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.

NOTE.

The Chief Justice desires the following corrections made in his opinions, viz:—Upon page 460, second line from the bottom, strike out the words "in course, or;" and upon page 467, insert "from" before "what" at the commencement of the ninth line from the bottom, and in the same line, insert the word "they" between the word "logs" and the word "are."

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OF THE CASES REPORTED.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

IRA N. BEALS *vs.* PASCHAL M. THURLOW.

Limitation is one year for suit by third party to recover gaming losses.

So much of R. S., c. 125, § 4, as authorizes an action on the case to be brought, in certain contingencies, by any person to recover from the winner treble the value of property received by him upon a gambling transaction, one half to the plaintiff's use, and the other to the use of the town where the offence was committed, is penal, and should be strictly construed; therefore such action must be commenced within a year after the offence is committed, or it will be barred by R. S., c. 81, § 90.

ON FACTS AGREED.

The plaintiff, on the sixth day of January, 1874, instituted this action, declaring in his first count, that John W. McDuffee, at Lewiston, on the twentieth day of July, 1872, made a bet with the defendant upon the result of two races to be run against each other by their respective horses, "King William" and "Phil Sheridan," which was won by the latter on the twenty-eighth day of August, 1872, and on the thirtieth of that month, the stakeholder, by McDuffee's order, paid over the $250 put up by that gentleman upon this wager; that McDuffee neglected, for a space of three

months, to prosecute any suit to recover the sum thus lost by him; whereby this plaintiff is entitled to sue for and recover three times that amount, being $750, of the defendant, according to the statutes in this behalf provided, one half to his own use, and the other to the use of the city of Lewiston, where said bet was made, won and lost as aforesaid.

The second count set out another bet between the same parties, upon the same horses, with a like unfortunate result for McDuffee, and like indifference to it on his part; the fifty dollars staked by him upon it having been paid over, by his direction, to Mr. Thurlow on the twelfth of October, 1872, five days after the second race, and he never making any effort to reclaim it; for which reason the plaintiff demanded treble that sum in this action, by virtue of R. S., c. 125, § 4. The defendant filed a brief statement, under the general issue, pleading that the suit was not brought within one year after the cause of action accrued, as required by R. S., c. 81, § 90. If the action was thus barred, the plaintiff was to become nonsuit, otherwise the cause was to stand for trial.

Record & Hutchinson, for the plaintiff.

Ellis v. *Beale*, 18 Maine, 337, decides that the statute under which this action is brought is remedial. The form is case. Therefore, it is only barred by the lapse of six years, as provided with relation to such actions. R. S., c. 81, § 79. This action was brought under R. S., c. 125, § 4; the third section of the same chapter, limiting the remedy by indictment to six months, shows that R. S., c. 81, § 90,—which gives the remedy by indictment within two years, if no individual has prosecuted within a year,—cannot apply to these cases. The third section of c. 125 gives half the sum recovered to the town, while by c. 81, § 90, the whole goes to the State. See *Frohock* v. *Pattee*, 38 Maine, 103.

Frye, Cotton & White, for the defendants.

The statute of limitations is properly given in evidence under the general issue. *Moore* v. *Smith*, 5 Maine, 490; *Pike* v. *Jenkins*, 12 N. H., 255; *Coburn* v. *Odell*, 30 N. H., 540.

Ellis v. *Beale*, 18 Maine, 337, simply says that this is a remedial statute to the loser; as to a third person it cannot be so, since he needs no remedy who suffers no ill. The same statute may be—and this one is—partly penal and partly remedial. Potter's Dwaris on Statutes, 247, note 36, and cases there cited. The last clause of the fourth section of this statute is purely penal, since it "imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited." Potter's Dwaris, 74, 75, (edition of 1871;) Bouv. Law Dict., Tit., "Penal;" *Plummer* v. *Gray*, 8 Gray, 243.

Barrows, J. The plaintiff sues to recover, by virtue of the provisions of the fourth section of chapter 125 of the Revised Statutes, one moiety to the use of himself, and the other for the city of Lewiston, treble the amount of certain moneys lost and paid by one John W. McDuffee to the defendant, in betting upon horse races.

The suit was not commenced until more than one year had elapsed after the last transaction alleged in the writ between the defendant and McDuffee occurred.

The defendant relies upon R. S., c. 81, § 90, which provides that "all actions and suits for any penalty or forfeiture on any penal statute brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year after the offence was committed." But the plaintiff insists that the penalty imposed upon the winning gambler is provided in the third section of chapter 125, and that the fourth section must be deemed remedial only, as otherwise the offender would be liable to be twice punished, contrary to fundamental law; and therefore, he claims that this action of the case given by § 4, is subject only to the six years' limitation provided in R. S., c. 81, § 79. We think otherwise. It is true, that part of the section which gives the loser an action to recover his money or goods was held in *Ellis* v. *Beale*, 18 Maine, 337, to be remedial; but the remaining portion which authorizes any person to prosecute the winner in a *qui tam* action

for treble the amount of his unlawful gains, in case the loser does not, within three months, avail himself of his right to retrieve his loss, is purely and distinctly penal; and such action comes directly within the purview of R. S., c. 81, § 90.

The plaintiff does not sue to compel payment of any debt due to himself, or for the redress of any wrong done to himself; but simply to enforce a pecuniary penalty against a wrongdoer, which must be done in the mode and time prescribed by the statute, or not at all. *Plaintiff nonsuit.*

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

CHARLES J. BISHOP *vs.* WILLIAM SMALL, Junior.

Deceit—for what misrepresentations it will not lie.

An action of deceit will not lie upon false representations either as to what a patent right cost the vendor; or was sold for by him; or as to offers made for it; or profits that could be derived from it; or for any mere expressions of opinion of any kind about the property sold.

ON EXCEPTIONS.

CASE for deceit on the sale of the right to make and vend a patented crank churn for the States of Kentucky and West Virginia, for which plaintiff and one Eaton paid the defendant $7000, being induced to do so by certain false and fraudulent representations made to them by Small, which are sufficiently stated in the opinion. The plaintiff offered to prove that he bought this right relying upon these statements, that other similar ones were made by the defendant, and that they were false; that he spent six weeks in Kentucky, in a vain effort to introduce the churn into use; that the churn and alleged invention were of no value, and that these representations were made by the defendant with intent to defraud and deceive the plaintiff; but the judge ruled that there

were not sufficient allegations in the writ, if all proved, to sustain the action, and ordered a nonsuit. The plaintiff excepted.

M. T. Ludden, for the plaintiff.

Frye, Cotton & White, for the defendant.

