that which Karen had placed in her purse the afternoon before, and unlike any which the prisoner had upon any of his clothes. Karen's purse was

found upon the floor of the house entirely empty. These circumstances were competent evidence,—taken by themselves by no means conclusive,—but in connection with others not insignificant.

We do not understand that positive identification is essential in such cases. Proof of the possession of similar property, with such circumstances as tend to establish the identity if unexplained, may furnish ground for a legitimate inference, the force and value of which the jury must determine in view of all the circumstances of the case.

It is impossible to imagine that the exhibition of the articles respecting which there was no evidence tending to show that they came from Hontvet's house could have injured the defendant. Moreover, there was no objection to any specific articles, but only to the package as a whole.

VII. We see no ground for the complaint of the admission of the pencil. A witness testified positively that it was the prisoner's pencil, and that he saw it in his possession at Portsmouth a few days before the murder. Another witness testified to finding it in the entry of Hontvet's house a day or two after the murder. If both statements were true, the facts were significant. An examination of the pencil itself was likely to be serviceable in enabling the jury to determine whether any witness could identify it with certainty.

None of the other exceptions to the rulings in relation to the admission or exclusion of testimony is relied on in argument, and a careful review of the case satisfies us that they are all devoid of merit.

It is competent for the prosecuting officer to explain his positions and illustrate the testimony by diagrams as well as by word of mouth. This was all the use that was made of the plans.

No witness who hears a conversation can be excluded from testifying in relation to it because it was not addressed to him and the party to whom it was addressed is a witness in the case.

Ample opportunity was allowed to contradict any government witness, or to show the *animus* of any such witness towards the

prisoner. The evidence offered and excluded was purely immaterial.

We find no good cause for a new trial, upon a careful consideration of the whole case, and accordingly the entry must be

Exceptions overruled.

GUSTAVUS B. WHITELEY *vs.* INHABITANTS OF CHINA.

Evidence as to damages to horse by defective way.

In an action for injury to plaintiff's horse by reason of defect in a way the defendants are bound to keep in repair, testimony as to the value of the horse before and after the accident is admissible.

If the injury is alleged to have caused lameness, the condition of the horse and of his legs within a week after the occurrence is material, and testimony relative thereto should be admitted.

Where it is alleged that a horse, sound, safe, and kind before receiving an injury by breaking through a bridge, was by that accident rendered unsound and so timid as to be unsafe and unkind, testimony as to the conduct of the horse in crossing bridges immediately before and after the accident—and any other direct evidence of the facts alleged—is admissible.

ON EXCEPTIONS.

The plaintiff instituted this action to recover damages said to have been sustained by him by an injury done to his horse by a hole in a bridge which defendants were bound to keep in repair. The statement in the writ was, substantially, that in crossing the bridge the horse got one foot into this hole, was thrown down, lamed, and otherwise greatly injured and bruised on his legs and body, "and became so frightened that he has always been timid when crossing a bridge since, and has never been safe since that time."

The plaintiff was a witness in his own behalf at the trial, and after the usual preliminary questions to show him competent to ex-

press an opinion on the subject, was asked by his counsel, "What, in your judgment, was that horse actually worth before the accident happened?" This inquiry was objected to and the answer excluded. The witness testified that before the accident the horse was sound and kind, and was then asked whether or no after the accident he was as kind as before, which question he was not permitted to answer. His counsel then inquired of him, "What took place after the accident in crossing the bridge?" The reply was excluded, as was the answer to the question, what (if anything) took place immediately after the accident the first time the horse was harnessed and used.

Joseph Young, called by the plaintiff, testified that he knew the horse before the accident, and drove him; bought him within a week after the injury and owned him three months. He was asked if he made an offer for the horse before the accident, but was not allowed to state; he did testify, however, that in his opinion the horse was worth fifty dollars less after the accident than before. The plaintiff proposed to tell what he was offered for the horse on the day of the accident, before it happened; but this the court would not permit. Young was asked, "What was the condition of the horse when you bought him as regards his legs, his lameness, and as regards his kindness?" which was objected to by the defendant, and the answers excluded.

The judge's charge to the jury upon the points considered in the opinion was as follows:

"The rule by which you are to be governed is simply this: The damage to the property which was the direct and necessary result of this accident. . . . How much was the horse injured? How much was taken from his value as the direct and necessary result of that accident (if any)? That, as I understand the law, is the rule of damages by which you are to be governed. So you see this is a matter of dollars and cents. What was the property reduced in value in consequence of that accident? You will see, then, the necessity of some of the rulings which have been made in this case, that the case must be confined really to the damage which took

place—which happened at that time. If it had been proved that the horse, for instance, had a limb broken, why the necessary expense of curing it (if it was to be cured), or if it was such as to render it necessary to kill the horse, the value of the horse would have been the rule of damages. If the injury had been such that it could have been cured, the necessary expense of curing. Here, then, is nothing of the kind. So far as the subsequent history of the horse is concerned, for the reason which I have suggested to you, I did not admit that. What might have happened subsequent to this is not a matter important for us to know. It is proper for the plaintiff to prove to you the nature of the injury which resulted to the horse, and the extent of the damage or the amount to be deducted from his value in consequence of that injury, and that is as far as he is authorized to go. There are no consequential damages laid in the writ, and if there were, I do not deem it would make it legitimate or legal for him to prove them here. No question of that kind arises in this case. The rule which I give you is a simple one. You will apply the testimony to it, and come to such a conclusion as you are authorized to do from the testimony in the case."

The presiding judge was requested to instruct the jury that if the horse was rendered timid or unkind by the accident, they would have a right to take this fact into consideration, in estimating the damages, which instruction was given.

To the other rulings above-mentioned the plaintiff excepted, the verdict in his favor being small and, in his opinion, reduced by those rulings.

J. H. Greely, for plaintiff, in support of exceptions.

The evidence as to the value of the horse before and after receiving the injury was competent and could properly be given by the plaintiff, who had shown himself an expert. *Wyman* v. *Lexington*, 13 Met. 316; *Crane* v. *Northfield*, 33 Verm. 124; *Nellis* v. *McCorn*, 35 Barb. 115; *Honsee* v. *Hammond*, 39 Barb. 89; *Allison* v. *Chandler*, 11 Mich. 542; *Illinois Cent. R. R.* v. *Finnegan*, 21 Ill. 646; *Dickinson* v. *Fitchburg*, 13 Gray, 546.

So was that relating to the animal's kindness and the effect the accident had upon him in this respect and in inspiring timidity, as well as inflicting bruises visible a week afterwards.

The offers made for the horse in good faith, were admissible. 13 Met. 316; 13 Gray, 546; *March* v. *P. & C. R. R.*, 19 N. H. 372; *Carr* v. *Moor*, 41 N. H. 131; *Tuttle* v. *Holyoke*, 6 Gray, 447.

"The necessary expense of curing" the horse is not the true rule; time and trouble of effecting the cure are an element of damage. *Street* v. *Laumier*, 34 Misso. 469; *Gillett* v. *Western R. R.*, 8 Allen, 560; 11 Mich. 542; 41 N. H. 131, cited *supra*.

A. Libby, for defendants.

Evidence as to the value of the horse properly excluded. The witnesses stated the damage to the horse and the injuries he received. What happened afterwards had no tendency to show the damage occasioned by the accident. The plaintiff was allowed to prove that the horse was rendered timid and unkind by the injury; hence the instructions were too favorable to him, as this is too vague and speculative an injury to be a proper element of damage.

Tapley, J. This was an action to recover damages for injuries received by the plaintiff's horse from a defect in the highway of the defendant town.

The question raised by the exceptions relates to damages. The value of the horse before the accident and after was a material matter in ascertaining the amount of damage done. The condition of the horse as regards his lameness and his legs within a week after the accident, might aid very much in determining the character and extent of the injury received. The questions relative to this matter were, we think, proper, and the answers should not have been excluded.

The presiding judge instructed the jury "that if the horse was rendered timid or unkind by the accident, they would have a right to take this fact into consideration in estimating damages." This, we think, under this declaration was proper, and the plaintiff should have been allowed to prove this fact by any direct evi-

dence showing the fact. We cannot conceive of any evidence more direct to this point than the conduct of the horse afterward and immediately before the accident in similar places. Witness was allowed to state that previous to the accident the horse was sound and kind; if he was rendered unkind and timid so as to be unsafe to drive over any bridge thereafter, it was a "damage in his property" within the meaning of R. S., c. 18, § 61, and the plaintiff should have been allowed to show the fact.

Exceptions sustained.

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

LORENA E. FRENCH *vs.* JOSEPH W. PATTERSON.

Assessment of taxes. Tax sale.

It is sufficient if the assessors so describe the land of non-residents taxed by them as to identify it with reasonable certainty.

The description, "Orrin Emerson, or unknown, about 175 acres, 4th range, 17 school-district, part of the Craig lot, value $875, amount of tax, $15.93," held sufficient.

Such description sufficient also in the advertisement of land to be sold for taxes.

In order to authorize the sale of an entire parcel of land for taxes assessed thereon, it should distinctly appear of record that the sale of the whole "was required to pay the tax, interest, and charges;" if this be not made so to appear of record the sale will be invalid.

It should appear that the treasurer offered for sale, to pay these sums, a fractional part of the land; or that no person would pay the amount due for a less quantity of land than the whole parcel.

ON REPORT.

February 10, 1869, the plaintiff brought this action to recover certain land in Augusta, claimed by the defendant under a tax-deed from the city. She derived her title thus: Elias Craig, then owning the estate, conveyed it Nov. 4, 1861, to Louisa Emerson,

who, by her last will executed March 27, 1866, and admitted to probate the fourth Tuesday of the following May, devised it, under the residuary clause of that instrument, in these words: "I give and bequeath all the residue of my property both real and personal to Orrin Emerson, jr., of Bath, in the county of Sagadahoc, and his heirs, in trust for my husband and his father, Orrin Emerson, senior, during his life, remainder to my children in equal proportions. It is my wish that my said husband should have the management and control of all my said property while he lives, the title in the meantime to be in the said trustee as before provided. I also give power and authority to said trustee to sell any and all of said property at such times and prices as his father may deem best, and to give good and sufficient conveyances, the proceeds to go to my said husband for the benefit of himself and my children,—to be used by him for their benefit." . . . "I appoint the said Orrin Emerson, jr., sole executor of this will."

Orrin Emerson, jr., accepted this trust and gave bond for its faithful discharge, but did not give the bond required of testamentary trustees. Sept. 24, 1867, Orrin Emerson, senior, the *cestui que trust* under the will, and Orrin Emerson, junior, reciting that he was acting in his capacity of executor, conveyed the demanded premises to Lorena Emerson French, the plaintiff; and this was the title upon which she rested her claim thereto. To overcome it the defendant put in deeds from Louisa Emerson to Henry K. Chadwick of fifteen acres, and from her to Oliver Chase of another small lot, both these pieces of land being parcel of the tract conveyed to her by Craig; but Patterson derived no title to himself from Chadwick or Chase. He introduced, however, as covering the rest of the Craig lot, and all of the demanded premises, the records of the assessment of a tax thereon for the year 1864, and of the proceedings for its collection by a sale of the land. The only objections to these proceedings considered by the court were to the descriptions of the assessed land in the assessment list, advertisement and deed thereof, and to the course pursued by the treasurer in making sale of it; and it will be unnecessary to make

a statement of the other papers connected with the case. In the list of "non-resident taxes in Augusta for 1866," under the proper columns for the "names of the persons taxed, No. of lot, No. of range, school-district, No. of division, or description of range, etc., if known, value, amount of tax," appeared this entry: "Orrin Emerson of Pittston, or owner unknown, range 4, school-district 17, about 175 acres land, part of Craig lot, value $875, amount of tax, $15.93." In the advertisement the lot was described as owned by "Orrin Emerson or unknown, about 175 acres, part of Craig lot," with the value and tax as stated in the assessment. The treasurer advertised that he should sell "so much of the real estate taxed as will be sufficient to pay the amount due therefor including interest and charges." In his record of the sale he says: "I proceeded to sell, according to the tenor of the advertisement the estates upon which the taxes so assessed remained unpaid, and in the schedule following is set forth each parcel of the estate so offered for sale and the amount of the taxes, interest, and charges for which it was sold, the quantity sold and the names of the purchasers. The city authorized Charles E. Hayward to bid the amount due for taxes, etc., upon the lands sold, and its treasurer for this sum conveyed it to the city of Augusta and the city subsequently conveyed it to the defendant. The description in the deed from the treasurer to the city was: "About 175 acres of land in 4th range east of river, being a part of Craig lot south of Thomaston road." The court was authorized to enter such judgment as the nature of the case required.

S. Lancaster, for demandant.

Our title of record is perfect. The tax-title set up in defense must fail because the description in the assessment is insufficient; altogether too indefinite and uncertain. Craig's deed conveyed to Louisa Emerson more than three hundred acres; one parcel containing that number and the other an unmentioned quantity. The fifteen acres she sold to Chadwick, as appears by the deeds put in by defendant, were south of the Thomaston road, and those sold to Chase were north of that road. It is impossible, then, to tell

what part of the Craig lot was embraced in the lands advertised and sold. The record of sale does not show that the land was sold to the highest bidder or to him who would pay the tax, interest, and charges for the least quantity of land. This defect is fatal. *Lovejoy* v. *Lunt*, 48 Maine, 377. The advertisement, the only notice given the owner and the public of what was to be sold, was not like the record of sale or the deed, in its description of the premises.

The deed of Orrin Emerson, senior, if executed by him alone, would convey his right to manage and control the estate and his life interest therein and be sufficient to enable the plaintiff to maintain this suit. Orrin Emerson, jr., held a mere dry, naked trust with no interest in the property. Then under the Statutes of Uses, 27 Henry VIII, c. 10, which is part of our common law, the legal estate was transferred to the *cestui que use* the instant the will was approved, and vested the whole estate in him. 1 Greenleaf's Cruise (ed. of 1849), 349, Tit. 11, c. 3; *Hayes* v. *Tabor*, 41 N. H. 521; *Northampton B'k* v. *Whiting*, 12 Mass. 108; *Thatcher* v. *Omans*, 3 Pick. 521; *Morgan* v. *Moore*, 3 Gray, 323; *Johnson* v. *Johnson*, 7 Allen, 197; 4 Kent's Com. 294; *Bowman* v. *Long*, 26 Geo. 142; *Adams* v. *Guerard*, 29 Geo. 651; Saunders on Uses, 85, 98.

G. C. Vose, for tenant.

The description of the property in the assessment roll was all that could be reasonably required and was sufficient; and it agrees substantially with that in the subsequent documents. There has been no such tender of the taxes, &c., due as the law requires; the one made was not by nor to the proper person, nor of a sufficient sum.

Orrin Emerson, jr., had no right to convey. He had obtained no license from probate court to do so, nor was this sale necessary to pay debts; nor could he convey as testamentary trustee, since he had given no bond in that capacity. *Groton, Judge* v. *Ruggles*, 17 Maine, 137; R. S. c. 68, § 1.

DICKERSON, J. Writ of entry. The plaintiff claims title under a warrantee deed from Elias Craig to Louisa Emerson, dated Nov. 4, 1861, the will of Louisa Emerson, probated in May, 1866, and a deed signed by Orrin Emerson, jr., executor of Louisa Emerson and Orrin Emerson, dated Sept. 28, 1867.

Louisa Emerson acquired a valid title to the demanded premises by the Craig deed, and held that title at the time of her death. Did the deed of Orrin Emerson, jr., her executor, signed also by Orrin Emerson, her husband, convey her title to the plaintiff? Orrin Emerson, jr., gave that deed in his capacity as executor of the will of Louisa Emerson. An executor, as such, has no right to sell real estate of the testator. The estate was not rendered insolvent, nor was the requisite license to sell granted by the probate court. His deed, therefore, as an executor's deed, conveyed no title to the plaintiff.

By the provisions of the will the residue of the property, not otherwise disposed of, was bequeathed to Orrin Emerson, jr., the executor, in trust for Orrin Emerson, during his life time, remainder to the testatrix's children. By accepting this trust Orrin Emerson, jr., became a testamentary trustee. The statute requires such trustees to give a bond for the faithful execution of their trust, except in certain specified cases, of which the case at bar is not one. The trustee, not having given such bond, could not convey a valid title to the demanded premises as trustee, if he had undertaken to do so. If, therefore, the deed of Orrin Emerson, jr., to the plaintiff could properly be construed as a deed given in his capacity as trustee, as the counsel for the plaintiff contends, it would not be effectual to pass the title. But we think that deed will not bear such construction. It purports to have been given in the grantor's capacity as executor, and there is nothing in its phraseology to indicate a different intention.

But the deed in question was also signed by Orrin Emerson, the *cestui que trust.* The will imposed no active duties upon the trustee, but made him the simple depositary of the title. It provided that the *cestui que trust* should have the management and

control of the property while he lived, for his benefit and the benefit of the testatrix's children. Power was also given to the trustee to sell the estate, when the *cestui que trust* should think best. The trust was clearly a passive trust. In such a case this court has held that the trustee cannot maintain a writ of entry against the *cestui que trust.* Besides, the trustee sanctioned the conveyance by joining in the deed. *Skowhegan* v. *Sawyer*, 57 Maine, 506.

The plaintiff having acquired a valid title to the demanded premises by the deed of Sept. 28, 1867, is entitled to maintain this action, unless the defendant acquired title thereto by virtue of his tax deed from the city of Augusta, dated Aug. 7, 1867.

As the plaintiff contests the validity of the tax sale he is not bound to pay or tender payment of "the taxes, charges, and interest," under R. S. of 1857, c. 6, § 145 until the defendant has produced the treasurer's deed, duly executed and recorded, the assessment signed by the assessors, and their warrants to the collector, and shown that the taxes were advertised according to law;" and the plaintiff may also contest the validity of these proceedings at every stage of the proof without such payment or tender. *Inhabitants of Orono* v. *Veazie*, 57 Maine, 518.

In order to establish his title under his tax-deed the defendant introduced evidence that these preliminaries of the statute had been complied with. No objection is made to the form or execution of the deed, but the counsel for the plaintiff contends that the assessment is void for uncertainty in the description of the premises. The description is as follows: "Orrin Emerson or unknown, about 175 acres, 4th range, 17 school district, part of Craig lot, value $875, amount of tax $15.93." It is not questioned but the range and school district are given correctly, or that the premises were known as a part of the Craig lot, but as the evidence shows that the "Craig lot" at the time of the assessment consisted of more than one parcel, it is argued that it is uncertain which parcel was intended to be assessed. The tax was assessed to "Orrin Emerson," who was the husband of Louisa Emerson, the owner of

the Craig lot, "or unknown." Orrin Emerson owned no land, and the parcel intended by the designation, "Orrin Emerson or unknown," . . . "part of Craig lot" was undoubtedly that part of the Craig lot which his wife continued to own at the time of the assessment. The deeds and other evidence show that that was the part of "the Craig lot" south of the Thomaston road, exclusive of the fifteen acres conveyed to Henry K. Chadwick. That was the parcel sold by the treasurer, as more fully appears by his return of the sale; and the description in the deed to the defendant substantially corresponds with that return.

The statute does not require, nor is it often practicable that the assessors of taxes should give a minute description of the non-resident lands assessed by them. It is sufficient if they so describe them in their assessment that they can be identified with reasonable certainty. We think that this was done in the case at bar.

The assessment appears to have been duly signed by the assessors, and the warrant duly issued. The reasoning in support of the sufficiency of the description in the assessment applies also to the description in the advertisement. The taxes, moreover, appear to have been advertised according to law.

The record of the sale shows that the whole tract was sold. In order to authorize this, it should distinctly appear of record that the sale of the whole tract "was required to pay the tax, interest, and charges." The treasurer has no authority to sell a foot of land more than is required for this purpose. It may or may not be necessary to sell the whole tract. This is to be determined by ascertaining whether or not any person at the sale will pay the required amount for a part of the land. In order to do this the statute provides as follows: "At the time and place appointed for the sale, the treasurer shall offer for sale so much of the estate taxed as shall be required to pay the tax with interest, . . . and the costs of advertising. . . . If the bidding is for less than the whole, it shall be for a fractional part of the estate, and the bidder who will pay the sum due for the least fractional part shall be the purchaser." R. S. of 1857, c. 6, § 143.

The record shows that the treasurer sold the whole tract, but it does not show that he "offered for sale" a fractional part of it, or that no person would pay the amount due for a less quantity than the whole land. Indeed, it does not appear that the purchaser was the highest bidder, or the one who would pay the sum required for the least quantity of the land; or that the statute requirement for ascertaining whether or not any person present at the sale would pay "the tax, interest, and charges" for a part of the land was complied with. If the reference, in the return of the treasurer's doings at the sale, to the advertisement may be regarded as making that a part of the return, it would then only appear that he "sold so much of the estate as was sufficient to pay the amount due." He may have sold what was "sufficient" for this purpose, and yet more than "was required" therefor. He had authority to sell only so much land "as should be required" to pay the tax, interest, and charges. The defect in the record consists in its failure to show that the treasurer pursued the mode provided by the statute, for ascertaining whether or not the sale of the whole tract "was required" to pay the assessment due. We regard this omission as fatal to the defendant's title. The sale of land for taxes is a proceedure *in invitum*, and the provisions of the statute authorizing such sale must be strictly complied with or the sale will be invalid. Blackw. Tax Titles, 47, 67, 93, 94, 104; *Loomis* v. *Pingree*, 43 Maine, 311; *Lovejoy* v. *Lunt*, 48 Maine, 378.

The defendant having failed to show a compliance with one of the requirements of the statute, preliminary to his right to require the plaintiff to prove payment or tender of payment of the amount due, it becomes unnecessary to determine the sufficiency of the alleged tender. *Judgment for the demandant.*

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

Mr. Chief Justice Appleton added the following opinion.

APPLETON, C. J. The tax-title under which alone the defendant claims is void for the reasons assigned in the opinion of Mr. Justice Dickerson.

The plaintiff claims title under a deed of warranty from a party in the possession and occupation of the premises conveyed. This makes out a *prima facie* case. *Blithen* v. *Dwinel*, 34 Maine, 133.

Judgment for the demandant.

EVELYN C. PEACOCK, appellant, *vs.* EDWARD PEACOCK.

Probate jurisdiction. Notice—of certain petitions required.

No notice is required upon the petition for the appointment of a guardian to a minor less than fourteen years of age, resident in the county where such petition is filed.

Upon a guardian's petition for the care of his ward's person to be committed to him, under R. S., c. 67, § 3, notice to the living parent of the child must be given.

ON EXCEPTIONS.

Upon the petition of Edward Peacock of Farmingdale, in Kennebec county, uncle of Mary E. Peacock, who was stated in the petition to be "aged two years, now resident of Farmingdale, in said county, minor child of Solomon E. Peacock late of the city of New York, deceased, and of Evelyn C. Peacock, now of said city of New York," that gentleman, signing as "nearest of kin in this State," was appointed guardian of said Mary by the judge of probate of Kennebec county, at a probate court holden at Augusta on the fourth Monday of January, 1871, when said petition was filed. At the same session of that court the guardian petitioned to have the care of the child's person committed to him, which prayer was granted the same day. No notice of the pendency of either of

these petitions was ordered or given. On the tenth of the following month the child's mother appealed from these decrees, filing as her reasons of appeal the non-residence of the minor in the county and that she had no estate therein ; and that the appellant was the widowed mother of the child, "competent to transact her own business" and that to take the child from her would be contrary to law. In the appellate court the appellant moved to reverse the decree appointing the respondent guardian for want of jurisdiction, apparent of record, and that the petition be dismissed. The presiding justice granted this motion and the appellee excepted.

J. Baker, for appellee.

The language of each petition states a case clearly within R. S., c. 67, §§ 1, 3. This court has no jurisdiction, because there was no legal appeal. There were two several, distinct petitions, but there is only one appeal and that seeks to affect both petitions.

No notice required on petition for appointment of guardian to a minor under fourteen. Compare the various statutes and revisions. *Coltman* v. *Hall*, 31 Maine, 196; *Pierce* v. *Irish*, Ib. 254–265. Nothing to show that notice was not given. The record need not state the fact of notice. *Marcy* v. *Marcy*, 6 Met. 368. If the probate court had no jurisdiction the appeal and not the original petition must be dismissed. *Veazie Bank* v. *Young*, 53 Maine, 555.

A. Libbey, contra.

There should have been notice given. *Shaw* v. *Hathaway*, 14 Mass. 222. The averments do not show jurisdiction. *Fairfield* v. *Gullifer*, 49 Maine, 360.

APPLETON, C. J. The judge of probate appointed the appellee as guardian of Mary E. Peacock, a minor of the age of two years, upon the following petition:

"To the judge of probate for the county of Kennebec.

The undersigned represents that it is necessary that a guardian should be appointed for Mary E. Peacock, aged two years, now

resident of Farmingdale in the said county, minor child of Solomon E. Peacock late of the city of New York, deceased, and of Evelyn C. Peacock, now of said city of New York, and prays for the appointment to that trust of himself of Farmingdale.

EDWARD PEACOCK, uncle of the minor,
and nearest of kin in this State."

Upon the above petition, the appellee was appointed guardian.

When the record in the case was read the appellant moved that the decree below appointing a guardian be reversed for want of jurisdiction in that court, apparent on the face of the record, and that the petition be dismissed, and the court so ruled, to which rulings exceptions were duly taken.

The ground mainly relied upon is that no notice had been given to parties interested of the pendency of the petition before the decree. We think none was required.

By R. S., c. 67, § 1, "the judge of probate may appoint guardians to minors residing in his county, or out of the State and having estate in his county," etc. By § 2, "If the minor is under fourteen years of age, the judge may nominate and appoint his guardian. . . . If the minor is over that age, he may nominate his own guardian in the presence of the judge or register of probate, or in writing certified by a justice of the peace," etc.

The petition is within every provision of the statute and was assumed as true by the presiding justice. The minor is under fourteen years of age and is a resident within the county of the judge of probate to whom petition was made. The mother is a resident of another State. A child of the tender age of two years should not be left without guardianship.

Now, in such case as this there is no necessity of notice. There is no body within the jurisdiction to be cited to appear, if a citation were to be required. Nor does the statute direct the giving of a citation in such case. *Coltman* v. *Hall*, 31 Maine, 196.

When the minor is over fourteen years of age and has the right to nominate his guardian, he should be cited to appear. So in case of appointing a guardian for a spendthrift or *non compos mentis.*

But in case of a minor under two years of age, the judge of probate appoints upon petition, as in England is done by the Chancellor. The statute relating to guardians recognizes the distinction between appointing guardians for those under and those over fourteen years, requiring a citation in the latter case and not in the former. Indeed, upon the face of the petition, ample cause is shown for the action of the probate court, for an infant of the tender age of two years, a resident of this State, should not be left a mere waif without any one to care for and protect it.

The guardian being appointed, different considerations apply when the question arises as to the care of the person and education of the minor.

By R. S. of 1871, c. 67, § 3, the guardian appointed by the judge of probate "shall have the care and management of all his ward's estate, and continue in office until the ward is twenty-one years of age, unless sooner lawfully discharged; but the father, if alive and competent to discharge his own business, if not, the mother, while unmarried and thus competent, shall have the care of the person and education of the minor; otherwise, these duties shall devolve upon the guardian; and in any case, the judge may decree them to him, if he deems it for the welfare of the minor, till his further order."

In this case, the father having deceased, "the care of the person and education of the minor" devolve on the mother by the statute. They cannot be taken from her without due notice and a hearing. It remains with her until, upon such hearing after notice, the judge shall decree upon the petition of the guardian, that he deems it for the welfare of the minor that it shall be given to such guardian. *Exceptions sustained.*

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

NOAH WOODS, *scire facias*, *vs.* LORENZO D. COOKE.

Scire Facias. Tender. Demand. Officer's return—amendment of.

Where a trustee was charged conditionally, that "if the plaintiff pay the trustee $2000 within sixty days after final judgment, then the trustee is to deliver to the officer" certain specified property, holden by the trustee as security, and during the sixty days the trustee disposed of a portion of the property and appropriated the proceeds toward the payment of his claim, a tender by the plaintiff of simply the balance due was held sufficient.

When by a previous disposition of such property the trustee renders himself unable to deliver it upon demand, it is not necessary for the maintenance of *scire facias* that the officer make a demand.

A return of *nulla bona*, dated the second day after the return day of the execution, taken in connection with a previous return by the officer that by virtue of the execution he had made demand upon the trustee, shows with sufficient certainty that the search for goods was made in the life-time of the execution, and that what was done by the officer was done by virtue of it.

The court may allow an officer to amend his return upon execution, by adding his certificate of *nulla bona* after the return day of the execution.

It is no defense to an action of *scire facias*, that the note, upon which the original suit was instituted, was afterwards paid by an indorser, and the suit carried on for the benefit of such indorser in the name of the payee.

The defendant in *scire facias* cannot show, in order to reduce the damages, that the adjudication of the court in the original action was erroneous.

ON REPORT.

Scire facias against Lorenzo D. Cooke as trustee of Barker A. Neal. The disclosure of this defendant shows that he and Barker A. Neal made, some time before, a joint purchase of $7,000 worth of cigars, for which they paid down $1,000 each, and gave a note for $5,000, of which Cooke afterward paid the whole, thus leaving an indebtedness from Neal to him of $2,500. Cooke sold a part of the cigars to one Stanwood and took a note for $1,000, which at the time of the disclosure was considered perfectly good, and was then in Cooke's hands. Cooke also held under his control the unsold cigars. Neal had previously subscribed to build one-eighth of the schooner "Marion Draper" which would cost about $2,000, and had paid toward it $1,600, and it was agreed that his propor-

tion of the ship's earnings should be appropriated to the payment of the balance. Cooke disclosed that this one-eighth of the "Marion Draper" stood in his name as collateral security for Neal's indebtedness to him.

The adjudication of the court upon this disclosure was as follows: "The trustee charged conditionally, namely: if the plaintiff pay the trustee $2,000 and interest from April 19, 1865, within sixty days after final judgment, then the trustee is to deliver to the officer one-half of the cigars and the interest in the vessel."

Judgment was entered up March 26, 1869, and execution issued the following day. Before the expiration of the sixty days Cooke sold the remainder of the cigars. On the 17th day of May, 1869, plaintiff made a tender of $608.26, this being the amount which he claimed was due the defendant, allowing interest at six per cent. The defendant claimed that by agreement with Neal he should receive interest at the rate of nine per cent.

The following return appears upon the execution:

"Kennebec, ss. May 29, 1869.

By virtue of this execution I have this day demanded of L. D. Cooke, trustee within-named, the goods, effects, and credits of the within-named debtor, viz.: all his, said debtor's interest in the vessel or schooner Marion Draper in the hands and possession, of the said trustee, and named in the order of court, which he then and there refused to deliver to me, the said one-half of the cigars being accounted for as so much money now in the hands of said trustee, and retained by him.

GEORGE WHEELER, Deputy Sheriff."

The execution was filed in the clerk's office with no further return, and, subsequently, by leave of court, to the granting of which defendant objected, the officer made the following additional return:

"Kennebec, ss. June 29, 1869.

I certify that I have made diligent search for the property of the within-named debtor, but could find none, so I return this execution is no part satisfied.

GEORGE WHEELER, Deputy Sheriff."

The defendant introduced testimony in this case showing that the note upon which the original suit was instituted, was paid after suit was brought by one of the indorsers and the action carried on by consent of the payee for the benefit of that indorser, and also that, after he had been charged as trustee, Stanwood had gone into bankruptcy and but twenty per cent. had been received upon the $1,000 note.

This case has been before the law court once before on demurrer to the declaration. See 58 Maine, 282.

J. Baker, for the plaintiff.

The amendment of the officer's return being legally made, the return of *nulla bona* on the 29th day of June, 1869, two days after the expiration of the execution, was sufficient. *Austin* v. *Goodale*, 58 Maine, 109.

The claim of defendant to be allowed for loss on the Stanwood note and for nine per cent interest was idle. The decree of the court, not excepted to, was conclusive ; *res adjudicata.*

A. Libbey, for the defendant.

I. Plaintiff must show a legal demand on the trustee, which could not be made until payment or tender of sum fixed by the court. The amount of $2,000 and interest from April 19, 1865, to May 17, 1869, was $2,489.34. That amount should have been tendered before demand. But the return shows no legal demand, as the officer demanded Neal's interest in the schooner only.

II. The execution was not returned unsatisfied, and even if it were competent for him to amend it by leave of court, then the return is a nullity, for it was dated two days after the return day. The return must appear to be made during the life of the execution, or it is void. *Prescott* v. *Wright*, 6 Mass. 20.

The case is not like *McLellan* v. *Codman*, 22 Maine, 308. In the case at bar the whole return may be true and the officer may have made no search or effort to collect till after the 27th of June.

III. The attachment was dissolved by payment of the note after suit. Taking judgment in the suit after the note was paid was a fraud upon the trustee.

IV. If the suit can be maintained, defendant is entitled to have the $2,500 paid by him for Neal, less one-half received on the Stanwood note, allowed.

WALTON, J. The defendant claims that he is not liable for the value of the property on account of which he was adjudged trustee, for various reasons.

1. Because the full amount of his debt ($2,000 and interest) was not tendered him. Such a tender was not necessary. After he was adjudged trustee and before the property was demanded of him, he had sold enough of it to pay all of his debt and interest except $608.26, and this amount was tendered him. Why should the plaintiff be required to tender him $2,000 and interest when there was only $608.26 due? Why should the defendant be allowed to exact a tender which he could not legally accept? He should not. The claim is as unfounded in law as it is destitute of reason. Mr. Benjamin testifies that the defendant agreed to account for the cigars, most if not all of which he had before that time sold and received the money for, as so much money in his hands. He says they figured up the amount they came to, and that he, the defendant, agreed with Mr. Bradstreet that that should be received as so much money as a part of the tender; that Mr. Bradstreet tendered the balance to make out $2,000 and interest from April 19, 1865; and that this balance was $608.26; that no objection was made by the defendant as to the amount figured up in his hands that belonged to the debtor, Neal, or that $608.26, did not make up the $2,000 and interest, according to the order of the court; that what the defendant then objected to was the order of the court. And we do not understand the defendant as denying that such a tender was made. He pretends not to recollect precisely how the sum tendered him was arrived at, but he does not deny that it was the full balance due him, according to the judgment of the court, and interest reckoned at the rate of six per cent per annum, after deducting therefrom the money in his hands. In our judgment such a tender was all that was legally required of

the plaintiff. The law is well settled that a tender which cannot be legally accepted need not be made. *Richards* v. *Allen*, 17 Maine, 296; *Newcomb* v. *Brackett*, 16 Mass. 161. As the defendant could not legally accept more than was justly his due, more need not be tendered. All that was due was tendered him. We think the tender was therefore sufficient.

2. Another ground of defense is that the officer's return on the execution does not show a demand of the property; that it shows a demand of the debtor's interest in the schooner only, and no demand for the cigars. No such demand was necessary. The defendant had sold the cigars. Of what use would a demand be? The law is well settled that a demand that cannot be complied with need not be made. If a deputy sheriff release goods attached, no demand upon him for the goods is necessary to make him liable to the creditor for their value. *Cooper* v. *Mowry*, 16 Mass. 5. It is there said to be a settled rule of law that a demand, otherwise necessary, becomes useless and unnecessary when the party on whom it is to be made has disabled himself from complying with it by his own act. And where the receipter for a ship, which had been attached, promised to re-deliver her on demand, and afterwards permitted the owner to take her to sea, it was held that no demand was necessary to make him liable. The ship having gone to sea the demand, if made, could not be complied with. No demand was therefore required. So in this case. The cigars having been sold, a demand if made could not be complied with. None was therefore required. *Webster* v. *Coffin*, 14 Mass. 196.

3. Another ground of defense is that the officer's return of *nulla bona*, being dated two days after the return day of the execution, does not show that it was in his hands while it was in force, and that the search for goods was made by virtue of it. This is, perhaps, true of so much of the return as relates to the search for property of the debtor. But this is not the whole of the officer's return. Under an earlier date he certifies that he demanded of the defendant the debtor's interest in the schooner, and that he did so by virtue of the execution. This shows that the execution was in

his hands long before the return day. We think the two returns, taken together, show with sufficient certainty that the search for goods was in the lifetime of the execution, and that what was done by the officer was done by virtue of it. This brings the case within the principle of the decision in *McLellan* v. *Codman*, 22 Maine, 308.

4. Another objection to the officer's return is that as it was originally made, it was fatally defective, and that it was not competent for the officer to amend his return by adding the certificate of *nulla bona* after the return day had expired. That it was competent for the court to permit the officer thus to amend his return we cannot doubt. Such amendments are almost of daily occurrence.

5. It is claimed that the attachment was dissolved by payment of the note declared on in the original suit after the action was brought. Paid by whom? Not by the maker, surely. The case shows that one of the indorsers or his administrator paid the amount due upon the note to the holder, and that it was then agreed that the suit should go on for the benefit of the party thus paying. We hardly think it will be seriously claimed that such a payment would be a bar to the further prosecution of that suit, and much less a bar to this suit; and if not, we perceive no ground on which it can be claimed to operate as a dissolution of the attachment. We think this objection is not well-founded.

6. We now come to the question of damages. It is said that when the defendant disclosed in the original suit, he held a note against one Stanwood for $1,000, which he took on a sale of cigars owned by him and Neal, jointly; that Stanwood has since gone into bankruptcy, and that only twenty per cent of the amount due upon the note has been paid; and he claims that he should have deducted, by way of reduction of damages, one-half of the amount of the loss upon the note. We think not. The amount to be paid or tendered the defendant was definitely ascertained and adjudicated upon in the trustee suit. The greater portion of that amount has been paid him by a sale of the cigars. The balance has been

tendered him. Upon such tender it was his duty to deliver to the officer holding the execution, the unsold portion of the property on account of which he was adjudged trustee. This he refused to do. He thereupon became liable to the creditor for its value. To allow him now to go behind the former adjudication of the court, and show that it was wrong, would not only be in violation of well-settled rules of law, and the express provisions of the statute applicable to such cases, but against public policy, as it would tend to encourage future disobedience to the judgments and decrees of the court, in the hope that thereby a similar advantage might be gained. The cigars having been sold by the defendant and the proceeds accounted for, the true measure of damages is the value of the debtor's interest in the schooner, less the balance due from him to the defendant as ascertained at the time the tender was made.

The report states that if the action can be maintained the damages are to be assessed by the court. Whether it was intended that the damages should be assessed by the law court or a judge at *nisi prius* is not clear. But as the assessment is not difficult, and if done by the law court will save further litigation and bring the case to a more speedy termination, we have concluded to make it.

The evidence satisfies us that the fair value of the debtor's interest in the schooner was $2,000. We are also satisfied that the amount justly due the defendant, May 17, 1869, was $608.26. Balance $1,391.74. To this interest should be added from the time of the demand. *Judgment for plaintiff for* $1,391.74, *and interest from May* 17, 1869.

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

ATWOOD HARMON *vs.* FREDERIC W. HARMON and trustee.

License to cut growth may be inferred. Evidence.

License to cut wood and timber may be verbal or it may be inferred from circumstances.

The defendant in an action of trespass *quare clausum* relied upon a power of attorney given him by plaintiff. The plaintiff claimed that a previous power to his brother had been revoked and this one given to his father (the defendant) by reason of false representations contained in letters from several persons, to the effect that his brother was trying to swindle his father out of all his property: that his father was destitute, and that plaintiff had better put the real estate into his father's hands; *held*, that testimony relative to the pecuniary circumstances of the father at the time these letters were written was properly rejected.

"On exceptions, the court will not consider the findings of the jury as to whether the verdict is or is not against the weight of evidence."

ON EXCEPTIONS.

This was an action of trespass for breaking and entering the plaintiff's close at divers times between January 1, 1866, and March 17, 1871, the date of the writ, and for cutting and carrying away wood and timber.

The case shows that the plaintiff received his title to the real estate, upon which the trespasses are alleged to have been committed, from the defendant, his father, December 27, 1862, and that the conveyance was without consideration, the son being in California at the time it was made; that the father afterward continued in occupation as before and paid the taxes thereon. On the 24th day of February, 1868, the plaintiff gave to the defendant a general power of attorney, of the revocation of which, by a power of attorney given to Hartson Harmon, plaintiff's brother, the defendant had notice about the seventh day of February, 1870.

The power of attorney to Hartson Harmon was revoked and a second power of attorney given to the defendant on the 16th of March, 1870, which was again revoked on the 17th of March,

1871, the day upon which the writ in this case was made. The plaintiff in his deposition, in answer to a question as to what induced him to revoke the power of attorney given to his brother Hartson, and to give a power of attorney to his father to take charge of, manage, and control the real estate, testified: "I received letters from Harris Doe, William Haskell, and Elbridge Haskell, and also other parties, that my brother was going to swindle my father out of all his property; that he was destitute and that I had better put the real estate hereinbefore referred to, in my father's hands."

The plaintiff proposed interrogatories to several witnesses, called by him, in regard to the pecuniary circumstances of the defendant, as to whether he had stated to witness the amount of insurance money which he had in his pocket at the time of the conversation; whether defendant had called on the witness in regard to a town order for $400; whether the defendant ever told the witness that he had a thousand dollars in his pocket in the spring of 1870, whether he ever told witness that he had money enough to carry him through and didn't want any of his son's help, and questions of similar import, all of which, being objected to, were excluded by the court.

The presiding judge, among other things, instructed the jury as follows: "With respect to the acts alleged to have been committed, whatever they were, from the 1st day of January, 1866, to the 24th of June, 1868, he (defendant) says he had a license, not a written license, authorizing him to cut off wood and use it, but there was an understanding between him and the defendant growing out of the relations of the parties; the acts of the parties which in law and in fact amount to a license; which affords him a complete protection, and answers for all the acts he did and committed upon the premises during that time. In order to show a license for doing those things, it is not necessary that there should be a written permission or authority or power of attorney. It may be verbal. It is not necessary that the parties should get together and talk the matter over, the one giving the other permission and

authority verbally and personally to do the acts. It may be inferred and proved from other circumstances, like any other fact."

The jury found for the defendant, and to the instructions and the refusal of the judge to admit the testimony above referred to, the plaintiff excepted.

Baker & Baker, for the plaintiff.

E. F. Pillsbury and *W. P. Whitehouse*, for the defendant.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*. The case comes before us on exceptions. The whole evidence, however, is reported and the counsel for the plaintiff has endeavored to satisfy us that the finding of the jury was against the weight of evidence on various issues raised during the progress of the trial. That may be so, but no motion for a new trial as against evidence has been filed. All, therefore, that remains for us is to examine the validity of the exceptions which have been taken to the rulings of the presiding justice.

It seems that the parties are father and son; that the defendant conveyed the land upon which the trespass is alleged to have been committed to his son; that the deed was without consideration and without the knowledge of the son at the time that it was given, and that after the deed was recorded the father remained in possession as before, paying the taxes thereon, etc.

The presiding justice after calling the attention of the jury to the relationship of the parties and the circumstances of the case, instructed them that to show a license, it was not necessary that there should be a written permission or authority or power of attorney; that it might be verbal or inferential from circumstances, and then left it for the jury "to determine whether there was or was not a license for the defendant to do what he did."

The rulings on these points were in accordance with law. A license may be created by parol. *Ricker* v. *Kelley*, 1 Greenl. 117; *Batchelder* v. *Sanborn*, 24 N. H. 479. So it may be inferred from the relations of the parties and the circumstances of the case. *Lakin* v. *Ames*, 10 Cush. 198.

No incorrect rule of law was given to the jury. If any further instructions were needed for the better elucidation of the case, the counsel for the plaintiff should have requested them. If there were any error of fact in the finding of the jury it is not before us for correction.

There were trespasses claimed to be committed between different periods of time, as they are specified in the charge of the judge. As to the fact of their commission, that was left to the judgment of the jury.

It seems that the plaintiff on or about the 24th of June, 1868, gave his father a power of attorney, which remained in force until Feb. 9, 1870, when it was revoked and one was given to his (plaintiff's) brother. While this power of attorney was in force, it is not claimed that the defendant is responsible in trespass for any acts done under it.

On the 16th day of March, 1870, or about that time, the power of attorney last mentioned was revoked and a new power given by the plaintiff to his father, which remained in force until its revocation in 1871. The plaintiff seeks to recover for trespasses claimed to have been committed during this last-mentioned period, on the ground that the defendant obtained the power of attorney by fraudulent misrepresentations.

The question of fraud in obtaining the last-mentioned power of attorney was submitted to the jury, and the fact was negatived by their verdict.

But the plaintiff claims that evidence tending to establish the fraud was improperly excluded. In his deposition, in answer to the inquiry why he revoked the power of attorney given his brother, Hartson Harmon, and gave a new power to his father to take charge of and manage and control his real estate, his answer is as follows: "I received letters from Harris Doe, William Haskell, and Elbridge Haskell, and also other parties, that my brother was going to swindle my father out of all his property; that he was destitute and that I had better put the real estate hereinbefore referred to in my father's hands."

It is claimed that evidence to contradict the letters thus alleged to be the ground of the revocation of one power of attorney and the giving of another, should have been admitted. But the letters in question only state that "Oliver and Hartson are trying to hurt your father;" that "Harts. and the rest of the boys, Will and John, they are trying to get every cent he has got and turn him out for himself; and this land he gave you, they are bound to get it away from him and I think you ought to hang to your father."

Now, these letters are mainly advisory. They do not say that the father was destitute, but that he might become so, nor that one of his sons (my brother) was going to swindle him out of his property, but the boys were trying to get his property.

Now, however these letters are to be regarded, the evidence offered and excluded can hardly be deemed as contradictory to the statements contained therein. Whether the defendant stated that he had the insurance money received for his mill that had been burnt, whether he had a town order for $400, whether he stated he had money enough to carry him through and did not want any of his son's help, whether he ever said he had a thousand dollars in his pocket, whether in Feb., 1870, he was worth from $2,500 to $3,000, were questions, howsoever answered, which would not contradict the statements contained in the letters which, as the plaintiff says, induced his action in the premises. As for any and all other purposes, they were obviously immaterial and irrelevant.

So far as relates to the defendant's letter to the plaintiff, he does not say that was what induced his changing his attorney, but confines himself to what was said by Doe, and the Haskells and other parties, which can hardly be deemed as including his father.

The power of attorney was revocable at the will of the plaintiff. It is not denied that if properly obtained it was a protection to the defendant during its continuance.

It may well be questioned, whether the statements contained in the letters upon which the plaintiff based his action, even if untrue, would avoid and render null a power of attorney under seal. If not, then it was voidable only and in full force until revoked. If

so, while remaining in full force and not revoked, the defendant would not be a trespasser for acts done under its authority, and the instructions on this point were sufficiently favorable to the plaintiff.

Exceptions overruled.

CUTTING, DICKERSON, and PETERS, JJ., concurred.

DANFORTH and VIRGIN, JJ., concurred in the result.

FREDERIC W. HARMON *vs.* HARTSON HARMON.

Duress, what is.

Mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment.

The threats of personal injury which the law considers duress are such as constitute an impending danger to life, or of serious bodily harm sufficient to overcome the will of a man of ordinary firmness.

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ON EXCEPTIONS.

ASSUMPSIT to recover fifty dollars, alleged to have been paid under threats of personal injury and of criminal prosecution. The parties formerly owned a mill together, the plaintiff owning three-fourths and the defendant one-fourth. In the fall of 1869 the mill was burned, and the plaintiff collected $300.00, insured thereon; of this sum the defendant claimed one-quarter as being upon his interest. The plaintiff testified that Hartson came to his house and demanded it. "He ripped and swore very bad, damned me, and G—d d—d me. That scared me, for he is a man I haven't heard speak a wicked word for a great many years. I went out into the shed and he followed me out there, talking tremendous to me; he said he would have me in jail before night and he would have the handcuffs on me, for I had burned the

mill, and he would have the insurance. As he followed me out he had his knife whittling this way [illustrates] as quick as I ever saw anybody, and come up close to me. I started off from him and begged him to keep away from me." The witness went on to say the same language and threats were repeated until (as he says) "My son William came and put his hand on to me and led me off into the other room, and said it was best to have it settled. I told him that I should never settle it, in no way, thinking I owed him a copper, but for some particular reasons I consented to let him have $50.00. When I placed the bill upon the table I told him I would let him have $50.00, not that I owed it to him, or anything of the kind, but for sake of saving my wife's life. . . He said I burned the mill; that he had seen three responsible men who saw me set that mill on fire. If he hadn't gone as far as that I shouldn't have let him have any money, but I found she could not stand it." This evidence was substantially corroborated by plaintiff's wife, and his counsel contended that this constituted such duress as would enable him to recover the money so paid. Upon this point the jury were instructed as follows: "Duress must necessarily be one of two kinds. It either refers to threats or to imprisonment. There is no pretence of imprisonment here, of any kind; therefore that is laid out of the case. There is something said about threats of prosecution. That you may also lay out of the case; for a party, if he settles under a threat of prosecution, cannot recover it back in a case of this kind. This duress, or settlement under duress, must be done to relieve himself from some impending danger that hangs over him at the time, or some absolute imprisonment, which I have told you does not exist in this case. Now, was there any impending danger at that time? The plaintiff must satisfy you that there was; that there was absolute danger of serious bodily harm, either of losing his life, or a limb, or serious danger to his person on that occasion. If the testimony fail to satisfy you of that point, then the plaintiff cannot recover on this ground, because he is not to pay over his money under any less danger than that."

To these instructions the plaintiff excepted.

E. F. Pillsbury and *W. P. Whitehouse*, for plaintiff.

Threats of imprisonment may amount to duress. 1 Coke on Lit. 253, 6, § 419; 2 Coke's Inst. 483; 1 Sheppard's Touchstone, 61; Story on Cont. § 91; *Eddy* v. *Herrin*, 17 Maine, 338; *Whitefield* v. *Longfellow*, 13 Maine, 146; *Foshay* v. *Ferguson*, 5 Hill, 154; *Taylor* v. *Jacques*, 106 Mass. 291.

Baker & Baker, for defendant.

There was no evidence of threats of personal injury; had there been the instruction that "there must be danger of serious bodily harm" was correct. 1 Parsons on Cont. 393, 394, and cases there cited. Where no warrant has been obtained, a mere threat of prosecution cannot be such immediate and impending danger as will coerce the payment of money. *Taylor* v. *Jacques* is not law in Maine. *Eddy* v. *Herrin*, 17 Maine, 338.

DANFORTH, J. No question is raised in this case except under the second count in the writ, which is for money paid under an alleged duress, arising from threats of a criminal prosecution and personal injury. The first instruction excepted to is that a threat of prosecution does not constitute duress. In this we see no error. Bacon, in his Abridgment, Vol. 2, p. 156, referring to Lord Coke, says: "That for menaces, in four instances, a man may avoid his own act. 1. For fear of loss of life; 2. Of loss of member; 3. Of mayhem; 4. Of imprisonment." A prosecution cannot come under either of the items of personal violence; unless, therefore, it implies imprisonment it cannot constitute duress. All the cases to which our attention has been directed, or which after considerable research we have been able to find, hold threats of prosecution sufficient to avoid an act only as they are connected with threats of imprisonment, either illegal in its beginning, or which by abuse becomes illegal. There must be imprisonment, or a fear of it, sufficient to overcome the will of a man of ordinary firmness and constancy. Coke says it is the fear of imprisonment "that sufficeth to avoid a bond or a deed." In *Whitefield* v. *Long-*

fellow, 13 Maine, 146, and *Eddy* v. *Herrin*, 17 Maine, 338, it is held that there must be an unlawful imprisonment or a reasonable fear of it. In both of these cases a warrant for the arrest of the threatened party had been procured. To the same effect is 2 Kent's Com. 453; Story's Pl. 249, 250; 2 Greenleaf's Ev. § 301 and note; 1 Parsons on Cont. 393, 394.

The two cases mainly relied upon in argument are clearly distinguishable from this. In *Foshay* v. *Ferguson*, 5 Hill, 154, the threat relied upon is that of arrest upon a real or pretended warrant and not simply of prosecution. In *Taylor* v. *Jacques*, 106 Mass. 291, the threat was not only of a prosecution, but of an immediate imprisonment, and on a warrant alleged to have been already procured. In this last case the jury were instructed, substantially, that duress must be by unlawful imprisonment, or by threats of imprisonment, inducing a reasonably grounded fear of restraint of liberty. This instruction was held to be substantially correct, and the exceptions on this point were sustained only on the ground that the jury were subsequently told that an admission of indebtedness, on the part of the defendant, to the amount claimed, or to part of that amount, and a liability to indemnify the plaintiffs for damages he had caused them, for the balance, would repel the inference of duress, although indicated by the other facts in the case. This case cannot properly be cited as authority to show that anything short of illegal imprisonment, or a well-grounded fear of it, will constitute duress.

It should be observed that in the case at bar no instructions were given and none asked as to the effect of threats of imprisonment. If the case required such the counsel should have asked them, and in the absence of such request exceptions will not be sustained, unless the rule of law given is erroneous. Some of the testimony in the case may have a tendency to prove threats of imprisonment, but none connected with a prosecution, or growing out of a warrant already obtained or even threatened. There is in the case no allusion to any precept issued or to be issued. A threat of prosecution simply, before the commencement of any le-

gal proceedings, does not necessarily include an arrest. It is no more than an assertion that the proper steps will be taken to institute a legal process, which may or may not result in an arrest of the person. And whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and witnesses, as well as the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness.

Another answer to this exception is that the instruction was not material. If from the testimony it can, by any possibility, be inferred that there were any threats of criminal prosecution, it does not appear that the plaintiff's will was overcome by them, but quite the contrary. According to his own testimony, if his will was overcome by anything other than a submission to a claim of an amount due, it was by the danger of personal injury, or rather the effect of the violence manifested upon his wife. It is true an act done to relieve the wife from duress may be avoided; but th's case is not put upon that ground. All the duress complained of is upon the plaintiff himself.

The second instruction complained of, that of threats of personal injury, seems to be abandoned in the argument. But if not, it is in accordance with all the authorities. It is true that the later authorities have somewhat modified the older, requiring a less degree of personal injury than formerly to justify a man in yielding for the time, still all hold that there must be an apparent danger of serious bodily harm. 1 Parsons on Cont. 393; 2 Greenleaf on Ev. § 301 and note. *Exceptions overruled.*

APPLETON, C. J.; CUTTING, DICKERSON, VIRGIN, and PETERS, JJ., concurred.

JOHN D. BUCKHINGHAM, libelant, *vs.* HARRIET BUCKHINGHAM.

Costs in divorce cases.

A libelee cannot recover costs when the libel is dismissed, unless the court ordering its dismissal decree that costs be paid.

ON EXCEPTIONS.

The libel in this case was filed at the October term, 1870, and thence continued to the October term, 1872, when it was dismissed on motion of the libelant's attorney, no decree for costs being made. The libelee's attorney claimed costs and presented his taxation, but the clerk refused to allow them, and on appeal to the presiding justice he also held that the libelee was not entitled to costs under these circumstances. The libelee excepted.

S. Titcomb, for libelee.

DICKERSON, J. The wife, libelee, cannot recover costs where none are allowed by the court ordering the libel to be dismissed. *Stone* v. *Locke*, 48 Maine, 425.

APPLETON, C. J.; CUTTING, WALTON, VIRGIN, and PETERS, JJ., concurred.

FREDERIC W. HARMON and wife *vs.* OLIVER HARMON.

Slander—evidence in. Exemplary damages.

In an action on the case for slander, where the statute of limitations is pleaded, and part of the testimony of the witness called to prove the utterance of the slanderous words alleged tends to show that they were spoken more than two years before the date of the plaintiffs' writ, and part would indicate that they were uttered within that time, it is in the sole power of the jury to determine whether or not the cause of action is barred by the statute of limitations. R. S., c. 81, § 81.

In such action, testimony of facts occurring more than two years before its commencement are admissible to prove malice.

Exemplary damages are allowable in an action for slander.

ON EXCEPTIONS.

The writ in this case, dated June 20, 1871, contained two counts upon slanderous words, alleged to have been spoken by the defendant concerning the female plaintiff. Those specified as intended to be covered by the second count, which was general, are all to which the exceptions relate. The witness [one Sproul] to whom this slander was said to have been spoken testified that the conversation of which it made a part was had in the summer after the plaintiffs were married. He added: "I think it was in July or August; I think I was haying. They were married in the spring before; I think they were married in '69, if my memory serves me right." He then stated the occasion of the interview, how the conversation ensued, and what it was, giving the words as set forth in the specification under this count. Upon cross-examination the witness said he had had difficulty with the defendant since Mr. Harmon married this woman, sometime in 1869, and he believed in the spring of that year; that he entered a complaint against the defendant, and that after the entry of the complaint he never had any conversation with the defendant, "nothing more than to pass the time of day." Upon re-direct examination he said, "I was on the best of terms with the defendant at the time of the conversation in the field."

Another witness [John Reed] testified to meeting the defendant in the road, but "could not tell when it was;" that Oliver then spoke about his father getting married, and the witness thought it was after the marriage; that defendant said his father "was getting married to a d—d old rip," which words contain the charge alleged as slanderous under the second count. Reed also said: "I think the time was in the spring of 1869, the fore part of the season of '69," and gave the rest of the conversation, of same purport as that stated. The first witness was recalled and testified that the defendant was reputed to be worth $2,500.

The plaintiffs were in fact married May 22, 1869. Nothing in the testimony reported fixed the date of the complaint made by the first witness against the defendant.

The statute of limitations was pleaded by the defendant, and his counsel objected to the testimony of the conversations given above, claiming they were barred by the statute, and also because that stated by the second witness [Reed] embraced a distinct cause of action for which another suit might be brought; but the court admitted it as tending to show that the words stated in the writ were maliciously used, and left it to the jury to find whether they were uttered before or after June 20, 1869. The evidence as to defendant's property was objected to, but admitted; and to these rulings the defendant excepts, a verdict being found against him.

Upon the subject of damages, among other instructions, not excepted to, was this: "The jury would give according to the circumstances of the case and the degree of injury of the defendant, and if there was actual malice they may put on something, even, as punitive damages; something for the purpose of punishment, so that it shall be an example that he will not be likely to do the thing again, and it is for that reason that this testimony [Reed's] has been introduced to show that there was actual ill-will and hostility, and a desire to injure beyond that which is implied by the law in the use of the language itself. How much weight you may give to that, I do not know. It is a question which bears exclu-

sively upon the damages, and you will be very careful, if you come to that question, to make the proper discrimination and not allow any damages for the words spoken [as testified to by Reed], or which grow out of that, but simply so far as you are satisfied (if you are satisfied) of any additional malice in consequence of it. You will only allow for the additional malice upon the words which are actually charged in the writ, and for the purpose of recovering damage, the plaintiff cannot go outside of his writ." To so much of this instruction as permits the jury to give punitive damages the defendant excepted.

Baker & Baker, for defendant.

Reed's testimony was admitted, not to support any allegation in the writ, but to prove malice by showing a repetition of the charge by the defendant. It may be too late to ask our court to exclude this kind of testimony, but we say it ought to be confined to statements made about the time of those charged and within the period of the statute of limitations. Punitive damages were not allowable. *Watson* v. *Moore*, 2 Cush. 140.

E. F. Pillsbury & W. P. Whitehouse, for plaintiff.

Whether the slander was uttered before or after June 20, 1869, was a question of fact for the jury. Reed's testimony properly admitted to show malice. *True* v. *Plumley*, 36 Maine, 466; 2 Starkie on Slander, 51; Townsend on Slander, § 394. So was that relative to defendant's property. 36 Maine, 466; *Humphries* v. *Parker*, 52 Maine, 506; *Shute* v. *Bartlett*, 7 Pick. 86; *Lewis* v. *Chapman*, 19 Barb. 252. Punitive damages allowable. *Day* v. *Woodworth*, 13 Howard, 371; Townsend on Slander, § 290; *Pike* v. *Dilling*, 48 Maine, 539; *Goddard* v. *G. T. Railway*, 57 Maine, 202.

The following rescript was sent down:

DICKERSON, J. When the statute of limitations is pleaded, and a part of the testimony of a witness, relied upon to fix the time when a particular fact transpired, indicates that it took place be-

fore, and a part of it that it occurred after, the time when the statute of limitations commenced to run, it is the sole province of the jury to determine which part of the testimony is entitled to control.

In an action of slander it is not erroneous in the court to allow the plaintiff to introduce evidence of facts that took place more than two years before the commencement of the suit, in proof of malice, when the statute of limitations is pleaded.

Exemplary damages are allowable in an action of slander.

Exceptions overruled.

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

DANIEL B. PALMER *vs.* BOWMAN PALMER, executor.

Commissioners under R. S., c. 64 § 54—report of.

It is a sufficient compliance with the provisions of R. S., c. 82, § 131, requiring a certified copy of the commissioner's report to be filed before making an application for execution, if the order of acceptance by the probate court, referring to and making the report a part of the order, be certified.

If the report of commissioners under R. S., c. 64, § 51, declares that they acted "pursuant to the annexed commission," it need not appear affirmatively that they notified the parties, or otherwise complied with the directions contained in the commission, or required by statute.

If such requirements were in fact complied with, and the report omitted to show it, the defect might be cured by amendment

The phrase "after their report is made" used in R. S., c. 66, § 11, means after their report has been returned and finally accepted, as in R. S., c. 82, § 131.

The creditor can resort to the process provided in R. S., c. 82, § 131, when an executor has entered an appeal from the report of the commissioners, but has failed to complete it by giving the requisite notice.

ON EXCEPTIONS.

PETITION for execution under the provisions of R. S., c. 82, § 131.

It appeared that the petitioner presented a claim against the estate of Benjamin Palmer, late of Readfield, deceased, to Bowman

Palmer, executor of the will of said Benjamin Palmer, and the executor represented in writing to the judge of probate that said claim was deemed by him to be exorbitant, unjust, and illegal; whereupon, after notice and hearing, commissioners were appointed under provisions of R. S., c. 64, § 51.

The report of the commissioners was made to the probate court on the fourth Monday of July, A. D. 1871, and accepted by order of the court on the same day. The exceptions state that a certified copy of report was filed in the office of the clerk of the courts with the petition.

On the 12th day of August, 1871, Bowman Palmer, executor, filed notice of appeal, reasons of appeal, and bond to Daniel B. Palmer in the probate court.

At the October term, 1871, of the supreme judicial court, sitting as the supreme court of probate, the appeal was entered by the executor, and order of notice to the claimant by publication in *Maine Standard* obtained, but no notice was published.

It was admitted by the executor that no notice of the appeal was ever given to the petitioner, his agent or attorney.

The presiding judge ordered execution to issue and the executor filed exceptions.

The remaining facts are stated in the opinion.

E. F. Pillsbury, in support of the exceptions.

The filing of the petition was unauthorized until a certified copy of the report had been filed in the clerk's office. R. S., c. 82, § 131.

This proceeding is not authorized in cases where an appeal has been entered in probate court, only authorized where the report of the commissioners has been "finally accepted."

The statute on which this proceeding is based treats the final acceptance of the report as a judgment, and this process is but the means to enforce it. The appeal vacated such judgment. *Hunter* v. *Call*, 49 Maine, 556; *Tarbox* v. *Fisher*, 50 Maine, 236.

When the appeal "is so taken" (R. S., c. 66, § 13) the only

method provided for getting the case into the supreme court is by suit for money had and received within three months.

The statute provides no remedy where appealing party fails to notify the adverse party, but no serious inconveniences can arise therefrom, for if by accident or mistake he omits to bring suit within three months, the court may allow him to at any time within four years. Chap. 35, laws of 1872. Provision is made in common cases of appeal from the probate court, that if from accident, mistake, defect of notice, or otherwise, without fault on the part of the appellant, there is a failure to appeal or to prosecute an appeal, the supreme court may allow it to be done within one year. R. S., c. 63, § 23.

It does not appear in this case that the commissioners notified the parties or held a meeting, or complied in other respects with the directions contained in their commissions as required by statute.

E. O. Bean, and *A. Libbey*, for petitioners.

There was no appeal perfected.

Probate courts are courts of record, and everything necessary to be done under the statute to perfect the appeal, should appear of record.

A return of service should have been made to the probate office; until this was done no appeal could appear of record. *Moody* v. *Moody*, 11 Maine, 247; *Gammon* v. *Chandler*, 30 Maine, 152.

To vacate the judgment or decree of the probate court accepting the report of the commissioners, an appeal must have been taken and prosecuted according to the provisions of the statute. This not having been done that judgment remains in full force, and this court has jurisdiction only under the statute providing for issuing execution where payment has not been made. *Bates* v. *Ward, Admr.*, 49 Maine, 87; *Pattee* v. *Low, Admr.*, 36 Maine, 138; *Dolloff* v. *Hartwell*, 38 Maine, 54; *Knights* v. *Bean, Admr.*, 18 Maine, 219; *Atkins* v. *Wyman*, 45 Maine, 399.

Bringing a suit by the creditor does not give the court jurisdiction, nor does the entry of the appeal in this court by the executor,

as has been done. There was no waiver of the requirements of the statute, nor could there be. Neither proceeding has any record to sustain it; both would be dismissed on inspection by the court. On motion of the defendant, the creditor's action must be dismissed. He could have no remedy on the bond filed. Whether there has been a legal appeal cannot rest upon the option of either party. *Giles* v. *Vigereaux*, 32 Maine, 565; *Bennett* v. *Greene*, 46 Maine, 499; *Harris* v. *Hutchins*, 28 Maine, 102; *Hilton* v. *Longley*, 30 Maine, 220; *Smith* v. *Robinson*, 13 Met. 165; *Carlisle and ux.* v. *Weston*, 21 Pick. 535.

No injustice is done by issue of execution.

VIRGIN, J. This is a written application for an execution, founded on R. S., c. 82, § 131, the essential provisions of which are as follows:

"When the report of commissioners appointed by the probate court to decide upon exorbitant, unjust, or illegal claims against a solvent estate, has been returned and finally accepted in favor of a creditor, and the amount allowed him is not paid within thirty days thereafter, he may file a certified copy of such report in the office of the clerk of the courts, and apply in writing to a judge of the supreme judicial court for an execution; and he shall order a hearing thereon, with or without notice to the adverse party. . . . If no sufficient cause is shown to the contrary, the judge shall direct an execution to be issued for the amount allowed the creditor by such report," etc.

R. S., c. 64, § 51, after authorizing the appointment and defining the general duties of such commissioners, provides that "sections five, six, seven, eight, eleven, twelve, thirteen, fourteen, and fifteen of c. 66, shall apply to such claims, and the proceedings thereon. No action shall be maintained on any claim so committed, unless proved before said commissioners; and their report on all such claims shall be final, saving the right of appeal."

So much of c. 66, § 11 as is applicable to the case at bar, provides as follows:

"The claimant, the administrator, an heir-at-law, or any creditor may appeal from the decision of the commissioners by giving written notice thereof at the probate office within twenty days after their report is made. . . . When the appeal is made by any party other than the claimant, he is to give notice to the creditor within thirty days," etc.

The case finds that the commissioners were duly appointed and commissioned May 8, 1871, and their report returned into the probate office and finally accepted by the judge of probate, on the 4th Monday of July, 1871, within the time limited in the commission; that on Nov. 15, 1872, during the October term of this court, a copy of the report of the commissioners was filed in the office of the clerk of the courts with this petition; and the justice presiding ordered execution to issue, whereupon the respondent alleged exceptions.

In support of his exceptions, the respondent contends:

1. That the copy of the report filed in the office of the clerk is not a "certified copy" as required by c. 82, § 131.

Although the bill of exceptions expressly finds that a "certified copy of report was filed" there, "with the petition," still, as the report itself, termed in the bill of exceptions "commissioners' return," is made a part of the case, and as it may, with more or less plausibility, be contended that the statement of what the paper is and the paper itself ought to be taken together, we will examine the report and ascertain whether it is, in fact, "certified."

The document actually filed, contains, on the first page, what purports to be the commission, dated May 8, 1871, addressed to the commissioners and reciting their statute duties, together with the jurat, dated July 10, 1871; on the third, the return or report of the commissioners, duly signed, of the following tenor: "Pursuant to the annexed commission, the undersigned commissioners on the estate of Benjamin Palmer, late of Readfield, deceased, having received and examined the claims of said creditors, hereby make their report of the claims presented, whether allowed or disallowed, with the amount allowed on each claim; name, Daniel B.

Palmer; nature of claim, for labor; amount presented, $2,199.00; amount allowed, $2,024.00;" and on the fourth, the order of the judge of probate, as follows: "Kennebec county. In probate court, held on the 4th Monday of July, 1871. The foregoing list of claims, presented and allowed against the estate of Benjamin Palmer, late of Readfield, deceased, having been returned into the probate court, it is ordered that the same be accepted. H. K. Baker, judge. A true copy. Attest: Charles Hewins, register."

Thus it is seen that while the page containing what may be termed the report proper bears no formal certificate, the order of acceptance referring to it in terms and thus making the report a part of the order, is certified. The report alone is of no avail, and cannot be appealed from until it has been accepted. *Robbins Cordage Co.* v. *Brewer*, 48 Maine, 484. And the order of acceptance embodying, as it virtually does, the report of the commissioners, being duly certified and filed, together with the report, constitute a sufficient compliance with this requirement of the statute; especially since there is no suggestion that the report filed was not, in fact, a true copy of the original, and correctly stated the actual amount allowed.

2. The further technical objection is made, that it does not appear that the commissioners notified the parties or otherwise complied with the directions contained in their commission and required by the statute.

But on inspection of the commission it will be seen that they were therein directed to do what the statute requires them to do; and their report declares that they acted "pursuant to the annexed commission." We fail to perceive why that is not equivalent to a detailed statement of their official action. But if not, it is not pretended that the commissioners did not notify the parties, or otherwise comply with the statute requirements, but simply that these do not affirmatively appear by the report. But if they were, in fact, complied with and the report omitted to show it, the defect may be cured by an amendment in accordance with the facts. *Crocker* v. *Crocker*, 43 Maine, 562.

If these technical objections do not prevail, then it is said that there was an appeal taken from the decision of the commissioners on the part of this respondent, "by giving written notice thereof at the probate office within twenty days after their report was made," as is prescribed in the first clause of c. 66, § 11.

If the claimant had been the appealing party, then the appeal, so far as any notice is concerned, would have been perfected; for all that is required of him is to give the notice at the probate office that was given in the case at bar by this respondent. But a "party other than the claimant" being the appellant, "he is to give notice to the creditor within thirty days," before his appeal can be considered as perfected. In such case, the statute requires the two notices, one at the probate office for the guidance of the court and all concerned there, and the other to the creditor. If the latter may be omitted with impunity, why not the other.

Again, the reason for giving the notice to the creditor is seen by a brief examination of the sections pertaining to this subject: By c. 64, § 51, the report is final, "saving the right of appeal." When an appeal is properly taken and completed, the decision of the commissioners is thereby vacated. And by c. 66, § 13, "when an appeal is taken the claim is to be determined in an action for money had and received, commenced within three months after the report was made." This action is to be commenced by the claimant. If his claim was disallowed in whole or in part, and being dissatisfied he appeals, there is no need of notice to him, and notice at the probate office where the estate is being settled must necessarily come to the knowledge of the representative party. But if the claimant be the prevailing party before the commissioners and the representative party, being dissatisfied, appeal, then the claimant should be notified in order that he may bring the action in the common-law court.

Thus, Appleton, J., in construing c. 66, § 11, as it was in R. S. of 1841, c. 109, § 18, says: "All which this section requires is that the creditor appealing shall claim his appeal and give notice thereof at the probate office within a specified time. The same

section makes provisions entirely different when the appeal is taken by the administrator." *Pattee* v. *Low*, 35 Maine, 123.

And Kent, J., in *Bates* v. *Ward*, 49 Maine, 89, in speaking of the decisions of commissioners, says: "An appeal is allowed from their decision. An adjudication by the commissioners is final and binding on both parties, unless appealed from and unless the appeal is prosecuted according to the requirements of the statute."

The "thirty days" mentioned in the last clause of c. 66, § 11, limiting the time of giving notice to the creditor, commence when the "twenty days" in the first clause begin. Hence, "within thirty days" there used, means "within thirty days" "after their report is made." The phrase "after their report is made" is not to be taken literally, but means (in the language of Kent, J., in *Robbins Cordage Co.* v. *Brewer*, 48 Maine, 484) "after their report has been made to the judge and by him has been accepted." The phrase "after their report is made," as used in c. 66, § 11, means the same as after their report "has been returned and finally accepted" in c. 82, § 131. So that the "thirty days" in § 131 begin at the same moment with the "thirty days" in § 11. This is the natural and proper construction of the language in § 11, and makes the two sections harmonize.

The respondent not having completed his appeal "by giving notice to the creditor within thirty days" after the final acceptance of their report, and the amount allowed the creditor not having been paid within the same time, the right of appeal lapsed and the petitioner had a right to resort to this process. If the respondent had preferred the common-law tribunal, he should not have compelled the claimant to prove his claim before commissioners; or if he desired to try the latter tribunal first and then appeal, he should have followed the plain requirements of the statute regulating the appeal. This he did not do. *Exceptions overruled.*

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

SAMUEL O. KING *vs.* ANDREW J. CROWELL.

Promissory note. Demand.

A demand by the holder of a note payable generally may be made upon the maker in the street, the maker having no place of business, and raising no objection to the place where the demand is made.

The actual exhibition of the note at the time of the demand is unnecessary, if the holder then has it with him and is not requested to produce it.

A notice upon the last day of grace on the indorser, after previous demand upon and refusal by the maker upon the same day, is not premature.

ON FACTS AGREED.

ASSUMPSIT against the defendant as indorser of the following promissory note, his signature admitted to be genuine.

"$150.00. April 8, 1871.

Four months after date I promise to pay to the order of A. J. Crowell one hundred and fifty dollars. Value received.

H. E. Morton."

Endorsed, "A. J. Crowell, Jeremiah Glidden, C. H. Glidden."

Writ dated Feb. 17, 1872. Plea, general issue.

This note was negotiated to the plaintiff for a full consideration a short time after its date.

The maker and the indorsers resided in Winthrop village, and the plaintiff in Monmouth. H. E. Morton, at the time of the making of the note in question, was a manufacturer of boots and shoes, and a dealer in boots, shoes, hats, and caps, and had a store and place of business in said Winthrop village. On the third day of July, 1871, the maker failed in business. His real estate and goods were attached on that day, and his place of business closed, the attaching officer taking possession of the keys and the goods. On Friday, the morning of August 11, 1871, the plaintiff went to Winthrop for the purpose of collecting this note, or of taking the necessary steps to hold the indorsers. He went to the store re-

cently occupied by the maker of the note, and finding it closed he went directly to Morton's house, with the note in his possession, for the purpose of making a demand of payment. Morton was not at the house, but the plaintiff was informed he was on the street, where the plaintiff found him about ten o'clock, A. M., and then and there requested payment of the note of said Morton, which was refused. About two hours afterwards, on the same day, the plaintiff sought the defendant, told him he had demanded payment of the note of Morton, that he refused to pay it, and informed him (defendant) that he should look to him, as indorser, for the payment of the note. The defendant replied that he would look into the matter, and, if he found that he was holden, would see the note paid in two or three weeks. In two or three weeks the plaintiff called on the defendant again for payment, when the defendant refused to pay, saying that he had inquired carefully into his liability as indorser of this note, and was advised that he was not liable, and should not pay the same.

It was agreed that upon the above facts the full court should enter such judgment as the law required.

If the action could be maintained, defendant to be defaulted; otherwise, plaintiff to become nonsuit.

E. Kempton, for the plaintiff.

The demand was made on the last day of grace, and at a reasonable hour, therefore seasonable and sufficient. *Stanton* v. *Blossom*, 14 Mass. 116; *Greely* v. *Thurston*, 4 Greenl. 479; Dane's Abridgment, 425; *Staples* v. *Franklin Bank*, 1 Met. 43.

Maker had no place of business and was not at his house; the demand on the street was therefore sufficient.

The plaintiff is entitled to one day in which to give notice to indorsers. This time is allowed for plaintiff's benefit and he may waive it and give notice at once. *Shed* v. *Brett*, 1 Pick. 401; *Flint* v. *Rogers*, 15 Maine, 67.

Not only was the notice not premature, but suit might have been commenced against the maker and also against Crowell on

August 11th, after the demand and notice. *Shed* v. *Brett*, cited above; 2 Parsons on Notes and Bills, 462.

The maker and indorsers residing in the same town, verbal notice of dishonor is sufficient. *Ticonic Bank* v. *Stackpole*, 41 Maine, 321.

J. H. Potter, for the defendant.

Demand made upon the maker on the street is not sufficient. Byles on Bills, 5th Am. Ed., 196, note 1; 1 Parsons on Notes and Bills, 372, 421; *McGruder* v. *Bank of Washington*, 9 Wheat. 198; *King* v. *Holmes*, 11 Penn. State Rep. 456; *Fall River Union Bank* v. *Willard*, 5 Met. 216; *Otsego County Bank* v. *Weaver*, 18 Barb. (S. C.) 292; *Sanderson* v. *Judge*, 2 H. Black. 509.

The note should have been exhibited. Byles on Bills, Am. Ed. 196; 1 Parsons on Notes and Bills, 230, note *x*, and 367; *Freeman* v. *Boynton*, 7 Mass. 453; *Musson* v. *Lake*, 4 Howard, 262; *Draper* v. *Clemens*, 4 Mo. 52.

The maker is not bound to pay without presentation of the note. *Hansard* v. *Robinson*, 7 B. & C. 90, and 9 Dow. & R. 860.

The notice to the indorser was premature. The maker had the whole day in which to pay the note. *Pierce* v. *Cate*, 12 Cush. 190; *Henry* v. *Jones*, 8 Mass. 453; *Wiggle* v. *Thompson*, 11 S. & M. 452; *Osburn* v. *Moncure*, 3 Wend. 170; *Crosby* v. *Grant*, 36 N. H. 275; 1 Parsons on Notes and Bills, 411.

VIRGIN, J. When the defendant indorsed and put into circulation the note in suit, he thereby ordered the maker to pay the amount therein specified to the plaintiff; and he also thereby promised that if the note were duly demanded of the maker and not paid, then he himself would, upon receiving due notice of the demand and non-payment, pay it to the plaintiff.

And now, in this suit upon his promise, the defendant declines to pay the note on the following alleged grounds:

1. That the demand was not lawful inasmuch as it was made on the street.

The general rule of law is that the holder must use diligence to find the maker and demand payment of him; and the inquiry will be, whether, under the circumstances of the case, due diligence has been used. 3 Kent's Com. 129.

It is familiar law that when a promissory note payable generally, and not at a specified place, is seasonably demanded at the maker's known and settled place of business for the transaction of his moneyed concerns, it is sufficient to hold the indorser. And the same may be said of a like demand made at his place of residence. Neither does it make any difference whether the maker be personally present or temporarily absent at the time of the demand. In either case, the law has for many years been constant in declaring that the evidence afforded by such a demand constitutes full proof of due diligence on the part of the holder.

But in the case at bar the plaintiff went still further than the technical exactions of the law required. He was a resident of Monmouth. On the day the note became due he went to Winthrop village, where both the maker and the defendant resided, "for the purpose of collecting this note, or of taking the necessary steps to hold the indorser." On going to the store which had been occupied by the maker as his place of business, he found it had been closed and in the possession of an officer more than thirty days; that the maker had failed in his business, and that all his property was under attachment. Thereupon the plaintiff went to the maker's place of residence, where he was informed that the maker was not at the house, but had gone out on the street. Had he gone through the ceremony of demanding payment of the note at the house, while the maker was out on the street, the law would pronounce the plaintiff's diligence ample. But not finding the maker at home the plaintiff trebled his diligence, sought and found him on the street in that country village, and then and there requested payment of the note of the maker personally, which was refused.

It does not appear (as it would be likely to, if true) that any objection to the place of demand was made by maker. If he had

had funds with which to pay, not with him, but at his house, he would at once have said so. If he had objected to the place and requested the plaintiff to accompany him to his house and receive the money due on the note, and the plaintiff had declined so reasonable a request, the legal aspect of this branch of the case might thereby have been materially changed. But no such facts exist. He simply refused payment, and, in all human probability, for the real, though to him, perhaps, unpleasant, reason that all his property was in the custody of the law, and he had in fact nothing wherewith he could pay.

It would seem that such a demand would be more satisfactory to all concerned than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is concerned, to charge the defendant.

We are aware that Byles on Bills, 196, declares that a demand made on the street is not sufficient. Such is the doctrine expressed, too, in the author's notes in Leading Cases on Bills, 327, 328. And there are several cases containing the *dictum* in general terms that a demand must be made either at the maker's place of business or place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any wherein the court having the question before it decided adversely to a demand made on the street, under circumstances similar to those in this case.

On the other hand, Judge Story, in discussing the law applicable to notes like this, uses the following language: "The general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling-house or other place of abode, or at his counting-house or place of business. It seems a presentment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicil, or at his place of business." And he cites quite a large number of cases, in a note, as authority. Story on Prom. Notes, § 235.

In Edwards on Bills (2 ed.), 150, is found the following: "Being made payable at large, it is due at any and every place; but for the purpose of charging the indorser, it must be presented for payment to the maker personally, or at his residence or place of business. If it be made payable at a particular place in the city, it is necessary to present the note there for payment, for the purpose of charging the indorser. But even in this case, if a personal demand is made upon the maker, and no objection is made by him as to the place, it is sufficient."

So in 3 Kent's Com. 128. "Demand of payment must be made by the holder or his agent upon the acceptor at the place appointed for payment, or at his house or residence, or regular known place of his moneyed business, or upon him personally, if no particular place be appointed." And again, on page 96, "If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand."

And Prof. Parsons says: "In general a personal demand would be sufficient, if made at any place where the maker may reasonably be expected to be in condition to pay; and if made in any other place—such, for instance, as in the street—it would usually be good, unless objection were made to payment because the place was an improper one, or some similar reason were given for the refusal. 1 Parsons on Notes and Bills, 421. And he uses somewhat similar language on p. 372.

The doctrine as stated above by Judge Story is approved in *Taylor* v. *Snyder*, 3 Denio, 145, Sup. Ct. N. Y., published as a leading case in Leading Cases on Bills, 313, 316.

Finally, our own court held, that where a note signed by two, made payable at their dwelling-houses, was demanded of them, together, at the barnyard of one of them, and no objection was made as to the place of the demand, the demand was sufficient. *Baldwin* v. *Farnsworth*, 10 Maine, 414.

2. But the defendant further objecting to the sufficiency of the demand says: "As the payer has a right to require its delivery

up to him before he pays, and may insist that the holder produce it, the note should have been exhibited."

It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note.

The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by C. J. Shaw, in *Gilbert* v. *Dennis*, 3 Met. 497, where he says: "Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary."

The case finds expressly that the maker had the note in his possession when he made the demand. We think the objection cannot prevail. *Arnold* v. *Dresser*, 8 Allen, 435; *Freeman* v. *Boynton*, 7 Mass. 485; *Etheridge* v. *Ladd*, 44 Barb. 69.

3. The defendant finally contends that the notice having been given to the defendant on the last day of grace was premature, for the reason that the maker had the whole day in which to pay.

We presume, however, that the defendant predicated this objection upon the alleged insufficiency of the demand. For long before, and certainly ever since, the review of the cases by C. J. Shaw in *Staples* v. *Franklin Bank*, 1 Met. 43, the rule applicable to notes like the one in question has been that the note is due on actual demand at any such hour on the last day of grace that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in condition to attend to ordinary business; and if upon such demand pay-

ment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no such demand be made, and the maker does nothing amounting to a waiver, he has the whole of the day in which to make payment, and is not in default until the expiration of the business day within which such demand might have been made. *Greeley* v. *Thurston*, 4 Greenl. 479; *Flint* v. *Rogers*, 15 Maine, 67; *Lunt* v. *Adams*, 17 Maine, 230; *Farnsworth* v. *Allen*, 4 Gray, 453; *Estes* v. *Tower*, 102 Mass. 65; *Gordon* v. *Parmelee*, 15 Gray, 413; *Manchester Bank* v. *Fellows*, 28 N. H. 303; *Crosby* v. *Grant*, 36 N. H. 418.

Defendant defaulted.

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

NATHANIEL K. BURKETT *vs.* ARTHUR TROWBRIDGE.

Husband's liability to support wife—when implied.

One who in consequence of a disagreement arising between himself and his wife carried her to her father's house and left her there, where she remained till she obtained a divorce, was held liable to her father for her board while there, without any express contract between them, notwithstanding the fact that the defendant paid his wife an agreed sum, in lieu of alimony, upon her proceedings for divorce.

ON REPORT.

ACTION on account annexed for board of defendant's wife for the thirty-eight weeks next preceding the rendition of a decree of divorce obtained, upon her libel against him, on the twelfth day of March, 1869. It was agreed to reckon it at $3.00 per week, and that if the plaintiff, upon the evidence, was entitled to recover at all, judgment was to be entered in his favor for $114.00 and interest from the date of the writ. The defendant's wife was

the plaintiff's daughter. The husband and wife did not live happily together and had separated for short spaces of time before June, 1868; but, upon a disagreement arising between them in that month, he then carried her to her father's house and left her there, where she remained until her divorce was granted. The plaintiff testified that he "made no contract with him [defendant] as to board. At one time when he was there I had a talk with him relative to her board. They were then making arrangements for her to get divorced; it was a month or two before the divorce was granted. I said to him I didn't know but I could collect a bill for board. He said he didn't know about that, whether I could or not. The first time he came, after June, I asked him if he thought they could live together in the way they had been living. He replied that he didn't want to live with her. This was about four weeks after he brought her to my house." Just after haying in 1868 the plaintiff and his daughter went to the defendant's house and took away her clothing. Nothing then said about her being with her father, or about price of board. On cross-examination the plaintiff stated that his daughter frequently came home, but he claimed nothing for board except for the period above specified; that she came home on account of domestic troubles, and said: "I received her as my daughter. She applied for divorce. They agreed on terms. I was at Mr. Gould's office to finally settle up her divorce case for her and receive the money for her; she managed her own case otherwise. Nothing was said about her board when her husband first left her. I did not know then why she came home, unless it was on a visit; when he went away I supposed it was something more than a mere visit. He made no promise to pay her board. At the time of settlement in Gould's office I made no claim for board; nothing was said about it. At the time of final adjustment I said to him that I didn't know but I could collect board."

The plaintiff introduced, subject to objection, the record of the divorce case.

The defendant testified, in his own behalf, that he carried his

wife to her father's at her request. "Nothing said about board until I went to make final adjustment. I had no expectation that board would be charged to me. When I paid the money for adjustment I did not understand that there was any claim for board. The terms of the divorce were arranged between the parties. I understood the money paid settled everything. I asked her, when I carried her up in June, 1868, when she was coming back; she did not answer me. I gave my consent to their taking her clothes." The defendant's counsel testified that there were cross libels; his was dropped, hers prosecuted, and a sum mutually agreed upon paid her; that he made the adjustment and paid over the money under instructions to settle everything; that at no interview did the plaintiff claim board; and counsel did not understand that he made any claim for board. He said, on cross-examination, "I did not know that there was any claim for board. My client had not informed me that there was any claim made for board. The subject was not mentioned by me or Mr. Burkett." He added, on re-direct examination, "My client told me the conversation about board. He stated the facts and asked if he were liable for board and I told him he was not."

The case was then reported to the court, with jury powers, under the agreement as to damages before stated; to be determined on such of the testimony as was legally admissible, drawing legitimate inferences therefrom.

A. S. Rice, for plaintiff.

I. If husband and wife separate by mutual consent, without any provision for her maintenance, he is liable for her necessaries, and sends credit with her to that extent. 2 Kent's Com. (6th ed.) 146; *Mayhew* v. *Thayer*, 8 Gray, 172; *Emmett* v. *Norton*, 8 C. & P. 506; *Dixon* v. *Huwell*, Ib. 717; *Rumney* v. *Keyes*, 7 N. H. 571.

II. The father of the wife, without special contract, can maintain an action for such necessaries, notwithstanding alimony or allowance granted by court on libel for divorce on wife's petition.

Hancock v. *Merrick*, 10 Cush. 41; *Burlen* v. *Shannon*, 14 Gray, 433; *Reynolds* v. *Sweetser*, 15 Gray, 80; *Dowe* v. *Smith*, 11 Allen, 107.

Gould and Moore, for defendant.

This is a question of contract, to be proved in some legal method. Plaintiff must prove a promise to pay this board. None was expressed, and Burkett expressly swears there was "no contract." Can he now ask the court to imply that which he says had no existence? Without this statement, the law implies none from the admitted facts. There is no evidence that she was compelled to leave her husband's house or justified in doing so. The allegations in the libel no evidence in this suit, because the plaintiff was not party or privy to that judgment. *Burlen* v. *Shannon*, 3 Gray, 387. She was taken to her father's by her own request. Each party libelled the other, and then an adjustment was effected by mutual consent; but the original separation was her own act, not consented to by her husband. It was not originally intended by her to be final.

The board was not furnished upon the husband's credit. *Dowe* v. *Smith*, 11 Allen, 107. The plaintiff's language and acts show this. He received her as his daughter. His conduct at the settlement of the divorce suit shows he had no intention then to charge board, so could not have originally furnished it on credit of the husband. To make this claim now is not honest.

The relation between the parties was such that no promise of compensation is implied from the mere fact of her being at her own father's house. 1 Parsons on Cont. 529, 530, note *e*; *Fitch* v. *Peckham*, 16 Vermont, 150; *Andrews* v. *Foster*, 17 Vermont, 556; *Guild* v. *Guild*, 15 Pick. 130; *Alfred* v. *Fitzjames*, 3 Esp. 3; *Weir* v. *Weir*, 3 B. Monroe, 647; 1 Bishop on Mar. and Divorce, §§ 568–572, where the cases of *Hancock* v. *Merrick*, 10 Cush. and *Burlen* v. *Shannon*, 3 Gray, are criticised and questioned.

BARROWS, J. The defendant carried his wife to the house of her father, the plaintiff, in June, 1868, as he says at her request, and left her there, and never afterwards requested her to return to his home, or made any provision for her support. The somewhat scanty detail of the circumstances and of the conversations which occurred between the husband and wife at this time is, however, sufficient to satisfy us that he understood perfectly when he carried her there that she was going, not upon a visit merely, but with the intention of separating from him for an indefinite time. The paucity of evidence on his part as to the cause of the separation is somewhat suggestive. There is absolutely nothing tending to show that she was in fault in thus leaving him, or that he did not consent both to her going and remaining. At an interview between the father and the husband, about four weeks after he had carried her to her father's house, the father testifies, "I asked him if he thought they could live together in the way they had been living. He replied, he did not want to live with her." A week or two later, and after a libel for divorce, sued out at her instance, had been served upon him, he consented to her taking her clothing, when she and the plaintiff went for it. She remained at her father's house until she had obtained a decree of divorce, in March, 1869, and this suit is brought against the husband for her board during this interval. But the testimony negatives the idea of any express contract on the part of the defendant to pay the plaintiff for boarding his wife. All that ever passed between them on the subject was about a month before the divorce was granted, when the plaintiff said to the defendant that he didn't know but he could collect a bill for board, and the defendant questioned his right to do it.

Is there an implied promise, under the circumstances above stated? As the parties have chosen to present the case, it was one of separation by mutual consent, without fault on the part of the wife, and with a knowledge on the part of the husband that the plaintiff was furnishing the support and maintenance which he himself was under a legal obligation to provide. We do not think

that he can rid himself of this obligation by carrying her to her father's house under such circumstances, even though he may feel tolerably certain that, whether he pays, or promises to pay, or says nothing about it, she would not be turned out of doors by her father. The defendant has no right thus to impose a burden, which by law is his, upon one to whom it does not legally belong, unless he expects and intends at the same time to pay what it is reasonably worth.