PETERS, J. The plaintiff seeks to recover damages for a deceit in the sale of a patent right. The representations of the defendant, relied upon, were substantially these:—that the patent right was a "good thing;" "of great utility and benefit, and popular;" that "it was in great demand, and that the defendant had been offered $40,000 for it, for the territory of Pennsylvania;" that he had "sold one quarter of the right for the territory of Pennsylvania, for $4000;" that "it had been rapidly sold, and he had sold interests in it as fast as he could travel on the road;" that "he had himself bought additional interests in it at great prices, and that he and others had made large sums of money in making sales of it;" that "the plaintiff could sell it upon the territory for which he was to have it, and, if he did not succeed, that he would go and sell it for him, and would assure him that he would make a large amount from the transaction." The plaintiff avers that the right was of no value; in no demand; and that it could not be sold, and that the defendant knew it to be so. He does not contend that the article has no efficiency as a churn; but contends that it has no superior advantages in those respects for which it was patented.

We are of the opinion that these representations are not actionable. When analyzed, they seem to consist of the opinion of the defendant as to the value of the property sold; or relate to the price that was given for it; or which had been offered for it; or prices at which it had been sold; or to the future profits that could be made out of it. All the representations complained of were merely loose, exaggerated, vague and indefinite recommendations which a vendor is likely to make of property of this description, which he is desirous to sell, and so plainly so, that a person in the use of ordinary care should not be deceived by them. *Caveat*

emptor applies. It is not so much that such representations are not enough to amount to fraud and imposition, but that they are, so to speak, too much for that purpose. Most of them are too preposterous to believe. None of them are representations of facts, affecting the quality of the article sold, known to the vendor, but unknown to the vendee, and such as a vendee using common care would be deceived by. They are only "dealer's talk." This is the well settled doctrine in this State and Massachusetts. *Long* v. *Woodman*, 58 Maine, 49; *Holbrook* v. *Conner*, 60 Maine, 578. And see the Massachusetts decisions cited and approved in these cases. So far as a contrary doctrine is held in the case of *Ives* v. *Carter*, 24 Conn., 403, it is not in accord with the cases cited. The late case of *Somers* v. *Richards*, 46 Vermont, 170, sustains the plaintiff's propositions in the case at bar, but it is clearly at variance with our own decisions. We think the rule adopted by us is the more reasonable and logical one. Any other must be uncertain and indefinite. The case of *Nowland* v. *Cain*, 3 Allen, 261, cited by the plaintiff, does not militate against the principle of the cases relied upon in support of our conclusion in this case, where the defendant falsely represented the qualities of a horse, when the plaintiff had no opportunity to ascertain the falsehood by any examination. That was not an expression of opinion, but of fact.

The statement of the defendant in this case, not alleged in the writ, but testified to, that he had "churned butter from the buttermilk that had been left by another churn," if it amounts to an actionable representation, or has any important bearing upon the rights of the parties, cannot be considered here. The declaration sets out specifically the fraudulent representations relied on, and this is not one of them. *Exceptions overruled.*

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

KINGSBURY DONNELL *vs.* INHABITANTS OF WEBSTER.

Tax.

Prior to the enactment of Public Laws of 1874, c. 178, hay was not exempt from taxation.

"Eighteen tons of hay, $540" is a sufficiently definite description of the property in the inventory to support the assessment of a tax thereon.

It is immaterial whether or not the other items of property, real and personal, for which the plaintiff was taxed were sufficiently described in the inventory, since he voluntarily paid the tax upon them.

ON EXCEPTIONS.

ASSUMPSIT to recover under a count for money had and received, ten dollars and eighty-five cents, declared in the plaintiff's specification of claim to be made up of $8.64 illegally assessed as a tax against him, and two dollars and twenty-one cents as the costs and charges of the officer collecting the tax, which was enforced by a seizure of personal property, and paid by Mr. Donnell under written protest. Before this suit was brought the collector had paid the $8.64 into the town treasury. The whole tax assessed against Mr. Donnell in that town was $63.77, upon this valuation; "one poll; 116 acres of land, $3000; one horse, $85; 2 cows, $70; one two year old, $25; 4 swine, $26; 7 sheep, $42; 18 tons of hay, $540." There was no further description of the property assessed. Mr. Donnell had voluntarily paid, prior to the seizure of his property, all the tax except this item of $8.64, which, it was admitted, was assessed upon the hay, which was pressed and stored in bundles upon the plaintiff's farm.

The case was submitted to the presiding justice with right to except. Judgment was ordered for the defendants, and the plaintiff excepted.

Frye, Cotton & White, for the plaintiff, contended that the tax was void on account of the uncertainty of the description of the

property assessed, and because the hay was exempt from taxation. When a man's farm is assessed, it is valued according to its producing powers; i. e., its capacity to produce hay and other such crops. For all taxable purposes, the harvests the land will yield are considered when the latter is listed, and to put a tax upon them again after they are gathered, is in effect, double taxation. The law of this year, Public Laws of 1874, c. 178, is simply declaratory, affirming what the law already was.

Morrill & Wing, for the defendants.

The plaintiff was a citizen of, and legally taxable in Webster, and if assessed there for more estate than was properly to be taxed to him in that town, his remedy was by appeal to the county commissioners. *Holton* v. *Bangor*, 23 Maine, 264; *Stickney* v. *Bangor*, 30 Maine, 404; *Gilpatrick* v. *Saco*, 57 Maine, 277; *Rogers* v. *Greenbush*, 58 Maine, 390. But the hay had become personal property before April 1, 1872, and was legally taxable that year. The costs ($2.21) never came to the hands of the town, so the defendants are not liable for that in any event. *Briggs* v. *Lewiston* 29 Maine, 472.

Walton, J. The plaintiff was rightfully taxed for the eighteen tons of pressed hay of which he was the owner on the first day of April, 1872. "Hay, grain and potatoes, orchard products and wool, owned by, and in possession of the producer," are now exempt from taxation. Act of 1874, c. 178. But hay was not exempt in 1872.

It is also objected that the assessment is void for uncertainty. We think the objection cannot be sustained. The amount and value of the hay are distinctly stated. We think that is enough. The balance of the tax having been paid without objection, and no claim being made in the writ to recover it back, it is unnecessary to inquire whether the description of the articles taxed is sufficient or not. *Exceptions overruled.*

Appleton, C. J., Dickerson, Barrows, Virgin and Peters, JJ., concurred.

ALEXANDER DUNN *vs.* CALVIN RECORD.

Attorney—in dealing with client must use utmost good faith.

An attorney who purchases of a client a claim which is the subject of litigation, in case the propriety of such purchase is questioned, is bound to show the perfect fairness, adequacy, and equity of the transaction.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL by the defendant.