We do not use the record of the proceedings in the divorce suit brought by the wife against the husband in this case for any purpose except to establish their legal status during the period covered by the account annexed to the writ. Starkie lays down the rule thus: "Mere proof of the marriage is *prima facie* evidence of the husband's liability, and it lies upon him to discharge himself by evidence. For although they part by mutual consent, the husband lies under a legal obligation to support the wife, unless she has forfeited her right to maintenance by misconduct, and consequently he is liable for necessaries supplied to her, unless he can show that he himself maintains her, or that she has an adequate provision from some other source." Starkie on Evidence, Pt. 4, Vol. 2, p. 696, 1st Am. Ed. And the authorities concur in holding that the husband's liability for necessaries for the wife, in case of separation by mutual consent, still continues, unless he exonerates himself from it by fitting proof. *Mayhew* v. *Thayer*, 8 Gray, 175, and authorities there cited.

A promise is implied, then, in a case of this description, unless there is something in the evidence to show an understanding that the board was a gratuity. So far as the circumstances under which the defendant carried his wife to plaintiff's house are developed, it does not seem to us that he could reasonably expect that her board at her father's should be so considered. It was plainly, from the very first, not understood by him to be a visit. It was simply a leaving her there, without any provision for her support, trusting it may be to the paternal instinct to keep her from want. Did the father have any intention to relieve the defendant from

the support of his wife, and to take it upon himself to support her gratuitously? What little talk they did have upon the subject looks the other way.

Nor can it be pretended that the claim for board was adjusted when the question of alimony to the wife was disposed of by agreement. The only time that the claim for board had been in any manner asserted previously, it was repudiated by the defendant. At that time nothing whatever was said about it by either party. It is impossible to infer that it was included in that adjustment.

Neither the fact that the plaintiff was the father of the wife, nor his intervention in the adjustment of the alimony, can properly preclude him from recovering here. *Hancock* v. *Merrick*, 10 Cush. 41; *Burlen* v. *Shannon*, 14 Gray, 434; *Dowe* v. *Smith*, 11 Allen, 107. *Judgment for plaintiff for* $114.00 *and interest from the date of the writ.*

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

JOSEPH HOEY *vs.* JOSEPH CANDAGE.

Variance. Evidence, parol. Verdict—amendment of.

In an action of trover the defendant justified under a mortgage bill of sale of the property alleged to have been converted by him, given by plaintiff to the firm of which the defendant was a member, with condition that it should be void if the mortgagor should save the mortgagees harmless in consequence of having signed with him a note dated June 12, 1868, for $550, payable Nov. 10, 1868, to the Net & Twine Co., of Boston; and offered to prove payment by said firm of a note signed by the plaintiff, dated May 28, 1868, for $556, payable in four months to the American Net & Twine Co. at any bank in Boston; it was *held*, that the note was inadmissible without proof of its identity with that described in the mortgage, but that it was competent to prove such identity by parol evidence in such cases.

A verdict is an action of trover "that the defendant did promise," etc., may be amended by substituting the words "is guilty" for "did promise."

ON EXCEPTIONS AND MOTION to set aside the verdict as against the law and the evidence.

This was an action of trover, tried at the September term, 1871.

Plea, not guilty, with a brief statement denying plaintiff's ownership of the chattels named in the writ, and setting up a conveyance of them long before suit brought to Joseph Candage & Company.

The verdict returned by the jury was "that the defendant did promise in manner and form as the plaintiff has declared against him," with an assessment of damages.

The defendant filed a motion for a new trial on the ground that the verdict was against the law and the evidence and was not in accordance with the issue joined, and also filed exceptions to the ruling of the presiding judge in excluding certain testimony offered by him, the facts in relation to which are sufficiently stated in the opinion.

At the March term, 1872, the plaintiff moved that the error in the form of the verdict be corrected by striking out the words "did promise" and inserting in lieu thereof the words "is guilty." The motion was allowed and the defendant again filed exceptions.

Hale & Emery and *D. N. Mortland*, for the defendant.

The defendant should have been allowed to prove title to the property, jointly or severally, generally or specially, for a lien or otherwise, in himself; or paramount title in a stranger. 2 Greenleaf on Ev., § 648; *Ames* v. *Palmer*, 42 Maine, 197; *Parsons* v. *Tinker*, 36 Maine, 384; *Kilgore* v. *Wood*, 56 Maine, 150; *Fairbanks* v. *Phelps*, 22 Pick. 538.

There was no question that, about the time mentioned in the brief statement, Joseph Candage & Co. signed a note for and with the plaintiff to the American Net & Twine Company, and that the note offered in evidence was the one so given and the one intended to be secured by the mortgage. The action was not on the mortgage and plaintiff was bound to show his right to immediate possession. 1 Greenleaf on Ev., § 74; 42 Maine, 197; *Elwell* v. *Gillis*, 14 Maine, 72; *Clapp* v. *Glidden*, 39 Maine, 448; *Vining* v. *Baker*, 53 Maine, 544; *Winship* v. *Neal*, 10 Gray, 382.

The amendment of the verdict was not allowable as it is now a different verdict from the one really rendered by the jury. *Bucknam* v. *Greenleaf*, 48 Maine, 394, and cases there cited. *Blackley* v. *Sheldon*, 7 Johns. 32; Woodfall's case, 5 Burr. 2667.

The jury should find the issue joined for or against the party tendering it. *Holmes* v. *Wood*, 6 Mass. 2.

Gould & Moore, for plaintiff.

1. The note offered did not agree in any single particular fixing identity with that described in the mortgage; neither as to date, amount, time, and place of payment, makers or payees; nor was any evidence adduced to establish the fact of its being the one intended to be secured by the mortgage; nor any pretense made that it was a renewal of any such note. *Barrows* v. *Turner*, 50 Maine, 127. Testimony to show this note the one intended to be secured by the mortgage would have been inadmissible, the difference between this and the one described was so great. *Jewett* v. *Preston*, 27 Maine, 400. No evidence of a contemporaneous delivery of the mortgage and this note. *Partridge* v. *Swasey*, 46 Maine, 414. Neither *Sweetser* v. *Lowell*, 33 Maine, 446, nor *Bourne* v. *Littlefield*, 29 Maine, 203, nor any of the many cases there cited, afford any parallel to this case.

II. Ordinarily, a mortgage is *prima facie* evidence of right of possession in the mortgagees. *Brooks* v. *Briggs*, 32 Maine, 447; *Davis* v. *Mills*, 18 Pick. 394.

But this mortgage is to secure no debt, and is conditioned for a retention of possession by the mortgagor. The defendant, then, was a mere trespasser in taking it, since he did so before he paid the note; and paid it before maturity.

III. The error in the verdict was one of form, and amendable. *Little* v. *Larrabee*, 2 Maine, 38; *Barnard* v. *Whiting*, 7 Mass. 358; *Porter* v. *Rumery*, 10 Mass. 64; *Clark* v. *Lamb*, 8 Pick. 417; *Jones* v. *Kennedy*, 11 Pick. 131; *Bates* v. *Schoonover*, 43 Ill. 494; *Hall* v. *Williams*, 10 Maine, 283.

BARROWS, J. In 1868 the plaintiff was engaged in the fishing business at Bluehill, and had occasion to purchase a seine upon credit in Boston from the American Net & Twine Co. They required sureties and he applied to the defendant, one of the firm of Joseph Candage & Co., who were in the same business, to sign a a note with him. The members of the firm of Joseph Candage & Co., and one Marks, did sign with him, subscribing their individual names; and the plaintiff gave a mortgage of the property in controversy June 12, 1868, to the firm of Joseph Candage & Co., with proviso that "if the said grantor, his, etc., shall save the said grantees, their, etc., harmless and indemnified from all loss in consequence of having signed with the said Joseph Hoey a certain promissory note of this date for the said sum of five hundred and fifty dollars, payable on the tenth day of November next to the Net & Twine Co., of Boston, then this bill of sale shall be void. Provided also, that it shall and may be lawful for said grantor to continue in possession of said property without denial or interruption by said grantees, until they shall be damaged by the neglect of the grantor in not paying said note." The plaintiff made a partial payment on his note to the American Net & Twine Co., in Boston, in the fall of 1868, and took it up by giving a new note payable in the spring of 1869, with the same signers. Then he went out south and did not return until June, 1869. Before he got back the defendant had taken the mortgaged property and sold it. But, apparently, he had not paid the note to the Twine Co., for the plaintiff testifies, and his version of the matter is left uncontradicted, that he paid the note which was given in renewal of the first note, after his return from the south in June, 1869, by signing another note which was also signed by Joseph and Samuel Candage, and that when he went to pay the last note eight or ten days before it was due, he found it had been paid a month or more previously.

At the trial, the defendant undertook to justify under this mortgage which he offered in evidence. He called for the production of the first note to the Twine Co., and on its production by plain-

tiff's counsel, offered it in evidence. Plaintiff objected to it on the ground that it did not correspond to the note as described in the mortgage. The date was "May 28, 1868," instead of June 12. It was payable "in four months after date," not on Nov. 10, "to the order of American Net & Twine Co.," in place of the Net & Twine Co. of Boston; and was for the sum of $556, instead of $550.

The judge held that there was too great a variance to permit the reception of the note as evidence in that stage of the case. The defendant did not thereupon proceed, as perhaps he might have done, to offer evidence to show that, notwithstanding the plurality of errors in description, the note was in fact the one intended to be secured by the mortgage.

But after drawing out anew from the defendant substantially the same statement of the antecedent circumstances which the plaintiff had previously given on cross-examination, he again offered the note which was rejected, and this is the ruling specially complained of in the first bill of exceptions. The complaint is not well founded.

The form of the ruling when the note was first offered, should have indicated to the defendant that the discrepancies between the note described and the one offered, were too great and too numerous to permit the use of the note in evidence unless they were accounted for.

The plaintiff's counsel now contends that parol evidence could not have been received to establish the identity of this instrument with the one referred to in the mortgage, because it differs in so many particulars. But if the principle is once established, that parol evidence is admissible to show that a note offered in evidence is the one intended to be secured by a mortgage, when it differs from the description in the condition in one or more particulars, we think that the number of mistakes in the description, while, with each addition, it necessarily makes the proof of the fact more difficult, cannot so change the principle as to exclude that kind of evidence. That such evidence is admissible for this purpose, not-

withstanding "a difference in one or more particulars," is settled in this State by the cases of *Bourne* v. *Littlefield*, 29 Maine, 302, and *Sweetser* v. *Lowell*, 33 Maine, 446.

But the exceptions do not show that the defendant offered any such evidence. In its absence the note was properly excluded. This being done the refusal to permit the defendant to prove the payment of an indebtedness of the plaintiff in Boston, which was not shown to be either the mortgage debt or a renewal of it, followed as a matter of course. Had the defendant proved that the note was the one intended to be secured by the mortgage, and that he was called upon to pay and did pay a renewal of it, then, to avoid circuity of action, it would have been competent for him to have shown such payment in mitigation of damages, although, upon the facts above rehearsed, he would still have failed to make out a full justification under his mortgage; because, so far as appears, when he took the property he had not been damaged by reason of the plaintiff's failure to pay the note. For it seems to be pretty well settled that though a mortgagee or pledgee be liable in trover for a tortious sale, or conversion of the goods embraced in the mortgage or pledge, still the amount of the debt should be deducted in assessing the damages. *Byerly* v. *Kendall*, 17 Q. B. 27; *Jarvis* v. *Rogers*, 15 Mass. 389; *Hunt* v. *Harbell*, 24 Maine, 339; *Briggs* v. *Boston & Lowell R. R. Co.*, 6 Allen, 247.

But this species of recoupment can be had only when the defendant has a legal or equitable interest in or a lien upon the specific goods in controversy, and for the amount only of the debt which they are held to secure; for any independent demand which the defendant might have against the plaintiff must be made the subject of another suit and could not be thus used as an offset, *pro tanto*, in an action of trover. If the defendant has paid the plaintiff's debt under such circumstances as will give him a right of action against the plaintiff, his remedy must now be sought in a cross-action.

Must the verdict be set aside as not responsive to the issue, or the exceptions to the allowance of an amendment of it at a subse-

quent term be sustained? The plea was "not guilty." The verdict returned was that the defendant "did promise" with an assessment of damages. The verdict was clearly erroneous in point of form; but we fail to see how the substantial rights of the parties could possibly have been affected by the mistake. There is no room for doubt as to the party in whose favor the jury intended to decide, nor as to the amount which they held him entitled to recover. The form of the verdict was doubtless inadvertently furnished by the clerk and never engaged the attention of the jury.

It seems to us to belong to that class of cases in which the court may make the amendment upon the principles set forth in *Little* v. *Larrabee*, 2 Greenleaf, 37.

In *Foster* v. *Caldwell's estate*, 18 Vt. 180, the action was assumpsit on a warranty of soundness. The verdict was "guilty," and after the panel were discharged, the court, on motion, permitted the verdict to be amended by striking out the words "is guilty" and inserting "did promise."

We see no good cause for sustaining either the motion or exceptions on account of this misprision. It is not by any means clearly demonstrated that the amount of damages found is excessive or not warranted by the evidence. The motion cannot be sustained on that ground. *Motion and exceptions overruled.*

Judgment on the verdict.

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

Amos Moody *vs.* Inhabitants of Camden.

Certain defects in declaration waived by pleading general issue. Evidence.

An objection, at the trial, made after general issue joined and the evidence closed, in an action for injury received upon a defective highway, that there is no allegation that the hearse used was suitable or safe to ride upon, and none that the injury was caused by a want of repair in the way, cannot avail, where it is alleged in the declaration that the plaintiff was driving carefully with a safe horse, and that the road was unsafe by means of drifts, in passing which plaintiff was injured.

When no question is made that the damages are excessive, if any damages are recoverable, an exception taken to the exclusion of evidence which could have a bearing only upon the amount of injury sustained becomes immaterial.

On exceptions and motion for new trial.

Case for injury received by the plaintiff March 19, 1872, by reason of a defective highway in Camden, which the defendants were bound to keep in repair. The defect consisted of snowdrifts that had blown in and filled the road, and had become compact and dangerous. The plaintiff was driving a hearse along this way when the fore part of the vehicle settled and pitched him out into the snow in such a manner as to severely strain his right leg and knee and otherwise injure him. The declaration contained no allegation that the carriage was suitable and safe, and it was not specifically stated, in terms, that the accident was solely occasioned by the want of repair of the way. The defendants went to trial on the general issue, and after the testimony was closed contended that the declaration was insufficient to sustain a verdict for the reasons above stated; but the justice presiding ruled that the objection was not made in the proper time and manner to avail the defendants. The evidence relating to the other point determined in the case is sufficiently stated in the opinion. The testimony was voluminous and other objections were made during the trial, but the foregoing are all which the decision of the court

fully discusses. The jury rendered a verdict of $425.83 for the plaintiff, and the defendants excepted.

Joseph Baker and *Geo. H. M. Barrett*, for the plaintiff.

Gould & Moore and *T. R. Simonton*, for defendants.

PETERS, J. The defendants contend that the declaration is insufficient, because it is not alleged that the hearse upon which the plaintiff was riding when the accident occurred was suitable and safe to ride upon, and because it is not alleged that the injury was occasioned by a want of repair in the road. There was no demurrer offered. The objections were not taken until after the general issue was pleaded and joined, and the evidence closed. The declaration alleges that there were blocking snow drifts which rendered the road unsafe and inconvenient; that the plaintiff had a safe horse harnessed to a hearse, and was necessarily passing along the road thus blocked; that he was driving with due care; that in the drifts the hearse was partly overturned and he was thrown out and injured. The allegations describe with particularity how the upsetting occurred. The declaration could have been made more formal, but as it would have been at any stage amendable, and the case was rightly understood at the trial, we think the objections, at the time and under such circumstances made, were properly overruled.

It is contended by the defendants that certain testimony by them offered was improperly excluded. A question arose at the trial, whether the plaintiff took reasonable care of himself after he was injured, or whether his injury became aggravated by his carelessness. A physician of the homœopathic school testified, that the treatment followed at a certain date subsequent to the injury was a correct one. Whereupon the defendants called as a witness a physician of the allopathic school to show the contrary, and proposed to ask him what the proper treatment would have been, if the case was as the other medical witness had stated it. This was excluded unless the latter witness should undertake to testify

what the treatment should have been according to the school of the witness first called, who had testified that the treatment of the two schools was different. How far an objection to the exclusion of the evidence offered would be available to the defendants, if material, it is unnecessary to decide. But as its admission could have had a bearing only upon the amount of injury sustained, and not upon the question whether any injury was sustained, and there is no motion to set aside the verdict as against excessive damages, and the counsel for the defendants admitted at the argument the damages to be none too large, if any were recoverable, the contest in this matter becomes entirely immaterial. It is not perceived, that in the exclusion of any other evidence offered the defendants were injuriously affected, as the matters sought to be admitted were either too remote, or were afterwards substantially admitted, or were immaterial.

The objections to the instructions and refusals to instruct are not well founded. If the requested instructions which were refused had been given, it would have been, in most instances, an assumption by the court of what were more properly considerations for the good sense and discretion of the jury.

We have doubt about the correctness of the verdict, upon the question whether the plaintiff was in the use of ordinary care, to undertake what he did under the circumstances, disclosed even in his own testimony; and we suppose the defendants may rely more upon the motion to set aside the verdict on that account than upon the other questions submitted to us. But as the result is rather in accordance with the view more commonly accepted by juries in kindred cases, and the case is one peculiarly addressed to their good sense rather than for the opinion of the court, and the damages are evidently not excessive, we do not incline to disturb the verdict. *Exceptions and motion overruled.*

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

Alfred Sleeper *vs.* Union Insurance Company.

Evidence.

A shipmaster and owner procured a marine insurance policy upon his one-quarter of his vessel "on account of whom it may concern;" loss payable to himself. The vessel was lost during the voyage covered by the policy, with the master and all on board. The plaintiff, a creditor of the deceased master, brought this action upon the policy claiming that it was obtained for his benefit. He introduced testimony of the declarations of the deceased that if the plaintiff would make him a loan he would secure him by a policy on this vessel; and subsequent declarations that the loan had been made to him by the plaintiff and that he had secured the plaintiff by procuring a policy for his benefit. It was held that this testimony was inadmissible without proof that the deceased was acting as plaintiff's agent in effecting the insurance, and that the declarations themselves were not competent for this purpose.

Evidence was introduced to prove the insolvency of the estate of the deceased; *held*, that it was improperly admitted.

On exceptions.

This action is based upon a policy of insurance upon schooner Abby Brackett, issued by the defendant company to one E. K. Alexander, "on account of whom it may concern," loss (if any) payable to him. The plaintiff claimed that the policy was procured by Alexander for his (Sleeper's) benefit. By his own testimony and that of Dr. Thomas Frye he proved that Capt. Alexander wished to purchase one-quarter of this schooner, but had not the means, and desired to borrow $2,250 of the plaintiff for this purpose, proposing to secure $750 of it by mortgage upon real estate, and $1,500 by mortgage of the quarter of the vessel and a policy of insurance for Sleeper's benefit; and Dr. Frye testified that Alexander subsequently told him he had obtained the loan of Sleeper, given the mortgages and procured the policy for Capt. Sleeper's benefit. This transaction was in November, 1866. The vessel was lost at sea with all on board, including Alexander, April 13, 1867. Soon after hearing of the loss the plaintiff ascertained what company issued the policy, asked the widow and administra-

trix of Capt. A. for it, but she refused to surrender possesssion of it, and Sleeper then notified the defendants that he claimed it and forbade its payment to any other person. Mrs. Alexander, in her capacity of administratrix, afterwards instituted suit upon the policy and recovered judgment at the return term against the defendants on it upon their default; and the corporation paid the execution which issued on this judgment.

Captain Sleeper then brought this suit. At the trial he offered the probate records to show the estate of Alexander represented insolvent by the administratrix and they were admitted against the defendants' objection. The defendants also objected to the admission of Capt. Alexander's declarations hereinbefore mentioned as to the person for whose benefit he obtained the policy; and to the ruling, receiving this evidence, they excepted.

Charles P. Stetson, in support of the exceptions.

1. After stating the facts, counsel contended that Capt. Alexander being the owner and the loss payable to him the company were authorized to pay it to his representative. *Farrow* v. *Commonwealth Ins. Co.*, 18 Pick. 55; *Herman* v. *Louisiana State Ins. Co.*, 7 Louisiana, 502; Parsons on Maritime Law, 30; *Reed* v. *Pacific Ins. Co.*, 1 Met. 171.

The judge erred in refusing requested instruction that the jury might take into consideration the language of the policy in determining for whose benefit it issued.

2. Dr. Frye's testimony improperly admitted. Plaintiff can only recover as the principal of E. K. Alexander; or, in other words, the policy is of no avail to him unless it be shown that Capt. Alexander acted as his agent in procuring it. *Newson* v. *Douglass*, 7 H. & J. 450; Parsons' Mar. Law, 30, note 1.

There must be proof of agency before admitting declarations of the alleged agent. *Hazeltine* v. *Miller*, 44 Maine, 181. And the agency cannot be proved by the declarations of the professed agent, however publicly made, nor if he even sign the principal's name, by himself, as agent. *Tuttle* v. *Call*, 5 Pick. 417; *Brigham* v. *Peters*, 1 Gray, 145; *Boynton* v. *Laighton*, 1 Allen, 509.

The conversation of Sleeper and Frye was improperly admitted; and that of Dr. Frye with Capt. Alexander was several days before and a week after the arrangement was concluded, and were either before the agency was created, if any ever existed, or after it had terminated; hence, they were mere hearsay and no part of *res gestæ*. 1 Greenleaf on Ev. § 124; *Corbin* v. *Adams*, 6 Cush. 93; *Lane* v. *Bryant*, 9 Gray, 246; *Stiles* v. *Western R. R.* 8 Met. 45; *Haven* v. *Brown*, 7 Greenl. 424; *Fairlee* v. *Hastings*, 10 Vesey, 123; *Lucas* v. *Trumball*, 15 Gray, 309; *Myers* v. *Ward*, 19 Conn. 269; *Beecher* v. *Mayall*, 16 Gray, 376; *Allen* v. *Holton*, 20 Pick. 464.

The records showing insolvency of Alexander's estate were improperly admitted. They were entirely irrelevant to the issue. *Simpson* v. *Carleton*, 1 Allen, 111; *Hilton* v. *Scarborough*, 5 Gray, 422; *Veazie* v. *Hosmer*, 11 Gray, 396; *Agawam Bank* v. *Sears*, 4 Gray, 98; *Shepard* v. *Ashley*, 10 Allen, 542; *Graves* v. *Jacobs*, 8 Allen, 141; *Com.* v. *Willard*, 2 Gray, 294; *Com.* v. *Madden*, 1 Gray, 486; *Orcutt* v. *Ranney*, 10 Cush. 182.

The verdict was against the evidence and the weight of evidence.

Gould & Moore, for plaintiff.

It was competent for the plaintiff to show that insurance effected "on account of whom it may concern" was intended for his benefit. *Aldrich* v. *Equitable Ins. Co.* 1 W. & M. 272; Angell on Ins. §§ 78–82, 379; 1 Arnould on Ins. 25, 26, note; *Stephenson* v. *Piscataqua Ins. Co.* 54 Maine, 72.

And this may be shown by parol. 2 Duer on Ins. 9, 29, §§ 8, 21; 1 Arnould on Ins. 170, note 2; 2 Arnould on Ins. 1249, § 433, note 1; Angell on Ins. § 82, last clause; 2 Parsons' Mar. Law, 29, 30, and notes; *French* v. *Backhouse*, 5 Burr. 2727; *Finney* v. *Bedford Ins. Co.*, 8 Met. 348.

A mortgagee can recover on such a policy if it was his interest it was intended to cover. 2 Phillips on Ins. 378; *Motley* v. *Manuf. Ins. Co.*, 29 Maine, 337. So can any other interested party, if such was the intention when the policy was issued. *Jefferson Ins.*

Co. v. *Cotheal*, 7 Wend. 72; 2 Duer on Ins. 29. Or he may ratify the obtaining of a policy in his behalf by subsequent adoption of it. 1 Arnould on Ins. 169 *et seq.*; *Finney* v. *Fairhaven Ins. Co.*, 5 Met. 192; 2 Parsons' Mar. Law, 33.

And may forbid suit thereon in the name of the party procuring it. *Copeland* v. *Mercantile Ins. Co.*, 6 Pick. 198.

And sue it himself. *Farrow* v. *Com. Ins. Co.*, 18 Pick. 53.

Alexander's declarations were properly admitted. 1 Greenleaf on Ev. §§ 147, 189–191; *Smith* v. *Smith*, 3 Bing. 29; *Ivat* v. *Finch*, 1 Taunt. 141; *Hodges* v. *Hodges*, 2 Cush. 460.

They were declarations of one in possession and against his interest, which are therefore admissible. 1 Starkie on Ev. 70; 1 Phillips on Ev. (7 ed.) 358; *Hatch* v. *Dennis*, 10 Maine, 244; *White* v. *Loring*, 24 Pick. 319, 323; *Holt* v. *Walker*, 26 Maine, 107; *Dailey* v. *Gower*, 24 Maine, 563.

Being of facts peculiarly within his knowledge they should be admitted after his death, when the statements are against his interest when made. *Hingham* v. *Ridgway*, 1 East. 109 in 2 Smith's Leading Cases, 193; *Stair* v. *N. Y. Nat. Bank*, 54 Penn. St. 364; 1 Greenleaf on Ev. § 108. See also, *Edwards* v. *Currier*, 43 Maine, 482.

The records of insolvency are not made part of the reported case; hence they are not before the court, and the court cannot judge of it.

It is of no consequence that Capt. Alexander had an insurable interest. The question is, "For whose benefit was this policy procured and intended?"

Appleton, C. J. E. K. Alexander being indebted to the plaintiff on a note dated Nov. 2, 1866, for $1,500, payable in one year, gave him at that date a mortgage on his quarter of the schooner Abbie Brackett.

On the 10th of the same November, Alexander effected an insurance of $2,000 on the schooner Abbie Brackett "on account of whom it may concern, loss payable to him . . . against a total loss only."

The vessel was lost within the time specified in the policy, with all on board, among whom was E. K. Alexander, the master.

Annie D. Alexander, the widow of E. K. Alexander, was appointed administratrix on the estate of her husband, commenced a suit upon the policy to which reference has been had, and obtained judgment for a total loss, which the defendants have paid.

As the policy was "on account of whom it may concern," this plaintiff claims that it was effected for his benefit, and this was the question presented to the jury for their determination.

To maintain the issue on his part the plaintiff offered to prove the insolvency of Alexander's estate. An objection being made, it was withdrawn. The offer was again made and the record showing the insolvency was put in, subject to objection, with the accompanying remark, that "it is simply the declaration of the administrator that the estate is insolvent."

This testimony in any aspect of the case was inadmissible. The declarations of the administratrix were no more competent than the declarations of any one else. The solvency or insolvency of the estate of Alexander had no tendency to prove the issue on trial. But it did have a tendency to show that the plaintiff's remedy against the estate would be of little value. It is obvious that able counsel might make effective use of this fact adversely to the defendants. Nor can we believe that its admission would have been thus strenuously and persistently urged unless the counsel thus urging supposed it would have an effect upon the jury favorable to his client. Its admission would hardly have been thus repeatedly insisted upon, if regarded as unimportant.

The plaintiff claims that Alexander was his agent and effected the policy in suit for his security. To prove this, Thomas Frye was called, who testified as follows: "Capt. Alexander called to see me and expressed thanks for the assistance I had offered. He told me he obtained the money of Capt. Sleeper. He offered to me his thanks and offered to pay me. He said he had ordered or effected the insurance for $2,000 for Capt. Sleeper's benefit, for security in addition to the mortgages, and carried out the details in

regard to the land. He said he had given a mortgage bill of sale and a mortgage deed."

This evidence was received against the objections of the counsel for the defendants. It is difficult to perceive upon what grounds it can be regarded as admissible.

Were Alexander living, this testimony of his declarations would not have been admissible except to contradict statements of his as a witness. The fact of agency is not to be proved by the statements of an agent asserting his agency. There must be proof of agency before the declarations of an agent are admissible, and then only such are received as are strictly part of the *res gestæ*. *Hazeltine* v. *Miller*, 44 Maine, 177. The general and well-settled rule that the declarations of an agent while in the transaction of the business confided to his charge, are binding upon the principal. But his recital of past transactions are hearsay and are not admissible. *Burnham* v. *Ellis*, 39 Maine, 320. The same rule applies to prospective intentions. The declarations as testified to by Frye are either the statements of what Alexander had done or proposed doing. The plaintiff, if Alexander was his agent, could not have been prejudiced by the conversations of his agent before he had entered upon the business of his agency, or after its termination, when the objects for which he had been appointed were accomplished. Neither can such recitals of past events or proposed undertakings be used by him as testimony against these defendants.

As the evidence shows that the policy was never in Alexander's possession and, indeed, had not been issued at the time of this conversation, these declarations can hardly be deemed admissible as those of a person in possession, for he never had possession of the policy or knew that one had been issued.

These declarations were offered, not merely to negative the title of Alexander, but to establish one in the plaintiff. These declarations are the merest hearsay, and upon no recognized principle of evidence, can they be deemed evidence between third parties.

Exceptions sustained.

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

AMARIAH K. KALLOCK *vs.* SAMUEL B. PERRY and another.

Trespass quare clausum.

When a wife has been divorced from her husband for his fault, and has left her furniture and other property upon his premises, he cannot maintain trespass *quare clausum* against her servants, after divorce, for peaceably entering at her command and removing her goods and chattels so left.

TRESPASS *quare clausum.*

MOTION FOR NEW TRIAL by the plaintiff, who alleges that the verdict against him was not in accordance with the law and the evidence.

D. N. Mortland, for plaintiff.

Rice & Hall, for defendants.

APPLETON, C. J. This is an action of trespass *quare clausum.* The gist of the action is the breaking and entering.

It is admitted that the plaintiff had been divorced from his wife upon her libel. Being divorced upon her libel it was for fault on his part. A portion of the household furniture claimed by the wife remained upon the premises occupied by the husband. The defendants entered as the servants of the wife to aid her in its removal. They were not forbidden to enter. They removed only what belonged to the wife, and did this without injury to the plaintiff's premises. So the jury must have found to have rendered the verdict they did. The property of the wife was left in the house occupied by the plaintiff and his wife before the divorce. It was on the plaintiff's premises by his consent. Upon the divorce the wife had a right to its possession and control. An entry made by her for the purpose of its removal, peacefully, without objection or resistance on the part of her former husband, and a removal of the same without injury to the premises, was but the exercise of

her legal rights. It was no wrong done to the plaintiff. As she might remove her own property, so she well might call in the assistance of others to aid in its removal. *Wheelden* v. *Lowell*, 50 Maine, 504.

No exceptions are taken to the rulings of the presiding justice. There was contradictory testimony upon the various questions submitted to the jury, but it was for them to determine what was the truth of the case and to that determination the parties must submit, for there is no such preponderance of evidence on the part of the losing party as would justify our interference.

Motion overruled.

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

SAMUEL PILLSBURY *vs.* JONATHAN S. WILLOUGHBY.

Tender.

When money has been tendered before or after suit brought, the defendant, to keep his tender good, must bring it into court on the return day of the term at which the entry of the action, to which the tender applies, is made.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion.

Gould & Moore, for the plaintiff.

Rice & Hall, for the defendant.

1. A plea of tender is an issuable plea in bar, and may be pleaded after a general imparlance. *Kilwick* v. *Maidman*, 1 Burrows, 59; *Moore* v. *Smith*, 1 H. B. 369; 3 Chitty on Pl. 922; 2 H. B. 442. In this State there is no distinction as to time of pleading a tender and any other plea in bar; but subject to Rule

VII, it may be pleaded at any time before trial. R. S. of 1871, c. 77, § 3; Rule VIII. S. J. C.; *Hart* v. *Hardy*, 42 Maine, 196. Parties have the right to govern their practice, as to pleading, by the Rules, which are equally obligatory upon them and upon the court. *Thompson* v. *Hatch*, 3 Pick. 512; *Maberry* v. *Morse*, 43 Maine, 176.

2. On a plea of tender the money is paid into court when the plea is filed. 2 Roll. Abr. 523; 6 Bac. Abr. 464; 5 Com. Dig. 635, 315; 2 Stark. on Ev. 778; 1 Esp. N. P. 300; Broom's Com. 200; 3 Black. Com. 303, note 19; 15 Petersdorf, 30; 1 Tidd, 622; 1 Crompton, 319; 1 Bouv. Inst. 324; 2 Kent's Com. 692; Story on Pl. 161; 2 Greenl. on Ev. 600; *Eddy* v. *O'Hara*, 14 Wend. 221; *Brooklyn Bank* v. *De Graw*, 23 Wend. 342; *Knox* v. *Light*, 12 Ill. 86; *Warren* v. *Nichols*, 6 Met. 261; Colby's practice, 216; *Woodcock* v. *Clark*, 18 Vt. 336. The case of *Reed* v. *Woodman*, 17 Maine, 43, which is in conflict with these authorities, is founded upon *Pether* v. *Shelton*, 1 Strange, 328, which is not in point, and cannot sustain it.

Appleton, C. J. This is an action of assumpsit upon an account annexed. It was entered at the September term, 1872, holden in this county and continued to the following December term. On the fifth day of the last mentioned term the defendant, having obtained leave to plead double, filed a plea of *non assumpsit* as to a portion of the plaintiff's claim, and a tender of the residue before the commencement of the action, and with the plea brought into court the sum tendered and notified the plaintiff thereof.

The presiding justice ruled that the tender, to be available, should have been brought into court on the first day of the return term and minuted on the clerk's docket, and not having been so brought in, that the defendant could not avail himself of it. To this ruling the defendant seasonably excepted.

It was decided in *Reed* v. *Woodman*, 17 Maine, 43, that when money had been tendered before or after suit brought, that the defendant to keep his tender good must bring it into court on the first day of the term at which the entry is made.

The learned and elaborate argument of the counsel for the defendant proves, or tends strongly to prove, that the rule of the common law as established in England and in most of the States of the Union differs from that adopted by the court of this State in *Woodman* v. *Reed*; that the plea of tender may by leave of court be filed at any time, and that it is in season if the money tendered be brought into court when the plea is filed.

When a tender has been made before action brought, it is somewhat immaterial what rule should be established as to the time when it should be brought into court; whether it should be when action is entered, or at a later period, and when the plea of tender is filed. But when a rule of practice has been established and acted upon for a long time, its change presents a very different question from that of its original adoption.

The decision in *Reed* v. *Woodman* has been uniformly adhered to since its promulgation. As a rule of practice, it is well understood by the profession. There must be a definite time fixed when money tendered is to be brought into court. Whether that time should be when the action is entered or when the plea of tender is filed, is of no consequence in advance of any rule, but the time being once fixed and determined by judicial decision, it is eminently a case where the rule of *stare decisis* should apply.

Exceptions overruled.

CUTTING, DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

JOHN McLEAN, administrator, *vs.* ADDIE C. WEEKS.

Voluntary conveyance by intestate—void as to amount of debts due from him.

The administrator of an insolvent estate, in an action for money had and received, may recover for money given by his intestate after he became insolvent without a valuable consideration.

As such gift is valid as against the heirs of the giver, the donee is entitled to all over the amount required for the payment of debts and expenses of administration.

It is for the administrator to show the amount of such debts and expenses, and he is entitled to recover only that amount.

Plaintiff's attorney may administer the oath required by R. S., c. 113, § 2, to authorize the arrest of the defendant.

ON EXCEPTIONS.

This was an action of assumpsit for $700.00, money had and received, brought by the plaintiff as administrator of the estate of William Woodman, deceased.

The writ was served by arrest of the defendant, an affidavit having been made upon the writ and sworn to by the plaintiff before Jason M. Carlton, Justice of the Peace, in the form prescribed in R. S., c. 113, § 2.

The writ was made and entered by Jason M. Carlton, attorney. Upon the second day of the first term the defendant filed a motion to dismiss the suit for want of legal service, and the court overruled the motion.

It is admitted by defendant that plaintiff's intestate, on the 3d day of December, 1868, gave and delivered the defendant the sum of $700.00 in consideration of love and affection simply, and that Woodman died Dec. 25, 1868.

The plaintiff offered to show by the proper evidence that the estate of Woodman was rendered insolvent, and to prove that in fact it was insolvent at the time of the gift and of his decease.

The court ruled that an action at law could not be maintained on the facts offered to be proved, and the plaintiff filed exceptions.

A. P. Gould, for the plaintiff.

1. The gift was voluntary, without valuable consideration. It was made in contemplation of approaching death, and intended as a provision for the defendant and void as to creditors. *Welcome* v. *Batchelder*, 23 Maine, 85.

2. The administrator is the trustee and representative of creditors. If property has been placed in the hands of third persons, by his intestate, which of right ought to belong to the estate, it is his duty to take the necessary steps to recover it. *Fletcher* v. *Holmes*, 40 Maine, 364, 367, 368. The administrator may maintain an action at law to recover the $700.00. *Martin* v. *Root*, 17 Mass. 222. It appears here that Woodman was insolvent at the time of this gift, and consequently the whole amount will be necessary to pay the debts. It is therefore a stronger case than *Martin* v. *Root*.

3. The gift cannot be good in part and bad in part, for if the intestate was insolvent at the time of the gift and so continued till his death, it was wholly void. Therefore if the $700.00 exceeded the amount of the prior debts, outstanding at the time of his death, subsequent creditors would be entitled to the balance.

4. The authorities cited by defendant do not sustain the proposition that the only remedy is in equity. These cases show that the only instances in which a suit in equity can be maintained by the administrator, to recover property or money transferred by a fraudulent or voluntary conveyance, are where there is a failure of proof to sustain an action at law.

5. As the estate could not have been represented insolvent until the proper inventory had been returned, it will be presumed that it was returned.

A. Libbey, for the defendant.

In this case the gift to defendant was executed. It was for love and affection. It was not made for the purpose of defrauding creditors. It is valid against everybody, unless Woodman was insolvent at the time it was made, and then against everybody except existing creditors. *Beal* v. *Warren*, 2 Gray, 447; *Parkman* v. *Welch*, 19

Pick. 237; *Pelham* v. *Aldrich*, 8 Gray, 515; *Rollins* v. *Mowers*, 25 Maine, 192; *Webster* v. *Whitney*, 25 Maine, 326.

1. An action at law cannot be maintained to recover back the donation. The proper remedy is in equity. The defendant has a right to retain all the donation not needed to pay the debts of the donor existing at the time of the gift. She has a right to be heard on the questions as to the amounts and dates of the debts, and the amount of the donor's property at the time. These questions cannot be tried collaterally in an action at law. She can be heard in court on these questions only in a bill in equity. *Gibbons, admr.*, v. *Peeler*, 8 Pick. 254; *Holland* v. *Cruft*, 20 Pick. 321.

2. If the suit at law can be maintained at all, it can be so only after the amounts of the claims against the estate have been fixed in some way so as to be conclusive on defendant, and the amount of assets has been made certain, so that it shall appear, by proceedings duly had, how much of the donation is necessary for the payment of the creditors entitled to impeach the gift. *Holland* v. *Cruft*, before cited; *Caswell* v. *Caswell*, 28 Maine, 232; *Fletcher* v. *Holmes*, 40 Maine, 364.

No representation of insolvency was made before the commencement of the action. No proceedings by suit or otherwise had been had to fix the amount of claims against the estate, nor does it appear that the administrator had returned an inventory or settled an account by which the amount of the assets can be ascertained. Further, there is no offer to prove that any debt, existing at the time of the gift, is now outstanding, or was so at the decease of plaintiff's intestate.

3. But if the action can be maintained on the facts, it should be abated on the motion filed on the ground that the affidavit of plaintiff, necessary to authorize defendant's arrest, was certified by the attorney who made the writ and entered the suit in court.

The attorney is interested, and incompetent to certify the oath.

APPLETON, C. J. This is an action of assumpsit, brought by the administrator of the estate of William Woodman, to recover the sum of seven hundred dollars, given by said Woodman to the defendant a few days before his decease. The plaintiff offered to prove the insolvency of Woodman at the date of the gift, and that the estate was rendered insolvent and was so insolvent.

The presiding justice ruled upon the facts offered to be proved that the action was not maintainable.

The gift, as between the parties thereto and the heirs of the donor, was valid. So far as the rights of prior existing creditors are concerned it was fraudulent, or evidence from which the inference of fraud must be drawn.

The estate being insolvent, the creditors defrauded cannot institute suits against the donee for the recovery of the money given. The administrator must act for them. He is trustee. It is his duty to protect and enforce their rights. As to them the gift is void, and the money given should be in the hands of the administrator, as a part of the assets of the estate for the payment of its debts.

Assumpsit for money had and received is an equitable action. The gift being void, so far as the plaintiff acts for the creditors, he can recover on the money counts the amount in the defendant's hands, to be appropriated with the other property of his intestate, for the payment of the creditors entitled thereto and the necessary expenses of administration. The balance, if any, will belong to the defendant. Though the gift may be void as to creditors, it is valid as against the heirs of the giver. *Abbott* v. *Tenney*, 18 N. H. 110. It is for the administrator to show the amount required to pay the debts due from the estate to its several creditors, defrauded by his intestate, for that is all which he is entitled to recover. The remainder, if any there be, belongs to the defendant.

The motion to dismiss cannot avail the defendant. It is not entitled in this suit. It will apply as well to any other cause on the docket as to this. It is not stated in the bill of exceptions that the oath was administered by the plaintiff's attorney, and if it had

been, it is not readily perceived why he was not as competent to administer it as any other magistrate. *Exceptions sustained.*

KENT, J., concurred; and DICKERSON, BARROWS, and DANFORTH, JJ., concurred in the result.

TAPLEY, J., dissented and delivered the following opinion, stating the grounds of dissent.

This case shows that William Woodman in his life-time gave the defendant, in consideration of love and affection, the sum of seven hundred dollars. The plaintiff is the administrator of the estate of said Woodman, now deceased, and brings an action of assumpsit upon an account annexed in these words:

"1868. Addie C. Weeks to William Woodman, Dr.
Dec. 23. To cash had and received, $700.00."

Woodman died the 25th day of December, 1868. There is also a general count for money had and received, both counts averring a promise to the intestate in his life-time. To sustain his action the plaintiff offered "to show by proper evidence that the estate of said Woodman was rendered insolvent, and to prove that in fact the said Woodman was insolvent at the time of the gift and of his decease." The presiding judge ruled "that an action at law cannot be maintained on the facts offered to be proved." In considering this ruling it may be well to consider first the condition and rights of the donor and donee after the gift was made, and during the life-time of the donor.

There can be no question that the donor parted with all his title and interest in the money by the gift. This has been too often settled to need any citation of authorities. In an hour after had he repented of the gift he could not have recovered it back. There was no promise, express or implied, or raised by law, to repay him. He could not maintain an action of assumpsit for it, nor could any other person in his name do it. There was nothing upon which to base assumpsit, or indeed to maintain any form of action for it. He had no cause of complaint to bring before the court.

If this plaintiff can maintain assumpsit, it must be upon some other promise than that made the deceased, for there was none made to him; yet we find this declaration based solely and entirely upon a promise alleged to have been made to the intestate in his his life-time and broken in his life-time. These are the allegations and none other, and it would not seem to admit of argument that this action cannot be maintained unless there was a promise, express or implied, or one raised by law, to pay the intestate this sum.

If there was such a promise, why could not the donor in his life-time maintain a suit upon it? If there was none, how can the administrator maintain a suit upon such allegations? The difficulty with the plaintiff's case is a failure to distinguish between a promise of repayment and a liability upon the part of the donee to have the property seized and applied in the extinguishment of certain claims against the donor.

The death of the donor creates no promise upon the part of the donee to the dead donor. His death neither enlarges nor diminishes the claim any creditor may have upon the fund. It does not increase or diminish the interest the donee takes in the fund. The donor is a stranger to it from the time he parted with his interest in it.

Second. What were the rights of third parties?

The transfer being made upon no other consideration than love and affection, and being absolute, not held in trust by the donee for the donor, may have been void as to creditors of the donor existing at the time of the transfer. Assuming it to be so, the donee took it subject to a right in them to seize it and apply it in satisfaction of their claims. They could or not proceed against this fund as they chose. It was a personal right to be exercised or not. It was not one common to all the creditors. The relation of debtor and creditor must be shown to exist at the time of the transfer to entitle the party to proceed against the fund, and the donee held it subject only to the right of such persons to seize it by process of law and apply it to such claims. When seized, the creditor could make no other application of it than to indebt-

edness existing at the time of the transfer, whatever other claims he may have had. In such a proceeding he is dealing with the property of the donee, a person who has a perfect title against all claims except those existing at the time he took it.

In the life-time of the donor the proceeding must be by attachment of the property thus held. If the property be such as can be come at to be attached in specie, and manually, it must be so done; if it be such as cannot be reached in this way it may be reached by our process of foreign attachment. The remedy is against the fund and not against the person holding it. No creditor in the life-time of the donor could maintain assumpsit against the donee for the money. He had simply a right to seize the property, the gift notwithstanding. There was no promise existing between the creditor and the donee, and indeed, as before remarked, no promise between the donee and any one else. He took the property, with the right of the creditor still existing to seize it, for his demand, upon execution process.

As between the donor and donee the consideration is a good one, and the transaction gives the donee as good and as sacred a right to the property as that by which any individual holds his possessions. She has as much claim upon the law and the courts for its protection as she has for any other property she possesses. Subsequent creditors have no more legal or equitable claims upon this property than have entire strangers to the estate, and they will not be allowed to obtain by indirection that which the law forbids them to get by direction. They cannot compel the prior creditors to look to this fund in order that they may hold the intestate's estate for their own benefit. All the creditors alike have a claim upon the estate of the deceased, and should that prove deficient, the prior creditors may recover their balance from any fund thus disposed of. The only ground upon which they can look to such a fund is that the disposal of it was without a valuable consideration and to their injury. It is not to their injury unless the estate proves insufficient to meet their demand, and it is only to their injury to the extent the estate fails to pay. If these

proceeds were put into the common fund, and the estate of the intestate increased to that amount, it would inure to the benefit of all the creditors, disregarding the distinction between prior and subsequent creditors. If it was seized upon by the administrator and applied to the payment of prior claims, it would thus inure to the benefit of subsequent creditors, and take from the innocent and meritorious donee funds of her own to pay liabilities arising long after the gift. By the death of the donor, subsequent creditors acquire no interest in such property they did not before possess. They have no greater claims upon the property than they had in the life-time of the donor, and that is none at all.

There was no legal duty devolving upon the intestate in his life-time to recover back the money for the benefit of his creditors; as we have seen before, he could not do it. The law would not aid him in so doing. It lent its aid only to those who were injured by the transaction; those who had a claim upon the fund when it was transferred. The community of interest in the fund was solely in the donee and prior existing creditors. They were the only parties having any interest at all in the fund. The deceased, after the gift, had not the most remote interest in it, nor any person who thereafter became a creditor. As to these the right of the donee is as clear, legal, and equitable, as that possessed by any member of the court to his property.

By pursuing the inquiry concerning the rights of the donee and the rights of creditors a little farther we shall discover some of the embarrassments attending the mode of procedure adopted in the case at bar. As we have before seen, the intestate parted with all his interest in the property, and the defendant took it, discharged of every claim save that of creditors. The possession of the intestate in his life-time was rightful, and the possession he conferred by the gift and delivery was rightful. She was no trespasser, but the owner in possession, subject to the right of certain persons by process of law to seize. She was not holding in wrong. To be dispossessed of this property any person claiming it must show his right to it. He must prove he is a creditor and was a

creditor at the time of the gift. The fact of an existing *bona fide* claim must be established by legitimate evidence. It must be established on the issue between the creditor and the person holding the property. *Miller* v. *Miller*, 23 Maine, 22. She has a right to contest the claim, and contest any allegation of its existence prior to the gift. Now, suppose in the case at bar there are fifty in number of these claims (and we know nothing of their number), must not those claims be proved before the defendant is required to yield her property to the claimants? Is it sufficient that they shall be settled upon *ex parte* hearings? Shall she have no voice in the investigation? Must she part with her property upon the mere claim of a party? She is directly interested in the inquiry, both as to the legitimacy of the claim and the time of its origin. It would seem to be very clear she must have the right to be heard upon all these matters, and that she cannot be concluded without the opportunity of contesting the claims that may be presented against her property. To exclude her would render her liable to such injustice as the law never casts upon a party. If she has a right to be heard and contest the claim, both as to its genuineness and its origin, can she be called upon to do it with fifty claimants, in an action of assumpsit, brought by the administrator upon an account annexed, based on a promise made to the intestate in his life-time; or, upon a still more general money count, for money had and received to the intestate's use, and a promise to repay to the intestate in his life-time? Such a proceeding, to say the least of it, would be a novel one. What notice would such a writ and declaration as that, in the case at bar, give her of the claims intended to be proved, or the ground upon which she was called upon to pay seven hundred dollars? How could she be prepared to meet the claims thus made against her? And suppose the writ was different from that now presented, and such as it might be made by amendment, if amendable, and it averred that some twenty or fifty individuals were creditors, naming them and their claims, and that they were creditors at the time of the gift, shall each of these several creditors come into

court under such a writ, founded upon such alleged promises as we have in this writ, and maintain and establish his claim against the intestate? Upon a plea of never promised, made by this defendant in a suit by this plaintiff, all manner of claims and defenses to claims between third parties are to be tried. Shall the jury render a verdict on each claim, finding both facts, viz.: its genuineness and its priority of origin? Find in one case a verdict for the claimant and in the other against him? Some may have claims against the estate, but not against the fund; all these must be settled. Here would seem to be difficulty enough, but it will at once be perceived that claimants at once become contestants, where the fund is not large enough to cover them all. Each would be interested to reduce the other's claim, and each to defeat the claim of its priority. A multitude of questions would be presented showing the impracticability of such a procedure.

Again, in such an investigation, the several parties, claimants under our law, would be witnesses in their own behalf, while in pressing their claim against the administrator they would not. They might be able to make a claim when proved as a collateral matter between the administrator and this defendant, and be wholly unable to do so in a direct issue with estate. As to this defendant it would be a claim, and as to the estate it would not. Suppose the administrator should leave out a creditor whose claim was in fact an existing claim at the time of the gift, does he become responsible for that claim? Suppose he proceeds upon the general allegation that the estate is insolvent, and was insolvent when the gift was made, and is then held entitled to receive the fund, shall he then, upon his own mere motion or judgment, determine conclusively upon this defendant that A. and B. are prior creditors, and determine conclusively upon C. and D. that they are subsequent creditors and entitled to no part of the fund? The law invests him with no such power. His powers are not judicial. He cannot thus settle the rights of parties. Neither will the law impose upon him the other alternative of paying or withholding at his peril. The truth is, such claims, viz.: those against

property in which the deceased parted with his interest by a *bona fide* gift, are mere personal claims, to be made and enforced by the persons who have the right, and are in no sense claims held by the estate, or for which the estate is in any wise responsible.

If it be said these questions may be settled by the commissioners of insolvency, it may be answered for this case that they have not done so; but inasmuch as proceedings in insolvency may go forward before the decision is announced, and inasmuch as the question is one important in practice, a few suggestions upon the proposition may be proper.

The first apparent answer is that they are charged by law with no such duties, nor clothed with powers adequate to their performance. Their powers and duties are specifically defined. They are not a court of general judicial power, but exist for a certain specified purpose. It is no part of their duty to ascertain and adjudicate upon the rights of particular persons to any particular property, over that of others. They are not charged with the duty of determining whether claims are or not, with reference to any conveyance or transfer, prior or subsequent. They do not determine whether or not an estate is insolvent. They settle the amount due each claimant from the estate.

The question involved in the case at bar is an important one to persons holding property, and upon both issues that may be raised the evidence may be of such a character as to require an investigation in, and the decision of, a court of last resort. If proceeding were had in such cases before the commissioners of insolvency this could not be done. It is only the administrator, the creditor, and the heirs at law who have a right to appear and contest the claims, and only those can appeal, and the decision made cannot reach a vital question, viz.: that of prior or subsequent origin of claim. This defendant being neither administrator, creditor, or heir at law would be a stranger before them and consequently unaffected by their proceedings.

In the case at bar, as before remarked, no such proceedings appear to have been had or instituted. It simply appears that the

estate had been rendered insolvent, and the plaintiff offered to prove that it was in fact insolvent. The inference from this is very strong that it had simply been represented insolvent. If proceedings had been instituted before commissioners appointed by the court of probate, and the issues necessary to be found had been duly passed upon and adjudicated by a board having the legal power and authority so to do, the inquiry might well be made if these facts should not be averred in a proceeding founded upon them. If they are a necessary prerequisite, must not such facts appear by allegation in the pleading? Would it be quite sufficient to proceed upon an allegation of a promise never made, and not implied or raised by law?

Another inquiry suggests itself and that is, whatever the form of remedy, what has the administrator to do with the matter? It is a proceeding against property the intestate had at his decease no interest in, and property that has never to come to the possession of the administrator for the estate. It is simply property some of the creditors may seize for their own benefit, a security they have beyond that found in the assets of the deceased. It is the duty of the administrator to administer upon the estate of the deceased. It is not his duty to administer upon property in which the deceased had no interest at all; upon property he had parted with all interest in. It is his duty to enforce all the claims the deceased might if he was living, and discharge all obligations he was in duty bound to do, so far as assets come into his hands, and if creditors have a claim upon other property or upon other persons for the security or liquidation of their demands, he is not bound to pursue that property and those persons for the creditors. Each creditor must look for himself to any means he has beyond that possessed by the deceased to liquidate and discharge his claim.

Suppose the creditor holds the guarantee of a third person, for the payment of the claim he holds against the intestate, must the administrator pursue that guarantee for the creditor to pay any balance the assets in his hands fail to meet? Clearly, that is no

part of his duty, nor is he authorized so to do, if disposed to, at the expense of the estate. When he has distributed that which the deceased debtor left, as required by law, he has performed his duty, and if the creditor has a claim upon some other fund for the balance he must look after it himself. If the guarantee was a mortgage the administrator would have no power or right to proceed against that property to pay the balance.

He is not bound to sue indorsers upon the deceased's paper for the benefit of the creditor. They constitute a security the creditor holds beyond the property left by the deceased, and a security the administrator has nothing to do with. He administers upon that which the deceased left. He demands that which the deceased could demand, and he pays and discharges, as far as assets will permit, all that the deceased was bound to pay and discharge. He is in no sense the representative of the creditors, and in assuming that he is lies the cause of some diversity of opinion as to the remedy that may be pursued in cases of this kind. He is th e representative of the deceased alone. That he will do that which the deceased was by law bound to do for the benefit of the creditors he is required to give bond to the judge of probate, for their use. He could not act as agent for the creditors in those cases where their interests were not identical, but antagonistic. He could not be their representative in such cases. He could at best but represent a part. In settling the question of a priority or preference of one claim over another to liquidation from a certain fund, interests arise which render such a relation to all the creditors impracticable, if not impossible. The creditors in such cases become contestants. The administrator and creditor are often contesting and adverse parties in court. They are always so before the commissioners of insolvency, and each may appeal from their decision made against them and litigate the questions in this court. Every proceeding in probate court by the administrator must be after due notice given the creditor, that he may appear and oppose the proceeding, and any creditor has the right to appear and contest the claim of the administrator. He is to every

intent and purpose the representative of the deceased, and creditors may require of him, as such representative, to do that which they could require of the deceased, so far as assets will permit him to respond, and if he does not he becomes liable upon his bond. No creditor can compel him to institute proceedings to defend against those instituted. He does this or not as he chooses. If he fails to act when he should and as he should he becomes responsible to the creditors upon the bond he has given. Holding the personal estate of the deceased for the benefit of the creditors he may so far be said to be their trustee. He may be said to be a trustee of the heir to the same extent he is to the creditor, and that is to the extent of personal assets received. These he must hold for and dispense to those entitled by law to receive them, whether it be heir or creditor, and if he give to one more than he is entitled he is liable therefor to the other. He is to all intents and purposes the personification of his principal, the intestate, charged with the duty of immediately performing all the legal obligations resting upon his principal. Beyond this he is not required to go.

In those cases where the intestate had not parted with the title to property, but had secreted it in the hands of the party called to account, in order to keep it beyond the reach of creditors, the remedy sought in the case at bar might avail. In such, the title still remaining in the intestate would pass to the administrator, if personal, and any promise arising from the circumstances to the intestate might be enforced by the administrator. But where all interest has passed irrevocably, and there is no promise, express or implied, the rights of creditors arise under the law derived from the Statutes of Elizabeth concerning fraudulent and voluntary conveyances. Such conveyances under those statutes were void and of none effect only as against creditors. In the leading case in this State upon that subject, *Andrews* v. *Marshall*, 43 Maine, 272, Mr. Justice Cutting says: "In *Osborne* v. *Moss*, 7 Johns. Rep. 161, citing *Hawes* v. *Loader*, Cro. Jac. 270, and Yelv. 196, as also in *Anderson* v. *Roberts*, 18 Johns. Rep. 527, it was decided that if

goods were conveyed to defraud creditors the conveyance was void as against them, but remained good as against the party, *his executors, and administrators.*" This is the well recognized doctrine. The sale or gift binds the party making it and his representative.

In *Brownell* v. *Curtis*, 10 Paige Chancery Rep., the cases referred to by Mr. Justice Cutting are referred to as establishing the doctrine of the common law and the law of the Statutes of Elizabeth adopted as the common law of this country, and the chancellor says, "a similar decision was made by the court of appeals in Maryland in the case of *Dorsey* v. *Smithson*, 6 Har. & Johns. Rep. 61."

The case of *Osborne* v. *Moss* was a case where the defendant justified the taking of goods, as administrator of the former owner, upon the ground of "fraud between the intestate and the plaintiff to cheat the creditors of the intestate." The court say the case of *Hawes* v. *Loader* "is an answer to this defense and completely destroys it." The administrator farther suggested that he was also a creditor of the intestate. The court say "this does not alter the case; as creditor he had no right to take the goods without suit." That his remedy as creditor would have been to have sued the plaintiff for his debt and charged him as executor *de son tort*. This he could have done, notwithstanding he was administrator; and the case of *Ashley* v. *Child*, Styles, 384, is expressly to this point.

Upon recurring to the report of the case of *Hawes* v. *Loader*, it seems Loader was administrator of Cookson. That Cookson in his life-time conveyed certain goods to defraud his creditors, retaining the possession of them himself. While thus in possession he died intestate. The grantee of the goods (Hawes) brought an action against the administrator, into whose hands the goods came, for the goods thus conveyed; the administrator pleaded the Statute of 13 Eliz. of fraudulent deeds of gift, etc., and the fraudulent conveyance and the indebtedness of the deceased. There was a demurrer to the plea, and it was adjudged for the plaintiff on several grounds, one of which was, "that the defend-

ant is not such person as is enabled by the Statute 13 Eliz. to plead this plea; for the deed is made void against all creditors, etc., but it is not made void against the party himself, *his executors and administrators*, but as against them it remains a good deed of gift."

In this case it was also held that the goods, as to creditors, "are liable in the hands of the plaintiff as executor *de son tort*, if the deed of gift be fraudulent."

This same doctrine is declared in 1 American Leading Cases, 43, in a note to the principal case reported. It is there said "the general principle is clear that a fraudulent conveyance is good between the parties and their representatives; and that the fraudulent donee may recover the property from the executor or administrator, even if the latter be a creditor. The creditors also have their remedies independently of the administrator; for a fraudulent donee taking or keeping possession of the goods is at common law liable to the creditors as executor *de son tort;* and creditors are entitled to go into equity against the property in the hands of the fraudulent grantee." "The better opinion is, that at law such property is not assets from the testator's death, for the profits of which in his hands from that time the administrator is responsible; or which he can recover, as administrator, from the fraudulent grantee."

In the case of *Allen* v. *Kimball*, 15 Maine, 116, such an action was sustained against a fraudulent grantee who had sold, after the decease of the fraudulent grantor, the property thus conveyed to him. This case recognizes very clearly this remedy of a creditor against a fraudulent grantor.

In an earlier case *Morrill* v. *Morrill*, 13 Maine, 415 such an action was not sustained, because the sale and disposition of the property by the fraudulent grantee took place before the death of the fraudulent grantor; therefore the grantee was not an intermeddler after the decease and in no wise executor in his own wrong. The court say the doctrine has never been carried so far as to unravel transactions in regard to property of this description, which had

been lawfully sold and disposed of before the decease of the supposed testator. The creditors should have looked up the property at an earlier period."

In the case cited from Maryland it is held, "the executor of the donor has no right to the goods the donor has fraudulently conveyed, and is estopped to allege that the deed is a fraud upon creditors. The property is not assets in his hands and he is not accountable for it as executor."

In a case in Alabama it is held that "if one in his life-time makes a fraudulent conveyance of his property, his grantee may, after his death, be charged as executor *de son tort*, although there is a lawful representative, because the latter being bound by the fraud of his testator or intestate cannot be charged at all in his representative capacity." *Simonton* v. *McLane*, 25 Ala. 353.

As to the liability of the fraudulent grantee or donee as executor *de son tort* to the creditor, see also in North Carolina, *Bailey* v. *Miller*, 5 Iredell, 444; *McMorine* v. *Story*, 3 Dev. & Batt. 87; *McMorine* v. *Story*, 4 Dev. & Batt. 189; *Norfleet* v. *Reddick*, 3 Dev. & Batt. 221; *Bayner* v. *Robinson*, 3 Dev. & Batt. 439; *Sturtevant* v. *Davis*, 9 Iredell, 365. South Carolina, *Tucker* v. *Williams*, Dudley, 329. Georgia, *Howland* v. *Dews*, R. M. Charlt. 383; *Clayton* v. *Tuck*, 20 Geo. 452; *Gleaton* v. *Lewes*, 24 Geo. 209. Alabama, *Densler* v. *Edwards*, 5 Ala. 311; *Simonton* v. *McLane*, 25 Ala. 353. Kentucky, *Hopkins* v. *Tower*, 4 B. Monroe, 124. Missouri, *Foster* v. *Nowlan*, 4 Mo. 18. Maryland, *Dorsey* v. *Smithson*, 6 H. & T. 61.

Numerous other cases might be cited showing the practice of other courts to be the same as that adopted in this State in the case of *Allen* v. *Kimball*.

This practice seems to be sustained not only by this great weight of authority, but would seem to be almost the necessary result of a correct construction of the law concerning fraudulent conveyances arising under the Statutes of Elizabeth.

The legal proposition made in *Andrews* v. *Marshall*, before referred to, that such conveyances "remain good as against the party,

his executors and administrators," is well supported by numerous decisions, ancient and modern, and by a reading of the statutes before referred to. See 1 American Leading Cases, 45, and cases cited in note, p. 75.

In some cases bills in equity, in the name of the administrator, have been sustained to set aside gifts *donatio causa mortis*, the interests of all the creditors being identical. This method of proceeding "has been much disputed," and is subject, indeed, to much criticism when attempted to be sustained upon principle.

Where the interests of the creditors are identical, there is perhaps no impracticability or inconvenience in allowing the creditors to move in equity in the name of the administrator.

In such cases, however, he proceeds not as administrator binding his sureties upon his administrator's bond, but as a trustee of the creditors.

If the interests of the creditors are not identical many serious embarrassments may be supposed in such a proceeding.

In *Caswell* v. *Caswell*, 28 Maine, 232, the remark is made by the learned judge who drew the opinion, that the "administrator of an insolvent estate, as trustee of the creditors, is entitled in proper cases to the aid of this court, as a court of equity, to obtain property belonging to the intestate, which creditors may lawfully claim, to apply in satisfaction of their debts where the same is held in fraud of their just rights. And the court has power, upon satisfactory evidence that a conveyance was made by the intestate for the fraudulent purpose of delaying or defeating creditors of the grantor, to pronounce the conveyance inoperative and void, and thereby enable the administrator more effectually to obtain means to be appropriated in discharge of the debts."

How far this general proposition can be maintained or how far it is practicable to proceed in equity as administrator, may admit of some doubt. The statutes of this State authorize administrators to sell lands which the deceased has fraudulently conveyed to defraud creditors. R. S., c. 71, § 22; R. S. of 1857, c. 71, § 22; R. S. of 1841, c. 112, § 31.

The remedy in such cases, by the statute, seems to be to sell the estate which is fraudulently conveyed, and leave the purchaser to seek any remedy he may need. If the administrator should proceed and the conveyance be pronounced void entirely, it is no longer a conveyance fraudulent as to creditors, but then stands as no conveyance at all, and subject to such a distribution or inheritance precisely as any other estate not thus attempted to be conveyed.

It seems to me that a careful consideration of the statute will lead to the conclusion that its design was to provide for a summary and safe mode of selling the interest creditors had in the land, leaving the purchaser to seek any remedy he might afterward need and afforded by the law. It may well be supposed that the Legislature thought it more wise and prudent to do so than to allow administrators to enter upon a litigation that might consume all the estate left and result in the end unsuccessfully. It would indeed, we think, be a dangerous policy, and one which might well be avoided by authorizing the sale of the interest in the estate which might ultimately be found in the creditors.

It will be remembered that in none of the sales of administrators does the law require a warranty of title in the deceased. It is such only as he has, if any, that the administrator undertakes to sell, and he only warrants the regularity of his proceedings. There would be very little propriety in requiring him to go forward in the very class of cases doubtful, and establish a title at the expense of that which is not doubtful.

These statutes, however, refer to lands and do not in terms reach personal estate; and personal estate, in which the deceased himself had no interest, can receive no aid from these provisions, however we may construe them.

If each of the creditors upon the decease of the debtor took a separate, vested, ascertainable interest in the property, it is easy to see how a bill in equity could be maintained by making such creditors respondents as did not desire to be complainants, and thus have them all before the court to settle their several interests.

But where they have no interest in the property of any kind, but simply a right to seize it and sell if they choose in the life-time of the debtor for the extinguishment of their demand, and the death of the debtor in no way enlarges their rights concerning it, more difficulty is perceived in allowing a bill in equity to be maintained at the expense of those not desirous of avoiding the sale, as well as of those who may desire so to do. This idea seems to again suggest to us that the right the creditor has to treat the sale invalid is purely personal, and he cannot be required to assume this position in relation to it unless he chooses.

As has been before suggested, the rights of prior and subsequent creditors may be materially different, and in such case it would be very difficult for the administrator to serve both parties in a bill, and equally difficult for both classes to proceed together as complainants, or, indeed, as respondents. The gist of the thing seems to be that it is not a fund of the deceased nor one belonging to the estate as an estate, but is one creditors, any one or more, may look to for the purpose of extinguishing any demand they may have.

Another question of practice of some importance might arise, and that is, whether or not the creditors' claims must be established in a court of law, before the creditors could proceed by bill in equity to obtain the fund. This would seem to be necessary. It would be very difficult in a single bill to settle a hundred different claims, and that, too, where the claimants, who are also complainants, are adversely interested against each other.

If the bill was prosecuted by the administrator, it would be equally necessary that these claims should be settled at law, for, as before remarked, the administrator could not well represent different and conflicting interests. It would indeed be serving two masters whose interests were adverse. And were all the claims reduced to judgments, still a question of priority of claim to the fund may arise, and here again the interests of the judgment creditors might be antagonistic.

Many other difficulties might be suggested of more or less force in the way of proceedings by bill in equity, either in the name of the administrator or by general creditors' bill.

The idea at every point of the argument presses itself, that it is a mere personal privilege any creditor may avail himself of to use the fund to extinguish his claim, and not one he is bound to follow.

The gift being good as to all others, remains undisturbed unless he see fit to disturb it.

If it should be regarded as assets falling to the administrator and vesting in him for the benefit of the creditors, it might well be argued that it becomes his duty to collect such before resorting to the realty, and the heir might insist that he should do so, to save the realty for him, and thus one as to whom the gift is valid might derive an advantage from the fact there were persons against whom it is invalid. It must be remembered that a gift or fraudulent sale made with a view to defraud creditors is equally invalid as to such creditors, whether the party be or not insolvent. It is the purpose and design of the transfer that affects its validity.

It does not become necessary in this case to determine whether or not in any given case a bill in equity could be maintained, nor indeed what remedy remains for the party. The simple question here to be decided is whether this action can be maintained upon the facts proved and offered to be proved, and that is all that is here decided. The suggestions here made are made in view of other possible ulterior proceedings, by way of suggesting some of the difficulties which may be found to attend a proceeding in equity, and aiding the party, in some degree, in the solution of the question of what in fact the true remedy is.

Had these questions been fully argued by the able counsel who appear on either side of this case, we might have thought it advisable to determine the question and make this case a precedent for future practice.

Perhaps the suggestions here made and a farther examination of the question will lead to the conclusion that the right to ignore the sale or gift is a personal right, attaching to each prior creditor to be exercised or not as he chooses, regardless of the wishes of others possessing a similar right, and that when done it must be done on his own motion and responsibility, and that the simplest and most

practicable form for him is that of holding the possessor as executor *de son tort.*

At all events we think this action cannot be maintained, and that the ruling was right. *Exceptions overruled.*

EDWARD B. NEAL, petitioner, *vs.* KNOX & LINCOLN RAILROAD COMPANY.

Verdict on petition for increase of damages, must follow the petition.

Where E. N. petitioned for an increase of the damages awarded by the county commissioners for his land taken by the K. & L. Railroad Company, and the jury before whom the petition was heard, returned a verdict purporting to be "on the petition of E. N., administrator of the estate of B. N., deceased," and to award damages for the real estate of the deceased, taken by said corporation, such verdict was set aside.

Unless the real estate, which was of an intestate, be taken for public uses prior to his decease, his administrator has no right to petition for increase of damages; since, in such case, it would be the land of the intestate's heirs that was taken.

ON EXCEPTIONS.

This was a petition for an increase of damages in the form and words following:

"To the court of county commissioners for the county of Lincoln:

Your petitioner respectfully represents, that he is aggrieved by your estimation of damages for his real estate taken by the Knox & Lincoln Railroad Company, as reported at your September session, 1870. He therefore petitions for increase of damages, and that, if the matter be not submitted to a committee, a jury may be summoned and all other due proceedings had.

Dated OCT. 22d, 1870. EDW. B. NEAL."

The verdict of the jury, so far as relates to the person to whom damages were awarded, and the ownership of the land taken, was as follows: "At a view and hearing by a jury on petition of Edward B. Neal, administrator of the estate of Barker Neal, deceased, for increase of damages by location and construction of the Knox & Lincoln railroad over and upon the real estate, which was of said deceased," etc. The defendant moved to set aside this verdict, among other reasons because the petitioner had no sufficient title to the land taken, no legal right to recover damage for the taking, and was not aggrieved by the estimate of the county commissioners; because the verdict did not conform to the petition in the description of the title to said premises, and that the verdict did not show that the premises were the real estate of the petitioner. And they further moved that the petition may be dismissed, "because the petitioner has no authority to maintain the same as administrator of the estate of Barker Neal, and has no sufficient title to authorize him to maintain said petition. These motions the justice presiding overruled, and it was to this ruling that the defendants alleged exceptions.

Gould & Moore, for respondent.

Petitioner had no right to recover in his official capacity; only the heirs could petition, even if the estate were insolvent, which is not alleged. *Boynton* v. *P. & S. R. R.*, 4 Cush. 467; *Lobdell* v. *Hayes*, 12 Gray, 238.

Therefore, and also because it does not follow the statement of title in the original petition, the petition for increase of damages should be dismissed.

Samuel E. Smith, for petitioner.

VIRGIN, J. I do not see how the verdict can be sustained.

The original petition is by an administrator of Barker Neal's estate, for damages to "his land," *i. e.* petitioner's land.

Being aggrieved, as he says, by the commissioners' "estimation of damages for his real estate taken," etc., "he petitions for in-

crease." This latter petition contains no hint that he is or acts otherwise than as an individual.

The verdict refers to the "petition of the administrator, etc., for increase of damages," etc., and "awards damages to the petitioner for land so taken."

If the land was taken during the lifetime of Barker Neal, his administrator would be entitled to damages; but the heirs could not petition for increase, for they would have no interest, having been divested by the taking. They might have an interest subject to respondents' rights. If taken after Barker Neal's decease, it was the heirs' land, and the administrator had nothing to do with it or the damages. *Moore* v. *City of Boston*, 8 Cush. bottom of p. 277 and top of p. 278.

Motion sustained.

Verdict set aside.

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

NATHANIEL BRYANT, jr., pet., *vs.* KNOX & LINCOLN R. R. Co.

MARGARET WATERS, petitioner, *vs.* SAME.

Exceptions. Motion to set aside verdict for damages caused by location, must be in writing.

Exceptions will not be sustained unless the case shows affirmatively that the excepting party has been aggrieved by the ruling complained of.

In cases where a hearing is had on a petition for an increase of damages for the location of a railroad or highway before a jury, in order to present the questions of law involved, the statute (R. S., c. 18, § 13) requires a written motion setting out the objections to the verdict, whether of law or fact, and exceptions filed to the ruling of the court in adjudicating thereon. If these requirements be not complied with the court will decline to consider any objections to the verdict, or exceptions improvidently allowed to the rulings relative thereto.

ON EXCEPTIONS.

Each of these petitions were for an increase of the sums allowed to the respective petitioners, by the county commissioners, as damages for their lands taken for the location of the Knox & Lincoln Railroad, upon which a hearing was had before a jury, agreeably to R. S., c. 18. The person appointed to preside at this hearing reported his rulings in matters of law, as follows: "In this case it appeared by the evidence, and by the admissions of the parties, that the railroad had been located and built partly along and over the highway, and partly on lands of the petitioners adjacent to said highway, the wall which formerly stood upon the line of the highway having been removed or covered by the embankment of the railroad; and that the said highway had been altered by the county commissioners, upon petition of the railroad company, so as to run parallel with, and outside of, the location of the railroad; and that the damages for the land taken for this alteration of the highway had been assessed upon the railroad company.

The petitioners claimed, and requested me to instruct the jury, that they should award damages for that portion of the land taken by the railroad which was within the original limits of the highway, as well as for that portion which was outside of said limits and within their enclosures.

I declined to give such instruction to the jury, but did instruct them that the railroad having been located and built partly upon the enclosed lands of the petitioners and partly on the highway, and the highway having been altered for that reason, on the petition of the railroad company, and damages having been assessed upon the railroad company for the land taken by the new location of the highway, the petitioners were not entitled to damages for that portion of the land taken which was within the original limits of the highway, but only for so much as was outside that limit.

I further instructed the jury, "that they could only embrace in their estimate injuries caused by the acts of the company which are authorized by their charter."

"That they were not to go into conjectural and speculative es-

timations of consequential damages, but confine themselves to estimating the value of the land taken to the owner."

"That they were to assess all the damages, present and prospective, to which the petitioner would ever be entitled, by the prudent construction and operation of the road;" and that

"They should take into consideration all such incidental loss, inconvenience, and damage as might reasonably be expected to result from the construction and use of the road in a legal and proper manner," but that they were not to assess speculative and prospective damages for the value which the land might hereafter acquire for uses to which it was not now and had never been applied.

Which rulings and instructions, and refusal to instruct, are reported at the request of the petitioner."

The exceptions originally stated that "the court sustained (*pro forma*) the rulings of the person presiding, and directed an entry to be made confirming the verdict;" but the presiding justice certified that they should be so changed as to read:

"No written motion to set aside the verdict was presented to the court, and the presiding judge directed an entry to be made that the verdict be confirmed."

By which ruling and direction the petitioners considered themselves aggrieved and excepted thereto.

Wales Hubbard, for petitioners.

A. P. Gould, for defendants.

DANFORTH, J. In each of these cases precisely the same questions are involved. The person appointed to preside at the hearing before the jury instructed them that the petitioners could not recover damages for that portion of the land taken within the limits of the highway. It may admit of a question under the circumstances of these cases whether this ruling is not correct, even if the petitioners were the owners of the land so taken. If not the owners the ruling was right. We may, perhaps, infer that the title was in them, but the cases do not show it, and exceptions will

not be sustained unless the case shows affirmatively that the excepting party has been aggrieved by the ruling complained of.

The other rulings of the presiding officer are clearly in accordance with the law.

But a question of considerable importance as a matter of practice has been raised, which it may be well to have settled. No written motion to set aside the verdict was filed in the court to which it was returned, and if such were necessary the cases are improperly here.

This is a statute process and the provisions of the statute must be strictly followed. These provisions are found in R. S., c. 18, §§ 12, 13; and it is material now to consider only those found in § 13, relating to the return of the verdict and the manner in which objections may be made to it. After the verdict has been duly made up and sealed it is to be handed to the officer in charge, who is to return it to the next term of the court "to be held in the same county." The statute then provides that, "said court shall receive said verdict and the certificate and report of the person presiding. Either party interested therein may file a written motion to set aside said verdict, for the same cause that a verdict rendered in court may be set aside. The court shall hear any competent evidence relating to the same, adjudicate thereon, and confirm the verdict, or set it aside for good cause, reserving the right to except as in other cases." These are all the provisions requiring any return on the part of the court in relation to the verdict. They are simple and plain. In the first place, the court shall receive the verdict. If neither party have any objection to it, no further action is required; the verdict then becomes a matter of record and is the foundation of the judgment on the petition, precisely as a verdict received from a jury in court goes to judgment necessarily, when no objection is made to it; but either party may make any objections to a verdict thus returned which he might make to one rendered in court.

There is, however, no way provided in which these objections can be made except in writing, and no way in which they can be

carried to the law court, otherwise than by exceptions to the rulings of the presiding justice in his adjudication upon this written motion. There is no provision for any exceptions to the rulings of the person presiding. But if such rulings are objected to, such objections may be stated in the written motion, and the certificate of such rulings, required to be returned with the verdict, becomes the competent evidence upon which the court is to adjudicate.

The result is that the only way in which questions of law involved in cases of this kind can be presented to the full court, is by a written motion to set the verdict aside, in which the objections to it, whether of law or fact, must be set out, filed in the court to which the verdict is returned, and by exceptions to the ruling of the court upon that motion. *Exceptions dismissed.*

APPLETON, C. J.; CUTTING, DICKERSON, VIRGIN, and PETERS, JJ., concurred.

GEORGE W. COLBY *vs.* INHABITANTS OF WISCASSET.

Damages for injury by defective way.

An instruction based upon the assumption that the injuries received by the plaintiff, through a defect in a way the defendants are bound to keep in repair, will be permanent is properly refused, since the question of the nature of the injuries and the probable duration of their effect is solely for the jury. Hence, the court rightly declined to instruct the jury that they might consider the shortening of life, loss of future labor, etc., that would probably result from the injury. The court could assume no such result as probable.

ON EXCEPTIONS.

This is an action for the recovery of damages for an injury to the female plaintiff, Amanda M. Colby, wife of the other plaintiff, occasioned by want of repair in a public highway in the town of Wiscasset, sustained February 17, 1871.

The testimony tended to prove that the plaintiffs were driving along said road in the winter season in a sleigh, and that using due and proper care the sleigh struck a rock six to eight inches high, a little to the right of the center of the traveled part of the road, which was covered with snow at the time; that the concussion threw said Amanda, with violence, from the sleigh upon the ground, on her left shoulder and side, and that she thereby received a very serious injury in her shoulder joint and broke the collar bone, and broke one or two ribs in her left side; that by reason of these injuries she had suffered and continues to suffer great pain; that her left arm has become permanently disabled, and that there are permanent injuries to the left side, lung, and pleura.

Drs. Hill, Fuller, Colby, Whitmore, and Boynton all testified that in their opinion she could never fully recover the use of her left arm, and that her health was more or less endangered in the future, and that her whole system was in a measure debilitated and disabled by the shock which it thus received.

The plaintiffs requested the court to instruct the jury that in estimating the damages sustained by or resulting from said injuries (if they found the plaintiff was entitled to recover) they might consider (among other things) "the probable shortening of life, the value of all the labor of the said Amanda past and in the future which probably would be lost, and the expense of medical treatment, nursing, and care in the past, and that which will probably be necessarily incurred in the future," by reason of the permanence of said injuries.

It appeared that said Amanda had been accustomed to do her work for her family prior to the accident, but that by reason of the injuries she had thus sustained she has been and is now unable to do any hard work, or to do many kinds of ordinary house-work. And the opinion of the physicians, as proved, was that she would never fully recover her capacity to do such work.

Verdict was for the plaintiffs for $1525.00.

The court refused to give the instruction requested; to which refusal to rule the plaintiffs excepted.

Gould and *Moore*, for plaintiffs.

All the damages sustained must be recovered in this action, since the husband cannot sue separately, as he could at common law. *Sanford* v. *Augusta*, 32 Maine, 536. The suffering and loss of time properly included in a verdict for such injuries. *Verrill* v. *Minot*, 31 Maine, 299; *Mason* v. *Ellsworth*, 32 Maine, 271. She was entitled to the avails of her own labor in the future, and was damaged by her loss of such future earnings.

A. Libbey, for defendants.

Plaintiffs entitled to recover all damages which are the natural, necessary, and proximate cause of the injury. *Longfellow* v. *Quimby*, 29 Maine, 196; *Worcester* v. *G. F. Manuf. Co.*, 41 Maine, 129; *Prentiss* v. *Shaw*, 56 Maine, 427; *Noxon* v. *Hill*, 2 Allen, 215. The elements of damage stated in the request are too vague and speculative. "The probable shortening of life" is entirely speculative; so is the rest of the requested instruction.

DANFORTH, J. The defect in the requested instruction is that the basis of it is an assumption of the permanence of the injuries to the plaintiff. This was a question of fact for the jury upon the evidence in the case, but would have been taken from them if this instruction had been given. It was therefore rightfully withheld.

Exceptions overruled.

APPLETON, C. J.; DICKERSON, VIRGIN, and PETERS, JJ., concurred.

NAHUM BROOKS, executor, *vs.* GUY C. GOSS and another.

Trespass de bonis by executor. Evidence.

An action of trepass *de bonis* to recover for timber and trees cut from land mortgaged is properly brought by the executor of the deceased mortgagee for the benefit of the person beneficially interested under the will, if the severance was before the death of the mortgagee.

The defendants in this action justified the removal of the growth from the real estate mortgaged, by virtue of an alleged parol license from the deceased mortgagee, and called a witness who testified to two conversations in the course of which such license was given. Upon cross-examination this witness added that she made a memorandum of these conversations at the time each occurred and produced them, and they were put into the case by the plaintiffs: *held*, that they were properly received as tests of the accuracy of the witness' recollection of the conversations, and of the degree of credibility to be attached to her testimony.

To afford ground of exception the testimony admitted must be of such a nature as to work prejudice to the excepting party.

Exceptions will not lie to the admission of a written memorandum of a conversation which the witness has detailed upon direct examination, when such memorandum is elicited and introduced upon cross-examination.

In this action the executor not becoming a witness, the defendants were precluded from testifying.

Declarations of the plaintiff, made before his appointment as executor, *held* inadmissible.

Evidence of the entry of "neither party" in a suit between the plaintiff, in his fiduciary capacity, and the person under whom defendants claim, and that such suit was for the same cause of action as the present, is inadmissible.

ON EXCEPTIONS and motion for a new trial.

TRESPASS *de bonis asportatis* brought by Nahum Brooks, as executor of the will of late Mary Hathorn, of Woolwich, who d'ed about the last of September, 1868, and this plaintiff was appointed to the trust aforesaid Nov. 2, 1868. In the preceding year Mrs. Hathorn owned land in Woolwich known as "the Joseph Blackman farm," having inherited it from her sister, Susannah Blackman. August 26, 1867, she conveyed this estate to John W. Gray who, at the same time, mortgaged to her one undivided

half of the farm, to secure a note of $1,350, payable in five years from that date, to her order, with interest, given for so much of the purchase money. John W. Gray afterwards sold to Goss & Sawyer, the defendants, who were ship-builders, the oak and other timber and trees standing on this land, and they cut and removed it in April, 1868. To recover the value of this growth, and the damages occasioned by taking it, this suit was brought March 17, 1870.

The last codicil to Mary Hathorn's will contained this provision: "In addition to my former provisions in favor of the Free Will Baptist Foreign Mission Society and the Free Will Baptist Home Mission Society, I give, bequeath, and devise to those two societies, in equal portions, all and whatever property, money, goods, and estate, real, personal, or mixed, I have, or may have inherited, or which I have received, or shall hereafter receive, or which may or shall be derived or received in my right, from the estate of my late sister, widow Susannah Blackman, late of Woolwich, deceased; to have and to hold the same by the same title and in the same manner as I myself do, can, or might hold the same."

The writ contained two counts, one describing the premises from which the timber was cut and alleging the testatrix's ownership of an undivided moiety of it, and the second alleging the cutting and taking of "two hundred tons of oak timber, of which the said Mary, in her lifetime, owned and possessed one undivided half;" but in both the plaintiff declared in his capacity of executor, and in the first count that the cause of action survived to him as such executor. The defendants plead the general issue with a brief statement "that the acts complained of, etc., were done under the permission of Mary Hathorn, in her lifetime, and that the plaintiff, in his said capacity, cannot maintain this action, in its present form, for any such acts done under such permission; that said Mary, in her lifetime, was the mortgagee out of possession, and there never has been any breach of the conditions of said mortgage during her lifetime, and as such she was but a tenant in common with the other owners of said land; that John W. Gray,

the mortgager of an undivided moiety of said land, had authority and permission from said Mary, then living, to cut timber on said premises; that defendants purchased some timber of said Gray, who was then in possession of said land, the conditions of said mortgage not having been broken; that no action survives to the executor in the premises as averred by him; that he cannot recover in this action, because if any action lies it should lie in *quare clausum* in the name of the special legatee under the will of said Mary; that the act complained of is an injury to real estate, and lies in the name of the heirs of an intestate, or in case of special bequest or devise in the name of the legatees or devisee; that Mary Hathorn specially devised this property, and the executor as such has no action; that plaintiff has no estate in the timber described in his writ."

After proof by two or three witnesses of the quantity and value of the timber cut from the Blackman farm by Goss & Sawyer, the plaintiff introduced the probate records of the will, several codicils thereto, and of the inventory of the estate, showing a total valuation of $7,136.15, and of his own appointment and qualification as executor. He then rested his case, not having been a witness in his own behalf.

The first witness called for the defense was John W. Gray, the mortgager before-mentioned, who testified as follows:—

"I was in possession of this property in 1868. I got permission from Mrs. Hathorn to cut timber on it shortly after I went on to it in the spring. I got permission to sell timber to Goss & Sawyer. The permission was by word of mouth. I was in her house. I went to Mrs. Hathorn, to aunt Hathorn, and told her that I had a chance to sell the timber to Capt. Goss, Sawyer & Co.; 'well,' says she, 'if you have got a chance to sell the timber sell it and do the best you can;' and I did so. After I sold it and received pay for it I offered to pay Mrs. Hathorn the money; she told me she did not know what she should do with the money if she had it; told me to keep it; that I did not know what might happen. My mother was present at the time. Goss & Sawyer

paid me for the timber they had of me." This was the whole of his testimony in chief.

The next witness, Sarah Gray, called by defendants, testified:—

"I reside in Woolwich; am John W. Gray's mother. I reside in the same house with him and did in 1868. I went to Mrs. Hathorn's with him April 23, 1868; he told Mrs. Hathorn that he had a chance to sell the timber to Capt. Goss, of Bath. She told him to do so. I was there with him in June, 1868. My son told Mrs. Hathorn that he would pay her for the farm, his part; she told him to keep the money; she said I don't want it, I don't know what I should do with it if I had it. I heard that distinctly. In February, 1868, Mr. Brooks said to her, if she was a mind to stand out, that they should not have one cent of property." This was the whole of her direct testimony.

Both of these witnesses were subjected to a long and searching cross-examination, and the plaintiff's counsel contended that inconsistencies and contradictions were developed thereby. In the course of Mrs. Gray's cross-examination it appeared that she had with her what purported to be memoranda of the two conversations had by her son with Mrs. Hathorn, April 23, 1868, and June 15, 1868. They were handed by her to the plaintiff's counsel, who was permitted to read them to the jury against the objection of the defendants. The papers produced by her she said were not the original, but were copied by her in ink from those originally written in pencil at the time of the respective conversations. Two of these copies she said were made upon the same day, some time in the month of February, 1869, and accounted for the ink of one being paler than the other, when her attention was called to that fact, by saying that the ink was too thick and she added vinegar which made it paler when she made the second copy. Both of these witnesses swore that $1,000 of the $1,350 which John W. Gray offered to pay Mrs. Hathorn was obtained of Benjamin Bailey; but this gentleman, when subsequently called by the defense, denied that he ever paid John Gray so

much money at one time, or in the aggregate prior to April 23, 1868. Mr. Bailey bought three-eighths of this land of John W. Gray, and took timber from it for which he afterwards settled with the executor, paying $800 upon a contract with the beneficiaries under the will through Mr. Brooks, acting in their behalf, for their interest in this land, and in full for the timber cut by him from it, with power to occupy the premises precisely as the mortgagees might, and an agreement that the mortgage should be assigned to Bailey after the claims of Mr. Brooks, as executor, and of the legatees under the will against John W. Gray and Goss & Sawyer were adjusted. Mr. Bailey was asked by the defendants if he ever had any conversation with the executor, after witness had cut timber on this land, with regard to the timber growing on the Blackman farm or that they had been cutting there, and whether or not Mr. Brooks told the witness anything "in regard to the understanding or permission that was given by Mrs. Hathorn to John W. Gray about cutting off wood and timber from these premises;" but upon Mr. Bailey's statement that the conversation referred to took place before the time of Mr. Brooks' appointment as executor the court excluded the testimony, the plaintiff not having been a witness. Mr. Bailey said the conversation was the last of September, or first of October, 1868, and Mr. Brooks was appointed executor Nov. 2, 1868. The defendants also offered a writ in favor of the present plaintiff, as executor of Mary Hathorn's will, against John W. Gray, and the docket entries to show the settlement of that suit, and offered to prove that it covers the property in this suit and that it is settled; but the court excluded this testimony. The defendant, Goss, then offered himself as a witness, but was not admitted. The memoranda, or copies, produced by Mrs. Gray, as before stated, were as follows:—

WOOLWICH, April 23, 1868.

My son told Mrs. Hathorn that he had got a chance to sell the timber to Capt. Goss, of Bath; she told him to cut it and sell it, and to do the best he could with it; he asked her if there would

be any trouble, she said no; then he asked her if Mr. Brooks would trouble him, she said he had nothing to do with it, you have got a deed and Mr. Brooks never can trouble you.

SARAH GRAY.

June 15, 1868.

My son offered to pay Mrs. Hathorn, she told him to keep the money, she said she did not want it; she says you don't know what may happen, if I had it I shouldn't know what to do with it.

SARAH GRAY.

Mrs. Hathorn told me before my son in February, 1868, that Mr. Brooks said if she was a mind to stand it out that the Gray children could not get one cent of that Blackman property.

SARAH.

Upon the foregoing testimony and pleadings the defendants' counsel asked the court to rule that this action cannot be maintained in its present form, it being for an undivided half part of certain timber alleged to have been taken by said defendants, and because the plaintiff in his said capacity had no interest in the property alleged to have been taken, and that the legatees and devisees thereof, with the consent of the plaintiff, had conveyed all their interest in the same to one Benj. F. Bailey; that because by the will and codicils of the said testatrix all that property vested specifically in the said devisees and legatees; that they alone could maintain an action therefor unless the said property should be required for payment of testatrix's debts, all of which instructions the judge presiding refused to give, but instructed the jury that "it is objected on the part of counsel for the defense that this action cannot be maintained for various reasons, and without going into a specification of those grounds relied upon by the defendants against the maintenance of this action, in order to give progress to this trial and to enable you to pass upon an important question of fact, I instruct you that it is competent for this plaintiff, in his capacity, to maintain this action, if he establishes his claim by competent evidence."