ASSUMPSIT. The exceptions were to the allowance of an amendment. The writ originally contained a count upon an account annexed, and a general money count. The former consisted of a single item for cash received upon a judgment in favor of Mr. Dunn against the Grand Trunk Railway Company recovered at the April term, 1869, of the superior court, and interest thereon, $2,377.66; this was stricken out and a new account annexed, setting out this judgment more particularly, stating the debt, costs and interest separately, the aggregate amount ($2,377.66) remaining unchanged.

By the testimony it appeared that, upon the twenty-second day of July, 1868, Mr. Dunn was severely injured by the saloon car, attached to a freight train upon the Grand Trunk Railway, in which he was riding, being thrown from the track; that he applied to Mr. Record for advice, who, after some hesitation and consultation with T. H. Haskell, Esq., of Portland, concluded to undertake the case, and suit was brought for Mr. Dunn against the corporation, by writ dated December 28, 1868, entered in the superior court for Cumberland county at its February term, 1869, and tried at the ensuing April term, resulting in a verdict for the plaintiff of $1,800. The defendants took exceptions to the rulings of the justice of the superior court, relative to their defence, that Mr. Dunn was improperly riding upon a freight train; which exceptions were overruled—see 58 Maine, 187—June 5, 1871, and at that term of the superior court judgment was entered upon the verdict, the in

terest accrued to that date making the amount of damage $2,032.50 and the costs were $51.44, for which sums execution issued June 9, 1871. The writ was made and entered by Mr. Haskell who attended to the case in court up to the time of trial, when it was opened to the jury by him and closed by Mr. Record. Its trial did not occupy an entire day. It was argued before the law court by Mr. Haskell, who testified that the plaintiff came twice to his office about the case, while Mr. Dunn denied that he ever assented to the employment of any additional counsel by Mr. Record, and that he never knew of Mr. Haskell's engagement. While the cause was pending before the law court, to wit, on the nineteenth day of November, 1870, Mr. Record paid Dunn three hundred dollars, and took an assignment of the claim and action against the Grand Trunk Railway Company. The plaintiff denied the reception of this money and all knowledge of the assignment, though admitting the signature to be apparently his. The defendant said it was finally taken by him after much importunity by Mr. Dunn, who was going to Connecticut. Its execution was proved by a respectable gentleman of Auburn who had attested it as a witness. While testifying in his own behalf Mr. Record said, that at that time, he had an inkling of what the result of the company's exceptions was likely to be, and that the chief justice had drawn an opinion overruling them, but that the corporation's counsel, the late Hon. Phineas Barnes, had expressed a determination to obtain a review of the case and reversal of the judgment upon the facts, if the law was held against his clients; for this reason he told Mr. Dunn, who could not be made readily to understand technical terms and process, that the matter was still pending after the execution had been satisfied. A deputy of the sheriff for Cumberland county collected the execution, a few days after it issued, paid from its proceeds to Mr. Haskell his bill ($456.08) and the balance ($1,627.86) to Mr. Record. Subsequently to this, Mr. Record let Mr. Dunn have a hundred dollars at one time and eighty-three at another, which he claimed were merely gratuities, the execution and its proceeds being wholly his own.

One of the plantiff's counsel testified that, in a conversation with Mr. Record, prior to the bringing of the present action, that gentlemen told him he took the assignment for the protection of Mr. Dunn; the defendant denied having made this statement, but admitted he expressed his willingness to do right by Mr. Dunn.

The jury returned a verdict for the plantiff for $1,373.28, which the defendant moved to have set aside as against law and evidence, and clearly excessive in amount.

Enos T. Luce and *L. H. Hutchinson*, for the defendant.

Pulsifer, Bolster & Hosley, for the plaintiff.

PETERS, J. The amendment was allowable. It is argued that the amended count is upon a judgment. It is not. It is a count for money due to the plaintiff on account, and a judgment is merely referred to as the source from which the money sued for was derived.

The first question under the motion is, whether the assignment from the plaintiff to the defendant was valid or not. The plantiff denies that it was valid, because such a kind of claim is not legally assignable. *McGlinchy* v. *Hall*, 58 Maine, 152. The defendant contends that the assignment, as between the parties, would be effectual, after the money was collected upon the claim assigned. But aside from mere technicality, and upon the broader ground of justice and equity, we are very clear that this assignment cannot be upheld. The law is very watchful of the rights of a client, as between him and his attorney. It distrusts purchases by the one of the other. It requires an attorney to be satisfied with compensation, without seeking to obtain speculative bargains for his services. An attorney is not made incapable of purchasing property of his client, which is the subject of litigation. But he can take no advantage whatever from his confidential relation. He must impart to his client all the knowledge he has about the matter. Judge Story, (in Eq. Jurisprudence) says, (citing earlier authorities) that the burden is upon the purchaser, and not upon the client,

to establish the perfect fairness, adequacy, and equity of the transaction. Lord Brougham expresses it in this way: "in a word, standing in the relation he does to the other party, the proof lies upon him to show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting; and that nothing has happened which might not have happened, had no such connection subsisted." In *Gibson* v. *Jeyes*, 6 Vesey, 267, Lord Eldon says: "if the attorney will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given him against a third person." Tested by these rules, this assignment cannot for a moment stand. The parties stood upon an unequal footing. One is a learned, the other an ignorant man. The one could calculate the chances of success in the then pending suit, and (according to his impression) already had a favorable inkling about it, which he did not disclose; while the client was all in darkness about it. The consideration was an inadequate one, whether it was wise or not to pay it. The defendant did not act upon the assignment as equitably conclusive, but, according to his account of their transactions, paid money to the plaintiff afterwards. From this, as well as from the well known honorable character of the defendant, we have no doubt that he never intended to use the assignment as a finality between the plaintiff and himself, but uses it as a protection, as far as he can, against what he regards as an unfair and ungrateful attempt of the plaintiff to take from him a larger share of the proceeds of the suit than he is entitled to have.

But we are satisfied that the consideration paid for the assignment should be allowed to the defendant as money advanced. And we are satisfied that he did advance it. His own oath, corroborated by the writing itself, controls the other evidence, upon this point. The plaintiff's denial lacks frankness. Even if the defendant did not communicate to Mr. Bolster, in direct words, the fact that he had paid the plaintiff $300 for the demand, still, he relied

upon the assignment as valid, which was tantamount to it. While Mr. Bolster was seeking to get statements from the defendant, it is evident that the defendant was not, under the circumstances, disposed freely to make them. Under such circumstances, it was an easy thing for honorable gentlemen to misunderstand each other.

Then should the defendant be allowed the $183, which he claims to have paid? Whatever our belief and predilection about it may be, a jury could not be regarded as in error, by believing that the evidence, upon these items, preponderated the other way. The burden is upon the defendant to prove them. He has no receipt, or charge upon book account, or any thing but his oath to support a charge denied by the oath of the other side. His loss of these sums may be imputable only to his own neglect to take the proper evidence that he paid them. What the minor item was, paid for a tax, does not appear.