Relative to the several memoranda made by the witness for the defendant, Mrs. Sarah Gray, above set forth, the judge instructed the jury that these papers had been permitted to go before them, "not for the purpose of allowing you to take into consideration the memorandum itself, the language of the memorandum, the meaning of it, the purport of it, but simply, as the counsel for the plaintiff claims, to satisfy you that it discredits her and shows conclusively that all of these memoranda introduced by the plaintiff and elicited from her were made a long time or some time after the meeting at Mrs. Hathorn's, if there ever was any such made."

The counsel for the defendants requested the court to instruct the jury that they might take into consideration as a fact in the case the circumstance that the plaintiff, who was present at the trial, does not offer himself as a witness in the case, which the judge refused, but instructed the jury "that he (the plaintiff) may or may not go upon the stand, and that they may take into consideration the fact that he does not go upon the stand, but that they will not be authorized to allow that to operate to his prejudice unless they shall be satisfied from the evidence in the case that he knows facts which would operate to his prejudice and declines to go upon the stand for that reason."

The defendants except to the admission of the testimony objected to by them and also to the rejection of the testimony offered by them, which was excluded, and to the foregoing rulings and refusals to rule, as hereinbefore stated. The verdict was for the plaintiff, and the defendants moved to set it aside as against law and evidence and the weight of evidence, and because it was unjust and for excessive damages.

Tallman & Larrabee, for defendants.

The trees were cut by Mrs. Hathorn's consent, and the title thereto passed to the purchasers; otherwise, this action could be maintained. *Hill* v. *Penney*, 17 Maine, 409. But on such a state of facts it cannot. The parties were not tenants in common. *Norcross* v. *Norcross*, 105 Mass. 265. Hence, under the peculiar

circumstances of this case, the burden is on the plaintiff to prove that his testatrix did not consent to the cutting. But, if not, we say her consent is fully proved. Brooks' statements should have been admitted, considering his relations with the deceased, and that he was present at the conversation between her and Mr. Gray.

The plaintiff, as executor, had no interest in this property, because it was specifically devised, and he assented thereto and guaranteed the performance of the agreement between the devisee and Bailey. *Andrews* v. *Hunnemann*, 6 Pick. 128. As the parties were not tenants in common, Gray was not obliged to notify Mrs. H. of his intention to cut under R. S., c. 95, § 5. She was simply a mortgagee of a moiety, not in possession. *Kimball* v. *Lewiston, etc.*, 55 Maine, 499. The circumstances show she waived her rights.

The executor was a nominal party, suing for the benefit of the legatees; therefore Goss should have been permitted to testify. R. S., c. 82, § 86, item 3. 2 Bouv. Law Dict. 232.

J. S. Baker and *N. M. Whitmore*, for plaintiff.

As to the motion. The jury simply refused to believe the story of Mrs. Gray and her son, though they both testified to a parol license in precisely the same words. Mrs. Gray says she went to see her aunt Hathorn upon her death-bed, prepared with paper and pencil to take down her conversation! Not only the inherent improbability of their story, but the strong interest they had to manufacture it, and their mode of telling it, discredited them.

This action could be maintained by the executor even if Mrs. Hathorn had owned the land absolutely. *Hill* v. *Penney*, 17 Maine, 409; *Wilbur* v. *Gilman*, 21 Pick. 250. Certainly, then, she can when she is only interested as mortgagee.

DICKERSON, J. This was an action of trespass *de bonis asportatis* brought by the executor of the last will and testament of the mortgagee of the premises from which the timber was taken.

The counsel for the defendants contended that the action was improperly brought in the name of the executor; but we think this objection is not tenable.

Real estate held by an executor in mortgage is deemed personal assets held by him in trust for the persons who would be entitled to the money, if paid; when paid, he may execute a release of the estate and account to the *cestui que trust* for the sum received, and if not paid, he may sell it, as he could personal estate, and assign the mortgage and debt. R. S. of 1857, c. 65, §§ 22, 23.

The first two memoranda admitted in evidence, against the defendants' objection, were elicited on cross-examination of their witness. That witness testified on direct examination that the mortgagee gave the mortgager, the witness' son, a parol license to sell the timber sued for, and also that he offered the mortgagee $1,350, the amount of the mortgage note, which the mortgagee declined to take, saying "she did not know what to do with the money." The testimony shows that the chief value of the land was in the timber, and that the mortgagor, at the time of the pretended tender of $1,350, was poor. The witness testified that the original memoranda were made at the time of their date. Those memoranda related directly to the two grounds relied on in defense, license and payment of mortgage note. In connection with the other evidence they had a material bearing upon the credibility of the witness, and therefore were clearly admissible.

The other memorandum was immaterial, and could not have damaged the defendants; besides, the same testimony was drawn out on the direct examination; nor have they any valid ground of complaint that the court restricted the application of the several memoranda in the manner specified in the exceptions.

As the executor did not offer himself as a witness the defendants were properly excluded. The other rulings were also unobjectionable.

The cutting and carrying off the timber were not seriously controverted. The defendants relied upon a parol license and payment of the mortgage debt. These questions were fairly sub-

mitted to the jury, and it was their province to determine them. When we consider the conflict between Bailey and Gray, the defendants' witnesses, in regard to the latter's borrowing the money of the former to pay the mortgage note with, and the improbability of the testimony of the mortgager and his mother, it is not strange that the jury discredited the testimony upon the two grounds of defense, and returned a verdict for the plaintiff.

Exceptions and motion overruled.

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

ELIAS MILLIKEN, in equity, *vs.* BERNARD C. BAILEY, and another.

Misdescription. Amendment of officer's return, effect of. Right in equity of mortgager's assignee to redeem.

In the description of premises sought to be redeemed in equity, mistakes in the names of the owners of adjoining estates and the omission of one boundary line are immaterial, if enough remain clearly to identify the land intended to be designated.

The notices and limitations of the chancery rules may be waived by consent of counsel, express or implied, so as to preclude any subsequent application of those limitations.

An amendment relates back to the date of the original proceeding, so far as this can be done without injury to the intervening rights of innocent third persons, but will not be permitted to affect such rights; so that, where an officer's return upon an execution states the original attachment of the land sold on such execution to have been Sept. 20, 1866, instead of the true date, Sept. 28, 1864, it was held that, though he might amend his return according to the fact, this could not affect the title of one taking a mortgage of the land Oct. 13, 1864; but that the sale and return would convey the equity of redemption of a mortgage made prior to the attachment.

If a mortgagee recognize the right of redemption as existing in one demanding an account, and render an incorrect statement, he cannot subsequently avail himself of a technical defect in the title of such person, which has been cured by amendment, to avoid payment of costs.

Milliken *v.* Bailey.

When a mortgagee in possession either actually receives rent, or ought to have received it, he will be held accountable therefor to the person entitled to redeem. *Bailey* v. *Myrick*, 52 Maine, 135, does not change this rule in such cases.

Where the same person holds as assignee two mortgages of real estate, the purchaser of the equity of redemption may maintain a bill to redeem from only one of them; nor will the expiration of the statute term of foreclosure proceedings upon the other mortgage prevent a decree in his favor as to the mortgage he seeks to redeem.

BILL IN EQUITY.

THIS was a bill of complaint in equity, brought by Elias Milliken, of Augusta, to redeem certain real estate in Phipsburg from a mortgage thereof, and for an account of the sum actually and justly due under such mortgage. The cause was heard upon bill, answers, and proof, from which it appeared that the land was formerly owned by one Samuel D. Reed who, on the ninth day of June, 1864, mortgaged it in the sum of $500 to Mrs. Sarah J. B. Davis, one of the defendants; from which mortgage the complainant desired to redeem the estate by these proceedings. On the last day of December, 1868, Mrs. Davis sold, transferred, and assigned this mortgage to her father, Bernard C. Bailey, the other respondent. Before making this assignment, however, to wit, on the fourth day of June, 1868, Mrs. Davis had entered peaceably and taken possession of the premises in order to foreclose her mortgage for breach of its condition. Upon the seventh day of June, 1867, the complainant purchased at a sheriff's sale thereof, on an execution in favor of Elbridge Berry and another against Samuel D. Reed, all said Reed's right to redeem the premises; and upon the fifth day of July, 1869, in accordance with the requirements of the statute in this behalf, demanded of these defendants an account of the balance justly due upon this mortgage after deducting the rents and profits. Deeming the account rendered him incorrect he brought this bill to redeem, filed Nov. 17, 1869. In describing the real estate in his bill the complainant followed the language of the sheriff's return on the execution aforesaid, and of the sheriff's deed to him; in which there were mistakes in the names of two of the proprietors of premises adjoining the land in

question; and omitted to state the easterly boundary of one of the parcels; but there appeared to be no doubt what land was intended to be designated.

Reed's equity of redemption was taken upon said execution on the tenth day of April, 1867, and advertised to be sold on the first day of the following June, but on the day last-named the sale was adjourned, as the officer stated in his original return, "for the want of bidders, to the seventh day of June then current, at the same place;" but no hour was specified, nor did he say that he gave any notice or public proclamation of such adjournment; nor that the same was had because it was for the interest of all concerned, unless that may be inferred from "the want of bidders." This original return began thus: "Sagadahoc, ss. April 10, A. D. 1867. By virtue of the within execution I have taken all the right in equity that the within-named debtor had on the twentieth day of September, 1866, at nine o'clock in the forenoon, being the time of the attachment of the same on the original writ, to redeem a certain tract of land," etc., etc. The attachment on said writ was, in fact, made September 28, 1864, which was the day the writ bore date; and on the twelfth day of October, 1864, Reed made a second mortgage of the property for $1,000, to Samuel I. Robinson, whose representative sold, transferred, and assigned the same to B. C. Bailey, the defendant, on the twenty-seventh day of May, 1868; and Bailey entered to foreclose this mortgage on the fourth day of June, 1868,—the same day his daughter entered to foreclose the one to her.

Subsequently to the filing of the general replication in this cause the deputy-sheriff who sold Reed's equity of redemption as aforesaid, petitioned for leave to amend his return as to the year of the attachment on the original writ, and the facts relative to the adjournment of the sale; and on the eighteenth day of August, 1870, by the supreme judicial court then sitting in Sagadahoc county, "permission is granted to the petitioning officer to amend his return according to the facts, saving all rights of intervening third parties." Accordingly the officer did amend by inserting 1864 in-

stead of 1866, as the year of the original attachment on the writ, but did not change the day of the month from the twentieth to the twenty-eighth; this error remained uncorrected. He also stated the hour to which he adjourned the sale, and that the adjournment was made by public proclamation. Though the return upon the original writ was entitled as of Sagadahoc county, it stated that the deputy had attached all the defendant's interest in any and all real estate in the county of Kennebec. This error arose from the suit of *Berry* v. *Reed* being brought in the latter county, while Reed resided in the former. This error was never corrected. In the account of the expenses and charges arising under the Davis mortgage, was an item for advertising foreclosure and the taxes for 1868 and 1869, which are estimated to be the same as previous years. These taxes, for the two years specified, the mortgagee says have not been paid but will have to be to prevent a sale of the land. The respondent, Bailey, claimed to hold the estate under both of the mortgages assigned to him, and denied complainant's right to redeem from the Davis mortgage, which was all that he sought by his bill, without also redeeming from the Robinson mortgage. Mrs. Davis denied that any account had ever been demanded of her or that she was liable to account, since she had assigned all her interest as aforesaid, Dec. 31, 1868, before said alleged demand. The defendants also denied complainant's right to redeem said estate at all, claiming that he derived no title under his deed from the sheriff and the proceedings upon the Berry execution.

A. Libbey, for complainant.

The officer's return, if originally defective, was amendable and has been amended; this amendment cannot prejudice the defendants, since it can make no difference to them whether the right of redeeming is in Milliken or Reed.

Tallman & Larrabee, for respondents.

The defendants deny the complainant's right to redeem from this mortgage; or that he can maintain this bill even if he have

the right of redemption. The bill was served Nov. 20, 1869; the answers denying his title were filed Feb. 9, 1870; and the general replication at the April term, 1870. The plaintiff then had no title, because in the officer's sale to him, the requirements of the statute, which should be strictly followed, were utterly disregarded. *Pratt* v. *Skolfield*, 45 Maine, 386; *Stinson* v. *Ross*, 51 Maine, 556.

All the officer pretended to sell was Reed's right taken by attachment Sept. 20, 1866; if none were then attached; still more, if it were never attached, he sold and conveyed nothing to Milliken. The officer's return on the Berry execution is grossly defective. If the amendment has any force against us, it is not retroactive. If Mr. Milliken had no title till after he brought his bill, then his prior demand was nugatory because made by one having then no interest in the estate, and it cannot support this proceeding.

Certainly, the amendment cannot affect the Robinson mortgage now held by Mr. Bailey.

When this bill was brought against her, Mrs. Davis had no interest in the estate. *Hilton* v. *Lothrop*, 46 Maine, 297.

She denies that any demand was ever made on her, and such is the proof. The mere fact that she had taken formal possession in order to foreclose does not imply that she received anything from the land. *Bailey* v. *Myrick*, 52 Maine, 132.

The complainant must redeem both mortgages, if either. If he only redeem the Davis mortgage the foreclosure under the Robinson mortgage will be perfected.

At the time of the sale on execution, June 7, 1869, Mr. Reed had no right to redeem from the Davis mortgage, since he had already sold that right to Mr. Robinson by his mortgage to that gentleman. His right at the time of that sale was simply of redeeming from the Robinson mortgage; and that was all that passed by the sale. *Thompson* v. *Chandler*, 7 Maine, 377. But this right was neither attached nor sold. *Palmer* v. *Fowler*, 5 Gray, 545. In fact, there was no legal sale of any right. *Smith* v. *Dow*, 51

Maine, 21. And no interest to authorize any demand for an account.

Libbey, in reply.

The Robinson mortgage has nothing to do with this case; we do not now ask to redeem from that.

The amendment takes effect from the date of the original proceedings.

BARROWS, J. Reed mortgaged the premises which the plaintiff seeks to redeem June 9, 1864, to Mr. Davis, one of the respondents. His right of redemption was attached by a creditor Sept. 28, 1864, and he again mortgaged the premises in October, 1864, to Robinson. On June 7, 1867, Reed's right to redeem from the Davis mortgage, having been seized on the attaching creditor's execution on the 10th of April preceding, was sold at auction and bought by this plaintiff. But in making his return on the execution the officer gave as the date of the original attachment Sept. 20, 1866, instead of Sept. 28, 1864, and omitted to state how and to what hour of the day the sale upon execution was adjourned from June 1, 1867, which was the day designated for the sale in the notices given to the debtor and posted April 10, 1867, and published three weeks successively prior to June 1. And thus his return stood until the August term, 1870, after the commencement of this process, when the officer was permitted to amend his return according to the facts. But in the interim it would seem that Bailey, the other respondent, had taken an assignment of the Robinson mortgage from Robinson's executors May 27, 1868, and had also, Dec. 31, 1868, received from his daughter, Mrs. Davis, a transfer of her mortgage which this plaintiff seeks to redeem. His right to do this is sharply contested by Bailey, who claims a foreclosure of both mortgages; of the Davis mortgage by virtue of entry made and possession taken for that purpose by Mrs. Davis June 4, 1868; of the Robinson mortgage by virtue of a similar proceeding on his own part as assignee of the mortgagee.

He commences his answer by denying the mortgage of the premises to Mrs. Davis and the assignment thereof to himself, because in the bill the southern boundary of one parcel is stated to be "land of William Penny when it should be Perry, and part of the northern boundary of the other parcel is said to be a road leading to one Hutchinson's, when it should read Hutchins'. The identity of the parcels is, however, sufficiently demonstrated. *Falsa demonstratio non nocet*, where the misprision is so readily corrected.

He next invokes the rules in chancery practice respecting the manner of putting in documentary evidence, and claims that everything except the bill and answers should be excluded, because the rules have not been observed; but the signature of his counsel admitting the genuineness of one of the documents filed as evidence by the complainant, and the proceedings before the court when the argument of the case was postponed, show clearly that it had been understood by the counsel on both sides that the formalities required by the rule should be waived, and after that it is too late, and would be unjust to insist upon them.

But it is further argued that the plaintiff had no right to redeem this (Davis) mortgage when he commenced his bill, or if he had such right, that this suit cannot be maintained. And these positions are based for the most part upon the omissions in the officer's return as originally made, above adverted to. The true answer is that the amendment allowed and made at the August term, 1870, perfected the evidence of the complainant's title, and made it good from the date of the original proceeding, except so far as that construction of it might wrongfully affect intervening third parties, whose rights, where they acted in good faith, were not to be prejudiced by it. How far does this affect the relative positions of the parties in this suit?

There is no evidence before us in this case to show that Bailey did not purchase the Robinson mortgage in good faith after the creditor's sale of Reed's right of redemption upon the execution, and before the amendment which carried back the date of the al-

leged original attachment so as to make it anterior to that mortgage. Upon this showing, then, all Bailey's rights as assignee of the Robinson mortgage must, notwithstanding the amendment, stand upon the same footing as though the original attachment had been in fact made Sept. 20, 1866, instead of Sept. 28, 1864.

It is, therefore, unnecessary to determine whether the respondent can properly introduce the return on the original writ in the creditor's suit to show that, in point of fact, it was Reed's right and interest in real estate in Kennebec county, and not in Sagadahoc, that the officer returned as attached; for this view of the effect of the amendment renders it immaterial as between these parties whether the complainant's right originated in the sale of Reed's equity on the execution, or relates to the date of the supposed original attachment. But it is one thing to have one's own rights protected from the effects of an officer's mistake, and quite a different thing to make use of that mistake to operate a forfeiture of the rights of another man. All Bailey's rights honestly acquired before the amendment, as a prior incumbrance, must be protected, but it does not follow that he should be heard to say, that the complainant did not acquire whatever right of redemption from the Davis mortgage Reed had at the date of the sale on the execution. In the eye of the law it can make no difference to Bailey whether Reed or his creditor, whom this complainant represents, holds that right.

The amendment, then, relates back to the date of the original return, so as to transfer, as of that date, to the complainant, as against Reed and these respondents, all the right of redemption of the Davis mortgage which Reed had at the time of the sale on execution. The plaintiff is entitled to be considered as the owner of that right when he brought his bill, although until the amendment was filed he was not in a condition to prove it. But still it is insisted that he cannot maintain this process because his demand for an account was made before the amendment, and therefore the respondents were under no obligation to comply with the demand.

If the respondents had refused to recognize the complainant as the owner of the equity when the demand was made, we might

have felt bound to limit the effect of the amendment, so far as to hold that they should not be responsible for any costs in any event; but, when the demands were made, the respondents did not object to rendering an account nor claim that the plaintiff was not the owner of the equity; they gave him accounts which are manifestly not correct. The amendment, then, did not change anything in the position which they assumed towards the complainant.

Now, when the amendment has cured the apparent defect, the respondents cannot be heard to urge that they might have found a flaw in the plaintiff's title at the time of his demand, when they recognized him then as the rightful owner, and any liability to costs to which they may have subjected themselves arises, not from a refusal to give an account, but from giving an incorrect one.

Mrs. Davis in her answer denies that any demand for an account was made on her; but the production in evidence of the statement of her claim, apparently made by her father for her, militates somewhat strongly against the correctness of this portion of her answer. She is a proper party to the suit, although she had assigned her interest in the mortgage before the filing of the bill, if she received rents or profits while she was in possession before her assignment, or rents and profits accrued during that time which she might and ought to have collected and accounted for, or if any payments were made to her.

And upon these points the parties may properly produce evidence before the master. It is true, as remarked by the court in *Bailey* v. *Myrick*, 52 Maine, 135, that the taking possession for the purpose of foreclosure under the statute "does not necessarily impose upon the mortgagee the obligation to account for rents, if he should not receive them;" but that case was not intended to change the doctrine that when he does in fact receive them, or when it is owing to his own inexcusable default or negligence that he fails to receive them, he will be chargeable therewith at the instance of any one who has a right to complain, while he would not be so accountable to the mortgager himself, or to those claiming under him if they consented to his remaining in possession without the pay-

ment of rent. But that is not, apparently, this case. The master's report will determine it, and until that comes in, and a final decree is entered, the question of costs as to each of the respondents will remain in abeyance. That there were some rents and profits received, at least to the amount of $60 per annum, which ought to have been accounted for, is admitted by the respondent, Bailey, in his statements filed in evidence, and also that none were, in fact, put upon the account as originally rendered. Moreover, the claim for taxes which had not been paid was incorrect. Virtually admitting, as they did, the complainant's right to an account, they should have made the account a correct one.

Finally, it is urged that the respondent, Bailey, has obtained an assignment of the Robinson mortgage, and that that is foreclosed, and thereby the complainant is precluded from redeeming the Davis mortgage. We do not feel called upon to determine at the present time the validity or effect of the Robinson mortgage, and the proceedings under it. Up to the time of the sale of Reed's right to redeem from the Davis mortgage to the plaintiff, it appears that Reed had a subsisting right of redemption from both mortgages. Everything was, in fact, done at that time which was necessary to convey to the plaintiff his right to redeem from the Davis mortgage, and so far as he was concerned, that right then vested in the plaintiff. Such is the effect of the amendment. It is that right which the plaintiff seeks to enforce in this suit, and he claims that it should be passed upon as if the Robinson mortgage were not in the case. When he commenced this process there is no pretence that the right which Reed originally had to redeem from both or either of these mortgages was foreclosed.

When the plaintiff claimed and offered to redeem the Davis mortgage, and brought this bill for that purpose, the respondent, Bailey, had nothing in the premises except the security which his mortgages gave him for the payment of whatever was justly due him. His interest in the premises was subject then, and also when the amendment of the officer's return was made and filed, to the outstanding rights of redemption, and we think that the delay in

bringing this case to an issue should not prevent us from deciding it as it must have been decided had it been sooner heard.

The plaintiff for some reason or other which does not appear here, ignored the existence of the Robinson mortgage. In this process, at least, he seeks only to have his right to redeem from the Davis mortgage declared. Whether he can safely or profitably to himself exercise that right, he does not ask us to decide. Upon what ground he intends to contest Bailey's title under the Robinson mortgage we are not informed. It may be that he supposes that if he can be allowed to redeem the Davis mortgage, he can prevail against the other as not having been made in good faith, or as having been fully paid without breach of the condition.

It will be time enough to settle the rights of these parties to this land under the Robinson mortgage and its alleged foreclosure when the issues respecting it are framed and presented.

At present, the question for us to determine is, had the plaintiff the right, when he commenced his bill, to redeem the Davis mortgage, and maintain this process for that purpose?

We think he had. *Bill sustained.*

Master to be appointed.

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

HORACE A. GRAY *vs.* PATRICK K. MILLAY.

Sale.

The plaintiff caused to be attached certain cigars and tobacco upon two suits against one Tinker, and was made keeper of the goods by the defendant, who was the officer making the attachment. It was afterward agreed between Tinker and the plaintiff that plaintiff should have the property and that Tinker should act as his agent and sell it on plaintiff's account. The cigars were not counted, nor the tobacco weighed, nor any price for them fixed upon, nor any credit given Tinker for them upon his debts to plaintiff. The plaintiff discontinued his suits, whereupon the property was attached as Tinker's at the suit of other parties. *Held*, that the transaction did not constitute a sale, and that plaintiff could not maintain replevin against the attaching officer.

ON REPORT.

REPLEVIN against the sheriff for cigars and tobacco, claimed by the plaintiff by virtue of an alleged sale from one Tinker under the circumstances stated in the opinion, upon process against whom the defendant had attached them, at the suit of third parties.

The facts, upon which the case was submitted, are sufficiently stated in the opinion.

Tallman & Larrabee, for the plaintiff, cited *Shumway* v. *Rutter*, 8 Pick. 443; *Packard* v. *Dunsmore*, 11 Cush. 282.

E. J. Millay, for the defendant.

BARROWS, J. The case is presented upon a report of the testimony offered by the plaintiff, accompanied by the admission that the defendant, as sheriff of the county, on June 12, 1869, duly attached the cigars and tobacco here replevied upon writs against one Tinker, in whose possession they were at the time of the attachment, and that the suits in which they were attached are still pending. The plaintiff claims under an alleged verbal sale from Tinker, and it is incumbent upon him to prove an absolute *bona fide* sale, as the defendant represents Tinker's attaching creditors.

The only testimony he offers is his own deposition, by which it appears that he is a brother-in-law of Tinker; that about March 2, 1869, in Tinker's absence from home, he caused two suits to be instituted against Tinker, one upon a demand of his own, and one upon a note on which he was responsible as Tinker's indorser, and that the defendant, who served the writs, attached thereon "about fifty-two boxes of cigars and a quantity of loose tobacco," what quantity he says he "cannot tell, but should judge about two or three hundred pounds." The sheriff made the plaintiff keeper of this property, and on Tinker's return, about the middle of March, plaintiff says he told Tinker that he had attached his cigars and tobacco; that they were in his possession; whereupon Tinker "said very well, I could have the cigars, and he said if you wish me to act as your agent I will do so and sell them for your account; I told him he could, as perhaps he could sell them better than I could."

This was the whole transaction as testified to by the plaintiff. The cigars and tobacco went back into Tinker's possession, and the suits instituted by the plaintiff were not entered. It would seem that no price for any of the articles was agreed on, nor were the boxes of cigars ever counted nor the tobacco weighed. When asked on cross-examination how much he gave for the cigars, plaintiff says: "Took them on account for the debt he owed me." To the inquiry how much he allowed for them towards the debt, he says: "I suppose the cigars were not sufficient for the debt, and he should sell the cigars and give me the proceeds of them, and then we were to settle." To the further inquiry, "Did you ever allow him anything towards the debt for the cigars," he responds: "He has not rendered an account of sale of the cigars; took the cigars on account of debt." It further appears on cross-examination that he kept no books but a memorandum book, and gave Tinker no credit for the goods upon that; that he "supposes" the tobacco replevied is the same that was attached, and that he "does not remember" whether he stated when he brought the suits against Tinker that he did it "merely to prevent others from suing him and should not prosecute them."

The transaction between Tinker and the plaintiff appears to have been simply a relinquishment of plaintiff's attachment upon Tinker's agreement to sell the goods attached and apply the proceeds to the payment of plaintiff's demands, and not a sale. Tinker is not called as a witness nor his absence accounted for. Plaintiff paid him nothing for the goods, gave him no credit for them on account, nor any receipt, as for a partial payment, and it does not seem to have been contemplated by the parties that he should, except as he might receive the proceeds of sales by Tinker. Upon such testimony a verdict for the plaintiff could not be sustained.

Plaintiff nonsuit.

Judgment for a return.

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

JOSEPH W. SPAULDING *vs.* NEW YORK LIFE INSURANCE CO.

Agents of life insurance companies—compensation of. Contract—construction of.

The rules of an insurance company provided that agents should receive a commission of "five per cent on each renewal collected and transmitted by them." *Held*, that the plaintiff, whose agency of such company had terminated, was not afterwards entitled to this commission on policies procured by him while he was agent, the collection and remittance of the renewals not having been made by him, and no custom to pay such commission after the termination of the agency being shown.

ON REPORT.

ASSUMPSIT on account annexed for $74.18, commissions on renewals of insurance policies from July 3, 1870, to September 18th of the same year. On the 27th day of July, 1866, the plaintiff received an appointment as agent of the defendant company. The agency was terminated on the first day of July, 1870, and the plaintiff brings this action to recover for commissions upon renewals paid after the termination of his agency upon policies pro-

cured by him while acting as agent. The plaintiff did not collect nor remit the premiums upon which he seeks to recover commissions.

Among the rules of the company are the following:

"10. The commission to agents is 10 per cent on first year's premium and 5 per cent on each renewal collected and remitted by them. This applies to business procured by the agent under this appointment. Upon the collection of other premiums (the risk being originally obtained by other parties) and upon interest, the commission is 2½ per cent. . . ."

"21. This appointment is revocable at the pleasure of the company, and can be terminated in like manner by the agent."

J. R. Dean, a witness called by the plaintiff, testified that he was General Agent of the Continental Life Insurance Co.; that so far as he knew it was the usual custom, if agents receive a commission upon premiums after the first year, they receive it ever after, as long as the renewals are paid, unless they are discharged for misconduct.

M. L. Stevens, also called by the plaintiff, testified that he was General Agent of the North American Life Insurance Co.; that in all general contracts it was understood that a commission upon future premiums was a part of the compensation for doing the work, and that so far as his knowledge, observation, and experience went, agents had always received that renewal commission as long as the policies were in existence.

Wm. H. Beers, Vice-president and Actuary of the defendant company, stated in his deposition that agents were to receive five per cent for collecting and remitting renewals only during the continuance of the agency.

The defendant corporation agreed to a default, which was to stand, and plaintiff to have judgment for the amount of his bill, if the action was maintainable; otherwise, the default to be taken off and the plaintiff to become nonsuit.

T. B. Reed, for the plaintiff.

Tallman & Larrabee, for the defendant.

APPLETON, C. J. This action is brought to recover commissions on premiums, paid after the plaintiff ceased to be an agent of the defendant company, for renewals of policies, issued by his procurement, while he was such agent.

Among the rules adopted by the company was the following, which was in force when the plaintiff received his appointment as agent: "Rule 21. This appointment is revocable at the pleasure of the company, and can be terminated in like manner by the agent."

As the agency thus created may be terminated at the pleasure of either party, there can be no reason for complaint whenever it is so terminated. The tenure by which it is holden is uncertain and so recognized. Once terminated, the relation of principal and agent is at an end. The duties and the authority of the agent cease.

The plaintiff, notwithstanding he has ceased to be an agent, claims to recover a percentage on renewals of policies, procured by him when agent, by virtue of the following rule, which fixes the compensation of agents: "The commission to agents is 10 per cent on first year's premium and 5 per cent on each renewal collected and transmitted by them. This applies to business procured by the agent under this appointment. Upon the collection of other premiums (the risk being originally obtained by other parties) and upon interest, the commission is 2½ per cent."

The compensation on renewals is for services rendered. It is due "on each renewal when collected and transmitted," and then only by the terms of the rule. The agent has no right to his commission save on collection and transmission of the premium. The terms of the rule imply the continuance of the agency. When one ceases to be agent he cannot rightfully collect, and can have nothing to transmit.

The next sentence provides for the collection and transmission of premiums collected by an agent other than the one originally procuring the policies, and it gives such agent two and a half per cent commissions.

If one who is no longer an agent can have his commissions on premiums collected and transmitted by another, then the company must pay a commission of two and a half per cent to the agent collecting and transmitting funds, and five per cent to one who has ceased to be agent and who has neither collected nor transmitted funds.

There can be no mistake as to the meaning of the rule. It allows commissions only to the agent collecting and transmitting premiums paid on renewals, giving to the person procuring the original policy a premium twice as large as that to any other agent by whom premiums are collected.

The evidence entirely fails in showing any custom by which the defendants can be bound. Other insurance companies, with other rules, may have made such an allowance as the plaintiff claims, but that would not affect the defendants. Indeed, no proof is shown of the existence or recognition of any such custom as the plaintiff sets up, on the part of the defendant corporation. On the contrary, Mr. Beers, their actuary, testifies that there was no such custom. The defendant corporation cannot, most assuredly, be bound by the customs of other insurance companies. Certainly not, when those customs are not recognized by it and are in the very teeth of its own rules. *Default taken off.*

Plaintiff nonsuit.

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

DICKERSON, J., did not concur, and gave his opinion as follows: This action is brought to recover commissions on premiums paid after the plaintiff ceased to be agent of the defendant company, for renewals of policies issued by his procurement while he was their agent.

The decision of the case depends upon the construction to be given to the following rule of the company, fixing the compensation of agents: "The commission to agents is ten per cent on first year's premium, and five per cent on each renewal collected and

remitted by them. This applies to business procured by the agent under this appointment." Does the right of the agent, under this rule, to commissions on renewals of policies issued by his procurement cease when his agency is terminated, or does it continue after such termination and so long as such renewals are effected?

This rule is to be construed with reference to the subject-matter of the agency, the inducements of the parties to enter into the contract, and the respective interests to be subserved. The business to be engaged in was life insurance, which from its very nature is continuous, extending over an indefinite series of years, and involving numerous unforeseen contingencies. A policy once issued may be renewed fifty times, or not at all; whether it be the one or the other depends, among other things, oftentimes, not a little upon the intelligence, energy, integrity, and address of the agent through whose procurement the policy was originally issued, and under whose special charge the business continues; for these qualifications in an agent are not only necessary to enable him to succeed in inducing persons to become insured, but also in retaining the assured, by keeping them advised of the transactions and standing of the company he represents, and of the general practicability, the advantages, and, it may be, the duty of renewing their insurance.

The value to the company of the services of an agent consists both in the number and amount of the policies he is able to cause to be underwritten, and in the number and continuity of the renewals. The value of the agency to the agent depends upon the same considerations. Indeed, his continuous interest in the renewals is the chief inducement for him to accept the agency. These identical and mutual advantages may fairly be presumed to have been contemplated by both principal and agent when they agreed upon the contract of agency. The rate of compensation agreed upon confirms this view of the contract; agents were to have commissions on renewals as well as on original policies. If the agent was not to receive any compensation for renewals, he would not have the motive to procure substantial and continuous-

ly-paying persons to become insured that he would if he had an interest in the renewals, and the company would derive correspondingly less benefit from his services.

So, if the agent were entitled to commissions on renewals, and, at the same time, liable to lose his agency at the caprice of the company, without fault on his part, and with that to loose, also, his claim for commissions on renewals, the same result would follow.

As, in general, life policies lapse upon non-payment of the annual premiums, the assured are interested in making such payments promptly. Hence, the business of collecting and remitting those sums occupies but little time, and requires but little effort. The five per cent commissions on renewals may thus be regarded, not only as compensation for such services, but also as part payment for the more laborious and difficult work of soliciting customers and procuring the policies to be issued, which is so inadequately and disproportionately remunerated by the commissions allotted for such service. The defendants recognize this principle in their rule establishing the compensation of agents, which allows agents double the amount of commissions on renewals of policies issued through their instrumentality that it does for the same service in respect to policies procured by other agents. This extra allowance is undoubtedly intended as a part compensation for the previous service of soliciting and procuring persons to become insured. The plaintiff's claim, in fact, partakes of the nature of a claim for compensation for services rendered while he was the defendants' agent. By the contract between the parties the plaintiff was to have a *quasi* lien for commissions on the premiums paid for renewals of policies, issued through his agency, as a part of the compensation for his previous services. It is obvious that such a claim could not be defeated or impaired by a revocation of his authority as agent.

Taking, therefore, into consideration the nature of the business to be transacted, the interests to be subserved, and the inducements for the parties to enter into the contract of agency, I think that the plaintiff, under that contract, acquired a right to

commissions on the premiums paid for the renewal of all policies underwritten at his instance, and that this right attaches as well to premiums paid after as before the termination of his agency, it appearing that his authority ceased without any fault on his part, and that he has ever been ready and desirous "to collect and remit" such premiums to the defendants, less his commissions.

This view of the case is confirmed by the usage proved to exist among life insurance companies in such cases. The statute of 1870, c. 156, § 8, invoked by the defendants, cannot avail them. The plaintiff acquired his rights under a contract executed before that statute was passed, and it is not competent for the legislature to pass an act impairing pre-existing rights.

JOSEPH BRADSTREET, in review, *vs.* JAMES PARTRIDGE.

Practice. Review. Writ not to be sued out till after final judgment upon the petition.

The writ of review should not be sued out until the record upon the petition therefor is closed.

Case between same parties, 59 Maine Reports, 155, affirmed.

ON REPORT.

The writ of review in this case, dated March 9, 1872, was entered at the April term, 1872, of court for this county, while the original petition therefor was still remaining upon the docket, as still pending. This petition was entered at April term, 1869, continued to August term, 1869, when the prayer thereof was granted, and a writ of review sued out and entered at December term, 1869, and continued to April term, 1870, when the writ was dismissed, upon the ground that the cause should be tried upon the petition, which was still pending upon the docket. At the August

term, 1870, defendant moved to dismiss the petition and filed exceptions to the refusal of the judge to grant that motion. At December term, 1870, plaintiff offered to go to trial under the petition, but the justice then presiding doubted the propriety of this course and the facts were reported to the full court for its opinion, the original writ of review, motion to dismiss and exceptions, making part of the case. January 4, 1872, the clerk of the court for this county received the certificate of the order of the law court, as follows: "Review granted the petitioner to sue out his writ of review the next term after the entry of final judgment in this case."

The parties agreed to submit the cause to the decision of the court on these facts.

J. S. Baker, for plaintiff in review.

Tallman & Larrabee, for defendant.

APPLETON, C. J. There can be no final judgment when an action is continued for judgment. An action may be defaulted and continued for judgment, and at the next term the default may be stricken off and a nonsuit entered. The disposition of the cause while thus remaining upon the docket is subject to the control of the court. So, in case of a petition for a review, while it remains on the docket there can be no final judgment. The clerk cannot complete his record while it thus remains pending. The law on this subject was fully and clearly stated in *Bradstreet* v. *Partridge*, 59 Maine, 152.

For some unperceived cause, the counsel for the plaintiff saw fit to have a further continuance of the petition for a review. It still remains upon the docket at his instance, for when a case is ready for judgment it is not the clerk's duty to continue it at his own will and pleasure.

The action of review is a new proceeding. The writ of review is "to be entered the next term after the review is granted unless leave is granted to enter it at the second term." R. S., c. 89, § 7. But there can be no judgment granting a review while the peti-

tion remains continued upon the docket. Both actions cannot remain together upon the docket. There must be a final disposition of the petition for review before the writ can issue. The slightest attention to the opinion of this court, to which reference has been made, would have fully informed counsel as to the proper course of proceeding. *Plaintiff nonsuit.*

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

CHARLES CROOKER, in equity, *vs.* LEVI W. HOUGHTON and another, administrators.

Review in equity—grounds for.

Review in equity will be granted only on the ground of newly discovered matter, or for error apparent upon the face of the record.

A bill in equity was brought by the complainant for the purpose of obtaining a settlement of the affairs of the partnership of which he was a member. In 1861 a receiver was appointed, and the firm affairs in 1864 referred to a master for adjustment. In 1872 the master made his report which, among other things, found "that a portion of the moneys or securities in the hands of the receiver was and still is the individual property" of the complainant, and should be deducted before the distribution was made of the partnership assets, and stated that an interest account was uncalled for and such an account was not stated. The report found that the complainant was entitled to $17,808.63, and this bill was brought praying for a review on the ground that interest should have been allowed on the amount so found. *Held,* that, as it did not appear that the amount awarded the complainant did not include interest, and as the report did not show how it came into the receiver's hands, there was no such error apparent upon the face of the record as would entitle the complainant to a review.

BILL IN REVIEW IN EQUITY.

At the December term of court in this county, in 1857, this complainant commenced proceedings by bill in equity against William D. Crooker and others, alleging in the bill that in the

year 1826 he formed an equal partnership with William D. Crooker, under the name and style of C. & W. D. Crooker; that until the dissolution of this partnership on the 19th day of June, 1854, they were from time to time engaged in the buying and selling of merchandise, the building and sailing of ships, the cutting and marketing of lumber, and other business; that on said 19th day of June the copartnership was largely indebted, and that their assets consisted mainly of parts of certain ships and parcels of land; that these parcels of land were all purchased on the credit and with the money of the firm, and were holden by the complainant and William D. Crooker as tenants in common; that during the three and four years succeeding the dissolution of the copartnership numerous suits, the plaintiffs in which were joined with William D. Crooker as defendants in the bill, were instituted against said William D. for the recovery of debts contracted by him on his own separate and individual account and credit, and in the prosecution of business in which the complainant had no concern or interest; that the amount of these debts the complainant was unable to state, but believed them to be between twenty-five and forty thousand dollars; that he believed the other defendants intended to obtain satisfaction of the judgments which they might recover by levying upon the legal estate of William D. Crooker in the parcels of land mentioned above; that thereby one-half of the assets of the copartnership would be absorbed by the payment of the individual debts of William D., and the remainder would be utterly insufficient to discharge the firm liabilities; that the complainant had already been obliged to pay partnership debts to a large amount out of his own property, and that William D. Crooker had neglected and refused to come to a settlement of the partnership accounts and dealings and to join with the complainant in selling the partnership property and paying its debts. The complainant therefore prayed for the dissolution of the attachments against the estate of William D. Crooker in the before-named parcels of land; that the other defendants might be restrained from satisfying their judgments thereon; that a receiver might be

appointed, and William D. Crooker be compelled to join with the complainant in conveying to the receiver all the lands mentioned above and all other property of the copartnership, and that the receiver might be ordered to sell and dispose of the same, pay the firm debts, and dispose of the balance as the court should direct.

At the August term, 1861, a receiver was appointed.

At the April term, 1864, the injunction was granted, as prayed for, restraining the other defendants from further proceedings against William D. Crooker in their several suits, and decreeing a dissolution of their attachments; the matters of the firm were referred to C. W. Larrabee, master in chancery; the receiver, previously appointed, was confirmed, and Charles and William D. Crooker were required to convey to him all the real estate mentioned in the bill and all other property belonging to the firm.

The receiver was required, among his other duties, to account for, semi-annually, and pay what he should receive as below stated, unless otherwise ordered by the court; to sell and dispose of the lands and other property, and out of the proceeds thereof to pay the company debts as ascertained by the master, or so much thereof as the proceeds of the property and the partnership funds in his hands would pay *pro rata*, and if any balance remained after the payment of firm debts and the proper charges of the receiver and master, to pay such balance *pro rata* in adjustment of the private claims of each partner for services and advancements made by them severally for the benefit of the firm and in the settlement of its affairs. The remainder, if any, was to be divided equally between the partners.

At the August term, 1872, the master made his report, which was accepted and which, without the merely formal portions, was as follows:

"That from the condition of the accounts of the said firm of C. & W. D. Crooker, I find it impracticable to state an annual account from the beginning of the copartnership to the date of dissolution, covering a period of twenty-nine years, from the fact that an important portion of the accounts during said period do not

bear evidence of being original entries, and are constituted of vouchers whose history is not clear, and this difficulty is experienced to a great degree in all those partnership transactions, to a degree that makes an interest account, in my judgment, uncalled for, therefore I have not stated an interest account.

Since the date of dissolution in June, 1857, all the outstanding copartnership liabilities have been settled, not by the receiver, but by the individual members of the late firm out of their individual property.

The receiver has not paid out the moneys in his hands in liquidation of the copartnership liabilities, so that the money now in the hands of the receiver belongs to the members of the firm, that is to Mr. Charles Crooker, and the legal representatives of the late William D. Crooker, who in his lifetime with Charles Crooker composed said firm.

I find that a portion of the money or securities now in the hands of the receiver was and still is the individual property of the senior member, Charles Crooker, and that this shall first be deducted before the distribution be made of partnership assets, thus, viz.:

Total amount in hands of Wm. B. Taylor, receiver,		$36,460.00
Receipts of parties as per schedule,		2,058.21
		$38,518.21
Less bill of Wm. B. Taylor,	$100.00	
Less bill of master,	800.00	
Suit in favor of C. S. Jenks *vs.* J. A. Crooker for Duncan house,	173.73	
		1,073.73
Balance,		$37,444.48

Out of this sum I find that Charles Crooker, surviving partner, is entitled to be paid first the sum of	$17,808.63
and that the balance of	$19,635.85
is to be equally divided between the said surviving partner and the legal representatives of the deceased partner, that is—	
Charles Crooker shares one-half of $19,635.85 which is	9,817.92½
Est. of Wm. D. Crooker shares one-half which is	9,817.92½
	$19,635.85

I further report that said sum of $17,808.63 is owing to said Charles from the assets in the hands of the receiver, and is to be first paid to him therefrom, and that whatever the balance shall be at date of decree of distribution shall be divided equally as aforesaid, and that in making the division of said balance all receipts held by the receiver against the said parties shall be taken at their face without interest."

At the December term, 1872, Charles Crooker brought this bill in review against the respondents, who are administrators of the estate of William D. Crooker. This bill, after alleging substantially the same facts that have been set forth above and stating that the complainant in 1861 gave his deposition to be used in the original bill, in which he testified that the balance due him from the firm was $21,040.37, further alleges "That said master finds and reports that the whole net amount of assets in the hands of the receiver is $37,444.00, and that a balance is due to your orator from said firm, for advancements from his individual property to pay the debts of said firm, amounting to $17,808.63, and your orator alleges that the last item in said balance was the sum of $7,000.00, paid out of his private property on the 16th day of October, 1863, to discharge an outstanding execution against said firm, and that the balance of said sum had been paid out many years prior to 1863, and a large part was actually due to him at

the dissolution of the partnership in 1854, still said master did not allow him any interest on these sums. . . . Your orator further represents that at the time said report was made to the court and said final decree entered he had no counsel to advise him of his rights, and he did not fully understand that no interest had been allowed him till the decree was entered of record, and then, before the final adjournment of the court, he went to the court house to object and was informed it was too late.

Now, your orator charges that there is manifest error, appearing on the face of the record, in said report and the final decree of the court founded thereon and made in accordance therewith, inasmuch as by law and the rules of equity, and in justice and good conscience, your orator was entitled to interest on the balance, which was found due him for money advanced from his individual property, many years before, to pay the debts of the firm; but said master disregarded the law and the rules of equity in this respect, and did not allow him any interest; and therefore he brings this bill in review, and humbly prays that your honors will so far, at least, review the proceedings and record in this case as to rectify the error aforesaid, and allow him interest, at least, from the time of the last payment of $7,000 in October, 1863, and for such other relief in the premises as justice and equity may require."

The respondents demurred to all of the bill "except so much as alleges that the master in chancery finds and reports that a balance is due to said Crooker, from the firm of C. & W. D. Crooker, for advancements from his individual property to pay the debts of said firm, amounting to $17,808.63, and that said master did not allow him any interest on these sums;" and to this portion of the bill the respondents answer, denying that "said sum or any other sum was allowed by said master to said Charles, for advancements from his individual property to pay the debts of said firm," and alleging that the sum o $17,808.63 was the amount of the individual property of the complainant in the hands of the receiver, including interest at the time the report was made.

The complainant joined the demurrer, but made no replication to the answer.

Baker and *Baker*, for the complainant.

I. The first question to be considered is, was there a balance due the plaintiff from the firm or from the funds in receiver's hands?

1. The original bill so alleges under oath.

2. The plaintiff's deposition in that bill so states.

3. The master's report finds a balance of $17,808.63 due plaintiff in 1862 from the funds in the receiver's hands.

It is said that this sum was not for advances from the individual property of the plaintiff to pay firm debts, but which came in some other way into the receiver's hands.

In any event it was the plaintiff's money in the hands of the receiver and withheld by him from the plaintiff.

II. When was it so received by the receiver?

1. The receiver was appointed August term, 1861.

2. He was confirmed at the April term, 1864, and ordered to give security "duly and semi-annually to account for and pay what he shall so receive," to receive and collect the debts due the firm, to dispose of the lands and other property, and the balance which remained after the payment of firm debts was to be paid *pro rata* in adjustment of each partner's private claims for services and advancements for the benefit of the firm.

All the property, except certain real estate in Bath, was converted into money, when it does not appear, but we are to presume that the officer of the court complied with the terms of his bond and converted the property immediately or within a reasonable time.

III. 1. It is the duty of trustees to invest trust funds so as to earn interest. Adams Eq., 56 and note; 2 Story's Eq., §§ 127, 129; *Lowell* v. *Minot*, 20 Pick. 119; *Clark* v. *Garfield*, 8 Allen, 427.

2. He is liable for interest in this case, whether the funds earned it or not, since he disobeyed the orders of court and the terms of his trust.

3. But he did invest the funds, and it is to be presumed in government bonds, like the English "consols," according to the chancery rule. See the master's report. It is not to be presumed that for five to eight years any reasonable man would allow $38,000 to be locked up without interest.

IV. Did the master allow plaintiff any interest?

1. He does not intimate that he did.

2. He declares that he did not state "an interest account."

3. He also states that the receipts held by the receiver "shall be taken at their face without interest."

4. He does not find it impracticable to reckon interest or make an interest account, but simply that it was "uncalled for." All the elements necessary to reckon interest exactly were at hand. That he did not allow interest on the $17,808.63 of plaintiff's individual money is the gravamen of this bill of review.

5. We do not expect this court to ascertain the amount unjustly withheld from plaintiff, but that the case may be committed to another master.

V. Plaintiff had no counsel when the report and decree were made, and from age, the long vexation of this fifteen years' litigation, and the slow movement of his perceptive faculties, he did not perceive the defect in the report and decree till they were accepted and confirmed and court had adjourned.

Francis Adams, for the respondents.

This being a bill of review in equity, it can be sustained only upon one of two grounds, either for the discovery of new matter, or for error apparent upon the face of the record. *Robinson* v. *Sampson*, 26 Maine, 11, and authorities cited.

This bill contains no allegation of newly-discovered matter, and the review is asked on the ground that there is manifest error apparent on the face of the record. An examination of the case will show that the error is in the plaintiff's statement rather than in the report. The master's statements in the report relative to not stating an interest account had reference to the time during which the partnership existed, and had nothing to do with its ac-

counts after its dissolution. There was nothing in the master's report to show that the $17,808.63 did not include all that had been earned on the property in the hands of the receiver.

DICKERSON, J. This is a bill of review in equity, founded upon alleged errors on the face of the record of the case of *Charles Crooker, in equity*, v. *William D. Crooker*, commenced at the December term of the court, in the county of Sagadahoc, A. D. 1857, and disposed of at the August term, 1872.

The plaintiff and defendant in the original bill were copartners for twenty-nine years next preceding June 19, 1857, when the copartnership was dissolved; that bill was brought to enforce a settlement of the partnership affairs.

The error is alleged to consist in the omission of the master in the original suit to allow the plaintiff "interest on the balance of $17,808.63, which was found due him for money advanced from his individual property, many years before, to pay the debts of the firm," to which the plaintiff alleges he is entitled.

There being no allegation of the discovery of new matter, the bill can only be sustained upon showing that the errors alleged are apparent upon the face of the record in the report and decretal order of the court founded thereon. *Robinson* v. *Sampson*, 26 Maine, 11.

The report of the master shows that he found a portion of the money or securities in the hands of the receiver to be the individual property of the plaintiff, amounting to $17,808.63, and that the accounts of the firm, extending over a period of twenty-nine years, were in such a condition as to render it impracticable to state an interest account, and that, therefore, he did not do so. It will be seen that the report of the master does not state that he did not allow interest on any of the items going to make up the said sum of $17,808.63, but that "he did not state an interest account."

Whether the money or securities, found by the master to be the individual property of the plaintiff, were the excess of the

plaintiff's interest in the capital stock of the firm, or were due him for advances to pay the partnership debts, or were casually in possession of the partners when the partnership was dissolved, or whether they were received by the receiver in specie, or were the avails of other property disposed of by him, or came into his hands inadvertently by virtue of his office as receiver, does not appear from the report. Nor, as we have seen, does it appear that interest was not allowed upon any or all the items composing that amount. The phraseology of the report, that "the money or securities was and still is the individual property of Charles Crooker," would seem to indicate that "the money or securities" was received and had been kept by the receiver in specie.

If we pass from the report to the defendants' answer we there have a denial that the sum of $17,808.63 or any other sum was found due by the master to the plaintiff for advancements from his individual property to pay the debts of the firm, as alleged in the bill, and a distinct assertion that the said sum of $17,808.63, found due the plaintiff, included the interest at the time the report was made.

The allegations in the bill are not sustained by the evidence, nor is there sufficient matter alleged in the parts of the bill demurred to to entitle the plaintiff to review the record and proceedings in the former bill.

Demurrer sustained. Bill dismissed with costs for the defendants.

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

The following note was added by

APPLETON, C. J. I entirely concur in the above, but I wish to add that, in my judgment, the plaintiff is barred by his own negligence. The grounds of a review must be such as the party by reasonable diligence could not have known; if there was laches or negligence, that destroys the title to relief. The master's report

was filed on the second day of the April term, 1872. It was known to the plaintiff. He had ample opportunity to examine it. He asked for no delay. He made no objections to the report. He employed no counsel. He relied on his own judgment, and with full knowledge of the report and of its terms and conditions, or with ample opportunity for such knowledge, he stood by and permitted its acceptance without objection.

WILDES P. WALKER *vs.* CHARLES W. THOMPSON.

Contract, rescission of. Evidence.

Where money, which was the consideration of a contract, has come into the possession of the party paying it, the other party becomes released from the necessity of making a formal return of it in order to be enabled to rescind such contract as obtained by fraud.

The defendant contended that the plaintiff had obtained his guaranty for the payment of certain notes, by fraudulent misrepresentations as to the maker's solvency. *Held*, that testimony of the maker in relation to business transactions between himself and the plaintiff, tending to show his insolvency and the plaintiff's probable knowledge thereof, was admissible.

ON EXCEPTIONS AND MOTION for a new trial, on the ground that the verdict was against the evidence and the law, and that the jury were influenced by partiality and prejudice against the plaintiff.

This was assumpsit upon an alleged guaranty for the payment of five notes dated New York, February 18, 1869, payable in four, five, six, seven, and eight months, respectively, signed by H. H. Thompson, payable to his order and indorsed by him.

The plaintiff testified that upon the 7th day of June, 1869, the defendant called at his house, and, in consideration of fifty dollars, guaranteed the payment of the notes, which amounted in all to

$5177.91; that afterwards, the defendant, who was owing him $200 for money previously loaned, called at his house and left a check for $250, which was afterwards cashed and the plaintiff used the money; but the plaintiff stated that he did not discover that the check was for $250, till after defendant had left the house.

The defendant denied that he ever received any sum of money for indorsing the notes, but says that upon the seventh or eighth day of June, 1869, while at the plaintiff's house, plaintiff told him he wanted to get the notes discounted at the First National Bank of Bath, and that it was necessary to have three signers; that plaintiff represented to him that the maker was good, whereupon defendant placed his name upon the notes. The defendant also testified that upon the same day he borrowed fifty dollars of the plaintiff, which he afterward paid, with $200 previously borrowed, by a check for $250. The defendant's indorsement was originally in blank, but a guarantee was written over it a few days before proceeding to a trial of the cause.

The defendant called H. H. Thompson who testified, subject to plaintiff's objection, in relation to business transactions with the plaintiff, paying him ¼ of one per cent a day for loans, and other circumstances which tended to show his insolvency and plaintiff's knowledge thereof; and also testified to having told Walker when he gave these notes that he had no means, but would try to pay them; and that he several times after that and prior to June 7, 1869, told plaintiff of his (H. H. T.'s) insolvency.

At the trial the defendant contended, that, even if it was shown that he made the alleged guaranty, or that one was implied from his indorsement, he was induced to do so by the fraudulent misrepresentations of the plaintiff, and the presiding judge, in relation to the right of the defendant to set up the defense of fraud, charged as follows: "It is stated by the defendant that whatever money he did receive was paid back. Then if he paid back the money that he received the question of fraud would be open to him."

The jury returned a verdict for the defendant, and the plaintiff excepted to the above ruling and admission of testimony and to the

admission of other testimony, the facts in relation to which are stated in the opinion.

Tallman & Larrabee, for the plaintiff.

Wm. L. Putnam, for the defendant, cited upon the question of fraud. Chitty on Contracts, 459; 2 Parsons on Contracts, 8; *Franklin Bank* v. *Cooper*, 36 Maine, 197; *Bryant* v. *Crosby*, 36 Maine, 571; *Franklin Bank* v. *Cooper*, 39 Maine, 551–2; 1 Story's Equity Jurisprudence, §§ 214, 215.

PETERS, J. This is an action upon an alleged guaranty. The defendant indorsed notes to the amount of over $5000, which the plaintiff held against the defendant's brother. The plaintiff maintains that the defendant indorsed them as an act of guaranty, receiving fifty dollars from the plaintiff as a consideration therefor. The defendant denies this, and says that he made the indorsement without any consideration, and as an act of accommodation to enable the plaintiff to get the notes discounted at a bank. He admits, however, that at the time of the indorsement he received the sum of $50 from the plaintiff, but denies that it had anything to do with such indorsing, and claims that it was a sum he then borrowed of the plaintiff, and that it has since been repaid. At the trial the defendant also set up, that, even if it should be shown that he made a guaranty as alleged, he was led into it by the fraud of the plaintiff. It appears that the $50 was afterwards, and before suit brought, returned or repaid to the plaintiff by leaving it upon his office table, and by him retained.

A question arises whether if the $50 was returned by the defendant as borrowed money, and not for the purpose of rescinding the contract, the defendant would be in a position to set up that he had been defrauded in making a contract of guaranty, if one was made. But a rescission of a contract does not necessarily consist in restoring the consideration that was received as an inducement for making it, although such an act would ordinarily be requisite before a rescission could be made. To rescind is to

treat as a nullity. But if there is no return a waiver of the fraud might be implied. In order to rescind, the defendant must put the parties *in statu quo*, or do all that he can towards it. It is impossible in this case to return the $50 again, as it is already in the plaintiff's possession. The parties are really in the same position as if no contract had been made. That is all the law requires. The defendant disavows the contract, whatever it was, and treats it as a nullity.

A witness for the plaintiff on cross-examination, and without objection, testified that a suit prior to this one was brought against the defendant on these notes in the name of the First National Bank of Bath, for the plaintiff's benefit. The defendant put in the record of the judgment of the case, showing that the plaintiff became nonsuit, to the introduction of which evidence the plaintiff in his brief says an objection was made, though the case does not show it. Though the evidence admitted was of very little consequence, one way or the other, still, if it had a breath of importance, it might be as a single thread in the web of craft and contrivance by which the defendant alleges, and the jury may have found, that he was circumvented.

H. H. Thompson, the maker of the notes, was allowed against the objection of the plaintiff to testify about certain transactions between himself and his business partner on one side and the plaintiff on the other, consisting of notes and renewals and substitutions which resulted in the notes in suit. Nothing could be more clearly admissible. The evidence tended directly and necessarily to show plaintiff's probable knowledge of the insolvency of the maker of the notes which the defendant was induced to indorse. The exceptions cannot be sustained.

Nor can the motion to set aside the verdict as rendered against evidence prevail.

The case was peculiarly one to be settled by a jury. It was a question of the credibility of parties and witnesses. To be sure, there was an inconsistency in the contradictory and duplex character of the defence set up by the defendant. But there were con-

siderations of importance which bore heavily against the testimony of the plaintiff. The inadequacy of consideration would itself be a very controlling fact with a jury, when for $50 the defendant assumed the responsibility of worthless paper, of the amount of over $5000, of the worthlessness of which the defendant knew nothing, while the plaintiff may be presumed to have known much.

Exceptions and motion overruled.

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

RICHMOND FACTORY ASSOCIATION *vs.* DANIEL CLARKE.

SAME *vs.* NOAH ALEXANDER.

Voluntary joint-stock associations—organization of and assessments by.

Unless the certificate of the attorney-general be obtained as required by R. S., c. 48, § 19, persons associating themselves together under the provisions of that chapter do not become a corporation.

Where a number of persons had signed an agreement to associate themselves together, agreeably to the provisions of R. S., c. 48, for the purpose of erecting a shoe-factory building, and had voted an assessment upon themselves before applying to the attorney-general for his certificate under § 19 of that chapter, and another after such certificate had been refused them; and two more assessments were laid by the officers chosen by them, in accordance with the by-laws they had adopted; and subsequently a portion of those so subscribing had, without the concurrence of the defendant, procured from the legislature an act of incorporation to effectuate the purpose originally contemplated; it was *held*, that the corporation created by this act (Private Laws of 1872, c. 15) could not enforce payment of any of the assessments previously laid against the defendant in the manner aforesaid.

ON REPORT.

The agreement was that upon the report the court should make such disposition of the case as law and evidence required. Induced thereto by exemption from taxation and further aid promised from the town's treasury, thirty-four of the citizens of Richmond, of

whom the defendants in these suits were two, by written articles, subscribed by them, agreed to take stock in a shoe-factory building to be erected in that town, and to form themselves into a joint-stock company for that purpose, as provided in R. S., c. 48, §§ 18, 19, and 20. The capital stock was to be $20,000, divided into shares of $100 each, of which Clark agreed to take, and subscribed for ten shares, and Alexander three shares, "to be paid for in such sums as shall be assessed from time to time by the proper officers of the company." At a meeting of the subscribers, a president, secretary, treasurer, and six directors were chosen; and at adjournments of this same meeting two assessments were ordered to be made. After the adoption of by-laws, the directors, being thereby empowered so to do, voted to call on the subscribers for a third assessment. A statement, made in pursuance of R. S., c. 48, § 19, was sent to the attorney-general for certification, Sept. 8, 1871, but he declined to certify it, because he thought the statute did not authorize the formation of a corporation in this manner for the purpose specified; which, it will be noticed, was not the manufacture of shoes, but the erection of a building to be used for that business by others than the builders. Nevertheless, the directors proceeded as if the organization of the company had been perfected, and laid a fourth assessment for the balance of the subscription, and voted to apply to the legislature for an act of incorporation, which they did, and it was granted them, being chapter 15 of the Private and Special Laws of 1872. Seven of the original subscribers were omitted from the act of incorporation, of whom one was Noah Alexander. Daniel Clarke had nothing to do with procuring this act, and he and Alexander refused to pay the several assessments, believing all action, subsequent to the refusal of the attorney-general to certify their statement, to be illegal.

J. W. Spaulding, for plaintiff.

Whether or not the town was authorized to pass the votes promising pecuniary aid to the enterprise, and whether or not the stockholders can now hold the town to its engagement, are questions not in controversy here.

Up to the time of requesting the attorney-general's indorsement of our certificate, the proceedings were in strict conformity with the requirements of the law. From his decision there was no appeal, while a delay till the meeting of the legislature would involve great loss and deprive us of the benefit of the votes of the town. The machinery of a corporation *de facto* was all in working order; contracts had been made; money assessed, collected, and expended and in process of collection and expenditure. Numerous meetings of the shareholders were had in which the defendants participated, well-knowing that money was being expended by this *de facto* corporation, upon the faith of their promises as well as of their associates, in the manufacturing of a large, substantial, and beautiful edifice at enormous expense.

All this was done with the expectation and intention of procuring a charter so soon as the legislature met, as all the subscribers well understood. By the act of incorporation all the members of that *de facto* corporation became so of a corporation *de jure.* Their consent thereto may be implied. It is no uncommon thing for the subscription list to be signed before the charter is granted. This must be done in England. *Preston* v. *Dock Co.*, 11 Sims. (34 Eng. Ch.) 328. The principle is the same as if the organization had been perfected under the general law, in which case the subscription must be made before there is any company. *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 173. A retroactive law is void only when it changes, or attempts to, the rights or liabilities of the parties from what they were intended to be at the time of the alleged contract. *Bryant* v. *Morrill*, 55 Maine, 516; *Hess* v. *Werts*, 4 S. and R. 356.

Without a charter this contract is enforcible in equity. An examination of cases discloses this simple sale or principle; that where an individual is party to an agreement which requires a law to complete and perfect it, with knowledge and a desire on his part that such enactment be procured, and in pursuance of such agreement that law is passed with his knowledge, or without his knowledge, if he afterwards consents thereto by word or deed—then he

is estopped from denying his liability under the original agreement and is bound by it. *Kidwelly Canal Co.* v. *Raby*, 2 Price (1 Eng. Exch.) 193; *Ellis* v. *Marshall*, 2 Mass. 279; *Johnson* v. *Plank Road Co.*, 16 Ind. 389; *Bedford R. R. Co.* v. *Bower*, 48 Penn. St. 34; *R. R. Co.* v. *Wilson*, 22 Conn. 452; *Valk* v. *Crandall*, 1 Sandf. 179; *Bangor House* v. *Hinckley*, 12 Maine, 387; *Penobscot R. R.* v. *Dummer*, 40 Maine, 173; *Hathorn* v. *Calef*, 55 Maine, 471; *Eastern R. R.* v. *Vaughan*, 20 Barb. 155; *Edinboro' Academy* v. *Robinson*, 37 Penn. St. 210; Aug. and Am. on Corps. 521; *Heuston* v. *Cincinnati R. R. Co.*, 16 Ind. 275; *Selma* v. *R. R. Co.*, 5 Ala. 786; *Griswold* v. *Peoria University*, 26 Ill. 41.

A. Libbey and *W. T. Hall*, for defendants.

1. The contract of defendant was to become a member of a corporation, with the other parties who signed the agreement with him to be organized under R. S., c. 48, and to take and to pay for ten shares of the capital stock of the corporation, when so organized. The legal organization of the corporation failed for want of approval of the articles of association by the attorney-general, for the reason that it was not such an organization as the statute authorized.

When the organization of the corporation failed, the defendant's contract, by its terms, ceased to exist, and no longer had any force or effect. Chapter 15, of the acts of 1872, so far as it seeks to make valid this contract, is unconstitutional and void.

When a contract, valid when made, by its terms ceases to have any legal force or obligation, it is not competent for the legislature to make it valid and binding upon the parties to it. Such legislation is in conflict with the constitutions of the United States and of the States, which prohibit the legislature from passing any law impaining the obligation of contracts. *Coffin* v. *Rich*, 45 Maine, 507; *Atkinson* v. *Dunlap*, 50 Maine, 111; *Prop'rs Ken. Purchase* v. *Laboree*, 2 Green. 275; *Sturges* v. *Crowninshield*, 4 Wheaton, 122; *Green* v. *Biddle*, 8 Wheaton, 1; *Ogden* v. *Sanders*, 12 Wheaton, 213; *Hathorn* v. *Calef*, 2 Wall. 10.

2. But the act of 1872 is not merely an act to make valid the organization under the agreement of July 20, 1871. By that agreement the corporation was to be such a one as was authorized by c. 48 of the R. S. By the act of 1872 the parties named in it are constituted a corporation for general purposes, all that a corporation may legally engage in. By the agreement all the parties who signed it were to be members of that corporation. They represented a capital of $18,600. By the act of 1872, seven of the subscribers, representing a subscription of $3,400, were not made members of the corporation.

By the agreement the capital stock was to be $20,000. By the act of 1872 it might be $100,000. By the agreement the organization was to be before January 1, 1872, and the building was to be completed by that time so as to secure the benefit of the votes of the town of Richmond. But the act of 1872 seeks to make the defendant liable by creating a corporation after January 1, 1872, and when it is too late to secure the benefit of the votes of the town.

All this is without any action, approval, or ratification on the part of defendant. It is imposing upon him the obligation of a contract to which he never gave his assent.

3. The case against Alexander stands on the same grounds as that against Clarke, with the further fact that in the act of 1872 he is not made a corporator; yet it is sought to hold him to his subscription. This is absurd.

APPLETON, C. J. The defendant, with others, signed on 20th July, 1871, certain articles of agreement by which they agreed to "form themselves into a joint-stock company in the manner provided in chapter forty-eight of the Revised Statutes, under such corporate name and be governed by such by-laws as may be adopted at any meeting of the subscribers" thereto.

They further agreed that the capital stock of the corporation should "be twenty thousand dollars, and be divided into shares of one hundred dollars each," and "to take and pay for in such sums

as shall be assessed from time to time by the proper officers of the company, the number of shares placed opposite" their respective names.

The subscribers to this agreement met, chose their appropriate officers, by whom four assessments were made bearing date, respectively, Sept. 2, Oct. 1, Nov. 21, and Dec. 12, 1871.

On Sept. 8, 1871, the officers of the company prepared a certificate stating that the name of the association was Richmond Factory Association—that it was formed for the purpose "of erecting a boot and shoe factory building" in Richmond—giving the number of shareholders, their place of residence, the names of the directors, made oath to and forwarded the same to the attorney-general, who returned the same with the following indorsement thereon:

"PORTLAND, ME., Sept. 18, 1871.

I return certificate of the Richmond Factory Association without my indorsement, for the reason that I am satisfied after examination and reflection that the statute (c. 48, § 18) does not contemplate or authorize the formation of a corporation for such purpose as is specified in the certificate.

Yours truly, T. B. REED, A. G."

There being a failure to organize under R. S., c. 48, §§ 18, 19, and 20, application was made to the legislature for a charter, and certain of the individuals who had signed the agreement of July 20, 1871, were, by an act approved January 26, 1872, created a body corporate by the name of the Richmond Factory Association. The name of the defendant was included in the list of corporators, but he personally took no part in procuring the act nor in the proceedings subsequent to its passage.

The corporators named in the act (the defendant excepted) proceeded to organize under their charter, chose the usual officers, but made no assessments.

This action is brought to recover the assessments made under the first attempt at organization—one of which assessments was made prior to the refusal of the attorney-general to indorse the

certificate, and three after such refusal; but all were made before the passage of the act under which the plaintiff corporation was organized.

We think the action is not maintainable.

By R. S., c. 48, § 19, before commencing business, the president, treasurer, and a majority of the directors are to prepare a certificate setting forth the name and purposes of the corporation, the amount of capital stock, the amount already paid in, the par value of the shares, the names and residences of the owners, the name of the county where located, and the number and names of the directors—and shall sign and make oath to it. After it has been examined and certified by the attorney-general, it shall be recorded in the registry of deeds in the county where the business is to be done, and a copy, certified by such register, shall be filed in the office of the secretary of State, and he shall enter the date of filing thereon.

By § 20, "from the time of filing such certificates in the secretary of State's office, the signers of said articles and their successors and assigns shall be a corporation, the same as if incorporated by a special act, with all the rights and powers, and subject to all the duties, obligations, and liabilities provided by this and chapter forty-six."

But no such indorsement of the certificate of the officers of the proposed corporation by the attorney-general was obtained. The signers of the "written articles of agreement" mentioned in § 18 never became a corporation. There was an attempt to become one but it failed. The doings under such attempted organization became void and of no effect. There was no power in the vanished corporation to collect its attempted assessments.

But it is claimed that the defendant is made liable by virtue of the act creating the plaintiff corporation, by which the attempted organization of the Richmond Factory Association and all their doings and their by-laws are ratified and made legal, "so far as the same shall not be repugnant to the constitution and laws of this State," and all contracts hitherto made by said association are

hereby made valid and binding both upon said association and the person or persons or corporations who may have entered into contracts with such corporators.

The defendant had no agency in procuring the charter of the plaintiff corporation, nor has he since, by any voluntary act of his, become a member of the same. No man can be compelled by the legislature to become a member of a corporation without his consent. The mere enactment of a charter for a corporation does not create the corporation without an act of acceptance on the part of the persons named in the act as corporators. However willing the defendant might have been to become a member of the association as originally contemplated, there is no evidence of a willingness to become a member of the present corporation. On the contrary, his struggle is not to be made one against his will. Had there been indications of profit it might have been otherwise.

The limits originally proposed by the articles of agreement were twenty thousand dollars. The plaintiff corporation may increase their capital stock to one hundred thousand dollars. The liabilities of the defendant would be increased by becoming a member of the plaintiff corporation. He may well say, as he does, "*non in haec fœdera veni*," and there is no gainsaying it. Further, a part only of the signers of the "written articles of agreement" of July 20, 1871, are incorporated as the plaintiff corporation, seven of the number being omitted in the charter, so that the extent of his liability is increased, and the number of his associates is diminished—thus affording a double reason why he should not be compulsorily made a member of a corporation against his will.

The corporators named in the act of Jan. 26, 1872 (the defendant excepted), pursuant to notice, met on March 27, 1872, and accepted the charter thus granted and organized under the same. The corporators of the plaintiff corporation are not liable for any assessments made by its officers, none having been made since its organization. It is difficult to perceive how they can be liable for assessments made before their corporate existence. They have not adopted (if they could do so legally) the assessments made by the officers under the first and unsuccessful attempt at organization.

The cases cited by the counsel for the plaintiff in his ingenious and elaborate argument are not embarrassed by the difficulties which must prevent a recovery in this action.

In *Penobscot R. R.* v. *Dummer*, 40 Maine, 172, it was held that a promise in writing to take and fill a certain number of shares in a chartered company by a subsequent organization of the company and an acceptance of the subscription, becomes a binding contract. It is said, remarks Shepley, C. J., "that there being no such corporation existing when the agreement was made, there is no binding contract."

"It amounted to a written proposal to take so many shares, and when the corporation had been organized and had accepted the proposal, a valid contract was made. When the corporation was organized, the shares subscribed for were recognized as shares of its stock, and the subscribers as corporators. This was sufficient to complete the contract."

But in the case at bar no such facts exist. The signers of the written articles of agreement never contemplated the procuring an act of incorporation. Their purpose was to become members of a corporation different in its mode of organization—in the amount of its capital stock, and consequently in the individual liability of its members.

But if they were members without assent and against their will, in no case have subscribers been held liable to assessments except by and under the action of the corporation of which they were members. In no case have they been held to pay the assessments of an incipient but incomplete corporation, and which were made, or rather attempted to be made, before the corporation of which they are members had sprung into existence.

In *Bedford R. R. Co.* v. *Bower*, 48 Penn. 28, it was said that a change in the charter reducing its capital did not affect the liability of a stockholder who had participated in the election of its officers; but here was no such participation.

In *Eastern Plank Road* v. *Vaughan*, 20 Barbour, 155, the defendant and others signed a paper promising to pay B. & W. $100

for each share by him subscribed for the purpose of building a plank road. B. & W. were authorized to transfer the subscription to a company to be formed to build the road. The defendant took one share. Afterwards, articles of association were signed by the subscribers, except the defendant, for stock exceeding the original subscription, and the organization was completed by filing the articles of association, and the subscription signed by the defendant and others was transferred to the company by B. & W., and the defendant's name was subscribed to the books by them.

The court held that if B. & W. were agents to subscribe, their subscription would bind the defendant, and if not agents for that purpose, they were agents to transfer the defendant's subscription, and that such transfer vested in the plaintiffs the title to the subscription and the authority to collect the money due or to become due under it. In short, the defendant was a corporator by the authorized agency of B. & W., to subscribe for him or to transfer his subscription.

In *Edinboro Academy* v. *Robinson*, 37 Penn. 210, it was held that subscribers to a fund for the erection of an academy, become an association of persons united for contributing to a common fund for a common purpose, as soon as the stipulated amount of money has been subscribed, which act of association involves an agreement to organize for the purpose contemplated. In that case the specific mode of organization and the amount of capital were specially agreed upon. An agreement to do a specific thing can never be deemed an agreement to do something else.

In *Hess* v. *Wertz*, 4 S. & R. 356, it was decided that promissory notes issued by an unincorporated association were recoverable in a suit against the members of such association, notwithstanding they contained a promise to pay "out of their joint funds according to the articles of their association." The defendants being an unincorporated association, the notes as issued by them were declared null and void. Subsequently an act was passed repealing the provision rendering them void. In delivering his opinion, Duncan, J., says: "The plaintiff replies, but the prohibition is

taken off and the law has empowered him to recover from you that which you promised to pay; the whole system was a matter of policy; the prohibition was not intended to confer any right on these associations, but as a measure of policy to check a growing evil. . . . The interdiction is taken away and the party is restored to his common-law remedy, as if the prohibitory act had not been passed."

But the case under consideration presents no such state of facts as in *Hess* v. *Wertz.*

Indeed, no case has been cited, and we believe none can be found where a recovery has been had by a party whose claims were subject to the infirmities incident to those of this plaintiff.

In the case against Alexander the same result must follow as in that against Clarke; he is not even named as a corporator.

Judgment for defendant.

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

HARRIET M. BAILEY *vs.* CHARLES T. BAILEY.

Fraudulent conveyance to defeat claim for alimony.

A conveyance of real estate by a husband, though made before a libel for divorce had been filed, and for a full and valuable consideration, is void as between the husband and wife, if made expressly to prevent her from recovering such alimony as the court might decree to her in case a petition for divorce should be filed.

If, after divorce granted, the husband obtains a reconveyance to himself of real estate thus previously conveyed, a decree of court made before such reconveyance, allowing the use of it to the wife as alimony, will enable her to hold it as against any subsequent conveyance made by him without any consideration therefor.

Forcible entry and detainer lies against an agent, if guilty, as well as against his principal.

On exceptions.

This was an action of forcible entry and detainer, which was originally commenced before the municipal court for the city of Bath. The defendant appeared and filed a brief statement, alleging title to the premises described in the plaintiff's writ in one Urana F. Bailey, the present wife of the defendant, whereupon the case was transferred to this court according to the statute. The writ was dated May 21, 1872.

It appeared in evidence that on the 11th day of March, 1867, the defendant conveyed the premises described in the plaintiff's writ, by deed of that date, to his father, James Bailey, who on the 23d day of June, 1868, reconveyed, by his deed thereof, the same premises back to said Charles T. Bailey; that on the 26th day of October, 1871, the said Charles T. Bailey conveyed by deed the same premises to Phineas P. Jackson, who on the 31st day of October aforesaid executed and delivered his deed of the same premises to said Urana F. Bailey, the defendant's present wife, who now claims to own said premises by that title. Nothing was paid for the premises by either Jackson or the said Urana F. Bailey.

The plaintiff claimed possession of said premises under a decree of divorce from the said Charles T. Bailey, her former husband, wherein it was decreed by this court, at the April term, 1868, among other things, that the said Harriet M. Bailey should have the use, income, control, and occupancy of said premises, without hinderance or interruption by the defendant.

The defendant claimed that he did not own or have any legal interest in the premises at the time of said decree; but the plaintiff alleged, and there was evidence tending to prove, that the conveyance from Charles T. Bailey to said James Bailey was fraudulent, because made in anticipation of such a decree; and the plaintiff requested the court to instruct the jury that if the estate was conveyed to James Bailey to prevent the plaintiff from enforcing such decree for alimony or other aid as might be awarded to her by the court, in case she should prefer a libel against

him, such conveyance was fraudulent and void as between her and the defendant.

The court gave this instruction, and added that if it was void then the husband would continue to be regarded as the owner at the time of the decree, so far as the plaintiff's claim was concerned, and the decree of the court would attach and become an incumbrance upon the estate, and would not be shaken off by the subsequent conveyance to Jackson.

It was also in evidence that at the time of the entry the said Urana F. Bailey gave the key of the house to her husband, the defendant, and instructed him to enter the premises, and the defendant claimed to have acted under his wife.

The court instructed the jury that the fact that he claimed to act under the authority of his wife would be no defense. The defendant excepted to these instructions, the verdict being against him.

W. Gilbert, for the plaintiff.

J. D. Simmons, for the defendant.

PETERS, J. The defendant and plaintiff were formerly husband and wife. The plaintiff obtained a divorce from her husband, and the possession and use of the real estate in question was, by a decree of court granting the divorce, set out and assigned to her as alimony. Prior to her petition for divorce the defendant conveyed the premises to his father, and since the divorce the father conveyed the same back to the defendant, who afterwards conveyed them to one Phineas P. Jackson, who then conveyed them to the present wife of the defendant, he having married again since the divorce was granted.

The judge at *nisi prius* ruled that, if the estate was conveyed to James Bailey, the father, to prevent the plaintiff from enforcing such decree of alimony or other aid as might be awarded her, in case she should prefer a libel against him, such conveyance was fraudulent and void as between the plaintiff and the defendant.

The defendant contends that a person in the situation of the plaintiff could not be regarded as a creditor, so as to come within the Statutes of Elizabeth relating to fraudulent conveyances. But the Stat. of 13 Eliz., c. 5, was passed "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs." In *Livermore* v. *Boutelle*, 11 Gray, 217, in a case similar to the present, the court say, "If she was not a creditor, she was of the others whose just and lawful actions, suits, and reliefs would be delayed, hindered, or defeated by such conveyance."

As in the case at bar it does not appear that the cause of divorce existed before the conveyance by the defendant to his father, and as it does not appear but that the father paid a full and adequate consideration for the premises conveyed, the plaintiff would be in a no more favorable position than that of a subsequent and not an existing creditor; and this presents the question whether a conveyance, though for a full and adequate consideration, may or not, if made for fraudulent purposes, be void as to creditors who become such subsequent to the date of such conveyance. While it has been in a general way stated in cases in this State, as in *Howe* v. *Ward*, 4 Maine, 196, and *Clark* v. *French*, 23 Maine, 221, that a conveyance for a valuable and adequate consideration, if fraudulent, may be avoided by creditors who were such at the time of conveyance, but not by subsequent creditors, the doctrine thus stated had relation to the class of cases where the fraudulent intent was of a general character only, and would have no application where by means of such a conveyance a fraud was particularly and expressly meditated against a subsequent creditor. While, if nothing appeared to the contrary, such a conveyance, if made with bad faith, would be presumed to be

aimed only at present and existing creditors, still where it affirmatively appears to be aimed at a person with an expectation that he may become a creditor, the Statutes of Elizabeth can be invoked by such person for his protection so as to render the transaction void. *Hall* v. *Sands*, 52 Maine, 355; 11 Gray, *ubi supra*. See R. S., c. 126, § 3, which has a significant application in this connection.

It is easy to conceive of cases—and this case is a clear illustration of it—where a person in making a conveyance would have a particular design to injure a subsequent creditor only, and have no motive or intent to injure or defraud any one else.

Inasmuch as the conveyance was void as far as the defendant was concerned, it became immaterial whether his first grantee participated in the fraudulent intent or not, for when the premises were purchased back by the defendant there was no party left but himself to contend for their possession against the plaintiff, and as seen from the foregoing he was in no position to do so.

It is suggested, inasmuch as James Bailey, the grantee, received the conveyance without a participation upon his part in any fraud, that he would be legally authorized to pass a valid title of the premises to any other person; and that he might be deprived in some degree of the value of such premises if he was not permitted to convey such a title to the defendant himself. The answer is, that James Bailey could convey such a title to the defendant, but that the defendant receiving it would be estopped from holding the premises in any other way than for the benefit of the plaintiff, so far as her claim was concerned. The defendant not only could, but very properly should, be allowed to purchase back the premises. He would thus rescind the conveyance first made and purge the fraud he had thereby committed. The conveyance afterwards, without consideration, could have no effect against a previous decree of the court. The defendant, although in a condition to purchase and receive, is not able to retain, any more than would a grantee of premises, who, before receiving title, had conveyed by a warranty deed. In the one case the title

would go where the grantee covenants he had placed it, and in the other where it is ascertained to belong by the solemn decree of a judicial tribunal. It does not follow that James Bailey's right to the premises is lessened in the least degree, because, upon reconveyance to the defendant, the grantee cannot hold the title for his own benefit, any more than such a result would follow because a person could not purchase the land of him for his own use, for the reason that his insolvent condition and consequently his liability to the suits and attachments of creditors might render it impracticable to do so.

This process could as well be maintained against the defendant, who was acting as agent of his wife, as against her, if he was guilty of a wrongful and forcible entry or detainer, either or both. *Woodman* v. *Ranger*, 30 Maine, 180. And if he justifies his possession under a third person, the burden is on him to prove such third person's title. *Hogan* v. *Harley*, 8 Allen, 525.

Exceptions overruled.

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

JOHN J. RAMSEY *vs.* DANIEL O'LEARY.

Real action—verdict in.

If the demanded premises are not clearly described in the declaration in a real action, the statute provides that a nonsuit may be entered.

A verdict, however, for the demandant, defective for want of definite description of the premises recovered, will not be set aside, where the evidence shows that, at least, a trespass was committed by the tenant upon the close of the demandant, which would render him liable for nominal damages and costs.

Nor where it finds the disseisin by the tenant of the demandant's entire premises, when the evidence would warrant a finding of the disseisin of a small portion only, the disclaimer in the case not being seasonably filed, and the result being in such respect immaterial.

On exceptions and motion to set aside the verdict as against the law and the evidence.

Writ of entry, returnable to the supreme judicial court for this county, August term, A. D. 1871. At the trial, had at the August term, 1872, the tenant pleaded the general issue with a brief statement of a prescriptive right of way over a portion of the demanded premises, and also another brief statement disclaiming any title to soil and freehold in the land in controversy.

The jury found a general verdict of disseisin, which the tenant moved to set aside "because the description of the demanded premises is so vague, indefinite, and uncertain that no writ of possession can be made and executed." The presiding justice overruled this motion and the defendant excepted. A motion was also filed by the defendant to set aside the verdict as against the law and the evidence. The remaining facts appear in the opinion.

W. Gilbert, for the tenant.

Tallman & Larrabee, for the demandant.

Peters, J. This is a real action, evidently brought to recover of the tenant a narrow strip of land occupied by him, and in dispute between the parties as co-terminous proprietors. The controversy really involves the true location of the line separating their respective lots. The demandant, however, included in the description of the demanded premises his entire lot, and described it on the disputed side as bounded by a lot of land which is in fact the same now owned and occupied by the tenant. There was a general verdict for the demandant for the premises demanded. Thereupon the tenant moved to set the verdict aside "because the description of the demanded premises is so vague, indefinite, and uncertain that no writ of possession can be made and executed thereon." This motion was overruled by the presiding judge, and exceptions are taken to this order, and the tenant also moves against the verdict as rendered against the evidence in the case.

It is provided by R. S., c. 104, § 21, that if the demanded

premises in a real action are not clearly described in the declaration the court may direct a nonsuit. There may be other remedies for such insufficient declaration. The difficulty here, however, does not seem to be that the declaration does not of itself intelligibly describe certain premises, but that, in the particular situation of these parties as disclosed by the evidence, a judgment in this suit based upon such a description would have no tendency to establish a location of the line in dispute; that, if the declaration is sufficient, the verdict is not so, because of its indefiniteness. It is true, as the tenant does not claim to hold beyond the line of his own lot which the demandant invokes as his boundary, that a judgment in this case would establish nothing of record between the parties as far as the settlement of the disputed line is concerned. It will establish upon the records of the court only as much as already appears of record in the registry of deeds. Either the declaration, or the verdict, should have been in such definite terms as to have determined the real question in controversy.

But the tenant does not suffer by such abortive result. Beyond a bill of costs he will not be affected by it. He cannot be prejudiced by a judgment which cannot be applied to a certain, particular, and definite parcel of land. Unless the demandant can show that the premises in controversy are embraced within the verdict, the judgment founded on such verdict will be unavailing and useless to him, to aid his title to the premises he is seeking to obtain. *Silloway* v. *Hale*, 8 Allen, 61, is a pertinent authority as to the value and consequences of such a judgment.

It is clear that the verdict should not be set aside, even if it amounts to no more than a verdict for costs, for the jury were authorized by the evidence to find that the tenant claimed to hold as his own at least a small parcel of the demandant's premises.

It is contended that the verdict is erroneous because it finds that the demandant was disseized of his whole premises when the evidence shows a disseisin of a small portion only; but the tenant not having pleaded his special matter seasonably under the

statute, and his disclaimer being in part, at least, untrue, the verdict was not errroneous upon the ground alleged, and could work no injury to the tenant, if it was so.

Motion and exceptions overruled.

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

FREDERICK W. DEARBORN *vs.* THE UNION NATIONAL BANK OF BRUNSWICK.

Bailment—degree of. Care requisite. Evidence in relation to care.

This suit was brought to recover the value of certain bonds which, it is claimed, had been left at the bank as collateral security for money which the bank might, from time to time, advance the plaintiff. The plaintiff testified that on July 1, 1868, he went to the bank to obtain a loan upon this security; that the bonds could not be found, but that he received the money. The defendant requested the court to instruct the jury that "if the bonds were not found by the bank when the note of July 1st was offered, and were not afterwards found, the jury are not authorized to find that they were taken and held as collateral security for the note of July 1st." *Held*, that this instruction was properly refused.

The testimony of the assistant cashier of the bank as to other bonds having been lost or misplaced and afterwards found, *held* to be admissible, to show the manner in which the business of the bank was conducted, and as bearing upon the question of care.

ON EXCEPTIONS and motion for new trial.

ASSUMPSIT to recover the value of one $500 and two $100 "five-twenty U. S. bonds of the issue of 1862."

The writ is dated February 19, 1872. The declaration contains four counts.

The first count avers a deposit of the bonds, describing them separately, under an agreement that they should be used as a

pledge or collateral security for money to be loaned from time to time to the plaintiff by the defendants; a promise by them to take due and proper care of the bonds and to return them when redeemed; and that the defendants did not take care of the bonds, but negligently lost them.

The second count, also giving a separate description of the bonds, avers a deposit as collateral security for a loan made at time of deposit, with similar averments of promises by defendants and of a breach thereof.

The third count is upon all three bonds, and alleges a deposit of the bonds to be returned on request, but alleges a double consideration, one the deposit of the bonds, and the other "that the plaintiff had hired and would thereafter hire moneys" of the defendants, with the formal averments of breach.

The fourth is a count upon all three of the bonds, with an averment of a deposit of bonds to be returned on request, alleging the consideration to be the deposit of the bonds, with formal averments of breach. The fourth count differs from the third only in the averment of the consideration.

The plaintiff testified that he had the bonds and coupons described in the writ and the last he knew of them they were in the Union National Bank, in July, 1865; that he had left them there as collateral security; had hired money of the bank, and was in the habit of hiring money.

Three notes were introduced in evidence. One for $500, dated Oct. 9, 1867, on four months, one (a renewal of the former) for $500, dated Feb. 12, 1868, on sixty days, and one for $800, dated July 1, 1868, on thirty days' time, all payable to the Union National Bank of Brunswick, or order. The plaintiff testified that these notes had all been paid; that the bonds in suit were the security therefor, and that there was no other security; that he had had other loans upon the same security; that he had requested these bonds of the defendants and never had received them; that when he went to the bank to get the $800 discounted, H. A. Randall, the cashier, asked Mr. Whitmore, one of the directors, what

the security was to be. Whitmore replied that Mr. Dearborn had bonds there, and that he had seen them within a short time. The plaintiff did not see the bonds at that time and has never seen them since.

Frank Pennell, assistant cashier of defendant bank during 1867 and 1868, called by the plaintiff, testified, subject to objection, that a Mr. Curtis, having bonds in the bank, called for them at one time and was told that they were not there, but were afterwards found to be there. He also testified, subject to objection, that after he had left the bank, in 1868, he was sent for to find some bonds belonging to one Bailey, and that upon examination the bonds were found in the cash drawer. He testified that such bonds were usually kept in boxes in the safe.

The defendants offered testimony tending to show that a note from one Osgood to the plaintiff, secured by mortgage, was taken by the bank as the only collateral security for the loan of the $800. The defendants requested the presiding judge to instruct the jury that "if the bonds were not found by the bank when the note of July 1st was offered, and were not afterwards found, the jury are not authorized to find that they were taken and held by the bank as collateral security for that note of July 1st." This instruction was refused, and to this refusal and to the admission of the testimony objected to by them and admitted the defendants except. A motion to set aside the verdict as against the law and the evidence was also filed.

Josiah H. Drummond and *Francis Adams*, for the defendants cited, in support of the exceptions, *Dearborn* v. *Union National Bank*, 58 Maine, 273; *Smith* v. *First National Bank in Westfield*, 99 Mass. 605.

Henry Orr; Tallman & Larrabee, for the plaintiff.

The instructions were given "in a manner appropriate to the case," therefore defendant is not aggrieved. *State* v. *Barnes*, 29 Maine, 561; *Porter* v. *Seavey*, 43 Maine, 519; *Anderson* v. *Bath*, 42 Maine, 346; *Treat* v. *Lord*, 42 Maine, 552; *State* v. *Knight*,

43 Maine, 11; *Hovey* v. *Hobson*, 55 Maine, 256; *Brackett* v. *Persons Unknown*, 53 Maine, 238.

DICKERSON, J. Assumpsit to recover the value of one $500 and two $100 "five-twenty" U. S. bonds. The writ contains four counts, some of them alleging that the bonds were left with the bank, by the plaintiff, as security for his note, with the formal averments of a breach of the contract, and the others that they were deposited as a gratuitous bailment. The cause was submitted to the jury upon these two grounds, the one requiring the defendant to exercise ordinary care, and the other holding him to the observance of slight care only in respect to keeping the bonds.

It appeared in evidence that the bonds were in the bank as collateral security in July, 1865, and that subsequently to that time the plaintiff had notes discounted at the bank, using these bonds as collateral security.

There was evidence tending to show that in October, 1867, the plaintiff had a five hundred dollar note discounted at the bank and used the $500 bond as collateral security therefor; that that note was renewed, and the renewal paid in May, 1868; that the bond was seen in the bank at that time, and the plaintiff told the cashier to put it with his other bonds. There was, also, evidence tending to show that on the first day of July, 1868, the plaintiff had an $800 note discounted at the bank, and that the bonds were held by the bank as collateral security for that note; and there was testimony tending to show that other security was taken for the $800 note. There was no evidence that either of the bonds was seen in the bank at that time, but there was evidence that, in answer to the inquiry of the cashier as to what the security for the $800 note was to be, one of the directors of the bank, then present, replied, "Mr. Dearborn has bonds here;" and upon the cashier looking into the boxes kept for the deposit of bonds without finding them, the same director added the remark, "they must be here, for I have seen them within a few days."

Among other appropriate instructions, the court instructed the

jury that they were to ascertain whether the bonds were in the bank when the $800 note was negotiated on July 1, 1868. The jury must have understood that this was a necessary prerequisite to the bank holding them as collateral security for that note.

The counsel for the defendants requested the court to instruct the jury that "if the bonds were not found by the bank when the note of July 1st was offered, and were not afterwards found, the jury were not authorized to find that they were taken and held by the bank as collateral security for that note." The requested instruction was refused.

The question for the jury to determine was not whether the bonds were found in the bank on those occasions, or either of them, but whether they were actually there on the first day of July, when the $800 note was negotiated. If there at that time, though not then or subsequently found, they might have been held as collateral security for that note. The instruction asked for assumes that the bonds could not have been in the bank on the 1st of July, for either of the purposes claimed, if they were not then or afterwards found there, a *non sequitur*. If the bonds were actually in the bank at that time they might have been taken and held by it either as collateral security or a special deposit, though not then or afterwards found; there was no necessity of a manual tradition of them at that time by the plaintiff to the bank for either of those purposes.

There was no evidence in the case that the bonds were found in the bank either on the 1st of July or afterwards. To have given the requested instruction, therefore, in effect would have been to instruct the jury that they were not authorized by the evidence to find that the bonds were in the bank on the first day of July, and not being there then, they could not be taken and held as collateral security on the $800 note, as claimed by the plaintiff. This would have been to foreclose the question of fact, in issue before the jury, whether the bonds were held as collateral security for the note; under the instruction requested the jury could not find that fact in favor of the plaintiff, though the evidence should

authorize such finding. The requested instruction was very properly refused.

The testimony of the assistant cashier of the bank, as to other bonds having been mislaid or lost in the bank and subsequently found there, was admissible to show the manner in which the business of the bank was conducted in that respect, and as bearing upon the question of care.

We see no sufficient ground for setting aside the verdict as against evidence. There was positive evidence that the bonds were deposited with and demanded of the bank, and there was no evidence that they had been returned. Whether they were left as collateral security, or a special deposit without compensation, was a question of fact for the jury alone to determine, as was, also, the degree of care actually exercised by the bank in keeping them, under the plenary instructions received from the court. Whether the jury predicated their finding upon the one or the other theory of the plaintiff as to the character of the bailment does not appear; nor is that material since there was evidence applicable to both. *Motion and exceptions overruled.*

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

RUTH L. LEWIS *vs.* LEVINA MESERVE.

Dower—in what wife is entitled after divorce. Estoppel of tenant to deny his grantor's seisin. Abatement.

When a divorce has been decreed to the wife for the fault of her husband for any other cause than impotence, she is entitled to dower in all real estate owned by him at any time during the coverture, if she has not barred her right thereto by joining in a deed or otherwise.

In an action for dower in such real estate, the tenant having received her title by warranty deed from the demandant's husband after the marriage and before the divorce, cannot deny the seisin of her grantor.

Lewis *v.* Meserve.

The objection that it does not appear that the defendant was tenant of the freehold when the action was commenced can be taken advantage of only by plea in abatement.

ON REPORT.

WRIT OF DOWER.

The facts appear in the opinion.

C. W. Larrabee, for the demandant, cited *Davol* v. *Howland*, 14 Mass. 219; *Harding* v. *Alden*, 9 Greenl. 151; Bishop on Marriage and Divorce, §§ 665, 739.

Wm. T. Hall, for the tenant.

VIRGIN, J. This is an action of dower by the plaintiff who was the wife of one Reuben G. Meserve from June 15, 1860, when they were married, until August, 1870, when a divorce was decreed to her for the fault of her husband.

The case comes before us on report; and such a judgment is to be entered as the law and evidence require.

It is admitted that a legal demand was made at least one month before the date of the writ; that the defendant was seised in fee o the premises at the time the demand was made; and that Reuben G. Meserve was seised of the premises during the coverture.

The defendant contends that the plaintiff is dowable in such real estate only as her husband owned at the time of bringing her libel for divorce. If this be a correct view of the law, then the plaintiff cannot prevail in this action; for the case finds that the husband conveyed the very premises described in the writ, to the defendant, by deed of warranty, duly executed and acknowledged on the 13th of May, 1867, and recorded on the 20th of the same month—nearly three years before the date of the libel. But we do not so understand the law.

Dower originated in humane considerations. It is not the result of contract, but as Lord Coke expressed it, "it is the provision which the law makes for a widow out of the lands and tenements of her husband for her support and the nurture of her children." The prominent place it holds among the early writers as well as

among the decisions in the year-books, affords abundant evidence of the favor with which it was regarded in the early history of the common law. And Bacon, in his treatise on uses, remarks, that "tenant in dower is so much favored as that it is the common by-word of the law that the law favoreth three things—life, liberty, dower." 1 Washb. on Real Prop. 172.

And this favor has extended to and continued with the legislatures of Massachusetts and of this State since the separation. For while, at common law, in order to entitle a widow to dower, she must have been the wife of the husband at the time of his decease, and hence a divorce *a vinculo* would defeat her right (*Stilphen* v. *Houdlette*, 60 Me. 447), the Colony of Mass. Bay, in 1641, enacted that "Forasmuch as no provision hath been made for any certain maintenance for wives after the decease of their husbands: It is ordered, &c., That every married woman (living with her husband in this jurisdiction, or other where absent from him with his consent, or through his mere default, or inevitable providence, or in case of divorce where she is the innocent party) that shall not before marriage be estated by way of jointure, in some houses, lands, tenements, or other hereditaments, for term of life, shall immediately after the death of her husband, have right and interest, by way of dowry, in and to one-third part of all such houses, lands, tenements, and hereditaments as her husband was seised of to his own use, either in possession, reversion, or remainder, in any estate of inheritance (or frank-tenement not then determined), at any time during the marriage, to have and enjoy, for the term of her natural life," &c.; thus changing the common law by giving dower, in case of divorce, to an innocent wife, but her "right and interest" not to be assigned until "after the death of her husband." Anc. Chart. 99, c. xxxvii.

The Commonwealth of Massachusetts, by the act of 1785, c. 69, § 5, changed the time for assigning dower to a divorced woman by providing that "when the divorce shall be for the cause of adultery committed by the husband, the wife shall have her dower assigned her in the lands of her husband, in the same manner as if such husband was naturally dead."

By the Pub. Laws of 1821, of this State, c. 71, § 5, it was provided that "when the divorce shall be for the cause of adultery committed by the husband, in addition to her dower, to be assigned her in the lands of her husband, in the same manner as if such husband was naturally dead, and to the real estate which her husband held in her right," the court was authorized to assign her certain other property therein mentioned.

It may be remarked generally, that as this statute has been amended from time to time by adding other causes for divorce, the provision limiting the right of dower to the cause of adultery on the part of the husband has been extended to the new causes; until in 1854 (c. 116) the statute in these two particulars contained, substantially, the same provisions as R. S., c. 60, §§ 2 and 7, to wit (§ 2), "A divorce from the bonds of matrimony may be decreed . . when the judge deems it reasonable and proper, conducive to domestic harmony and consistent with the peace and morality of society;" and (§ 7), "when a divorce is decreed to the wife for the fault of her husband for any other cause" (than impotence), "she shall have dower in his real estate, to be recovered and assigned to her as if he was dead."

Again, "dower," as used in the statutes in this State, means "dower at the common law in the lands of the husband," with certain exceptions not material to this case. R. S., c. 103, § 1. And at common law, a wife is entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue that she might have had, might by possibility have been heir. 4 Kent's Com. 33 and 34. So that dower at common law embraces lands alienated during coverture. Hence, "dower in his real estate" does not mean "dower in such lands" only as the husband owned at the date of the libel, but such also as he had owned "at any time during the coverture," and may have alienated without her joining in the deed or otherwise barring her right.

In view of these considerations, we feel warranted in adopting

the direct and forcible language of Parsons, C. J., in construing the act of 1785, c. 69, § 5, in *Davol* v. *Howland*, 14 Mass. 219:— "This is too narrow a construction; for the whole sentence manifestly shows an intention to place the divorced wife upon the same footing with the widow, in respect to dower. The construction contended for would operate severely upon an unfortunate woman who feels obliged to seek a separation from an unworthy husband, and might prevent her from asking for the relief which the law designs for her. For if she remains with her husband after he has forfeited all claim to her respect and confidence, until his death, she will have dower in any lands he may have alienated during the coverture. But if she withdraws from the connection, she may be cut off from all dower; for it would be in the power of the husband, after committing the crime which is a legal cause of divorce, to transfer all his real estate and thus deprive his injured wife of the means of living. Such a construction of the statute would be unnatural and injurious. Nor is it to be supposed that the legislature intended to place in the hands of a criminal husband a power to coerce a continued cohabitation, by exposing the wife to want, if she should avail herself of the liberty afforded her by the law."

Again, it is said that the admission that the "husband was seised of the premises during coverture," is of itself no proof of ownership.

But as has already been seen,—the husband conveyed the premises by deed of warranty, to the defendant. Having received her title from the plaintiff's husband after the marriage and before the divorce, the defendant cannot be heard to deny the seisin of her grantor in this action. *Kimball* v. *Kimball*, 2 Greenl. (2d Ed.) 209; *Nason* v. *Allen*, 6 Greenl. 243; *Hains* v. *Gardner*, 10 Maine, 383; *Smith* v. *Ingalls*, 13 Maine, 284; *Browne* v. *Potter*, 17 Wend. 164, and cases there cited.

The last objection is that it does not appear that the defendant was tenant of the freehold when the action was commenced.

But this point is not open to the defendant at this stage. He should have raised that point, as he undoubtedly would have done

had the facts warranted it, by plea in abatement within the time allowed by the rules. He cannot be allowed now to do indirectly what the express provisions of the statute and long established rules of court would not have permitted him to do directly since the second day of the August term, 1871.

Judgment for the plaintiff and nominal damages.

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

SOMERSET RAILROAD COMPANY *vs.* JOSEPH CLARKE, JR.

Corporate shares; number must be fixed before assessment thereon.

If the charter of a corporation does not definitely fix the number of shares which shall compose its capital stock, this must be done by the directors or stockholders before there can be any valid assessment laid upon the shares of subscribers to its stock.

Where it is evident either that there has been no prescribed number of shares established as aforesaid, or else that the number is six thousand shares, and it is admitted or proved that so many shares have never been subscribed for or taken, any assessment upon the shares that have been subscribed for will be void.

ON REPORT.

This case was submitted to the court to be determined upon such of the evidence adduced as is found legally admissible, and such judgment to be entered thereon as the court may think the rights of the parties require.

This suit was brought to recover $3,960 and interest, as the unpaid balance due upon several assessments on four thousand dollars of stock in the plaintiff corporation, at a par value of $100 per share. The defendant's subscription was expressed in dollars and not in a specified number of shares. The writ alleged a subscription by him in April, 1868, "to be paid at such times, in such in-

stalments, and to such persons as thereafter required by a vote of the company;" that no assessment was to be made till a *bona fide* subscription of $300,000 had been obtained, and certain other conditions were affixed, all of which it was claimed had been complied with by the corporation; but that the defendant refused to pay any of his subscription; in consequence of which refusal his forty shares had been sold at public auction, agreeably to the charter and by-laws of the company, for one dollar per share; and that this action was brought to recover the balance aforesaid, and interest on each instalment from the time it became payable.

The defendant contended that there was an agreement for the company to take his $4,000 in railroad sleepers, which he was always ready and willing to deliver when the corporation fulfilled its part of the contract; but he further objected that all of the assessments were void for numerous reasons; those considered and acted upon by the court, and the facts upon which they rest, are fully stated in the opinion.

J. H. Webster, for plaintiffs.

Though the defendant's subscription was made prior to the organization of the company, yet in the organization and subsequently, he was recognized as the owner of forty shares, which was an acceptance of his proposal and a completion of the contract. It appears by the report of the committee, made April 18, 1868, that $316,500 had been *bona fide* subscribed and the condition of Clarke's subscription complied with; and it was then voted that all persons who had subscribed to the stock be admitted as members of the company. That completed the contract, so as to bind both parties to its fulfillment. *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 172; *K. & P. R. R. Co.* v. *Palmer*, 34 Maine, 366; *Atlantic Mills* v. *Abbott*, 9 Cush. 423; *Ladies' Institute* v. *French*, 16 Gray, 196.

By the charter, § 4, a personal obligation is imposed on the subscriber, to pay any balance due after the sale of his shares for non-payment of assessments thereon. *K. & P. R. R. Co.* v. *Kendall*, 31 Maine, 470.

From the course pursued by defendant's counsel at the trial, we presume he will contend that the amount of the capital stock and the number of shares have never been fixed, and several Massachusetts cases will be cited upon this point, especially *Troy & Greenfield R. R. Co.* v. *Newton*, 8 Gray, 596.

No provision of the Revised Statutes of Maine requires that this should be done before any assessment can be made. In the charters of the several Massachusetts companies was a requirement that the number of shares should be fixed. *Lexington R. R. Co.* v. *Chandler*, 13 Met. 312; 8 Gray, 596; *Worcester R. R. Co.* v. *Hinds*, 8 Cush. 110.

The minimum number of shares authorized by the charter of our company was one thousand; the maximum was six thousand. A subscription of one thousand shares would bind the subscribers. *Oldtown R. R. Co.* v. *Veazie*, 39 Maine, 571; 40 Maine, 172; *Penobscot R. R. Co.* v. *White*, 41 Maine, 512; *Lewey's Island R. R. Co.* v. *Bolton*, 48 Maine, 451.

But if this were necessary, the vote of May 12, 1868, accepting the subscription of the towns did fix the capital at $500,000, as much as the vote in the Massachusetts case "to close the books." 13 Met. 311.

The paper signed by Clarke is identical in its terms with that which was declared sufficient to hold the defendant in *K. & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360.

There was obtained a *bona fide* subscription to the stock of more than $300,000. This is sufficiently proved by the records, which are unimpeached. *P. & K. R. R. Co.* v. *Dunn*, 39 Maine, 598; 40 Maine, 172; 41 Maine, 512.

If any verbal agreement to take sleepers was ever made it was waived by Clarke's unconditional subscription. *K. & P. R. R. Co.* v. *Waters*, 34 Maine, 369. The arrangement for Thompson, the contractor, to take $40,000 in stock, half of which was to be paid to the Maine Cent. R. R. Co., did not make his subscription conditional, the case of the *Troy & Greenfield R. R. Co.* v. *Newton*, 8 Gray, 596, to the contrary notwithstanding. In that case

the stock was delivered at less than par. The transaction with the Maine Central was between Thompson and that company, and nothing to us. We could take needed work instead of cash. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. So we could, and would, have taken defendant's sleepers, but they were never offered us. Therefore, we have a right now to demand a payment in money. Indeed, we always had this right, because the subscription on its face is unconditional.

D. D. Stewart, for the defendant.

The proceedings under which the plaintiffs claim to hold the defendant are based upon statute provisions exclusively. These provisions must be strictly complied with. *York & Cumberland R. R.* v. *Ritchie*, 40 Maine, 425.

An examination of the proceedings shows that these provisions as well as the conditions of the defendant's contract, have been totally disregarded.

The charter of the Somerset R. R. Co. provides that its capital stock "shall consist of not less than one thousand, nor more than six thousand shares." Special Laws of 1860, c. 465, § 2.

Before any assessment could be legally made it was indispensable that the number of shares should be determined by a vote of the stockholders, or by the directors. *Somerset & Kennebec R. R.* v. *Cushing*, 45 Maine, 524.

Without this the president and directors could not make an equal assessment on all the shares, as the charter required.

It is not a little curious that the learned counsel for the plaintiffs should have so totally forgotten his own able argument in *Som. & Ken. R. R.* v. *Cushing*, cited above, and the decision of our court which closely followed that argument and fully sustained it. It need only be referred to as a complete and perfect answer to his argument in the present case.

All the alleged assessments were made before the number of shares, fixed by the vote of the stockholders, was subscribed for. No assessment could be lawfully made till the whole number of

shares had been taken. *Stoneham Branch R. R. Co.* v. *Gould*, 2 Gray, 278; *Worcester & Nash. R. R. Co.* v. *Hinds*, 8 Cush. 110; *Atlantic Cotton Mills* v. *Abbott*, 9 Cush. 426; *Troy & Greenfield R. R. Co.* v. *Newton*, 8 Gray, 596.

The proposition of the defendant to fix the number of shares at 3,000, and the proposition of the several towns to fix it at 5,000, were deliberately rejected, and the clerk was directed to keep the books open until subscriptions to the amount of 6,000 shares had been received. This was exactly equivalent to a vote "to close the subscription books" when 6,000 should be subscribed.

The defendant's subscription was made subject to the condition that the plaintiffs should obtain $300,000 by *bona fide* subscriptions. The case falls directly within the principle laid down in *Troy & Greenfield R. R.* v. *Newton*,—that the subscriptions of the towns were "upon other terms, and the defendant is not bound to treat such subscriptions as legal subscriptions in making up the required number of shares."

The $300,000 required as the condition of the defendant's subscription could not be made up without counting the subscriptions of the towns. These required that $500,000 should be obtained. The subsequent subscriptions making up this amount are not *bona fide*.

By § 4 of the charter, the president and directors are authorized to make assessments. No such power is conferred upon the treasurer, yet they were made by him, as treasurer. It does not appear that the president and directors gave any instructions to him in the matter, and they could not, if they wished, delegate their power. *Stoughton* v. *Baker*, 4 Mass. 530; *Brewster* v. *Hobart*, 15 Pick. 307; *Female Orphan Asylum* v. *Johann*, 43 Maine, 185.

If one of several assessments, for which stock is sold, is invalid, the sale is void. *Lewey's Island R. R.* v. *Bolton*, 48 Maine, 454

Appleton, C. J. The defendant is an owner of shares in the plaintiff corporation. Assessments were made upon his shares. Neglecting to pay them, his shares were sold at auction, and this

suit is brought to recover the balance remaining due on the assessments, after deducting the proceeds of such sale.

The plaintiff to recover must prove legal assessments upon the shares of the defendant, and a legal sale before he can "be held accountable to the corporation for the balance, if his share or shares shall sell for less than the assessments due thereon," with interest and costs of sale.

It must be borne in mind that this suit is not based upon any contract made by the defendant, but upon his accountability as a stockholder, by virtue of the provisions of § 4 of the plaintiff's charter.

By § 2, the capital stock of the corporation shall consist of not less than one thousand, nor more than six thousand shares.

Before an assessment can be legally made, the number of shares or the amount of capital stock must be definitely fixed. This may be done in the charter. If so, there must be a subscription for the prescribed amount, before an assessment can be made. If not done by the legislature, the amount must be determined by the directors or stockholders. Until the number of shares forming the capital stock is fixed, there is no capital stock, and no assessments can be rightfully laid and legally collected. *Worcester & Nashua R. R. Co.* v. *Hinds*, 8 Cush. 110; *Stoneham Branch R. R. Co.* v. *Gould*, 2 Gray, 277. In *Somerset & Kennebec R. R. Co.* v. *Cushing*, 45 Maine, 530, it was held, that it was indispensable that the number of shares should be determined before an assessment could be made, and if the number was not fixed by the charter, that it was to be presumed that it should be by the directors or stockholders.

At a meeting of the stockholders, holden on the eighteenth day of April, 1868, it was voted: "That persons and corporations are hereby authorized and invited to become subscribers to the capital stock of the Somerset Railroad Company, and the clerk is hereby authorized to receive subscriptions to the capital stock until the amount subscribed shall be equal to six thousand shares."

At this date it would seem, by the report of the committee, that

subscriptions to the amount of $316,500 had been obtained, and it was then voted, "that all persons and corporations who have subscribed to the capital stock of the Somerset Railroad Company, be admitted as associate members."

By the seventh article of the by-laws then adopted, the directors were authorized "to dispose of the *residue* of the capital stock authorized by the charter and not subscribed for at the time of organization, in such manner and at such times, and from time to time, as they shall judge most for the interest of the company."

At a meeting of the directors, held May 15, 1868, it was voted: "That the president have authority to take all necessary measures to procure subscription to the capital stock not subscribed for at the organization."

These votes are all that have any relation to fixing the capital stock of the corporation. From a fair construction they would seem to establish the capital stock at six thousand shares. If so, then the assessments are void, because there has been no subscription for that amount of stock. If not so, then they are void because the amount of the capital stock has never been fixed, but has been left fluctuating and undetermined.

As a compliance with the prerequisites of the charter and by-laws is a condition precedent to the liability of the defendant, if the assessments of shares were not in accordance with law, this suit is not maintainable.

There are various other objections made to the regularity of the proceedings of the plaintiff corporation, but it is not necessary to consider them. *Plaintiff nonsuit.*

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

State of Maine *vs.* William Smith.

Duplicity in a count in an indictment.

A count in an indictment, containing a joinder of two or more distinct offences, is bad for duplicity.

R. S., c. 27, § 20, prohibiting pedlars and dealers from "carrying for sale, or offering for sale, or offering to obtain, or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors," creates distinct and independent offences, a joinder of which in the same count of an indictment is good ground for demurrer.

On exceptions.

Two indictments under R. S., c. 27, § 20. The first indictment contained two counts; one alleging that the respondent, on the 15th day of June, 1871, at New Portland, "did travel from place to place in said town of New Portland, carrying for sale, and offering for sale, and offering to obtain, and obtaining orders for the sale and delivery of spirituous, intoxicating, and fermented liquors in this State;" and the other containing the same allegations with the additional averment "that William Smith, aforesaid, while so traveling as aforesaid, for purposes aforesaid, did then and there obtain from one Danvill Lowell, of said town of New Portland, in said County of Somerset, an order for the sale and delivery of a certain quantity of spirituous, intoxicating, and fermented liquors, to wit, ten gallons of rum."

The second indictment contained four counts. The first count contained all the allegations of the second count of the first indictment, with further and similar averments of obtaining an order for the sale and delivery of certain specified liquors to two other persons therein named; the second count set forth, in addition to the general averments of the other counts, "that the said William Smith, while so traveling as aforesaid, and for the purposes aforesaid, did then and there offer to sell to one William S. Jacobs, of New Portland, aforesaid, in said County of Somerset, and did offer

to obtain an order for the sale of and delivery to the said William S. Jacobs, a certain large quantity of spirituous, intoxicating, and fermented liquors, to wit, as much of said liquor as he the said Jacobs desired;" and also a similar averment of an offer to one William H. Lowell; the third count contains all the allegations of the other counts, and the last is substantially the same as the first count of the first indictment.

The respondent demurred specially to each indictment, specifying as the causes of demurrer:

1st. That the indictment was bad for uncertainty and repugnancy.

2d. That it was bad for duplicity.

3d. That it was double, charging two or more separate and distinct offences in the same count and in each count.

The presiding judge overruled the demurrers and the respondent excepted.

L. Clay, for the respondent.

Each of the acts charged in these indictments is made an offence by the statute. A penalty is affixed to each of the last three charges, but none to the first, *i. e.* the carrying for sale, etc. It is impossible for all the charges to relate to the same transaction.

Distinct offences may be charged in the same indictment, provided they relate to the same transaction, but not in the same count.

Several acts may be charged in the same count, provided they relate to one and the same transaction, and when taken all together they constitute but one offence, but not otherwise. 1 Bishop's Crim. Procedure, §§ 193, 189; *Commonwealth* v. *Hills*, 10 Cush. 530; *Carleton* v. *Commonwealth*, 5 Met. 532; *State* v. *Hood*, 51 Maine, 363.

When two or more distinct offences are sufficiently described in the same count, it is bad for duplicity. *Commonwealth* v. *Tuck*, 20 Pick. 356; *Commonwealth* v. *Hope*, 22 Pick. 1; *State* v. *Palmer*, 35 Maine, 9; *State* v. *Burgess*, 40 Maine, 592.

R. S., c. 27, § 20, affixes no penalty for carrying liquor to sell, therefore, if found guilty of that charge, he must be punished as provided in R. S., c. 135, § 1, a different penalty from that attached to the other offences charged in the same count; for this reason alone, the indictment was held bad in *Greenlow* v. *The State*, 4 Humph. 25, 26, cited in 1 Bishop's Crim. Pro. § 195.

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

As to the first indictment. The first count is correct, embodying the words of the statute and words describing the offence. 1 Wharton's Crim. Law, Ed. 1861, 393; 1 Bishop's Crim. Pro. § 19; *State* v. *Nelson*, 29 Maine, 329.

The second count is also good, describing the offence in the language of the statute and, for the benefit of the accused, specifying the individual from whom an order was obtained. *State* v. *Pillsbury*, 47 Maine, 449.

The second indictment.

1st. Although sales are alleged in all but the last count to have been made to more than one person, yet as the same time and place are alleged it is but one offence. *State* v. *Anderson*, 3 Rich. (S. C.) 172.

2d. The last count is unobjectionable, being in the language of the statute, cases, *supra*.

DICKERSON, J. These cases come before us on exceptions to the order of the presiding judge overruling the demurrer. The ground relied upon to sustain the demurrer is, that separate and distinct offences are charged in the same count. Both indictments are brought on R. S., c. 27, § 20.

No rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offences in the same count. A substantive offence is one which is complete of itself, and is not dependent upon another. When several acts relate to the same transaction, and together constitute but one offence, they may be charged in the same count, but not otherwise.

Each count in an indictment must stand or fall by itself. The jury cannot find a verdict of guilty as to one part, and not guilty as to another part of the same count. This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce.

When two or more independent offences are joined in the same count it will be bad for duplicity. *State* v. *Burgess,* 40 Maine, 592–594; *State* v. *Palmer,* 35 Maine, 9; 1 Bishop on Crim. Pro. §§ 189, 193.

The section of the statute under consideration subjects traveling dealers and pedlars in intoxicating and fermented liquors to "a penalty of not less than twenty nor more than one hundred dollars for each offer to take an order, and for each order taken, and for each sale so made." It is as much an offence to offer to take an order as it is to take one, and *vice versa.* To make a sale is as much an offence as either of the other prohibited acts. Each of these acts is independent of each of the others, and constitutes a complete substantive offence. A conviction for one of these acts does not imply or involve a conviction for either or both of the others. Moreover, the penalty affixed to each of them is distinct and entire, and cannot be apportioned upon two or more of them.

These several offences being of the same nature, defined in the same section of the statute, and punishable with the same penalty, may doubtless properly be charged in separate counts in the same indictment, though they cannot be embraced in the same count. In that case each count would present a single issue, and if sustained, would subject the accused to a certain, specified penalty. Not so, if all the three offences, or either two of them, are grouped together in one count. There would then be as many issues as there are offences charged, each requiring a different mode of proof. The evidence might warrant a conviction upon one of the offences charged, but not upon the others. But the jury cannot split up a count in an indictment, and find the accused guilty of a part, and not guilty of the balance; their verdict must be an entirety. Be-

sides, what sentence in such case must the court pronounce upon the conviction of the accused? Must it impose the penalty affixed to one of the offences only, or the sum of the penalties affixed to all of them? If the former, the accused escapes with a part of the penalty the law attaches to his acts; if the latter, the court assume and decide that the accused has been convicted of several offences charged in one count.

The construction to be given to this statute is not analogous to that given to the statute against buying, receiving, or aiding in the concealment of stolen goods. The two statutes are clearly distinguishable in respect to the question under consideration. In that case the punishment is the same for one as for all three of the prohibited acts; and though each of the acts were charged separately, in different counts, only one punishment could be inflicted. The several acts mentioned in that statute are but so many modes of describing one and the same offence, that offence being established by proof of either of the modes. But in the case at bar, as we have seen, each act is complete in itself, and punishable by a distinct, specified penalty, the penalty for one act by no means answering for all the acts mentioned in the statute. While in that statute but one offence is described, in the statute under consideration there are three offences, each of which may be charged in a separate count in the same indictment, and upon each of which counts the accused may be convicted and punished. *State* v. *Nelson*, 29 Maine, 334, 335.

The counts in the first indictment charge the two offences of "offering to obtain and obtaining orders," and must be held bad in accordance with the foregoing principles and construction of the statute. In this case the judgment must be

Exceptions sustained.

Indictment adjudged bad.

The first and second counts in the second indictment are bad for distinctly and separately charging the offence alleged as having been committed on more than one occasion, and with respect to more than one individual.

The third count is bad on the same ground and for the additional reason that it joins different and independent offences. For this last reason, also, the fourth count cannot be upheld.

Exceptions sustained.

Indictment adjudged bad.

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

JOHN WARE *vs.* JOSEPH PERCIVAL and another.

Taxes illegally assessed and paid—remedies for.

A person, whose property has been sold to pay an assessment which was illegal for want of jurisdiction in the assessors, may recover damages to the extent of his injury in an action of tort against the assessors; or he may recover the proceeds of the sale in assumpsit against the town.

Having elected assumpsit, and the judgment therein recovered having been satisfied, the party aggrieved is estopped to set up the tort, the waiver of which was the foundation of his suit in assumpsit, and cannot maintain an action against the assessors.

61 391
94 497

ON REPORT.

TRESPASS for the unlawful conversion of four hundred and thirty-two shares of Maine Central Railroad stock, belonging to the plaintiff, by causing them to be taken and sold to pay a tax assessed by the defendants, in their official capacity as assessors of Waterville, in 1865, against said Ware, who was not an inhabitant of that town on the first day of April in that year. The defendants pleaded the general issue and also a former recovery by the plaintiff in an action of assumpsit, brought by him against the town of Waterville, for the sum arising from the sale of this stock and paid into the town's treasury, which judgment had been fully

satisfied before this suit was commenced. The question whether or not such judgment was a bar to this suit was submitted to this court, this case to be disposed of as the answer to this inquiry would indicate as proper.

A. H. Ware, for plaintiff.

Plaintiff not being an inhabitant of Waterville April 1, 1865, its assessors of that year are not protected in assessing him. *Harriman* v. *Stevens*, 43 Maine, 497; *Gage* v. *Currier*, 4 Pick. 399; *Inglee* v. *Bosworth*, 5 Pick. 498. A former recovery against another party for money had and received is no bar to a suit against defendants for their tort. The entire damages plaintiff suffered could not be recovered in the former action.

A. Libbey, for the defendants.

The plaintiff, on his theory, had two remedies for the injury he sustained by the acts of defendants; one against the town of Waterville for the money received from the sale of his stocks; the other against defendants for his damages. The action against the town could be maintained only on the facts upon which this suit is brought.

When a party has two or more remedies for the same wrong, in which the measure of damages might be different, electing one and pursuing it to judgment is a bar to any other remedy. *Bunker* v. *Tufts*, 57 Maine, 417; *Sweet* v. *Brackley*, 53 Maine, 346; *Holbrook* v. *Foss*, 27 Maine, 441; *Goodrich* v. *Yale*, 97 Mass. 15; *Bennett* v. *Hood*, 1 Allen, 47; *Smith* v. *Way*, 9 Allen, 472; *Warren* v. *Cummings*, 6 Cush. 103; *Norton* v. *Doherty*, 3 Gray, 372.

The judgment against the town for the acts of defendants, as officers and agents of the town, acting in good faith, and full satisfaction of that judgment is a bar to this action against the defendants for the same acts. *Emery* v. *Fowler*, 39 Maine, 326; *Elliot* v. *Hayden*, 104 Mass. 180.

APPLETON, C. J. This is an action of trespass for unlawfully taking and carrying away certain shares of the capital stock of the Maine Central Railroad Company, the property of the plaintiff.

The defendants are assessors of the town of Waterville. The plaintiff was assessed by them as one of its inhabitants. Not being one, the assessors had no jurisdiction. A warrant was issued in due form of law to the collector of said town, who seized and sold the stock in controversy, and paid over the proceeds of such sale to its treasurer.

The property of the plaintiff having been seized and sold to pay an illegal assessment, the assessors having no jurisdiction, the plaintiff had two remedies, either of which he might pursue. He might sue the assessors in tort, or, waiving the tort, he might bring assumpsit against the town for the proceeds of the property sold. The damages are determined upon different principles, as the remedies pursued are in tort or assumpsit. Electing one of two forms of action, the party elects that his damages shall be determined by the rules which govern in assessing damages in the remedy adopted. The plaintiff, having his election as to the remedy to be pursued, brought his action of assumpsit, pursued it to judgment, and has received full satisfaction of the execution issued upon such judgment. In that suit, the tort being waived, he recovered judgment only for the proceeds of the stock sold and interest thereon.

Having thus affirmed the sale by claiming the proceeds and receiving the same, he now in this action demands damages for the tort heretofore waived. But the plaintiff having elected his remedy and received the satisfaction which the law gives in such case cannot revive his cause of action. A claim arising from one entire and continuous tortious act cannot be divided into distinct demands and made the subject of separate actions. A plaintiff cannot divide his cause of action, recover compensation in assumpsit by waiving the tort, and then having received such compensation resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived.

He cannot waive all wrong doing and recover compensation upon that basis, and then, treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles. Neither can he recover part compensation in assumpsit, thus waiving his tort, and then resorting to it as an existing wrong recover the residuum of damages in another form of action. He cannot split his cause of action into fractional parts and recover for such fractions in different suits and upon different grounds of action.

In *Inglee* v. *Bosworth*, 5 Pick. 502, a suit was brought against the assessors for an assessment which was unauthorized and illegal. In delivering the opinion of the court, Morton, J. says, "Although the money collected by this illegal distress and paid into the parish treasury might have been recovered by an action for money had and received against the parish (*Amesbury W. & C. Manuf. Co.* v. *Amesbury*, 17 Mass. 461; *Sumner* v. *First Parish in Dorchester*, 4 Pick. 361), yet in that form of action the remedy might not have been commensurate with the injury and the defendant was not bound to resort to that mode of redress." But if he does resort to that mode of redress he must be bound by the damages which are there obtainable. These, as has been seen, are limited to the proceeds of the property sold illegally. *Dow* v. *Sudbury*, 5 Met. 73; *Shaw* v. *Becket*, 7 Cush. 443.

Having sought and obtained the redress which the form of action first chosen gave him, he cannot be permitted again to renew litigation for a grievance once waived and without the waiver of which he was not entitled to recover.

Judgment for the defendants.

Cutting, Dickerson, Danforth, Virgin, and Peters, JJ., concurred.

Emily P. Davis *vs.* Eber Davis.

Judgment, conclusiveness of. Dower, how barred or released.

The parties to an action cannot impeach the judgment rendered therein in any collateral proceeding, on the ground that it was obtained through their fraud or collusion.

Nor can they be permitted to deny the truth of any fact established by the record of such judgment.

Where, pending a libel for divorce, alimony was agreed upon by the parties who, by written articles of agreement, fixed upon a specific division of the personal property upon the farm they had occupied, it was *held* that this was not such a "pecuniary provision" under R. S., c. 103, §§ 8, 9, as to bar dower; nor can parol testimony be admitted to show that it was so intended by the parties.

Dower cannot be released by parol.

On report.

Action of dower wherein the plaintiff claims dower in land owned by her former husband, the defendant, during their coverture, and now owned by him. She had obtained a divorce upon her libel at December term, 1869, of this court, upon allegations of infidelity and other improper conduct on his part. In this libel she claimed alimony, but during the pendency of the libel, which was entered at the September term, to wit, on the nineteenth day of November, 1869, articles of agreement were entered into between the parties for a division of the personal property on the farm occupied by them, the agreement to be in force and take effect after a divorce had been decreed. Thereupon an entry was made upon the docket that alimony had been agreed upon by the parties and paid to the libelant.

When the present cause came on for trial the defendant offered to prove that, prior to the filing of Mrs. Davis' libel, having for years lived unhappily, it was mutually agreed that a divorce should be procured upon her application, though each was equally in fault, and that no opposition should be offered, and that a fair division of the personal property was made, assigning to each their fair share,

and the husband gave the wife a note for $1,200, secured by mortgage of the land in which dower is claimed, which sum has been since paid and was more than one-third of all the defendant was then worth.

If any of the above testimony was admissible and would constitute a defence, this action was to stand for trial; otherwise the defendant was to be defaulted.

D. D. Stewart, for demandant.

Record is conclusive that the divorce was for the husband's fault and she is therefore entitled to dower. R. S., c. 60, § 7; *Slade* v. *Slade*, 58 Maine, 157; *Greene* v. *Greene*, 2 Gray, 362, 364.

If there were a verbal understanding that the division of property should be in full of all her claim upon this property, it would be void under the Statute of Frauds, *Giles* v. *Moore*, 4 Gray, 600; *Parker* v. *Barker*, 2 Met. 423, 431;

Dower cannot be released by parol. 1 Washburn on Real Prop. 201–204; Scribner on Dower, 266, 290.

Nor by the wife to the husband during coverture in any form. *Rowe* v. *Hamilton*, 3 Greenleaf, 63; *Vance* v. *Vance*, 21 Maine, 364; *Carson* v. *Murray*, 3 Paige Ch. 483; *Lothrop* v. *Foster*, 51 Maine. 367, 368; *French* v. *Peters*, 33 Maine, 410; *Manning* v. *Laboree*, 33 Maine, 343.

John H. Webster, for tenant.

As there were no pleadings evidence tending to maintain any issue is admissible. 1 Greenl. on Ev., § 528. We had a right to show that the former judgment did not affect the property here in dispute. 1 Greenl. on Ev., § 532; *Emery* v. *Fowler*, 39 Maine, 326.

The divorce was obtained by collusion, and the parties being *in pari delicto*, neither can reap any benefit from the judgment.

Virgin J. At the September term, 1869, this plaintiff, having been the wife of this defendant twenty years and borne him four children, entered a libel therein alleging, substantially, that for

several years prior thereto, the defendant was criminally intimate with another woman in the neighborhood, and had treated the libelant in such a cruel, brutal, and outrageous manner, both by word and deed, that her life had thereby become utterly wretched and miserable; that her only remedy was a divorce from the bonds of matrimony, which she prayed might be decreed to her together with a suitable sum by way of alimony or a specific sum in lieu thereof; and that the custody of her invalid minor son be decreed to her with a suitable allowance for his support.

The libel was continued until the following December term, when the parties appeared by their respective attorneys, "when," in the language of the record, "this libel was by consent of parties submitted to the court without the intervention of the jury, who, after a full hearing of all matters and things concerning the same, adjudged that the allegations in said libel were satisfactorily proved, and thereupon ordered and decreed that the bonds of matrimony heretofore existing between said Emily P. Davis and Eber Davis be dissolved, and that the custody of the said minor child be with the mother."

The record further discloses that "alimony was agreed upon by the parties and paid to the libelant."

In defence of this suit, the defendant offers to prove various facts; and, by the terms of the report, if any of the proof offered is admissible and would be a defence the action is to stand for trial, otherwise, the defendant to be defaulted.

We think it is all inadmissible.

The last "point" made by the defendant is, as expressed by his counsel, that "the proof offered shows as clear a case of collusion as can well be imagined. . . By the collusion of the parties, the court was imposed upon and induced to decree a divorce in violation of R. S., c. 60, § 18!" But this surprising defence cannot prevail. For, however dark a cloud such an unblushing assertion of his own active participation in an alleged fraud may cast upon the defendant's own character, the impeachment is purely personal, while the absolute verity of the judgment thus im-

pugned remains unscathed. The parties to an action cannot impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was obtained through their fraud or collusion. It is their business to see that it is not so obtained. Even if, without any fault or neglect of one party, his adversary succeed by fraud in obtaining an unjust or unauthorized judgment, he must through some prescribed mode reverse or annul the judgment before he can claim to treat it as invalid. *Granger* v. *Clarke*, 22 Maine, 128; Freeman on Judgments, § 334, and cases cited.

All the offered testimony which conflicts with the allegations in the libel is clearly inadmissible. For these allegations having been judicially tried and determined to be satisfactorily proved, by a court having jurisdiction of the subject and of the parties, so long as that judgment remains unreversed, it is conclusive upon the parties in any proceeding before any judicial tribunal. *Slade* v. *Slade*, 58 Maine, 157; *Walker* v. *Chase*, 53 Maine, 258; *Sturtevant* v. *Randall*, 53 Maine, 149; *Pratt* v. *Dow*, 56 Maine, 81; *Greene* v. *Greene*, 2 Gray, 361. It would seem that no principle of law has been more frequently asserted than the foregoing.

It conclusively appearing by the judgment that a divorce was decreed to this plaintiff for the fault of this defendant, for a cause other than that of impotence, she is entitled to dower in his real estate to be recovered and assigned to her as if he was dead (R. S., c. 60, § 7; *Stilphen* v. *Houdlette*, 60 Maine, 452); unless she has been barred of it by some "pecuniary provision" made for her benefit after marriage and in lieu of dower, R. S., c. 103, §§ 8, 9.

Was the written contract entered into by the parties, on Nov. 15, 1869, such a pecuniary provision as is contemplated by the statute?

The instrument declares itself to be "articles of agreement" between the parties, an agreement "upon the following division of the personal property now on the farm in Pittsfield occupied by them." It contains a detailed enumeration of all the personal estate upon the farm, with a statement of the ownership of each. The only other stipulation therein relating to property or interest

in property, is that the plaintiff is to have "also the note of said Eber Davis for $46.48, given by him to his son, Horace G. Davis. Said Eber is also to pay her $1,800, which he owes said boy, on Jan. 1, 1870." The consideration of this money transaction would seem to be the stipulation, on the part of the plaintiff, contained in the paragraph next the last, in the agreement "to support said Horace G. Davis till twenty-one years old, and to protect said Eber Davis from all liabilities of every sort on account of said Horace," etc.

There is not the remotest allusion, directly or indirectly, to dower or any interest whatever in real estate in the instrument. In the language of Kent, J. in *Bubier* v. *Roberts*, 49 Maine, 469, "nothing is found in it, from which can be inferred that it was intended as a jointure or pecuniary provision in lieu of dower;" but on the contrary the money portion is expressly declared to be intended for another and different purpose, while the division of the personal property was evidently understood by the parties, judging from the docket entries, and by the court judging from them and the language of the judgment, as something in lieu of alimony. We do not think it can be considered a "pecuniary provision" as contemplated by the parties. *Bubier* v. *Roberts*, *sup.*; and cases there cited.

The offer to prove that at the same time $1,200 were given in notes subsequently paid, was intended by the parties to be a full discharge of all claims upon the defendant or his property, is inadmissible as being in conflict with the agreement made in writing. And we know of no rule of law by which even an inchoate right of dower can be released or barred by parol. 1 Wash. on Real Prop. 201.

Defendant defaulted.

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

THEODORE B. SEEKINS *vs.* GEORGE C. GOODALE.

Taxes—sale of distress for. Trespasser ab initio.

The words "the distress shall be openly sold," as used in R. S., c. 6, § 104, are not to be construed as authorizing a collector of taxes to sell any additional articles after enough have been sold to pay the tax committed to him and the expense of sale.

Where a collector, after selling enough to pay the tax and expense of sale, sells other personal property distrained he will not become a trespasser *ab initio* as to any of the articles seized except such as he has sold in excess of his authority. *Williamson* v. *Dow*, 32 Maine, 559, explained.

The collector's warrant is a full protection to him, so far as he has not exceeded nor abused its authority. See *Nowell* v. *Tripp, post.*

ON REPORT.

TRESPASS for the unlawful conversion of five pieces of cloth, valued at $75.00. The defendant justified the taking under a brief statement that the goods were seized by him in his capacity of collector of taxes in Hartland, and sold by him to satisfy a tax assessed upon the plaintiff in Hartland for the year 1870. The tax was poll-tax $3.00, and tax on personal property $21.78; the expenses of sale, etc., were $1.62. The goods sold for $49.36, the first three pieces sold netting $26.66, the third having been bid off for $11.75. The defendant returned to the plaintiff an account of sale and $22.96 in cash. The defendant claimed that he was not an inhabitant of Hartland on the first day of April, 1870. He testified that at their retail prices all the goods were worth $75.44.

If upon these facts the plaintiff was entitled to recover, the court was to enter judgment for such sum as he ought to have; if he would become entitled to recover on proof that he was not taxable in Hartland that year, the case was to stand for trial; but if not entitled, and if he would not be entitled on such evidence to recover, a nonsuit was to be entered.

C. A. Farwell and *George W. Whitney*, for the plaintiff.

By the sale of the last two pieces of cloth, after the first three had sold for enough to pay the tax, the collector became a trespasser *ab initio*. *Carter* v. *Allen*, 59 Maine, 296. *Williamson* v. *Dow*, 32 Maine, 559, is decisive of this case.

As Mr. Seekins was not resident in Hartland this action must prevail. *Bowker* v. *Lowell*, 49 Maine, 429; *Preston* v. *Boston*, 12 Pick. 12. *Caldwell* v. *Hawkins*, 40 Maine, 526, does not militate against this, because in that case the assessors had jurisdiction. *Suydam* v. *Keyes*, 13 Johns. 444.

D D Stewart, for the defendant.

An officer acting *bona fide* ought to be protected. *Sprague* v. *Bailey*, 19 Pick. 440. The collector's return cannot be impeached by an action of trespass, but only in a suit for a false return. *Livermore* v. *Bagley*, 3 Mass. 487; *Purinton* v. *Loring*, 7 Mass. 390–392; *Gardner* v. *Hosmer*, 6 Mass. 327; *Estabrook* v. *Hapgood*, 13 Mass. 313; *Stinson* v. *Snow*, 10 Maine, 265; *Bates* v. *Willard*, 10 Met. 80; *Deane* v. *Washburn*, 17 Maine, 100, 102; *Kendall* v. *White*, 13 Maine, 245; *Caldwell* v. *Hawkins*, 40 Maine, 526; *Judkins* v. *Reed*, 48 Maine, 386; *Tuttle* v. *Gates*, 24 Maine, 395.

Nor can the return be contradicted by the account of sales or the collector's testimony. *Cowan* v. *Wheeler*, 31 Maine, 439; *Clement* v. *Wyman*, 31 Maine, 50.

In making sale the collector strictly followed the statute. See R. S. of 1857, c. 6, §§ 88, 104; *Loomis* v. *Pingree*, 43 Maine, 299; *Lovejoy* v. *Lunt*, 48 Maine, 377.

Plaintiff ratified the sale by accepting the surplus. Instead of restoring the goods not needed to pay the tax, the defendant returned the avails of them, which the plaintiff accepted.

The fact that Mr. Seekins was not an inhabitant of Hartland is immaterial. The collector is protected by his warrant. *Hoyt* v. *Drake*, 6 Gray, 389, 390; *Caldwell* v. *Hawkins*, 40 Maine, 526; *Judkins* v. *Reed*, 48 Maine, 386; *Bethel* v. *Mason*, 55 Maine, 501.

PETERS, J. The collector, having seized more goods and chattels than sufficient to pay the tax and expense of sale, after selling enough for that purpose proceeded further and sold all the balance of the distress remaining in his possession. This balance consisted of articles distinct and separate from those which were sold before the authority to sell was exhausted. The officer was actuated by no improper motive; and, in the attempt to perform his duty, followed so literally the provision of the statute prescribing that duty that his counsel contends that in all his doings he acted legally. The words of the statute are "the distress shall be openly sold." But it would be an unsatisfactory construction to say that the authority is to sell more of such distress than would be ample for the purposes for which the authority is conferred.

The question arises whether the officer was a trespasser *ab initio* as to all the property taken and sold, or only as to so much of it as was sold in excess of the requirements of law.

In *Dod* v. *Monger*, 6 Modern Rep. 215, where several barrels of beer were distrained for rent, and the distrainor drew beer out of one of them, Lord Holt held that it rendered him a trespasser *ab initio* only as to that single barrel. In *Harvey* v. *Pocock*, 11 M. & W. 740, it was decided that "where a landlord distrains for rent, amongst other things, goods in law not distrainable, the distrainor is a trespasser *ab initio* only as to the goods which were not distrainable." Lord Abinger, C. B., says, "The case in 6 Modern Rep. 215, is undoubtedly a very strong authority for the defendants. The Six Carpenters' case leaves it an open question how far the party becomes a trespasser *ab initio* as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by Lord Holt." This last case is approvingly alluded to in *Price* v. *Woodhouse*, 1 Exch. 559. In Smith's Leading Cases the doctrine is stated as follows: "But if there be a seizure of several chattels, some of which are by law seizable and some not, or some of which are subsequently abused and the rest not, the seizure is, or becomes, illegal only as to the part which

it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal." In *Walcott* v. *Root*, 2 Allen, 194, the point is stated by the court but not decided. It is contended by the plaintiff that *Williamson* v. *Dow*, 32 Maine, 559, decides that an officer would be liable in a case like the present for the entire value of all the articles distrained. It will be seen upon examination that the marginal note in that case is not authorized by the opinion of the court. The opinion is very brief, and while upon this point it is merely said that when an officer has sold sufficient property he is not authorized to sell more, the court adds, "there is also the same defect noticed in the case *Blanchard* v. *Dow* [a previous case in same volume], in the neglect to return with the overplus an account of sales and expenses." Upon this last point the case was really and necessarily decided, and need not be considered as limited or overruled by our conclusions in the case now before us. Nor is the doctrine of Lord Holt opposed by the case of *Moore* v. *Pennell*, 52 Maine, 162, where an officer attached an undivided half of chattels, and selling the entire property in the goods attached was held a trespasser *ab initio* as to the full value of the goods sold. The reasons given for the result reached in that case are not applicable here. There the officer committed upon each and every article of the property attached an act in excess of his authority which amounted to a conversion or trespass, while here no act of any sort was committed or neglected which would render the action of the officer irregular or abusive, excepting so far as the particular articles were concerned which were sold after the authority to sell had been fully executed. Had he stopped when he had sold enough for the payment of the tax and expense of sale no error would have been committed. Not even would a neglect of returning the balance of the property to the owner have been, according to many authorities, such an irregularity as to render him liable for the value of the whole distress, because such an act would have been a non-feasance only. His proceedings subsequently were a fresh trespass, by relation dating back to the first taking of such of the articles only

as were sold in excess of authority. The Six Carpenters' case speaks of the trespasser *ab initio* as one "who works or kills the distress." How has the officer in this case "worked or killed" so much of this distress as was legally sold? We think a fair construction of the rule established in the Six Carpenters' case makes the defendant liable as a trespasser *ab initio* only for the sale of so much of the goods as were sold in excess, and not for those sold in pursuance of authority. In this case it will work out exact justice to all concerned. The debtor will have paid his tax; the officer will receive the protection of the law as long as he obeyed the law; and for the injury inflicted by his abuse of it the party injured will be indemnified for all damages actually sustained. A doctrine which will ameliorate the hardships imposed upon honest officers rather than that which will put difficulties and dangers in their way is the safe and salutary one. The contrary doctrine would render a sheriff, who, upon an execution amounting to thousands of dollars, sold more goods by a few dollars only than was necessary to cover the amount of such execution and costs of sale, for an error or inadvertence such as a man of common care and common intelligence might commit, exposed to most hazardous consequences.

It is not perceived that the positions taken by counsel as to the conclusiveness of the officer's return have any application in this case. The return is not necessarily contradicted by the facts set up and proved by the plaintiff.

Another question raised in the report was lately settled in *Nowell* v. *Tripp*, 61 Maine, *post*; to wit: that the officer's warrant is a full protection to him so far as he has not exceeded or abused its authority.

The sum required by the collector for the tax and charges was $26.40. The first three articles were sold for $26.66, leaving to be returned 26 cents. The other articles sold for $22.75. The evidence shows that they were worth about fifty per cent more than sold for, which would make their value $34.05. This sum

added to 26 cents plaintiff would be entitled to, less $22.96, which left with him would go in mitigation of damages to that extent.

The defendant is to be defaulted for $11.35 *and interest from June* 22, 1871.

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

SUSAN J. EAMES, complainant, *vs.* ROBERT D. GRAY.

Bastardy process—objection to settlement of. Deed—consideration of.

The objection, in writing, to a settlement or discharge of a complaint in bastardy authorized by R. S., c. 97, § 8, is seasonably made, if made at the trial of the respondent on the complaint.

It is competent for the complainant in a bastardy process to testify that her "home" is in M., with a view of showing the liability of that town for the support of her child.

A seal implies that the instrument upon which it is placed was given for some consideration, but does not estop the parties to show the actual consideration.

ON EXCEPTIONS.

COMPLAINT under the Bastardy Act.

Proceedings were instituted before the magistrate, April 19th, 1871, and the respondent furnished the requisite bond for his appearance at the September term of court following.

On the 27th day of September, 1872, the overseers of the poor of the town of Madison, filed with the clerk of the courts a written objection to any settlement between the parties to the complaint, and to the admissibility in evidence of any such settlement to bar or affect the complaint. The case was tried at the December term, 1872. The respondent offered in evidence the following release, omitting the attestation.

"APRIL 20, 1871.

For a valuable consideration to me paid by Robert D. Gray, I

do hereby release to the said Gray all suits, promises, covenants, and demands which I have or can have against him.

SUSAN J. EAMES. [Seal.]

The respondent also offered a written request to the magistrate to give up the bond, and a written order to A. H. Ware, Esq., counsel for the complainant, "not to proceed any further in the matter and deliver to the bearer all the papers in the same" which he had in his possession. These papers were signed by the complainant and dated April 20, 1871.

The complainant offered the objection of the overseers of the poor referred to above. The complainant was allowed, subject to objection, to testify that her "home" was in Madison, and her counsel asked her what consideration she received for the release set forth above. The question was objected to and admitted by the court with the remark that the seal implied some consideration, but that the actual consideration might be shown.

The court ruled *pro forma* that the objection of the overseers of the poor having been filed, the release and discharge was invalid and constituted no defence.

A verdict of guilty was taken by consent, and the respondent excepted to the ruling and admissions of testimony as shown above.

Hiram Knowlton, for respondent, in support of the exceptions.

A. H. Ware, for complainant, *contra*.

DICKERSON J. The case calls for a construction of R. S. of 1871, c. 97, § 8, which is as follows: "No woman whose accusation and examination on oath have been taken by a justice of the peace at her request, shall make a settlement with the father, or give him any discharge to bar or affect such complaint, if objected to in writing by the overseers of the poor of the town interested in her support or the child's."

By § 9 of the same statute, such town may prosecute the complaint in behalf of the complainant. Section 7 requires that in addition to the bond given to the mother to perform the order of

court, the respondent, when found guilty, shall give a bond, with sufficient sureties, to the town liable for the maintenance of the child.

The object of these several provisions is to save the town, liable for the support of the child, harmless, as far as may be, by giving it a remedy against the putative father. The clause of § 8 under consideration should receive a construction in harmony with this purpose.

The statute is silent as to the time when the objection is to be made. In many cases it would be impracticable to make the objection before the settlement had been effected, or the discharge given, as that might be done before the overseers of the poor of the town interested in the question had any knowledge of the pendency of the complaint, or if they had such knowledge, before they had an opportunity to present their objection to the proper party. The fact of settlement or discharge is one peculiarly within the knowledge of the parties to it, who may choose to keep it secret. Indeed such knowledge may not be disclosed till the instrument itself is offered in evidence by the respondent on trial of the complaint. To hold, therefore, that the objection to a discharge or settlement should be made in advance of the making thereof, or at any time before the trial of the complaint, would be to render this section of the statute a nullity in a large class of cases.

Besides, a settlement or discharge whenever executed can only be available to the respondent when it is offered in evidence, by him, as a bar to the complaint; nor can an objection in writing made to such settlement or discharge by the proper officers, either before or after it was effected, or given, avail to prevent the complaint from being barred thereby, unless evidence of such objection is submitted at the trial. The objection, though ever so often before made, will be unavailing unless it is made at the trial; it will, moreover, be equally effectual if made then alone, as though it had been before made and then also. The statute requires that the objection shall be made to the settlement or discharge to prevent it be-

ing a bar to the complaint, and when the objection in writing is made at the only time when it can be available for that purpose, it is seasonably made in the purview of the statute.

This construction of the statute is in harmony with the statute of 1821 and the revision of 1841 upon this subject which severally provided that the complainant should not be allowed to make any settlement with the respondent, or give any discharge "which should be given in evidence on trial of the complaint" to bar the same, if objected to in writing by the overseers of the poor, etc. etc. The words included within the quotation marks were omitted in the revisions of 1857 and 1871, as surplusage, it being apparent that any settlement or discharge thus effected and objected to, being made inoperative by the statute, would not be competent evidence on trial of the complaint for the purposes specified.

The *pro forma* ruling of the justice presiding being in accordance with this construction of the statute is sustained. The other rulings, also, were unobjectionable. *Exceptions overruled.*

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

GEORGE K. JEWETT and others, petitioners for partition, *vs.* PERSONS UNKNOWN.

Partition—petition for. Description of petitioners' interest. Notice. Evidence. Office copies. Deeds recorded in wrong registry inadmissible. Parol testimony as to title not admissible.

It is a sufficient description of the petitioners' interest, if it be stated as a certain fraction of a township, though the fact be that their interest really is the stated proportion of said township exclusive of the number of acres reserved by the State for public uses.

Upon a petition for partition of a township no special notice need be given to the land agent, as representative of the State's interest in the lands reserved in such township for the use of the town.

Office copies of deeds given by the land agents of Maine and Massachusetts admitted under the provisions and limitations of R. S., c. 82, § 99.

A copy of a deed, recorded in a registry district other than that in which the land lies, is inadmissible.

Parol evidence of the contents of a deed, not shown to be lost, is inadmissible.

Persons not claiming under the mortgagee cannot set up his title under the mortgage to defeat a petition for partition.

ON REPORT.

Nine cases, each entitled as above, were submitted to the consideration of this court at the same time. They were petitions for partition. The first is for partition of Township No. 14, R. 14, which is situate within the limits of the Northern Registry District of Aroostook County. The petitioners claimed to be seized in fee as tenants in common of $\frac{24}{416}$ of said township with other persons unknown; but certain individuals were mentioned as the presumed owners of the tract with Jewett and his co-petitioners. The petition stated that a thousand acres of the land had been reserved by the State for the exclusive benefit of the town and not located. The petitioners therefore prayed to have it located and for partition, etc. No mention was made of the land agent in the petition, nor was any notice of its pendency given to him other than the published notice "to all parties," ordered by the court. Personal notice was given those named as supposed co-tenants with the plaintiffs, as directed by the order of the court. The parties who appeared in response to the notice, and assumed the defence, plead that the petitioners were not seized, as alleged in their petition; set up sole seizin in respondents, and that the petitioners' interest was not correctly described in their petition. The petitioners replied, denying defendants' claim of sole seizin, affirmed their own seizin of the proportions by them claimed, and add that if any others than those whose names appear in the petition are jointly interested in the land they are wholly unknown, and assert that their own interest in the premises is described with sufficient accuracy.

The pleadings were substantially the same in all these cases. The respondents contended that the interest of the petitioners

was incorrectly stated, insomuch as they were not entitled to $\frac{2}{4}\frac{4}{1}\frac{8}{6}$ of a township, but to only that fraction of so much as remained after deducting the thousand acres reserved by the State for the benefit of the town. For example, if the township contain 23,040 acres, the petitioners are entitled, after the thousand-acre reservation is located, to only $\frac{2}{4}\frac{4}{1}\frac{8}{6}$ of 22,040 acres; and if they petition, as in the case at bar, before that reservation is located they are entitled to $\frac{2}{4}\frac{4}{1}\frac{8}{6}$ of $\frac{2}{2}\frac{2}{3}\frac{0}{0}\frac{4}{4}\frac{0}{0}$ of a township, instead of to that fractional part of a whole township; hence that the petitioners had not truly stated their proportional ownership of the land of which they pray partition, and under their agreement, "if they are not entitled to have partition of said township as prayed for, they are to be nonsuit."

This and other objections to the petition are fully stated in the opinion of the court.

Wm. H. McCrillis, for petitioners.

Madigan & Donworth, for Rufus Mansur, respondent.

Peters & Wilson, for Thomas N. Egery and others, respondents.

APPLETON, C. J. These petitioners have presented their petitions for the partition of certain townships in which they are tenants in common. After setting out their fractional interests in the townships sought to be divided, they state in each petition that the township contains one thousand acres of land, reserved for the exclusive benefit of the town, which has not been located; that they cannot occupy and improve the said parts to any advantage while the same lie in common and undivided, but wholly lose the profits thereof, and they pray that notice may issue in due form of law, and that said one thousand acres may be located and their parts be set off and assigned to them in severalty.

The respondents, who appear, deny the seizin of the petitioners, plead sole seizin in themselves, and resist partition on various grounds, some of which are applicable to all, and others only to a part, of the petitions.

By the terms of the report, if the petitioners are not entitled to have partition, as prayed for, they are to become nonsuit.

1. It is objected that the interest of the petitioners is not correctly set forth in their several petitions. There should be reasonable certainty to enable the respondents to traverse the petitioners' seizin. The petitioners in each can describe their fraction of the whole township of which they pray partition.

It is urged that the fraction is not correctly described, because there is a reservation of land for public uses. If the fraction is truly given in case there is no reservation, it is equally so, if there be a reservation. In other words, if the petitioners own one-half or any other fraction of a township, if there is no reservation of any number of acres, their interest in the balance, when there is a reservation to which their title is subject, remains unchanged. The several petitions set forth the reservations for public uses with a prayer that they be first set out. It is obvious if these reservations are correctly stated in the petitions, and the petitioners have accurately stated their share, that it must be of the balance and that the description is sufficient.

2. Notice upon all parties interested was ordered upon the entry of the several petitions, and the case finds that notice has been proved as ordered.

The objection taken by the respondents is that no specific notice was ordered to be given to the land agent, to whom the care and custody of the public lands is intrusted. In *Upham* v. *Bradley*, 17 Maine, 423, "it was made a point of the defence," observes Shepley, J., "by the brief statement that the lands reserved for public uses had not been set off. The second section of the statute of 1838, c. 345, applies to process thereafter to be commenced, and the requisitions of the law may all be complied with in making the partition." In like manner, all the requirements of law as prescribed by R. S. of 1871, c. 88, § 29, may be complied with here.

But without determining the necessity of notice to the land agent, it is sufficient here to observe that there is no plea nor brief

statement of want of notice to the land agent. Nor is it readily perceived that the respondents are entitled without plea or brief statement or with them to intervene as volunteers in his behalf.

The petition and the notice are in the usual form and the order of court has been complied with.

3. By R. S. of 1871, c. 82, § 99, "In actions touching the realty or in which the title to real estate is material to the issue, and when original deeds would be admissible, attested copies of such deeds from the registry may be used as evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs."

The petitioners introduced record copies of the deeds of the land agents of Maine and Massachusetts to grantees under whom the petitioners and the respondents alike derive their title by various mesne conveyances. So far as these conveyances show the title in the petitioners to the fractions by them claimed, they establish their right to partition. If in any instance there is a failure to do this, it will be distinctly stated.

4. The respondents' plea of sole seizin is disproved by evidence offered. Indeed, the petitioners and the respondents derive their title from the same source and the evidence negatives any real conflict between them. It shows the petitioners entitled to partition as claimed, and that the respondents have no rights which conflict with the several interests of the petitioners as described in their several petitions.

5. In the tenth petition an office copy of a deed of the east half of township No. 15, R. 6, west from the east line of the State from the State of Maine to the Corinth Academy, but recorded in another registry than that in which the land was situated, was offered in evidence. But the copy is not admissible to affect the rights of the parties.

That deed being excluded, the title stands thus. Adams H. Merrill by deed of warranty, dated March 6, 1850, conveyed to George K. Jewett and Leonard March the east half of said

township No. 15, R. 6. On Jan. 6, 1851, Jewett and March by deed of warranty conveyed half of said east half to Elbridge G. Dunn. By these conveyances Dunn became the owner of half and Jewett and March of half of said east half. The respondents are the devisees of March and have shown no title to more than a quarter of said half. There is therefore no conflict between the title of the petitioners and the respondents.

6. The deeds in the case show that E. D. Jewett is an owner in the lands of which partition is prayed to the extent set forth in the several petitions to which he is a party. There is no sufficient proof that he has ever parted with his title. No deed or office copy of a deed from him to any one was offered in evidence.

George K. Jewett testified that he did not know of his own knowledge whether E. D. Jewett was now an owner or not; that some years since he named his intention to convey said land to him; that he believes he executed such conveyance, but he has no remembrance of seeing the deed, and that if there was one he has not transferred the land to any one.

The deed, if there was one, is not shown to have been lost so as to authorize parol evidence of its contents. It would seem probably not to have been recorded as no office copy was offered. It is not proved to have been delivered, but rather the reverse, for if not seen by the grantee there could not well have been a delivery.

7. The mortgage deeds from the petitioners to John H. Pope, of their interest in the land to be divided, cannot be interposed to prevent partition. Pope is no party to these proceedings and sets up no adverse interest. The respondents have no right to intervene in his behalf. As to all persons but the mortgagee the mortgager is regarded as the owner and seized of the estate. *Upham* v. *Bradley,* 17 Maine, 427.

Judgment that partition be made according to the prayer of the petitioners.

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

Alden R. Bellatty *vs.* Thomaston M. F. Ins. Co.

Misrepersentation—what is, is a question for the jury.

A misrepresentation as to the title of the property insured does not necessarily avoid the policy.

Whether or not it is material and fraudulent is to be submitted to the jury.

On Report.

This suit was brought upon a policy of insurance upon the house and furniture of the plaintiff, issued by the defendant company to the plaintiff February 5, 1867. The property insured was burned on the night of September 1, 1868. Mr. Bellatty showed title to the house by deed, dated April 12, 1858, to him from his father-in-law, Edward Beal. It appeared that the consideration of this conveyance was an agreement that Bellatty should maintain said Edward Beal and his wife, Jane Beal, during their natural lives; and that Bellatty on the same day that he took the title gave a bond of even date for the maintenance of his wife's parents, secured by a mortgage of these same premises. In 1862 Edward Beal died; in 1865 Mr. Bellatty's wife died, and in 1867 Mrs. Jane Beal went to live with her daughter, Mrs. Sutton, and in the spring of 1868 it was arranged that she should remain with Mrs. Sutton. In consideration of the payment of a specified sum she released and discharged the bond and mortgage aforesaid June 25, 1868.

In answer to a question on this point the plaintiff had stated, in his application for insurance, that there was no incumbrance upon the property, and that it was owned by him.

The proof of loss was filed with the company September 30, 1868, and was prepared from a memorandum made up by the plaintiff on the day following the fire. He testified that he recollected afterwards, and before making his proof of loss, that he had put down some things as lost which were saved and had affixed too high a value to others, but that he did not have these errors cor-

rected before subscribing and swearing to the proof and filing the same. Thereupon the presiding justice ruled that the action could not be maintained; it was then agreed to report the testimony and if this court were of the same opinion the plaintiff was to be nonsuit; but if he was entitled to have the case go to the jury upon these facts the action was to stand for trial.

Hale & Emery, for plaintiff.

The presiding judge stopped the case on two points, viz: 1. On the misstatement of title and as to incumbrance in the application; and 2. On the erroneous statements in the proof of loss.

Both questions were for the jury. R. S., c. 49, § 19; *Garcelon* v. *Hampden Ins. Co.*, 50 Maine, 580; Littleton and Blatchley's Digest of Fire Ins. Cases, 504 *et seq.*, citing *Tyler* v. *Ætna Ins. Co.*, 12 Wend. 507; *Mut. F. Ins. Co.* v. *Deale*, 18 Md. 26; *Cumb. Valley Co.* v. *Mitchell*, 48 Penn. 374; *Ins. Co.* v. *Chase*, 5 Wall. 509; *Columbia Ins. Co.* v. *Lawrence*, 10 Peters, 507.

Whether or not the false swearing in the proof is material and intentionally false is a question for the jury. Littleton & Blatchley's Fire Ins. Decisions, 280, *et seq.* citing *Moadinger* v. *Mechanics Ins. Co.*, 2 Hall, 490; *Franklin Co.* v. *Culver*, 6 Ind. 137; *Hoffman* v. *Western Ins. Co.*, 1 La. Ann. 216; *Park* v. *Phenix Ins. Co.*, 19 U. C. 110; *Franklin Co.* v. *Updegraff*, 43 Penn. 350; *Marion* v. *Great R. Co.*, 35 Mo. 148; *Moore* v. *Protection Ins. Co.*, 29 Maine, 97; *Dewy* v. *Williams*, 5 Allen, 5; *Carmel* v. *Phenix Ins. Co.*, 59 Maine, 482.

A Wiswell, for defendant.

The statement that there was "no incumbrance" on the property was a material misrepresentation, avoiding the policy, whether fraudulently made or not. R. S., c. 49, § 19; *Gould* v. *York Co. Mut Fire Ins Co.*, 47 Maine, 403; *Davenport* v. *N. E. Ins. Co.*, 6 Cush. 340; *Hayward* v. *Same*, 10 Cush. 444; *Draper* v. *Charter Oak. Ins. Co.*, 2 Allen, 569; Flanders on Fire Ins., 278–9, and cases cited; *Lowell* v. *Middlesex Ins. Co.*, 8 Cush. 127; *Pink-*

ham v. *Morang*, 40 Maine, 587; *Day* v. *Charter Oak. Ins. Co.*, 51 Maine, 100, and cases there cited; *Wall* v. *Howard Ins. Co.*, 51 Maine, 32.

APPLETON, C. J. The defendant corporation is a mutual fire insurance company. The plaintiff in his application for insurance stated that the estate to be insured was unincumbered when in fact it was incumbered by a mortgage. This statement being false, the presiding judge ruled that the policy was thereby avoided.

It had been repeatedly held, prior to the act of 1862, c. 115, that misrepresentations as to the title of the person insured were material and avoided the policy. *Pinkham* v. *Morang*, 40 Maine, 587; *Battles* v. *York Co. Mut. Ins. Co.*, 41 Maine, 208; *Gould* v. *York Co. M. F. Ins. Co.*, 47 Maine, 403.

By the act of 1862, c. 115, re-enacted in the revision of 1871, c. 49, § 19, it is provided that "any misrepresentation of the title or interest of the insured, in the whole or a part of the property insured, real or personal, unless material and fraudulent," shall not prevent his recovering on his policy to the extent of his insurable interest.

By c. 49, § 21, "The provisions in the foregoing sections relating to the amount of capital stock to be owned by an insurance company, and the division of the same into shares and dividends of profits thereon, and other provisions incidental to the nature of its fund, and such of said provisions as relate to the liability of directors or stockholders in case of a deficiency of capital, and the regulations concerning the business of any such company, contained in sections eight and nine, shall not be construed as applicable to mutual fire insurance companies; but the other preceding and following provisions shall be binding on such companies so far as consistent with their charters."

No inconsistency is shown or alleged to exist between this statute and the charter of the defendant corporation. The provisions of R. S., c. 49, § 19, are expressly made applicable.

Whether the misrepresentation as to title was material or fraud-

ulent was a question to be determined by the jury. So, too, if there was fraud in the proof of loss, it should have been submitted to the jury. Both these questions were withdrawn from their consideration. According to the agreement of the parties the entry must be *Action to stand for trial.*

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

MARY H. MOORE *vs.* WILLIAM H. MOORE.

Bail—how reduced. New trial. Adverse possession.

The court will not set aside a verdict establishing a title by disseizin when there is evidence on both sides, and no exceptions are taken to the rulings of the presiding justice, and there is nothing indicating misconduct or gross partiality on the part of the jury.

The court will not quash a *capias* writ, on which a defendant has been held to bail, on the ground that the *ad damnum* is evidently excessive.

Conceding a right to betterments is an admission that the possession, during the time in which this right was acquired, was adverse.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

TRESPASS *quare clausum* for breaking and entering the plaintiff's close in Ellsworth, particularly described, "known as the Alvin Starkee premises by being occupied by him during many years, and same conveyed by him to said Mary H. Moore by deed dated December 15, 1869;" and, being so entered, for breaking the bars, plowing up the ground, etc., etc., "contrary to the form of the statute and to the damage of the plaintiff in the sum of thirty-six dollars." The officer was by his precept commanded to attach property to the amount of three hundred dollars and for want thereof to take the body of the defendant, who was arrested

and gave bail in the sum required. The statement of damage above-quoted immediately preceded the *ad damnum* of the writ, which was filled up with three hundred dollars. Immediately after the writ was read to the jury the defendant's counsel moved that it be quashed because excessive bail had been required and taken upon it; this motion was overruled and the defendant excepted.

The plaintiff claimed the premises by the above-mentioned deed from Alvin Starkee, who asserted ownership by more than thirty years' possession under a quit-claim deed from Elias Inman, which had been lost, and the defendant justified his acts by title in himself, derived from Seth Tisdale, by warrantee deed dated August 30, 1871, and also put into the case a deed of warranty from Leonard Jarvis to Seth Tisdale, given July 10, 1849, in which there was a reservation "to the settlers on the lots whatever rights they may have by way of betterments." The fact of Starkee's occupation, and the erection of buildings on the lot by him, was not denied; but there was a great deal of evidence tending to show that his occupancy was permissive, and not adverse; and it was contended that his own testimony in the case admitted this, and that his declarations to others, while living upon the premises, established the fact; but he testified to his claim to own it after occupying for twenty-one years, and the jury found a verdict for the plaintiff, which the defendant moved to set aside as against the law and the evidence.

Hale & Emery, for defendant, cited *Kinsell* v. *Daggett*, 11 Maine, 309; *Arnold* v. *Stevens*, 24 Pick. 108; *Chadbourne* v. *Swan*, 40 Maine, 260.

George S. Peters, for plaintiff.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*. The defendant claims title in himself and denies that of the plaintiff.

The motion to quash the writ because excessive bail was de-

manded was properly overruled. Bail had been given. If it had not been, the defendant's remedy was to apply to the court for its reduction. R. S. of 1871, c. 99, § 9.

On the trial of the cause a verdict was found for the plaintiff. No report is made of, or exceptions taken to, the charge of the presiding justice. We may assume, therefore, that the law as applicable to the case was correctly given to the jury and that, at any rate, the defendant had no cause of complaint.

It appears that prior to 1833 one Inman lived on the lot in controversy, having built a log house thereon. In June of that year he conveyed by quit-claim deed the lot to Alvin Starkee, who entered into possession of and occupied the land until Dec. 15, 1869, when he conveyed the same by deed of quit-claim to the plaintiff, who entered into possession.

Alvin Starkee testifies that he did not know who owned the lot; that he did not know whether his deed was good for anything or not; that he occupied the lot to the time of his conveyance to the plaintiff, claiming and occupying it as his own and erecting an house and barn and building fences thereon; that he calculated he owned it; that he had lived on it long enough to hold it by possession; that he never had any lease of it; that he never applied to any one for writings in reference to purchasing it and that he was never disturbed in his occupation of it by any one. Other witnesses testify to Starkee's continued occupation of the premises in controversy for thirty-five years or more.

Here, then, was continuous occupation for over thirty-five years. The occupation by the witness was as his own, claiming title thereto. Such occupation is necessarily adverse to all others. It was open and notorious. During this period the tenant was never disturbed in his occupation by any one. Here, then, if the plaintiff's testimony was to be believed, there was open, notorious, exclusive, and adverse possession by one claiming title for over thirty years to the premises in dispute. It resembled in all its essential characteristics that of every farmer in the community. It is clearly within R. S. of 1857, c. 105, § 10; *Eaton* v. *Jacobs*, 52 Maine, 455.

Betterment rights are acquired by adverse possession, which continued for twenty years, ripens into a perfect title by disseisin. The deed from Jarvis to Tisdale, dated July 10, 1849, under which the tenant claims title, assumes the existence of a right to betterments, and specially reserves to the settlers "whatever rights they may have by way of betterments;" thus admitting that betterment rights might then have been acquired, and that the possession was adverse and not under the title of the grantor. *Treat* v. *Strickland*, 23 Maine, 192.

It is true there is much evidence contradictory to that offered by the plaintiff, evidence upon which the jury might, if uncontradicted, or believed, well have rendered a verdict against him. But the force and effect of the testimony, the degree of credit to be given to the witnesses on the one side or the other, was submitted to a jury under proper instructions, and no sufficient reason is shown for disturbing the verdict.

Exceptions and motion overruled.

CUTTING, DICKERSON, BARROWS, and PETERS, JJ., concurred.

JACOB S. LORD *vs.* ASA FRENCH and another, administrators.

Money had and received—lies to recover moneys fraudulently obtained.

When the seller agrees to sell a stock of goods at the Boston prices of similar goods at that date, but fraudulently makes out a bill with prices above Boston prices at the time of the contract, and the purchaser is thereby deceived, the vendee may recover in an action for money had and received, the difference between the prices in Boston and those stated in the bill as Boston prices; he is not restricted to his right to rescind the contract on discovery of the fraud.

ON MOTION FOR NEW TRIAL.

ASSUMPSIT to recover for breach of a contract entered into October 20, 1867, between the plaintiff and defendants' intestate to

sell the plaintiff a stock of goods "at the prices of said goods now in Boston, price to be settled and delivery given on or before the tenth of November," 1867. The alleged breach was that the vendor falsely represented to the plaintiff that the Boston prices of those goods, Oct. 20, 1867, were $1,500, whereas in fact they were but $1,000. The representation was made by preparing and delivering an inventory to the plaintiff with prices affixed to the various articles, amounting in all to $1500. These should have been and were then supposed by Lord to be the Boston prices; but, after going into business, he discovered they were considerably above Boston prices in many instances.

The jury returned a verdict for the plaintiff, which the defendant moved to have set aside as against the law and the evidence.

Hale and *Emery*, for the plaintiff.

A Wiswell, for defendants.

APPLETON, C. J. This is a motion for a new trial. As no exceptions are taken to the instructions given, we must assume that they were correct and embraced all the questions of law arising in the case.

It seems the plaintiff on the twenty-eighth day of October, 1867, agreed to purchase of the defendants' intestate, Hezekiah Means, "the goods now in the (his) store, at the prices of said goods now in Boston, prices to be settled and delivery given on or before the tenth day of November next." A bill of the goods was made out by Means and settled for by the plaintiff. As the bill was made out by Means it was his duty truly to state the Boston prices as specified in the contract. The bill as made out was his representation of those prices. There was evidence tending to show that this bill did not truly represent the then Boston prices. The difference between the bill as made out by Means and the prices as stated by the plaintiff's witnesses as the then Boston prices, was so great that, with the other testimony, the jury must have found the setttlement and payment for the goods was made in consequence of his fraudulent representations as to prices. In that event, the

plaintiff without rescinding the contract, might maintain an action for money had and received, in which he would recover the difference between the price of the goods sold as stated in the bill, and the Boston prices of the same goods as they were at the time of the contract. *Cushing* v. *Rice*, 46 Maine, 303. This the jury seem to have done and no reason is perceived for disturbing their verdict. *Motion overruled.*

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

ALBERT NOYES and others *vs.* BENJAMIN J. STAPLES and others.

Vessels—when owners are liable for supplies.

In order to make the master of a vessel the owner *pro hac vice* under a contract for sailing her on shares, he must have the exclusive control for the time being; otherwise, the owners will be held liable for necessary supplies furnished the vessel on their credit.

ON EXCEPTIONS.

ASSUMPSIT for the balance due for a stove furnished by the plaintiffs to the schooner Golden Rule, Nov. 17, 1868, while in the port of Bangor. The case was referred to the court reserving the right to except. James Greenlow, then master of the Golden Rule, went to the plaintiffs' store and desired to purchase a stove upon credit, which request the plaintiffs at first declined to accede to; but, upon Capt. Greenlow's statements that his schooner was loaded with potatoes and ready to sail, but could not do so without a new stove, and that he had no funds of his owners in his hands, and that it would take ten or fifteen days to obtain a remittance from Swan's Island, where they lived, whereas he could sail with that tide if he had the stove, while the delay would be very damaging, they finally assented, put the stove on board and took the

old one, giving credit for its value, and this suit was to recover the unpaid balance of the price. After the stove was sent to the wharf Capt. Greenlow said if there were any place in Boston where he could make payment out of the freight money he should receive on arrival there it would be much more convenient for him to do so; accordingly he signed a paper of this tenor:

"$23.00 BANGOR, Nov. 17, 1868.

Value received I promise to pay Seavey & Co., Boston, twenty-three dollars on account of Albert Noyes & Co., Bangor, Maine.

JAMES GREENLOW.

Schooner Golden Rule of Swan's Island."

The stove never was paid for, nor was any demand ever made upon Greenlow for payment, he not calling upon Seavey & Co. while in Boston.

The defendants showed that Greenlow was only temporarily in charge of the schooner during the sickness of Benjamin J. Staples, her regular commander; that Greenlow's arrangement with them was that "while she was mackereling the owners manned and provisioned her and the captain had three per cent of the net stock, but while she was coasting the captain manned and provisioned her and had three-fifths of what the vessel stocked;" that the vessel had always been sailed on these terms; that they had made a final settlement with Greenlow and paid him for the stove, he representing that he had a receipt for it which he had mislaid or lost. The presiding justice ruled that the vessel being let to the master on shares the plaintiffs could not maintain this action and ordered a nonsuit. The plaintiffs excepted.

H. L. Mitchell, for plaintiffs.

The amount claimed is small, but an important principle of law is involved in this suit. He who supplies necessaries to a vessel has not only the security of the master and owners but of the specific ship. *Rich* v. *Coe*, Cowper's Reports, 636.

The master generally carries with him the authority and credit of the owners upon the ordinary principles of agency; and it is

only when he, as charterer, has the exclusive control and entire management of the vessel that this relation of agency ceases and he is deemed the owner *pro hac vice*. *Emery* v. *Hersey*, 4 Maine, 407; *Lyman* v. *Redman*, 23 Maine, 289; *Reeves* v. *Davis*, 1 A. & E. 312.

If the case be one of pressing necessity it is of no consequence that it arises in a home port. *Arthur* v. *Barton*, 4 M. & W. 188; Abbott on Shipping (Perkins' ed.), 178; *Johns* v. *Simons*, 2 A. & E. 424; *Stonehouse* v. *Gent*, 4 A. & E. 431.

The creditors used due diligence. Abbott on Shipping, 179; *Jordan* v. *Young*, 37 Maine, 276.

The document signed by Capt. Greenlow to be sent to Seavey & Co. was no settlement for the stove. *Trustees, etc., in Dutton* v. *Kendrick*, 12 Maine, 381, and cases there cited.

Peters & Wilson, for defendants.

The credit was given to the master; hence no charge of this stove was made on their books, they holding his note for it.

As Greenlow was sailing the craft on shares he was *pro hac vice* the owner of her. *Thompson* v. *Snow*, 4 Maine, 265; *Winsor* v. *Cutts*, 7 Maine, 261; *Williams* v. *Williams*, 23 Maine, 17; *Sproat* v. *Donnell*, 26 Maine, 185.

It makes no difference whether the contract of hiring be known to the parties furnishing the supplies or not. *Cutler* v. *Thurlo*, 20 Maine, 213; *McLellan* v. *Reed*, 35 Maine, 172. Nor how necessary the articles are. *Swanton* v. *Reed*, 35 Maine, 176; 5 Pick. 422; 6 Pick. 335; 12 Pick. 424; *James* v. *Bixby*, 11 Mass. 34.

DICKERSON, J. Assumpsit against the defendants, as owners of the schooner Golden Rule, for a stove sold and delivered to her master, for her use, and on their credit. The presiding judge ordered a nonsuit on the ground that the vessel was let to the master on shares.

The agreement between the master and owners was that the owners should man and provision her while she was mackereling,

and the master should have three per cent of her net stock, but while she was coasting the master should man and provision her and have three-fifths of what the vessel stocked. There was no provision in the agreement that the master should have the control of the vessel pending this arrangement, or that he should decide when she should be engaged in the mackereling and when in the coasting business.

In order to make the master of a vessel owner *pro hac vice*, under a contract for sailing her on shares, he must have the exclusive control of her for the time being. This principle runs through all the recent authorities. *Thompson* v. *Snow*, 4 Maine, 269; *Winsor* v. *Cutts*, 7 Maine, 261; *Lyman* v. *Redman*, 23 Maine, 289; *Bonzey* v. *Hodgkins*, 55 Maine, 98.

The other point made by the counsel for the defendants, that the credit was given to the master, is not sustained by the evidence. One of the plaintiffs testified that the stove was furnished on the credit of the owners, and that it would not have been furnished on the master's credit. There is no evidence in the case to control this testimony. The taking of the master's due bill was at his solicitation, and for his accommodation, without any purpose to change the credit originally given. *Paine* v. *Dwinel*, 53 Maine, 52. *Exceptions sustained.*

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

THOMAS NOWELL *vs.* JAMES H. TRIPP.

Collector's warrant—sufficient justification for acts done in obedience to it.

A collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from the assessors of his town, is protected against all illegalities but his own, even though the assessors had not, in fact, any jurisdiction over the person they assumed to tax.

The defendant, as collector of taxes for the town of Kennebunkport, acting under authority of the commitment and warrant delivered to him by the assessors of that town, arrested the defendant, who had removed to, and become a citizen of Bangor prior to the assessment of the tax against him for which he was arrested; it was *held* that trespass would not lie against the defendant for making the arrest.

ON EXCEPTIONS.

TRESPASS against the defendant for arresting the plaintiff at Kennebunkport, October 27, 1869, and holding him in custody. The defendant justified his action in the premises as a collector of taxes for that town, to whom the assessment lists for that year had been committed with a warrant for the collection of the taxes mentioned therein; alleging that, upon these lists, there was a tax against said Nowell, and that the warrant aforesaid authorized and directed the arrest of those refusing to pay the sums assessed against them, and that Nowell refused to pay his tax, and that the plaintiff, in his official capacity, arrested him to enforce collection of the same, and discharged him from custody so soon as he paid said tax. The tax was entirely upon personal property, nothing being assessed as upon any real estate of the defendant. It was conceded that the assessors were regularly chosen and qualified, and that the assessment and commitment and warrant were in due form and that the name of the plaintiff appeared upon the lists of taxes committed to the defendant for collection, and that said Tripp was the legally chosen and qualified collector of taxes of Kenne-

bunkport for that year (1869.) The single ruling of the presiding justice at *nisi prius* to which exception was taken, was his instruction to the jury "that said warrant afforded no legal justification of said officer, James H. Tripp, unless the jury should find that the house and domicil of the plaintiff was at said Kennebunkport at the time of the assessment of said tax, April 1, 1869." The jury must have found that Capt. Nowell was not then resident at Kennebunkport as they returned a verdict in his favor.

S. W. Luques for defendant.

All cases holding the collector liable if the party arrested was not an inhabitant of the taxing town assume to follow *Lord Amherst* v. *Lord Somers*, 2 D. & E., 372; and yet this question was not presented in that case.

If the assessors were not liable in assessing the tax, as they were declared not to be in *Baker* v. *Allen*, 21 Pick. 382, *a fortiori* the mere collector, acting under their direction is not. But if they are liable it does not follow that he is. He cannot question the legality of the assessment, or of the proceedings which preceded it. *Stetson* v. *Kempton*, 13 Mass. 283.

He is not to look beyond his process. *Thurston* v. *Adams*, 41 Maine, 419; *Gray* v. *Kimball*, 42 Maine, 307; *Clark* v. *May*, 2 Gray, 413; *Hayes* v. *Drake*, 6 Gray, 390; *Howard* v. *Procter*, 7 Gray, 198; R. S. of 1857, c. 6, § 84.

Howard & Cleaves and *Peters & Wilson*, for plaintiff.

The assessors of Kennebunkport having no jurisdiction to assess Capt. Nowell of Bangor upon his poll and personal property, their whole proceedings were void *ab initio* and their warrant conferred no authority upon the defendant to execute it. *Bowker* v. *Lowell*, 49 Maine, 429; 2 Bouv. Law Dict. Title, "Trespass," 7, 4; *Preston* v. *Boston*, 12 Pick. 12; 9 Bac. Ab. 446; *Thurston* v. *Martin*, 5 Mason, 497.

R. S. of 1857, c. 6, § 29, did not protect assessors who erroneously assessed one not an inhabitant of their town. *Freeman* v. *Kenney*, 15 Pick. 44; *Dickinson* v. *Billings*, 4 Gray, 42.

Then, if they are not protected, but are mere trespassers, so is one who obeys a direction they are not authorized to give.

WALTON J. It is the settled law of this State that a collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from the assessors, is protected against all illegalities but his own. *Judkins* v. *Reed*, 48 Maine, 386; *Caldwell* v. *Hawkins*, 40 Maine, 526; *Ford* v. *Clough*, 8 Maine, 342.

In the case last cited Mellen, C. J., says that a collector is not responsible for any irregularities on the part of others, antecedent to the commitment of the assessment to him for collection; that "his warrant is his protection against all illegality but his own."

The law is the same in Massachusetts. 10 Mass. 119; 13 Mass. 272; 19 Pick. 440; 5 Met. 362; 8 Met. 102; 6 Gray, 387; 7 Gray, 129; 102 Mass. 75.

In New Hampshire, in one case, the court held that in order to justify the seizure of property to enforce the payment of a tax, the collector must show that the tax was legally granted. *Cloutman* v. *Pike*, 7 N. H. 209. But the legislature at once interfered and corrected the error, by enacting a statute declaring that "collectors should not be liable for any irregularities of the town or the selectmen, nor for any cause whatever, except their own illegal conduct." *Kinsley* v. *Hall*, 9 N. H., 190.

So in New York, in one case, Mr. Justice Platt, declared the rule to be that "all subordinate officers are bound to see that those who command them act within the scope of their legal powers." *Suydam* v. *Keyes*, 13 Johnson, 444. But this opinion was afterwards reviewed by Mr. Justice Marcy, in a very full and able manner, and shown to be in conflict with the previous decisions in that state as well as contrary to reason and the fundamental principles of the common law; and the true rule was declared to be that "a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not, in fact, jurisdiction in the par-

ticular case, provided that on the face of the process it appears that the court has jurisdiction of the subject matter, and nothing appears in the same to apprise the officer but that the court also has jurisdiction of the person of the party affected by the process." *Savacool* v. *Boughton*, 5 Wendall, 171.

This is a leading case upon this branch of the law; and it has been approved and followed in a great variety of subsequent cases, not only in New York but in other States, and by the Supreme Court of the United States. See 16 Wend. 514, 563. And for the application of the principle to the protection of a collector of taxes, see 2 Denio, 86; 27 Barb. 34; 30 Barb. 618; 1 Selden (5 N. Y.), 376.