The sum recovered against the railroad company was $2,083.94, as of June 5, 1871. Deducting Haskell's charges and the $300, and reckoning an interest account, and it will appear that the jury allowed (as near as may be) the sum of one hundred and fifty dollars for the defendant's professional services. While if the matter was left to us, we might allow more than that sum for all the defendant's risks and services, still we cannot regard the result arrived at by the jury as one that should be superseded. It must be borne in mind, that the whole costs of counsel in that suit was a little short of $600. It is not perceived that it was necessary to have two counsellors in the case; at all events, at an expense so extraordinary. The case itself, although important, was yet a simple one. It required no extensive preparation. It was tried in less time than a day. The plaintiff was the only witness for himself, outside of the medical witnesses, and they were produced in court by the other side. It would not be strange, if the jury in this case regarded the defendant responsible for some degree of laches in the management of the other suit, for the expenses consequent upon it. *Exceptions and motion overruled.*

Appleton, C. J., Dickerson, Barrows and Virgin, JJ., concurred.

AUGUSTUS M. PULSIFER *vs.* AUGUSTUS C. CROWELL.

Evidence. Practice.

A witness cannot corroborate his statements upon the stand by proof of other statements made by him elsewhere, although contained in a letter written about matters affecting the party in the suit against whom he has testified.

ON EXCEPTIONS.

ASSUMPSIT upon a note of this tenor:

"WATERVILLE, June 14, 1870.

Two years after date I promise to pay to the order of A. M. Capen, fourteen hundred and nineteen dollars, at Ticonic National Bank, value received, with interest *at the rate of two and half per cent each month after due until paid.*

A. C. CROWELL."

The issue of fact was whether or not the clause italicized above had been inserted after the delivery of the note to the payee, and without the maker's consent; the latter affirming that it was so added and the former denying it. Mr. Plaisted, the cashier of the Ticonic National Bank, called by the plaintiff, testified that he received from Mr. Capen, in July, 1870, these two letters:

"WATERVILLE, July 5, 1870.

A. M. CAPEN: I send you to-day eighty dozen socks by Eastern express. Please return my note by mail. I have a chance to sell all the stockings I take this fall on three and four months. If you like, you can return the other note you hold against me for socks by express, and I will give you a cash note payable in three months. Respectfully, A. C. CROWELL."

"NEW YORK, July 7, 1870.

Mr. A. PLAISTED,—Dear Sir: I enclose you some notes to collect against A. C. Crowell, which please do, and remit me, less your charges and commissions. The one at thirty days you may

deliver to Mr. Crowell, on his paying you $7.20, being the amount of express charges which I had to pay on the eighty dozen stockings I have just now received from him. The note at sixty days, as you see, he says he prefers to give a three months' note for, and to this I accede, if he means three months from June 14, which I presume he does; and you may take such a note, and give him his sixty day note in exchange, but please insert in the note you take the two and one-half per cent. penalty clause which you will observe in the others. I guess he will pay me this time. I have had trouble enough and much expense with him.

A. M. CAPEN."

This second letter was excluded by the presiding judge, upon defendant's objection, and the plaintiff excepted, the verdict being against him. He also filed a motion for a new trial, but no question of law arose under it.

Pulsifer, *Bolster & Hosley*, for the plaintiff.

It is in proof that four other notes were given to Mr. Capen by Mr. Crowell at the same time and place as the one in suit; two of them being for $390 each, payable in socks in thirty and sixty days at the Ticonic National Bank. The bank, then, was the place of delivery of the socks. Before the earlier note matured, or reached the bank, Crowell sent the socks to New York by express, to pay it, requesting Mr. Capen, by the foregoing letter, to return the note by mail, and, if he chose, to exchange the second one for a cash note. In furtherance of this arrangement, Mr. Capen sent these letters to Mr. Plaisted, the cashier, who swears he always observes the directions of those doing business at the bank, as to the disposition of notes left for collection, though he has no particular recollection what was done in the present instance, except that he did take a new note of Mr. Crowell for that drawn on sixty days. The defendant refused to comply with our notice to produce all the notes given by him to Mr. Capen. The cashier said that the note in renewal of the sixty days' note was in Crowell's own handwriting, and was taken up by him at

maturity, at the bank. Evidently, then, this last note was made in conformity with the instructions contained in this letter to Mr. Plaisted, which must, therefore, have been communicated to Mr. Crowell, and was thus rendered admissible. It was part of the *res gestæ*, peculiar to this case.

E. F. Webb, and *Frye, Cotton & White*, for the defendant.

PETERS, J. One question in this case was, whether a "penalty clause" in the note in suit was inserted without the maker's assent after the note was given. The defendant swore that he never signed this or any other note with such a clause in it. The payee of the note, who is the real but not the nominal plaintiff, swore that the defendant did execute this note with the clause in it, and that he had also executed other notes to him written in the same way. To corroborate himself, the plaintiff offered in evidence a letter written by him to a bank cashier, containing notes against the defendant to collect. The pith of the letter, which he seeks to introduce, is a statement of his own tending to show the existence of notes (other than the one in suit,) with the controverted clause in them. The letter was properly excluded. Its admission would have allowed the witness to corroborate his statement on the stand by his own statements made elsewhere. It could have had no other effect. It was no part of any *res gestæ*, by which the defendant could be affected; but was as to him *res inter alios acta*, and had no legitimate bearing upon the issue involved. *Commonwealth* v. *Harper*, 7 Allen, 539.

We do not feel called upon to set the verdict aside as against the evidence. The jury believed the defendant, and we cannot say that this conclusion was clearly erroneous.

Exceptions and motion overruled.

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

FRANCIS A. SAWYER *vs.* CHARLES E. GARCELON.

Record of judicial proceedings—how put in evidence. Practice.

Where the record of former judicial proceedings (in the same court) is admissible, the party desiring to introduce it may put in either the original record itself or a certified copy of it, at his option.

If the original record is introduced, it need not be taken to the jury room.

It is discretionary with the court at *nisi prius* to say whether or not the jury shall be permitted to take to their room papers used in evidence upon the trial; and the exercise of this discretion will not be revised by the court *in banc*, unless it is clear that some injustice has thereby been done.

ON EXCEPTIONS.

TRESPASS DE BONIS. To establish her title to the property in question, which had been attached by the defendant, as an officer, upon a writ against the plaintiff's husband, Mrs. Sawyer was called as a witness in her own behalf. To affect her credibility, the defendant then offered to read in evidence the record of her conviction of and sentence for larceny, upon a plea of guilty, at the September term of this court for this county. The justice presiding at the trial said he should not let the book of original records go to the jury without the consent of the clerk, which the latter declined to give; and, thereupon, the judge refused to allow the original record to be read to the jury, and the defendant excepted.

C. Record and *J. D. Stetson*, for the defendant.

A. D. Cornish and *H. C. Wentworth*, for the plaintiff.

PETERS, J. We are of the opinion that the record offered in evidence should have been received. There can be no question of its competency. Strictly speaking, it is the best, and only original, evidence of the facts recited in it. A verified copy of the record, though admissible, is still only secondary evidence. Anciently, the record itself was offered when the cause requiring it

was in the same court where the record was; and an exemplification of it was used when the cause was pending elsewhere. Now however, in most, if not all of the courts in this country, copies of the record properly authenticated, are received as sufficient in all cases; a practice said to be established either by immemorial usage or early statutes to that effect. *Knox* v. *Silloway*, 10 Maine, 201; *Vose* v. *Manly*, 19 Maine, 331; *Brooks* v. *Daniels*, 22 Pick., 498; *Day* v. *Moore*, 13 Gray, 522; *Ladd* v. *Blunt*, 4 Mass., 402; *Commonwealth* v. *Phillips*, 11 Pick., 28; and see 1 Greenl. on Ev., § 501, and notes. So that in this case the defendant was entitled to put in evidence either the record itself or a copy of it, at his option.

The judge presiding, however, excluded the original record, upon the supposition, that if admitted it must go to the jury room with the papers of the case. This, we think, was erroneous. It was not necessary that the jury should have it. They could get no aid from an inspection of it if in their possession. The construction of it was for the court. Where a domestic record is put in issue it is to be tried by the court, notwithstanding it is a question of fact. If a foreign judgment, the issue is to be tried by a jury. The reason is, that the court, in case of a domestic judgment, can have an inspection of the record itself, but if it is a foreign judgment it can only be proved by a copy, the veracity of which is a question of fact for the jury. *Hall* v. *Williams*, 6 Pick., 232; Greenl. on Ev., and notes, before cited.

Furthermore, it is inevitably, to some extent, a question of discretion with the court, whether papers used at a trial, shall be taken to the jury room or not. It not infrequently happens that it is imprudent, if not impossible for a jury to have papers and parcels used in evidence before them. Original volumes from the registry of deeds are often received as evidence in our courts; so too are dockets of our clerks; but neither of these would ordinarily go to the jury room. Some portions of documents are oftentimes admissible in evidence, when it might be extremely prejudicial to one party or the other, to have the remainder examined or seen. In

such, and in many other cases, the court at *nisi prius* would undoubtedly have a discretionary power, to be of course cautiously exercised, to give such direction, as to the admission of such materials into the jury room as might seem best; and the whole court would not be required to revise the decision of a single judge in regulation of such matters, unless it was clear that some injustice had thereby been done. *Commonwealth* v. *Haley*, 13 Allen, 587; *O'Reilly* v. *Duffy*, 105 Mass., 243; *Commonwealth* v. *Hatfield*, 107 Mass., 227. *Exceptions sustained.*

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

INHABITANTS OF WEBSTER, Appellants,

vs.

THE COUNTY COMMISSIONERS.

Action. Statute, effect and construction of. R. S., c. 1, § 3.

The word "actions" in R. S., c. 1, § 3, last clause—saving pending actions from the effect of statutes—does not include petitions for the location of highways pending before county commissioners; so that an appeal from their action upon such a petition, pending at the time a law is passed changing the time within which it is to be taken, must be dismissed.

ON EXCEPTIONS.

APPEAL from the decision of the county commissioners granting the petition of O. D. Potter and others for the location of a county way across the town of Webster. The commissioners filed their return with their clerk at their October term, 1870, and the case continued to their next regular term, and thence continued from term to term, on account of the pendency of petitions for increase of damages till the October term, 1872; at which term, to wit on the fifth day of March, 1873, the proceedings were closed and recorded. Thereupon the plaintiffs took this appeal which was entered at the April term, 1873, of this court for this county,

answered to by the attorney of the original petitioners and continued to the September term, 1873. Upon the thirteenth day of this last named term, the attorney of said petitioners moved to dismiss the appeal and that the judgment of the county commissioners be affirmed, upon the ground that the appeal was not entered at the term of this court next after the return of the county commissioners had been placed on file, as required by Public Laws of 1873, c. 91, in force when said appeal was taken and entered, approved January 29, 1873.

The original petitioners excepted to the denial of this motion.

R. Dresser, for the original petitioners for the way.

The right of appeal was limited and inchoate, and could be taken away—as it was—at any time by the legislature at its pleasure.

This was not an "action" within the legal definition of that term, or the meaning of R. S., c. 1, § 3, so as to be saved by the last clause of that section. 1 Bouv. Law Dict., 15.

The consequences of a palpably correct determination of the law, this court will not consider. *Coffin* v. *Rich*, 45 Maine, 507.

Frye, Cotton & White, for the appellants.

VIRGIN, J. By R. S., c. 18, § 4, county commissioners are required, after laying out a highway, to "make a correct return of their doings." By § 5, "their return, made at their next regular session after the hearing, is to be placed on file, and to remain in the custody of their clerk for inspection without record" in order that any land-owner aggrieved by the commissioners' estimate of damages may seek the statute redress. If no such redress is sought, on or before their next regular term, the proceedings are to be closed and "recorded." But by § 6, if an increase of damages is sought within the time mentioned, the case is to be continued until a final decision respecting damages is made; and then if the commissioners do not discontinue the location because of excessive damages, but determine that the location shall take effect

subject to the damages assessed, their "whole proceedings are to be recorded."

By § 37, parties interested may appeal from the decision of the commissioners in locating a highway, provided the appeal be taken "at any time after it (i. e., the return of the commissioners) has been entered of record, and before the next term of the supreme judicial court in said county."

Such were the provisions regulating the time for taking an appeal until January 29, 1873, when § 37 was amended by striking out the words "it has been entered of record," and substituting therefor the words "their return has been placed on file." Pub. Laws of 1873, c. 91. So that in cases commenced after January 29, 1873, at least, appeals must be taken at any time after the return of the commissioners has been placed on file and not after it has been recorded, &c.

In the case at bar, the return of the commissioners was seasonably made and "placed on file" with their clerk, to wit, at their October term, 1870. At any time after said October term and before the January term, 1871, of the supreme judicial court, parties interested might have appealed, had the provisions of the act of 1873 been then in force. But they were not. On the contrary as the statute then stood, no appeal could be taken until sometime after the "return was recorded," to wit, March, 1873, and before the April term, 1873, of the supreme judicial court. And when that time arrived the statute allowing an appeal then had been repealed and an appeal was allowable only at a time which had long before elapsed.