In one case tried before Judge Story, he ruled that a collector of taxes was liable for arresting one wrongfully taxed as an inhabitant. *Thurston* v. *Martin*, 5 Mason, 497.

But the supreme court of the United States, in a recent decision, have overruled the doctrine of that case. The court say that "whatever may have been the conflict at one time in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possesses jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued;" that a collector of taxes cannot revise, or refuse to enforce, the assessment; that his duties are pure-

ly ministerial; that the assessment, duly certified to him, is his authority to proceed; and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constitutes his protection; that the tax payer can no more complain of the collector who enforces a tax, on the ground that he was not liable to taxation, than a judgment debtor can complain of a sheriff who enforces an execution, on the ground that the court erred in finding that he was indebted to the plaintiff. *Erskine* v. *Holmbach*, 14 Wallace, 613.

We understand it to be conceded that if the assessors erroneously tax one as the owner of property, when in fact he is not the owner of it, the collector may, nevertheless, enforce payment of the tax with impunity.

But it is said that if the assessors erroneously tax one as an inhabitant, when in fact he was not an inhabitant, the collector will not be protected in collecting the tax. The distinction is sought to be maintained that in the one case the assessors have jurisdiction, and in the other not. In our judgment no such distinction can be maintained. It has no rational principle to rest upon. In determining what persons are to be taxed, the assessors are as clearly performing an official duty, one which they cannot legally escape from, as in determining what property is to be taxed; and there is no more reason for holding the collector responsible for an error in the one case than in the other.

Questions of domicile are among the most difficult which courts as well as town officers have to deal with; and yet such questions must be decided. It will not do to allow every one to escape taxation who can manage to leave his habitancy in doubt. And in a doubtful case if the assessors do not determine the question who will? Is there any other tribunal to whom it can be referred? Certainly not. The assessors must decide; and in doing so they are no more acting outside of their jurisdiction, than in determining what property shall be taxed. And in our judgment an error of the assessors in taxing one as an inhabitant of their town when, in fact, he was not an inhabitant, forms no exception to the rule

that a collector's warrant is his protection against all errors and illegalities but his own. His warrant is his protection against such an error, or illegality, as well as every other, committed by the assessors, provided the error does not appear upon the face of his warrant, nor in the list of assessments committed to him for collection. *Exceptions sustained.*

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

INHABITANTS OF ORONO *vs.* JOHN W. VEAZIE.

Taxes. Certainty required in description of land assessed.

An assessment of taxes upon land of a non-resident thus described, "2 acres of land, house, boom, and privileges, shore of lots one and two," is void for uncertainty in the description; nor is parol evidence admissible to identify the premises intended.

ON AGREED STATEMENT OF FACTS.

WRIT OF ENTRY to recover the possession of certain real estate in Orono, which originally belonged to the defendant and still belongs to him if it did not become the property of the plaintiffs under certain sales to them by the treasurer of their town for non-payment of taxes assessed on said premises as the property of the defendant, a non-resident, for the years 1857, 1858, 1859, and 1863. This case has been before the full court upon questions arising upon the construction of R. S., c. 6, § 145; *Orono* v. *Veazie*, 57 Maine, 519.

The question here presented was whether or not the description of the property as assessed and conveyed was sufficient. It was as follows: "2 acres of land, house, boom and privileges, shore of lots one and two."

The plaintiffs offered, if admissible, to show that the defendant,

at the date of the assessments and ever since, was the owner of so much of the easterly end of lots one and two on Penobscot River in Orono, according to Strong's plan and survey of said Orono, as would comprise two acres upon the shore of said lots upon said river, having thereon certain erections as described, being a short distance above defendant's mills in the town of Veazie; and that said plan is a recorded plan, well known, and one by which the assessments and conveyances in Orono have been usually made, and is the only general plan of said town.

If upon this case and proof of the facts above stated, if admissible in evidence, the description was insufficient to create a forfeiture by non-payment of the tax, and if the defendant could take the objection without paying or tendering any of the taxes, then the plaintiffs were to become non-suit; otherwise, the case was to stand for trial.

Peters & Wilson, for plaintiffs.

This description would be good in a writ, or in a deed. A conveyance of a "house" or "mill" *eo nomine* is good. A deed of an "acre off of, etc.," is good. *Grover* v. *Drummond*, 25 Maine, 185.

The description plainly means, "Two acres of land only, covered by house and boom, with privileges of the river adjoining, and is so much upon the shore of lots No. 1 and 2 as will make said two acres." No brief description could be much more intelligible. The testimony offered will show that nothing could be much plainer to the defendant; and the testimony is admissible as showing actual occupation and condition to explain the language of a description. *Treat* v. *Strickland*, 23 Maine, 234.

The word "shore" has a legal meaning; land between high and low water marks. 4 Hill, 375; 6 Cowen, 547.

Is or not the description good enough to require a tender of the taxes? See this case in 57 Maine, 517.

The very object of the statute was to avoid all questions of strictness till a tender was made.

J. S. Rowe, for defendant.

DICKERSON, J. Writ of entry for possession of certain real estate in Orono, sold to the plaintiffs by their treasurer on account of forfeiture for non-payment of taxes by the defendant, who was a non-resident owner of the premises.

The question presented involves the sufficiency of the description of the property, as assessed and conveyed, which was as follows: "2 acres of land, house, boom, and privileges, shore of lots one and two."

The description of the real estate assessed, in this class of cases, must be certain, or refer to something by which it can be made certain. *Adams* v. *Larrabee*, 46 Maine, 517; Blackwell on Tax Titles, 353; *Haven* v. *Cram*, 1 N. H. 93.

The description in this case does not conform to either of these requirements. It does not give any courses, distances, or monuments; nor does it refer to the ownership, occupation, or use of the premises, or any name or plan by which they may be identified. It affords no nucleus by which parol evidence may be legally available to render it certain or even probable where the "2 acres" are located upon the face of the earth, or what "house, boom, or shore" was intended. As the description is vague and uncertain upon its face, and affords no means by which it can be made certain by competent evidence *aliunde*, the assessment is void for uncertainty.

The defendant is not required to pay or tender payment of the "taxes, charges, and interest" until the plaintiff has made out a *prima facie* case. *Inhabitants of Orono* v. *Veazie*, 57 Maine, 519.

Plaintiffs nonsuit.

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

JOHN CASSIDY *vs.* CITY OF BANGOR.

Way—proceedings upon laying out by municipal officers.

In laying out or widening a way, in the exercise of the power granted by the sixth section of the city charter, the city council of Bangor need not conform to the prayer of the petition upon which such laying out or widening is made. The provision of R. S., c. 18, § 1, that the county commissioners shall comply substantially with the petition upon which they act, has no application in the case of ways laid out by municipal authority.

It is sufficient if the city council adopt measures suited to accomplish the end sought to be attained by the petitioners.

Orders passed at a meeting of the city council may be reconsidered and changed at an adjournment of the same meeting held upon a subsequent day.

A vote accepting a report made on the first day of such meeting may be reconsidered and the report recommitted with instructions at such adjourned meeting.

The city council of Bangor need not cause to be entered upon their records an adjudication that the widening of a way is of common convenience and necessity before they commit that subject to the consideration and action of the street engineers.

The fact that the notice required prior to an assessment of the damages occasioned in the laying out and altering of a way in Bangor was not given does not invalidate the action of the city council in establishing such laying out and widening; it only affects the assessment of damages.

The notice by publication of an intention to estimate the damages caused by the location and widening of a way in Bangor, according to the Act of 1835, § 1, amendatory of the city charter, relates to that subject only, and does not affect the general question of location.

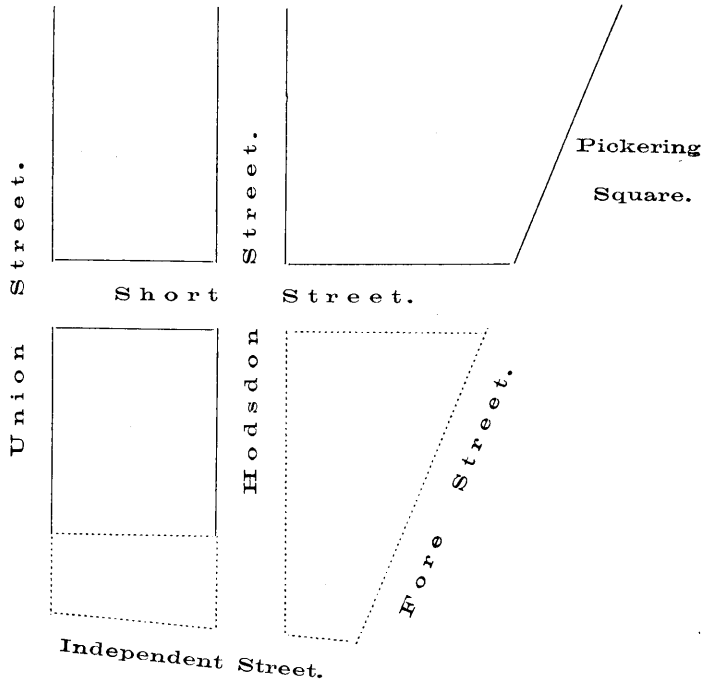
The city council of Bangor is a continuing body. If an assessment made by the council of one year is void, by reason of defective notice, the city council of the following year may order a new assessment of the damages occasioned by the location or widening of a way.

ON AGREED STATEMENT OF FACTS.

This was a petition for a writ of *certiorari* to bring before this court the record of the proceedings of the city council of Bangor in widening Pickering square and Independent street in that city, setting out the facts that, on the fifth day of May, 1870, Charles Hayward and other citizens presented to the city council a petition to have Union and Fore streets and Pickering square widened

in a manner particularly specified; that on the ninth day of May, 1870, Smith & Campell and others prayed the council "to enlarge Pickering square in the direction of Union street, by making room on each side of Fore street; that the city council, on the twenty-ninth day of September, 1870, ordered the street engineers to widen Pickering square in a designated way, which it is unnecessary to particularize; different, however, from the course ultimately pursued; that on the third day of November, 1870, the street engineers made to the city council their report of their proceedings under the order of Sept. 29th, which report was then accepted, and that meeting of the city council was adjourned to the eighteenth day of November, 1870, when their former action was reconsidered and the street engineers were ordered to lay out a widening of Pickering square by including in that square all the land lying between Short, Hodsdon, and Independent streets and Pickering square, and to widen Independent street by taking into it the lots adjoining it and lying between Hodsdon and Union streets. At a meeting of the city council, holden December 28, 1870, the street engineers reported that they had laid out a widening of Pickering square and Independent street, in conformity with the instructions last given them, first having given seven days' notice of their intention, and that they would estimate the damages caused by the laying out and widening by posting two written copies of such notice in public places and causing its publication in the *Bangor Daily Whig and Courier*. The city council, at a meeting held February 2d and 4th, 1871, accepted this report, though it differed essentially from the former one, and established by vote the laying out and widening therein made. This last location passed over the land of Mr. Cassidy who considers himself thereby aggrieved, contending that the change from the former report, once accepted, was very material and wholly unauthorized; that this last, so-called, "widening" was not, in fact, a widening of Pickering square at all, because none of the territory taken bounded upon it, but was all included between Short, Hodsdon, Independent, and Fore streets, as appears from

the diagram below, the land taken by the location and widening finally established being that enclosed within the dotted lines.



The petitioner claimed that his land had not been legally taken.

1. Because said proceedings were not in pursuance of the petition therefor.

2. Because the action of the city council of November 3, 1870, upon the report of the engineers of that date, was final and the vote of the 18th of November, reconsidering said action, was void.

3. Because the city council, before committing the subject-matter to the street engineers, did not adjudge the widening prayed for in either petition, or any widening, to be "of common convenience and necessity."

4. Because notice of their intention to widen, estimate, and apportion damages was not published in two newspapers in said city, and there was no assessment of betterments.

5. Because the report of the engineers of December 28, 1870, as made and accepted and recorded, contains an erroneous and impossible description of the enlargement of Pickering square.

The provisions of the city charter of Bangor applicable to the issues presented in this case are these:

"SEC. 6. *Be it further enacted*, That the city council shall have exclusive authority and power to lay out and establish any new street or public way, or widen or otherwise alter any street or public way of said city of Bangor, and to estimate the damage any individual may sustain thereby. And in all other respects the city council shall be governed by and be subject to the same rules and restrictions as are provided by the laws of this State, regulating the laying out and repairing streets and public highways." . . . A right of appeal as to damages only is given, these to be determined on appeal by a jury or committee.

The amendment to the city charter by Act of 1835 provided that . . . "before such assessment [of damages and betterments] shall be made, notice shall be given to all persons interested to appear before said city council at a time and place specified, if they see cause, then and there to be heard upon the subject, which notice shall be published in two newspapers printed in said city, at least one week prior to said time of hearing."

It was provided by a city ordinance that "there shall be elected by the city council, on the fourth Monday of March, annually, a board of street engineers, to consist of three citizens, of whom a member of the board of aldermen shall be one, and a member of the common council one, who shall be sworn faithfully to perform their duty, and who shall hold their office until others are chosen and sworn in their places. And whenever any citizen or citizens shall apply in writing to the city council to lay out, widen, or otherwise alter any public street, square, or highway, and the same shall be of common convenience and necessity, the said city council may commit the same to the board of street engineers, who, or the major part of whom, shall have authority to lay out, widen, or otherwise alter the same, and estimate the damage any

individual or individuals may sustain thereby, and shall apportion the damages so estimated upon such lots or parcels of land adjacent to and bounded on such street, square, or highway as may be benefitted or made more valuable by such laying out, widening, or altering, according to the provisions of 'an act in addition to an act to incorporate the city of Bangor,' subject to the revision and determination of the city council in all cases."

The presiding judge at *nisi prius* ruled *pro forma* that the writ of *certiorari* must be denied, as matter of law. The petitioner excepted, and it was agreed that this court should determine whether or not upon the records and facts the writ ought to issue.

John Varney, for petitioner.

The "rules and restrictions" referred to in the city charter, § 6, are those found in R. S., c. 18. *Preble* v. *Portland*, 45 Maine, 241.

1. The petitions should have been followed. It was formerly held that no petition was necessary to authorize municipal officers to lay out a way. *Howard* v. *Hutchinson*, 10 Maine, 335. Thereupon the legislature amended the law and expressly required proceedings to be initiated by petition. R. S., c. 18, § 18. So, our city ordinances require an application in writing. Certainly, then, the council should conform somewhat to its prayer. It has been repeatedly held that upon a petition for altering and widening a new location is unauthorized. In the present case the city council entirely disregarded the prayer of the petitions.

2. The ultimate action of the council was unauthorized because it had already, to wit, Nov. 3, 1870, acted finally upon the subject-matter and accepted the engineers' report then made. R. S., c. 18, § 20. By the vote of acceptance the land was then taken so as to subject the city to damages. *Loring* v. *Boston*, 12 Gray, 209; *Harrington* v. *Co. Commrs.*, 22 Pick. 263; *Hallock* v. *Franklin*, 2 Met. 558; *Shaw* v. *Boston*, 5 Allen, 538; *Getchell* v. *Wells*, 45 Maine, 443. The rights of third parties had thus intervened to prevent reconsideration. The way was established.

3. Under the ordinance the city council should have adjudicated the widening to be of common convenience and necessity before committing it to the street engineers.

4. The notice should have been published in two newspapers. See Act of 1835, § 1.

5. The new council had no right to commence *de novo* and make a new assessment.

6. It is doing violence to language to call the final action of the council a widening of Pickering square!

H. C. Goodenow, city solicitor, for respondent.

The proceedings for establishing the way and those for estimating damages are distinct and severable. The former were closed Feb. 4, 1871; the latter had to be subsequently completed, owing to defect of notice given. *Minot* v. *Cumb. Co. Commrs.*, 28 Maine, 121; *Com.* v. *Bluehill*, 5 Mass. 420; *Com.* v. *Derby*, 13 Mass. 433; *Com* v. *West Boston*, 13 Pick. 195; *Nichols* v *Bridgeport*, 23 Conn. 189.

DICKERSON, J. The petition calls in question the validity of the doings of the city council of Bangor, of Feb. 2d and 4th, 1871, in widening Pickering square and Independent street. The presiding justice, on a hearing of the case, denied the writ, as matter of law, and the plaintiff excepted. Several errors are assigned.

1. The petition alleges that "the laying out and widening" were not in accordance with any petition therefor. The proceedings of the city council were had upon two petitions, one praying for "an enlargement of area to accommodate market teams . . . by widening Union and Fore streets and Pickering square," and the other that "Pickering square be enlarged in the direction of Union street." The city council widened Pickering square and Independent street.

While the statute requires the county commissioners, in the location of highways, "to conform substantially to the description [in the petition] without adhering strictly to its limits," it con-

tains no such limitation of the powers of municipal officers in locating town and private ways. R. S., c. 18, §§ 1, 18.

By examining the petitions and the plan of the street engineers, it is obvious that the chief object of the petitioners was the enlargement of Pickering square in the direction of Union street. The petitioners having called the attention of the city council to the necessity for better accommodations for the public travel in that locality, it belonged to the latter to devise the best mode of securing this object. The petitioners might suggest a plan for doing this, but that would by no means be conclusive upon the city council; the petitioners cannot supersede the discretion of the city council by interposing their own. The petition gives the city council jurisdiction over the whole subject-matter, and it is their province to determine what changes, if any, are needed, and the manner of making them. The city council widened Pickering square by including therein all the land lying between Hodsdon, Short, and Independent streets and Pickering square as then existing. While this change did not, in terms, widen Union and Fore streets, as prayed for in one of the petitions, it had that effect practically, by throwing the whole space between Fore and Hodsdon streets open to the public accommodation. So, also, the widening of Independent street largely increased the space available for public use on a considerable portion of Union street. When the main object of the petitioners, the widening of Pickering square, was accomplished by these changes, it would establish a dangerous precedent to hold that the doings of the city council are invalid because Union and Fore streets were not widened, which was prayed for, or because Independent street was widened, which was not prayed for. In such cases much must be left to the discretion of the municipal authority, and in the case at bar there is nothing to show that there was an abuse of such discretion.

2. It is contended that the doings of the city council of Feb. 2d and 4th, 1871, cannot be sustained because the proceedings under the petitions were finally closed on Nov. 3, 1870. The

record shows that on that day the city council accepted the report of the street engineers, laying out and widening Pickering square and Fore and Independent streets; and it also shows that that meeting was adjourned to Nov. 17, 1870, when the vote accepting that report was reconsidered, and new instructions were issued to the street engineers touching the same subject. It was upon the report of the street engineers, made in accordance with these instructions, that the proceedings of Feb. 2d and 4th, 1871, were had.

The adjournment was carried for the declared purpose of the further consideration of the subject under consideration, to wit, the report of the street engineers. The adjournment, under these circumstances, carried with it the whole subject under consideration when it took place, and gave to the meeting of Nov. 18, 1870, the same power to do what it might have done on Nov. 3, 1870; the latter meeting was simply a continuation of the former one. When the declared purpose of the adjournment is considered, in connection with the subsequent doings, the adjournment itself may be regarded as interpreting the action of the city council in accepting the engineers' report on Nov. 3, 1870, and showing that the city council, by such acceptance, intended to bring the subject before them, and not to adopt and establish the laying out and widening as set forth in the report. It was competent, moreover, for the city council, at their meeting on Nov. 3, 1870, as a necessary incident of their authority over the subject, to reconsider any vote passed at that meeting, and as the meeting of Nov. 18, 1870, was a continuation of the meeting of Nov. 3d, it was also competent for them, on that day, to reconsider the vote they passed touching this matter at the previous session of Nov. 3d.

Besides, the report of the street engineers made Nov. 3, 1870, is lost, was never recorded as required by the city ordinance, and there is no plan or survey by which to determine with certainty what was embraced therein, as is also required by an ordinance of the city. The only record evidence of any alteration in the lines of the streets under the petitions is the following: "Report of

street engineers of their laying out and widening Pickering square and Fore and Independent streets accepted." At what particular points the alterations in the lines of those streets and that square began and ended, and in what directions they extended, cannot now be determined by any monuments, courses, or distances. It is obvious that the record is insufficient to establish any valid laying out or widening of any streets or square by the proceedings of the city council of Nov. 3, 1870.

3. The next objection is that the records do not show that the city council adjudged the widening to be of "common convenience and necessity" before they proceeded to make the alteration. The city ordinance referred to, § 1, provides that "whenever any citizen or citizens shall apply in writing to the city council to lay out, widen, or otherwise alter any public street, square, or highway, and the same shall be of common convenience and necessity, the said city council may commit the same to the board of street engineers," who are required to make a report of their doings therein, "subject to the revision and determination of the city council." This ordinance does not, in terms, require that the city council shall first adjudicate upon the question of "common convenience and necessity" before they commit the subject to the street engineers, and that such adjudication shall be recorded. It is, therefore, open to construction upon this point. Unlike county commissioners, the city council, ordinarily, do not make a careful personal examination of the locality, but intrust that duty to the street engineers; and, if they do, they may not be prepared to adjudicate finally upon the question of "common convenience and necessity" until they have received the report of the engineers. Indeed, they cannot, ordinarily, form an intelligent judgment until they have seen that report. It is, then, only that the city council are in the situation required of the county commissioners when they are authorized to adjudicate upon this question. R. S., c. 18, § 4. Their preliminary decision upon this point must necessarily be made upon an imperfect knowledge of the facts, and need not appear formally of record. The commitment of the subject to

the street engineers is sufficient evidence of such preliminary adjudication when, as in this case, the record shows that the city council, upon receipt and acceptance of the report of the engineers, adjudged "the widening so laid out by them of common convenience and necessity."

4. It is further contended that the engineers did not give the requisite notice prior to making their survey and report of Feb. 2, 1871. While the counsel for the defendants admits that the notice given was insufficient, he argues that this does not vitiate the doings of the city council in adopting and establishing the laying out and widening reported by the engineers, as such notice relates only to the subject of damages.

This raises the question whether the laying out, etc., and the estimation and apportionment of the damages are an entirety or distinct and independent acts; whether the former may be upheld and the latter declared void, or whether both must stand or fall together. It is obvious that the two acts are not necessarily interdependent, there being nothing in their nature requiring them to be done at the same time or by the same tribunal. If they are an entirety they must be made so by statute. The notice required by the Act of 1835, § 1, amendatory of the city charter, relates exclusively to the subject of damages. While the city council may make the required location without giving that notice, it has no authority to make the assessments without giving it. The act of laying out, etc., and the estimation and apportionment of damages are distinct and independent acts, so far as the notice is concerned; the former may be sustained and the latter held void.

This seems to have been the view of the city council, at the time, as they directed the proper notice to be given on the day they adopted and established "the laying out and widening" complained of, in accordance with which order a new estimate and apportionment of damages were made in substantial compliance with the requirements of law.

We see no objection to these proceedings. The first assessment being void, it was not necessary for the city council to reconsider

their vote in relation to it. Though the second assessment may have been made by different persons from those who made the location, it was made by members of the city council, who had the same authority to act upon that question that their predecessors would have had if they had finished the business during their term of office. For this purpose the city council must be regarded as a continuing board.

The fifth objection to the validity of the doings of the city council has been considered in connection with the first.

Exceptions overruled.

Writ denied.

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

CARLTON S. BRAGG and others *vs.* PARKER P. BURLEIGH.

Reserved lands—right to cut timber and grass thereon.

The provisions of the R. S. of 1857, c. 5, § 11, authorizing the land agents to sell the right to cut timber and grass growing upon all townships "until they are organized," is to be construed as terminating that right whenever any organization of the township, whether for election or plantation purposes, is perfected.

Nor can the land agent, by any form of language employed in his deed to the purchaser, extend the right to cut beyond the time of an organization of the township, for either purpose.

Where such deed professed to convey the right to cut till a township was organized for plantation purposes, it was nevertheless held that the right expired upon an organization of the township for election purposes.

ON REPORT.

REPLEVIN for certain logs cut in the winter of 1869 on the public lots reserved by the State in the east half of township No. 2, Range 5, W. E. L. S. The writ was dated June 11, 1869.

The plaintiffs claim title to the logs under a deed from the State, by B. W. Norris, then land agent, dated Dec. 26, 1862, to Davis R. Stockwell of the right to cut timber and grass upon the reserved land mentioned above, "until the said township or tract shall be incorporated, or organized for plantation purposes, and no longer."

The defendant, who was land agent at the time of the alleged trespass and has been ever since, contended that such right had ceased by reason of the organization of the township into a plantation by the name of "Silver Ridge," and that the plaintiffs were trespassers in cutting after that, and seized the logs in behalf of the State, under the authority and order of the governor and council, as trespass timber. There was no question but that the organization of Silver Ridge as a plantation for election purposes, was regular and sufficient for the end contemplated.

If the plaintiffs were authorized to cut after the township was organized for election purposes the defendant was to be defaulted; but if they could not justify under their deed the cutting after such organization, the case was to stand for trial that evidence might be introduced to show that certain of the logs replevied were not taken from the reserved lands aforesaid.

The case was elaborately argued by *Peters & Wilson* for the plaintiffs and by *A. W. Paine* for defendant, but as the R. S. of 1871, c. 5, § 12, confers upon the land agent the right to sell the timber and grass until the township is "incorporated into a town," the main point of their discussion has become immaterial, and is omitted.

Dickerson, J. Replevin for certain logs cut on the public lot reserved by the State on the east half of township No. 2, Range 5, W. E. L. S., in the winter of 1869. The plaintiffs claim title to the logs under a deed from the land agent, to Davis R. Stockwell of the right to cut timber and grass on said public lot, dated Dec. 22, 1862. It is admitted that the plaintiffs' title is good unless the right to cut under that deed had ceased before the cutting, by reason of the organization of the township into a plantation by the name of "Silver Ridge."

No question is made as to the validity of that organization for election purposes, the same having been legalized by the legislature. Special Laws of 1868, c. 570.

The plaintiffs' deed purports to give "the right to cut and carry away the timber and grass from the reserved lots," including the lot on which the logs in controversy were cut, "to continue until the said township or tract shall be incorporated, or organized into a plantation for plantation purposes." The authority of the land agent to give the deed is conferred by statute. He cannot exceed that authority by any recitals in his deed. The court, and not the land agent, are to give construction to the statute. The words, "for plantation purposes" contained in the deed, but not found in the statute, do not enlarge the plaintiffs' rights under their deed.

If the statute applies only to that class of plantations, the plaintiffs' rights would be complete without these words; if it does not their introduction into the deed does not restrict the rights of the parties to that kind of organization.

Nor does c. 135 of the public laws of 1870 amendatory of R. S. 1857, c. 5, § 11, affect the rights of the parties in this suit. It was passed after the litigation was commenced, does not purport to have a retrospective effect, and gives additional authority and new rights to the grantees in such cases.

The land agent's powers in such cases are given in R. S. of 1857, c. 5, § 11, which is as follows: "The land agent shall have the care of the reserved lands in all townships or tracts until they are incorporated or organized into plantations, and the fee becomes vested in the town, or is otherwise parted with. He may from time to time sell the timber and grass thereon, or the right to cut the same, for cash, except the grass growing on improvements made by an actual settler until so incorporated, or organized."

Did the contingency contemplated by the statute for terminating the plaintiffs' rights under their deed, arise when the township upon which the logs were cut was organized into the plantation of Silver Ridge?

Whether such contingency then occurred depends upon the con-

struction of the words, "organized into plantations," used in the statute. Does the word, "plantations," as there used, mean any plantation organized upon the township or tract on which the reserved lot is located? Or does it mean plantations organized in a particular mode, or for particular purposes? If the latter, what kind of plantations was intended, those organized for election or those organized for other purposes? The language of section 11 is general and may include both these classes of plantations. If, therefore, the statute is to be restricted to one particular kind of plantations, such intendment is to be ascertained by construction. According to well established rules of interpretation, the meaning of a statute is to be sought first of all in the words and language employed. When these are free from ambiguity, and clearly express the intent of the legislature, it is not allowable to resort to a subtle and forced construction in order to restrict or extend the meaning. The court will not undertake to interpret what is too plain to need interpretation.

The language of section eleven is clear and explicit. The care of the land agent over the reserved lands in all townships or tracts continues "until they are incorporated or organized into plantations, and the fee becomes vested in the town, or is otherwise parted with;" and his authority to sell the timber and grass thereon, or the right to cut the same, ceases upon their being "so incorporated or organized." There is nothing in this section to indicate that one kind of plantations and not another was intended. In the absence of any other statute provisions upon this subject, there can be no question but this provision embraces plantations organized for election purposes, as well as plantations organized for other purposes.

But the meaning of a statute is to be ascertained, not from a single section, or provision of it, but from an examination and comparison of all its provisions upon the subject-matter under consideration. Sections 12, 13, 14, and 15 immediately following section 11, contain important provisions. The land agent is required to keep an account, with each township and tract, of his receipts and

disbursements, and pay the balance over to the State treasurer, who is to keep the same until such township or tract is authorized by law to receive it. The money arising from the sale of timber and grass is set aside as a fund for school purposes; and provision is made that "the interest shall be added to the principal of such fund, until the inhabitants of such township or tract are incorporated into a town, or organized as a plantation for election or other purposes."

By these provisions plantations organized for election purposes are placed upon the same footing with plantations organized for other purposes, in respect to their right to share the benefits of the fund arising from the sale of grass and timber cut upon the public lots, while they were unorganized. So far from discriminating against the former class of plantations and in favor of the latter, the statute mentions "plantations organized for election purposes" first. Sections 12, 13, 14, and 15 furnish a key to the meaning of the words "organized into plantations," used in section 11, if any such was needed, and exclude the construction that they mean only plantations organized for other than election purposes. It is the fact of the organization of a township or tract containing reserved lots into a plantation, and not the purposes for which it is so organized, that terminates the land agent's authority to sell the timber and grass on the public lots. The moment such organization is effected according to law, whatever be its purpose or mode of organization, that same moment the land agent's authority to sell such timber and grass, or the right to cut the same, ceases. Nor can he by his deed, bearing date previous to such organization convey the right to operate upon the reserved lots after such organization has been effected.

In the two chapters of the R. S. of 1857, next preceding that which contains the sections we have considered, provision is made for organizing unincorporated townships and tracts of land into plantations for election and other purposes; and the powers and duties of these respective classes of plantations are defined. Such organizations are known and recognized, not only in those chap-

ters, but in other parts of the revision of 1857, by the general name of plantations, irrespective of the mode of their organization, or their purposes, powers, or duties. Neither organization has the exclusive right to appropriate to itself alone, the name of a plantation, or to assert a paramount claim to that appellation; on the contrary the title to plantationship is equally the right of both. If, therefore, in the next succeeding chapter of the Revised Statutes the words, "organized into plantations," are used without anything to define, limit, or qualify their meaning, they must be held to mean all plantations organized according to law. There is neither reason nor authority for holding that one class of organized plantations is intended and not another.

If we pass from the statutes to reason and public policy, we shall find that these lend their sanction to the view we have taken. Whatever provisions may have been previously made in respect to the reserved lands or the avails thereof, at the time of the enactment in question they were exclusively set apart for the cause of education and the support of schools. Plantations organized for election purposes, no less than plantations organized for plantation purposes, are vested with important powers, and required to perform grave duties. They are required to hold annual meetings for the choice of assessors, clerk, surveyors of lumber, fence-viewers, and constables. They have authority to raise money for the support of the poor, and have the same powers and duties as towns for the formation of school-districts, building school-houses, and supporting schools. R. S. of 1857, c. 4, § 71, c. 24, § 37, c. 11, § 59. They thus have the same necessity for, and the same power to appropriate, a share of this fund for the purposes for which it is specially designed and set apart by law, as plantations organized for more general purposes. Neither class of plantations can appropriate any part of this fund for any other purpose than the cause of education. Why then should the inhabitants of one organization be admitted as beneficiaries of this fund, to the exclusion of the inhabitants of the other organization? What object could the legislatures have had in making such discrimination?

Both classes of plantations are but incipient schools, preparatory to a town organization, which it is competent for each to enter upon without having passed through the ordeal of any other state of pupilage. Indeed participation in this fund would seem to be a substantial prerequisite for qualifying the inhabitants of a plantation for discharging the graver duties, and fulfilling the higher responsibilities of a town organization.

The intention of the legislature to include plantations organized for election purposes among the beneficiaries of the reservations upon the public lots, is so clear and unambiguous as almost to excite surprise that a contrary opinion should ever have been entertained. It is not improbable, however, that the mistake of the land agent in providing in his deed that the rights of the grantee should continue "until the said township or tract . . . should be organized for plantation purposes," originated in the misapprehension that the revised statutes of 1857, re-enacted the previously existing provisions of the statutes upon this subject; a misapprehension not likely to be corrected or complained of by the grantees. The prior statute limited the rights of the grantee to the organization of the township or tract "for plantation purposes," but the revised statutes established a different limit, to wit: the organization of the township or tract into a plantation; thus, for the beneficiaries of these lots, abolishing the distinction between plantations organized for election purposes, and plantations organized for plantation purposes.

The legislation of the State upon this subject prior to the revision of 1857 changed several times, sometimes admitting plantations organized for election purposes to the benefit of this limitation, and sometimes excluding them therefrom, according, it would seem, as the influence or interests of the settlers, or of the lumbermen controlled the action of the legislature. The eminent jurist who had charge of the revision of the statutes of 1857, could not have been ignorant of the history of this legislation, or the causes that gave rise to such legislative vacillation. He was too well versed in lexicography, as well as judicial lore, not to understand

the meaning of language, or the legal effect of changing the phraseology of a statute. Nor was he accustomed to change such phraseology without a purpose. He omitted the words "for plantation purposes" in the revised code of 1857, the manifest purpose and legal effect of which, in connection with the other language used in the revision, are to restore the inhabitants of plantations, organized for election purposes, to the rights they enjoyed in an earlier period of the legislation upon this subject. And yet it is gravely and ingeniously argued by the learned counsel for the plaintiffs that the statute means the same without as with these words. In other words, this court is called upon to find a distinction by construction where the legislature has abolished it in fact. We cannot adopt the learned counsel's construction of the statute without committing an act of judicial legislation, as repugnant to our inclination as it is incompatible with our duty. The legislature have said what they mean, and it is not for the court to say that they mean something different from what they have said.

This is not a case where either necessity or public policy invokes the court to interpose its powers of construction at the extreme limits of its authority. Far from it. The plaintiffs are presumed to know the law. They took their deed under the law, and must be content with what the law gives them. The legislature, and not this court, is the tribunal for hearing and deciding upon the equities of the plaintiffs' case, if any they have to present. This court, at least, will take care that they do not despoil the beneficiaries of this limitation of the land agent's authority, guaranteed to them by the plighted faith of the State.

Case to stand for trial.

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

GEORGE M. WESTON, in equity, *vs.* SAMUEL H. BLAKE and others.

Demurrer. Multifariousness.

A general demurrer to a bill in equity will not be sustained for want of parties when it appears that the bill relates to several distinct contracts and that as to some of them there is no apparent want of parties, although as to others parties who should have been joined are omitted. If the respondent would avail himself of this objection he should answer so much of the bill as makes a case, with proper parties, and demur only to the residue. A bill is multifarious only when it joins causes of relief so separate and distinct in their nature that they ought not to be joined.

BILL IN EQUITY.

George M. Weston complains in this bill that he has been for many years largely engaged in the purchase and ownership of timber lands and other real estate, severally and jointly with Dudley F. Leavitt, one of the defendants, employing more capital than was possessed by himself and Leavitt, obtaining such additional means of Blake, the other defendant, a capitalist, whose business it was to make loans on security; that Blake's loans to him, individually and jointly with Leavitt, were so large and frequent that he had notoriously become their general banker, and a very large amount of valuable real estate had, by the complainant and by Weston and Leavitt, been transferred to and put into the hands of Blake, who usually gave a writing back to convey to the order of Weston, or of Weston and Leavitt (as the case might be), on the payment to him of designated sums at times therein specified; but that, in every instance, and in and by his usual course of dealing, Blake had agreed to waive strict performance on the day stated, and declared that between them time should never be considered as of the essence of their contracts, which the complainant alleged would fully appear by the accounts pre-

viously adjusted between them, of which copies were annexed to the bill; that, in some instances, so great confidence was reposed in Blake, that they caused lands by them purchased to be conveyed directly to him, taking no writing, but he simply charged them in account with the amount loaned to make the purchase, and credited the proceeds of lots and timber sold therefrom and conveyed by him as they directed or requested; that the title to property had sometimes been allowed to remain in Blake after the loans which it was originally taken to secure had been fully paid. The complainant then stated the particulars of sixteen conveyances of large tracts of valuable land, timber, and grass to Blake as security for loans and advances, an equitable interest in which lands, etc., belonged to Weston and to Weston and Leavitt, and averred that he had demanded of Blake an account of all his claims against the complainant and against Weston and Leavitt and a specific statement of the balance due of the sum or loan charged to each separate tract or conveyance of land held by him in trust as aforesaid, which account said Blake refused to render. Leavitt declined to be a party to the complaint and was, therefore, made a party defendant. No other person than these three was made party to these proceedings, though it was stated in the bill that one of Blake's written agreements, relied upon and annexed to the bill, was to convey 33,899 acres of land to Nathan Weston and Reuben S. Prescott, and no assignment to the complainant of Prescott's interest was alleged, but it was said that Nathan Weston represented George M. Weston's interest therein and had subsequently assigned all his claim to said lands, or to a conveyance thereof, to said George. It also appeared that other persons had an interest or lien upon several of the other tracts referred to in the bill and in regard to which relief was prayed. The respondents demurred generally and assigned as causes of demurrer, want of parties, and that the bill was multifarious.

Peters & Wilson appeared for Leavitt, but before argument his interest was so adjusted that the bill was dismissed as to him by consent of all parties.

Charles P. Stetson, for Blake.

1. Want of parties may be taken advantage of on demurrer. All persons interested in the relief sought must be made parties. Adams' Eq. 698 [*312]. Therefore Prescott and those having any interest in or claim on the lots should have been joined as defendants. Adams' Eq. 709 [*317], note 2 (3d Am. ed.); Story's Eq. Jur. § 1526.

2. The bill is multifarious. It sets out and prays relief upon contracts made by Blake with Weston alone, with Weston and Leavitt, and with them and other persons.

3. There has been no tender of any sum to Blake. *Maynard* v. *Tabor*, 53 Maine, 511.

4. If payment were not demanded on the designated day, the waiver was only for a reasonable time, which has long since elapsed, as appears by the agreements annexed to and made part of the bill. *Litchfield* v. *Litchfield*, 49 Maine, 107.

5. Such of the contracts as were not in writing are not within the equity powers of the court. *Patterson* v. *Yeaton*, 47 Maine, 308.

George M. Weston, pro se.

Defendants' demurrer admits all the facts alleged and it must stand or fall as a whole. It cannot be good as to what it covers and bad as to the rest. *Burns* v. *Hobbs*, 29 Maine, 273; *Robinson* v. *Guild*, 12 Met. 323; *Hawkins* v. *Clement*, 15 Mich. 511.

It must appear that no substantial claim of the complainant is within the jurisdiction of the court. *Boston W. P. Co* v. *B. & W. R. R. Co.* 16 Pick. 512; *Dimmock* v. *Bixby*, 20 Pick. 368.

A demurrer to the whole bill, where any of the matters are relievable, is only good for multifariousness. *Livingston* v. *Story*, 9 Peters, 658; *Goodrich* v. *Staples*, 2 Cush. 261; *Conant* v. *Warren*, 6 Gray, 562; cases above cited.

The subjects of this bill are all alike and within one or all of paragraphs 1, 2, 3, 4, 6, and 8 of R. S., c. 77, § 8.

It seeks to redeem equitable mortgages. *K. & P. R. R.* v. *P. & K. R. R.* 54 Maine, 173. From civil forfeitures. *Hill* v.

Fisher, 34 Maine, 143. To compel specific performance. *Stearns* v. *Hubbard*, 8 Maine, 320. Relief in a case of fraud and trusts. *Linscott* v. *Buck*, 33 Maine, 530. An adjustment of accounts between part owners. *Reed* v. *Johnson*, 24 Maine, 322. And discovery in support of all these objects. *Russ* v. *Wilson*, 22 Maine, 207; Story's Eq. Pl. 312; *Foss* v. *Haynes*, 31 Maine, 89; *Fisher* v. *Shaw*, 42 Maine, 32; *Snowman* v. *Hartford*, 55 Maine, 197.

As to the charge of being multifarious. This rests in the discretion of the court. 54 Maine, 173. A matter concerning which one continuous story can be told should be contained in one bill, if possible. Story's Eq. Pl. §§ 287, 530 note 1, 539, 747.

At common law to sue a hundred different promissory notes against the same party, in as many actions, would be held oppressive. *Somes* v. *Skinner*, 16 Mass. 348. If this be so as to matters to be tried by a jury, certainly it is true of equity proceedings. This bill relates entirely to connected matters in every one of which Blake is interested; hence it is not multifarious. 31 Maine, 81; 54 Maine, 173; *Sawyer* v. *Noble*, 55 Maine, 227; *Atty. General* v, *Merc. Tailors*, 5 Sim. 288, and 1 M. & K. 189; *Robinson* v. *Guild*, 12 Met. 323; *Way* v. *Bregan*, 1 Maine, 223; *Fitch* v. *Creighton*, 24 Howard, 159; Story's Eq. Pl. § 271, and cases cited; *Oliver* v. *Piatt*, 3 Howard, 311; *Coleman* v. *Barnes*, 5 Allen, 376; *People* v. *Morrill*, 26 Cal. 336; *Bowen* v. *Kerseeker*, 9 Iowa, 422.

Walton, J. This is a bill in equity to which the defendants have severally demurred. In support of the demurrer several grounds are relied on.

1. It is said that there is a want of proper parties. Several distinct contracts are set out in the bill, and with respect to some of these there is an apparent want of proper parties, but with respect to others no such defect is apparent. In such a case a general demurrer to the whole bill cannot be sustained. To sustain such a demurrer it must appear that there is no part of the bill which ought to be answered. The rule is substantially the same

as in actions at law. If a writ contains good counts and bad counts a general demurrer to the whole declaration cannot be sustained. The defendant should plead to the good counts and demur only to the bad ones. So in equity. If the bill is good in part and bad in part the defendant should answer that which is good and demur only to that which is bad. If he demurs to the whole bill his demurrer cannot be sustained. In this case it is clear that the demurrers are too broad. If the defective portions of the bill—we mean those portions with respect to which there is an apparent want of proper parties—were all stricken out, enough would still remain to call for an answer. The demurrers cannot, therefore, be sustained on the ground of the want of proper parties.

2. It is said that the bill is multifarious. We think not. A bill is multifarious only when separate and distinct causes of relief are joined which ought not to be joined. This seldom happens; hence the objection that a bill is multifarious is not often sustained. We think there is no such misjoinder in this bill. On the contrary, we think the defendants might well have complained if each distinct contract mentioned in the bill had been made the ground of a separate suit. The demurrers are not sustained, therefore, on the ground that the bill is multifarious.

3. It is said that there is a want of equity—that is, assuming that all the allegations in the plaintiff's bill are true, they do not make out a *prima facie* case for relief. Among other grounds taken in support of this objection it is said that there is no averment of a tender of the amount due the defendant, Blake. The time has not arrived for discussing the merits of the case. It is enough to say that in the opinion of the court the bill contains matter which ought to be answered.

Our conclusion, therefore, is that the demurrers must be overruled and that the defendants must answer further.

Demurrers overruled.

Defendants to answer further.

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

WILLIAM H. PARSONS *vs.* THE CITY OF BANGOR.

Domicil.

To constitute a change of domicil there must be a concurrence of the intention to make, and the fact of making, such change.

On the 30th of March, a person, who had previously disposed of the greater portion of his furniture and his other personal property, paid his bill at the public house in Bangor, at which he had been boarding with his wife for several years, left that city and upon the first day of April arrived at New York, engaged a boarding place and went into business there in pursuance of an agreement entered into some time before; it being arranged that his wife should follow him as soon as a boarding place was obtained. *Held*, that such person was not liable to taxation in Bangor on the first day of April.

The acts and intentions of the wife do not affect the domicil of the husband.

ON REPORT.

ASSUMPSIT for money had and received to recover a poll and personal tax amounting to $439.80, assessed to the plaintiff by the defendant, for the year 1867, and paid by plaintiff on arrest therefor.

The facts are fully stated in the opinion.

F. A. Wilson, for plaintiff.

H. C. Goodenow, for defendants.

APPLETON, C. J. The plaintiff sues to recover a sum of money paid under arrest to discharge a tax, which he says was unlawfully assessed upon his poll and personal property in 1867, after he had ceased to be an inhabitant of Bangor. It was admitted that the tax was legally assessed and collected if plaintiff was an inhabitant of Bangor April 1, 1867.

At the trial he rested his case upon his own testimony, which in substance was as follows: that he now resides in Brooklyn; that

he resided in Bangor from 1835 to 1867, boarding the last four years of his residence there, with his wife, at the Bangor house, where the rooms they occupied were partially furnished by him; that he resigned his office as cashier of a bank in the city about the middle of March, 1867, in pursuance of an arrangement made the month preceding to take effect April 1st, to go into business in New York City as one of a firm of which his brother-in-law, a resident of Medford, Mass., was to be a member; that he sold a lot in Bangor upon which he had once intended to build, but had not; that he disposed of all his real estate in the city; that he sold his bank stock and vessel property, and some of the remnants of furniture, which he had stored when he gave up housekeeping in 1863; that he made a conditional sale of his horse because he did not know whether he should want to take him or not, and a like conditional sale of his carriage; that he afterwards took them back and had them sent to Massachusetts in the course of the summer. He says at first that he sold all his furniture, that he did not want to move, before going himself, as hereinafter stated, but afterwards admits that some of it might have been sold afterwards. What was finally removed (bedding, pictures, books, and some few articles of furniture) was sent sometime in the summer, not to New York but to Lexington, Mass., where he fixed his residence the following autumn.

On Saturday morning March 30, he settled his bill at the Bangor House, and, as he says, surrendered his rooms, but said to the landlord that if his wife could retain them for a few weeks she would like to do so; and taking with him nothing but his wearing apparel he started for New York where he arrived Monday morning, April 1, 1867, engaged board and commenced business the same day. He has never since lived in Bangor or in Maine. He was to pay a certain price for his own board and another and difent price when his wife, whom he left behind in Bangor, to remain until the boarding place was engaged, should arrive. She never did go to live in New York. His brother-in-law died the same week and that broke up the business arrangement. The plaintiff's

wife went to Massachusetts to attend the funeral a week after her husband left Bangor, and was then informed by her husband that it was uncertain under the circumstances whether he remained in New York, and she returned to Bangor in a week or two, as he says, "to complete her arrangements for removal, with his knowledge and approval." His interest in the New York business ceased in June. The plaintiff was back and forth between Boston and New York during the summer and his wife remained in Bangor so far as appears, retaining their old quarters at the Bangor House, until they finally settled at Lexington that year. Having testified to these facts upon his examination in chief and cross examination, on being re-examined by his counsel, he says "on April 1st, I had no intention but that I should live in New York, and when I left here the agreement was that I should live in New York." The plaintiff stopping here, the counsel for defendants was proceeding with his opening statements to the jury, when the presiding judge interposed with the remark that he "should instruct the jury that if they find that the plaintiff was actually present in New York on the 1st day of April with the intention of remaining and living there as testified to by plaintiff, no matter under what circumstances or how long it might be shown plaintiff's wife remained in Bangor, after April 1st, the plaintiff was not legally taxable as an inhabitant of Bangor on that day, and would be entitled to recover in this action."

By R. S., c. 6, § 13, personal property is "to be assessed to the owner in the town where he is an inhabitant on the first day of April in each year."

In *Briggs* v. *Rochester*, 16 Gray, 337, it was decided that an inhabitant of a town within the commonwealth, who before the first of May has left the commonwealth with the intention of never returning, and taking up his abode in a town in another State, and is on the first of May in another town in the State, is not under the R. S., c. 7, § 9, taxable in the Commonwealth on the first day of May, although he has not yet acquired a domicil in such other State. In *Colton* v. *Longmeadow*, 12 Allen, 598, it was held that when

a person had abandoned his domicil in Massachusetts and had gone beyond its limits, not intending to return there to reside, but to take up his residence in another State, which he did, he was not taxable in Massachusetts.

These cases are directly and decisively in point. If the testimony of the plaintiff was all the evidence in the case and was believed, can there be any question that the plaintiff had ceased to be an inhabitant of Bangor on the 1st of April, 1867? He had sold his property to a great extent; he had formed a business connection in New York; he left Bangor with the intention of abandoning it and had removed and was at New York with the intention of remaining and living there, on the 1st of April, 1867.

To constitute a change of domicil there must be the intention so to change and the fact of such change. Here both concur. The plaintiff was absent from Bangor with the intention of abandoning it as a place of residence. He was present in New York not merely with the intention of establishing that as his place of residence, but he had removed his funds to that place, had formed a connection in business there, had provided a place for his wife, and had done all a man could do to change his residence. In *Hampden* v. *Levant*, 59 Maine, 557, the pauper did not leave with any intention of abandoning Hampden as a place of residence, but while absent he formed the intention of abandoning it and establishing himself elsewhere, and the court held there was a change of residence.

It is to be observed no evidence was offered or excluded. No ruling was made as to the effect of any possible evidence which might be offered.

If, then, the plaintiff's testimony was true and not contradicted, can there be any doubt that he was not liable to assessment and taxation.

Now, the instruction was that if the jury should find that the plaintiff was actually present in New York on April 1, 1867, with the intention of remaining and being there as testified by him, no matter under what circumstances, or how long it might be

shown plaintiff's wife remained in Bangor after April 1st, the plaintiff was not taxable as an inhabitant of Bangor on that day and would be entitled to recover in this action.

The instruction assumes the finding by the jury the truth of all the testimony of the plaintiff, and that there was, on the first day of April, 1867, the then-existing intention on his part of being and remaining in New York as a resident.

If so, the question is, whose will determines the domicil or residence? Cannot the husband by his will and acts change his domicil against and contrary to the will and wishes of his wife, such being his intention? In other words, whose will and intention are to govern. If the husband's are to control, then it matters not, his will and acts controlling, that he is married or not. Suppose the wife remained six or sixty days in Bangor, with or without his consent, how can that affect the residence of the husband if he has abandoned his residence here with the intention of not returning, and has gone to and is in New York with the intention of there being and remaining. Suppose the wife declined to leave Bangor and remained there permanently, refusing to go to New York and live with her husband; does that make him an inhabitant of Bangor against his will, when he is absent therefrom with no intention of returning, and is in fact being and residing elsewhere with the intention of there so remaining?

What effect the wife's remaining and the circumstances under which she might remain would have on the credibility of the plaintiff's testimony, is not the question. If it would have been to render the plaintiff's testimony doubtful, then the ruling of the judge would not have applied, for only in case the jury should find the facts true as stated by the plaintiff, was the remark applicable.

The defendants not expecting nor offering to change, modify, or contradict the plaintiff's testimony, voluntarily submitted to a default. It is obvious, therefore, that the only question is whether the plaintiff has made a case which, uncontradicted, entitles him to recover, and unquestionably he has. If the defendants haddoubted the truth of any thing testified to by the plaintiff, or that they

could modify or change the facts stated by him, or the inferences to be drawn therefrom, they were at liberty so to do. They have been deprived of no rights and have no ground of complaint. They voluntarily consented to a default upon the plaintiff's testimony, which they did not attempt or offer to contradict; and in so doing they acted wisely. *The default to stand.*

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

DANIEL W. LORD *vs.* INHABITANTS OF KENNEBUNKPORT.

Exceptions. Demand.

In order to sustain an exception to a refusal to give a requested instruction the bill of exceptions must show enough of the evidence to establish, as a positive fact, that the excepting party really was aggrieved by the refusal; it is not sufficient to show inferentially, by a forced and unnatural construction of the statements of the exceptions, and in an improbable contingency, that he may possibly have been injured.

Where the requested instruction assumed that property received in adjustment of taxes was not equivalent in money value to the amount of those taxes, and that it was taken as a compromise settlement between the taxing town and the tax-payer, and the bill of exceptions did not state facts sufficient to support the proposed instruction, it was held that an exception to a refusal to give it must be overruled.

No demand is necessary before commencing suit to recover money paid under duress and protest.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion.

Peters & Wilson and *Hampden Fairfield*, for plaintiff.

Howard & Cleaves, *S. W. Luques*, and *Edwin B. Smith*, for defendants.

BARROWS, J. Lord sues the defendant town to recover back taxes assessed upon him as a resident thereof in the years 1865 and 1866, claiming that he was not liable to taxation for his poll and personal property in Kennebunkport in those years, but was then domiciled and taxable in Malden. Much and conflicting evidence was offered by the parties upon this question of Lord's domicil, and it is plain that it was the main question upon which the parties were at issue before the jury. It is stated in the exceptions that "the tax of 1865 (amounting to $2,839.60) was paid after arrest and under protest, August 20, 1866, by a check on Boston, which was exchanged by agreement for government bonds and cash to the amount of about $300, which were duly received by the town treasurer in payment;" and that "the tax of 1866 was committed to the collector of Kennebunkport, and in order to enforce the payment thereof he seized personal property of the plaintiff; and, to relieve his property from the seizure, he offered to pay this tax in town notes of the defendant town which had been given by the town of Kennebunkport to the soldiers of the last war, and the offer was accepted by the town by vote; and thereupon the collector took such notes as in payment for that tax, and passed the same notes to the treasurer of the town the same day, in October, 1867;" and that the treasurer "gave his receipt therefor, which is to be copied, and the note may be referred to." The exceptions further set forth that the defendants contended that "these transactions in respect to the taxes did not amount to payment in money, and that as respects the tax of 1866, the offer of the plaintiff, vote of the town, and doings of the collector aforesaid constituted a final settlement of that tax between the plaintiff and the town, and that this action cannot be maintained by him to recover back from the defendants the amount of the tax so settled;" and they requested the presiding judge to instruct the jury that if the plaintiff's domicil was not in the defendant town on the first of April in 1865 and 1866, still this action cannot be maintained without a previous demand for the money, of which there was no proof. Hereupon the defend-

ants now complain because this instruction was refused and the jury were instructed that if they found the plaintiff's domicil was in Malden on the 1st of April in the years 1865 and 1866, then their verdict should be for the plaintiff; and the plaintiff accordingly had a verdict covering both years' taxes. The complaint is well founded if there was any evidence upon which the jury might well have found either that the payments above described were not equivalent to payment by the plaintiff in money, or that the receipt of the town's notes for the tax of 1866 was, in substance and intent, a compromise of disputed claims between the parties. Without such evidence neither the positions for which it is stated the defendants contended, nor their exceptions, have any foundation. *Copeland* v. *Copeland*, 28 Maine, 525.

The plaintiff's claim was based not upon an alleged over-valuation or excessive taxation, but upon his legal right to recover that which he had been compelled to pay under an assessment which he alleged was totally illegal for want of jurisdiction in the assessors. If he maintained this allegation and showed a compulsory payment into the treasury of the defendants, his action was maintained. No proof of a demand previous to the commencement of the suit was necessary. *Look* v. *Industry*, 51 Maine, 375. Nor is it indispensable in cases of enforced wrongful payment to show that such payment was made in current money in order to recover it back upon money counts. Money's worth, received in lieu of money, will suffice. *Hall* v. *Huckins*, 41 Maine, 578.

The requested instruction was rightfully refused, and that which was given must be deemed unexceptionable unless some question of fact, fairly raised by the evidence in the case, was thereby withdrawn from the jury. If such was the fact these exceptions do not show it. It may be taken for granted that the diligent and able counsel have omitted nothing consistent with truth in their statement of the defendants' grievances. It is not sufficient to show that, upon a forced and unnatural construction of the statements in the exceptions, and in an improbable contingency,

the excepting party may have been aggrieved. It is incumbent upon him to show that he actually was so.

If there was any evidence tending to show that the town did not have, in the check on Boston with which the tax of 1865 was paid, or in the government bonds and $300 cash for which that check was exchanged, a full equivalent for the money it would have been easy to say so. The tax of 1866 was paid in the notes of the defendant town. If there was any reason to consider them invalid the excepting party should have stated it. In like manner, if the transaction by which their own notes were received in payment of the tax of 1866 amounted to a compromise between the parties, and was not a mere agreement as to the mode in which payment of a disputed tax might be made, leaving the plaintiff's cause of action unimpaired, it was the duty of the defendants to have reported in their exceptions enough of the evidence, at least, to give color to their position. But we are not even furnished with the receipt which was to be copied as part of the exceptions, or the vote which either party was to be at liberty to refer to. The presumption is that no instruction was withheld which ought to have been given, and none given that was not correct and applicable to the testimony presented at the trial. Finding nothing in the case as it comes before us to overcome this presumption, the entry must be *Exceptions overruled.*

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

NANCY J. HATHAWAY and others, in equity, *vs.* HARVEY H. SHERMAN, administrator, and others.

Life insurance—construction of the statutes relating to the disposition of moneys arising therefrom.

One who dies insolvent can make no testamentary disposition of the fund accruing from an insurance policy upon his life if he leave neither widow nor child; in such event, the insurance money becomes assets for the payment of debts.

A person having an insurance upon his life, dying insolvent, leaving a widow and children, may bequeath the insurance money among them as he pleases; but he cannot bestow it by will upon any other persons. The power to dispose of such fund by will, conferred by R. S., c. 75, § 10, is limited, in case of insolvency, to a disposition among the widow and children of the deceased.

An intention on the part of a testator, by his will, to dispose of the fund arising from an insurance policy upon his life, will not be inferred from the fact that his bequests were ultimately found to exceed the whole amount of his estate exclusive of this fund; nor from the fact that he designated a person as the legatee of the residue of his property of every description whatsoever. "The testator's intention to change the direction which the law gives to this very peculiar species of property is not to be inferred from general provisions in his will, the fulfillment of which might require the use of such money, but must be explicitly declared."

BILL IN EQUITY.

This was an amicable bill in equity brought by the widow of late James W. Hathaway, by the guardians of his children, and by his sister, Mrs. Dillingham, for and in behalf of her children, as complainants, against the administrator with the will annexed of said James' estate and the residuary legatee named in the will in order to obtain a construction of that instrument, which (omitting the attesting clause and execution, in ordinary form) was as follows:

"In the name of God, amen:

I, James W. Hathaway, of Bangor, in the county of Penobscot, and State of Maine, do make, publish and declare this my last will and testament in manner and form following, viz:

1. I order and direct that all my debts and funeral expenses be paid as soon as may be after my decease.

2. I give and bequeath to my beloved wife, Nancy J. Hathaway, the interest of five thousand dollars, so long as she remains unmarried and my widow. The amount not to include what is insured on my life for her benefit, but together with the same in lieu of her right of dower in any of my property of every description whatsoever.

3. I give and bequeath to my son, James N. Hathaway, five hundred dollars, besides the amount insured on my life for his benefit. And to my son, George E. Hathaway, I give and bequeath five hundred dollars.

4. I give and bequeath to my daughter, Evangeline Hathaway, two thousand dollars.

5. I give and bequeath the interest of two thousand dollars to be expended for the education of the children of my sister, Prudy Dillingham, of Temple, of this State, until they each arrive to the age of twenty-one years. And I herein order that the aforenamed legacies be paid, and annuities be conferred as soon as may be after my decease.

Lastly. The residue of my property of every description whatsoever, I give and bequeath, and herein order to be converted into money and devoted to the education of indigent students attending the East Maine Conference Seminary, at Bucksport, who are fitting for the Methodist ministry. And I herein direct that said legacy be held as a trust fund by the Board of Education of the East Maine Conference, and that only the annual interest of the same be so expended or conferred, and that no student shall receive more than one hundred dollars annually, and that only such students shall be beneficiaries of the aforesaid fund, as are recommended for the purpose by the faculty of the said Seminary."

The East Maine Conference Education Society was an unincorporated association, and its officers and managers were made defendants and represented its interests in this cause. It was admitted that a son of the testator named Frank, still living, was given away by his parents in infancy to one Richard H. Smith, who had adopted him as provided by statute, and that the testator said to the

scrivener who drew the will, that he omitted all mention of Frank because of such adoption; whether or not he supposed such adoption would make Frank an heir of said Richard did not appear; but, in fact, said Richard died after the bringing of this bill without making any provision for said Frank by will or otherwise.

It was further admitted that the testator's real estate was appraised at seventy-seven hundred dollars, a portion of this realty being under mortgage to secure debts hereinafter described, the full value of the real estate, however, being as above stated without any deduction on account of the mortgages; that the personal property, consisting of furniture and library was valued at four hundred forty-three and $\frac{50}{100}$ dollars; that the rights and credits besides the life policies hereinafter named were valued at thirteen hundred seventy-eight and $\frac{93}{100}$ dollars; that one hundred ninety-two and $\frac{2}{100}$ dollars had been paid out within three years on the two life policies issued in the name of said Nancy and James N. Hathaway, and that in addition to the assets aforesaid the deceased had, at the time of his decease, then existing upon his own life, in the Charter Oak Life Insurance Company, two policies, for one thousand dollars each, one made payable to his said wife, and one to his said son James N.; and also three other policies on his own life and payable to himself or his administrator, one in the Charter Oak Company for one thousand dollars, one in the Homœopathic Life Insurance Company for one thousand dollars, and one in the National Life Insurance Company of New York for five thousand dollars; all which policies have been adjusted and will unquestionably be paid, deducting certain liens upon them, amounting in all to about eight hundred twelve and $\frac{57}{100}$ dollars, so that the amount expected to be received from the last named three policies was $6,187.43; that the whole amount of estate thus inventoried and appraised, inclusive of said life policies, was fifteen thousand nine hundred one and $\frac{98}{100}$ dollars, and exclusive thereof, $9,714.55; that claims against the estate in favor of creditors had been already presented or come to the knowledge of the administrator to the amount of about seventy-six hundred and fifty dollars, to most

of which there is no defence or objection, and it is believed other demands may yet be presented for payment; that the amount due for legacies bestowed by said will unconditionally was three thousand dollars, and the sum required to be set aside as a fund during the widowhood of said Nancy and during the minority of said Dillingham children is seven thousand dollars, whereas the whole amount of estate as appraised over and above said indebtedness, exclusive of such life policies, is only about two thousand dollars, and inclusive thereof only about eight thousand dollars.

Inasmuch, therefore, as serious doubts arose as to the rights of the several parties in interest under this will, and as to its construction, and who should administer the trusts raised by said will; in order to dissolve such doubts and enable the estate to be speedily settled, the parties submitted this cause to the court to determine and make known the proper construction of the several provisions of said will, and other matters connected therewith, and more especially the following, viz.:

1. In what manner and among what parties the funds arising from the life policies, other than the two first named, should be divided, or what appropriation should be made thereof, under the various contingencies which may occur in the settlement of the estate, and especially under the contingency of the estate being insolvent or of the widow waiving the provisions of the will and claiming dower and allowance as she proposed to do. Can any part go to pay debts or the legacies to the children or the sums provided for the widow and Dillingham children, and if so, what proportion, if not enough for all?

2. Upon whom devolves the trust of holding the sums devised for the benefit of Mrs. Prudy Dillingham's children, and of the widow, if she does not waive the provisions of the will, and seeing to their appropriation, and what shall be done with the fund when the children arrive at the age of 21 years or the widow dies or remarries?

3. And inasmuch as there is no corporation known by the name indicated in the last item of the will, but only a private society or

association by the name before indicated, if there be any residue to be shared under that clause, who shall receive the same, and to whom shall the same be paid?

4. Of what shall such "residue" consist and how shall the same be determined, and whether especially any part of the debts or widow's allowance shall be paid out of the money coming from the life policies, or the sums devised to the sons and daughters, or the sums set apart for the said widow and Dillingham children, and does the said residue embrace any sum except what may be left after paying all said sums?

5. Said Frank H. Smith having been wholly unnoticed in said will and no provision being made for him, whether any portion of the estate or of the life policies should be paid or go to him, the testator having, at the time of making the will, made mention to the scrivener who wrote the will that his son Frank had been adopted and was already provided for, referring as is believed to the fact that he was adopted by a man of considerable property, but whether or not he supposed he would be heir to his god-father is not known.

6. And in general to construe and settle the rights of the different parties, under the will and the manner in which the assets shall be divided and appropriated by the administrator aforesaid, and the trusts raised by the will executed and carried into effect.

Albert W. Paine, for complainants.

H. K. Baker, for Hathaway boys.

R. Foster, for Frank H. Smith.

H. H. Andrews, for respondents.

BARROWS, J. This case calls for a careful examination of certain provisions contained in our statutes, relative to moneys which may accrue from life insurance, and to the disposition thereof by the insured or his personal representatives, and the adoption of such a construction of any ambiguous or indefinite expression found

therein, as shall best accord with the true intent and meaning of all the statutes touching the matter under consideration.

Section ten of chapter seventy-five of the Revised Statutes runs thus:

"A sum of money received for insurance on his life, deducting the premium paid therefor within three years with interest, does not constitute a part of his estate for payment of debts, or purposes specified in the first section of chapter sixty-six when the intestate leaves a widow or issue, but descends one-third to his widow and the remainder to his issue; if no issue the whole to the widow, and if no widow the whole to the issue. It may be disposed of by will though the estate is insolvent."

In R. S., c. 64, § 46, which defines the powers and duties of executors and administrators, among the articles "which shall be omitted in making the inventory and shall not be administered upon as assets," the fourth specification is, "any sum of money becoming due on the death of the deceased from an insurance on his life effected by him, after deducting the amount of premium paid therefor within three years with interest, provided such deceased left a widow or issue; but such sum shall be disposed of as provided by section ten, chapter seventy-five;" which is the section first above cited.

But by c. 87, § 1, "writs and executions against executors . . . for debts due from the deceased, run against his goods and estate in their hands."

By c. 64, § 41, every executor or administrator is required to "make and return upon oath into the probate court a true inventory of the real estate, and of all the goods, chattels, rights, and credits of the deceased which are by law to be administered, and which come to his possession or knowledge."

From this inventory, besides the money accruing from life insurance as above specified, nothing is to be omitted except the wearing apparel of the deceased, not exceeding one hundred dollars in value; if he left a widow or minor children, the apparel and ornaments of the widow, and the apparel and school books of minor

children, together with such provisions and other articles, not exceeding fifty dollars in value, as have necessarily been consumed in his family before the appraisal.

That it is the policy of the law to subject, with the exception of these trifles, all that can be fairly called the property of the deceased (even that which was by law exempt from attachment and seizure on execution for debt in his lifetime) "to the purposes specified in the first section of chapter sixty-six," and consequently to the payment of his debts, is shown by numerous provisions to that end. In laying down rules for the descent of the real estate of persons deceased intestate, it is first expressly made subject to the payment of debts. R. S., c. 75, § 1.

"The personal estate of an intestate, except that portion assigned to his widow by law and by the judge of probate, is to be applied, first, to the payment of his debts, funeral charges and charges of settlement" or, more briefly stated, to the purposes specified in the first section of chapter 66, and only the residue is to be distributed. R. S., c. 75, § 8. And the claims of devisees or legatees are entirely postponed to those of creditors, in the statutes authorizing the disposition of property by will in these emphatic terms:

"No part of the estate can be exempt from liability for payment of debts if required." R. S., c. 74, § 7. In marked contrast to what appears to be the general purport and design of the statutes regulating the disposition to be made of the property of persons deceased, stands this provision first above quoted touching the disposition to be made of the proceeds of life insurance policies.

A hasty reading of this section, without reference to other statute provisions, would be likely to carry the idea that any sum of money thus accruing after death, however large in proportion to the estate left by the decedent at his death, no matter what the condition of his estate as to indebtment, was not to be subject to the payment of his debts, but might be disposed of by him in his will to whomsoever he pleased, precisely as he might dispose of any surplus property after his debts were paid.

A little consideration, however, satisfies us that there are conditions and limitations here which must not be overlooked.

It is manifest that the legislature looked upon this fund, which from its very nature can never be possessed or enjoyed by the decedent, in a different light from that in which they viewed his estate and property generally. But perhaps it is not essential for us here and now to determine whether this money, which does not become payable to anybody until after his death, and then only in case the proper steps are taken to fix the liability of the insurance company, can, strictly speaking, rightly be regarded as property of the decedent. He certainly has a qualified interest in it, and there is at all events a right which he can transmit to his personal representatives, and, under some circumstances, can bequeath.

The questions arising here are, what, if any, are the conditions and limitations of this power to bequeath? Is it effectually exercised when a testator in his will simply gives legacies which his property, after paying his debts, is found insufficient to meet, and concludes by a general residuary bequest?

1. As to the conditions and limitations of the power to dispose of this fund by will, we remark, in the first place, that it is only when the insured leaves a widow or issue that he can exercise any testamentary power whatever over this fund if his estate prove insolvent. If he leaves neither widow nor issue, these special provisions have no application to his case at all. The fund is to be inventoried by his executor or administrator as part of his assets, subject to the payment of debts, and it is only upon the residue, after answering all prior legal calls, that any testamentary provisions he may make will take effect.

Is it conceivable that when the legislature have made the existence of a widow or issue an essential condition to the exercise of any power over this fund by an insolvent testator, they intended to allow him to bestow it where he pleased as if he left neither widow, issue, nor creditors?

There is such an inconsistency here as induces us to believe that such could never have been the design.

Before revision the statute stood thus: First, it laid down the rule that, aside from the excepted premiums, the money thus derived, "upon the death of any person who shall leave a widow and issue or either," was to be distinguished from other property of the deceased, that it should make no part of his estate for the payment of his debts, the funeral expenses, the expenses of administration or those of the last sickness, or the allowance to the widow or widower or children, nor even for the discharge of public rates or taxes. Then it directed the appropriation of the money to or among the widow and issue in the case of an intestate estate, and concluded with the following proviso: "That nothing herein contained shall prevent such person from providing, by will, for the distribution of such sum among his widow and issue, or either of them, in any other proportion, but such testamentary disposition shall be carried into full effect notwithstanding the insolvency of the estate." Laws of 1844, c. 114.

We think that if the legislature had intended in the revision so to enlarge this testamentary power, as to permit the insolvent testator to divert the fund or any part of it from his widow and issue, they would not at the same time have made its existence still dependent upon his leaving a widow or issue to survive him. Why make the survivorship of a widow or issue an indispensable condition of a grant of power to a testator to divert the fund not only from his creditors, but also from these very parties who seem to have been designed by the legislature in these provisions, to be the exclusive beneficiaries from this species of investment? The object of the legislature seems to have been to designate this very peculiar species of property as a disposition of his funds in advance, which any man may make so firmly, that, with the exception of certain premiums paid to secure it, the whole shall go after his death for the benefit and enjoyment of those who are in general dependent upon him for support while he lives, without regard to the claims of creditors, and to give him power simply to regulate the proportions in which it should be divided among those interested according to his view of their necessities or their deserts.

We do not think the abridgement in the revision should be construed as extending this power, for the benefit of any other objects of his bounty to the exclusion of his creditors, so long as it remains an essential pre-requisite to his exercise of such power that the widow or issue should survive him. A man who makes an investment of this sort, with these statutes before him, should understand that he makes it for the exclusive benefit of his widow or issue or some of them, if they or any of them survive him, and that in case of such survivorship, his testamentary power over it extends only to the designation of those among them who shall receive it, and the shares which each or any shall respectively receive. This, at any rate, must be the construction in all cases where, aside from the fund thus created, the estate is insolvent, *i. e.*, in all cases where, but for this provision of the statute, the decedent could make no valid disposition of the money as against creditors.

2. Whether the statute provision ought to be considered as limiting the power of a solvent testator, or of one who by appropriating a portion of the insurance money to the payment of his debts might make his estate solvent, over money thus accruing in cases where the decedent leaves a widow or issue, we deem it unnecessary now to decide, because we find in the will before us no language which we think authorizes us to conclude that it was the intention of the testator to dispose of this fund. The only arguments in favor of the hypothesis that such was his intention are found in the facts that he made bequests very considerably exceeding, in the aggregate, the amount of his estate, real and personal, exclusive of this fund, and that he made a final bequest of the residue of his property of every description whatsoever. The first of these facts is entitled to but little weight. The records of every probate court show too many instances of wills containing liberal bequests which the testators left no means, or very inadequate means, to fulfill, to justify us in concluding from this circumstance that the testator designed to change the disposition which the law would otherwise make of this fund, which he nowhere mentions as a source from which money to pay the legacies he gives is to be derived.

As to the claim that the fund would pass under the bequest of the residue of the testator's property, we remark that the legislature have placed all funds thus accruing in the same category with the wearing apparel of the deceased and that of his wife and minor children, and the provisions consumed in his family before the appraisal of his estate. Provided he leaves a widow or issue, the legislature have so distinguished between moneys thus accruing after his death and the rest of his property, that they are not assets in the hands of his administrator for any of the ordinary purposes to which the property of persons deceased is devoted by law; but on the contrary, they are classed with certain items of a character so peculiar that none of them can be considered as liable to be sold for the payment of pecuniary legacies, or as passing under a general residuary clause. It may be competent for a solvent testator who leaves a widow and minor children, to make by his will a different disposition of his wearing apparel from that which the law would otherwise make, but assuredly not an article of it would be considered as passing under a general residuary clause, or as liable to be sold for the payment of legacies unless specifically so ordered. So with the moneys accruing from life insurance policies after the death of the testator. If it be held that under the general statute authorizing the disposition of property by will a solvent testator, or one whose estate would be solvent with the addition of the fund thus created, may authorize his executor to use this fund for the payment of his debts, and otherwise dispose of it in a manner different from that which the law contemplates or will allow in the case of an insolvent estate, we think, in order to effect his object, the testator must use language directly significant of his intention in this respect; that, classed by the legislature as this fund is, it is not to be appropriated to the payment of debts or of any pecuniary legacies couched in general terms merely, even to the widows or children, unless it is expressly referred to as the fund from which such payment is to be made, and that it does not pass by any general residuary clause; in short, that the testator's intention to change the direction which the law gives to this very

peculiar species of property, is not to be inferred from general provisions in his will the fulfillment of which might require the use of such money, but must be explicitly declared.

Our conclusions in the case at bar are, that it is not competent for the executor to use any part of the moneys accruing from the life insurance policies, save the premiums and interest excepted in the statute, for the payment of debts, allowance to widow, or legacies bequeathed in the will. The testator has not declared his intention to change the disposition which the law makes of that fund, nor charged upon it the fulfillment of any of the provisions of his will. It must be distributed as the statute provides, one-third to the widow, two-thirds to the children, including Frank H. The will is to be executed so far as the condition of the estate in the matter of indebtedness will permit.

Looking at the representations made in the bill of the amount of debts which had come to light when the bill was filed, and the probability that the widow would claim her dower and allowance, instead of relying upon the provision made for her in the will, we deem it unnecessary at the present time to make further answers to the questions raised.

If a more favorable turn of the affairs of the estate than can reasonably be anticipated should make such answers desirable, they can be reached upon a case briefly stated by the parties interested.

Decree to be entered in accordance with the views herein expressed. Costs of all parties to be paid out of the estate.

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

JESSE MURPHY *vs.* JOHN P. WEBBER.

Appropriation of payments.

When a defendant is exonerated by the statute of frauds from liability upon his oral promise to pay for certain goods furnished by the plaintiff to a third person before a certain date and liable for those furnished afterwards, payments made by him on the orders of such third person, drawn, payable upon the account generally, without reference to the question of liability, may be applied by the creditor to the oldest item.

ON REPORT.

ASSUMPSIT to recover $190.75, balance of an account, the first item of which was "two bales of hay," delivered Nov. 1, 1869, to Albert Perkins. The plaintiff testified that, in the fall of 1869, Perkins sent to him for hay and grain which he declined to deliver unless some one else would become responsible for it; Perkins told him that Webber was going to give him an order, but that he (P.) left in such a hurry that he did not have time to stop for it, and Webber told him he could get his supplies of Murphy without an order, and that he (W.) would pay for them; that he would be up soon and make it all right with Murphy. Subsequently the plaintiff received from Webber the agreement or memorandum of Dec. 14, 1869, mentioned in the opinion. At its date Murphy had supplied Perkins with hay and grain to the value of $128.50 and other articles worth $64.08, and he afterwards furnished hay and grain to Perkins on Webber's credit and charged also for feeding two-horse teams thirty-one nights, $31.00. Upon this account Perkins paid about $60.00 and Dec. 24, 1869, Webber paid $50.00, and upon Perkins' order in favor of plaintiff $150.00, March 12, 1870. Between the 14th and the 24th of December, 1869, Murphy furnished about twenty dollars' worth of supplies to Perkins.

If, upon this evidence, the action could be maintained it was to stand for trial; otherwise, the plaintiff was to be nonsuit.

Charles P. Stetson, for plaintiff.

Albert W. Paine, for defendant.

PETERS, J. This action is to stand for trial if the evidence is sufficient to support the case for the plaintiff.

The plaintiff furnished hay and grain to one Perkins, for use in the woods, upon a representation of Perkins that the defendant would pay for the same. No promise, or authority to make one, was contained in any writing until the defendant gave the plaintiff the following order:

"BANGOR, Dec. 14, 1869.

Whatever hay or grain Mr. Perkins may want for woods I will pay for it if he does not. Yours truly,

J. P. WEBBER."

The defendant, while admitting his liability for such articles as were delivered after the date of this writing and upon the strength of it, denies any liability for such as were delivered before that time upon the ground that the oral promise, if any, was in terms like the written one, and therefore collateral only and within the statute of frauds. But, if so, still the action is maintainable. The error of the defendant consists in claiming that the sums received by the plaintiff upon his account shall be regarded as payment for hay and grain delivered after the date of the written promise instead of before that time. The law does not require nor have the parties made any such appropriation.

There is nothing to show that the sums paid by the defendant were to be applied to the later rather than the earlier items, but the evidence shows the contrary expectation. When the fifty dollars were paid less than half that sum was due for hay and grain delivered since the date of the written order, and there is nothing to indicate that any portion of such sum was a payment in advance of delivery. The payment of the one hundred and

fifty dollars was made upon the order and on the account of Perkins, and not for the liability of the defendant, excepting that, according to the receipt given, it was to be applied "on account of hay and grain delivered said Perkins," but not upon hay and grain delivered after Dec. 14, 1869. If the sixty dollars paid by Perkins from money of his own be appropriated generally upon the account of the plaintiff, which contains items besides such as the defendant was responsible for, it will operate as a payment to the extent of about half of it for hay and grain. Now, applying the two hundred dollars paid by the defendant upon the earliest items for hay and grain, not paid for by the money of Perkins, and it will leave a valid claim against the defendant unpaid. Upon these facts the plaintiff has a right to apply the money received so as to first pay the first items in his account for the grain and hay, excluding the claim "for feeding two-horse teams thirty-one days, $31.00," as that would be rather a charge for horse keeping than the sale of hay. See *Thurlow* v. *Gilmore*, 40 Maine, 378. *Action to stand for trial.*

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

PELEG T. JONES *vs.* IVORY A. HODGKINS.

Sale by agent—effect of.

When a commission merchant sells and delivers property, intrusted to him for sale, before notice of the revocation of his authority, he is not liable in trover for such sale.

The *bona fide* purchaser under such sale and delivery acquires thereby a good title as against a prior purchaser from the consignor without delivery.

On exceptions.

Trover. The facts are sufficiently stated in the opinion.

The presiding judge instructed the jury, that if the defendant was employed by McLaine as a commission merchant to sell all of his logs, and if the defendant run the logs which remained in the boom until April, 1871, and sold them to Walker before the defendant had notice or knowledge of the sale of them by McLaine to the plaintiff, it was a defence to this action, notwithstanding McLaine had sold and conveyed the logs to the plaintiff before the defendant had taken the logs or sold them to Walker.

Wm. H. McCrillis, for plaintiff, in support of the exceptions.

Brown and *Simpson*, for defendant.

Appleton, C. J. The defendant is a commission merchant. One McLaine had a quantity of logs in the Penobscot boom, in the spring of 1870, which he employed the defendant to sell on commission. The defendant sold the logs which came through the boom that year to James Walker. A portion of the logs remaining in the boom through the winter were, in the following April, run therefrom and sold and delivered by the defendant to said Walker, by whom they were manufactured and the lumber sold.

It appeared in evidence that in March, 1871, McLaine had sold the logs which remained in the boom to the plaintiff, but there was no evidence to show a delivery to him or that he had taken any actual possession of the same. Nor was it even alleged that such was the case. The jury found that the defendant had no knowledge of the sale from McLaine to the plaintiff until after the sale and delivery of the logs remaining over to Walker. The plaintiff proved a demand and refusal and then commenced this action of trover. Is it maintainable?

At the time of the demand made upon the defendant he had none of the logs in controversy in his possession or under his control. They had long before been sold and manufactured. The

defendant could not deliver what he had not, nor what was in the possession of others. Demand and refusal are evidence of conversion when the person upon whom the demand is made has the power to deliver the articles demanded, but when he has neither constructive nor actual possession and no right to or interest in the property and could not comply, a demand and refusal are not proof of conversion. *Davis* v. *Buffum*, 51 Maine, 160. The demand and refusal, under the facts proved, not being sufficient to support the action, there must be other proof of conversion to enable the plaintiff to maintain it. Indeed, no demand was necessary, if the defendant was guilty of a tort in selling. Was there any conversion of the plaintiff's logs prior to the demand? For if there was, his case would then be made out.

Trover is an action of tort. The conversion, which constitutes the gist of the action, is a tortious act. The action is not maintainable without proof of a tort on the part of the defendant. What tort has he committed? What wrong has he done?

The defendant received the logs in 1870 from the owner to sell for him at a stipulated commission. They were under his care and control. They were in his constructive or actual possession. It was his duty to make sale at the first good opportunity. If, having a good opportunity to sell, he neglected or omitted selling, he would be liable to his principal for the loss arising from such neglect or omission. He was bound by the contract between him and his principal not to cease in his efforts to make a judicious sale until the logs he was employed to sell were either sold or notice was given him that his authority was revoked. After accepting an agency he could not renounce it at pleasure without notice or good cause, and if he should, he would be liable to his principal for any loss occasioned thereby.

If, then, he sold, would his sale pass a good title to the purchaser? He had sold the logs which came through the boom in 1870 to James Walker, who thereby acquired a legal title to them. Walker knew the defendant to be a commission merchant. He purchased in good faith of one having control of the logs and re-

ceived a delivery of them. Suppose a part had been due for the logs sold the year before, a payment to the defendant by one having no notice of the revocation, even though the agent had such notice, would have been protected. But it matters not whether one buys of or pays to a commission merchant, the purchase and the payment are alike valid, if the person purchasing of or paying to the commission merchant is ignorant of the revocation of his authority to sell or receive payment.

The law on this subject seems unquestioned. "It is admitted," observes Mellen, C. J., "in *Harper* v. *Little*, 2 Greenl. 18, that a revocation of a power not coupled with an interest will not defeat and render void those acts which are done in pursuance of it and prior to notice of such revocation being given to the attorney. Authorities are clear and direct on this point." To the same effect is the law as laid down by Mr. Justice Story in his work on agency, § 470. As to the agent, the revocation "takes effect from the time when the revocation is made known to him; and as to third persons, when it is made known to them, and not before. Until, therefore, the revocation is so made known it is inoperative. If known to the agent, as against his principal, his rights are gone; but as to third persons, who are ignorant of the revocation, his acts bind both himself and his principal."

If, then, the defendant had authority to pass the title to Walker, no revocation of authority being known, is he liable as a tort feasor for doing precisely that which he was employed to do,—that which he had contracted to do,—that which if he neglected doing he would, so far as he knew, be liable in damages for not doing? If the sale passed the title, as it undoubtedly did, it was because the defendant had an authority to sell, which was unrevoked, or if revoked, no notice of the revocation had been given. Until notice of the revocation was given it was the bounden duty of the defendant to proceed in the performance of his contract with his consignor.

Undoubtedly, a sale of property in the hands of a commission merchant employed to sell such property is a revocation,—is an act

revoking the authority given. But as long as it remains unknown the commission merchant is not bound by it. He cannot regard it. The property still remains in his hands and his obligations to sell remain in full force.

In the case at bar the logs were under the control of the defendant precisely as they had been the previous year. He received them from the boom and sold and delivered them to Walker before, as the jury have found, he knew of the sale to the plaintiff. The sale to the plaintiff by McLaine was made at a distance from the logs and he had no delivery of them. The logs, then, were subject to any lien which the defendant might have for advances or to any contract he might make in reference to them until notice should be given him that his authority over them was at an end. "The contract of mandate," observes Mr. Justice Story, in his work on Bailments, § 207, "may also cease by a revocation of the authority, either by operation of law or by the act of the mandator. It ceases by operation of law when the power of the mandator ceases over the subject-matter. . . If he sells the property it ceases upon the sale if it is made known to the mandatary." These views are fully affirmed in an elaborate opinion of Sutliff, J., in *Ish* v. *Crane*, 8 Ohio, 520.

The defendant, having done only what he contracted to do and never having been notified of any revocation of his authority, is not to be held liable in tort for the performance in good faith of his contracts. *Exceptions overruled.*

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

WALTON, BARROWS, and TAPLEY, JJ., dissented.

TAPLEY, J., dissenting. One McLaine being the owner of certain logs, then in a boom, sold and conveyed them to the plaintiff in March, 1871. The defendant, being employed by McLaine as commission merchant to sell all his logs, did undertake to sell these logs in April following, not knowing McLaine had before sold them, and in pursuance of his contract run them out of the

boom and delivered them to one Walker. The defendant having done this the plaintiff demanded the logs of him, and they not being delivered he brought this action. It will be noticed the controversy arises between Jones, the purchaser of the owner, and an agent of the owner, and not between Jones, as purchaser, and Walker, as purchaser.

As between Jones and McLaine's agent where was the title? Where was the title from March to April? The instruction proceeds upon the ground and theory that the owner had sold and conveyed the logs to the plaintiff in March. These terms are broad enough to warrant the conclusion that the title had passed from McLaine to Jones, and that the logs actually belonged to Jones when the defendant seized them.

This being the case the defendant, in April, seized certain logs that the plaintiff had owned a month. Now, what is his justification? It is simply that he supposed they belonged to McLaine, and having a general authority to sell all his logs he supposed he was authorized to sell these. Does this erroneous supposition make any difference so far as title is concerned? It is not denied that had the defendant known of the sale to the plaintiff he would have been liable, and we think it quite clear he would be because he would have been intermeddling with property he knew belonged neither to himself nor his principal. It is very apparent that his knowledge or want of knowledge in nowise affected the title from March to April. We are therefore brought to the question whether trover can be maintained against one who sells another property, believing he has a right so to do, when in fact he has no such right.

We know of no rule of law that will excuse a man from liability under such circumstances. His ignorance may be purely his own fault or that of another. But this cannot affect the rights of the owner. Every man assuming control of property must see to it he has a legal right so to do, and if he has no such right he must respond in damages to the innocent party.

Whether that which took place between McLaine and Jones

operated as a sale and conveyance of the logs to the plaintiff we do not decide. The instruction given assumes that it did, and for the purpose of this discussion we must treat it as if it did, and so treating it we think the defendant should have responded on demand, and not doing so is liable in this action.

WALTON and BARROWS, JJ., concurred in this opinion.

JOHN SHERIDAN *vs.* DANIEL E. IRELAND and logs marked NXVIIXI.

Lien claim—notice of imperatively necessary.

When a party is seeking to enforce the lien upon logs or lumber given by statute the requirement of R. S., c. 91, § 35, that such notice of the suit shall be given to the owner of the logs or lumber as the court orders, is imperative and must not be disregarded.

The giving of such notice cannot be dispensed with though there may be an appearance upon the docket of parties claiming to own the logs or lumber.

The court cannot judicially know or determine whether such claimants are or are not the owners without giving a notice that shall be binding upon the owner whoever he may be.

The notice to be ordered in all such cases should be a public notice by posting or publication as well as a specific notice to parties supposed to be the owners.

To enforce a statute lien the course prescribed by the statute is to be strictly pursued.

ON AGREED STATEMENT OF FACTS.

This was an action of assumpsit to enforce a lien for labor upon a quantity of logs in Penobscot river, marked N, cross, V, two notches, cross, notch (NXVIIXI), and against Daniel E. Ireland, as employer and principal defendant, upon an account annexed, for cutting and hauling the logs, seventy-six days' work at a dollar *per diem*, $76.00, which labor was the basis of the lien claimed.

These facts were admitted to be truly stated in the writ. At the term of the entry of this action in court Whiting S. Clark, a counsellor of this court, as attorney for the firm of Shaw & Ayer, "claimants as log-owners," appeared and answered to the suit. The officer attached these logs within sixty days after their arrival at their place of sale and destination and delivered them to "the above-named claimants or owners" on their giving a receipt therefor. No notice of the lien claim, under R. S., c. 91, § 35, was given or ordered by the court.

The court, drawing all proper inferences from these facts, were to enter such judgment as the legal rights of the parties required.

Lewis Barker, for plaintiff, relied on *Bean* v. *Soper*, 56 Maine, 297.

W. S. Clark, for Shaw & Ayer, claimants.

Plaintiff must show that the logs attached are identical with those on which he labored. 56 Maine, 297; *Thompson* v. *Gilmore*, 50 Maine, 428.

This case not like *Bean* v. *Soper*, but like that in 50 Maine, 428. It is only admitted that the officer is commanded to attach the logs on which Sheridan labored; not that he did do it.

There was no notice to owners as required by R. S., c. 91, § 35. An appearance by certain persons as claimants does not obviate the necessity for such notice. *Perkins* v. *Pike*, 42 Maine, 141; *Redington* v. *Frye*, 43 Maine, 585; *Wilson* v. *Ladd*, 49 Maine, 73.

BARROWS, J. The case is presented upon an agreed statement of facts not essentially different from those reported in *Bean* v. *Soper*, 56 Maine, 297, except in one particular.

There, it appears by the opinion that all parties interested had been summoned. Elsewhere it is stated that the owners of the logs were duly notified and appeared. As we understand that case, the notice required by the statute which provides these liens and regulates the mode in which they are to be enforced was duly given.

Here, no notice ordered by the court was given, but at the term at which the writ was returnable an attorney, representing the firm of Shaw & Ayer, styled, in the agreed statement, "claimants as log-owners," appeared and answered to the action. Elsewhere in the agreed statement they are spoken of as "owners or claimants." If we could have judicial knowledge that Shaw & Ayer were in fact the owners as well as the claimants of the logs we should see little occasion to trouble ourselves about the sufficiency of a notice which, so far as they are concerned, at least, was effectual in causing their appearance, since which there have been two general imparlances at *nisi prius*, and no complaint of any defect of notice until the case is presented here for a hearing.

Nor would there be any difficulty, if the required statute notice had been given, in our drawing the inference, in the absence of anything tending to a different conclusion, that the logs described in the declaration and in the officer's return were the identical logs upon which the plaintiff worked and had a lien. Enough, at all events, is admitted to make a *prima facie* case for the plaintiff so far as the parties who have appeared are concerned.

But under all the practical difficulties which inevitably attend the enforcement of liens upon one man's property for the debt of another, we do not think it sound policy to dispense with any of the statute requirements. In the absence of notice we can render no judgment that would protect the officer in making sale of these logs, if it turned out that Shaw & Ayer were not the owners, but only the claimants, which is all that this case really shows.

Any loose practice with regard to these liens must almost certainly result in litigation. The Legislature have prescribed a definite and simple mode by which the logs can be appropriated as against all the world to the payment for the work which has been done upon them. When notice, such as is contemplated in the statute, to all interested as owners in the logs attached, has been given, a valid judgment can be rendered which will not subject innocent parties acting under it to further litigation. Much ingenuity is yearly expended in devising "how not to do" what the law requires. It is a work to which the court cannot lend its aid.