The repealing statute was unconditional in its terms, containing no saving clause. This remedy of the appellants was taken away, therefore, unless the case comes within the provisions of the last clause in R. S., c. 1, § 3, which provides that "actions pending at the time of the passage or repeal of an act, shall not be affected thereby."

Is a petition for the location of a highway, pending before a board of county commissioners, an "action" pending, within this statute?

A "right of action" has been defined in the Roman law as *jus persequendi in judicio sibi debetur.*" Coke declared that "an action is a legal demand of a man's right." And the action itself has been long considered to be the prescribed mode of enforcing a right in the proper tribunal.

The pending petition is denominated a "case" in § 6. But by R. S., c. 81, § 2, "all civil actions except *scire facias* and other special writs, shall be commenced by original writs," &c.; thus confining actions to courts of law.

We think, therefore, that the word "actions" in c. 1, § 3, does not include petitions pending before the board of county commissioners, for the location of highways; and that the right of appeal was taken away from these appellants by the change of the statute above mentioned. This may prove somewhat of a hardship upon them; but the responsibility is not upon us; and neither can we aid in making shipwreck of the law because of the hardship. Were the question one of damages instead of location, a more serious question might perhaps arise.

The change in the statute cannot simply have a prospective operation like some new positive enactment, for the change consists in a repeal of one provision and the substitution of another.

Exceptions sustained.
Appeal dismissed.

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

JAMES MCGLINCHY *vs.* HIRAM WINCHELL and trustee.

Trustee not chargeable for monies due under an illegal contract.

Where the only claim the principal defendant has against the supposed trustee is for the price of intoxicating liquors purchased in Massachusetts for the purposes of illegal sale in this State, the trustee will be discharged.

ON EXCEPTIONS.

ASSUMPSIT for money had and received. No service was made on the principal defendant who is a resident of Boston, Mass. Patrick Tobin, the alleged trustee, disclosed that his only indebtment to Mr. Winchell was for liquors purchased in Boston and intended for illegal sale in this State. Having been charged upon this disclosure, he excepted.

M. P. Frank, for the trustee.

A. A. Strout, for the plaintiff.

WALTON, J. The question is whether one is chargeable as trustee for the price of intoxicating liquors purchased out of the State with intent to sell the same in violation of law within the State. We think not. In this State a claim for intoxicating liquors, purchased with intent to sell the same in violation of law, cannot be enforced. Such a claim creates no debt, no legal liability, which the law will enforce. It matters not that the liquors are purchased out of the State. If purchased with intent to sell the same in violation of law within the State, an action for their price cannot be here maintained. R. S., c. 27, § 50; *Meservey* v. *Gray*, 55 Maine, 540. To allow a trustee suit to succeed would be an evasion of the statute. What the seller could not collect in his own name he could easily collect in the name of some friendly creditor. This the law will not allow. *Exceptions sustained.*

Trustee discharged.

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

DANIEL F. EMERY *vs.* JOSEPH HOBSON.

Check. Demand and notice.

A check is an appropriation of so much of the maker's funds in the bank upon which it is drawn as is necessary to meet it; hence the maker cannot object to any delay in presenting it, unless he can show special injury to himself arising therefrom.

If the maker has withdrawn from the bank his entire deposit against which the check is drawn, he is not injured by any delay in presenting it, or any lack of formal notice of its non-payment, before action brought.

ON EXCEPTIONS.

ASSUMPSIT upon a count for money had and received under which the plaintiff offered the defendant's check for $6000, dated June 11, 1870, payable to F. O. L. Hobson and by him endorsed. It was not presented to the bank upon which it was drawn until the fourteenth day of July, 1871, and upon the sixth day of that month the defendant had wholly withdrawn his deposit. The plaintiff testified to sending a letter to Mr. Hobson on the fourteenth of July, 1871, stating the presentation of the check at the bank and that payment was refused. No notice to produce this letter had been given. The case was submitted to the presiding justice, who found for the plaintiff, and the defendant excepted to his ruling that the delay of presentment did not release the defendant, and to the admission of testimony to show the contents of the plaintiff's letter, and of testimony to show that the defendant desired the delay in the presentment of the check, and that it was intended for a loan.

Edwin B. Smith, for the defendant, contended *inter alia* that no evidence outside the check was admissible to vary its legal effect. *Kelley* v. *Brown*, 5 Gray, 108; *Bigelow* v. *Colton*, 13 Gray, 309; *Clapp* v. *Rice*, Id., 403; *Bank of Albion* v. *Smith*, 27 Barb., (N. Y.) 489; *Central Bank* v. *Davis*, 19 Pick., 373; *McDonald* v. *Bailey*, 14 Maine, 101; *Farmer* v. *Rand*, Id., 225, 284.

William L. Putnam, for the plaintiff.

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Hobson was bound to keep funds in the bank. He had none after July 6, 1871. Not having any funds, no presentment was essential, and he suffered no injury from the delay in presentment.

Therefore the testimony outside of the check, as to the purpose of the parties relative to it, was immaterial, even if it was improperly admitted. *Exceptions overruled.*

DANIEL F. EMERY *vs.* JOSEPH HOBSON.

Unstamped receipt admitted in evidence.

An instrument not stamped as required by the acts of congress of the United States is properly admissible in evidence at a trial before the courts of this State, where the maker testifies that the stamp was omitted without any fraudulent intent on his part.

ON EXCEPTIONS.

ASSUMPSIT. The declaration contained only the count for money had and received. Under it the plaintiff offered in evidence a receipt for $1,321.77, dated October 3, 1870, signed by the defendant, to the admission of which the defendant objected, because it was not stamped, as required by the laws of the United States; but Mr. Hobson, being called by the plaintiff, testified that the omission of the stamp was without any fraudulent intent on his part, and the court then received the paper in evidence, overruling the defendant's objection, to which he excepted.

Edwin B. Smith, for the defendant.

The question in this case is not whether or not the instrument is valid, but whether it was properly received in evidence without being stamped. A deed may be perfectly valid to convey an estate, and yet not receivable in evidence until its execution is proved by the subscribing witness. The act passed at the first

session of the thirty-ninth congress, c. 184, approved July 13, 1866, § 9, (first section so numbered; this act having two sections bearing that number) found in 14 U. S. Stats. at Large, pp. 143, 144, in force when this cause was tried, so far as the point here raised is concerned, provides, "That hereafter no deed, instrument, document, writing or paper, required by law to be stamped, and which has been signed or issued without being duly stamped, or with a deficient stamp, or any copy thereof, shall be recorded, or used as evidence in any court, until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law."

Subsequent legislation diminished the fine for not affixing a stamp, but did not change this part of the section. And the latest act passed by the forty-second congress, c. 315, § 36, and approved June 6, 1872, found in 17 U. S. Stats. at Large, 257, repealing the laws requiring stamps almost *in toto*, did not modify this language, nor contemplate that unstamped instruments, made while stamps were required, should be received but did provide for their being stamped under the authority of a government official. Not only must a stamp be affixed, but its affixion must be in the manner "prescribed by law" to render the paper admissible.

This court has never, in any reported opinion, expressed itself as to whether or not these provisions of the U. S. Statutes will be held applicable as rules of evidence in the State courts of Maine. In *Angier* v. *Smalley*, 58 Maine, 426, there is an express waiver of this point, as the case did not require its determination, but reference is made to *Carpenter* v. *Snelling*, 97 Mass., 452, where it is held that they are not binding upon the State courts. The logical result of this last case was that the same court were obliged also to say that the provision as to recording unstamped instruments only applied to records kept by federal officials. *Moore* v. *Quirk*, 105 Mass., 49, 53. The courts of many other States have taken similar positions; but, in every instance that has come to our attention, have briefly announced this result, without entering into any discussion of the question; while those holding the con-

trary doctrine, recognizing the supremacy of the acts of congress, and their applicability to all the courts of the country, are founded in better reason, and have resulted from a more thorough investigation. See especially the able opinion of the supreme court of Pennsylvania (per Agnew, J.) in *Chartiers* v. *McNamara*, 72 Penn. St. R., 278; *Cole* v. *Bell*, 48 Barb., 104; *Howe* v. *Carpenter*, 53 Barb., 382; *Miller* v. *Larmon*, 38 Howard's Prac. Rep., 417; *Hugus* v. *Strickler*, 19 Iowa, 413; *Botkins* v. *Spurgeon*, 20 Iowa, 598; *Byington* v. *Oak*, 32 Iowa, 488; *Mobile* v. *Edwards*, 46 Ala., 267; *Conie* v. *Billiu*, 23 La. Ann., 250.

First. Did congress intend this clause to apply to the State courts?

Second. Could it constitutionally carry such intention into effect?

The answer to both these inquiries must be found, it is true, in the act itself and in the constitution; but both are to be examined with the light of history, and a consideration of the object intended to be accomplished and the circumstances attending these efforts. We may construe any act by its declared purpose and our knowledge of the exigency out of which it arose. Its object is declared in the title, (which it is proper to notice; Dwarris on Stats., 501; *Rex* v. *Greenop*, 3 T. R., 133; *U. S.* v. *Fisher*, 2 Cranch, 386; *U. S.* v. *Palmer*, 3 Wheat, 610.) "To provide internal revenue to support the government, to pay interest on the public debt, and for other purposes." This was the intention of congress; its "acts" must be so construed as to carry it out. Sedgwick on Stats. and Const. Law, 229, *et seq*; Cooley's Const. Lim., 55, *et seq*; *Minor* v. *Mechanics' Bank*, 1 Peters, 64; *Winslow* v. *Kimball*, 25 Maine, 493; and authorities *passim*.

Two inquiries arise. First, what is the object to be attained? Second, what are the means to be employed? Sedgwick on Stats. and Const. Law, 228, 229, &c. If we must seek to discover the legislative design, in order to accomplish it, it would be a gross dereliction of duty to thwart it, if known. *The Emily & Caroline*, 9 Wheat., 381; *U. S.* v. *Wiltberger*, 5 Wheat., 95; *Cook* v.

Hamilton Co., 6 McLean, 112; *State* v. *Stinson*, 17 Maine, 157. But it must be so taken as most beneficially to effectuate its purpose. 1 Bl. Com., 88; 1 Bacon's Ab., 7-9; *Cumming* v. *Fryer*, 1 Dudley, (Geo.) 182.

The particular clause under consideration was intended to prevent frauds upon the revenue, and should be so construed as to best effectuate that laudable purpose, taking the words in their ordinary sense. Opinion, 7 Mass., 524; *Maillard* v. *Lawrence*, 16 Howard, 251; *U. S.* v. *Bassett*, 2 Story, 389. So as to do substantial justice. *Russell* v. *Smyth*, 9 Mees. & Wels., 818. Or, as the supreme court of the United States say: A strict construction "is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend." *U. S.* v. *Wiltberger*, 5 Wheat., 95; *Faw* v. *Marsteller*, 2 Cranch, 24; *U. S.* v. *Coombs*, 12 Peters, 72, 80, &c.

The declared purpose here was to raise revenue to support the government, and to pay interest on its debt, &c. The emergency which called it forth the court cannot fail to notice. *Preston* v. *Browder*, 1 Wheat., 115; *Aldridge* v. *Williams*, 3 Howard, 24. This desired end could be best accomplished—even if attainable at all in any other way—by attaching invalidity everywhere to an unstamped instrument. That such was the design is demonstrable by reference to other parts of the act—making it "its own best expositor." *Pennington* v. *Coxe*, 2 Cranch, 33, 55.

It has been assumed by the courts of Massachusetts, and of other States making similar decisions, as a reason for their construction of this act, that congress would not attempt to pass any law that would affect proceedings by State tribunals or State officials; thus arguing from presumptions of comity and considerations of political relations against the express language of the statute itself. But in Maine, Massachusetts, and probably every other State, probate courts, by whatever name known, are courts of record, with a judge or surrogate, register or clerk, and having a seal by which it authenticates its records and documents issued by its authority.

As to matters within their jurisdiction, these courts are entitled to all the respect and consideration due to any tribunal. The writs and processes issued by other courts are no more exempted from national taxation than those that bear the sanction of probate courts. These latter issue "letters of administration." R. S., c. 63, § 4. Yet these very documents, which issue as completed instruments, and to accomplish a special purpose for the particular estates to which they relate—instead of being signed in blank and purchased in quantity, as writs are—are expressly charged with a stamp duty by the first of the series of tax acts, and continued in every succeeding enactment, 12 Stats. at Large, 483; 13 Stats. at Large, 300; 14 Stats. at Large, 475.