In the case before us the defect of notice is the only real defect to which our attention has been called. For reasons already adverted to it is one of which the parties who appear here to defend cannot complain. Justice obviously requires that the agreed statement should be discharged and the case remanded to the court at *nisi prius* to enable the plaintiff to proceed regularly to enforce his lien according to the statute. R. S., c. 91, § 35. In the very nature of things that notice must always be a public notice as well as a specific notice to parties supposed to be the owners, because the court can never determine who are owners upon the mere suggestion of the plaintiff or of those who appear as claimants, and who may or may not be the owners who must be notified in conformity with the statute in order to have a valid judgment. We cannot proceed to determine who are the owners until such notice has been given as will bind the owners whoever they may be. *Agreed statement discharged.*

Case remanded for notice to the log-owners.

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

JOHN B. PARKS *vs.* WILLIAM A. CROCKETT and logs marked XWAXI.

Lien claim upon logs—practice relative thereto.

The general owner of logs, not the debtor, in a suit to enforce a lien, may demur to the plaintiff's writ and declaration, as insufficient to establish such lien.

By the Acts of 1862, c. 131, the writ is sufficient for such purposes, though in the ordinary form of assumpsit, if the declaration discloses that the suit is brought to enforce a lien on the logs attached.

The writ will be deemed insufficient if one count therein contains a claim *in personam* and another count a different claim *in rem.*

The clause in R. S., c. 91, § 35, taken from Acts of 1862, c. 131, which provides that in a lien action the forms and proceedings shall be the same as in ordinary actions of assumpsit, is to be construed as permissive and not mandatory; so that the word "shall," contained therein, will be construed as meaning may.

A lien claim can be preserved in no form of proceeding without notice to log owners, the necessity of which under the statute of 1855 was not abrogated by the Acts of 1862, c. 131.

ON EXCEPTIONS.

This was assumpsit upon an account annexed for labor, rendered by the plaintiff to the defendant, upon certain logs in the Penobscot river, marked cross, W, A, cross, notch (XWAXI). At the return term of the writ notice by publication was ordered. It was given accordingly, and at the ensuing term Ivory A. Hodgkins and Nathaniel M. Hartwell, as general owners of said logs, came in to defend the suit as to the logs, but no further, and filed a general demurrer to the plaintiff's writ and declaration as against these logs. After joinder the presiding justice overruled the demurrer and the claimants excepted.

By the precept the officer was commanded "to attach the goods or estate of William A. Crockett, of Springfield, in the county of Penobscot, to the value of two hundred dollars, and also attach logs marked XWAXI, now lying in the Penobscot boom in the Penobscot river, to enforce a lien on said logs for his personal services at cutting and hauling said logs into the Mattagoodus stream, in the town of Prentiss, the last logging season, and driving on said logs this spring in said Mattagoodus stream," and to summon "the said defendants" to answer unto John B. Parks, etc., upon an account annexed. This count was in the ordinary form, making no mention of the logs or of any lien claim, and the account itself was merely "To sixty-eight days' labor in the woods" and "four days at driving," saying nothing about logs or lien.

The only other count in the declaration was the following, with the last sentence placed as below, leaving room for argument whether the claim of lien applied only to this count or to both: "Also, for that the said defendant at said Bangor, on the sixth day of May, A. D. 1871, by his note or due bill of that date, by him subscribed,

promised the plaintiff to pay him the sum of $76.71, for labor done in the woods and driving on logs marked XWAXI. And the plaintiff claims a lien on said logs for his personal services at cutting and hauling said logs in the town of Prentiss in this State, also for his personal services at driving said logs on the Mattagoodus stream, and this action is brought to enforce said lien according to the statute of this State, in such cases made and provided."

It appeared from the officer's return upon the writ that these logs were attached upon the demands of three persons, of whom plaintiff was one (in three several suits), amounting in the whole to less than $200.00, and that the officer's fees on all three of these writs were $488.75, one third of which was charged upon the writ in this case.

Brown & Simpson, in support of the demurrer.

The two counts of the declaration set out two separate, distinct causes of action; the first, a non-lien claim (for aught that appears of record) for labor, in the ordinary form of declaring upon an account annexed, and the other upon a due bill or note, for which a lien is claimed.

A joinder of lien and non-lien claims is a waiver of the lien. *Lambard* v. *Pike*, 33 Maine, 141; *Safford* v. *True*, Ib. 283; *Bicknell* v. *Trickey*, 34 Maine, 273; *McCrillis* v. *Wilson*, Ib. 286; *Johnson* v. *Pike*, 36 Maine, 384; *Robinson* v. *Bowker*, 38 Maine, 130; *Perkins* v. *Pike*, 42 Maine, 141.

Nothing to justify an inference that the two causes of action are identical. *Neally* v. *Judkins*, 48 Maine, 566, and cases there cited.

A. Sanborn and *C. A. Cushman*, for plaintiff.

PETERS, J. The questions presented in this case will be satisfactorily solved by a reference to the statutes and decisions in this State upon the subject of a laborer's lien on logs.

The first act giving a lien on logs and lumber for laborers'

wages was in 1848. The only remedy provided by the act was that any person having the lien might secure the same by an attachment. No forms or details were prescribed. It was an innovation upon the rules of the common law to attach the property of one person upon a process against another. Extreme difficulty was imposed on the court to give a sensible and practical construction to the legislative requirement so as not to disregard fundamental rules of law and, at the same time, preserve the spirit and equity of the statute.

In *Bicknell* v. *Trickey*, 34 Maine, 273, and *McCrillis* v. *Wilson*, Ib. 286, the first reported decisions in cases arising under this statute, it was settled that a lien claim would be lost if absorbed in a judgment with a non-lien claim; and, to meet the difficulty, that separate actions might be maintained upon the two kinds of claims contained in an account that was in other respects an entirety. Questions, which arose afterwards, involving a more definite construction of the statute, as to the form of proceedings in such actions, were not presented by counsel in those cases, nor considered by the court. In the opinions, however, it was declared that proceedings under this statute are to be viewed in a double aspect; so far as the debtor is concerned as *in personam* and as to the general owner of the property, not the debtor, as *in rem*.

Subsequently, in *Cunningham* v. *Buck*, 43 Maine, 455, it was decided that a declaration in common form, on an account containing no allegation of any claim upon the logs, or authority to attach them only as the goods or estate of the debtor, judgment and execution corresponding, would not authorize a sale of the logs upon such execution to satisfy a lien claim thereon. *Perkins* v. *Pike*, 42 Maine, 141, is to the same effect. But the result reached in those cases did not clear the difficulty. Their tendency was to require, virtually, an *in rem* proceeding assimilated to a proceeding in admiralty. This was objectionable, because it exposed the court to the necessity of granting what was apparently a valid judgment, but really an invalid one, as against a person

not the debtor, who was an owner of the logs. Such a proceeding was injurious to the officer who undertook to execute the mandate of the court, or to the owner, when he was not the debtor, upon whose property it was executed. If the officer was not protected by his process, injurious to him; if he was, then injurious to the owner. The difficulty arising from an *in rem* proceeding without notice to all concerned was thus adverted to in *Perkins* v. *Pike* by the court: "The practical difficulty in cases of lien by statute arises from an omission on the part of the legislature to make provision for notice to all persons interested, so that the judgment rendered should be concluded upon all. In admiralty the process is *in rem*, and notice being given the judgment binds the rights of all. Until provision is made for general notice the judgment may conclude the parties to the suit, but cannot bind others."

In 1855, the remedy thus alluded to was provided in the following act: "In all suits brought to enforce the lien given by the act to which this is additional such notice *shall* be given to the owners of the lumber as the court shall order, and the owner may come into court and defend such suit."

Thereupon the decisions have been that a notice *must* be given to the owners of logs or a judgment *in rem* cannot be obtained, and that it was necessary that the process, judgment, and execution must correspond in all essential respects to a libel *in rem* and proceedings thereon in admiralty. The following leading cases are illustrations of different phases of the practice as settled by the court after the act of 1855. *Redington* v. *Frye*, 43 Maine, 578; *Holyoke* v. *Gilmore*, 45 Maine, 566; *Annis* v. *Gilmore*, 47 Maine, 152; *Campbell* v. *Smith*, Ib. 143; *Thompson* v. *Gilmore*, 50 Maine, 428; *Bean* v. *Soper*, 56 Maine, 299; and the case of *Sheridan* v. *Ireland*, *ante*.

A question has been heretofore mooted as to what kind of notice to the owners of logs should be given. A practice has to some extent prevailed of allowing persons, claiming to be owners, to appear without notice and defend the suit. It is obvious that,

under such a practice, a real owner may sometimes fail to receive either actual or constructive notice of the pendency of a proceeding which results in a judgment against his property. In the case of *Sheridan* v. *Ireland and logs*, 61 Maine, *ante,* this court has lately decided that in every case before a judgment of lien can be granted against logs there must be some form of general notice, like publication or posting, to be ordered by the court, which will be sufficient and conclusive notice against all persons concerned.

In 1862, c. 131, it was enacted as follows: "And in all cases where the house or building, or the logs or lumber, on which the labor was performed, have been or shall be attached, the proceedings shall be deemed sufficient to effectuate the lien, if the writ, officer's return of attachment, and the judgment recovered in the suit are or shall be in the usual and common forms of the common law, as heretofore understood and practiced in all other actions of assumpsit, the declaration disclosing that the suit is brought to enforce the lien." In R. S., c. 91, § 36, this provision is consolidated into these words: "The declaration must show that the suit is brought to enforce the lien; but all other forms and proceedings shall be the same as in ordinary actions of assumpsit." It will be observed that the mode, provided in the act of 1862, is a permissible one, and not exclusive, while in the revision of the statute it is made mandatory. But as the act was remedial, and was intended to add, and not to take away, a form of remedy, the word shall in the revised statutes must be construed as meaning no more than may. *Hughes* v. *Farrar*, 45 Maine, 72.

It will be seen that the necessity of notice required by the act of 1855 is not dispensed with by the act of 1862, so that in no form of proceeding can a lien upon logs be made effectual without it. If, however, the writ is in the appropriate form as required by the act of 1862, and the statutory notice has been given, a judgment and execution in the common form will be sufficient to make the lien claim available. When the officer is commanded in such execution to seize and sell the property of the judgment debtor, he will be justified in taking the property attached on the original

precept, although not belonging to such debtor. It will be regarded as his (the debtor's) goods and estate for the purposes of satisfying such execution, and the general owner, whose property is legally encumbered with such lien, will be bound by it. The idea of the legislature, undoubtedly, was that such proceedings, if pursued as a remedy, might have substantial correctness enough for practical purposes.

But it is evident that there will be an essential difference in the value of the two kinds of judgments that may be obtained. In the one case a conclusive judgment *in rem* is had, binding upon all parties, available without further proceeding or proof, an end of the litigation. In the other case the facts to show that the claim recovered is a lien claim that may be enforced against the property attached will not be established by the record itself, but must be shown by proof *aliunde*. If the owner sues an officer for taking his property upon execution, the officer will be compelled to prove facts not contained in the record in order to complete his justification. Two suits are thus necessary to complete the litigation instead of one. As the officer would not be protected by his process, as in the other case, he would be justified in refusing to serve the execution without indemnity; and it may be questionable whether an officer would be compelled to serve an execution against the property of one not the judgment debtor, without any command in such execution therefor, even with indemnity. The owner, moreover, would have the advantage of postponing the commencement of his action as long as he pleased within the period of the statute of limitations. Of course the officer would be allowed, in a suit against him, to supply any deficiencies of fact apparent on the record, that may be necessary for his justification, by evidence contained in any special findings or verdicts, if such exist. In any view, however, it is obvious that a proceeding, which accords only with the requirements of the act of 1862, would be disadvantageous to the creditor in comparison with the mode of getting an adjudication strictly *in rem*.

The only conceivable advantage in the act of 1862 would be

that where a plaintiff in a suit, through inadvertence, by some irregularity or omission, fails to obtain a valid *in rem* judgment, to which he was entitled, but takes, instead, a judgment in the common form, the lien is not thereby extinguished and lost, but may still be effectual by proof of the necessary facts in ulterior proceedings. A great mass of lien claims, in early cases, were lost by non-conformity to the forms required by the construction given by the court to the statute, and to this may be imputed the origin of the act referred to.

In the case at bar a demurrer is filed by the owners of the logs, and this opens an inquiry as to the pleadings to be permitted in such cases. The rule of the common law in this regard does not seem to have been dispensed with. In *McPheters* v. *Lumbert*, 41 Maine, 469, it was declared that the owners could not be permitted to try the question whether there was a lien claim or not; but this declaration was not necessary to the decision there, and has not been adhered to. In *Lumbert* v. *Lumbert*, 44 Maine, 85, it was afterwards decided that the owner could contest the lien claim; that both the defendant and owner could not plead the general issue; that there could be but one general issue, otherwise two general verdicts would be required; that there could be but one general issue, and under that and appropriate brief statements one verdict and special findings, under the direction of the court, would be sufficient to establish the rights of all parties. Cutting, J., adds: "For instance, on such an issue the jury might return a verdict for the plaintiff against the defendants, and at the same time find specially that the lien claim did or did not attach, which findings and verdict would be incorporated into the judgment, and thereby enlarge or limit ulterior proceedings."

We can see no reason why the log owners may not demur to the plaintiff's writ and declaration. This is a form of pleading incident to every kind of judicial proceeding. It need cause no complication here. The result of it will settle the controversy, as far as such owner is concerned, one way or the other. The allegations of the plaintiff could be adjudged to be insufficient for a

judgment *in rem*, but sufficient for one *in personam*. When the owner comes into court, in obedience to its mandate, he has a right to have all questions affecting him settled as speedily as possible.

The counsel for the log owners, under the demurrer, urges several objections to the declaration in this case. The writ is unskillfully framed, but still the meaning of the allegations may be easily enough understood. It must be regarded as sufficient for a lien-claim writ if it comes within the requirement prescribed by the act of 1862, which dispenses with the necessity of any allegations outside of the common forms of the common law, except that the declaration must disclose that the suit is brought to enforce a lien upon the property attached. It is apparent enough that the first count, aided by the general words following the second count, which are designed to apply to the action and not to that count, comes within the rule.

It is contended that the second count is for an independent cause of action, distinct from the claim covered by the first count, and not a lien claim, and therefore that, as far as the log owner is concerned, the action is not maintainable. But it is evident that the claims described in the two counts are identical. If it were otherwise the objection would be unanswerable. The owner is summoned in to answer "to the suit," and not to a part of it, or to one claim in it, when there are more claims than one. His property should not be subjected to the costs and delays of a controversy in which he has no interest whatever. Even in admiralty a joinder of a claim *in personam* with a different claim *in rem* is never admissible, and at common law independent causes of action can be comprised in one suit only when they are of the same general nature and the mode of trial upon them is the same. The language of R. S., c. 91, § 36, is: "The declaration must show that the suit is brought to enforce the lien." How can it be said to be brought for that purpose if it is brought also for another purpose? An account can be divided, and separate actions main-

tained, where a portion is secured by a lien and a portion not secured. *Bicknell* v. *Trickey*, *ubi supra*.

It is earnestly urged that the owners should not be subjected to what is claimed to be an exorbitant charge of costs by the officer for keeping the logs attached. The apparently extraordinary sum charged in this case cannot be allowed without clear proof of its necessity. That, however, cannot be determined here. The owner, upon notice, can be heard elsewhere and his rights preserved.

It would be well if the court had power to settle all questions of costs and to apportion them in cases like this, as in equity cases, a power conferred already by R. S., c. 91, § 15, in cases of lien upon vessels.

It does not appear by the case whether the defendant in this action is still in court or not. Therefore the result must be as follows:

Exceptions overruled. Judgment in rem for the amount claimed in the first count to be entered for the plaintiff as against the logs; to be final unless the sum is reduced or the action defeated upon an issue between the plaintiff and defendant.

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

Seth H. Riggs *vs.* Inhabitants of Lee.

Equalization statute—who are entitled to shares, and the proportion of shares under it.

The soldiers entitled to share in the "surplus," mentioned in Act of 1868, c. 225, § 6,* are those who served on the town's quota without receiving a bounty from the town.

Their shares in the "surplus" are in proportion to the length of time they served, and may be recovered in an action of assumpsit after a demand therefor upon, and a refusal to pay by, the town.

On report.

This was an action of assumpsit in which the plaintiff, who enlisted and served three years in the rebellion without having received any bounty, claims to recover his proportion of the money paid the defendant town under the Act of 1868, c. 225.

Chief Justice Appleton, as referee, found the following facts: That the plaintiff made a demand on the selectmen at the March meeting previous to the bringing of this action; that the defendants furnished the commissioners with a certified copy of the vote of the town as required by Act of 1868, c. 225, § 6, and a list of the soldiers of the town who enlisted, were drafted, or served as substitutes and the period for which they enlisted and served, on which list the plaintiff's name appears; that the commissioners allowed the town $3,500; that there was paid into the town's treasury $3,337 of that sum, and that after deducting the amount

*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 representatives."

of $1,850, for bounties previously paid by the town to certain soldiers on their enlistment, there remained $1,487; that this last sum had been paid out on town orders before demand or suit brought; that there were five men who served nine months, eleven men who served one year, and twenty men who had served three years, without receiving any bounty, and nine three-years men who had received bounties from the town. There was also in evidence the vote of the town to appropriate the sum to which it was entitled under the Act above referred to, 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 representatives.

Upon these facts the court was to determine whether the plaintiff was entitled to recover, and if so, for what sum, and the proportions to be paid to the different classes of men in the service.

A. W. Paine and *C. A. Cushman*, for plaintiff.

We claim to hold the town liable in a twofold manner.

I. By virtue of their vote and the consequent receipt of this money under it. They agreed thereby to so appropriate the money received.

The case is precisely that of the "surplus revenue" cases. *Davis* v. *Bath*, 17 Maine, 141; *Fletcher* v. *Buckfield*, 17 Maine, 81; *Pease* v. *Cornish*, 19 Maine, 191. The same principle is recognized in *Simmons* v. *Hanover*, 23 Pick. 188; *Cooley* v. *Granville*, 10 Cush. 56.

II. As trustee holding money for our use, the town is liable here. The town had a legal right to receive the money and did so, voluntarily and in trust, and thus became liable as trustee to pay it for the use for which it was received.

A. Sanborn, for defendants.

This fund was a joint fund belonging to the soldiers jointly, and this action cannot be maintained, if any action at law is maintainable, because the other soldiers who are living, and there is no evidence that any are dead, are not joined with the plaintiff. 1

Chitty's Pl. 5; 1 Saunders, 153, note 1. Not too late to make the objection now. 1 Chitty's Pl. 7.

If this sum was a bailment, a deposit made by the State with the town for the benefit of the soldiers, this action cannot be maintained without demand upon the town. Story on Bailments, § 107, and notes; *Hosmer* v. *Clarke*, 2 Greenl. 308.

Such demand was not made.

1. No stated sum was demanded.

2. The selectmen had no authority over the fund without an express vote of the town. The demand was therefore insufficient. There was no conversion of this money, thereby rendering a demand unnecessary.

But the fund was a trust fund and an action at law does not lie to recover it. The only remedy is in equity.

"A trust is an obligation upon a person, arising out of a confidence reposed in him to apply property according to such confidence." Bouvier's Law Dict. 607; 2 Story's Eq. Jur., § 964; 4 Kent's Com., 8th ed., 316, § 61; 3 Black. Com. 431.

The distinction between this case and *Hall* v. *Marston*, 17 Mass. 575, and *Lewis* v. *Sawyer*, 44 Maine, 332, is, that in this case the State had no right to take back the money, had no legal interest in it before it was paid to the soldiers, and in those cases parties sending money by one person to be paid over to a third person had that right and interest, and the money could not be considered a trust fund.

WALTON, J. The soldiers entitled to share in the "surplus" mentioned in c. 225, § 6, of the public laws of 1868, entitled "An Act for the equalization of municipal war debts, and a limited assumption and reimbursement by the State," are those who served on the town's quota without receiving any bounty from the town.

Their shares in the "surplus" are in proportion to the length of time they served. A soldier who served three years is entitled to three times as much as the soldier who served but one year; and four times as much as the soldier who served but nine months.

A soldier may recover his share of the "surplus" in an action of assumpsit after demanding it of the town and a refusal to pay it. The demand may be made upon the selectmen.

Upon the facts found and reported by the chief justice, the plaintiff is entitled to recover for his three years' service, $59.68. Those who served one year are entitled to $19.89. Those who served nine months are entitled to $14.92. To which interest will be added from the date of the demand.

Judgment for plaintiff for $59.68.

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

ANN S. FRENCH *vs.* JOHN L. CROSBY and others.

Dower.

Where a wife joins in a deed with her husband for the purpose of releasing dower, she will not be barred thereby in a suit for dower, by her, against a third person who holds the lands by an attachment against the husband prior to said deed and a levy made afterwards, the tenant having no estate or claim under such deed.

ON REPORT.

DOWER for certain land on Exchange Street, Bangor. Demand was made November 21, 1872, and the writ dated December 22, 1872. It was admitted that demandant was married to George S. French in 1832 and that he died in 1849; that Zadoc French was seized of the premises, in which dower was demanded, at the time of his death in 1830, and that Ebenezer, Frederick F., and George S. French were his only heirs.

The demandant introduced a levy in favor of James Crosby

against George S. French, made July 3, 1838, upon one-seventh of one-third of the premises in which Mrs. French claimed dower. The attachment was made September 27, 1836. Also, a levy in favor of E. H. Sleeper against the same, dated February 3, 1842, the attachment having been made September 20, 1836, upon one-fifth of one-third, and a deed from Sleeper to Crosby, thus giving James Crosby title to four thirty-fifths of the whole lot. There was a partition by which the premises in which dower is demanded were set off in severalty to said Crosby, who died leaving the tenants his heirs at law.

The tenants introduced a deed from George S. French to Eben French of his one-third of the premises, dated September 28, 1836, in which the plaintiff released her dower; also, a deed from Frederick F. to Eben French, dated May 24, 1836, whereby Eben became possessed of the whole estate subject to the attachments mentioned above. The tenants also introduced eight levies, made on executions against Eben French, the attachments upon which were made after the deed of George S. French to him, covering his whole title in the estate.

The tenants requested the presiding justice to rule that the demandant, having released her dower as aforesaid, could not maintain this suit. This ruling was refused and the court, on the contrary, instructed that, inasmuch as tenants did not claim under the deed from George S. French, demandant's release of dower did not affect her right to recover in this action.

The tenants submitted to a default which was to be stricken off and a nonsuit entered if the rulings were erroneous. An agreement was also made as to the assessment of damages in case the default should stand.

John F. Godfrey, for demandant.

A. W. Paine, for tenants.

Barrows, J. The plaintiff sues for her dower in premises which the defendants hold under levies made upon executions

against her late husband. At that time he was seized as tenant in common; but partition was afterwards made at the instance of the levying creditor. These levies do not preclude her recovery. R. S., c. 103, § 6. All the matters necessary to establish her right are admitted or proved, and she is confessedly entitled to judgment for her dower and damages for the detention of it, unless she is barred by reason of having released dower in a deed including the premises from her husband to a third party, given subsequently to the attachments in the suits wherein the levies were made under which the defendants claim. The title of the grantee in that deed never came to these defendants, yet they claim that it shall inure to their protection by way of estoppel, and requested the presiding judge to rule that by reason of that release she could not maintain her suit against them.

He ruled, on the contrary, that inasmuch as the defendants do not claim under that deed, her release of dower therein does not affect her right to recover here. The ruling was correct. *Pixley* v. *Bennett*, 11 Mass. 298; *Smith* v. *Eustis*, 7 Maine, 41; *Littlefield* v. *Crocker*, 30 Maine, 192; *Harriman* v. *Gray*, 49 Maine, 537.

Judgment for plaintiff in conformity with the stipulations in the report.

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

JOSEPH CHASE *vs.* GOING HATHORN and others.

Deposition—notice to adverse party. Surety on note—liabilities of, when principal's name is forged.

A notice to take the deposition of one of several defendants is sufficient if served only upon the deponent as an adverse party.

It affords a surety no defense that the names of two of the principals upon a note are forged, the fact being unknown to the surety and holder when delivered.

If a principal sells a note to a third person, not the payee, without the express or implied consent of the surety, the surety is not liable thereon; but such consent may be implied by the course of business between the parties.

A note payable to a savings bank purchased of the makers by a party, not the payees, the bank having no interest in it, may be indorsed without recourse by the bank to such purchaser, to enable him to maintain a suit in his own name thereon; and the authority of the treasurer to indorse it for the bank may be inferred from the conduct of the trustees without any express direction or vote.

ON REPORT.

ASSUMPSIT upon the following note:

PITTSFIELD, December 29, 1869.

Four months after date we promise to pay to the order of the Treasurer of the Newport Savings Bank, three hundred dollars at the Newport Savings Bank, value received.

DANIEL W. SIMONS,
HENRY M. SIMONS.
GOING HATHORN, *Surety.*

On the back of the note was indorsed,

"Waiving demand and notice,
JOHN E. SIMONS.

Not holden,
A. HOBART, Treasurer of Newport Savings Bank."

John E. Simons, one of the defendants, was defaulted. The plaintiffs discontinued as to Daniel W. Simons and Henry M. Simons without costs, upon the ground that their names were

forged to the note by John E. Simons. Going Hathorn, the surety upon the note, defended. Writ dated Sept. 19, 1870.

The plaintiff offered the deposition of John E. Simons, which was objected to because the defendant Hathorn was not notified of its taking and was not present, Hathorn claiming that there was fraud and collusion between the plaintiff and John E. Simons, and that notice to Simons would not authorize the deposition to be used to affect the rights of Hathorn without notice to him. The objection was overruled and the deposition admitted.

John E. Simons testified in this deposition, among other things, that the actual signers to this note were himself and Hathorn; that the names of Daniel W. and Henry M. Simons were placed upon the note by himself without any authority; that the note was given to raise money to pay on notes upon which Mr. Hathorn and himself were holden, and that the money obtained upon the note in suit was so used; that it was the talk between himself and Hathorn that the money should be obtained of Mr. Chase or a Mr. Nichols if he could not get it from the bank, and that the note was in the same condition at the time Hathorn signed it as it was at the time of the taking of this deposition. The plaintiff testified, against objection, that when Simons brought the note he (S.) told him (C.) "that Hobart said the bank could not discount the note and sent him to me" (plaintiff).

A. Hobart, called by the defence, testified that he was treasurer and general agent in managing the affairs of the Newport Savings Bank; that the note in suit was offered at the bank by John E. Simons to be discounted at about the time of its date, and they refused because they had no funds; that the next he saw of the note was sometime after its maturity, when the plaintiff presented it to him and asked him to endorse it; witness told him he wished to consult the trustees and did consult one of them, who gave his consent, whereupon he indorsed it as it now appears, and that no consideration was paid for the indorsement and the note was never the property of the bank or of the witness.

The defendant, Hathorn, testified that this was an accommoda-

tion note; that nothing was said about using the money to pay upon notes for which he was holden, nor about getting the money anywhere but of the Newport Savings Bank and that witness never consented nor assented to Simons' getting the money elsewhere; that he supposed when he signed the note that the signatures of both Henry M. and Daniel W. Simons were genuine, otherwise he would not have signed; that Henry M. Simons had previously agreed to pay all paper witness signed for John, or at John's request, and to protect him in so signing.

The plaintiff testified among other things that he discounted this note for John E. Simons at twelve per cent, and that after the note became due Hathorn promised to pay it. Hathorn being recalled denied the making of any promise to pay the note. He offered letters written by Chase and John E. Simons to prove a conspiracy between them to throw the debt upon him; that of Chase was admitted and that of Simons excluded.

The case was withdrawn from the jury and reported to the full court, who were authorized to draw such inferences as a jury might from so much of the testimony as was admissible and enter such judgment as should be deemed to be in accordance with the legal rights of the parties.

A. M. Robinson and *E. Walker*, for plaintiff.

D. D. Stewart, for the defendant, Going Hathorn, contended:

1. That on account of the forgeries upon the note the defendant was not liable, and cited, as tending to establish a principle opposed to that laid down in *York Co. M. F. Insurance Co.* v. *Brooks*, 51 Maine, 506, the following cases: *Miller* v. *Stewart*, 9 Wheat. 703; *Getty* v. *Borisse*, 49 N. Y. 385; *Smith* v. *United States*, 2 Wall. 234; *Pratt* v. *Gibbs*, 9 Cush. 86; *Bean* v. *Parker*, 17 Mass. 591; *Wood* v. *Washburn*, 2 Pick. 24; *Ferry* v. *Burchard*, 21 Conn. 603; *Leaf* v. *Gibbs*, 4 C. & P. 466 [19 Eng. C. L. 475]; *Awde* v. *Dixon*, 6 Exch. 869; *Mason* v. *Bradley*, 11 Mees. & Wels. 589; *Wood* v. *Steele*, 6 Wall. 82; *Howe* v. *Peabody*, 2 Gray, 556; *Martin* v. *Thomas*, 24 Howard, 315; *Gardner* v. *Walsh*, 32 Eng.

L. & Eq. 162; *Seeley* v. *The People*, 27 Ill. 173; *Pepper* v. *The State*, 22 Indiana, 399; *Baxter* v. *Duren*, 29 Maine, 434; *Agawam Bank* v. *Sears*, 4 Gray, 98; *Wait* v. *Pomeroy*, 20 Mich. 425; *Little* v. *Derby*, 7 Mich. 325.

2. The signature of John E. Simons upon the back of the note, after the instrument was executed and ready for delivery to the bank, made him an original promissor; this was a material alteration and avoided the note as against Hathorn, without whose knowledge it was done. *Malbon* v. *Southard*, 36 Maine, 147; *Lowell* v. *Gage*, 38 Maine, 35; *Gardner* v. *Walsh*, 32 Eng. L. & Eq. 162; *Lee* v. *Starbird*, 55 Maine, 492; *Chadwick* v. *Eastman*, 53 Maine, 12; *Wallace* v. *Moell*, 21 Ohio St. 163; 2 Parsons' Bills and Notes, 556.

3. The deposition of John E. Simons should be rejected. *Com.* v. *Weiber*, 3 Met. 447; *Chase* v. *Hathaway*, 14 Mass. 224; *School Dist.* v. *Copeland*, 2 Gray, 417; *Scott* v. *Dickerson*, 14 Pick. 276; *Ex parte Davis*, 41 Maine, 59; *Penob. R. R. Co.* v. *Weeks*, 52 Maine, 457; *Walton* v. *Greenwood*, 60 Maine, 364.

4. The bank had no interest in the note, nor had its treasurer, and having acquired no legal title thereto neither could transfer one to the plaintiff. *Lloyd* v. *Howard*, 1 Eng. L. & Eq. 23[illegible] and note.

5. The note having been made payable to the Newport Savings Bank, but not having been discounted by the bank, never became a valid and operative contract. *Prescott* v. *Brinsley*, 6 Cush. 233; *Adams Bank* v. *Jones*, 16 Pick. 577; *Allen* v. *Ayers*, 3 Pick. 298; *Skowhegan Bank* v. *Baker*, 36 Maine, 154; *Maine Bank* v. *Cole*, 39 Maine, 188; *Granite Bank* v. *Ellis*, 43 Maine, 367.

6. Having been given without consideration and not negotiated to plaintiff nor accepted by the payees till after maturity, the note was absolutely void on the day of its maturity. *Calder* v. *Billington*, 15 Maine, 398; *Savage* v. *King*, 17 Maine, 301; *Andrews* v. *Pond*, 13 Peters, 65; *Clark* v. *Whitaker*, 50 N. H. 474; *Whistler* v. *Foster*, 14 C. B. (N. S.) 248; *Lancaster Bank* v. *Taylor*, 100 Mass. 18; *Fisher* v. *Leland*, 4 Cush. 468; *Haskell* v. *Mitchell*, 53 Maine, 468.

7. Hathorn's subsequent promise to pay (if any such was made) was not binding unless made with full knowledge of the facts. *Leaf* v. *Gibbs*, 4 C. & P. 466; *Davis* v. *Gowen*, 17 Maine, 390; *Trimble* v. *Thorne*, 16 Johns. 152; *Hunt* v. *Wadleigh*, 26 Maine, 271; *Lee* v. *Howard*, 10 Cush. 162; *Townsend* v. *Wells*, 32 Maine, 416; *Thomas* v. *Mayo*, 56 Maine, 41.

PETERS, J. The deposition of John E. Simons, one of the defendants, taken before action entered, was objected to because no tice of the taking was not given to Going Hathorn, the other defendant, who claimed there was fraud and collusion between the deponent and the plaintiff. No facts are suggested to show what the alleged fraud and collusion was. By R. S., c. 107, § 8, it is provided that where there are several plaintiffs or defendants in an action a notice to one or more of them shall be sufficient. If the defendant Hathorn suspected a sinister purpose in the manner of notice given for taking such deposition, and was dissatisfied with its contents, his remedy would be in taking the testimony anew, and, if necessary, obtaining a continuance for such purpose, but his objection to the admissibility of the deposition cannot be sustained.

The defendant Hathorn claimed to prove a conspiracy, between John E. Simons and the plaintiff, "to throw this debt upon him," and offered written statements of both of them to show it. It does not appear that there was any offer to prove admission of Simons as contradictory to his testimony as a deponent. The evidence offered was properly excluded.

Objection is taken to the admission of the statement of John E. Simons made when he sold the note in suit to the plaintiff. If not admissible as a part of the *res gestæ*, the testimony is utterly immaterial, and its admission not injurious to the defendant.

It is contended by the defendant Hathorn, that he cannot be held upon the note because two signatures on it preceding his, upon the strength of which he was induced to sign as surety, prove to be forgeries. But the question involved in these facts, however viewed elsewhere, has been settled, in this State, adversely to the

defendant, in the case of *York Co. M. F. Ins. Co.* v. *Brooks*, 51 Maine, 506. But it is insisted by the counsel for the defendant that this case should be overruled as not in accordance with an array of authorities contended by him to be inconsistent therewith. There are many questions of a mercantile nature, a decision of which, either way, will result in some degree of hardship as well as of benefit to different parties concerned. Upon such questions different courts are often found to have arrived at different conclusions. But when the principles involved in this description of cases have been once decided by a deliberate adjudication, such decision, unless for reasons of a very controlling character, should be regarded as a finality in the jurisdiction where made, so that all persons interested, knowing the rule of law, can protect themselves accordingly. We are not convinced that the principle established, in the case referred to, is an unjust or erroneous one, but on the contrary, are satisfied that a departure from it would be productive of much more harm than good.

Whether the surety, Hathorn, can be held upon the note, if sold, without his previous consent or subsequent ratification by the principal, John E. Simons, to any person other than the payees, is a point which has been confidently argued on both sides. The reasons upon either side are so forcible it is not strange that different courts hold opposite opinions upon the question. But the precise principle involved here has already been established, as we regard it, in the adjudged cases in this State. The question is touched in *Skowhegan Bank* v. *Baker*, 36 Maine, 154; decided in *Manufacturers Bank* v. *Cole*, 39 Maine, 188; and conclusively settled in *Granite Bank* v. *Ellis*, 43 Maine, 367, that the surety cannot be held. Not upon the ground that there has been a change of contract prejudicial to him, but that there has been no completed contract at all; that there was no delivery to the only party to whom the note by its very terms was to be delivered, and therefore that the contract which was merely undertaken to be made never took effect.

This leads us to determine, whether, as a question of fact, the

surety either expressly or by implication consented to, or ratified the act of the principal in getting the note discounted outside of the Newport Savings Bank. The evidence bearing on this issue extensively conflicts. Still, we think there is a preponderance upon the proposition favorable to the plaintiff. If the testimony of the plaintiff himself is to be regarded as true, no doubt is left about it.

It would be difficult, however, to accord the result of the issue to the plaintiff, with the burden of proof upon him, upon his statements opposed by the denials of the other side. John E. Simons, the defaulted defendant, testifies that the talk between the surety and himself was to get the money of other parties if he could not get it at the bank. Hathorn denies this. Which statement should be relied on? The effect of the testimony of the surety is to clear himself from liability while the liability of Simons is fixed, and he has no legal interest either way. But the defendant invokes against the credibility of Simons that the case shows that he is a confessed forger. It may be questionable, when a cause has been withdrawn from a jury and referred to the court, whether it is not to be regarded as submitted upon the character of the evidence given, rather than upon the character of the persons giving it. His testimony, however, so far as contradicted will not be relied on to help produce the result we arrive at. But Simons deposes to an important fact not contradicted. He says the money got upon the note "was used to pay the interest on notes where Hathorn and I were holden." This is not denied, and it nowhere appears that Hathorn did not know that the money was obtained from the plaintiff and was so used. As this note became substituted for the same amount of liability of the surety upon other notes of a like character, his liability was not in the aggregate increased. It does not appear why the surety should care from what source the money should be obtained. It is urged that it was material because the act of 1869 prohibited discounts by savings banks upon names alone, and, as the money could not be legally obtained but upon some security, that the surety would have been better off on that account. It would seem that the bank rejected the paper only "because they

then had no funds," and not because unaccompanied with security. It does not appear that the parties were aware of the statutory provision, and, if they were, it would be a circumstance to prove that the note was to be thrown upon the market rather than discounted at the bank, for the business and situation of the parties show clearly enough that the very object of the surety's name was because the principal had no security he could use.

The situation of the parties sheds light upon the transaction. When the surety signed the note he relied upon the two names which turn out to be forged; supposed them genuine or he would not have signed; relied on Henry Simons to pay all paper he signed for John; and had intimate business and personal relations with them both. Evidently there was a large quantity of paper upon the market bearing these same names. From such an inspection of the situation of the parties and the course of their business transactions as is afforded us upon the evidence, we feel authorized, under the terms of the report, to find that there was an implied permission of the surety that this note might be discounted wherever the money could best be obtained. When the surety testifies that he never assented that the note might be discounted any where outside of the Newport Bank, his testimony can mean no more than that he made, in words, no direction or declaration to that effect.

Objection is taken by the defendant against the legality of the transfer of the note to the plaintiff from the bank. If the note is regarded as a note to the treasurer individually, no such question can be raised. Whether a note of this description is a promise to the corporation or its treasurer, usually depends much upon the source from which the consideration for it comes. That criterion cannot exist here, as neither of them purchased or paid for the note. Assuming that the bank, and not its treasurer, was the legal payee of the note the objections urged cannot be sustained. That the form of the indorsement was correct was settled in *Farrar* v. *Gilman*, 19 Maine, 440. That a corporation can use its name for a purpose like this is substantially decided in *Lime Rock Bank* v. *Macomber*,

29 Maine, 564, and *B. O. & M. R. R. Co.* v. *Smith*, 47 Maine, 34, and kindred cases in this State, and precisely adjudged in *Elliott* v. *Abbott*, 12 N. H. 549. That this right or power can as well be exercised by a Savings Bank as any other kind of banking institution, follows from the similarity of the attributes and powers common to both; and that the treasurer had the authority of the bank to make the indorsement, appears sufficiently from the evidence in the case.

This transaction being outside of the ordinary course of business of the bank, the treasurer would not be authorized to indorse the note for the bank without a power specially delegated to him to do so. The assent of the bank, for this purpose, may be inferred from the acts of its officers without any recorded vote or express direction of the board of trustees. *Lime Rock Bank* v. *Macomber*, *supra*; *Brown* v. *Donnell*, 49 Maine, 421; *Sherman* v. *Fitch*, 98 Mass. 59; *Lester* v. *Webb*, 1 Allen, 34. In these cases in Massachusetts it is stated that authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection, as well as in the case of individuals; and considerable stress is placed upon the implied authority conferred upon a treasurer of a corporation, by allowing him to act as their general agent or manager.

A distinction is made between the authority of an agent to bind the corporation by a contract of indorsement, and simply to transfer the property in a note. The latter authority is more readily inferred. *Brown* v. *Donnell*, *ubi supra*.

Here, by an indorsement "without recourse" no liabilities were assumed; the bank had no more than a nominal interest to pass; the treasurer was "general agent in managing the affairs of the bank," which evidently meant the possession from the trustees of more than the ordinary authority of a treasurer; the attorney who prosecutes this suit is one of the trustees of the bank, and its president is an active practitioner at the bar where this case came up. The action of the treasurer seems to have been unobjected to and acquiesced in long enough to amount to *prima facie* proof of authority for what he has done.

It is not necessary to consider the effect of an alteration of the contract, contended by counsel for the defendant to have been made by the signature of John E. Simons upon the note after its completion, without the consent of Hathorn, as the point does not appear to be presented by the facts of the case.

Defendants defaulted.

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

EDWARD H. BURR and wife, in equity, *vs.* CHARLES D. HUTCHINSON.

Equity. Power of court to reform deed of real estate.

Where the complainant bargained one parcel of land, and, by a mistake of both parties, conveyed another parcel to the respondent, the equitable jurisdiction of this court will authorize it to reform such deed according to the intention of the parties, and, by decree, to protect the interests of such persons as may legally claim to hold the correct premises through and under the respondent.

BILL IN EQUITY, heard on bill and answer.

The facts appear in the opinion.

T. W. Vose, for complainants.

A. Sanborn, for respondent.

PETERS, J. The complainant alleges that in the year 1854 he bargained to the respondent a parcel of lot number "five" in Brewer, and by mistake conveyed to him by deed of warranty a part of lot number "six;" that the respondent, however, went into possession of the lot he bargained for and supposed he purchased, and made valuable improvements upon it. This is fully

admitted by the respondent in his answer, and no question arises between the parties excepting as to what relief shall be granted under the bill and as to costs. This being a case of admitted mutual mistake it is well settled that this court has full chancery power to rectify the mistake and reform the deed according to the original bargain and intention of the parties.

The respondent is ready to convey back the portion of lot "six" which was deeded him, and has produced in court a release for that purpose, to be delivered to the complainant whenever he will give the respondent his warrantee deed of so much of the lot "five" as was originally agreed and intended by them. The complainant thinks that would be unjust toward persons now claiming to occupy and own lot number "five" through and under the respondent. It seems the parcel "five" was levied upon by the respondent's creditors, who by quitclaim transferred the premises to Caroline Arey, who quitclaimed to one Maria L. Rogers, who conveyed by deed of warranty to a party, that party also conveying by warrantee to still other parties. If the supposed title had passed out of the respondent by his deed of general warranty, a conveyance of the title to him now by the complainant would inure at once by estoppel to the benefit of all the parties succeeding to the title from the respondent, and the result would be just and equitable to all concerned. *Pike* v. *Galvin*, 29 Maine, 183. But as the land was taken from the respondent by a levy the result would be otherwise. *Crocker* v. *Pierce*, 31 Maine, 177. Should the respondent's demand be strictly complied with, the consequence would be to deprive the third parties of all interest in the land and give it to the respondent, whose creditors have once already paid him for it and, as it is to be presumed, at its full value. Such a result is unnecessary and would be inequitable and unreasonable. Nor would such a result be reached by merely reforming the deed, which, according to the legal definition, "would be to make it in fact just what the parties at the time intended to make it, and with all the results as if it had been so made." Almost any form of injunction in reforming a deed can be employed,

which may be adapted to the special circumstances of the case. *Prescott* v. *Hawkins*, 12 N. H. 19; *W. L. C. & W. Man. Co.* v. *Perley*, 46 N. H. 83–109; 1 Story's Eq. Jur. §§ 437, 438.

Nor would it be expedient, as contended by the complainant, for him to convey to the person alleged to be the present owner, under the respondent, of the premises that should have been conveyed, lest it turn out that other persons are interested in the questions involved who are not made parties to the bill.

It would have been well to have made the third persons alluded to parties to these proceedings, but as it is not proposed to make any decree prejudicial to them, and no point is taken as to the omission, their absence may be regarded as immaterial.

There should be an order that the deed shall be reformed, so that it shall grant and convey such premises as it was intended to, with all the results as if it had been so made; that the complainant be required to release to the respondent the land originally intended to be conveyed, with such terms of warranty as would be suitable in a conveyance made now for them, the form of conveyance and covenants therein to be appropriate to protect the rights and interests of such persons as may legally claim to hold the correct premises through and under the respondent; and that the respondent be required to release the lot number "six," and enjoined from making any other conveyance or use of the same. No person, not a party hereto, to be prejudiced thereby.

As the mistake was the fault of both parties, and the respondent was justified in awaiting an appeal to court, for directions in the matter, before action on his part, neither party will recover costs.

Bill sustained without costs. Decree to be entered as indicated in the opinion of the court.

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

INHABITANTS OF PLANTATION NO. 4, R. 1, *vs.* JOHN R. HALL and others doing business under the name of the EASTERN EXPRESS COMPANY.

Common carrier—when liability ceases.

Where a common carrier takes goods to forward and deliver, if within his route, if not, to deliver to the connecting express or a stage at the most convenient point, his liability as a common carrier ceases when the goods arrive at such convenient point of intersection. The common carrier then becomes a forwarder and he ceases to be an insurer of the safety of the goods forwarded.

In a suit against such forwarder for negligence, the burden of proof is on the plaintiff to establish the same.

ON EXCEPTIONS.

CASE against the defendants, who are doing business under the firm name and style of the Eastern Express Company, for neglecting to deliver to plaintiffs a package of money intrusted to the defendants as common carriers. The verdict was for the plaintiffs, and the defendants excepted to certain rulings and instructions, the facts in relation to which are sufficiently stated in the opinion.

F. A. Wilson, for the defendants.

J. F. Robinson and *W. H. McCrillis*, for the plaintiffs.

APPLETON, C. J. This action is against the defendants as common carriers for neglect in not delivering a package of money intrusted to them as such.

The plaintiffs on August 21, 1866, wrote N. G. Hichborn, treasurer of Maine, to forward to them the amount allowed for aid to the families of volunteers, and requested him to send "the money by express or a check on one of the Bangor Banks."

The defendants, by their agent, received a package of $527.34 under an agreement "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 the most convenient point."

The express route of the defendants was from Augusta to Mattawamkeag. Lincoln was an intermediate station and the nearest on the route to No. 4. One Patterson drove the mail stage from Lincoln to Springfield and his route was the nearest and only express or mail route to No. 4. Said Patterson had long been in the habit of carrying packages for others as well as the defendants. The money arrived at Lincoln and was there delivered to Patterson who appropriated the same to his own use.

The defendants were insurers during the whole of their route. But no loss occurred "within their route." The money was safely carried to the place where it was to be delivered "to the connecting express, stage, or other means of conveyance." The defendants have made no contract to carry the money farther or to make any delivery other than is specified in their contract. They have delivered to the person and at the place where they agreed to deliver it. It was held in *Gray* v. *Jackson*, 51 N. H. 9, after a very learned and elaborate examination of all the authorities, that common carriers between two points, taking a parcel for a place beyond their route and delivering it, according to the usage of the business, to the next carrier, who misappropriated the same, were not responsible for its loss. In *Burroughs* v. *Norwich & Worcester R. R. Co.*, 100 Mass. 26, it was held that a corporation established to transport goods for hire between certain places and receiving goods directed to a more distant place is not responsible beyond the end of its own route, as a common carrier, but only as a forwarder, unless it makes an express agreement extending its liabilities. In *Pendergrast* v. *Adams Express Co.*, 101 Mass. 120, the principle was affirmed that the liability of the company, as carriers, ceases at the termination of their route. In the absence of a special contract a common carrier is only liable for the extent of his own route and for the safe storage and delivery to the next carrier. *Baltimore R. R. Co.* v. *Schumacher*, 29 Maryland, 176. A common carrier is not liable for goods lost be-

yond the end of his route, unless by special contract. *Skinner* v. *Hall*, 60 Maine, 477. In *American Express Co.* v. *Second National Bank*, 69 Penn. 394, the express company undertook to "forward to the nearest place of destination reached by this company." "If they were carriers at all," observes Sharswood, J., "it was to the nearest point of destination; beyond that they were forwarders only. There was nothing unreasonable, unusual, or unlawful in such a contract. It is very well settled that forwarders are not insurers as common carriers. They are liable only as ordinary bailers to carry for hire." In *Read* v. *U. S. Express Co.*, 48 N. Y. 462, it was held when an express company agrees to forward a package to a point beyond the terminus of its route, the contract limiting its liability to that of forwarders, through charges not having been paid, that their liability as carriers ceases at the end of their route, and if the package arrives there in safety and is delivered with proper instructions to another responsible carrier upon the line to the point of destination, its liability ceases.

Such, unquestionably, is the law. What their liability may be as forwarders is not now before us. They are not declared against as such.

The instruction, that if the defendant knew Patterson to be dishonest and untrustworthy and not a safe person to whom to intrust the package, or by ordinary care might have known it, the defendants would be guilty of negligence for which they would be liable, was erroneous.

The contract of the defendants was "to deliver to the connecting express, stage, or other means of conveyance, at the most convenient point." This they have done. It was no part of their duty, as carriers, to make special investigations as to the integrity or trustworthiness of the connecting express or stage driver. They did not, as carriers, contract so to do. All they had to do was to deliver the money as they agreed. They were not in the first instance to make inquiries. They had a right to assume that the person to whom they were to deliver the money in their charge was one to whom the delivery would be satisfactory to the

plaintiffs. The burden, therefore, would be on the plaintiffs to prove negligence, not on the defendants to disprove it. The instruction imposed on the defendants the duty of exoneration, but the burden was on the plaintiffs to show negligence in the defendants in delivering the money to the person to whom, and at the time and place when, it was so delivered.

Exceptions sustained.

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

STATE OF MAINE *vs.* INTOXICATING LIQUORS claimed by JOHN C. FRANK, appellant.

Sale—evidence of. Intoxicating liquors—claimant can set up no right not specified in his claim.

When goods have been sold and delivered and are in the vendee's possession, the same evidence is necessary to show a sale to the original vendor as would have been required to establish a sale from him.

The claimant of spirituous and intoxicating liquors seized under the search and seizure section of R. S., c. 27, can assert no right to the liquors seized except that specifically set forth in his written claim filed with the magistrate before whom the proceedings are pending.

ON EXCEPTIONS.

SEARCH AND SEIZURE PROCESS against James McCann and certain liquors which were claimed by John C. Frank as the property of Thomas J. Dunbar & Co., of Boston, of which firm the claimant is a member and made this claim in behalf of his firm.

After the introduction of the testimony on the part of the claimant, which is substantially set forth in the opinion of the court, the presiding judge ruled as follows:

"If the liquors were not intended for unlawful sale in this State it would become immaterial what the arrangement was between

McCann and Frank. For then, as between McCann and the liquors, McCann might defend them. But Frank comes as a claimant, and he must show that he had a title, otherwise he has no claim whatever. Now, it strikes me that these liquors were originally sold by Frank to McCann, no matter whether in violation of law or not, so far as this claimant is concerned. They were sold and delivered, and taken into possession by McCann, and he had sold from them a certain quantity. He says there was afterwards a resale to Frank. But it requires as much for a resale as for the original sale. There must be a delivery or some writing to take it out of the statute of frauds. Now, I do not see anything to take it out of the statute of frauds. All I see is the memorandum made upon the book, but that would not come within the statute. Therefore, for the purposes of this trial, I rule that it does not constitute a resale, and these claimants have no standing in this court."

Upon this ruling a verdict was taken *pro forma* that the liquors were kept for unlawful sale, and the claimant excepted.

F. A. Wilson, for the claimant.

No memorandum was required as it was an executed and not an executory contract. *Bucknam* v. *Nash*, 12 Maine, 474.

The price of the resale was a cancellation of the debt. This was sufficient to complete the sale between seller and purchaser. *Ludwig* v. *Fuller*, 17 Maine, 162.

The relations of purchaser and seller are the only ones in this case. The State can raise no question as a second purchaser or creditor. A third party cannot invoke the application of the statute of frauds for his own benefit. Brown on Stat. of Frauds, 3d ed. § 135; *Cahill* v. *Bigelow*, 18 Pick. 369; *Cowan* v. *Adams*, 10 Maine, 374.

It is not necessary under R. S., c. 27, § 36, that the claimant should have "title" in himself.

H. M. Plaisted, Attorney-General, *contra*.

APPLETON, C. J. This was a proceeding under the search and seizure clause against James McCann for having liquors in his possession with intent to sell the same in violation of law.

The claimant, Frank, one of the firm of Thomas J. Dunbar & Co., wholesale liquors dealers, of Boston, Mass., sets up the title of his firm to the goods and asks for their return. The only questions reserved for our consideration relate to the right of Frank to intervene in his own right or as a member of the firm of Dunbar & Co.

It is not denied that the liquors in controversy were sold by Dunbar & Co. to McCann in Boston, were shipped to Bangor and received by McCann, and that he took them into his possession.

The claimant, Frank, testified that when at Bangor, in April, prior to the seizure, McCann told him that he had received notice from the city marshal not to sell and wished him to take back the goods; that he finally determined to take them; that he told him (McCann) to put them in a safe place; that the liquors stand charged in the book of their firm to McCann; that no act was done but telling him that he would take them when the river opened; that they were then to be sent back; that he did not take a delivery of the goods; that there was no writing between him and McCann; that no credit was given McCann for these liquors, nor was there to be until they were returned to Boston and there gauged.

Upon this testimony the presiding justice held that there was no resale of the liquors to the firm of Dunbar & Co. The facts were not in dispute. Upon those facts, as fully stated by the claimant, the title to the liquors never revested in the firm of which he was a member. In *Quincy* v. *Tilton*, 5 Maine, 277, it was held that where a sale has been made and perfected the same formalities are necessary to revest the property in the original vendor which were necessary to pass it from him to the vendee. Here was neither agreement in writing, delivery of the property, payment of the price or earnest, the giving of credit for the goods

resold, the taking them into possession, or any act done by which, upon the recognized principles of law, the title could pass.

It is true that by R. S., c. 27, § 36, the magistrate after the seizure of the liquors shall give due notice of the time and place of hearing the libel against the liquors so seized to all persons interested. By § 37, the claimants or persons interested "shall file with such magistrate such claim in writing, stating specifically the right so claimed and the foundation thereof, the items so claimed," etc., etc. This the claimant has done. He asserts no title but as owner. If not owner, he has no right whatever to the liquors seized, or to any portion of the same, or to the possession. The claim as set forth is completely negatived by his own testimony and it is not pretended he has any other. He must be limited to the right as he has set it forth in his claim.

Exceptions overruled.

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

DONALD MCAULEY *vs.* CHAS. M. TRACY and trustee and LAWRENCE G. TRACY, claimant.

Necessaries within the meaning of R. S., c. 86, § 55.

Groceries furnished an unmarried person and used in the family in which he is boarding, being taken in payment for his board, are not necessaries "furnished him or his family" within the meaning of R. S., c. 86, § 55.

ON EXCEPTIONS.

ASSUMPSIT for groceries furnished to the defendant or his order, and which, it is admitted, had not been paid for.

The trustee, George W. Ladd, disclosed an amount due the principal defendant, less than twenty dollars, for personal services performed within a month prior to the service of the writ upon him.

At the time the groceries were sold to defendant he was an unmarried man and boarded with his mother. The family consisted of himself, his mother, a brother, and a sister. The brother and sister paid their board to the mother and the defendant paid his board in part by the provisions, to recover pay for which this suit was brought. These provisions were consumed by the family.

Upon these facts the court charged the trustee, and Lawrence G. Tracy, who became a party to the suit as claimant of the money in the hands of the trustee, filed exceptions.

T. W. Vose, for the claimant.

P. G. White, for the plaintiff.

APPLETON, C. J. This case finds that there was less than twenty dollars due the principal defendant for personal services earned within one month prior to the service of the plaintiff's writ.

The goods specified in the bill of particulars were delivered on the defendant's order. At that time he was boarding with his mother, whose family consisted of the defendant and his brother and sister. The defendant paid his board to his mother by the goods sued for, which were carried into and consumed by the family.

The question presented is whether the goods sold the defendant on credit were "necessaries furnished him or his family" within the meaning of R. S., c. 86, § 55.

The goods furnished were not necessaries for the family of the defendant, for he was unmarried and had none.

They cannot be regarded as necessaries for the defendant, for they were not procured for his use, but for that of the family in which he was boarding and to the head of which he was indebted for board. They paid his board precisely as if it had been paid by money. If he had borrowed money with which to pay his board the money borrowed would not have been necessaries within the meaning of the statute. The board was the necessary

thing. Whether the defendant borrowed money or bought goods on credit with which he paid for what was necessary makes no difference. The goods purchased were the means by which payment was made for what was necessary. The necessaries furnished the defendant and the goods with which payment was made cannot both be regarded as necessaries within the statute. If he had paid for board with a silk dress purchased for his mother, the silk dress would not be deemed a necessary for him, though the board would be. *Exceptions sustained.*

Trustee discharged.

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

DAVID FULLER and another *vs.* EUGENE WILDER and another.

Sale—evidence to rebut the inference arising from possession.

In an action for goods sold and delivered against parties individually and in their capacity of surviving partners, in order to explain their possession of the goods, and rebut the inference of a sale drawn from such possession, it is competent for the defendants to introduce evidence to prove that when their copartnership was formed, it was agreed by the members of the firm that the partner to whom the plaintiffs testify that they sold the goods, supposing that he was acting for the firm, should put in the goods in controversy as his share of the capital stock, that he did so, and that they knew nothing of any purchase of the goods from the plaintiffs.

ON EXCEPTIONS.

ASSUMPSIT for certain logs sold and delivered. The facts in relation to the case, and the grounds of exception are fully stated in the opinion.

A. W. Paine, for the plaintiffs, in support of the exceptions.

The testimony admitted, subject to objection, was not simply *res inter alios,* an agreement between strangers to the suit, but between one of the litigating parties and another member of the firm, all of whose interests were directly adverse to plaintiffs.

Had the plaintiffs known of the agreement, and then delivered the logs, a valid agreement would have existed; until then this evidence would be inadmissible. *Bucknam* v. *Chaplin*, 1 Allen, 70; *Kelleher* v. *Miller*, 97 Mass. 71; *Lincoln* v. *Taunton Copper Manuf. Co.*, 9 Allen, 181; *McLellan* v. *Pennell*, 52 Maine, 402; *Forsyth* v. *Day*, 41 Maine, 382; *Hall* v. *Tribou*, 42 Maine, 192; *Boody* v. *McKenney*, 23 Maine, 517; *Fogg* v. *Hill*, 21 Maine, 529; *Jones* v. *Stevens*, 5 Met. 373.

F. A. Wilson, for the defendant, *contra.*

Dickerson, J. This was an action on account annexed for the value of certain logs, cut under a permit granted by the plaintiffs to Edward Wilder and by him assigned to them, one-fourth absolutely, and three-fourths collaterally, to secure the plaintiffs for supplies to be furnished by them to Edward, to carry on his part of the operation. One count in the writ declares for logs sold to the defendants individually, and the other for logs sold to them as surviving partners of the firm of E. & E. Wilder.

After the logs arrived at the boom Edward Wilder formed a copartnership with his two brothers, Eugene and Charles, the defendants, for the manufacture of timber, after which the plaintiffs claim that they sold the logs to the firm by a trade with Edward, acting for the firm, and that the firm manufactured the logs for their own use. Edward Wilder afterwards died.

The defendants claimed that no sale was made to the firm, but that it was made either to Edward alone, or that he took the logs as his part of the whole drive. Testimony was introduced tending to prove each of these respective positions.

The defendants were permitted to introduce evidence of the arrangement made between them and their deceased brother, to the

effect that when they entered into copartnership it was agreed between them that Eugene should put in, as his part of the capital, the sum of $4,000 in money, and that Edward should put in these logs, and that in pursuance of this arrangement the money was put in by Eugene, and these logs were taken, and that they knew of no purchase from the plaintiffs. No evidence was offered that the plaintiffs had any knowledge of this arrangement. To this evidence the plaintiffs objected, but the presiding justice overruled the objection and admitted it. The verdict being for the defendants, the plaintiff excepted to this ruling.

The plaintiffs testified to a sale of the logs to the firm through Edward, acting, as they supposed, for the firm. It was clearly competent for the defendants, either in their individual capacity or as surviving partners, to testify that they knew of no such purchase on account of the firm. But this denial would not explain the possession of the logs by the firm, or rebut the presumption of a sale arising therefrom. This is not an action of trespass or trover for the value of the logs. The plaintiffs testify that they parted with their property in the logs; it is an action on a contract of sale and delivery of the logs. One of the counts in the writ charges the sale of the logs to the defendants individually. The logs being in their possession, must they be restricted in their evidence to a denial of the sale to them, or may they also show that they came into possession of the logs by purchase from another party, or in some other way than by purchase of the plaintiffs, in order to explain their possession or rebut the presumption arising from that fact? In other words does the law of evidence allow them to introduce the truth in evidence, or does it prohibit them from so doing? The question at issue is, was there a sale of the logs to the defendants?

In addition to direct evidence of a sale to the defendants, the plaintiffs showed possession of the logs in the defendants as further, and if unexplained conclusive, evidence of a sale. May not the defendants rebut such evidence by showing that the inference of a sale derived from their possession is a false inference, because the

possession itself was obtained otherwise than by a sale to them, and in a manner, too, that in law would relieve them from liability as purchasers, individually or as surviving partners? We think they may, and that it would be a reproach upon the law to hold otherwise. Such evidence is strictly a part of the *res gestæ*; it is counter evidence to the evidence of the plaintiffs upon a material point in the case. The law will not allow one suitor thus to rob his adversary by excluding the truth. Even a party charged with theft or robbery has a right to rebut the inculpation of guilt arising from his possession of the property alleged to have been taken feloniously, by showing that he received it under circumstances that involved no crime. If such evidence is admissible in a criminal prosecution to prevent the accused from being unjustly deprived of his liberty, it would seem to be admissible in a civil suit to save a party from being wrongfully deprived of his property. If the position taken by the defendants at the trial was true, the inference of a sale drawn from possession was deduced from false premises, and they had a right to show that these premises were false, else the plaintiffs might in law win their case by a falsehood when the truth was at hand to refute it. The ruling may have prevented a wrong being done to the defendants, but, if it did, the result is to be set down to the credit of the wisdom of the law, not to the fault of the presiding justice. There being no error in the rulings the result must be, *Exceptions overruled.*

Judgment on the verdict.

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

ARTHUR G. SAWYER *vs.* JOHN H. WILSON.

Permit—rights of assignee under. Delivery. Sale on mesne process—notice of.

An assignment of a permit to cut timber transfers to the assignee the trees afterwards cut under it, so as to enable him to maintain an action of trespass against an officer attaching the lumber as the property of the assignor.

An officer who sells attached property upon mesne process, without giving the notice required by law, becomes a trespasser *ab initio*, and will not be permitted to show in defense of a suit against him that the conveyance of the attached property by the debtor named in such process to the party suing the officer was fraudulent and void as to creditors.

A notice of a sale of goods taken and appraised on mesne process, defective for want of sufficient time, is not cured by a postponement of the sale on the day appointed therefor to one remote enough to answer the statute requirement. The officer cannot make a valid sale at the adjournment that would be invalid if made on the day originally designated.

ON REPORT.

TRESPASS against the sheriff of Penobscot county for the act of his deputy in taking a quantity of cedar rails, posts, stakes, and shingle timber, the property of the plaintiff, and selling them upon a writ in favor of Orimel Rogers *et al.* against Elisha Sawyer. The timber was cut under a permit given by Henry E. Prentiss to Elisha Sawyer and John Sutherland. Elisha assigned all his interest under the permit, before cutting at all, to the plaintiff, who also bought out Sutherland before the cedar, afterwards attached as aforesaid, was cut. The defendant justified the taking and sale, relying upon the authority of his precept and alleging that the transfer of the permit by Elisha Sawyer to Arthur G. was fraudulent and void as to Rogers & Co. and other creditors of said Elisha; but it appearing that the property was appraised on Saturday, the 9th day of March, 1872, and advertised upon that day to be sold on the next Tuesday, March 12th, and that the sale was thence adjourned to March 16, 1872, when the cedar was sold, the presiding justice ruled that the defense of fraud in

the assignment was not open to the defendant, and could not avail him, if proved. The defendant claimed that the assignment of the permit did not, of itself, carry the title to the timber afterwards cut under it, without any further delivery, so as to require the defendant to justify the taking, but the judge held otherwise. If these rulings were correct the defendant was to be defaulted; if not, the case was to stand for trial.

Wm. H. McCrillis and *J. H. Hilliard*, for plaintiff.

1. Assignment of permit carried all timber cut under it. *Fiske* v. *Small*, 25 Maine, 453.

2. The sale not being made by the defendant's deputy in the manner required by statute he cannot enter upon the question of the good faith of the transaction between the Sawyers. *Andrews* v. *Marshall*, 43 Maine, 272. He could not even adjourn upon the day he first advertised to sell. *Tuttle* v. *Gates*, 24 Maine, 398. He was a trespasser *ab initio*. *Ross* v. *Philbrick*, 39 Maine, 29; *Knight* v. *Herrin*, 48 Maine, 533; *McGough* v. *Wellington*, 6 Allen, 507.

C. A. Bailey, for defendant.

There was no evidence of due execution of the assignment. *Howe* v. *Farrar*, 44 Maine, 233. The assignment was, *prima facie*, an abuse of license and forfeited it, all rights reverting to the grantor. *Emerson* v. *Fisk*, 6 Greenl. 200; *Mugridge* v. *Eveleth*, 9 Met. 233.

Elisha Sawyer cut the timber. His possession negatives that of Arthur.

The permit was assigned in equitable mortgage, or pledge, and should have been recorded or possession retained by Arthur of the lumber. *Ware* v. *Otis*, 8 Greenl. 387; *Walker* v. *Staples*, 5 Allen, 34.

The officer kept the property four days before actually making sale of it and after giving requisite notice. *Knight* v. *Herrin*, 48 Maine, 533. He first intended to do an illegal act; but this will not invalidate subsequent proceedings which were lawful. *Gates*

v. *Lounsberry*, 20 Johns. 427; *Stoughton* v. *Mott*, 25 Verm. 668. If possible, the officer's return and action should be sustained. *Coggswell* v. *Warren*, 1 Curtis' Cir. Ct. 223; *Townsend* v. *Meader*, 58 Maine, 288.

DICKERSON, J. This is an action of trespass against the defendant, as sheriff, for default of one of his deputies in attaching and selling a quantity of cedar, the property of the plaintiff.

The plaintiff claims title to the cedar under a permit assigned to him by Elisha Sawyer, and given to said Elisha and one John Sutherland by Henry E. Prentiss, Oct. 7, 1871, and by purchase of Sutherland's interest. The defendant justifies the taking by his deputy under a writ sued out by creditors of Sawyer.

The case finds that the cedar was cut by Elisha Sawyer after the assignment of the permit. It was held in *Fiske* v. *Small*, 25 Maine, 453, that in such case the interest in the permit and the license to cut the timber passes to the assignee without a formal delivery, subject to the interference of the grantor of the permit for any violation of the contract. Moreover, as the cedar was cut by the assignor of the permit, after the assignment, he must be regarded as acting under the authority of the assignee in possession of the property. The case also shows that the plaintiff purchased Sutherland's interest in the permit before the attachment.

The plaintiff thus acquired a valid title to the property, as between himself and the original holders of the permit, and has the right to require the defendant to show legal justification for taking it.

The property was appraised at request of the plaintiff in the original suit, and as the defendant did not take it at the appraisal the officer advertised it for sale by giving four days' notice, including the day of taking, Sunday, and the day of sale. In such case the statute requires the officer to keep the property "for the space of four days, at least, next after the day on which it was taken, exclusive of Sunday. R. S., c. 81, §§ 30, 35; c. 84, § 3.

The officer, not having given the requisite notice of the sale of

the cedar, had no authority to sell it on the day designated therefor, and he did not undertake to sell it on that day, but "postponed said sale, giving notices as before." The original day of sale was March 12th, and the day fixed by the postponement was March 16th. The officer in his return used the word "postpone" in the sense of the statute, and we must conclude that he meant what he said, "a postponement of said sale," and not a new and independent notice of a sale. The "postponement" did not cure the defect in the original notice; he could not make a valid sale at the adjournment which would have been invalid if made on the day adjourned from. Legality, in such case, cannot be predicated upon illegality.

The justification, therefore, pleaded by the officer fails, and he must be regarded as a trespasser in selling the property. Being himself a wrong-doer, he is not in a situation to impeach the assignment of the permit to the plaintiff as a fraud upon the creditors of the assignor.

The rulings of the justice presiding were in accordance with the law of the case, and the parties have agreed, if they should be sustained, that the entry shall be *Defendant defaulted.*

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

Penobscot Boom Corporation *vs.* Penobscot Lumbering Association.

Charter—construction of.

The defendants are the lessees of the plaintiff's boom and appurtenances at the rent of nine cents for each and every thousand feet of logs and other lumber passing through the same. This rent is the equivalent, by statute, for the use of the booms and appurtenances, and is not to be increased, though under some circumstances a portion of the logs may be twice rafted before they pass through the plaintiff's booms.

On report.

Assumpsit to recover tolls, claimed by the plaintiffs, under the statutes regulating the leasing of the works and privileges of the plaintiffs to the defendants.

The Penobscot Boom Corporation exists by Private and Special Laws of 1832, c. 236, and the additional and amendatory acts passed in 1838, c. 468; 1841, c. 163; 1842, c. 47; 1844, c. 167; 1846, c. 299; 1854, c. 298 and c. 299; and 1869, c. 25 and c. 34.

The Penobscot Lumbering Association was created by Special Laws of 1854, c. 298, by which also the plaintiff's charter was amended; and this last named act was amended in 1869, by c. 25 and c. 34 of the Private and Special Laws of that year.

By the Special Act of 1854, c. 298, §§ 6, 9, the defendants were authorized to take a lease of the plaintiffs' booms and other property, paying a toll of ten cents per M. feet on all logs, etc., "passing through said booms;" and by c. 299 of that year, § 10, the plaintiffs were required to execute such lease if applied for within twenty days after the passage of the act. Both corporations acquiesced and availed themselves of the provisions of these enactments.

There were two booms, several miles apart, included in the leased property. During the rafting season logs are rafted out of both booms. Rafting is the separation of the logs of different own-

ers, putting those of each into separate joints, secured together by warps and wedges. They are then put on to buoys and there delivered to the owners. Certain of the logs rafted in the upper (called the Argyle) boom, upon which the rental-toll has been paid by the defendants to the plaintiffs, have to be again rafted in the lower boom, owing to the causes and under the circumstances stated in the opinion. The question at issue is, whether or not a second toll is collectable upon such logs as are twice rafted, once in each boom; if so, the defendants are to be defaulted; otherwise, judgment is to be rendered in their favor.

F. A. Wilson, for plaintiffs.

The logs rafted at the lower boom are, as to that boom, new and unrafted logs, notwithstanding they may have been rafted above. Precisely the same service is performed upon them as though they had never been rafted. The single toll is for passing the boom once and not twice. As well might a foot passenger over a toll-bridge claim an immunity from further payments after paying toll once each way.

The toll is payable for the labor, the use of the works, the risks and liabilities and as a compensation for the franchise.

The logs wintered in the lower boom wear it out, press upon the works and create a risk and liability to themselves and the boom, occupying room otherwise available for other logs, and by their position have the precedence in rafting and in the market in the spring. And in this second rafting the plaintiffs' property is used.

The case shows that the logs, after being rafted at the upper boom and placed at the buoys, have been there accepted by their owners.

Wm. H. McCrillis, for defendants.

The toll was fixed upon the cost of the works as a basis; therefore only one toll is demandable upon the same logs under any circumstances. This point is decided in *Penobscot Lumbering Association* v. *James Walker*, A. D. 1871, not reported.

APPLETON, C. J. The plaintiff corporation erected two booms, the upper or Argyle boom and the lower boom, both comprised within the limits of "the boom."

The upper or Argyle boom is some miles up the river from the lower boom. Both together constitute the plaintiff corporation. The owners of logs at the Argyle boom after receiving them on the buoys from the defendants (rafted), place them on the shore of the river for safe keeping until removed to the mills below for manufacture; such logs remain there for days, and even for months. Some of them escape and go into the lower boom. Some by stress of weather and storms are detached from the shores and go into the lower boom; some are detached by the owners and driven into the lower boom for shelter and safety during the winter. All such logs detached from the shores, on passing into the lower boom become intermingled with logs that come into the lower boom without passing through the upper boom, and are again rafted at the lower boom.

The question presented for the determination of the court is this: When logs are rafted at the Argyle boom, and the rental of nine cents per thousand feet has been paid by the defendants to the plaintiffs on such logs, and the logs afterwards, as before stated, go into the lower boom and are rafted there, are the defendants liable to the plaintiffs for another and additional rental of nine cents per thousand feet on such logs?

The rights of the parties litigant depend upon the construction to be given to the several legislative acts by and under which they exist.

The boom was incorporated in 1832, and its limits, embracing the river between the upper and lower boom, fixed, and by c. 299, § 2, approved April 5, 1854, the limits were extended to the head of Olamon Island, and it was provided that "said corporation shall have the exclusive right within said limits to boom, pick up and raft logs, and are authorized to raft the same at such places from their booms, as they shall deem necessary."

By § 3 it is made "the duty of log-owners to receive and take

away their logs as the same shall be rafted and fastened to the buoys; and if they shall neglect so to do and suffer them to accumulate so as to retard the rafting, then the corporation may run them away and hitch them to the shores below, and for doing the same shall be entitled to receive the sum of four cents each for the logs thus run away."

It is thus seen that the rights of the plaintiffs within their limits are exclusive, and that if there be neglect on the part of the log-owners, so as to retard their operations, the logs may be removed by the plaintiffs and at the cost of the log-owners. The logs too are to be rafted from the plaintiffs' boom at such places as they shall deem necessary.

By c. 298, approved April 5, 1854, the defendant corporation received their charter, and that of the Penobscot Boom Corporation was amended.

By § 9, "Instead of the toll or boomage now allowed to the proprietors of the Penobscot Boom Corporation, there shall be allowed and paid to them by the association as and for a full equivalent for the use of said boom, shore, buildings, and other structures connected therewith the sum of ten* cents for each and every thousand feet of logs, and other lumber passing through said booms for the term of fifteen years next ensuing, and without being subject to alteration by the legislature during that time."

The toll allowed is for the use of the boom and its appurtenances. It is for logs and lumber passing through "said booms." Whether there are one or more raftings within the limits of the boom, the rafts pass through "the said booms" but once. "The said booms" are, obviously, the upper and lower booms. But one toll is given and it is for the use of the plaintiffs' booms and other erections and for that only, and that toll the statute declares shall be a "full equivalent" for such use. The log-owners as a matter of convenience and arrangement, may take the logs when rafted, before they reach the lower boom. But if rafted, and taken at the lower boom, the logs have only passed through the booms.

*Reduced to nine cents by an act approved April 5, 1869.

The various acts for which compensation is sought, were done within the exclusive limits of the plaintiff corporation and in the use of its booms and appurtenances. Double toll was not to be exacted. The "full equivalent" for the "use," of the plaintiffs' booms and appurtenances, as provided by statute, has been paid, and the plaintiffs are not entitled to further or additional compensation. *Judgment for defendants.*

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

VINAL D. WASS *vs.* MAINE MUTUAL MARINE INSURANCE CO.

Agent—who is. Insurance upon open policy—when effected.

When an insurance company issues to a person an open policy, with blanks therein for the indorsement of risks agreed upon by him and blank certificates for the description of the risks thus agreed upon to be signed by him, with authority to take the premiums, he is to be deemed an agent of the company.

When an open policy is issued "on property on board vessel or vessels, at and from port or ports in the United States and foreign countries, with such other risks as may be agreed on, as per indorsement hereon, accepted by the company," and the risk is agreed upon, the premium paid, and the indorsement thereof made by the agent, the insurance is effected.

ON REPORT.

ASSUMPSIT on an open policy of insurance or on a certificate issued under such policy, the terms of which and all material facts are stated in the opinion.

Charles P. Stetson, for plaintiff.

F. A. Wilson, for defendants, contended that the instructions sent Hopkins with the open policy restricted him to coastwise risks between parts of the United States exclusively; also, that no insurance could be effected till the risk was accepted by the company, and that this one was promptly declined.

APPLETON, C. J. This is an action on a certificate or policy of insurance.

On Jan. 2, 1871, the defendants issued an open or running policy to George A. Hopkins "for account of whom it may concern, loss, if any, payable to George A. Hopkins, a member of said company (pursuant to said acts and by-laws), to be insured, lost or not lost, fifty thousand dollars on property on board vessel or vessels, at and from port or ports in the United States and foreign countries to other ports in the United States and foreign countries, with such other risks as may be agreed as per indorsement hereon, accepted by this company."

The plaintiff applied to Mr. Hopkins for insurance on a cargo of hay, shipped on board schooner Julia, from Dover, N. B., to Boston. The rate of insurance was agreed upon, the premium paid, and an indorsement made by Hopkins on the open policy running to him of the amount insured upon the hay.

Policies like the one under consideration are termed open policies because they remain open for the addition of subject-matters, to which the insurance attaches. The insurance is made by the indorsement thereon of whatever is to be insured and the amount to be insured. Sometimes the policy requires the assent of the insurers to the indorsement before the insurance attaches. In other policies the indorsement of itself has this effect, when made by an agent.

At the time of the indorsement Hopkins gave the plaintiff a certificate in these words:

MAINE MUTUAL MARINE INSURANCE COMPANY, BANGOR, ME.

$600. No. 8.

Revenue Stamp.

This certifies that, on the eleventh day of November, 1871, V. D. Wass insured under and subjected to the conditions of open policy, No. 97, with Maine Mutual Marine Insurance Company, $600, on cargo hay on board the schooner Julia, of Jonesport, Me., at and from Dover, N. B., to Boston.

Loss payable to V. D. Wass.

Under deck, $300 at 1½ per cent, $4.50.

On deck, $300 at 5 per cent, $15.00.

GEORGE A. HOPKINS, agent.

Dated at Millbridge, Nov. 11, 1871.

The defendants gave Hopkins an open policy, not for himself, but for the benefit "of whom it might concern." On the back thereof the date, amount, rate, premium, and subject-matter of insurance were to be indorsed as indicated by the blanks for that purpose. The indorsements were to be made by Hopkins. They gave him blank certificates, like the one given the plaintiff, to be filled and signed by him. He was to sign them for the company, not for and on his own account. They authorized him to write risks by indorsement and receive premiums therefor. They may not have intended he should bind the company at pleasure. They may have expressly directed him that he should not. But the question is not what powers the defendants intended to confer on him, but what those dealing with him were authorized to consider as conferred upon him by the documents they furnished for his use, and which they must have expected he would use. True, if his authority was limited or restricted, and that limitation or restriction was known to the plaintiff, he must be bound thereby. But it is not pretended that the plaintiff was aware of any restriction or limitation, if any there was. He must, therefore, be deemed their agent to fill the blank indorsements upon his open policy and to issue blank certificates, when he has agreed with the party to be insured upon risks and has received the premiums therefor. Being their agent for those purposes, the inquiry arises whether the company is bound by an indorsement made and a certificate issued by him, where the risk has been agreed upon, the indorsement made, and the premium paid, in good faith, by one ignorant of any limitations or restrictions upon his authority, if any there were.

The certificate which they furnished Hopkins to fill and sign described the person whose name was to be inserted in the blank as "insured under and subject to the conditions of open policy, No. —." The blank was filled by inserting the name V. D. Wass, and 97 as the number of the open policy. The plaintiff must have understood that he was insured. By recurring to

"open policy, No. 97," he would perceive that the company were in the habit of issuing open policies, and he would naturally infer that this was the ninety-seventh of that description. By examining it, he would see it was conditioned that the insurance was to be "on property on board vessel or vessels, at and from port or ports in the United States and foreign countries to other ports in the United States and foreign countries, with such other risks as may be agreed upon, as per indorsement hereon, accepted by the company." The certificate describes the plaintiff "insured." It refers to the open policy. The risk is agreed upon, the premium is paid. The certificate indicates that it is to be agreed upon by the agent having it in his possession, and that having been agreed upon it is to be signed by the agent and given to the person thereby insured when the premium is paid. It refers to the open policy given to the agent. The holder of the open policy indorses the risk as agreed upon. It is in his hands for that purpose, as the blanks were furnished by the defendants to be used, and the use contemplated was the filling them when risks were agreed upon and premiums paid. The certificate indicates that the risk was to be agreed upon by the agent having it in his possession, and that having been agreed upon it was to be given to the person insured as a voucher or proof of the contract.

The expression "as per indorsement hereon, accepted by the company" indicates that the risk, "as may be agreed upon," was to be regarded as "accepted by the company by indorsement hereon." Accepted by the company cannot mean the same thing as "to be accepted by the company." The one expression is in the present; the other is contingent and in the future. The natural and obvious meaning of the clause in the open policy is that whenever an agreed risk is indorsed thereon it is to be regarded as accepted and binding. The insurance was complete when the premium was paid and the risk was agreed upon, "as per indorsement, accepted by the company," not an indorsement to be accepted at some indefinite period in the future. The indorsement

by the agent, the receiving the premium, and issuing the certificate completed the contract.

No question is made but the loss occurred. The defendants are, therefore, to be defaulted. *Defendants defaulted.*

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

FRANCIS HILL *vs.* CHARLES H. MORSE.

Judgment, when it bars another suit. Contribution, right to compel.

A verdict and judgment rendered in a suit upon a joint and several note in favor of one surety will not be a bar to another suit against another surety upon such note, unless it is shown that the first verdict was rendered upon a defence which would be an extinguishment of the cause of action; or unless the grounds of defence set up in both cases are shown to be identical.

A surety who has been discharged from his primary liability upon a note, may be held to contribute to reimburse a proportional part thereof to a co-surety who has been subsequently compelled to pay it.

ON EXCEPTIONS.

The facts in this case were reported by Mr. Chief Justice Appleton, to whom the action was referred under an agreement that he should "report facts upon any question of law" that either party might require. The referee determined that the plaintiff should recover the amount of the note in suit and costs unless, upon the statement of facts, the opinion of the court should be otherwise. The defendant claimed that Hill had, for a valuable consideration, granted a six months' extension to D. S. Knowles, principal signer of the note, without the consent of Morse, who was a surety upon the same with Lowell Knowles, but the referee found there had been no such extension. The defendant then offered the record of a suit in favor of the plaintiff against Lowell Knowles upon

this note and the judgment therein, claiming that such judgment was a bar to the maintenance of the present action, but the referee held the contrary opinion. The defendant claimed that, at all events, since Lowell Knowles had been discharged, he was liable for but half of the note; but upon this point also the referee ruled against him. If the referee's views of the law were correct then the plaintiff was to have judgment accordingly; or such entry was to be made as the law, upon the facts found, required. The report was accepted at *nisi prius*, and judgment for the plaintiff ordered and the defendant excepted.

A. W. Paine, for defendant.

The judgment against Hill, in favor of Lowell Knowles, defendant's co-surety upon this note, is conclusive upon the plaintiff. *Sturtevant* v. *Randall*, 53 Maine, 149; *Walker* v. *Chase*, Ibid, 258. As the act of Hill has discharged the co-surety, certainly he can, in any event, recover but half of the note of Morse. *Andrews* v. *Marrett*, 58 Maine, 539. He has deprived Morse of the right of claiming contribution from Lowell Knowles and should bear this loss. He should not have changed the relations between the sureties. But we say the judgment barred the whole debt. *Spencer* v. *Dearth*, 43 Vermont, 98.

J. S. Rowe, for plaintiff.

PETERS, J. Charles H. Morse is sued by the payee upon the following note:

"CORINNA, March 12, 1868.

Value received I promise to pay Francis Hill or order five hundred dollars six months from date with interest.

D. S. KNOWLES,
L. KNOWLES,
C. H. MORSE."

It is admitted that the first signer is the principal and that the others are sureties. A former suit was brought by this plaintiff against the other surety in which the defendant prevailed.

It is insisted by the defendant that the judgment in the former suit is a bar to the plaintiff's recovery in this suit, and he relies upon the cases of *Sturtevant* v. *Randall*, 53 Maine, 149, and *Walker* v. *Chase*, Ib. 258, as sustaining that proposition. But he does not show or plead facts sufficient to make the principle established in the cases referred to applicable to this case.

There is no doubt that if any fact was necessarily decided for the defendant in the former suit, which would be as well a defence to this defendant, that the plaintiff in this suit, when it is shown, would be estopped by it. But while it appears in this case that the former action was tried upon the plea of the general issue, it does not appear upon what ground of defence, under that plea, the verdict and judgment were rendered. There is no evidence introduced to show that the defendant prevailed upon any facts, which went to the merits of the case, or were an extinguishment of the cause of action, or that the facts involved in that judgment were such as would be available to the defendant as a bar to this action if the same were proved here. *Non constat* that the former defendant may not have prevailed upon some personal defence, such as infancy or many others allowable under the general issue, which could not be available to the present defendant. It is said in *Burlen* v. *Shannon*, 99 Mass. 200, "that a verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered." It is very clear that the former verdict might have been rendered upon facts which would not be a ground of defence to the present defendant, and therefore there can be no presumption that it was otherwise. The misfortune of the defence, if anything, is probably that the trial of the first suit involved such complications as to render it impossible to show that any particular issue decided in that suit was the identical issue here. This point is elaborately considered in *Spencer* v. *Dearth*, 43 Vt. 98.

It is contended further that the defendant would be liable in this suit, at the most, for no more than one-half the amount of the note, because, as he says, by the discharge of the other surety in

the first action, he has been deprived of all right to claim contributions of him, should he be unsuccessful here. But such a result will not follow. It is well settled that one surety has a claim against another, for contribution for any sum he may be compelled to pay, although such co-surety may have been discharged from liability primarily upon the same contract. *Crosby* v. *Wyatt*, 23 Maine, 163; *Godfrey* v. *Rice*, 59 Maine, 308; *Clapp* v. *Rice*, 15 Gray, 557. *Exceptions overruled. Defendant defaulted for the amount of the note and interest.*

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

WILLIAM E. GOULD *vs.* ALLEN MONROE.

Assessors—choice of. Collector—appointment of by the assessors.

A town, making no choice of assessors, voted that the selectmen act as assessors, and the persons so chosen made oath "faithfully and impartially to discharge the duties of selectmen and assessors;" it was held that this was a full compliance with R. S. of 1857, c. 6, § 61, and that the selectmen were assessors.

An assessment made by persons so chosen may be properly signed by them as assessors, without any statement that they are selectmen acting as assessors.

The neglect or refusal of the person chosen as collector by the town to take the oath or furnish the requisite bond creates a vacancy in that office which may be filled by the assessors by appointment, and there need be no record of such neglect or refusal in order to render the appointment valid.

The record of the warrant to the collector is a sufficient record of his appointment.

ON EXCEPTIONS.

DEBT by the plaintiff, as collector of taxes of the town of Milo, for the year 1866, to recover the sum of $147.50, the amount of a supplemental assessment upon the poll and personal estate of the defendant.

The plaintiff claimed that the defendant was an inhabitant of Brownville at the time of the commencement of this action, but concerning this and the liability of the defendant to taxation in Milo in 1866 there was conflicting testimony.

At the March meeting, 1866, the inhabitants of Milo chose three selectmen; voted to pass the articles relating to the choice of assessors, and also voted that the selectmen be assessors. The persons so chosen made oath to "faithfully and impartially discharge the duties of selectmen and assessors . . . to the best of their abilities and according to law." The assessment was signed by them as assessors. The records of the town, showing that J. H. Ramsell was chosen collector for that year, and the supplemental warrant directed to the plaintiff as collector were admitted in evidence with other records and papers, subject to the seasonable objection of the defendant, who assigned as reasons for his objections, among other things, that there was no evidence by any record that any assessors for Milo were legally chosen and qualified for 1866; that the records show that no assessors were legally chosen and qualified; that the records did not show that any supplementary invoice or valuation was made, as the law requires, because the persons assuming to make them were not legally chosen to do it; that the plaintiff was not shown to have been collector of Milo for 1866; that the record of the attempted appointment of plaintiff as collector shows no authority of the assessors to appoint him, because no vacancy in the officer of collector is shown, but the record shows that J. H. Ramsell was collector, and does not show that Ramsell had declined to serve or to give bond; that if the selectmen acted as assessors they should have certified in accordance with the fact.

The defendant's counsel asked the court to instruct the jury that the assessor's records were insufficient as evidence in this suit for the foregoing reasons, but the presiding judge declined to do so, and did instruct them, that on the records, papers, and evidence the tax sued for was legally voted, assessed, and committed to the collector; and that the defendant was liable to the tax to be

collected according to law, if he was an inhabitant and liable to be taxed; and that upon the record, and certificate, and evidence, the plaintiff was legally collector. And the court, against the objection of defendant's counsel, admitted parol testimony to show that Ramsell, the collector chosen at the annual town meeting in March, declined, after request by one of the selectmen, to give bond, or to serve as collector for that year; and that thereupon the plaintiff was appointed collector as appeared by the record of his appointment, and also admitted, against defendant's objection, parol testimony of the day of making the assessment, which had no date to it.

The jury found for the plaintiff a verdict of $157.08, and the defendant excepted.

A. G. Lebroke, for the defendant.

Henry Hudson, for the plaintiff.

Appleton, C. J. This is an action of debt brought by the plaintiff, as collector of taxes of the town of Milo, for the year 1866, to recover the amount of the supplemental tax assessed upon the poll and personal estate of the defendant under the provisions of R. S. of 1857, c. 6, § 97.

The jury found by their verdict that the defendant was an inhabitant of Milo and liable to be assessed in that town.

Numerous objections were raised to the regularity of the appointment as well as to the proceedings of the officers of the town of Milo, which will be considered in their order.

1. At a legal town meeting the inhabitants duly chose certain individuals as selectmen. They then voted to pass the articles for the choice of assessors and that "the selectmen be assessors." By c. 6, § 61, "If the town does not chose assessors . . . the selectmen shall be the assessors, and each of them shall be sworn as an assessor." The law is fully complied with whether we regard the assessors as duly chosen, or acting as such by virtue of § 61. *Mussey* v. *White*, 3 Greenl. 290.

2. The persons chosen as selectmen made oath that "they would faithfully and impartially discharge the duties of selectmen and assessors . . . to the best of their abilities and according to law." This is obviously a full and complete compliance with the statute. *Mussey* v. *White*, 3 Greenl. 290; *Patterson* v. *Creighton*, 42 Maine, 376.

3. The assessment was signed by them as assessors. It is immaterial whether they became assessors by a legal choice of the inhabitants, or by the operation of the statute and as a consequence of their having been previously duly chosen as selectmen. In either event they were assessors, and there can be no objection to their signing their assessments as such.

4. The power to make supplemental assessments is given by R. S., c. 6, § 25, and the assessors appear to have carefully conformed to the provisions of the law in that respect.

5. The collector of taxes must take the oath of office before he can properly act as such. *Payson* v. *Hall*, 30 Maine, 319. The refusal on his part to give the bond required by the statute is to be regarded as a non-acceptance of the office to which he was chosen. *Morrill* v. *Sylvester*, 1 Greenl. 249. It does not appear by the records of Milo that J. H. Ramsell ever took the oath of office or gave the bonds required by law. It further appears by other evidence that Ramsell never took the oath nor gave the bonds required by law and that he refused to accept the office. A vacancy in the office of collector was fully established.

6. By the act approved Feb. 24, 1865, c. 318, provision is made for the choice of collectors, and "if none are chosen, or if those chosen refuse to serve or give the requisite bonds, the assessors may appoint a suitable person to act as constable and collector for the collection of taxes." The evidence is satisfactory to show that a state of facts existed requiring the action of the assessors in that behalf. It seems that it is not necessary that the refusal of the person chosen as collector to accept that office, or his omission to qualify himself for the discharge of its duties, by taking the oath and giving the requisite bonds, should appear on

record in the books of the town. *Hays* v. *Drake*, 6 Gray, 387. "That the appointment should, in some way, appear of record," remarks Parker, J., in *Souhegan Factory* v. *McConihe*, 7 N. H. 320, "is true. But there is no particular form of a record in such case, and the warrant granted to him, which is his commission for collecting the taxes, and which of course must have been recorded in the town records, being under the hands and seals of the selectmen, is a sufficient evidence of an appointment by them, the town having neglected to elect. 2 N. H. 205."

Exceptions overruled.

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

ISAAC PHILLIPS *vs.* HORACE G. SHERMAN and others.

Pleading. Complaint for flowage. Tax-deed—recitals must be proved. Tender under R. S., c. 6, § 174.

All the co-tenants must be joined in a complaint for flowage and their non-joinder may be taken advantage of under the general issue, with a brief statement denying the ownership.

The recitals in a tax deed that the officer executing it complied with the requirements of the statute in advertising and selling the land, must be proved by extrinsic evidence. Five years' possession by the complainant raises no presumption of law that the statute has been complied with.

The claimant under a tax deed cannot invoke the provisions of R. S., c. 6, § 174, relating to payment or tender of the amount of the taxes, charges, and interest by the defendant before he can contest the validity of such deed, where the land in controversy was sold in gross with other land for one consideration.

ON REPORT.

COMPLAINT for flowage of part of lot No. 13, Range 5, in Monson. Plea, general issue with a brief statement denying the ownership of the complainant as alleged in the complaint, and claiming a prescriptive right of flowage in the respondents.

The evidence first introduced in the case, by both parties, showed that the plaintiff was owner of an undivided two-thirds part of lot No. 13. The complainant claimed that the respondents' objection to the non-joinder of his co-tenants, could be taken advantage of only by plea in abatement, if available at all. The complainant then put in a deed from Abner Brown, collector of taxes, to Aretas Chapin, acknowledged Aug. 9, 1839, bearing no date, but admitted to have been duly executed before acknowledgment, and it was also admitted that all title acquired by Chapin by virtue of this deed had passed to the complainant through mesne conveyances, before the time named in the complaint as the commencement of the flowage.

This deed purported to convey twenty lots, and among them lot No. 13, for non-payment of the taxes assessed thereon, without specifying the amount for which each lot was assessed, and contained the usual formal recitals of a tax-deed.

The case was taken from the jury and reported to the full court, who were to determine whether the non-joinder could be taken advantage of under the pleadings filed, and, if it could be, whether by the deeds in the case the complainant had such an interest in the premises as would entitle him to maintain this action; if so, the case was to stand for trial; otherwise, a nonsuit to be entered.

Lebroke & Pratt, and *Henry Hudson*, for the complainant.

The fact that the collector's deed purported to convey several tracts of land, belonging to different owners and sold for their respective taxes is no objection. *Pejepscot Proprietors* v. *Ransom*, 14 Mass. 147. If the requirements of the law are complied with it is unnecessary to state the facts in the deed. The presumption is that this deed, almost thirty years old, is properly given and that all legal preliminary formalities were observed. *Freeman* v. *Thayer*, 33 Maine, 76.

At all events, defendants should have tendered the taxes, charges, and interest; not having done so, they cannot contest the legality of the deed. R. S., c. 6, §§ 164 and 174.

The complainant has been in sole possession, claiming title, during the period for which damages are claimed. This is sufficient against those claiming no title.

The objection can only be taken in abatement. *Fosdick* v. *Gooding*, 1 Maine, 30. To hold the right of prescription the defendants should show that they have flowed, causing damage, for the requisite period. *Hathorne* v. *Stinson*, 12 Maine, 183; *Nelson* v. *Butterfield*, 21 Maine, 220; *Wentworth* v. *Sanford Manf. Co.*, 33 Maine, 547; *Underwood* v. *No. Wayne Co.*, 41 Maine, 291; *Prescott* v. *Curtis*, 42 Maine, 65.

C. A. Everett and *A. M. Robinson*, for defendants, cited, as to the non-joinder of all the land-owners, *Tucker* v. *Campbell*, 36 Maine, 346; *Davis* v. *Stevens*, 57 Maine, 594; *Webster* v. *Holland*, 58 Maine, 168; *Hill* v. *Baker*, 28 Maine, 9; *Moor* v. *Shaw*, 47 Maine, 88.

As to plaintiff's possessory claim. *Worthing* v. *Webster*, 45 Maine, 270.

That the mere recitals of the tax-deed prove nothing unless supported by evidence *aliunde*. Blackwell on Tax Titles (Balch's ed.), 72 and cases there cited. That the deed was invalid. *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Green* v. *Lunt*, Ibid, 518.

Dickerson, J. Complaint for flowage submitted on report. Plea, the general issue with a brief statement denying ownership in the complainant and alleging a right to flow by prescription.

It is well settled that in a complaint for flowage all the cotenants must join, and that their non-joinder may be taken advantage of without a plea in abatement. *Tucker* v. *Campbell*, 36 Maine, 346; *Davis* v. *Stevens*, 57 Maine, 594; *Moor* v. *Shaw*, 47 Maine, 90.

Whether the complainant is the sole owner of the land described in the complaint, depends upon the validity of a tax-deed given by Abner Brown, collector of taxes for the town of Monson, to Aretas Chapin, bearing no date, but acknowledged Aug. 9, 1839,

the title, if any, thus acquired by Chapin having passed to the complainants.

In order to pass the title to the land sold by a collector of taxes, it must be proved that he complied with the requirements of law in advertising and selling it. The recitals in his deed are not sufficient for this purpose, but this must be shown by proof *aliunde* of the deed. Blackwell on Tax Titles, 72.

This was not done in the case at bar, nor has the complainant had such long and continuous possession of the premises, as raises the presumption that the requirements of law were complied with, his possession commencing in 1867, and there being no evidence that his grantors ever had possession. *Worthing* v. *Webster*, 45 Maine, 270.

The complainant is not in a situation to invoke the provisions of R. S., c. 6, §§ 164, 174, requiring the defendants to pay or tender payment of the amount of the taxes, charges, and interest before he can contest the validity of the tax sale, as the land in question was sold for a gross sum with other lands, and the defendant has no means of ascertaining the amount to be paid or tendered by him.

Our conclusion is, that the complainant cannot maintain his complaint because of the non-joinder of one of his co-tenants.

Complainant nonsuit.

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

INHABITANTS OF ORNEVILLE *vs.* URIAH T. PEARSON and others.

Collector of taxes—liability of.

A collector of taxes, acting under a warrant to make a partial collection of the assessments committed to him, is exonerated from completing the service under such warrant if it directs an exemption from distress of property not exempted by statute.

Where a person was collector of taxes for consecutive years, money paid, without any appropriation on his part, by him to the treasurer, who applied it to the oldest liability without any notice that the money came from the assessments of any particular year, cannot afterwards be applied by the collector upon his liabilities for a subsequent year though collected from that year's taxes.

Where a collector who was also a selectman, at the request of the overseers of the poor, advanced money for town purposes, and the sum was afterwards paid to him by the town officers without notice that the money so advanced came from any particular fund or from official sources, neither he nor his sureties can require that such amount shall be allowed upon his liability as collector although it was, in fact, collected from the taxes committed to him.

A collector is not entitled to anything for committing a debtor after one year from the time the tax is committed to him.

ON REPORT.

This was an action of debt upon a bond given by Uriah T. Pearson, as collector of the town of Orneville, for the year 1869, to the plaintiffs, and signed by the other defendants as sureties. The assessors for that year delivered to Pearson a book containing the lists of taxes and a warrant for their collection in the usual form, as prescribed by R. S. of 1857, c. 6, § 79, except that, in the last clause, the officer was commanded, "for want of goods and chattels whereon to make distress besides those *animals*, implements, tools, articles of furniture, *and other goods and chattels* which are by law exempted from attachment for debt," to arrest and commit those refusing to pay their taxes. It will be noticed that the words italicized above do not appear in R. S. of 1857, c. 6, § 79, which is same as R. S. of 1871, c. 6, § 94. The warrant was executed and delivered to the collector about the first of Sep-

tember, though dated September 31, 1869. The balance of uncollected taxes for 1869 was $336.43, with which the collector was chargeable unless excused from its collection by reason of the informality of his warrant in containing the words above-mentioned. The collector, at a hearing of this cause before an auditor, October 20, 1872, made a written offer to return to the selectmen his list of uncollected taxes and the warrant, which he claimed to be defective. After January, 1872, by special order from the selectmen, Pearson committed to jail certain persons, for which services he claimed ten dollars. He was one of the selectmen for 1870–1871 and, by order of the overseers of the poor, paid $144.11 for the support of the poor of the town. This payment was made from moneys received for taxes, but this fact was not known to the other selectmen, who drew an order in favor of Pearson for the $144.11 and he applied it to his own benefit. His sureties contended that this sum, having once been collected and paid to the use of the town, should be deducted from the amount for which they were liable, if they were holden for anything, as the drawing of it from the town's treasury by the order was the act of the selectmen. Mr. Pearson was collector for 1868, but the bond and tax of that year were not in controversy. He paid the town's treasurer, in the winter of 1871, $304.03, in two payments, giving no direction as to their application and taking receipts which indicated nothing as to the year upon which they were allowed, but they were, in fact, applied by the treasurer to the taxes of 1868. The moneys, all but $34.50, given for his services as selectman, were collected from the taxes of 1869, and the defendants claimed to have them applied to liquidate the claim of the town against the collector for the taxes of that year. If so applied there would be no deficiency for 1869 on account of cash collections, but there would be only left the claim for uncollected taxes. If the $304.03 were properly applied to the balance due for the taxes of 1868, there would be a deficit to that amount upon the collections of 1869.

C. A. Everett, for plaintiffs.

If the warrant is legal we should recover, according to the auditor's report, $336.43, uncollected taxes, as well as the deficit of $304.03; being $640.46. The first form of warrant was prescribed by Act of 1821, §§ 17, 18; 2 Laws of Maine, 478. It contained no exemption or exception of goods to be distrained. Between 1821 and 1841 there were many exemption acts passed, but the form of warrant remained unchanged. The statutes and not the warrant indicate what property may be taken. The clauses of the warrant are mere recitals. The form inserted in the first revision, R. S. of 1841, c. 14, § 57, is the same as that used in this case. The collector should no more consult the warrant to learn what is subject to distraint than a sheriff commanded to attach property generally upon a writ would look at that precept to see what is attachable. The form in R. S. of 1841, c. 14, § 57, was amended by Acts of 1850, c. 205, by striking out the word "animals" and the words "and other goods and chattels." But he might have arrested delinquents under his warrant. He did arrest certain persons by virtue of it and claims ten dollars for doing it. If his warrant did not authorize it how can he claim compensation for an illegal arrest?

The form used was "in substance" that prescribed. *Mussey* v. *White*, 3 Greenl. 290; *King* v. *Whitcomb*, 1 Met. 328; *Barnard* v. *Graves*, 13 Met. 85. The Massachusetts statutes at the time of these decisions required that the warrant should specify the duties of the collector. See also *Cheshire* v. *Howland*, 13 Gray, 321, citing *Sandwich* v. *Fish*, 2 Gray, 298.

Pearson had no right to ten dollars for arrest, as R. S. of 1857, c. 6, § 128, declared he should not be released from liability for the tax unless the delinquent were committed within one year, which time had elapsed in this case. Pearson has had his pay once for the $144.11 advanced to support the town's poor and that must suffice. He had a claim against the town and it was paid; how does that affect this bond? The law appropriates payments to debts in the order of time if the payer makes no differ-

ent appropriation. *Readfield* v. *Shaver*, 50 Maine, 36; *Milliken* v. *Tufts*, 31 Maine, 497.

W. P. Young also argued for plaintiffs, claiming, in addition to considerations upon the points above stated, that Pearson's own tax of $69.50 could not by him be treated as uncollected, but should be added to the $304.03, even if he were not holden for all the taxes he had failed to collect. He could not plead that his failure to collect his own tax was by reason of any defect in his warrant.

Lebroke and *Pratt*, for defendants.

The collector never had a sufficient warrant with which to enforce payment of the $336.43, uncollected taxes, and so is not liable for them.

The treasurer had no right to appropriate part of the collections of 1869 to relieve the sureties of 1868 at the expense of those of 1869. Pearson could not have authorized this, had he desired to do it, so as to affect his sureties of 1869. *P. M. General* v. *Nowell*, Gilpin, 106; *Myers* v. *United States*, 1 McLean, 493; *United States* v. *Eckford*, 1 Howard, 250; *United States* v. *January*, 7 Cranch, 572; *Stone* v. *Seymour*, 15 Wend. 19; *Porter* v. *Stanley*, 47 Maine, 515.

A fortiori, then, the treasurer cannot do it, of his own mere motion, without Pearson's assent. *Readfield* v. *Shaver*, 50 Maine, 36, simply decides that the burden is on the defendants to show the deficit for each year, or for that for which they are holden.

PETERS, J. It was provided by R. S. of 1857, c. 6, § 84, which is applicable to this case, that a warrant of a certain description should be committed to the collector and that he "shall faithfully obey its directions." Such warrant, in all material respects, should be a regular and legal one. Whether the general statutory formula of a warrant would be sufficient, when (as, it is argued, it sometimes has been) at variance with other positive and particular provisions of the statute, it is not now necessary to con-

sider, for it is clear that the warrant in question is repugnant to the prescribed form and also not in accordance with particular provisions. This warrant directed an exemption from distress of "those *animals*, implements, tools, articles of furniture, *and other goods and chattels* exempted from attachment for debt," while the form of warrant provided by statute exempted only "those implements, tools, and articles of furniture exempted from attachment for debt." The collector was, therefore, circumscribed within less than the statutory limit of the articles to be distrained in case of the non-payment of taxes.

It is not an answer to this objection that the collector could discharge his duties fully by making arrests where he did not make collection, for such a proceeding might be both illegal and unprofitable. By R. S. of 1857, c. 6, § 90, an arrest would be unwarranted if the debtor should show sufficient goods and chattels to the collector to pay his tax; so that, if the debtor should show certain property exempted by the warrant and not exempted by law, the collector might be in a dilemma of obeying the warrant and disobeying the law, and by a scrupulous compliance with the very terms of his warrant, in making an illegal arrest, expose himself to penalties for his official exactness. *Lothrop* v. *Ide*, 13 Gray, 96.

The strongest case cited by the plaintiffs to sustain the validity of the warrant is *Barnard* v. *Graves*, 13 Met. 185, where a question arose between the debtor and the collector whether a distress, made by virtue of a warrant erroneous in some respect, was illegal on that account, when, notwithstanding the defects in the warrant, all the proceedings under it were executed in conformity to law. The question here is between the collector and the town, whether an officer shall be compelled to act under an instrument not authorized by law. We are of the opinion that the collector is excused from any further service under it, and that he and his sureties are discharged from liability as far as the uncollected assessments are concerned. An amended and unobjectionable warrant can easily be committed to the same or some other collector.

Orono v. *Wedgwood*, 44 Maine, 49; *Cheshire* v. *Howland*, 13 Gray, 321.

The item of ten dollars for committing a debtor cannot be allowed the collector. The year within which it should have been made having expired an arrest made afterwards would be rather for the benefit of the collector than the town. See R. S. of 1857, c. 6, § 128.

Nor can the defendants be allowed the item of $144.11. The overseers authorized the collector to pay that sum of money for the support of the poor. He paid it out of money collected from the taxes assessed in 1869; but he was not directed or authorized to pay the bills out of any town funds, and it does not appear that the town officers knew that the town funds were so used. Having contracted that amount of indebtedness with the collector the town afterwards paid the same. Money has no ear-marks as other property may have by which its ownership can be followed, and, as this court say in *Dwinel* v. *Sawyer*, 53 Maine, 27, "It would be an insupportable burden upon the business community if they were obliged at their own peril to ascertain that every dollar they receive in the ordinary course of business is lawfully in the hands of him from whom they received it, with power to dispose of it as he undertakes to do."

The above remarks are as significant upon the next point submitted. The collector paid to the treasurer certain money, collected mostly from assessments of 1869, and the treasurer credited it upon the collector's liability for taxes collected upon the assessments of 1868. The collector, although he intended to have it applied upon the collections of 1869, expressed no intention about it, and made no appropriation whatever, nor undertook to make any. The treasurer did make an appropriation and, under the circumstances, very properly upon the liability of the longest standing. It does not appear that the treasurer knew where the money came from, or that he was aware that the collector desired to make any particular appropriation of it. It was paid in to him as money merely, and not as money collected upon

the tax lists of 1869. There would be no end to error and confusion in town transactions if such appropriations and settlements can be afterwards repudiated or overhauled when obtained without unfairness or fraud. According to the authorities the appropriation as made must stand. *Coleraine* v. *Bell*, 9 Met. 499; *Sandwich* v. *Fish*, 2 Gray, 298; *Readfield* v. *Shaver*, 50 Maine, 36.

The counsel for the defendants relies much upon the case of *Porter* v. *Stanley*, 47 Maine, 515, as opposed to this conclusion and as conflicting to some extent with the case of *Readfield* v. *Shaver*, before cited. The cases are not alike. In *Porter* v. *Stanley* there was a special fund consisting of town orders taken by a collector, who was also treasurer, for the taxes assessed in certain years, and in his settlement with the town officers applied upon his liabilities as collector for another year. It was not consented to by the collector, "unless it was right," which it was not, and was a clear case of an intentional misappropriation, into which the collector was induced by the town officers. It would have been another thing if, as here, the orders or money had been paid over as money merely and not as any particular fund.

The result must be that the defendants are to be defaulted for $304.03 with interest from date of writ.

Defendants defaulted.

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

Inhabitants of Foxcroft *vs.* Inhabitants of Corinth.

Pauper—intention of overseers in furnishing supplies does not affect settlement of.

When supplies are furnished by the overseers of the poor to, and are received by, a pauper who is then actually in need of immediate relief, the intention of the overseers thereby to prevent a settlement by such pauper in their town is immaterial to qualify the legal effect of their action.

But the fact that five years continued residence without assistance have nearly expired, coupled with an intention on the part of the overseers to prevent the paupers gaining a settlement, may properly be considered by the jury in weighing the credit to be given to their testimony as to the existence of actual distress and the necessity for immediate relief.

On exceptions.

This was an action to recover for supplies furnished one Millet and his family as paupers. It was admitted that the settlement of the alleged pauper at the time the supplies were furnished was in Corinth, and it was admitted or proved that Millet had resided in the plaintiff town four years and about eight months without having received pauper supplies within that time. The principal question in the case was whether Millet and his family, at the time the supplies were furnished, were destitute, within the meaning of the statute, and had fallen into such distress as demanded immediate relief.

It was proved that two of the overseers of the poor and three other residents of Foxcroft (one of them the agent and attorney of the town) visited the family and, after conversation with them and examination into their condition, furnished them certain supplies which were afterward consumed in the family.

The plaintiffs contended that the supplies were needed to relieve immediate destitution, and that they acted in good faith in furnishing them; but the defendants claimed that the supplies were furnished to prevent the Millet family from gaining a settlement by a

five years' residence, and were not furnished in good faith and to relieve actual destitution.

The defendants' counsel requested certain instructions which, with the instructions qualifying them, given by the presiding judge, are stated in the opinion.

The verdict was for the defendants and the plaintiffs excepted.

Lebroke and *Pratt*, for the plaintiffs.

Rowell and *D. F. Davis*, for defendants.

APPLETON, C. J. This is an action to recover pay for supplies furnished one Millet and his family, whose settlement at the time was admitted to be in the defendant town.

It was in proof that Millet had resided in the plaintiff town four years and eight months when these supplies were furnished. It is obvious that relief furnished to prevent a pauper gaining a settlement in the town where he was then residing, and when there was no existing distress to be relieved, would not be in good faith and would not affect the settlement of the pauper. The question submitted to the jury was, whether supplies were furnished merely to prevent the paupers gaining a settlement or to relieve actual distress.

The plaintiffs' counsel requested the court to instruct the jury that, "if the alleged paupers were in actual need of immediate relief, as paupers, at the time the articles were furnished by the overseers of Foxcroft to supply the actual wants of said alleged paupers, and were received and used by them for that purpose, the intention of the overseers, in relation to fixing or affecting the settlement, would be wholly immaterial." On this point the court instructed the jury that "the request assumes that a case of necessity for immediate relief is made out, and that the supplies were furnished to supply such needs and were received and used by the alleged paupers. I give you this requested instruction with this qualification. I do not say 'would be wholly immaterial in the case;' but I say, if such a case is made out by proof, that the

overseers would be justified in relieving the destitution, although they might know and act upon the knowledge that it would prevent or postpone for five years more the gaining of a settlement, and might have taken steps to ascertain the condition of the family, which they would not have taken, if the alleged paupers had had an acknowledged settlement in their own town, and they might have intended that the act should have an effect on the settlement, as well as to relieve a case of destitution which came within the statute. Or, in brief, I say, if it was an established case of destitution and necessity, within the rules I have given you, I do not see how there could be any fraud in relieving it."

The presiding judge thus, as will be perceived, affirmed the general principle of the requested instruction. Now, he was not bound to use the language of the request, and he was at liberty to qualify any portion of the request, if he deemed a qualification necessary, provided the instruction with the qualification as given, was in accordance with law.

"I qualify the request in this only; I do not say that their intentions would be *wholly* immaterial in the case." This was the only qualification of the requested instruction. Was it erroneous? How stood the case? The distress of the paupers and the necessity of affording relief, when it was afforded, were the issues presented. But in relation to these it was proper to call the attention of the jury to the condition of affairs, the history of the case, to use the expression of the presiding justice, as affecting the credibility of the testimony on the one side or the other. The paupers' settlement in a few months would be in the plaintiff town by lapse of time. The remark was made not to change the general instruction as given, but to call their attention to the actual state of things. No change was made in the rule of law. That was retained in all its original force.

This qualification or explanation had relation only to the weight to be given to the evidence. The judgment of the overseers as to existent distress or as to the necessity of relief might be biased by the nearness of time when the settlement of the pauper would

become fixed. The overseers might the more acutely perceive the distress, or imagine an existent distress, when it did not actually exist, in their anxiety to prevent the gaining of a settlement, than they would under other and different circumstances. They might afford relief where there was no existent distress to be relieved. There might be, in the history of the case, circumstances tending to prove they did so. The jury might properly regard those circumstances in determining whether the distress really existed and relief was really furnished to remove distress; but if the distress actually existed, and the supplies were really furnished for its relief, then the instruction of the presiding justice was peremptory that the intentions of the overseers were immaterial.

Exceptions overruled.

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

ALBERT D. MAYO and another *vs.* ANDREW J. STEVENS.

Partial payment—when a discharge in full.

Part payment of a debt made with an agreement that the debtor shall have his "own time to pay the balance," does not come within the operation of R. S., c. 82, § 38, and an action is maintainable to recover the amount remaining due.

To render a partial payment an extinguishment of the whole debt, both parties must concur in the understanding that it was a payment in full.

ON REPORT.

ASSUMPSIT to recover $35.30 as the balance due on account.

The plaintiffs sold the defendant $70 worth of flour in 1867. In 1869 the defendant paid $35 on this indebtedness with the agreement that the defendant should have his own time to pay the balance.

The presiding justice remarked, that upon the testimony of the defendant, giving the facts substantially as stated above, he should instruct the jury that there was a balance legally due the plaintiffs, whereupon the case was reported for the determination of the full court.

Joseph Williamson, for the plaintiffs.

William H. McLellan, for the defendant.

DICKERSON, J. Assumpsit for balance of account, submitted on report.

At common law payment of part of the debt, as and for the whole, did not extinguish it, on the ground that the amount paid was no consideration for the release of the amount unpaid.

By R. S., c. 82, § 38, this rule of law is changed, so that now in this State no action can be maintained for the balance of a debt where an amount, however small, has been paid in full discharge of the whole debt. But in order to render payment of part, an extinguishment of the whole debt under this statute, both parties must concur in the understanding that the amount paid is paid and received as and for the whole debt.

In this case there was no such understanding. The plaintiff agreed with the defendant that he might take his own time to pay the balance of the debt, not that the whole debt should be discharged. The statute relied upon by the defendant being inapplicable he is liable at common law for the balance of the plaintiffs' account.

These views are in accordance with the opinion of the justice presiding, and the report provides that if his opinion is sustained the defendant is to be defaulted. *Defendant defaulted.*

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

JOHN J. BROWN *vs.* LEVI JOY and others.

R. S., c. 83, § 25 construed.

The R. S. of 1857, c. 83, § 18, identical with R. S. of 1871, c. 83, § 25, provide for the issue, by a justice to whom the records of a deceased justice have been delivered, of an execution upon any judgment rendered by such deceased justice; but that "no such first execution shall issue after one year from the time the judgment was rendered, unless on *scire facias*. *Held*, that the words "such first execution" referred to the first execution issued by the magistrate with whom the records of the deceased justice were deposited, and not to the first execution issued on the judgment; and that the justice to whom the records of the deceased justice have been delivered, has no right to issue his first execution (unless on *scire facias*) after one year from the time the judgment was rendered.

ON AGREED STATEMENT OF FACTS.

DEBT on a poor debtor's bond.

This action was submitted to this court on the following agreed statement of facts:

The writ in the suit in which the execution issued, upon which the debtor was arrested, was returnable before Edwin Small, Esq., a trial justice for the county of Kennebec, at China, in that county, on the fourth day of May, 1868, at which time and place the defendant, Levi Joy, was defaulted and judgment rendered against him for the sum of eighteen dollars, debt, and four dollars, cost of suit. This judgment was properly recorded and signed by the justice. On the 6th day of May, 1868 said Justice issued execution on the judgment which was returned in no part satisfied, and an alias execution was issued by said Small on the 6th day of September, 1869, which was also returned in no part satisfied. In January, 1870, Mr. Small died, and on the 1st day of February, 1870, his records, containing the record of the judgment and proceedings aforesaid, were delivered to one James Brainerd, Esq., another trial justice for the county of Kennebec, agreeably to R. S., 1857, c. 83, § 17 (same as R. S. of 1871, c. 83, § 25) who transcribed

the same upon his book of records, agreeably to said section, and on the second day of the same month issued execution on such transcribed record under section 18 of the same chapter, on which last-named execution the debtor (Joy) was arrested, and was released by giving the bond provided for by R. S., 1857, c. 113, § 22, which bond is the one in suit here.

None of the conditions of said bond having been performed, this action was seasonably commenced.

It was agreed that if the execution issued by James Brainerd, Esq., was legally issued, the defendants were to be defaulted; otherwise, a judgment was to be entered in their favor.

William H. Fogler, for the plaintiff.

The point at issue is whether the words "such first execution," mean the first execution issued by the transcribing justice, or the first execution issued on the judgment. He succeeds to all the powers of the deceased magistrate; and the clause in question was inserted to place the same restriction upon his power as upon that of the original justice as to the first execution issued on the judgment. The execution issued by Brainerd was not a first execution but a *pluries*. R. S., c. 82, §§ 126, 127.

George E. Johnson, for the defendants.

Originally the transcribing justice could not issue any execution from the transcribed record, but must issue *scire facias*. Laws of 1821, c. 76, § 15. By R. S. of 1841, c. 116, § 22, he could issue no execution after one year after judgment had expired except upon *scire facias*. R. S. of 1857, c. 83, § 17, go one step further, that his first execution cannot issue after the lapse of that period, except upon *scire facias*. If the intention were to give the same power that the original magistrate possessed, this last clause would have been omitted.

APPLETON, C. J. Provision is made by R. S., 1857, c. 83, § 17, for the transcribing the records of a deceased trial justice upon the records of another justice.

By § 18, "On such transcribed record, the justice may issue execution as if the judgment was rendered by himself, changing the form as the case requires; but no such first execution shall issue after one year from the time the judgment was rendered, unless on *scire facias.*"

The first execution referred to in the above section is the one to be issued by the transcribing justice, which must be done within "one year from the time the judgment was rendered." Unless issued within the year, he can only issue on *scire facias.*

The execution, upon which the bond in suit was given, was issued after one year from the time judgment was rendered and was improvidently issued, and in such case, by the agreement of parties judgment is to be rendered for the defendants.

Judgment for defendants.

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

JOEL W. LOW *vs.* ISAAC DUNHAM and schooner LUCY M. COLLINS.

R. S., c. 91, § 19. Judgment upon lien-claim—how enforced. Construction of statute. Liability of receiptors.

Upon a judgment recovered for the amount decided to be a lien in any suit on which a vessel was attached, the order to the attaching officer to sell it at auction, etc., is one consequent upon the judgment and a necessary sequence thereof. It follows the judgment as a matter of course, as the execution does.

The word "may" in a statute is to be construed "must" or "shall" where the public interests or rights are concerned and the public or third persons have a claim *de jure* that the power shall be exercised.

The receiptors for property attached agreed by the terms of their receipt to redeliver it on demand to the officer, at a place named; and that if no demand should be made, they would, within thirty days after judgment in the action, redeliver the property as aforesaid that it might be taken on execution. *Held*, that they were liable on their receipt, though no demand was made, if they failed to redeliver the property at the place named, within thirty days after judgment.

On report.

The facts are stated in the opinion.

T. W. Vose, for the plaintiff.

N. H. Hubbard, for the defendants.

Appleton, C. J. This is an action on a receipt to the sheriff for property attached.

The plaintiff in the original suit having furnished materials for the schooner Lucy M. Collins, commenced process against her and the builders, Messrs. Dunham & Eveleth, to secure his lien for the same in accordance with the provisions of the Act of 1858, c. 15, § 21, since incorporated into R. S. c. 91.

Upon that process the schooner was attached and the receipt in suit given.

The writ was against the schooner, in the form prescribed by R. S., c. 91, § 8.

A trial was had and the jury found a verdict, in accordance with which the plaintiff was entitled to a portion of his claim against the builders personally, and the residue against them and the schooner, thus affirming the plaintiff's lien in part.

Two executions issued in accordance with the Act of 1858, c. 15, § 16, and with R. S., c. 91, § 17, and were seasonably placed in the hands of a deputy sheriff, who made a demand within thirty days upon the receiptors.

The execution against the schooner and the builders, as it was originally issued, contained no direction to sell the vessel nor any such order as is prescribed by the Act of 1858, c. 15, § 17, or by R. S., c. 91, § 19. The omission of the order was made known to the clerk, who, thereupon, inserted before the last sentence of the execution, which orders a return of the writ within three months, these words: "And it is by the court ordered that the within-named vessel be sold and the proceeds of the sale be disposed of as provided by section seventeen of chapter fifteen of the public laws of the State of Maine passed in the year 1858." The execution

with this addition was again placed in the hands of the deputy sheriff to whom it had been delivered in the first instance, but no second demand is shown to have been made.

As the execution against the schooner and builders, when first issued was against the goods, chattels, and land of Dunham & Eveleth, and ordered satisfaction from them only and not from the schooner, there was no authority to sell the vessel, had the receiptors surrendered the same. But the jury, by their verdict and upon evidence to which no exceptions were taken, have found all the facts entitling the plaintiff to an order of sale. His lien and its extent have been established. He has brought himself within all the requirements of the statute, and has a right to the aid of the law for the enforcement of his lien. The clerk in the first instance omitted to make out his execution in accordance with the legal right of the plaintiff. It was no fault of the plaintiff. The mistake was seasonably corrected. The clerk only did his duty in making the correction. *Lewis* v. *Ross*, 37 Maine, 231. The receiptors were not thereby discharged. *Farnham* v. *Gilman*, 24 Maine, 250.

The execution, after the original mistake was corrected, was placed in the hands of an officer before the expiration of thirty days from the rendition of judgment. The vessel, for which the defendants had given their receipt, was at sea. By the terms of the receipt, if no demand was made on them for the property attached, they agreed to redeliver the same, within thirty days from the rendition of judgment, so that the same might be taken on execution. This they did not and could not do and by the terms of their contract they are liable for not doing, though no demand may have been made upon them. *Wentworth* v. *Leonard*, 4 Cush. 414; *Hodskin* v. *Cox*, 7 Cush. 471.

The record shows a lien upon the vessel and a judgment against the vessel. It is urged that there is no special order of the court to the attaching officer to sell the vessel at auction as required by R. S., c. 91, § 19. The language of this section is "the court may issue an order to the attaching officer to sell," etc. But it

was not the intention of the legislature, that it should be left to the discretion of the court whether an order should issue or not. All persons having established a lien are equally entitled to its enforcement and to an order of court for such enforcement. A lien being established, the order could not legally be withheld. The word "may" in a statute is to be construed "must" or "shall," where the public interest or rights are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised. *Blake* v. *Portsmouth & Concord R. R. Co.*, 39 N. H. 437; *Rogers* v. *Brown*, 42 N. H. 102; *Milford* v. *Orono*, 50 Maine, 529.

The order is one consequent upon the judgment and a necessary sequence thereof. It follows the judgment equally as the execution. *Judgment for the plaintiff.*

CUTTING, DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

HENRY C. WILLEY and wife *vs.* INHABITANTS OF BELFAST.

Injury by defective way. Practice. Verdict.

If a defect in a highway is the sole, true, efficient cause of an accident, it is not necessary that the injury should be actually received upon the precise spot where the defect exists, or that it should appear that there was any defect where the injury was received.

If a party desires specific instructions dependent upon a finding by the jury of a particular state of facts, he must seasonably request them in writing and not rely upon the judge, without such requests, to notice all the positions he may have taken in argument.

It is a question of fact for the jury to determine in the first instance, whether a defect in a highway was the sole cause of an injury; but their finding may be set aside by the court in case of manifest error.

Willey *v.* Inhabitants of Belfast.

If a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that the direct and natural consequence is the frightening of a kind, safe, and well-broken horse beyond the control of a reasonably skillful and careful driver, and the horse while violently running down a steep hill falls and the plaintiff is thrown out and injured, it is competent for the jury to find the defect to be the sole cause of the accident. The fall of such a horse, under such circumstances, is not to be reckoned a contributory cause, but a part of the accident, like the fall of the plaintiff from the carriage.

A paper found in the jury-room after the jury have left it, upon which twelve different sums, ranging from nothing to several thousand dollars, are set down and added together and the amount divided by twelve, the quotient being the precise sum for which the verdict was rendered, does not furnish sufficient cause for setting aside the verdict. It cannot be concluded from this alone that each and all of the jurors did not agree to the verdict rendered.

On exceptions and a motion to set aside the verdict as being against the law and the evidence, and "because the jury made up their verdict by rendering the twelfth part of eleven sums chalked by eleven of the jury, one of the jury chalking nothing, thus showing that the verdict was the verdict of eleven members of the panel only," and a motion for a new trial on the ground of newly discovered evidence.

This was an action to recover damages for injuries alleged to have been received by the female plaintiff by reason of a defect in a highway, which the defendants were bound to keep in repair.

At the trial of the cause the defendants' counsel assumed certain legal positions in his argument, and to the neglect of the presiding judge to give specific instructions upon these points, the defendants except.

A verdict was rendered for the plaintiff for $3,541.67. After the trial a paper was found in the jury-room, by the messenger, upon which there were written eleven sums of various amounts and a space for another sum filled with cyphers. These amounts were added together and the sum divided by twelve, the quotient so obtained being the precise amount of the verdict.

The remaining facts in relation to the case are sufficiently stated in the opinion.

N. Abbott, for the defendants.

The fact that the defendants' counsel took certain legal grounds in his argument to the jury, was equivalent to a request to the judge to instruct upon those points. Upon the points thus raised, that it must appear that the road was defective where the horse fell, and that it must appear that the road was defective at the place where the bolt came out, the justice presiding gave instructions against the positions urged by defendants' counsel. On this point see *Cook* v. *Charlestown*, 98 Mass. 80; *Titus* v. *Northbridge*, 97 Mass. 258.

Upon the other positions the judge gave no instructions.

A. G. Jewett, for the plaintiff.

Barrows, J. The plaintiffs are husband and wife, and sue here to recover damages for a personal injury suffered by the wife by reason, as they allege, of the defective condition of the highway on a long and steep hill known as "the Pitcher Hill" in Belfast.

The defendants present the case upon exceptions, and two motions to set aside the verdict rendered for the plaintiffs, accompanied by a voluminous report of evidence, and a stenographer's transcript of the charge given to the jury by the presiding justice.

That the road was and had long been defective and dangerous at various points on this hill by reason of stones fixed and loose, and channels wrought by running water, seems to have been clearly established. The precise mode in which the accident occurred seems to have been thus: The female plaintiff had that afternoon driven over the road up the hill and some distance beyond with another woman in the wagon, and was returning alone. Just after passing a large rock in the middle of the road, so placed that one or the other of the wheels of the carriage must almost unavoidably go over it, the bolt which held the whiffletree to the cross-bars of the wagon came out and the whiffletree fell on the heels of the mare, ordinarily a gentle and safe animal, and she began to run down the hill, the plaintiff meanwhile doing what she could to guide the beast, which before being checked, and while running violently, stumbled and fell upon a comparatively level

and smooth place, throwing the plaintiff violently out and inflicting severe bodily injuries. The whiffletree bolt was found in the road, a couple of hours after the accident, nine rods below the large rock above mentioned, and was exhibited to the jury at the trial. The plaintiff testified that her brother, Charles West, at her request, examined the wagon that morning and found it all in good order. And the said Charles West gave testimony to the same purport and effect, and in particular that the nut was then in place and well secured.

The defence appears to have proceeded mainly upon the ground that the insecurity or deficiency of the nut contributed to the accident; that West's testimony was false; that the nut could not have worked off in going two or three miles, nor have been wrenched off in passing the stone and rut near and below which the accident occurred, and that there was carelessness on the part of the plaintiff in causing the mare to quicken her pace a little distance above the rock, in order to avoid a sight offensive to her modesty, and that this was also a contributory cause. These questions were all raised to the jury, and their attention was particularly directed to them by the Chief Justice in his charge, as vital questions in the case for their determination. We do not think the conclusions to which the jury seem to have come, were so manifestly erroneous as to authorize us to set aside the verdict on the ground that it was against law or evidence or the weight of evidence. But besides these matters to which the attention of the jury was directly called with appropriate instructions so far as the law was concerned, the exceptions show that the defendants' counsel in his argument to the jury took the following positions: 1. That to establish the liability of the city "the jury must find that the road was defective where the horse fell and the injury was received." 2. "That, to make the city liable, the jury must find that the road was defective either where the horse fell or where the whiffletree bolt was twisted or came out." 3. That the nut must have been shaken off or worked off wholly by the defects in the road, and not in part by passing over such portions of the road

as were not found to be defective. The defendants' counsel contends now that the fact that he took these positions in his argument to the jury is equivalent to a request for specific instructions as to each, and that it was, thereupon, incumbent upon the presiding judge without further reminder or request, besides laying down the general principles which were to govern the jury in their examination of the case, to instruct them particularly as to these precise points which the defendants' counsel had made in argument.

We cannot recognize the correctness of any such rule of practice. On the contrary we hold that if either party desires the presiding justice to make a specific application of the law to the view which such party takes of the facts in the case, he must seasonably present his propositions in writing in distinct and intelligible form. The presiding justice is under no obligation to comment upon the testimony, or to enforce or indorse the arguments or positions of counsel. It is competent for him to do so when in his opinion a decision in accordance with law and justice will thereby be promoted, and the correctness of all legal propositions which he lays down may be tested on exceptions. But it is no cause of complaint, when he has stated correctly the principles of law applicable to the case, that he omits to give specific instructions which may or may not be correct and applicable, depending in these respects solely upon the view which the jury may entertain of the facts proved, where no specific requests are made to that end, even though counsel in their arguments to the jury may have made the points and endeavored to enforce them.

But it is urged that as to the first two points the judge, although he did not directly rule adversely to the positions taken by the defendants' counsel, said that which implied that they could not be sustained. He had repeatedly and in various forms instructed the jury that among the matters which it was incumbent upon the plaintiff to establish, in order to entitle her to a verdict, were the propositions that the horse and wagon were safe, suitable, and proper; that she was driving with ordinary skill and care, and that the injury was occasioned solely by the defect in the highway.

He had called the attention of the jury to the inquiry whether the nut which held the whiffletree bolt in place was securely fastened, and whether the testimony of Charles West, the plaintiff's brother, was credible and true, and told them that if the nut "was insecurely fastened, although the brother examined and thought it was safe, yet the plaintiff could not recover if the insecure fastening contributed to the injury." Then he went on to call their attention to what he spoke of as the main question of fact for them to decide, viz.: "whether the wagon, in reference to the fastening of that bolt by the nut, was safe or was the accident caused by the bad road?" A review of the series of questions which he put to the jury as to the cause of the accident, makes it plain that while he stated no positive rule of law with respect to the defendants' first two points above-named, he left it to the jury to decide what was the true, efficient cause, in such a manner as must have conveyed the idea to them that it was not necessary that they should find that the road was defective at the spot where the horse fell, if the defects in the road had caused the detachment of the nut and the twisting out of the whiffletree bolt and the consequent fright of the horse.

And therein we think he did right. It was all one catastrophe, from the passing of the wagon wheels over the rock and rut and the detachment of the whiffletree till the plaintiff struck the ground.

We have no scruple in holding that if a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that the direct and natural consequence is the frightening of a kind and well-broken horse, and putting him beyond the control of a reasonably skillful and careful driver, the town liable to repair the highway, and having notice of the defect must answer for the consequences, although the ultimate injury occurs, fortunately for all concerned, on a spot where the way may be smooth and not defective. The stumbling of a safe, gentle, and well-broken horse running violently down hill, in consequence of an accident caused by a defect in the highway, cannot be reckoned as

a contributory cause. It is as much a natural and direct consequence as the fall of the plaintiff herself from the wagon. It is part of the accident caused by the defect. And this brings us directly to the consideration of the third matter of complaint which is, that the judge gave no instructions as to what conclusion would follow in case the jury should find that the nut, which held the whiffletree bolt in place, became detached partly by means of the defect and partly by working off in passing over those portions of the road which were not defective. As we have before observed the omission to request specific instructions touching such a hypothesis takes away the ground of complaint. It may be further remarked that the hypothesis is based, not upon any evidence, but purely upon the surmise of counsel; and we take occasion here to add that the doctrine of contributory causes produces annually a crop of disputations, which savor more of the subtleties and learning of the schoolmen than of a desire to evolve any practical, intelligible rule which shall be of service in administering justice between party and party.

In the case before us the defendants' counsel asks the jury to go back of the wrench which brought a well-secured whiffletree against the horse's heels, and find upon mere surmise that the nut might have been started in traveling over portions of the road not defective; and the complaint is that the judge refrained from mystifying the jury by a suggestion that, in such contingency, it would be competent for them to relieve the defendants from liability on the ground of a contributory cause.

One might as well suggest the laws of gravitation as a contributory cause. Those laws certainly did operate in producing the injury, while there is neither certainty nor evidence that the smooth portions of the way aided in loosening the nut. Yet every one would feel the absurdity of reckoning those laws as a contributory cause of the accident. If it ever happens that logic and common sense cannot be reconciled in the application of this doctrine to the decision of causes, logic must give way.

The only substantial question of this nature that arose upon this

evidence was whether the fright and violent running of the horse ought to be accounted a contributory or intervening cause.

Now, in this State, it was settled in *Verrill* v. *Minot*, 31 Maine, 299, that it could not be ruled as matter of law that the violent running of the horse at the time of the accident would preclude the plaintiff from recovering. Among us the law has been administered in conformity with that decision ever since. So far as this doctrine is inconsistent with that propounded in the cases cited by the defendants' counsel, from the ninety-seventh and ninety-eighth volumes of Massachusetts Reports, we are satisfied to adhere to the rule upon which we have so long practiced.

Even where the fright and the running was not occasioned, as it was here, by the defect in the highway, it cannot be determined as matter of law that the defect was not the sole, true, efficient cause of the injury. It is a question of fact for the jury to decide; and their decision is subject to revision by the court if there is manifest error. The case forcibly brings to mind that numerous class in which various courts, with more or less show of reason, have undertaken to declare as matter of law that this or that hasty act, omission, or neglect shall be deemed to constitute a want of ordinary care. The result is a mass of decisions apparently irreconcilably in conflict, but which on being carefully examined will each be found to include some matter of fact not present in the previous case; some one of the "circumstances which alter cases," and which demonstrate the futility of attempting to lay down any general inflexible rule of law in relation to the subject. The attempt to adhere to such rules produces every now and then results which reflect no credit upon courts, and are felt to be painful perversions of right and justice. The difficulty is inherent in the nature of the subject. In the infinite variety of circumstances attending an accident of the kind we are considering, it is in vain to attempt to lay down in advance the doctrine that one isolated act or fact, the character and effect of which may be totally changed by concomitants which it is impossible to foresee, shall be deemed conclusive against the right to maintain the suit. All that can be

settled is whether, under all the circumstances of the particular case, it must have that effect.

The motion to set aside the verdict based upon the paper found in the jury-room cannot be sustained. Each juror signified his assent in open court to the verdict which was rendered. It by no means follows that the one who is supposed to have put down nothing was not in favor of returning a verdict for large damages. The previous conferences of the jury may have satisfied him that the average would more nearly conform to his estimate if he added nothing to the aggregate. It was the subsequent unanimous assent to and ratification of the precise sum found, which constituted the verdict.

The testimony called newly-discovered might have been had at the trial by the exercise of reasonable diligence, and it is not necessarily conflicting, and would not probably change the result.

Motions and exceptions overruled.

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

HANNAH F. BELCHER, pet'r for mandamus, *vs.* UPTON TREAT.

Mandamus—when it issues. Trial justice—adjournment by, under R. S., c. 83, § 12.

The writ of mandamus is not a writ of right, but is issuable at the discretion of the court when equity requires it.

Parol evidence is receivable to show that the writ should not issue.

When a trial justice is unable to attend at the time and place appointed for trial, the continuance by another trial justice or any justice of the peace and quorum as provided by R. S., c. 83, § 12, must be within and not without the office appointed as the place of trial.

PETITION FOR MANDAMUS.

Hannah F. Belcher of Winterport applies to this court for a writ of mandamus to issue to Upton Treat, Esq., one of the trial

justices of Waldo county, commanding him to make out and deliver to her an execution in her favor against one Sewall Simpson, and Eli C. West, as Simpson's trustee, upon a judgment which she claims to have recovered under these circumstances, as stated by her in her petition. On the second day of June, 1873, Sewall Simpson was indebted to her for house-rent in the sum of $13.98, and fifty-six cents interest accrued on the debt; she then sued him therefor by a writ signed by Mr. Treat, as trial justice, and returnable before him at his office in Frankfort on the fifth day of July, 1873; due service was made, and on the day last-named, at the appointed hour, her attorney carried the writ to Mr. Treat's office-door, which he found closed and fastened, and learned that Mr. T. was out of town with the key; thereupon the attorney immediately procured Elisha Chick, Esq., of Winterport (a town adjoining Frankfort), a trial justice of the same county, to go to Mr. Treat's office-door with the writ and remain there till eleven o'clock in the forenoon, Simpson also appearing at the door, but Mr. Treat did not return; therefore Mr. Chick, claiming to act under R. S., c. 83, § 12, adjourned the cause to July 12, 1873, at 3 P. M., and noted the facts upon the writ and on his own docket. At the day and hour to which the adjournment was had the action was entered by Mr. Treat and a default recorded against the principal defendant and the trustee, both of whom failed to appear, and costs were awarded the plaintiff, taxed and entered of record by the justice. After the lapse of twenty-four hours Mrs. Belcher's attorney called on Mr. Treat for her execution which he refused to issue, has persisted ever since in refusing to do so, and this application was for a writ of mandamus to compel compliance with this request. It appeared by the deposition of Sewall Simpson that he owed the $13.98 rent as claimed; that Mrs. Belcher owed him two dollars and sixty-two cents; and that, between the time of the service of the writ upon him and its return day, he had paid her the balance of $11.36 due her, but that she declined to give any receipt for it. The petitioner contended that this deposition was not legally admissible, because tending to contradict

the justice's record; but did not attempt to controvert the facts alleged therein; claiming, however, that, at all events, the interest and costs were still unpaid. Mr. Simpson further testified that, though he went to Mr. Treat's office-door and saw Messrs. Chick and Vose there, the latter having a paper in his hand, nothing was said to him (S.) about any adjournment of the case nor did he know aught about it till told by Mr. Treat that judgment had been entered in Mrs. Belcher's favor against him and West, as his trustee.

T. W. Vose, for petitioner.

N. H. Hubbard, for respondent.

APPLETON, C. J. This is a petition for a writ of mandamus against the defendant, a trial justice in and for the county of Waldo, in which the petitioner prays that he may be commanded to issue a writ of execution in her favor and against one Sewall Simpson and Eli C. West, as his trustee.

It has been repeatedly held that when a justice of the peace before whom an action is returnable does not appear at the place, and within a reasonable time after the hour appointed, his failure so to appear amounts to a discontinuance of the suit. *McCarthy* v. *Johnson*, 11 Johns. 407; *Martin* v. *Fales*, 18 Maine, 23; *Stanton* v. *Hatch*, 52 Maine, 245.

To remedy the inconvenience which might result from the absence of the magistrate it is provided by R. S., c. 83, § 12, "when a trial justice is unable to attend at the time and place appointed by him for the trial of any suit already entered, or at which any writ is returnable before him, any other trial justice, who might legally try the same, or any justice of the peace and quorum residing in the same or an adjoining town, may attend and continue such action once, to a day certain, not exceeding thirty days, and note the fact on the writ and in his own docket; and if the inability is not removed at that time, such action at the time and place fixed in the continuance, may be entered before and

tried by some other trial justice of the same town, or if none such resides therein, then before some other trial justice of the same county," etc.

At the time when and the place where the writ is returnable, the trial justice, by whom it was issued, should be present. If from any cause, he is unavoidably absent the office should be left open, if the case is to be continued by any other justice. The defendant is not summoned to be present at any other place any more than at any other time. If the justice, before whom the writ is returnable, should undertake to order a continuance at any other time than that to which the writ is returnable, or to which the cause may stand adjourned, it would operate as a discontinuance. *Spencer* v. *Perry*, 17 Maine, 413. In *Chamberlain* v. *Dover*, 13 Maine, 466, it was held that there could not be a legal town-meeting, unless it be originally held in the place appointed in the warrant for calling it. In that case the meeting was held in the open air near the school-house where it was notified to be held. "In the case before us the meeting called," remarks Weston, C. J., "was never held at the place appointed. It was to be at the school-house, which must be understood to mean within its walls." So here the adjournment should have been at the place where the defendant had been summoned to appear; that is at the office, within and not without it. The justice of the peace, who was called in to preserve jurisdiction could not do what was not in the power of the magistrate, before whom the writ was returnable. He could no more continue at a different place than at a different time, from that to which the writ was returnable. The defendant was not summoned to appear at the office door, any more than at the window of the office, or at any point of space in the street and adjoining the office.

The magistrate is "to attend." Where? At the place where the defendant is summoned to appear, and not elsewhere. If the the case is to be tried by another justice it is at the time and place fixed in the continuance. The time is fixed, the place is fixed and the same rule that applies to the one is equally applicable to the other.

In *Knight* v. *Berry*, 22 Vermont, 246, it was held sufficient for the magistrate, by whom the action is continued, to appear at the door. But if sufficient for him, it must be equally so for the party. It would, however, hardly be held that a party who went to the door, but did not enter the office, had appeared at the place of trial.

The writ of mandamus is not a writ of right. It is issuable at the discretion of the court and when equity requires it. Parol evidence, therefore, is admissible to show it ought not to issue. In the present case, before the return of the writ, it appears from the evidence of Sewall Simpson that he paid the petitioner the debt for which the suit was brought; that he asked for a receipt for the amount paid, which the petitioner declining to give, he then demanded the money which the petitioner refused to return and still retains. The petitioner claims there is due fifty-six cents for interest on the amount, and costs, but there is no evidence that interest was claimed, or that at the time the suit was brought the petitioner was entitled to interest. If the debt has been paid the plaintiff could not recover her costs.

We do not think sufficient cause exists for issuing the writ as prayed for. *Writ denied. Costs for defendant.*

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

NAHUM P. MONROE *vs.* HOSEA B. THOMAS.

Amendment—what is allowable.

An amendment by which a charge for spirituous liquors is stricken out of an account is properly allowed.

On exceptions.

Assumpsit to recover the balance due upon an account annexed for medical services and medicine furnished by the plaintiff, a physician, to the defendant and to the defendant's son, at the father's request, amounting to $43. The last item of the account originally was: "To advice, brandy, and wine of calisaya, sent by son, $1.00." The defendant pleaded the general issue and filed a brief statement that the account sued, and a part thereof, were for spirituous liquors sold in this State contrary to law; thereupon the plaintiff was allowed to amend his account by striking out the word brandy, and the defendant excepted.

The plaintiff, proceeding to trial upon his account thus amended, recovered the full amount then claimed.

Wm. H. McLellan, for plaintiff.

J. B. Murch, for defendant.

Appleton, C. J. This is an action of assumpsit for medical services rendered the defendant.

One of the charges originally was: "To advice, brandy, and wine of calisaya, sent by son, $1.00." The plaintiff was allowed to amend his writ by striking out the word brandy. That being stricken out, the plaintiff could not recover therefor, and there is no proof he did.

The amendment was properly allowed. *Boyd* v. *Eaton*, 43 Maine, 51.

The case shows that a motion for a new trial and to set aside the verdict as against evidence has been filed; but the evidence as reported shows no ground whatever for disturbing it.

Motion and exceptions overruled.

Cutting, Walton, Dickerson, Barrows, and Peters, JJ., concurred.

Sewall Butterfield *vs.* Inhabitants of School District No. 6 in Prospect.

School-district—town cannot alter without notice to inhabitants.

Under an article in the warrant "to see if the town will set off a part of the districts, numbers 9 and 17" so as to form a school-district with contiguous portions of an adjoining town, it is not competent for the town to set off a portion of a district other than those specified in the warrant.

A person seeking to recover a tax paid by him to a school-district, upon the ground that he was not, at the time of the assessment, a resident of the defendant district, but that the part of the town in which he resided had been formed into a new district with portions of a neighboring town, is not entitled to recover unless he shows that the towns co-operated in their corporate capacity to form such new district.

On report.

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

The opinion contains a statement of the case.

T. W. Vose, for the plaintiff.

W. H. McLellan, for the defendants.

Dickerson, J. This is an action to recover back the amount of a school-district tax assessed upon the plaintiff by the defendants in 1869, and paid by him under protest.

The plaintiff claims to maintain this action upon the single ground that the premises occupied by him when the tax was assessed were not within the limits of school-district No. 6.

It is admitted that the district in which the plaintiff was assessed is now called No. 6, and was called No. 10 in 1850, and remained No. 10 until 1857.

It appears by the town records that the town was divided into school-districts anew in 1822, and that the territorial limits of No. 10 were specifically defined and established and, by parol evidence, that the premises occupied by the plaintiff when he was assessed were a part of No. 10 under that division.

The plaintiff contends that the premises occupied by him when the assessment was made were set off into a new district, composed of portions of the towns of Prospect and Frankfort, by vote of the town, passed April 1, 1833. The article in the warrant calling that meeting, upon the subject in question, is as follows: "To see if the town will set off a part of districts Nos. 9 and 17, being the northeast part of Prospect, to unite with the districts Nos. 1 and 16, being the southwest part of Frankfort, to form a district on a line between the two towns." Under this article the town voted "to set off a number of the inhabitants of Prospect to form a school-district with a number of the inhabitants of Frankfort, somewhere on the line between the two towns." The new district thus provided for on the part of Prospect embraced the "Batchelder lot;" the same that the plaintiff occupied when he was assessed.

In order to establish a school-district out of contiguous portions of two towns it is necessary that both towns should co-operate in their corporate capacity to effect this purpose. There being no evidence before us that the town of Frankfort ever did so in this case, the vote of Prospect, for the purposes of this controvesy, must be regarded as inoperative and void.

But the article in the warrant was to see if the town would set off No. 9 and No. 17, not No. 10, or any part of it. The vote of the town in setting off the "Batchelder" lot from No. 10 did not follow the warrant. The call in the warrant did not notify the inhabitants of No. 10, or any one of them, that any action of the town in regard to the territorial limits of that district was contemplated. They had a right to such notice, and the vote of the town, undertaking to dismember that district without notice was a nullity.

The premises of the plaintiff, assessed in 1869, were a part of school district No. 10 in 1822, and there is no evidence in the case to prove that they ever ceased to constitute a part of that organization, though its name was subsequently changed to No. 6.

Plaintiff nonsuit.

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

MARSH RIVER LODGE OF FREE AND ACCEPTED MASONS *vs.* INHABITANTS OF BROOKS.

Pleading. Amendment.

When the members of a voluntary association, a lodge under one name, become incorporated under a different name, and a suit is brought in the name of the voluntary association, an amendment substituting the corporate name is not allowable.

ON AGREED STATEMENT OF FACTS.

This action, for money had and received, commenced December 6, 1871, to recover $21.26 paid to the collector of the town of Brooks for taxes for the years 1868, 1869, and 1870, alleged to have been assessed upon the plaintiffs and paid under protest, was submitted upon facts agreed for this court "to enter such judgment as law and justice demanded."

Regular proceedings were had in May and June, 1865, to form the persons composing this lodge into a corporation by the name of "Marsh River Corporation" conformably to the provisions of R. S., c. 55, §§ 1, 2, and 3, as appears by the opinion.

During the years 1868, 1869, and 1870 the corporation owned, under R. S., c. 55, § 4, the real estate in Brooks upon which the taxes aforesaid were assessed, but claimed to hold it exempt from taxation by virtue of R. S., c. 6, § 6. Being compelled to pay these taxes this suit was instituted, in the name of the old lodge, to recover them. At the April term, 1873, of this court, for Waldo county, the plaintiffs asked leave to amend by inserting their corporate name in the place of that of the lodge, which was to be granted if in the opinion of the court the writ was legally thus amendable. As will be seen by the opinion, the cause was decided solely upon this point.

W. H. Fogler, for plaintiffs.

N. Abbott, for defendants.

APPLETON, C. J. It is apparent from the report that the plaintiffs are a Masonic lodge, existing by virtue of Masonic authority, and not a corporation created by the laws of this State, for the case finds that on the fourth day of May, 1865, seven of the members of said lodge applied to a justice of the peace for the county of Waldo, signifying their desire to incorporate themselves and their associates into a Masonic lodge under the statutes of this State, and asked said justice to issue his warrant for that purpose, which was done, and such proceedings were had that the applicants and their associates duly and legally organized themselves into a corporation under the statutes of this State, by the name of "The Marsh River Corporation."

The plaintiffs claim exemption from taxation upon property belonging to them under R. S., c. 6, § 6, which among other things provides that "the real and personal property of all literary institutions, and the real and personal property of all benevolent, charitable, and scientific institutions incorporated by this State," shall be exempted from taxation. But these plaintiffs are not shown to be a corporation "incorporated by this State." The reverse is the inevitable conclusion from the facts upon which the parties have agreed. Conceding, for the sake of argument, that Masonic lodges "incorporated by this State" are entitled to the exemption under c. 6, § 6, still the plaintiffs not being shown to be "incorporated by this State, or under its laws," cannot claim the statutory exemption.

The plaintiffs desire to amend by substituting the name of the corporation created by virtue of the proceedings to which reference has been had. But this amendment is not allowable. The plaintiffs in this writ, if they had been a corporation under the laws of the State, might by legislative authority have changed their corporate name, and in such case the new corporate name might, by amendment, perhaps, have been inserted in lieu of the original corporate name. But such is not this case. The present plaintiffs are a voluntary association. They have no corporate existence. To substitute the name of the new corporation would be

to insert a new party against the consent of the defendants. A voluntary unincorporated association and a corporation duly organized under the law of the State, cannot be regarded as identical. The property of the former is not exempt from taxation; that of the latter may be. *Plaintiff nonsuit.*

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

DAVID W. DYER *vs.* WILLIAM H. BRACKETT and schooner DANIEL WEBSTER.

Lien on vessel—when omission of credit will not defeat. Amendment. Affidavit of claim.

In a suit to enforce a lien on a vessel, where, without fraudulent intention but through forgetfulness, there was an omission to render in the specification certain small credits, and such omission is discovered before trial and seasonably communicated to the defendant, who disclaims any objection to the omission, the plaintiff should have leave to amend so as to make his writ valid and sufficient.

An oath that the plaintiff in his belief had a lien for the amount of his claim, is sufficient where the statute requires an oath of his belief that he has a lien for the whole or a part thereof.

ON REPORT.

This is an action to enforce a lien for labor and materials furnished for repairing the schooner Daniel Webster, to the amount of $2,346.11; brought under R. S., c. 91, § 9.

The concluding paragraph of the plaintiff's oath to the specification was: "I believe that, by the laws of this State of Maine, I have a lien on said vessel for the amount thereof."

Upon the trial the plaintiff testified, among other things, that he had omitted to credit the defendant with several articles of the value of $18.01; that he had forgotten these credits at the time the suit was brought and, discovering the omission after the attachment had been made, spoke to the defendant about it, who said it made no difference; it was all right between them.

The case was reported to this court to determine whether the plaintiff could maintain his suit for a lien against the vessel.

A. G. Jewett and *W. H. Fogler*, for plaintiff.

The statute is remedial and should be liberally construed so as to practically benefit the mechanic. *Winslow* v. *Kimball*, 25 Maine, 495.

It contemplates that mistakes may occur as to amount of claim. R. S., c. 91, § 16. *Deering* v. *Lord*, 45 Maine, 275; *McCabe* v. *McRea and Ship Enterprise*, 58 Maine, 98.

J. F. Godfrey, for defendant.

PETERS, J. The plaintiff sued out his writ to enforce a lien for materials and labor furnished the schooner Daniel Webster, by virtue of the provisions of R. S., c. 91. Section 9 of the chapter referred to, among other things requires that "the specification annexed to the writ shall contain a just, true, and particular account of the demand claimed to be due the plaintiff with all just credits." He annexed to his writ a specification of items due him of about $2,400, and gave a small credit, but omitted to credit a further sum of about $18 which should have been credited. Such omission was occasioned through forgetfulness and inadvertency without any intention to deceive or defraud. The error was discovered before trial, and seasonably communicated by the plaintiff to the defendant, who disclaimed any objection on account of it. If the plaintiff should amend so as to credit the sum omitted, then his specification would be just what the statute requires it should be, and his writ will be valid and sufficient. In all admiralty proceedings amendments are allowed to both libel and answer, where justice requires it, even though the papers to be amended have been sworn to. To require that a specification, such as this, should be literally exact in all respects and under all circumstances, would be so rigid an interpretation of the statute as to take away from parties in many cases the beneficial purposes for which it was designed. It would require a person to construe

all questions, both of law and fact, with the utmost correctness at his peril. We think under the circumstances of this case an amendment should be allowed.

In *Lynch* v. *Cronan*, 6 Gray, 531, cited by the defendant, the mechanic in his certificate claimed $24.06; credited $1, when he should have credited $5. No reason whatever appears why the true credit was not given. The court were divided in the opinion. In *Story* v. *Buffum*, 8 Allen, 35, also relied on by the defendant, the builder of a vessel claimed $4,250; declared in his certificate that a large credit should be given, but credited nothing. The sum which should have been credited proved to be $3,208.69. The plaintiff testified that when he subscribed his statement he knew over $3,200 had been paid, and that he could easily have ascertained the true sum to be credited upon inquiry. The court say he should, at least, have credited the $3,200. These cases are unlike the case at bar. Besides, in the Massachusetts statute there is a provision that the lien shall be dissolved unless the person, seeking to avail himself of it, within four days files in the office of the town clerk, if personal, and registry of deeds, if real property, a certificate in the language before quoted. Here is a positive condition fixed by statute, which must be complied with to keep a lien effectual. The court could allow no amendment of the original certificates, for they would not be within the control of the court for that or any other purpose. Our statute, so far as relating to a lien upon vessels, has no such or any similar provision.

The plaintiff made oath that in his belief he had a lien on the vessel "for the amount of his claim." Is this insufficient where the statute requires that his oath shall declare a lien "for the whole, or a part thereof?" The whole certainly includes all the parts. The limitation in the oath need be observed only when the party making the oath has any doubt or belief requiring it.

Action to stand for trial with leave to amend.

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

ROWENA LONGFELLOW and others *vs.* GEORGE H. LONGFELLOW.

Tenant estopped to deny landlord's title.

A tenant who has not surrendered the demised premises, nor been evicted by paramount title, is estopped to deny his landlord's title; nor does the giving of thirty days' notice to terminate the tenancy, stating that he shall surrender the premises on the day specified for the termination of his tenancy, and thereafterwards claim to hold them in fee by a paramount and independent title, authorize him to set up such title without having made any actual surrender of the premises, but remaining in continuous occupation thereof.

ON REPORT.

The facts necessary to an understanding of the issue determined by the court are sufficiently stated in the opinion.

If upon the facts the tenant is estopped to deny the demandant's title, or to set up title in himself, or if his notice to them and the subsequent acts of the parties did not terminate the tenancy, then a default is to be entered; otherwise, the action is to stand for trial. If the tenant is defaulted the question of the recovery of rents and profits and their amount is to be determined by a judge at *nisi prius*.

Walker & Lynch and *L. G. Downs*, for the demandants.

Bradbury & Bradbury and *J. Lippincott*, for the tenant.

APPLETON, C. J. On the first day of April, 1846, the demandants leased the land in controversy to the tenant for a term of ten years. That term expired. The tenant remained in the occupancy of the premises as tenant at will and was held liable for the rent of the same in *Longfellow* v. *Longfellow*, 54 Maine, 240.

Upon the ninth day of May, 1864, the tenant gave the demandants notice that at the expiration of thirty days from date he would surrender the possession of the premises to the demandants, and that he claimed title to the same.

On the day designated for the surrender, the agent of the demandants met the tenant within twenty rods of the premises in dispute and, as he says, offered to accept a surrender of the same. The tenant's version of what took place is somewhat different. He says the demand was for rent which he refused to pay, but that he told the agent he might take the property.

It appears that the goods of the tenant or of his son were in the store on the premises; that the store was locked; that no possession was taken, though the agent came for that purpose; that no surrender was made, and that the tenant has occupied or rented the premises ever since, claiming title thereto.

The tenant has expressly denied the title of his landlord, and given full notice of his adverse claim. The demandants' agent when he comes to take possession, finds the store locked. The owner of the fee may elect to regard himself disseized, in some cases, for the sake of the remedy. *Stearns* v. *Godfrey*, 16 Maine, 158; *Jackson* v. *Vincent*, 4 Wend. 633.

The demandants have brought their writ of entry. The tenant has pleaded *nul disseisin*. By the plea the tenant admits he is in possession, claiming a freehold and is thereby estopped from proving that he is tenant at will of the demandants. *Melcher* v. *Flanders*, 40 N. H. 139; *Williams* v. *Noiseux*, 43 N. H. 388.

The tenant, not having surrendered the premises and not having been evicted by paramount title, is estopped to deny the title of his landlords. *Longfellow* v. *Longfellow*, 54 Maine, 240; *Towne* v. *Butterfield*, 97 Mass. 105.

Tenant defaulted. The rents and profits to be assessed by the judge at nisi prius.

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

ROBERT MOWE *vs.* JOHN B. STEVENS.

Adverse possession. Administrator cannot, without a consideration, bind his intestate's estate, or release easement.

Where one has a right to use land for certain purposes his occupation of it must be presumed, *prima facie*, to be in accordance with his legal right.

A voluntary release of an easement by an administrator does not bind the estate, nor the heirs of the intestate.

ON REPORT.

The court to enter such judgment as the case requires. The facts sufficiently appear by the opinion.

Bradbury & French, for the plaintiff.

Bates & Jos. Granger, for defendant.

APPLETON, C. J. This is an action of trespass *quare clausum*. The *locus in quo* is a lane called Proprietors' lane, running from High to Elm streets, and between the lots on Washington and Boynton streets, the plaintiff's lot being on Washington street and the defendant's on Boynton street. The plaintiff erected a gateway across the land, which the defendant carefully removed, and without damage.

The acts done are justified on the following grounds: 1. That the plaintiff has no title to the premises where the alleged trespass was committed. 2. That the fee of the same was in the defendant. 3. That the said premises were part of a lane which had become a public thoroughfare by prescription. 4. That said premises were part of a lane over which all the abuttors, of whom he was one, had a right of way.

The plaintiff derives his title from Charles Peavey by various mesne conveyances. Peavey acquired his title from George Norton by deed of warranty dated May 21, 1821, in which the premises conveyed are described as follows: "a certain piece or parcel of land situated and lying in Eastport aforesaid and bounded as follows, viz.: Beginning on Washington street at the northwest corner of a lot of land owned by said George Norton, thence on said Washington street northwesterly four rods and three-quarters of a rod to land of Norton & Coombs, thence by said land of Norton & Coombs, southwesterly five rods and two feet to a lane lately laid out by said Norton & Coombs and called "Proprietors' Lane," thence by said Proprietors' Lane southeasterly four rods and three-quarters of a rod to the aforementioned lot of George Norton, thence by said Norton's lot northeasterly five rods and four feet to the first-mentioned bounds, with all the privileges and appurtenances thereunto belonging. And the said George Norton, his heirs and assigns, doth covenant and engage with the said Charles Peavey, his heirs and assigns that the aforementioned lane called Proprietors' Lane, shall be kept open from Coombs (now Elm) street to High street back of Charles Peavey's lot, one rod wide from the lines of Thomas Pierce and Solomon Rice, forever." By this deed Peavey acquired only an easement in the lane and could only convey what he had thus acquired. The plaintiff having no legal title to the premises from one authorized to convey, if he has a title, it is one gained only by adverse possession. It is true, that he claims the land is covered by the language of some of the intermediate conveyances under which he derives his title. This, however, is denied by the defendant and may well be questioned. But, however that may be, still the plaintiff has a title only by adverse possession. He testifies, "I claimed title to the lane by occupation."

The defendant derives title from George Norton and Philip Coombs by deed of October 17, 1817, which as he contends includes the lane. In the deed from Isaac Hobart to Abel Stevens, the father of the defendant, dated May 11, 1829, one of the lines

is described as "running north 67 deg. west, five rods on the lane." But it is immaterial to determine whether the fee of the lane is in the defendant or not, inasmuch as if he has an easement therein, and the plaintiff has wrongfully interfered with his rightful enjoyment of it, he would be fully justified in removing the obstructions of the plaintiff which prevent such enjoyment.

If the legal title of the lane remained in the proprietors, they would be estopped by their deed from interference with its use. But the plaintiff does not claim under them.

The plaintiff by his deed had a right to use the lane for the purposes for which it was established. His use must be regarded, *prima facie*, in accordance with his legal right, and not adverse to the owners of the fee whoever they may be, or of those for whom or for whose estates the lane was established.

The evidence shows the lane to have been used by the public and by the occupants of the adjacent lots, without restriction, from 1821 when Peavey became the owner of the plaintiff's lot to October 29, 1848. The use during that time was open, continuous, undisturbed, and adverse to the plaintiff's claim, and if under a claim of right was none the less adverse. At that date the plaintiff had gained no rights as against the owners of the fee of the lane or against those having an easement therein. On the twenty-ninth day of October, 1848, a paper was signed by "Charles Stevens, administrator for the estate of A. Stevens, and occupant," the purport of which was to save to the plaintiff and others "their right, property, or control over said lane and the land on which it passes, and to prevent the acquisition by the owners or occupants of the lots on the southerly side (Boynton street) of any right by prescription or otherwise, to keep open, use, and enjoy said lane, and that they do and will claim no right therein, but they acknowledge their use and enjoyment of the same is wholly by the permission and consent of said Mowe.

But Charles Stevens, as administrator, had no right to bind the estate. The writing is not under seal. He could not diminish or destroy the estate of his co-heirs or injuriously affect the rights of

the other owners of land on Boynton street or of the public. There is no consideration for this paper, and there is no proof whatever of the truth of the statement therein contained, "that the lane was opened by the owners of the lots lying on the northerly side for their use and accommodation, and was taken wholly from land belonging to their lots." On the contrary, that the lane was laid out by the proprietors, the plaintiff by the very basis of his title, the deed to Peavey, is estopped to deny.

From October, 1848, to the time of the alleged trespass, the lane has been used as heretofore. There is proof of a gate and bars being erected by the plaintiff and continuing for some years, and of the plaintiff forbidding individuals in two or three instances to pass over the lane. But there has been no continuous, exclusive, open, and adverse enjoyment of the lane for any period of twenty years. The defendant as well as the public have exercised and claimed the right to pass and repass over the premises at their own will and pleasure, and they have so passed and repassed without any continued interruption or hindrance. We think the plaintiff fails to show a title by disseisin and he manifestly has no other.

Judgment for the defendant.

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

RICHARD P. ESTEY and another *vs.* CHARLES A. BOARDMAN.

Trover by one co-tenant of a chattel against another, does not lie for a mere attempt to sell.

One tenant in common cannot maintain an action of trover for conversion against a co-tenant for an attempted sale of a larger share of a vessel than belonged to him, where no sale was fully effected and no title to, or possession of the common property passed thereby.

On motion by the defendant to set aside a verdict rendered for the plaintiffs, on the ground that it was contrary to the law and the evidence.

This was an action of trover to recover the value of a lighter, or small vessel, her chain and anchor. The defendant pleaded the general issue and a brief statement denying the plaintiffs' ownership or right of possession of the vessel, and setting up title and a right of possession in himself; claiming that, if he did not own the whole, he was a tenant in common, owning one-half of the craft.

Robert B. Estey and Richard P. Estey, composing the firm of R. B. Estey & Co., the plaintiffs, were merchants at Calais. The vessel in controversy was built at Calais in 1867–8, by William Charles Cookson and Henry C. Hold, upon an original expectation that each was to have one-quarter and that other parties would purchase one-half. Hold testified that, failing to find purchasers, it was agreed between W. C. Cookson and him to go on and build her equally, but W. C. Cookson swore that nothing was said about Hold's taking more than one-quarter till after she was launched (July 25, 1868), just prior to the time the mortgage of her to the defendant was given and about seven weeks after that to the plaintiff was executed and recorded. The verdict was for $258.75. William Cookson, father of William C., did some work upon the vessel, June 6, 1868; William and William C. Cookson mortgaged to the plaintiffs "the new vessel now building by us near the Marine Railway, on Kelley's Point (so called), in Calais . . . with all her spars, tackle, appurtenances," etc., etc. William Cookson's name was signed to this document, as the plaintiffs testified, to bar any claim of lien by him upon the vessel. Upon the twenty-eighth day of July, 1868, three days after she was launched, Henry C. Hold and William Charles Cookson (by the name of Charles Cookson, he being commonly called by his middle name, to distinguish him from his father), executed a mortgage of "a certain new vessel built by us on the wharf of William E. McAllister," to the defendant.

There was no question but that the vessel referred to in these two mortgages was the same. Both mortgages were recorded about the times they were given. December 22, 1868, the plaintiffs notified a foreclosure of their mortgage, which notice was recorded May 21, 1869. The plaintiffs took possession of the vessel, December 10, 1868, procured the chain and anchor sued for, moored her by them, and afterward hauled her out upon Kelley's Beach. She lay there a long time and until the defendant took her off, had her towed down to the marine railway, and hauled her out to be calked. He attempted an adjustment of their respective interests with the defendants, but as he claimed one-half, while they would only admit his ownership of one-quarter, nothing was accomplished. August 2, 1870, Mr. Boardman advertised her to be sold at auction, on the railway, on the 6th day of the same month at two o'clock in the afternoon, saying that, at the time and place designated, he should sell "a small vessel built by Clarkson and Hold;" but he testified that at the time she was set up for sale both he and the auctioneer stated publicly that it was only his right, title, and interest in the vessel that was to be sold, but that he claimed this to be a one-half interest; that the chain and anchor belonged to Mr. Estey, and certain other articles to another person, and would not be sold.

A Captain Cook bid off the vessel, but, failing to procure the Esteys' interest (the plaintiffs offering to sell him the whole, not one-half, the vessel), he declined to complete the purchase, or pay for, or take the vessel, or to have anything to do with her. Soon after the auction, while still upon the railway she was consumed by fire, which destroyed a great deal of other property at the same time. The chain and anchor were permitted to remain where the fire left them, the plaintiffs declining to have aught to do with them after their removal from Kelley's Beach (whence they were brought in the vessel, when she was towed down to go upon the Railway), and the defendant disclaiming all title or interest in them. One witness testified that the fire extended beyond the point on Kelley's Beach from which the vessel was removed.

The motion for a new trial was argued by

E. B. Harvey, for the defendant.

Trover by one tenant in common against his co-tenant can only be maintained by such an act as amounts to a total destruction of the chattel. 2 Greenl. on Ev., § 646. The defendant never denied the plaintiffs' right to one-half the vessel, did not seek to deprive them of it, or to injure them in it, but stated to them all he proposed to do, and tried, ineffectually, to adjust matters with them. The only acts which are claimed to be a conversion were the removal of the vessel from Kelley's Beach to the dry dock and the attempt to sell her at auction there, which failed. The mere taking possession of a chattel by a part-owner is not a conversion of his co-tenant's interest. 2 Hilliard on Torts, 277–8, and cases there cited, and in the notes. *Heath* v. *Hubbard*, 4 East. 107; *Foster* v. *Crabb*, 11 Eng. L. & Eq. 521; *Moorly* v. *Buck*, 1 Sandf. 304; *Bonner* v. *Latham*, 1 Iredell, 271.

The demand, after she had been burned, could not be complied with; so is no evidence of conversion. *Daniels* v. *Daniels*, 7 Mass. 137; *Dain* v. *Cowing*, 22 Maine, 347; *Boobier* v. *Boobier*, 37 Maine, 406.

A. McNichol, for the plaintiffs.

A party in possession of a chattel can maintain trover against one who takes it away unless the latter can show a better title. *Hubbard* v. *Lyman*, 8 Allen, 520. The plaintiffs were in possession under a mortgage covering the entire vessel, when she was taken from them by the defendants.

At all events, the defendant was only second mortgagee so far as Charles Cookson's interest was concerned; and Cookson being a party to them both, the defendant's must be considered as a second mortgage.

Whether the defendant's acts in removing the vessel from the beach to the place where she was consumed was the cause of her destruction, was a question of fact for the jury, which they decided in our favor.

Hold, at most, could not convey to the defendant more than one-

quarter of the vessel; yet, by Mr. Boardman's own testimony he took entire control of her, advertised the whole, and at the auction claimed and sold one-half. This was clearly a conversion of the quarter that he claimed and sold without any color of title. *Wheeler* v. *Wheeler*, 33 Maine, 347; *Barnardston* v. *Chapman*, 4 East. 121.

PETERS, J. This case comes up on a motion for a new trial, and presents the question whether as a matter of law, upon all the facts proved, the plaintiffs were entitled to recover. We think not.

Hold and Cookson built a vessel, the proportions of respective ownership being uncertain. But it may be regarded as ascertained by the verdict that Hold owned one, and Cookson three-quarters of her. Cookson, owning less than the whole, mortgaged the vessel to the plaintiffs. Afterwards Cookson and Hold jointly mortgaged her to the defendant. This would make the plaintiffs and the defendant tenants in common, in the proportion of the respective ownership and interests of Cookson and Hold.

There is no foundation in the plaintiffs' claim, that the defendant would take nothing primarily by his mortgage, but only as a second mortgagee. There is no reference made to the earlier in the later mortgage, and while the plaintiffs would be first in representing Cookson's share, the defendant would be a second mortgagee so far as that share was concerned, and would be the only person having any claim upon the share which belonged to Hold.

The plaintiffs first got possession of the vessel, and, as there was a dispute about the ownership between the parties, put her upon a beach where she remained out of use and with no one on board of her. Then the defendant took possession and carried her to a dry dock for the purpose of putting her into some employment, or availing himself of a chance to sell. In this the defendant committed no act amounting to a conversion of the property as between tenants in common. The vessel was not carried beyond the reach of the plaintiffs, nor was she taken by any forcible act against the resistance of anybody. Lord Coke says the remedy

for such taking would be for the co-tenant to retake her "when he can see his time."

After this the defendant undertook to sell his interest in the vessel at auction, and proceeded so far as that a Mr. Cook bid her off. It is not certain from the evidence what proportion of the vessel was undertaken to be sold. It was stated at the sale that only the defendant's actual interest was offered, but it may be admitted as found by the verdict, that the proposition was made to sell an undivided half. The sale was not completed, inasmuch as the person, to whom she was struck off, refused to comply with his bid as he immediately ascertained that there was a dispute of ownership. Nor did the defendant claim to hold the bidder as a purchaser. This act, as between tenants in common, was not a conversion. Whether the absolute sale of the whole of an entire chattel by one of several owners would amount to a conversion, by one tenant of his co-tenants' share, is a point upon which in different courts there have been different opinions, though decided in this State affirmatively; but the doctrine has never been anywhere carried so far as to make anything less than an absolute sale a conversion. To authorize an action of trover for conversion it must appear, not only that the defendant assumed to sell, but that he actually did sell his co-tenants' share. There must be an actual completed sale, or something equivalent to it, or as efficacious as that would be to show actual appropriation. Here was, at most, but an abortive sale. Nothing was delivered over; nothing passed; and no change whatever took place either in possession or title. As the facts in this case fall short of showing an absolute completed sale, the verdict cannot be sustained upon the rule nor upon the reason of the rule as stated in the cases of *Dain* v. *Cowing*, 22 Maine, 347, and *Weld* v. *Oliver*, 21 Pick. 559, and other cases cited.

Motion sustained. Verdict set aside and new trial granted.

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

APPENDIX.

Opinion of the Justices of the Supreme Judicial Court.

Constitution of Maine—Art. IX of Amendments construed.

Judges and registers of probate who have been elected to those offices, agreeably to the provisions of the amendment to Art. VI of the Constitution of Maine (Art. IX, § 7), are entitled to hold them for a term of four years from the first day of January next succeeding their election, although their elected predecessors may have vacated their offices before the expiration of the full terms for which they were chosen.

Under the provisions of the Constitution, Art. VI, § 3, His Excellency, the Governor, asked the opinion of the court as to the true construction to be given to § 7 of that article as amended. The facts upon which the question arose appear in the subjoined correspondence.

Augusta, Aug. 8, 1872.

Hon. John Appleton, *Chief Justice of the Supreme Judicial Court of State of Maine.*

Sir.—I respectfully request that you give the opinion of the justices of the supreme judicial court upon the following facts:

At the September election of 1868, Joseph Bartlett, Esq., was elected Register of Probate for Penobscot county for four years, and on the first day of January following entered upon the duties of his office. On the first day of April, 1870, he deceased, and on the ninth day of April, 1870, Ambrose C. Flint was appointed by the governor Register of Probate to fill the vacancy until the

first day of January following, and accepted said appointment. At the September election of 1870, said Ambrose C. Flint was elected Register of Probate, and entered upon the duties of his office by virtue of said election, on the first day of January following.

The question presented is, whether said Flint by virtue of said election of September, 1870, holds his office for four years from January 1, 1871, or only for the unexpired part of the term for which said Bartlett was elected, ending December 31, 1872. In other words, whether an election should be holden the coming September for a Register of Probate for said county.

SIDNEY PERHAM, *Gov. of Maine.*

BANGOR, Aug. 10, 1872.

Pursuant to the foregoing request the undersigned answer your proposed inquiry as follows:

The sixth article of the Constitution of Maine was amended by adding the following section at the end of said article:

"Sect. 7. Judges and Registers of Probate shall be elected by the people of their respective counties, by a plurality of the votes given in at the annual election on the second Monday of September, and shall hold their offices for four years commencing on the first day of January next after their election. Vacancies occurring in said offices by death, resignation, or otherwise shall be filled by election in manner aforesaid at the September election next after their occurrence; and in the meantime the governor, with the advice and consent of the council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January thereafter."

This provision of the constitution it will be noticed fixes the term for which Judges and Registers of Probate shall hold their offices (when *elected*) at four years. No other limitation is imposed, except in those cases where the incumbent holds by executive appointment.

In the case under consideration the incumbent holds by election, and we suppose the doubt raised concerning the term for which he was elected and entitled to hold, arises from the fact that Joseph

Bartlett, who was elected in 1868, deceased April 1, 1870, nearly two years before the expiration of the time mentioned in his commission.

So far as it concerns the office of Register of Probate, there would seem to be no necessity for fixing any different limitation to the term of office when filled by an election, made necessary by the decease of an incumbent, than one resulting from the expiration of time.

The framers of the constitution, contemplating the possible contingency of a vacancy in the office, arising from the death of an incumbent, provided a mode for immediately and temporarily filling it, and for a subsequent permanent filling of the office made thus vacant.

It was to be accomplished temporarily by executive appointment, for a term limited to the first day of January following the next September election thereafter, and permanently by election at the September election next after the occurrence.

It will be perceived that no other limitation than four years is imposed, except in cases of executive appointment. This term seems to be a fixed and positive term attached to an election. The only mode of permanently filling the office, however it becomes vacant, is by election, in which case the constitution says they "shall hold their office for four years." These provisions are clear and unambiguous, and no doubt concerning the question we apprehend would have arisen but for an opinion of this court given in 1863, upon a question concerning the election of a part of a board of County Commissioners. See the case and opinion in the 50th Maine, 606.

That case when examined will be found to be entirely different in its essentials and in the law governing its decision.

The court of county commissioners consists of a board of officers, the election of whom was so fixed by law as to occur upon different years. There was to be an annual election of one of its members. The mere expiration of time did not and could not leave the court vacant.

Vacancies might occur in the board by death or resignation. To

meet this contingency and still preserve the annual election of one of its members, the statute provided for a choice to fill the place which was vacant. R. S. of 1857, c. 78, § 3.

Considering the clearly expressed design of the legislature to elect the board upon different years, this phraseology of the statute was held to refer to the unexpired term. Such a construction was deemed not only reasonable, but necessary to maintain and preserve an essential element in the constitution of the court.

In the case under consideration no such reasons exist; and no such provisions of law are found.

No place upon a board of officers is to be filled. An office was vacant and has been filled in a constitutional manner so far as we are informed, and the only limitation fixed by law is four years.

This has been the construction adopted in a number of similar cases in this State, and we think the correct one.

Vacancies in this court, and in the superior court for the county of Cumberland, have always been filled and commissioned for the full constitutional limit, with no more or other reason for so doing, than in the case under consideration.

We therefore answer, that Ambrose C. Flint, by virtue of a due election in September, 1870, would be entitled to hold the office for four years from January 1, 1871.

JOHN APPLETON,
JONAS CUTTING,
EDWARD KENT,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHAS. DANFORTH,
RUFUS P. TAPLEY.

INDEX.

ABATEMENT.

1. Upon a debt due a partnership, one of the members of which has deceased, the action must be brought in the names of the survivors, whether for their own benefit, or under the control of the administrator of the deceased partner.
Strang v. *Hirst*, 9.

2. The objection that it does not appear that the defendant was tenant of the freehold when the action was commenced can be taken advantage of only by plea in abatement. *Lewis* v. *Meserve*, 374.

ACCEPTANCE.

See PAYMENT, 1.

ACCESSION.

See MORTGAGE, 2.

ACTION.

1. To recover in an action against a town, founded upon its vote, the plaintiff must bring his claim strictly within the terms of such vote.
Warren v. *Durham*, 19.

2. Thus, where a town voted to pay $500 for men mustered into the U. S. service for three years and credited upon its quota, no claim arises for re-payment of a smaller sum expended in procuring a man to be so mustered and credited, by agreement between the town and the plaintiff, as whose substitute such man was mustered; the soldier having received the $500 from the town. *Ib.*

3. After denial of a petition for review, suit can be maintained on a bond filed with such petition, given to obtain stay of execution on the judgment recovered in the action sought to be reviewed; although, before suit brought, a new petition to review such action, and a new bond for the same purpose as the previous one had been filed, and a stay of execution ordered.
Kenney v. *Burke*, 134.

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ADJOURNMENT.

See CITY COUNCIL. SALE, 7.

ADULTERY.

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ADVERSE POSSESSION.

1. Conceding a right to betterments is an admission that the possession, during the time in which this right was acquired, was adverse. *Moore* v. *Moore*, 417.
2. Where one has the right to use land for certain purposes, his occupation of it must be presumed, *prima facie*, to be in accordance with his legal right. *Mowe* v. *Stevens*, 592.

AGENCY.

See CONTRACT, 1, 2, 3. EVIDENCE, 17. FORCIBLE ENTRY AND DETAINER. INSURANCE, 9, 10. PROMISSORY NOTE, 1.

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See CONTRACT. DOWER, 5. PRINCIPAL AND SURETY, 1, 3.

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See FRAUDULENT CONVEYANCE, 1, 2. HUSBAND AND WIFE, 1.

AMENDMENT.

1. An unaccepted bill of exchange is not an extinguishment of the debt for which it was given; hence, a new count, declaring upon such debt, may be added as an amendment of the plaintiff's declaration upon such bill, since it introduces no new cause of action. *Strang* v. *Hirst*, 9.
2. An amendment relates back to the date of the original proceeding, so far as this can be done without injury to the intervening rights of innocent third persons, but will not be permitted to affect such rights; so that, where an officer's return upon an execution states the original attachment of the land sold on such execution to have been Sept. 20, 1866, instead of the true date, Sept. 28, 1864, it was held that, though he might amend his return according to the fact, this could not affect the title of one taking a mortgage of the land Oct. 13, 1864; but that the sale and return would convey the equity of redemption of a mortgage made prior to the attachment. *Milliken* v. *Bailey*, 316.

3. An amendment by which a charge for spirituous liquors is stricken out of an account is properly allowed. *Monroe* v. *Thomas*, 581.

4. When the members of a voluntary association, a lodge under one name, become incorporated under a different name, and a suit is brought in the name of the voluntary association, an amendment substituting the corporate name is not allowable.
Marsh River Lodge of Free and Accepted Masons v. *Inhabitants of Brooks*, 585.

5. A lien-claim may be amended by inserting credits accidentally omitted; especially where the omission has been mentioned to the defendant, who replied that it made no difference. *Dyer* v. *Brackett and schooner Daniel Webster*, 587.

See PROBATE LAW, 8. SCIRE FACIAS, 3. TROVER, 2.

APPEAL.

See COSTS, 1. 2. PROBATE LAW, 2.

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See PAYMENT, 3. TAX, 20.

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See CORPORATION, 6, 7, 8. SCHOOL DISTRICT TAX. TAX, 1, 2, 6, 7, 12, 13, 14, 19.

ASSIGNMENT.

An assignment of a permit to cut timber transfers to the assignee the trees afterwards cut under it, so as to enable him to maintain trespass against an officer attaching the lumber as the property of the assignor.
Sawyer v. *Wilson*, 529.

ASSUMPSIT.

1. In an action for money had and received, the plaintiff is entitled to recover no more than the sum actually received for his use by the defendant. An instruction that he can recover so much as his property converted by the defendant into money was reasonably worth, is erroneous. *Rand* v. *Nesmith*, 111.

2. A judgment in assumpsit, and satisfaction, estop the plaintiff from setting up a tort, the waiver of which was the foundation of his suit in assumpsit.
Ware v. *Percival*, 391.

See DURESS, 3. FRAUD. LIEN, 8, 10. MONEY HAD AND RECEIVED. PROBATE LAW, 11. SOLDIER, 2. TAX, 6, 7.

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See LIEN, 1.

BAIL.

The court will not quash a *capias* writ, on which a defendant has been held to bail, on the ground that the *ad damnum* is evidently excessive. The remedy is by R. S., c. 99, § 9. *Moore* v. *Moore*, 417.

BAILMENT.

See EVIDENCE, 25. PRACTICE, 15.

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See CORPORATION, 1, 2, 3, 4. EVIDENCE, 25. PRACTICE, 15. PROMISSORY NOTE, 7.

BASTARDY.

1. The objection, in writing, to a settlement or discharge of a complaint in bastardy authorized by R. S., c. 97, § 8, is seasonably made, if made at the trial of the respondent on the complaint. *Eames* v. *Gray*, 405.

2. It is competent for the complainant in a bastardy process to testify that her "home" is in M., with a view of showing the liability of that town for the support of her child. *Ib.*

BETTERMENTS.

See ADVERSE POSSESSION, 1.

BILLS OF EXCHANGE.

An accepted bill of exchange is *prima facie* evidence of payment of the debt for which it is given, *aliter*, as to an unaccepted bill. *Strang* v. *Hirst*, 9.

See AMENDMENT, 1. Also see PROMISSORY NOTES.

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BURDEN OF PROOF.

See COMMON CARRIER, 2. NEGLIGENCE, 2.

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See CONTRACT, 3. CORPORATION, 3, 4, 7.

CASE.

1. The Richardson Lake Dam Company, under its charter, c. 104 of the Private and Special Laws of 1853, has the right to maintain its dams and to keep its gates closed, although the natural flow of the water from the lake may thereby be impeded and diminished. *Toothaker* v. *Winslow*, 123.
2. The remedy for an illegal hoisting of these gates is not confined to the corporation, but may be sought in an action brought by any individual injured thereby, in his own name and for his own benefit, declaring upon the particular and special injury done to him. *Ib.*

See RICHARDSON LAKE DAM COMPANY, 1, 2.

CASES AFFIRMED, DOUBTED, EXAMINED, OR OVERRULED.

Blake v. *Brackett*, 47 Maine, 28, affirmed, and *Foss* v. *Edwards*, *Ibid*, 145, overruled. *Hackett* v. *Lane*, 31. *Bradstreet* v. *Partridge*, 59 Maine, 152, affirmed. *Bradstreet* v. *Partridge*, 335. *Williamson* v. *Dow*, 32 Maine, 559, explained. *Seekins* v. *Goodale*, 400.

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CHARTER.

See CORPORATION. COST, 1. PENOBSCOT BOOM COMPANY. RICHARDSON LAKE DAM COMPANY.

CITY COUNCIL.

Orders passed at a meeting of a city council may be reconsidered and changed at an adjournment of the same meeting held upon a subsequent day. A vote accepting a report made on the first day of such meeting may be reconsidered and the report recommitted with instructions at the adjourned meeting.
Cassidy v. *Bangor*, 434.

See WAY, 1, 2, 3, 4, 6.

COLLATERAL SECURITY.

See PRACTICE, 15.

COMMISSION MERCHANT.

See SALE, 4.

COMMON CARRIER.

1. Where a common carrier takes goods to forward and deliver, if within his route, if not, to deliver to the connecting express or a stage at the most convenient point, his liability as a common carrier ceases when the goods arrive at such convenient point of intersection. The common carrier then becomes a forwarder and he ceases to be an insurer of the safety of the goods forwarded.
Plantation No. 4 v. *Hall*, 517.

2. In a suit against such forwarder for negligence, the burden of proof is on the plaintiff to establish the same. *Ib.*

COMPLAINT FOR FLOWING LANDS.

1. A complaint for flowage must allege defendant's ownership of the land on which the dam causing the flowage is erected. *Jones* v. *Skinner*, 25.

2. All the co-tenants must be joined in a complaint for flowage.
Phillips v. *Sherman*, 548.

See PLEADING, 4, 6.

CONFESSION.

See EVIDENCE, 3.

CONSTITUTIONAL LAW.

An elected register of probate holds this office for the full term of four years from the first day of January next succeeding his election, although his last *elected* predecessor may have vacated the office before the expiration of the term for which he was chosen. *Opinion of the Justices*, 601.

CONTRACT.

1. In construing a contract, to determine whether the signers intended to bind themselves personally or merely executed it as agents for another party, the intention is to be gathered from the whole instrument and not from any particular collocation of words or form of expression used in signing. *Winship* v. *Smith*, 118.
2. Some inquiries tending to aid in ascertaining the real parties liable in such cases, suggested. *Ib.*
3. The rules of an insurance company provided that agents should receive a commission of "five per cent on each renewal collected and transmitted by them." *Held*, that the plaintiff, whose agency of such company had terminated, was not afterwards entitled to this commission on policies procured by him while he was agent, the collection and remittance of the renewals not having been made by him, and no custom to pay such commission after the termination of the agency being shown. *Spaulding* v. *N. Y. Life Ins. Co.*, 329.
4. Where money, which was the consideration of a contract, has come into the possession of the party paying it, the other party becomes released from the necessity of making a formal return of it in order to be enabled to rescind such contract as obtained by fraud. *Walker* v. *Thompson*, 347.

See ACTION, 1, 2. DOWER, 5. EQUITY, 6. HUSBAND AND WIFE, 1. PRACTICE, 18. PRINCIPAL AND SURETY, 1, 3. SHIPPING.

CONTRIBUTORY CAUSE.

See WAY, DEFECTIVE, 2.

CONVERSION.

See SALE, 4. TROVER, 3, 4.

CORPORATION.

1. Holders of stock in a bank when its charter expires, are liable, under R. S. of 1857, c. 47, § 46, to contribute for the redemption and payment of all bills issued by the bank, and remaining unpaid, in the proportion that the number of shares held by them respectively bears to the aggregate number of shares held by all the stockholders. *Dane* v. *Young*, 160.

2. Under that statute the charter of a bank expires by operation of law when an injunction restraining it from doing business is made perpetual. *Ib.*

3. A provision in the by-laws of a bank that its "shares shall be transferable by indorsement in writing by the holder in presence of the cashier or two other witnesses," requires that the cashier or two other witnesses shall in writing attest the signature of the holder in order to render the transfer valid between the parties. *Ib.*

4. Such provision is consistent with the laws of the State and the charter of the Sanford Bank. *Ib.*

5. Unless the certificate of the attorney-general be obtained as required by R. S., c. 48, § 19, persons associating themselves together under the provisions of that chapter do not become a corporation. *Richmond Factory Association* v. *Clarke*, 351.

6. Where a number of persons had signed an agreement to associate themselves together, agreeably to the provisions of R. S., c. 48, for the purpose of erecting a shoe-factory building, and had voted an assessment upon themselves before applying to the attorney-general for his certificate under § 19 of that chapter, and another after such certificate had been refused them; and two more assessments were laid by the officers chosen by them, in accordance with the by-laws they had adopted; and subsequently a portion of those so subscribing had, without the concurrence of the defendant, procured from the legislature an act of incorporation to effectuate the purpose originally contemplated; it was *held*, that the corporation created by this act (Private Laws of 1872, c. 15) could not enforce payment of any of the assessments previously laid against the defendant in the manner aforesaid. *Ib.*

7. If the charter of a corporation does not definitely fix the number of shares which shall compose its capital stock, this must be done by the directors or stockholders before there can be any valid assessment laid upon the shares of subscribers to its stock. *Somerset R. R. Co.* v. *Clarke*, 379.

8. Where it is evident either that there has been no prescribed number of shares established as aforesaid, or else that the number is six thousand shares, and it is admitted or proved that so many shares have never been subscribed for or taken, any assessment upon the shares that have been subscribed for will be void. *Ib.*

See AMENDMENT, 4.

COSTS.

1. In an action appealed from the Lewiston municipal court, the original *ad damnum* was thirty dollars. The plaintiff obtained a verdict in the supreme court for less than twenty dollars—judgment below having been rendered against him—and was held entitled to full costs. *Estes* v. *White*, 22.

2. An heir-at-law appealing from the allowance of a claim by commissioners of insolvency, under R. S., c. 66, § 11, is liable to have costs awarded against him if the creditor recover, though the amount finally allowed may be less than that awarded by the commissioners. *Henry* v. *Miller*, 105.

3. A libelee cannot recover costs when the libel is dismissed, unless the court ordering its dismissal decree that costs be paid.
Buckhingham v. *Buckhingham*, 232.

See EQUITY, 5, 9.

COUNTY.

All parts of the State are included within the body of one or another of the several counties into which the State is divided. *State* v. *Wagner*, 178.

DAMAGES.

1. In an action for money had and received, the plaintiff is entitled to recover no more than the sum actually received for his use by the defendant. An instruction that he can recover so much as his property converted by the defendant into money was reasonably worth, is erroneous. *Rand* v. *Nesmith*, 111.

2. Exemplary damages are allowable in an action of slander.
Harmon v. *Harmon*, 233.

3. An instruction based upon the assumption that the injuries received by the plaintiff, through a defect in a way the defendants are bound to keep in repair, will be permanent is properly refused, since the question of the nature of the injuries and the probable duration of their effect is solely for the jury. Hence, the court rightly declined to instruct the jury that they might consider the shortening of life, loss of future labor, etc., that would probably result from the injury. The court could assume no such result as probable.
Colby v. *Wiscasset*, 304.

See EVIDENCE, 11, 12, 13, 16. LAND DAMAGES, 1, 2, 3. MONEY HAD AND RECEIVED, 1. POOR DEBTOR, 1. SLANDER, 3. TAX, 6.

DEED.

Where a land agent, in his deed of the right to cut timber and grass upon a certain township, sold under R. S. of 1857, c. 5, § 11, professed to convey this right till the township was organized for plantation purposes; it was held, nevertheless, that the right was terminated upon the organization of the township for election purposes. *Bragg* v. *Burleigh*, 444.

See DOWER, 7. EVIDENCE, 2, 26, 27, 28, 30. TAX, 17, 18.

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See WAY, DEFECTIVE.

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See EVIDENCE, 2. SALE, 1, 4, 5, 6.

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See DURESS, 3. EQUITY, 5. PROMISSORY NOTE, 4, 5, 6. SCIRE FACIAS, 1, 2. SOLDIER, 2.

DEMURRER.

A brief statement may be demurred to, like a special plea. *Strang* v. *Hirst*, 9.

See EQUITY, 14. INDICTMENT, 3. INTOXICATING LIQUOR, 4.

DEPOSITION.

A notice to take the deposition of one of several defendants is sufficient for all of them if served only upon the deponent as an adverse party
Chase v *Hathorn*, 505.

DEVISE AND LEGACY.

See WILL.

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See PRACTICE, 16. REAL ACTION, 3.

DIVORCE.

A libellee is not entitled to costs when a libel is dismissed, unless they are decreed by the court. *Buckhingham* v. *Buckhingham*, 232.

See DOWER, 3. FRAUDULENT CONVEYANCE, 1, 2. HUSBAND AND WIFE, 1.

DOMICIL.

1. To constitute a change of domicil there must be a concurrence of the intention to make, and the fact of making, such change. *Parsons* v. *Bangor*, 457.
2. On the 30th of March, a person, who had previously disposed of the greater portion of his furniture and his other personal property, paid his bill at the public house in Bangor, at which he had been boarding with his wife for several years, left that city and upon the first day of April arrived at New York, engaged a boarding place and went into business there in pursuance of an agreement entered into some time before; it being arranged that his wife should follow him as soon as a boarding place was obtained. *Held*, that such person was not liable to taxation in Bangor on the first day of April. *Ib.*
3. The acts and intentions of the wife do not affect the domicil of the husband. *Ib.*

DOWER.

1. Prior to Acts of 1863, c. 215, incorporated into R. S., c. 103, § 6, a minor *feme covert* could not bar her right to dower by joining in the execution of her husband's deed for that purpose; such deed was voidable by her on attaining her majority. *Dela* v. *Stanwood*, 51.
2. That Act (c. 215) could not defeat the existing right of a widow to dower. *Ib.*
3. When a divorce has been decreed to the wife for the fault of her husband for any other cause than impotence, she is entitled to dower in all real estate owned by him at any time during the coverture, if she has not barred her right thereto by joining in a deed or otherwise. *Lewis* v. *Meserve*, 374.
4. In an action for dower in such real estate, the tenant having received her title by warranty deed from the demandant's husband after the marriage and before the divorce, cannot deny the seisin of her grantor. *Ib.*
5. Where, pending a libel for divorce, alimony was agreed upon by the parties, who by written articles of agreement, fixed upon a specific division of the personal property upon the farm they had occupied, it was *held* that this was not such a "pecuniary provision" under R. S., c. 103, §§ 8, 9, as to bar dower; nor can parol testimony be admitted to show that it was so intended by the parties. *Davis* v. *Davis*, 395.
6. Dower cannot be released by parol. *Ib.*
7. Where a wife joins in a deed with her husband for the purpose of releasing dower, she will not be barred thereby in a suit for dower, by her, against a third person who holds the lands by an attachment against the husband prior to said deed and a levy made afterwards, the tenant having no estate or claim under such deed. *French* v. *Crosby*, 502.

DUPLICITY.

See INDICTMENT, 3. INTOXICATING LIQUOR, 4. PLEADING, 3, 5.

DURESS.

1. Mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. *Harmon* v. *Harmon*, 227.

2. The threats of personal injury which the law considers duress are such as constitute an impending danger to life, or of serious bodily harm sufficient to overcome the will of a man of ordinary firmness. *Ib.*

3. No demand is necessary before commencing suit to recover money paid under duress. *Lord* v. *Kennebunkport*, 462.

DYING DECLARATIONS.

See EVIDENCE, 8.

EASEMENT.

1. A voluntary release of an easement by an administrator does not bind the estate, nor the heirs of the intestate. *Mowe* v. *Stevens*, 592.

2. Where one has a right to use land for certain purposes his occupation of it must be presumed, *prima facie*, to be in accordance with his legal right. *Ib.*

EQUITY.

1. Where, in a bill in equity against several defendants, all of whom appear, and all but one allow the bill to be taken *pro confesso*, the existence of a common interest in property, and the transaction of a joint business is admitted, and the complainant (a partner), applies for an adjustment of the accounts respecting it, the court will not accept a general denial of indebtment on the part of the respondent, however positive, and dismiss the bill, without reference to a master for an investigation of accounts, notwithstanding such denial may be accompanied with a statement of circumstances rendering it probable that, as to such respondent, the denial may prove well founded; especially, when the respondent does not assert his full knowledge of all the details of the accounts. The master to whom the case is referred may receive proof that the partnership transactions extended over a longer period of time than that specified in the answer. *Lawrence* v. *Rokes*, 38.

2. While the court, in equity, will ordinarily give full effect to the statutes of limitation, in so doing it acts in obedience to the spirit of those statutes, and "rather upon the reason and principles on which, as positive rules, they are founded, than the rules themselves;" so that, if, by the laches of the complainant, the respondents have lost their evidence, or are placed in a disadvantageous position, the court will deal with the remedy as if barred in equity, even although the full term of the statute of limitations may not have elapsed; and, on the other hand, where there has been no change in the condition and position of the parties, and peculiar circumstances appear to justify the delay, appropriate relief will not be refused, although a strict application of limitation rules might seem to require it; certainly not where the respondent admits the reception of firm assets within six years. *Ib.*

3. To operate as a bar, the benefit of the statute must be expressly claimed in the answer. *Lawrence* v. *Rokes*, 38.

4. Whether actions of account at law, and the analogous remedy by bill in equity are now subject to any other than the general limitations of twenty years, *quære?* *Ib.*

5. The making, or omission to make, a demand before filing the bill, only affects the question of costs; especially where the answer shows such a difference between the parties as to indicate that a demand would be a mere fruitless formality. *Ib.*

6. Specific performance of a contract not signed by all the persons named as parties thereto, and of which the claimant obtained possession without the consent of him who did sign it, will not be decreed; especially where the complainant has not fully performed on his part the conditions precedent of the instrument. *McIntire* v. *Bowden*, 153.

7. In the description of premises sought to be redeemed in equity, mistakes in the names of the owners of adjoining estates and the omission of one boundary line are immaterial, if enough remain clearly to identify the land intended to be designated. *Milliken* v. *Bailey*, 316.

8. The notices and limitations of the chancery rules may be waived by consent of counsel, express or implied, so as to preclude any subsequent application of those limitations. *Ib.*

9. If a mortgagee recognize the right of redemption as existing in one demanding an account, and render an incorrect statement, he cannot subsequently avail himself of a technical defect in the title of such person, which has been cured by amendment, to avoid payment of costs. *Ib.*

10. When a mortgagee in possession either actually receives rent, or ought to have received it, he will be held accountable therefor to the person entitled to redeem. *Bailey* v. *Myrick*, 52 Maine, 135, does not change this rule in such cases. *Ib.*

11. Where the same person holds as assignee two mortgages of real estate, the purchaser of the equity of redemption may maintain a bill to redeem from only one of them; nor will the expiration of the statute term of foreclosure proceedings upon the other mortgage prevent a decree in his favor as to the mortgage he seeks to redeem. *Ib.*

12. Review in equity will be granted only on the ground of newly discovered matter or for error apparent upon the face of the record. *Crooker* v. *Houghton*, 337.

13. A bill in equity was brought by the complainant for the purpose of obtaining a settlement of the affairs of the partnership of which he was a member. In 1861 a receiver was appointed, and the firm affairs in 1864 referred to a master for adjustment. In 1872 the master made his report which, among other things, found "that a portion of the moneys or securities in the hands of the receiver was and still is the individual property" of the complainant, and should be deducted before the distribution was made of the partnership assets, and stated that an interest account was uncalled for and such an account was not stated. The report found that the complainant was entitled to $17,808.63, and this bill was brought praying for a review on the ground that interest should have been allowed on the amount so found. *Held*, that, as it did not

appear that the amount awarded the complainant did not include interest, and as the report did not show how it came into the receiver's hands, there was no such error apparent upon the face of the record as would entitle the complainant to a review. *Crooker* v. *Houghton*, 337.

14. A general demurrer to a bill in equity will not be sustained for want of parties when it appears that the bill relates to several distinct contracts and that as to some of them there is no apparent want of parties, although as to others parties who should have been joined are omitted. If the respondent would avail himself of this objection he should answer so much of the bill as makes a case, with proper parties, and demur only to the residue. *Weston* v. *Blake*, 452.

15. A bill is multifarious only when it joins causes of relief so separate and distinct in their nature that they ought not to be joined. *Ib.*

16. Where a grantor bargained one parcel of land, and, by a mistake of both parties, conveyed another parcel to the grantee, the equitable jurisdiction of this court will authorize it to reform such deed according to the intention of the parties, and, by decree, to protect the interests of such persons as may legally claim to hold the correct premises through and under the grantee. *Burr* v. *Hutchinson*, 514.

17. Such a result will be accomplished by a decree reforming the original deed, and requiring the grantor to convey anew to the grantee, and through him to any persons legally holding the premises under the grantee; the grantee releasing to the grantor the premises conveyed by mistake. *Ib.*

See AMENDMENT, 2. LACHES. TRUSTEE, 2.

ESTOPPEL.

1. A plea of performance estops a poor debtor from denying the validity of the bond given to obtain his release from arrest. *Hackett* v. *Lane*, 31.

2. A tenant cannot deny the seizin of his grantor, to defeat a claim for dower. *Lewis* v. *Meserve*, 374.

3. Recovery and satisfaction in assumpsit estop the plaintiff from afterwards setting up a tort waived by bringing that action. *Ware* v. *Percival*, 391.

4. A tenant who has not surrendered the demised premises, nor been evicted therefrom by a paramount title, is estopped to deny his landlord's title. *Longfellow* v. *Longfellow*, 590.

See DOWER, 7. SEAL.

EVIDENCE.

1. In Maine a promissory note, or an accepted bill of exchange is *prima facie* evidence of payment of the debt for which it is given; *aliter*, as to an unaccepted bill. *Strang* v. *Hirst*, 9.

2. In an action of *trespass quare clausum*, evidence is admissible to show that the deed by which plaintiff claims title to the *locus in quo*, though executed and recorded prior to the date of the writ, was not delivered till after suit brought. *Maxwell* v. *Mitchell*, 106.

3. The record of the committing magistrate, showing that the respondent in a criminal process pleaded guilty to the complaint, is admissible in evidence upon the final trial. Oral testimony in regard to such plea is also admissible. *State* v. *Bowe*, 171.

4. Testimony of the *particeps criminis* that she was "married two years ago by C. L., at his house;" it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons married, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery. *Ib.*

5. The outcries of a person deceased made during the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a party charged with the murder of such person, and may be considered by the jury with other circumstances and testimony upon the question of the identity of the accused. *State* v. *Wagner*, 178.

6. The outcries of another person who was murdered by the same party a few minutes previously during the perpetration of one and the same burglary, but on another part of the premises, are admissible under like circumstances for the same purposes upon such trial. *Ib.*

7. Such exclamations are competent as part of the *res gestæ*. *Ib.*

8. Moreover their admission may be distinctly justified for the same reasons which are held to justify the admission of dying declarations. *Ib.*

9. The contents of the prisoner's pockets found when he is arrested may be put in evidence when there is testimony tending to show that they or a portion of them came from the recent possession of the deceased or from the locality of the crime. *Ib.*

10. Articles which a witness identifies as the property of the prisoner, and in his possession shortly before the crime was committed, when found shortly after its perpetration, at the house where the crime was committed, may be offered in evidence. *Ib.*

11. In an action for injury to plaintiff's horse by reason of defect in a way the defendants are bound to keep in repair, testimony as to the value of the horse before and after the accident is admissible. *Whiteley* v. *China*, 199.

12. If the injury is alleged to have caused lameness, the condition of the horse and of his legs within a week after the occurrence is material, and testimony relative thereto should be admitted. *Ib.*

13. Where it is alleged that a horse, sound, safe, and kind before receiving an injury by breaking through a bridge, was by that accident rendered unsound and so timid as to be unsafe and unkind, testimony as to the conduct of the horse in crossing bridges immediately before and after the accident—and any other direct evidence of the facts alleged—is admissible. *Ib.*

14. The defendant in an action of trespass *quare clausum* relied upon a power of attorney given him by plaintiff. The plaintiff claimed that a previous power to his brother had been revoked and this one given to his father (the defendant) by reason of false representations contained in letters from several persons, to the effect that his brother was trying to swindle his father out of all his property: that his father was destitute, and that plaintiff had better put the real estate into his father's hands; *held*, that testimony relative to the pecuniary circumstances of the father at the time these letters were written was properly rejected. *Harmon* v. *Harmon*, 222.

15. On exceptions, the court will not consider the findings of the jury as to whether the verdict is or is not against the weight of evidence. *Ib.*

16. When no question is made that the damages are excessive, if any damages are recoverable, an exception taken to the exclusion of evidence which could have a bearing only upon the amount of injury sustained becomes immaterial. *Moody* v. *Camden*, 264.

17. A shipmaster and owner procured a marine insurance policy upon his one-quarter of his vessel "on account of whom it may concern;" loss payable to himself. The vessel was lost during the voyage covered by the policy, with the master and all on board. The plaintiff, a creditor of the deceased master, brought this action upon the policy claiming that it was obtained for his benefit. He introduced testimony of the declarations of the deceased that if the plaintiff would make him a loan he would secure him by a policy on this vessel; and subsequent declarations that the loan had been made to him by the plaintiff and that he had secured the plaintiff by procuring a policy for his benefit. It was held that this testimony was inadmissible without proof that the deceased was acting as plaintiff's agent in effecting the insurance, and that the declarations themselves were not competent for this purpose. *Sleeper* v. *Union Ins. Co.*, 267.

18. Evidence was introduced to prove the insolvency of the estate of the deceased; *held*, that it was improperly admitted. *Ib.*

19. The defendants in this action justified the removal of the growth from the real estate mortgaged, by virtue of an alleged parol license from the deceased mortgagee, and called a witness who testified to two conversations in the course of which such license was given. Upon cross-examination this witness added that she made a memorandum of these conversations at the time each occurred and produced them, and they were put into the case by the plaintiffs: *held*, that they were properly received as tests of the accuracy of the witness' recollection of the conversations, and of the degree of credibility to be attached to her testimony. *Brooks* v. *Goss*, 307.

20. Exceptions will not lie to the admission of a written memorandum of a conversation which the witness has detailed upon direct examination, when such memorandum is elicited and introduced upon cross-examination. *Ib.*

21. In this action the executor not becoming a witness, the defendants were precluded from testifying. *Ib.*

22. Declarations of the plaintiff, made before his appointment as executor, *held* inadmissible. *Ib.*

23. Evidence of the entry of "neither party" in a suit between the plaintiff, in his fiduciary capacity, and the person under whom defendants claim, and that such suit was for the same cause of action as the present, is inadmissible. *Ib.*

24. The defendant contended that the plaintiff had obtained his guaranty for the payment of certain notes, by fraudulent misrepresentations as to the maker's solvency. *Held*, that testimony of the maker in relation to business transactions between himself and the plaintiff, tending to show his insolvency and the plaintiff's probable knowledge thereof, was admissible.
Walker v. *Thompson*, 347.

25. In an action against a bank to recover the value of bonds there deposited as collateral security the testimony of the assistant cashier of the bank as to other bonds having been lost or misplaced and afterwards found, *held* to be admissible, to show the manner in which the business of the bank was conducted, and as bearing upon the question of care. *Dearborn* v. *Union National Bank*, 369.

26. Office copies of deeds given by the land agents of Maine and Massachusetts admitted under the provisions and limitations of R. S., c. 82, § 99.
Jewett v. *Persons Unknown*, 408.

27. A copy of a deed, recorded in a registry district other than that in which the land lies, is inadmissible. *Ib.*

28. Parol evidence of the contents of a deed, not shown to be lost, is inadmissible. *Ib.*

29. In an action for goods sold and delivered against parties individually and in their capacity of surviving partners, in order to explain their possession of the goods, and rebut the inference of a sale drawn from such possession, it is competent for the defendants to introduce evidence to prove that when their copartnership was formed, it was agreed by the members of the firm that the partner to whom the plaintiffs testify that they sold the goods, supposing that he was acting for the firm, should put in the goods in controversy as his share of the capital stock, that he did so, and that they knew nothing of any purchase of the goods from the plaintiffs. *Fuller* v. *Wilder*, 525.

30. The recitals in a tax-deed of the advertisement and sale of the land distrained must be proved by extrinsic evidence. *Phillips* v. *Sherman*, 548.

See BASTARDY, 2. DEPOSITION. DOMICIL, 2. DOWER, 5. FRAUDULENT SALE, 3, 4. INSURANCE, 1, 2, 3. JURISDICTION, 2, 3, 4, 5. MANDAMUS, 2. PAUPER, 2. PRACTICE, 15, 16. PRINCIPAL AND SURETY, 3. PROMISSORY NOTE, 7. SLANDER, 1, 2. STATUTES, 1. TAX, 12. TROVER, 1.

EXCEPTIONS.

1. Immaterial instructions are no ground for exceptions.
State v. *Murphy*, 56. *Moody* v. *Camden*, 264.

2. Nothing can be considered that is not expressly made part of the exceptions.
Maxwell v. *Mitchell*, 106.

3. On exceptions the court will not determine whether or not the verdict is against the weight of evidence. *Harmon* v. *Harmon*, 222.

4. To sustain exceptions the testimony admitted must be of a nature to work prejudice to the excepting party; and the exceptions must show affirmatively that he has been aggrieved thereby.

Bryant v. *K. & L. R. R. Co.*, 300. *Brooks* v. *Goss*, 307.

This must be stated as a positive fact, and not inferentially.

Lord v. *Kennebunkport*, 462.

5. Where the requested instruction assumed that property received in adjustment of taxes was not equivalent in money value to the amount of those taxes, and that it was taken as a compromise settlement between the taxing town and the tax-payer, and the bill of exceptions did not state facts sufficient to support the proposed instruction, it was held that an exception to a refusal to give it must be overruled. *Ib.*

6. Desired instructions should be requested in writing. *Willey* v. *Belfast*, 569.

See EVIDENCE, 20. FRAUDULENT SALE, 1, 3. JURISDICTION, 6. PRACTICE, 2, 6, 8, 9, 11, 13, 14, 15, 19.

EXECUTION.

The R. S. of 1857, c. 83, § 18, identical with R. S. of 1871, c. 83, § 25, provide for the issue, by a justice to whom the records of a deceased justice have been delivered, of an execution upon any judgment rendered by such deceased justice; but that "no such first execution shall issue after one year from the time the judgment was rendered, unless on *scire facias*. *Held*, that the words "such first execution" referred to the first execution issued by the magistrate with whom the records of the deceased justice were deposited, and not to the first execution issued on the judgment; and that the justice to whom the records of the deceased justice have been delivered, has no right to issue his first execution (unless on *scire facias*) after one year from the time the judgment was rendered.

Brown v. *Joy*, 564.

See LIEN, 1. PROBATE LAW, 6. SCIRE FACIAS, 2, 3.

EXECUTOR AND ADMINISTRATOR.

A release of an easement, given by an administrator, without consideration, does not bind the estate, nor the heirs of his intestate. *Mowe* v. *Stevens*, 592.

See EVIDENCE, 21, 22. LAND DAMAGES, 2. PROBATE LAW, 10, 11, 12, 13. TRESPASS, 2. WILL, 1, 3, 4, 5, 9.

FLOWING LANDS.

See COMPLAINT FOR FLOWING LANDS.

FORCIBLE ENTRY AND DETAINER.

Forcible entry and detainer lies against an agent, if guilty, as well as against his principal. *Bailey* v. *Bailey*, 361.

FRAUD.

When the seller agrees to sell a stock of goods at the Boston prices of similar goods at that date, but fraudulently makes out a bill with prices above Boston prices at the time of the contract, and the purchaser is thereby deceived, the vendee may recover in an action for money had and received, the difference between the prices in Boston and those stated in the bill as Boston prices; he is not restricted to his right to rescind the contract on discovery of the fraud. *Lord* v. *French*, 420.

See CONTRACT, 4. INSURANCE, 1, 2, 3. JUDGMENT, 1.

FRAUDS, STATUTE OF.

If it be agreed that goods sold shall be hauled by the vendor to a place specified, it does not necessarily follow that the title thereto does not pass till they reach the place designated. The property may pass so as to take the case out of the Statute of Frauds, at the time the agreement is made, if the parties so intend; and whether or not such was their intention, in any given case, is a question for the jury, to be determined from the words, acts, and conduct of the parties, and all the circumstances. *Dyer* v. *Libby*, 45.

See PAYMENT, 3.

FRAUDULENT CONVEYANCE.

1. A conveyance of real estate by a husband, though made before a libel for divorce had been filed, and for a full and valuable consideration, is void as between the husband and wife, if made expressly to prevent her from recovering such alimony as the court might decree to her in case a petition for divorce should be filed. *Bailey* v. *Bailey*, 361.

2. If, after divorce granted, the husband obtains a reconveyance to himself of real estate thus previously conveyed, a decree of court made before such reconveyance, allowing the use of it to the wife as alimony, will enable her to hold it as against any subsequent conveyance made by him without any consideration therefor. *Bailey* v. *Bailey*, 361.

See PROBATE LAW, 11, 12.

FRAUDULENT REPRESENTATIONS.

See EVIDENCE, 14, 24. INSURANCE, 1, 2, 3.

FRAUDULENT SALES.

1. The defendant, seeking to avoid a sale as fraudulent, relied upon a series of occurrences happening before and after the sale to prove the fraud, and the judge instructed the jury that "it was primarily important to consider the state of facts existing with the knowledge of the plaintiff, on the 16th day of June, when he made the purchase," and separately called the attention of the jury to subsequent occurrences; it was *held*, that exceptions would not lie to this method of presenting the case unless the defendant had requested more specific instructions. *Rice* v. *Perry*, 145.

2. To avoid a sale there must have been an accomplished purpose by means of it, to defraud, hinder, or delay the creditors of the vendor. The fraudulent intent alone is not sufficient. *Ib.*

3. The defendant called one of the vendors to a sale which he sought to avoid as fraudulent, and argued in support of his position upon the inherent falsity and improbability of the testimony given by this vendor. The judge repeatedly invited attention to the fact that this witness had been called by the defense; that his statement disproved the alleged insolvency of his firm at the time of sale, saying as to their solvency, "the defendant has proved it if you believe his witness;" and by other similar expressions several times presented the idea that the testimony must be taken more strongly against the defendant because given by his witness; this was held no ground for exception. *Ib.*

4. One of plaintiff's witnesses testified that the plaintiff and one Marshal O. Warren, unloaded, on its arrival at the depot, the superphosphate, for the value of which plaintiff brings this suit as sole owner, and that all arrangements in regard to unloading it had been made with plaintiff and Warren, and witnesses for the defense testified that Warren had requested them to unload it or to procure some one to do so, and in answer to an inquiry made in the presence of the plaintiff as to "how he (W.) came to buy that phosphate at that season of the year," Warren had answered that he had "bought it at a bargain;" *held*, that this testimony did not sufficiently connect Warren with the plaintiff in the ownership of the phosphate to render testimony as to Warren's declarations in regard to its purchase admissible. *Ib.*

GIFT.

See PROBATE LAW, 11, 12.

GUARDIAN.

See PROBATE LAW, 4, 5.

HUSBAND AND WIFE.

1. One who in consequence of a disagreement arising between himself and his wife carried her to her father's house and left her there, where she remained till she obtained a divorce, was held liable to her father for her board while there, without any express contract between them, notwithstanding the fact that the defendant paid his wife an agreed sum, in lieu of alimony, upon her proceedings for divorce. *Burkett* v. *Trowbridge*, 251.

2. The acts and intentions of the wife do not affect the domicil of her husband. *Parsons* v. *Bangor*, 457.

See DIVORCE. DOMICIL, 3. DOWER, 1, 3, 4, 5, 7. TRESPASS, 1.

INDICTMENT.

1. When murder has been done in an unincorporated place, publicly and commonly known by name, in any one of these counties, the venue is well laid, and the place sufficiently described, if the crime is charged in the indictment as having been committed at (insert the name by which the place is commonly known) a place within the county of (name of county) aforesaid, in the absence of anything tending to show that the prisoner would be embarrassed in the preparation of his defense for want of a more particular description. *State* v. *Wagner*, 178.

2. The jury were properly instructed that proof that the crime was committed on the island called "Smutty Nose," was equivalent to proof that it was committed within the county of York. *Ib.*

3 A count in an indictment, containing a joinder of distinct offences, is bad for duplicity. *State* v. *Smith*, 386.

See COUNTY. EVIDENCE, 3, 4, 5, 6, 7, 8, 9, 10. RAILROAD, 1.

INDORSER.

See PROMISSORY NOTE, 1, 2, 6, 7. SCIRE FACIAS, 4.

INFANT.

See DOWER, 1.

INSURANCE.

1. The question whether or not an over-valuation in an application and proof of loss is fraudulent is for the jury. *Williams* v. *Phœnix Ins. Co.*, 67.

2. A misrepresentation as to the title of the property insured does not necessarily avoid the policy. *Bellatty* v. *Thomaston Ins. Co.*, 414.

3. Whether or not it is material and fraudulent is to be submitted to the jury. *Ib.*

4. One who dies insolvent can make no testamentary disposition of the fund accruing from an insurance policy upon his life if he leave neither widow nor child; in such event, the insurance money becomes assets for the payment of debts. *Hathaway* v. *Sherman*, 466.

5. A person having an insurance upon his life, dying insolvent, leaving a widow and children, may bequeath the insurance money among them as he pleases; but he cannot bestow it by will upon any other persons. *Ib.*

6. The power to dispose of such fund by will, conferred by R. S., c. 75, § 10, is limited, in case of insolvency, to a disposition among the widow and children of the deceased. *Ib.*

7. An intention on the part of a testator, by his will, to dispose of the fund arising from an insurance policy upon his life, will not be inferred from the fact that his bequests were ultimately found to exceed the whole amount of his estate exclusive of this fund; nor from the fact that he designated a person as the legatee of the residue of his property of every description whatsoever. *Ib.*

8. "The testator's intention to change the direction which the law gives to this very peculiar species of property is not to be inferred from general provisions in his will, the fulfillment of which might require the use of such money, but must be explicitly declared." *Ib.*

9. When an insurance company issues to a person an open policy, with blanks therein for the indorsement of risks agreed upon by him and blank certificates for the description of the risks thus agreed upon to be signed by him, with authority to take the premiums, he is to be deemed an agent of the company. *Wass* v. *Me. Mut. Mar. Ins. Co.*, 537.

10. When an open policy is issued "on property on board vessel or vessels, at and from port or ports in the United States and foreign countries, with such other risks as may be agreed on, as per indorsement hereon, accepted by the company," and the risk is agreed upon, the premium paid, and the indorsement thereof made by the agent, the insurance is effected.

Wass v. *Me. Mut. Mar. Ins. Co.*, 537,

See CONTRACT, 3. EVIDENCE, 17.

INTENTION.

See CONTRACT, 1, 2. DOMICIL, 1, 3. DOWER, 5. FRAUDS, STATUTE OF. FRAUDULENT SALE, 2. INSURANCE, 7, 8. PAUPER, 1, 2. PAYMENT, 5. STAMP, REVENUE.

INTOXICATING LIQUORS.

1. Upon a complaint in the form prescribed by statute alleging that intoxicating liquors were kept by the defendant for unlawful sale in a shop which is particularly described, a general verdict of guilty is sufficient. *State* v. *McCann*, 116.

2. That the officer proceeded illegally in making search for and seizure of the liquors so kept is no defense to the prosecution of the person keeping them. *Ib.*

3. In the prosecution against the person upon such complaint, it is immaterial what was done with the liquors; the proceedings are distinct. *Ib.*

4. R. S., c. 27, § 20, prohibiting pedlars and dealers from "carrying for sale, or offering for sale, or offering to obtain, or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors," creates distinct and independent offences, a joinder of which in the same count of an indictment is good ground for demurrer. *State* v. *Smith*, 386.

5. The claimant of spirituous and intoxicating liquors seized under the search and seizure section of R. S., c. 27, can assert no right to the liquors seized except that specifically set forth in his written claim filed with the magistrate before whom the proceedings are pending. *State* v. *Intoxicating Liquors*, 520.

6. An amendment by which a charge for intoxicating liquors is stricken out of an account is properly allowed. *Monroe* v. *Thomas*, 581.

JOINT STOCK ASSOCIATIONS.

Unless the certificate of the attorney-general be obtained as required by R. S., c. 48, § 19, persons associating themselves together under the provisions of that chapter do not become a corporation.

Richmond Factory Association v. *Clarke*, 351.

See CORPORATION, 6.

JUDICIAL DISCRETION.

See MANDAMUS, 1.

JUDGMENT.

1. The parties to an action cannot impeach the judgment rendered therein in any collateral proceeding, on the ground that it was obtained through their fraud or collusion. *Davis* v. *Davis*, 395.

2. Nor can they be permitted to deny the truth of any fact established by the record of such judgment. *Ib.*

See LIEN, 12. PRINCIPAL AND SURETY, 4. SCIRE FACIAS, 5.

JURISDICTION.

1. All parts of the State are included within the body of one or another of the several counties into which the State is divided. *State* v. *Wagner*, 178.

2. When there is no controversy as to the precise spot on the face of the earth where the crime was committed, and it appears by ancient charters, legislative enactments, and judicial records that the political authorities and courts have heretofore claimed and exercised jurisdiction over the locality in question, the question of jurisdiction is one of law—for the court, and the defendant cannot in any stage or form of pleading rightfully claim to have it submitted to the jury as one of fact, for their determination. *Ib.*

3. Upon such a question the presiding judge in addition to the matters of which he will take judicial notice, such as legislative enactments, ancient charters, and geographical position, may refresh his recollection and guide his judgment by reference to the records of the courts in the county where he sits, general histories of deceased authors of established reputation, and the records of the census of the inhabitants of the county taken under the laws of the United States by its officers. *Ib.*

4. It is competent for the Assistant United States Marshal who took the census for the district, and made the return to the office of the clerk of the courts for the county, when the record does not show the specific locality where the individuals enumerated resided, to testify as to their place of residence. *Ib.*

5. When the political authorities of a State have actually claimed and exercised jurisdiction over a particular locality, the courts of the State are thereby concluded, and will respect such decision, and act accordingly without questioning the validity of such claim. *Ib.*

6. The prisoner was not wronged by the instruction given in this case that proof that the crime was committed on the island called Smutty Nose is equivalent to proof that it was committed within the county of York, and would make the crime properly cognizable by the court sitting in this county. That instruction was correct. *Ib.*

See COSTS, 1. TAX, 6, 11.

JURY.

See LAW AND FACT. VERDICT.

LACHES.

Laches destroys the title to relief in equity. *Crooker* v. *Houghton*, 346.

LAND AGENT.

1. R. S. of 1857, c. 5, § 11, authorized the land-agent to sell the right to cut timber and grass upon all townships "until they are organized;" this authority terminated whenever there was any organization of the township, whether for election or plantation purposes. *Bragg* v. *Burleigh*, 444.

2. Nor can the land-agent convey any right beyond the time thus limited; any clause of his deed, attempting to do so, is void. *Ib.*

LAND DAMAGES.

1. Where E. N. petitioned for an increase of the damages awarded by the county commissioners for his land taken by the K. & L. Railroad Company, and the jury before whom the petition was heard, returned a verdict purporting to be "on the petition of E. N., administrator of the estate of B. N., deceased," and to award damages for the real estate of the deceased, taken by said corporation, such verdict was set aside. *Neal* v. *K. & L. R. R. Co.*, 298.

2. Unless the real estate, which was of an intestate, be taken for public uses prior to his decease, his administrator has no right to petition for increase of damages; since, in such case, it would be the land of the intestate's heirs that was taken. *Ib.*

3. In cases where a hearing is had on a petition for an increase of damages for the location of a railroad or highway before a jury, in order to present the questions of law involved, the statute (R. S., c. 18, § 13) requires a written motion setting out the objections to the verdict, whether of law or fact, and exceptions filed to the ruling of the court in adjudicating thereon. If these requirements be not complied with the court will decline to consider any objections to the verdict, or exceptions improvidently allowed to the rulings relative thereto. *Bryant* v. *K. & L. R. R.*, 300.

See WAY, 4, 5, 6.

LANDLORD AND TENANT.

A tenant who has not surrendered the demised premises, nor been evicted by paramount title, is estopped to deny his landlord's title; nor does the giving of thirty days' notice to terminate the tenancy, stating that he shall surrender the premises on the day specified for the termination of his tenancy, and thereafterwards claim to hold them in fee by a paramount and independent title, authorize him to set up such title without having made any actual surrender of the premises, but remaining in continuous occupation thereof.
Longfellow v. *Longfellow*, 590.

LAW AND FACT.

It is a question of fact for the jury to determine in the first instance, whether a defect in a highway was the sole cause of an injury; but their finding may be set aside by the court in case of manifest error. *Willey* v. *Belfast*, 569.

See DAMAGES, 3. INSURANCE, 1, 2, 3. PAUPER, 2.

LEGACY.

See WILL, 5, 7, 8, 9, 10, 11.

LICENSE.

License to cut wood and timber may be verbal or it may be inferred from circumstances. *Harmon* v. *Harmon*, 222.

See ASSIGNMENT. EVIDENCE, 19. TRESPASS, 3.

LIEN.

1. An attorney's lien is not defeated by payment of the execution to the judgment creditor by the debtor, without the consent of the attorney.
McKenzie v. *Wardwell*, 136.

2. When a party is seeking to enforce the lien upon logs or lumber given by statute the requirement of R. S., c. 91, § 35, that such notice of the suit shall be given to the owner of the logs or lumber as the court orders, is imperative and must not be disregarded. *Sheridan* v. *Ireland and logs*, 486. *Parks* v. *Crockett*, 489.

3. The giving of such notice cannot be dispensed with though there may be an appearance upon the docket of parties claiming to own the logs or lumber. *Ib.*

4. The court cannot judicially know or determine whether such claimants are or are not the owners without giving a notice that shall be binding upon the owner whoever he may be. *Ib.*

5. The notice to be ordered in all such cases should be a public notice by posting or publication as well as a specific notice to parties supposed to be the owners. *Ib.*

6. To enforce a statute lien the course prescribed by the statute is to be strictly pursued. *Ib.*

7. The general owner of logs, not the debtor, in a suit to enforce a lien, may demur to the plaintiff's writ and declaration, as insufficient to establish such lien. *Parks* v. *Crockett*, 489.

8. By the Acts of 1862, c. 131, the writ is sufficient for such purposes, though in the ordinary form of assumpsit, if the declaration discloses that the suit is brought to enforce a lien on the logs attached. *Ib.*

9. The writ will be deemed insufficient if one count therein contains a claim *in personam* and another count a different claim *in rem*. *Ib.*

10. The clause in R. S., c. 91, § 35, taken from Acts of 1862, c. 131, which provides that in a lien action the forms and proceedings shall be the same as in ordinary actions of assumpsit, is to be construed as permissive and not mandatory; so that the word "shall," contained therein, will be construed as meaning may. *Ib.* 490.

11. A lien claim can be preserved in no form of proceeding without notice to log owners, the necessity of which under the statute of 1855 was not abrogated by the Acts of 1862, c. 131. *Ib.*

12. Upon a judgment recovered for the amount decided to be a lien in any suit on which a vessel was attached, the order to the attaching officer to sell it at auction, etc., is one consequent upon the judgment and a necessary sequence thereof. It follows the judgment as a matter of course, as the execution does. *Low* v. *Dunham*, 566.

13. An oath that the plaintiff in his belief had a lien for the amount of his claim, is sufficient where the statute requires an oath of his belief that he has a lien for the whole or a part thereof. *Dyer* v. *Brackett and Schooner Daniel Webster*, 587.

LIMITATIONS, STATUTE OF.

See EQUITY, 2, 3, 4. SLANDER, 1, 2.

MANDAMUS.

1. The writ of mandamus is not a writ of right, but is issuable at the discretion of the court when equity requires it. *Belcher* v. *Treat*, 577.
2. Parol evidence is receivable to show that the writ should not issue. *Ib.*

MANSLAUGHTER.

See PRACTICE, 3.

MARRIAGE.

Testimony of the *particeps criminis* that she was "married two years ago by C. L., at his house;" it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons married, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery. *State* v. *Bowe*, 171.

See EVIDENCE, 4.

MARRIAGE SETTLEMENT.

See TRUSTEE, 1.

MILLS.

See COMPLAINT FOR FLOWAGE.

MISTAKE.

See EQUITY, 7, 16, 17.

MONEY HAD AND RECEIVED.

1. In an action for money had and received, the plaintiff is entitled to recover no more than the sum actually received for his use by the defendant. An instruction that he can recover so much as his property converted by the defendant into money was reasonably worth, is erroneous. *Rand* v. *Nesmith*, 111.
2. The administrator of an insolvent estate, in an action for money had and received, may recover for money given by his intestate after he became insolvent without a valuable consideration. *McLean* v. *Weeks*, 277.
3. Money had and received lies to recover moneys fraudulently obtained. *Lord* v. *French*, 420.

See DURESS, 3. PROBATE LAW, 11. PROMISSORY NOTE, 2.

MORTGAGE.

1. A recital that, "On the 22d day of June, 1850, Lewis Dela, of Portland, mortgaged to the undersigned certain property particularly described in the deed, situated at the corner of Fore and India streets, in said city," is not a sufficient description of the premises in a notice of foreclosure, under R. S. of 1841, c. 125, § 5. [Same as R. S., c. 90, § 5.] *Dela* v. *Stanwood*, 51.

2. Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession. *Bryant* v. *Pennell*, 108.

See AMENDMENT, 2. EQUITY, 9, 10, 11. PARTITION, 3. TROVER, 1.

MURDER.

See EVIDENCE, 5, 6, 7, 8, 9, 10. INDICTMENT, 1.

NEGLIGENCE.

1. Where a statute declares that railroads, by whose negligence the life of a person is lost, forfeit not less than five hundred nor more than five thousand dollars, to be recovered by indictment to the use of the heirs of the deceased; *held*, that to bring a case within this statute the killing must be instantaneous. *State* v. *G. T. Railway*, 114.

2. In an action against a forwarder for negligence, the burden of proof is on the plaintiff. *Plantation No. 4* v. *Hall*, 517.

See RAILROAD, 1.

NEW TRIAL.

See PRACTICE, 16.

NONSUIT.

See REAL ACTION, 1.

NOTICE.

See DEPOSITION. EQUITY, 8. LIEN, 2, 3, 4, 5, 10. PARTITION, 2. POOR DEBTOR, 6. PROBATE LAW, 4, 5. PROMISSORY NOTE, 6. TRESPASS, 4, 5. WAY, 5.

OATH.

See POOR DEBTOR, 5. PRACTICE, 12. TAX, 13, 15.

OFFICER.

See SCIRE FACIAS, 1, 2, 3. TAX, 9, 10, 11, 15, 16, 17, 19. TRESPASS, 4, 5.

OPINION OF THE JUSTICES.

See CONSTITUTIONAL LAW.

PARTIES TO ACTIONS.

See CASE, 2. COMPLAINT FOR FLOWING LANDS, 2. CONTRACT, 1. EQUITY, 14. FORCIBLE ENTRY AND DETAINER. INTOXICATING LIQUOR, 1, 2, 3. JUDGMENT, 1. 2. LAND DAMAGES, 1. LIEN, 3, 4, 11. PARTITION, 2. PLEADING, 1, 6. PROBATE LAW, 3, 5, 11. TRESPASS, 2. 3. TROVER, 4.

PARTITION.

1. It is a sufficient description of the petitioners' interest, if it be stated as a certain fraction of a township, though the fact be that their interest really is the stated proportion of said township exclusive of the number of acres reserved by the State for public uses. *Jewett* v. *Persons Unknown*, 408.
2. Upon a petition for partition of a township no special notice need be given to the land agent, as representative of the State's interest in the lands reserved in such township for the use of the town. *Ib.*
3. Persons not claiming under the mortgagee cannot set up his title under the mortgage to defeat a petition for partition. *Ib.*

PARTNERS AND PARTNERSHIP.

See ABATEMENT, 1. EQUITY, 1, 13. PLEADING, 1, 2.

PAUPER.

1. When supplies are furnished by the overseers of the poor to, and are received by, a pauper who is then actually in need of immediate relief, the intention of the overseers thereby to prevent a settlement by such pauper in their town is immaterial to qualify the legal effect of their action. *Foxcroft* v. *Corinth*, 559.
2. But the fact that five years continued residence without assistance have nearly expired, coupled with an intention on the part of the overseers to prevent the paupers gaining a settlement, may properly be considered by the jury in weighing the credit to be given to their testimony as to the existence of actual distress and the necessity for immediate relief. *Ib.*

PAYMENT.

1. In Maine a promissory note, or an accepted bill of exchange is *prima facie* evidence of payment of the debt for which it is given; *aliter*, as to an unaccepted bill. *Strang* v. *Hirst*, 9.
2. A bill of exchange, not accepted by drawee, is not an extinguishment of the original indebtedness on account of which it was given; hence, a new count, declaring upon such debt, may be added as an amendment of plaintiff's declaration upon such bill, since it introduces no new cause of action. *Ib.*
3. When a defendant is exonerated by the statute of frauds from a liability upon his oral promise to pay for certain goods furnished by the plaintiff to a third person before a certain date and liable for those furnished afterwards, payments made by him on the orders of such third person, drawn, payable upon the account generally, without reference to the question of liability, may be applied by the creditor to the oldest item. *Murphy* v. *Webber*, 478.
4. Part payment of a debt made with an agreement that the debtor shall have his "own time to pay the balance," does not come within the operation of R. S., c. 82, § 38, and an action is maintainable to recover the amount remaining due. *Mayo* v. *Stevens*, 562.
5. To render a partial payment an extinguishment of the whole debt, both parties must concur in the understanding that it was a payment in full. *Ib.*

See LIEN, 1. TAX, 20. WILL, 1, 5, 8, 9.

PENOBSCOT LUMBERING ASSOCIATION.

The Penobscot Lumbering Association is the lessee of the boom and appurtenances of the Penobscot Boom Corporation, at the rent of nine cents for each and every thousand feet of logs and other lumber passing through the same. This rent is the equivalent, by statute, for the use of the booms and appurtenances, and is not to be increased, though under some circumstances a portion of the logs may be twice rafted before they pass through the booms.

Penobscot Boom Corporation v. *Penobscot Lumbering Association*, 533.

PERMIT.

See ASSIGNMENT. TRESPASS, 3.

PLEADING.

1. Upon a debt due a partnership, one of the members of which has deceased, the action must be brought in the names of the survivors, whether for their own benefit, or under the control of the administrator of the deceased partner.

Strang v. *Hirst*, 9.

2. Objection to plaintiff's right to maintain suit as surviving partner, because he has not given the bond required by law, must be taken in abatement, or it will be considered as waived. *Ib.*

3. The brief statement in this case, setting up this defense, is bad for duplicity. *Ib.*

4. A complaint for flowage under R. S., c. 92, § 1, containing no allegation of defendants' ownership of the land on which the dam causing the flowage was erected, held bad on demurrer. *Jones* v. *Skinner*, 25.

5. A count in an indictment containing a joinder of distinct offences is bad for duplicity. *State* v. *Smith*, 386.

6. All the co-tenants must be joined in a complaint for flowage and their non-joinder may be taken advantage of under the general issue, with a brief statement denying the ownership. *Phillips* v. *Sherman*, 548.

See ESTOPPEL, 1, 2, 3, 4. INTOXICATING LIQUOR, 5. LIEN, 9. PARTITION, 1, 2. PRACTICE, 10. TENDER.

POOR DEBTOR.

1. To entitle a debtor to have the damages assessed under R. S., c. 113, § 52, the justices acting in the premises must be selected according to law, and have jurisdiction over that particular disclosure; otherwise the damages must be assessed according to the provisions of R. S., c. 113, § 40. *Blake* v. *Brackett*, 47 Maine, 28, affirmed. *Foss* v. *Edwards*, 47 Maine, 145, so far as relates to the question of damages, overruled. *Hackett* v. *Lane*, 31.

2. The only bar to an action upon a poor debtor's bond, is a complete fulfillment, on the debtor's part, of one of its three alternative conditions. *Ib.*

3. Plea of performance of the conditions of such bond, according to the statute, estops the debtor from claiming it to be, by reason of its variance from the requirements of the statute, a common-law bond. *Ib.*

4. A poor debtor's bond, approved by two justices not selected agreeably to R. S., c. 113, §§ 24, 42, is only good at common law. *Smith* v. *Brown*, 70.

5. It is a compliance with the conditions of such a bond to take the oath mentioned therein, though this differ from the one that poor debtors are required to take under the statutes in force at the time it is administered. *Ib.*

6. If such bond provide for notice to the creditors of debtor's disclosure, but fail to state how it shall be given, service upon one of the creditors is sufficient. *Ib.*

7. No appraisal of demands, disclosed upon a disclosure under a common-law bond, is necessary, unless required by the terms of the obligation. *Ib.*

8. The record of the justices hearing such a disclosure held sufficient, though not showing that they were disinterested, or why the creditor did not select one of them, nor where they met, nor that any disclosure was had. *Ib.*

POSSESSION.

See ADVERSE POSSESSION. SALE.

PRACTICE.

1. Whether an over-valuation and proof of loss were fraudulent or not, is a question of fact for the jury; and where there is "much conflict of testimony," and that adduced by the plaintiff is sufficient, if believed, to justify a verdict in her favor, such a verdict will not be set aside, if the discrepancy between the value of the property as found by the jury and the amount insured thereon be not so great as to make it incredible that the over-valuation in the application, and over-estimate in the proof of loss, could have occurred without positive dishonesty or fraudulent intent on the part of the plaintiff.

Williams v. *Phœnix Ins. Co.*, 67.

2. Immaterial instructions are no ground for exceptions. *State* v. *Murphy*, 56.

3. In this case the jury were instructed that, if the respondent, "in the heat of blood, and upon sufficient provocation," threw the deceased down stairs, the offense was manslaughter; subsequent instructions showed that this word "sufficient" was used as equivalent to the words "great and sudden;" *held*, that the prisoner had no cause for exceptions. *Ib.*

4. Where a cause was brought before this court from the superior court of Cumberland county, under an agreement that if the jury would be authorized to find a verdict for the plaintiff upon the testimony reported, the defendant was to be defaulted; otherwise the action to stand for trial; and the evidence showed a conflict upon several questions of fact; this court refused to determine the case and discharged the report. APPLETON, C. J.; CUTTING, and DICKERSON, JJ., dissenting. *Nickerson* v. *Mills*, 74.

5. Whether or not it is proper to invoke the decision of this court in such cases, where there has been no action of the superior court, and the report does not present the rights of the parties, *quære?* *Ib.*

6. Evidence reported upon a motion for a new trial, which has been overruled by consent, cannot be considered in a hearing upon exceptions, when such evidence is not referred to in, or made part of, the exceptions. *Maxwell* v. *Mitchell*, 106.

7. The laws of other States can only be recognized by our courts when proved as facts. In the absence of such proof their law will be assumed to be the same as our own. *McKenzie* v. *Wardwell*, 136.

8. Objections to the admission of testimony, which is apparently relevant and competent, will be considered as waived unless the ground of objection be specifically set forth when the objection is made. *State* v. *Bowe*, 171.

9. On exceptions, the court will not consider the findings of the jury as to whether the verdict is or is not against the weight of evidence. *Harmon* v. *Harmon*, 222.

10. An objection, at the trial, made after general issue joined and the evidence closed, in an action for injury received upon a defective highway, that there is no allegation that the hearse used was suitable or safe to ride upon, and none that the injury was caused by a want of repair in the way, cannot avail, where it is alleged in the declaration that the plaintiff was driving carefully with a safe horse, and that the road was unsafe by means of drifts, in passing which plaintiff was injured. *Moody* v. *Camden*, 264.

11. When no question is made that the damages are excessive, if any damages are recoverable, an exception taken to the exclusion of evidence which could have a bearing only upon the amount of injury sustained becomes immaterial. *Ib.*

12. Plaintiff's attorney may administer the oath required by R. S., c. 113, § 2, to authorize the arrest of the defendant. *McLean* v. *Weeks*, 277.

13. To afford ground of exception the testimony admitted must be of such a nature as to work prejudice to the excepting party. *Brooks* v. *Goss*, 307.

14. Exceptions will not be sustained unless the case shows affirmatively that the excepting party has been aggrieved by the ruling complained of. *Bryant* v. *K. & L. R. R. Co.*, 300. *Lord* v. *Kennebunkport*, 462.

15. Suit was brought to recover the value of certain bonds which had been left at a bank as collateral security for money which might, from time to time, be advanced the plaintiff. July 1, 1868, he went to the bank to obtain a loan upon this security. The bonds could not be found, but he received the money. The defendant requested the court to instruct the jury that "if the bonds were not found by the bank when the note of July 1st was offered, and were not afterwards found, the jury are not authorized to find that they were taken and held as collateral security for the note of July 1st." *Held*, that this instruction was properly refused. *Dearborn* v. *Union Nat. Bank*, 369.

16. The court will not set aside a verdict establishing a title by disseizin when there is evidence on both sides, and no exceptions are taken to the rulings of the presiding justice, and there is nothing indicating misconduct or gross partiality on the part of the jury. *Moore* v. *Moore*, 417.

17. The court will not quash a *capias* writ, on which a defendant has been held to bail, on the ground that the *ad damnum* is evidently excessive. The remedy is by R. S., c. 99, § 9. *Ib.*

18. The receiptors for property attached agreed by the terms of their receipt to redeliver it on demand to the officer, at a place named; and that if no demand should be made, they would, within thirty days after judgment in the action, redeliver the property as aforesaid that it might be taken on execution. *Held*, that they were liable on their receipt, though no demand was made, if they failed to redeliver the property at the place named, within thirty days after judgment. *Low* v. *Dunham*, 566.

19. If a party desires specific instructions dependent upon a finding by the jury of a particular state of facts, he must seasonably request them in writing and not rely upon the judge, without such requests, to notice all the positions he may have taken in argument. *Willey* v. *Belfast*, 569.

See INSURANCE, 1, 2, 3. PARTITION, 1, 2. PROMISSORY NOTE, 3. REVIEW, 1, 2. STATUTES, 1. TENDER.

PRESUMPTION.

See STATUTES, 1. TAX, 17.

PRINCIPAL AND SURETY.

1. If a surety give the creditor his individual notes under an agreement between them, not known to the principal that these notes when paid shall be in full satisfaction and discharge of the original contract, and part only of the notes are paid; this does not discharge the principal, who may be sued upon the original contract and held for so much as remains due thereon after deducting the amounts paid by the surety. *Emery* v. *Richardson*, 99.

2. It affords a surety no defense that the names of two of the principals upon a note are forged, the fact being unknown to the surety and holder when delivered. *Chase* v. *Hathorn*, 505.

3. If a principal sells a note to a third person, not the payee, without the express or implied consent of the surety, the surety is not liable thereon; but such consent may be implied by the course of business between the parties. *Ib.*

4. A verdict and judgment rendered in a suit upon a joint and several note in favor of one surety will not be a bar to another suit against another surety upon such note, unless it is shown that the first verdict was rendered upon a defence which would be an extinguishment of the cause of action; or unless the grounds of defence set up in both cases are shown to be identical. *Hill* v. *Morse*, 541.

5. A surety who has been discharged from his primary liability upon a note, may be held to contribute to reimburse a proportional part thereof to a co-surety who has been subsequently compelled to pay it. *Ib.*

See TAX, 21.

PROBATE LAW.

1. Ordinarily, the personal estate of a decedent is to be first applied in payment of his debts before resort is had to the realty; but real estate may be sold for this purpose without having used any part of the personal, where this course is evidently necessary in order to carry out the intent of the testator, as gathered from the whole of his will, though such sale be not expressly directed by any of its particular provisions. *Quinby* v. *Frost*, 77.

2. An heir-at-law appealing from the allowance of a claim by commissioners of insolvency, under R. S., c. 66, § 11, is liable to have costs awarded against him if the creditor recover, though the amount finally allowed may be less than that awarded by the commissioners. *Henry* v. *Miller*, 105.

3. In such case the claimant is the prevailing party. *Ib.*

4. No notice is required upon the petition for the appointment of a guardian to a minor less than fourteen years of age, resident in the county where such petition is filed. *Peacock* v. *Peacock*, 211.

5. Upon a guardian's petition for the care of his ward's person to be committed to him, under R. S., c. 67, § 3, notice to the living parent of the child must be given. *Ib.*

6. It is a sufficient compliance with the provisions of R. S., c. 82, § 131, requiring a certified copy of the commissioner's report to be filed before making an application for execution, if the order of acceptance by the probate court, referring to and making the report a part of the order, be certified. *Palmer* v. *Palmer*, 236.

7. If the report of commissioners under R. S., c. 64, § 51, declares that they acted "pursuant to the annexed commission," it need not appear affirmatively that they notified the parties, or otherwise complied with the directions contained in the commission, or required by statute. *Ib.*

8. If such requirements were in fact complied with, and the report omitted to show it, the defect might be cured by amendment *Palmer* v. *Palmer*, 236.

9. The phrase "after their report is made" used in R. S., c. 66, § 11, means after their report has been returned and finally accepted, as in R. S., c. 82, § 131. *Ib.*

10. The creditor can resort to the process provided in R. S., c. 82, § 131, when an executor has entered an appeal from the report of the commissioners, but has failed to complete it by giving the requisite notice. *Ib.*

11. The administrator of an insolvent estate, in an action for money had and received, may recover for money given by his intestate after he became insolvent without a valuable consideration. *McLean* v. *Weeks*, 277.

12. As such gift is valid as against the heirs of the giver, the donee is entitled to all over the amount required for the payment of debts and expenses of administration. *Ib.*

13. It is for the administrator to show the amount of such debts and expenses, and he is entitled to recover only that amount. *Ib.*

14. Moneys derived from insurance policies on the life of one dying insolvent, leaving neither widow nor child, cannot be bequeathed by the assured, but become assets for payment of debts. *Hathaway* v. *Sherman*, 466.

15. Registers of Probate hold that office, when *elected* by the people, for a term of four years from the first day of January next succeeding their election. *Opinion of the Justices*, 601.

See INSURANCE, 4, 5, 6, 7, 8.

PROMISSORY NOTES.

1. A note signed "A. B., Treas. for St. Paul's Parish," is the note of the parish. A material alteration of a note, in the hands of an indorsee, without the knowledge of the indorser, discharges the latter. *Sheridan* v. *Carpenter*, 83.

2. An indorser, ignorant of facts accruing subsequently to his transfer of the indorsed note which operate to discharge him from liability thereon, paying its amount to the holder, upon discovery of such facts, can recover the sum so paid in an action for money had and received. *Ib.*

3. An offer to return the note to the defendant, made at the trial, is sufficient. *Ib.*

4. A demand by the holder of a note payable generally may be made upon the maker in the street, the maker having no place of business, and raising no objection to the place where the demand is made. *King* v. *Crowell*, 244.

5. The actual exhibition of the note at the time of the demand is unnecessary, if the holder then has it with him and is not requested to produce it. *Ib.*

6. A notice upon the last day of grace on the indorser, after previous demand upon and refusal by the maker upon the same day, is not premature. *Ib.*

7. A note payable to a savings bank purchased of the makers by a party, not the payee, the bank having no interest in it, may be indorsed without recourse by the bank to such purchaser, to enable him to maintain a suit in his own name thereon; and the authority of the treasurer to indorse it for the bank may be inferred from the conduct of the trustees without any express direction or vote.
Chase v. *Hathorn*, 505.

See PRINCIPAL AND SURETY. SCIRE FACIAS, 4.

PUBLIC LANDS.

See LAND AGENT. PARTITION, 1, 2.

RAILROAD.

Where a statute declares that railroads, by whose negligence the life of a person is lost, forfeit not less than five hundred nor more than five thousand dollars, to be recovered by indictment to the use of the heirs of the deceased; *held*, that to bring a case within this statute the killing must be instantaneous.
State v. *G. T. Railway*, 114.

See CORPORATION, 7, 8. LAND DAMAGES, 1, 2, 3.

RAILROAD STOCK.

See CORPORATION, 7, 8.

REAL ACTION.

1. If the demanded premises are not clearly described in the declaration in a real action, the statute provides that a nonsuit may be entered.
Ramsey v. *O'Leary*, 366.

2. A verdict, however, for the demandant, defective for want of definite description of the premises recovered, will not be set aside, where the evidence shows that, at least, a trespass was committed by the tenant upon the close of the demandant, which would render him liable for nominal damages and costs. *Ib.*

3. Nor where it finds the disseisin by the tenant of the demandant's entire premises, when the evidence would warrant a finding of the disseisin of a small portion only, the disclaimer in the case not being seasonably filed, and the result being in such respect immaterial. *Ib.*

REAL ESTATE.

When real estate may be sold for payment of debts. *Quinby* v. *Frost*, 77.

See EASEMENT, 2. LAND DAMAGES, 1, 2. WILL, 1, 2, 3, 4.

RECEIPTOR.

The receiptors for attached property agreed, by the terms of their receipt, to redeliver at the place from which they took it, in thirty days after judgment, without demand, and were held liable for a failure to comply with the terms of their receipt. *Low* v. *Dunham*, 566.

See PRACTICE, 18.

RECORD.

See EVIDENCE, 3. POOR DEBTOR, 8. TAX, 16.

REGISTER OF PROBATE.

See CONSTITUTIONAL LAW.

REGISTRATION OF DEEDS.

See EVIDENCE, 27.

RESCISSION.

See CONTRACT, 4. FRAUD.

RES GESTÆ.

See EVIDENCE, 7.

REVIEW.

1. After denial of a petition for review, suit can be maintained on a bond filed with such petition, given to obtain stay of execution on the judgment recovered in the action sought to be reviewed; although, before suit brought, a new petition to review such action, and a new bond for the same purpose as the previous one had been filed, and a stay of execution ordered. *Kenney* v. *Burke*, 134.
2. The writ of review should not be sued out until the record upon the petition therefor is closed. *Bradstreet* v. *Partridge*, 335.
3. Case between same parties, 59 Maine Reports, 155, affirmed. *Ib.*

See EQUITY, 12, 13.

RICHARDSON LAKE DAM COMPANY.

1. The Richardson Lake Dam Company, under its charter, c. 104 of the Private and Special Laws of 1853, has the right to maintain its dams and to keep its gates closed, although the natural flow of the water from the lake may thereby be impeded and diminished. *Toothaker* v. *Winslow*, 123.
2. The remedy for an illegal hoisting of these gates is not confined to the corporation, but may be sought in an action brought by any individual injured thereby, in his own name and for his own benefit, declaring upon the particular and special injury done to him. *Ib.*

SALE.

1. If it be agreed that goods sold shall be hauled by the vendor to a place specified, it does not necessarily follow that the title thereto does not pass till they reach the place designated. The property may pass so as to take the case out of the Statute of Frauds, at the time the agreement is made, if the parties so intend; and whether or not such was their intention, in any given case, is a question for the jury, to be determined from the words, acts, and conduct of the parties, and all the circumstances. *Dyer* v. *Libby*, 45.

2. A building was sold and paid for, to be removed by a day designated, but was not so removed: *held*, that the vendee did not thereby forfeit his title thereto, but only became liable to his vendor for the damages occasioned by its continuance upon the land after the date fixed and in moving it subsequently, to the time agreed upon therefor. WALTON, BARROWS, and DANFORTH, dissenting.
Davis v. *Emery*, 140.

3. The plaintiff caused to be attached certain cigars and tobacco upon two suits against one Tinker, and was made keeper of the goods by the defendant, who was the officer making the attachment. It was afterward agreed between Tinker and the plaintiff that plaintiff should have the property and that Tinker should act as his agent and sell it on plaintiff's account. The cigars were not counted, nor the tobacco weighed, nor any price for them fixed upon, nor any credit given Tinker for them upon his debts to plaintiff. The plaintiff discontinued his suits, whereupon the property was attached as Tinker's at the suit of other parties. *Held*, that the transaction did not constitute a sale, and that plaintiff could not maintain replevin against the attaching officer.
Gray v. *Millay*, 327.

4. A commission merchant who sells and delivers property, intrusted to him for sale, before notice of a revocation of his authority, is not liable in trover for making such sale. *Jones* v. *Hodgkins*, 480.

5. The *bona fide* purchaser under such sale and delivery acquires thereby a good title as against a prior purchaser from the consignor without delivery. *Ib.*

6. When goods have been sold and delivered and are in the vendee's possession, the same evidence is necessary to show a sale to the original vendor as would have been required to establish a sale from him. *State* v. *Intoxicating Liquors*, 520.

7. A notice of a sale of goods taken and appraised on mesne process, defective for want of sufficient time, is not cured by a postponement of the sale on the day appointed therefor to one remote enough to answer the statute requirement. The officer cannot make a valid sale at the adjournment that would be invalid if made on the day originally designated. *Sawyer* v. *Wilson*, 529.

See EVIDENCE, 29. FRAUD. FRAUDULENT SALE, 2. TAX, 4, 5, 6, 8, 9, 17. TRESPASS, 4, 5.

SAVINGS BANK.

See PROMISSORY NOTE, 7.

SCHOOL-DISTRICT.

Under an article in the warrant "to see if the town will set off a part of the districts, numbers 9 and 17" so as to form a school-district with contiguous portions of an adjoining town, it is not competent for the town to set off a portion of a district other than those specified in the warrant.
Butterfield v. *School District No.* 6 *in Prospect*, 583.

SCHOOL-DISTRICT TAX.

A person seeking to recover a tax paid by him to a school-district, upon the ground that he was not, at the time of the assessment, a resident of the defendant district, but that the part of the town in which he resided had been formed into a new district with portions of a neighboring town, is not entitled to recover unless he shows that the towns co-operated in their corporate capacity to form such new district. *Butterfield* v. *School District No. 6 in Prospect*, 583.

SEAL.

A seal implies that the instrument upon which it is placed was given for some consideration, but does not estop the parties to show the actual consideration. *Eames* v. *Gray*, 405.

SEARCH AND SEIZURE.

See INTOXICATING LIQUOR, 2, 3, 5.

SCIRE FACIAS.

1. When by a previous disposition of the property for which he is charged the trustee renders himself unable to deliver it upon demand, it is not necessary for the maintenance of *scire facias* that the officer make a demand. *Woods* v. *Cooke*, 215.
2. A return of *nulla bona*, dated the second day after the return day of the execution, taken in connection with a previous return by the officer that by virtue of the execution he had made demand upon the trustee, shows with sufficient certainty that the search for goods was made in the life-time of the execution, and that what was done by the officer was done by virtue of it. *Ib.*
3. The court may allow an officer to amend his return upon execution, by adding his certificate of *nulla bona* after the return day of the execution. *Ib.*
4. It is no defense to an action of *scire facias*, that the note, upon which the original suit was instituted, was afterwards paid by an indorser, and the suit carried on for the benefit of such indorser in the name of the payee. *Ib.*
5. The defendant in *scire facias* cannot show, in order to reduce the damages, that the adjudication of the court in the original action was erroneous. *Ib.*

See TRUSTEE PROCESS, 1.

SELECTMEN.

See TAX, 13, 14, 21.

SHIPPING.

In order to make the master of a vessel the owner *pro hac vice* under a contract for sailing her on shares, he must have the exclusive control for the time being; otherwise, the owners will be held liable for necessary supplies furnished the vessel on their credit. *Noyes* v. *Staples*, 422.

SLANDER.

1. In an action on the case for slander, where the statute of limitations is pleaded, and part of the testimony of the witness called to prove the utterance of the slanderous words alleged tends to show that they were spoken more than two years before the date of the plaintiffs' writ, and part would indicate that they were uttered within that time, it is in the sole power of the jury to determine whether or not the cause of action is barred by the statute of limitations. R. S., c. 81, § 81. *Harmon* v. *Harmon*, 233.
2. In such action, testimony of facts occurring more than two years before its commencement are admissible to prove malice. *Ib.*
3. Exemplary damages are allowable in an action for slander. *Ib.*

SOLDIER.

1. The soldiers entitled to share in the "surplus," mentioned in Act of 1868, c. 225, § 6, are those who served on the town's quota without receiving a bounty from the town. *Riggs* v. *Lee*, 499.
2. Their shares in the "surplus" are in proportion to the length of time they served, and may be recovered in an action of assumpsit after a demand therefor upon, and a refusal to pay by, the town. *Ib.*

SPECIFIC PERFORMANCE.

See EQUITY, 6, 16, 17.

STAMP, REVENUE.

The assignment of a mortgage of real estate, in October, 1863, not stamped as then required by the laws of the United States, is not, therefore, void, unless it appear that the stamp was omitted with intent to defraud the revenue.
Dela v. *Stanwood*, 51.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES.

1. In the absence of proof the statutes of another State will be presumed to be similar to our own. *McKenzie* v. *Wardwell*, 136.

2. To enforce a statute lien the course prescribed by the statute must be strictly pursued. *Sheridan* v. *Ireland and logs*, 486. *Parks* v. *Crockett and logs*, 489.

3. The word "shall," in R. S., c. 91, § 35, means "may."
Parks v. *Crockett and logs*, 489.

4. The word "may" in a statute is to be construed "must" or "shall" where the public interests or rights are concerned and the public or third persons have a claim *de jure* that the power shall be exercised. *Low* v. *Dunham*, 566.

See BAIL. BASTARDY, 1. COMPLAINT FOR FLOWAGE, 1. CORPORATION, 1, 5, 6. DEED. DEPOSITION. DOWER, 3, 5. EXECUTION. EVIDENCE, 26, 27. FRAUDULENT CONVEYANCE, 1, 2. INSURANCE, 4, 5, 6, 7, 8. INTOXICATING LIQUOR, 1, 4, 5. JOINT STOCK ASSOCIATION. LAND AGENT, 1. LAND DAMAGES, 3. LIEN, 2, 10, 13. MARRIAGE. MORTGAGE, 1. PAYMENT, 4. PENOBSCOT BOOM CORPORATION. POOR DEBTOR, 1, 4. PROBATE LAW, 2, 5, 6, 9, 10, 14. RAILROAD. RICHARDSON LAKE DAM COMPANY. SALE, 7. STAMP, REVENUE. TAX, 13, 14, 15, 16, 19, 22. TENDER, 2. TRESPASS, 2, 4, 5. TRUSTEE PROCESS, 2. WAY.

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SURETY.

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TAX.

1. It is sufficient if the assessors so describe the land of non-residents taxed by them as to identify it with reasonable certainty. *French* v. *Patterson*, 203.
2. The description, "Orrin Emerson, or unknown, about 175 acres, 4th range, 17 school-district, part of the Craig lot, value $875, amount of tax, $15.93," held sufficient. *Ib.*
3. Such description sufficient also in the advertisement of land to be sold for taxes. *Ib.*

4. In order to authorize the sale of an entire parcel of land for taxes assessed thereon, it should distinctly appear of record that the sale of the whole "was required to pay the tax, interest, and charges;" if this be not made so to appear of record the sale will be invalid. *French* v. *Patterson*, 203.

5. It should appear that the treasurer offered for sale, to pay these sums, a fractional part of the land; or that no person would pay the amount due for a less quantity of land than the whole parcel. *Ib.*

6. A person, whose property has been sold to pay an assessment which was illegal for want of jurisdiction in the assessors, may recover damages to the extent of his injury in an action of tort against the assessors; or he may recover the proceeds of the sale in assumpsit against the town. *Ware* v. *Percival*, 391.

7. Having elected assumpsit, and the judgment therein recovered having been satisfied, the party aggrieved is estopped to set up the tort, the waiver of which was the foundation of his suit in assumpsit, and cannot maintain an action against the assessors. *Ib.*

8. The words "the distress shall be openly sold," as used in R. S., c. 6, § 104, are not to be construed as authorizing a collector of taxes to sell any additional articles after enough have been sold to pay the tax committed to him and the expense of sale. *Seekins* v. *Goodale*, 400.

9. Where a collector, after selling enough to pay the tax and expense of sale, sells other personal property distrained he will not become a trespasser *ab initio* as to any of the articles seized except such as he has sold in excess of his authority. *Williamson* v. *Dow*, 32 Maine, 559, explained. *Ib.*

10. The collector's warrant is a full protection to him, so far as he has not exceeded nor abused its authority. *Ib.* *Nowell* v. *Tripp*, 426.

11. A collector is not liable in trespass for arresting one whose name is borne upon the tax-lists committed to him for collection, though such person be not liable to assessment in the taxing town, when assessed. *Nowell* v. *Tripp*, 426.

12. An assessment of taxes upon land of a non-resident thus described, "2 acres of land, house, boom, and privileges, shore of lots one and two," is void for uncertainty in the description; nor is parol evidence admissible to identify the premises intended. *Orono* v. *Veazie*, 431.

13. A town, making no choice of assessors, voted that the selectmen act as assessors, and the persons so chosen made oath "faithfully and impartially to discharge the duties of selectmen and assessors;" it was held that this was a full compliance with R. S. of 1857, c. 6, § 61, and that the selectmen were assessors. *Gould* v. *Monroe*, 544.

14. An assessment made by persons so chosen may be properly signed by them as assessors, without any statement that they are selectmen acting as assessors. *Ib.*

15. The neglect or refusal of the person chosen as collector by the town to take the oath or furnish the requisite bond creates a vacancy in that office which may be filled by the assessors by appointment, and there need be no record of such neglect or refusal in order to render the appointment valid. *Ib.*

16. The record of the warrant to the collector is a sufficient record of his appointment. *Ib.*

17. The recitals in a tax deed that the officer executing it complied with the requirements of the statute in advertising and selling the land, must be proved by extrinsic evidence. Five years' possession by the complainant raises no presumption of law that the statute has been complied with. *Phillips* v. *Sherman*, 548.

18. The claimant under a tax deed cannot invoke the provisions of R. S., c. 6, § 174, relating to payment or tender of the amount of the taxes, charges, and interest by the defendant before he can contest the validity of such deed, where the land in controversy was sold in gross with other land for one consideration. *Ib.*

19. A collector of taxes, acting under a warrant to make a partial collection of the assessments committed to him, is exonerated from completing the service under such warrant if it directs an exemption from distress of property not exempted by statute. *Orneville* v. *Pearson*, 552.

20. Where a person was collector of taxes for consecutive years, money paid, without any appropriation on his part, by him to the treasurer, who applied it to the oldest liability without any notice that the money came from the assessments of any particular year, cannot afterwards be applied by the collector upon his liabilities for a subsequent year though collected from that year's taxes. *Ib.*

21. Where a collector who was also a selectman, at the request of the overseers of the poor, advanced money for town purposes, and the sum was afterwards paid to him by the town officers without notice that the money so advanced came from any particular fund or from official sources, neither he nor his sureties can require that such amount shall be allowed upon his liability as collector although it was, in fact, collected from the taxes committed to him. *Ib.*

22. A collector is not entitled to anything for committing a debtor after one year from the time the tax is committed to him. *Ib.*

See DOMICIL, 2. SCHOOL DISTRICT TAX.

TENANTS IN COMMON.

See PLEADING, 6. TROVER, 4.

TENDER.

1. When money has been tendered before or after suit brought, the defendant, to keep his tender good, must bring it into court on the return day of the term at which the entry of the action, to which the tender applies, is made. *Pillsbury* v. *Willoughby*, 274.

2. A plaintiff who contests the validity of a tax-sale is not obliged to tender "the taxes, charges, and interest," until the defendant produces the evidence mentioned in R. S., c. 6, § 162. *French* v. *Patterson*, 203.

See TAX, 18. TRUSTEE PROCESS, 1.

TOWN.

See ACTION, 1, 2.

TRESPASS.

1. When a wife has been divorced from her husband for his fault, and has left her furniture and other property upon his premises, he cannot maintain trespass *quare clausum* against her servants, after divorce, for peaceably entering at her command and removing her goods and chattels so left. *Kallock* v. *Perry*, 273.

2. An action of trespass *de bonis* to recover for timber and trees cut from land mortgaged is properly brought by the executor of the deceased mortgagee for the benefit of the person beneficially interested under the will, if the severance was before the death of the mortgagee. *Brooks* v. *Goss*, 307.

3. The assignee of a permit to cut timber can maintain trespass against an officer who attaches the lumber after it is cut as the property of the assignor. *Sawyer* v. *Wilson*, 529.

4. An officer who sells attached property upon mesne process, without giving the notice required by law, becomes a trespasser *ab initio*, and will not be permitted to show in defense of a suit against him that the conveyance of the attached property by the debtor named in such process to the party suing the officer was fraudulent and void as to creditors. *Ib.*

5. A notice of a sale of attached goods, defective for want of sufficient time, is not cured by a postponement of the sale, on the day appointed therefor, to one remote enough to answer the statute requirement; and the officer selling the property on the day of adjournment is liable in trespass. *Ib.*

See EVIDENCE, 2, 14, 19. TAX, 9, 10, 11.

TRIAL JUSTICE.

When a trial justice is unable to attend at the time and place appointed for trial, the continuance by another trial justice or any justice of the peace and quorum as provided by R. S., c. 83, § 12, must be within and not without the office appointed as the place of trial. *Belcher* v. *Treat*, 577.

See EXECUTION.

TROVER.

1. In an action of trover the defendant justified under a mortgage bill of sale of the property alleged to have been converted by him, given by plaintiff to the firm of which the defendant was a member, with condition that it should be void if the mortgagor should save the mortgagees harmless in consequence of having signed with him a note dated June 12, 1868, for $550, payable Nov. 10, 1868, to the Net & Twine Co., of Boston; and offered to prove payment by said firm of a note signed by the plaintiff, dated May 28, 1868, for $556, payable in four months to the American Net & Twine Co. at any bank in Boston; it was *held*, that the note was inadmissible without proof of its identity with that described in the mortgage, but that it was competent to prove such identity by parol evidence in such cases. *Hoey* v. *Candage*, 257.

2. A verdict is an action of trover "that the defendant did promise," etc., may be amended by substituting the words "is guilty" for "did promise." *Ib.*

3. Trover will not lie against a bailee who, without notice of a revocation of his authority, sells property intrusted to him for sale. *Jones* v. *Hodgkins*, 480.

4. One tenant in common cannot maintain an action of trover for conversion against a co-tenant for an attempted sale of a larger share of a vessel than belonged to him, where no sale was fully effected and no title to, or possession of the common property passed thereby. *Estey* v. *Boardman*, 595.

TRUST.

See TRUSTEE, 1, 2, 3. WILL, 5.

TRUSTEE.

1. Where by the terms of a marriage settlement the trustee under it is to change the investment of the trust-funds upon the joint request in writing of the *cestui que trust* and her husband, such written request is essential to relieve the trustee from liability for loss arising from any change of investment made by him. *Crocker* v. *Pierce*, 58.

2. If, after the determination of the trust by the death of the husband, in an adjustment, between the trustee and the beneficiary, of the matters of the trust, there be, in the property conveyed to her as the consideration of her release to the trustee, an "inadequacy of price, and inequality of advantages in the bargain," equity will set aside the release so obtained and afford relief. *Ib.*

3. Upon the facts of the present case, that principle applied; an adjustment set aside and the administrator of the trustee held to account in cash for the trust funds, and interest. *Ib.*

See WILL, 6.

TRUSTEE PROCESS.

1. Where a trustee was charged conditionally, that "if the plaintiff pay the trustee $2000 within sixty days after final judgment, then the trustee is to deliver to the officer" certain specified property, holden by the trustee as security, and during the sixty days the trustee disposed of a portion of the property and appropriated the proceeds toward the payment of his claim, a tender by the plaintiff of simply the balance due was held sufficient. *Woods* v. *Cooke*, 215.

2. Groceries furnished an unmarried person and used in the family in which he is boarding, being taken in payment for his board, are not necessaries "furnished him or his family" within the meaning of R. S., c. 86, § 55.
McAuley v. *Tracy*, 523.

See SCIRE FACIAS, 1, 2, 3, 4, 5.

VARIANCE.

See TROVER, 1.

VENUE.

See COUNTY. INDICTMENT, 1.

VERDICT.

A paper found in the jury-room after the jury have left it, upon which twelve different sums, ranging from nothing to several thousand dollars, are set down and added together and the amount divided by twelve, the quotient being the precise sum for which the verdict was rendered, does not furnish sufficient cause for setting aside the verdict. It cannot be concluded from this alone that each and all of the jurors did not agree to the verdict rendered.

Willey v. *Belfast*, 569.

See INTOXICATING LIQUOR, 1. LAND DAMAGES, 1, 3. PRACTICE, 16. PRINCIPAL AND SURETY, 4. REAL ACTION, 2, 3. TROVER, 1.

VOTE.

See ACTION, 2. CORPORATION, 6.

WAIVER.

See ABATEMENT, 1. ASSUMPSIT, 2. EQUITY, 8. TAX, 6.

WAY.

1. In laying out or widening a way, in the exercise of the power granted by the sixth section of the city charter, the city council of Bangor need not conform to the prayer of the petition upon which such laying out or widening is made. The provision of R. S., c. 18, § 1, that the county commissioners shall comply substantially with the petition upon which they act, has no application in the case of ways laid out by municipal authority. *Cassidy* v. *Bangor*, 434.
2. It is sufficient if the city council adopt measures suited to accomplish the end sought to be attained by the petitioners. *Ib.*
3. The city council of Bangor need not cause to be entered upon their records an adjudication that the widening of a way is of common convenience and necessity before they commit that subject to the consideration and action of the street engineers. *Ib.*

4. The fact that the notice required prior to an assessment of the damages occasioned in the laying out and altering of a way in Bangor was not given does not invalidate the action of the city council in establishing such laying out and widening; it only affects the assessment of damages. *Crosby* v. *Bangor*, 434.

5. The notice by publication of an intention to estimate the damages caused by the location and widening of a way in Bangor, according to the Act of 1835, § 1, amendatory of the city charter, relates to that subject only, and does not affect the general question of location. *Ib.*

6. The city council of Bangor is a continuing body. If an assessment made by the council of one year is void, by reason of defective notice, the city council of the following year may order a new assessment of the damages occasioned by the location or widening of a way. *Ib.*

See WAY, DEFECTIVE.

WAY, DEFECTIVE.

1. If a defect in a highway is the sole, true, efficient cause of an accident, it is not necessary that the injury should be actually received upon the precise spot where the defect exists, or that it should appear that there was any defect where the injury was received. *Willey* v. *Belfast*, 569.

2. If a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that the direct and natural consequence is the frightening of a kind, safe, and well-broken horse beyond the control of a reasonably skillful and careful driver, and the horse while violently running down a steep hill falls and the plaintiff is thrown out and injured, it is competent for the jury to find the defect to be the sole cause of the accident. The fall of such a horse, under such circumstances, is not to be reckoned a contributory cause, but a part of the accident, like the fall of the plaintiff from the carriage. *Ib.*

See DAMAGES, 3. EVIDENCE, 11, 12, 13, 16. LAW AND FACT. PRACTICE, 10.

WILL.

1. Ordinarily, the personal estate of a decedent is to be first applied in payment of his debts before resort is had to the realty; but real estate may be sold for this purpose without having used any part of the personal, where this course is evidently necessary in order to carry out the intent of the testator, as gathered from the whole of his will, though such sale be not expressly directed by any of its particular provisions. *Quinby* v. *Frost*, 77.

2. Where the income of all real estate is devised to the widow, she is entitled to that accruing from subsequently purchased land; this going to her under such devise instead of to the residuary legatees. *Stevens* v. *Burgess*, 89.

3. If land of which the income is devised be unproductive, the executor will not be authorized to expend any of the funds devised to the residuary legatees in an attempt to make it produce an income. *Ib.*

4. The executor, having no special authority by the will to sell the real estate, cannot make sale of it without the consent of the residuary legatees, or license from this court, which will not be granted where the personal assets are amply sufficient to pay the debts and meet all the calls of the will. *Ib.*

5. A bequest is payable presently unless some other time be specially fixed for payment. The executor has no authority to pay from the general funds of the estate the expenses of taxes, repairs, etc., upon real estate devised in trust and in the occupancy of the widow as *cestui que trust;* nor is any part of such expenditures to be borne by the trust to which the proceeds of such real estate are eventually to be devoted. The occupant must pay them. *Ib.*

6. A person to whom a specific sum, being not more than one-seventh of the whole estate, is devised for particular purposes, must give the bond required of testamentary trustees by R. S., c. 68, § 1, before he can receive such sum; though he be charged with no other trust than its reception and expenditure, to accomplish the desired end, "at his discretion." *Ib.*

7. A bequest evidently incomplete is void. *Ib.*

8. A bequest of "one-third of the personal property" conveys that fraction of it in gross, without any deduction for payment of debts, etc. *Ib.*

9. One who dies insolvent can make no testamentary disposition of the fund accruing from an insurance policy upon his life if he leave neither widow nor child; in such event, the insurance money becomes assets for the payment of debts. *Hathaway* v. *Sherman*, 466.

10. A person having an insurance upon his life, dying insolvent, leaving a widow and children, may bequeath the insurance money among them as he pleases; but he cannot bestow it by will upon any other persons. *Ib.*

11. An intention on the part of a testator, by his will, to dispose of the fund arising from an insurance policy upon his life, will not be inferred from the fact that his bequests were ultimately found to exceed the whole amount of his estate exclusive of this fund; nor from the fact that he designated a person as the legatee of the residue of his property of every description whatsoever. *Ib.*

See INSURANCE, 4, 5, 6, 7, 8.

WITNESS.

Where the plaintiff is an executor and does not testify, the defendants are precluded from testifying. *Brooks* v. *Goss*, 307.

See FRAUDULENT SALE, 3.

WORDS.

"Shall" construed to mean "may," in R. S., c. 91, § 35. *Parks* v. *Crockett*, 490.
"May" when to be construed "must" or "shall" in a statute.
Low v. *Dunham*, 566.

WRIT.

See MANDAMUS. TRIAL JUSTICE.