The administrators and executors, charged by these courts with the official duty of caring and accounting for the estates entrusted to them, of whose position and relation to the court the documents above referred to are the evidence and constitute their commissions, are as much the officers of that court, in performing the functions by it devolved upon them, as any recording officer is a State official; hence, a sale by one of these trustees, under license of court, or *virtute officii*, are held to be judicial sales. *Bashore* v. *Whisler*, 3 Watts, 492; *Williamson* v. *Berry*, 8 Howard, 547. Yet this stamp act compels these officers of a State court, acting (as it says) in their "fiduciary capacity" to the performance of certain duties, to aid in carrying out the general purposes of the act; i. e., the full equal and prompt collection of the taxes imposed. 12 U. S. Stats. at Large, 475, 485-487. The constitution of Maine, art. 6, § 5, provides for the appointment of notaries public, among the judicial officers of the State; whose unsworn statement, authenticated by his seal, is admitted in evidence, because it is the record of official action. R. S., c. 32. Yet a tax is imposed upon every protest "whether protested by a notary public or by any other officer, who may be authorized by the law of any State or States to make such protest. It dictates to the State official directly that he shall place a stamp upon a paper issued by him in his official capacity.

A negative argument can be drawn from other clauses of the statute. The exemption from tax of the certificate of the record of a deed, and (by the amendatory act of 1866, c. 184, § 9) of certain documents issued by State, county and municipal authorities, implies the power to impose one. In view of these provisions it is absurd to say congress did not intend the law to be regarded in all courts. Any other construction leads to infinite mischief, injustice and hardship. One holding a note against a fellow citizen of the same State can sue and recover upon an unstamped note; if they reside in different States the defendant can defeat the action by a transfer to the federal court. Success or failure does not depend on the laws of the land but on different rulings of tribunals sitting, perhaps, within a few rods of each other; and this in relation to commercial paper, in regard to which Lord Mansfield and Judge Story adopt the language of Cicero; "*non erit alia lex Romæ alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*" *Luke* v. *Lyde*, 2 Burrows, 883; *Swift* v. *Tyson*, 16 Peters, 19.

As Judge Agnew says in *Chartiers* v. *McNamara*, 72 Penn. St. R., 282: "We come now to the question of power, if indeed there can be any question in a matter so plain." The grounds for an affirmative answer are well stated in that case. Congress is authorized "to lay and collect taxes," &c., ... that "shall be uniform throughout the United States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c. U. S. Const., art. 1, § 8, clauses 1 and 18.

"The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object." Per Marshall, C. J., in *U. S.* v. *Fisher*, 2 Cranch, 396. It is not confined to those of absolute necessity. *M'Culloch* v. *Maryland*, 4 Wheat., 316. In *Osborn* v. *U. S. Bank*, 9 Wheat., 895–6. Johnson, J., said: "I will not undertake to define the limits within which the discretion of the legislature of the union may range, in the adoption of measures for executing their constitutional powers." It is very possible that in the choice

of means to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, *in order to collect a stamp duty, they have exercised a power over the general law of contracts*: . . . and all this, being within the range of their discretion, is aloof from judicial control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the States can, where they will, control the legislature of the United States."

This control over the general law of contracts within the United States, by whatsoever tribunal administered, was assumed by congress at an early period of our national existence. The thirteenth section of the act approved July 6, 1797, contains a provision identical with the one under consideration. 1 U. S. Stats. at Large, 527. See the several statutes upon this subject enumerated in note *a* upon this page.

It was not assumed, however, for the purpose of affecting contracts, as the end sought, but only as an incident in the accomplishment of the design, authorized by the constitution, of providing revenue for public exigencies. As Judge Agnew remarks, this "is not a rule for the regulation of evidence, but is a disqualification attached to the document, &c., . . . a provision to enforce the payment of the tax of the most necessary kind, and binding on all courts," &c. *Chartier* v. *McNamara*, cited *ante*.

This has been adopted in England as the most efficient method of collecting revenue, and compelling compliance with the law, the objection of the want of a stamp being properly raised so soon as the instrument is offered in evidence. 1 Chitty on Pl., 304; *Fields* v. *Wood*, 7 A. & E., 114; *Campbell* v. *Wilcox*, 10 Wallace, 423.

The subject matter being one on which congress can legislate, it may use all necessary and proper means to enforce obedience, as well on the part of States and their officials, as by private individuals. The rules of evidence, as administered by the State courts, are but the law of the State, as its statutes are; and if they conflict

with proper federal legislation both must equally yield. The courts of a State, indirectly representing its people, are entitled to no more regard than its legislature directly chosen by the people. It is "the laws of a government declared to be supreme" operating upon "those of a government which, when in opposition to those laws, is not supreme." *McCulloch* v. *Maryland*, 4 Wheat., 436; *Cohens* v. *Viginia*, 6 Wheat., 264, 414, 416, *et seq.* It is only requisite that the means be "*bona fide*, appropriate to the end." 2 Story on Const., 142, § 1253. In which case, the franchises of the State may be taxed out of existence. *Veazie Bank* v. *Fenno*, 8 Wallace, 548.

To secure debts due the United States, the order of the distribution laws of the States are disturbed. *U. S.* v. *Fisher*, 2 Cranch., 358. A special tax is imposed upon business carried on in Maine, under direct authority of the State. R. S., c. 27. *Licence tax cases*, 5 Wallace, 462, 476, *et seq.*

As a regulation of commerce, it requires the record of conveyances of vessels in a different place from that specified under State laws. *Gibbons* v. *Ogden*, 9 Wheat., 3; *Steamship Company* v. *Portwardens*, 6 Wallace, 31; *Sinnott* v. *Davenport*, 22 Howard, 242; and holds the mortgage so recorded, but not where our laws require, good against everybody. *Blanchard* v. *Martha Washington*, 1 Clifford, 463; *White's Bank* v. *Smith*, 7 Wallace, 646; *Aldrich* v. *Ætna Ins. Co.*, 8 Wallace, 491. The decision of the State court, that it could properly receive such document only when recorded conformably to its laws, was overruled. Under its prerogative "to establish post offices," &c., congress imposes penalties on mail robbers, thefts of letters, deposit of obscene matter in the mails, &c.

The sum of it all is, then, that an act of congress is not unconstitutional if passed in the exercise of powers delegated by the people to the federal legislature; i. e., to accomplish an end which that body has a right to seek, provided the means be used in good faith, and be appropriate to the end; even though the effect—not the purpose—of the statute be to change or abrogate the written

or unwritten code of a State, or the rules and course of procedure of its courts, whether relating to the admission of evidence or to some other subject. *Hepburn* v. *Griswold*, 8 Wallace, 603, 614, *et seq.*; 2 Story on Const., §§ 1236 to 1259.

The only reply attempted is that, if the power to tax State processes be conceded, it may be so exercised as to destroy the instrumentalities of the State governments; that they may be taxed out of existence. *Warren* v. *Paul*, 22 Ind., 279; *Jones* v. *Keep*, 19 Wisc., 369; *Fifield* v. *Close*, 15 Mich., 509; Cooley's Const. Lim., 483, *et seq.*, *notisque*. A resort to any such measures would be evidently neither necessary nor proper, nor "*bona fide* and appropriate to the end;" and hence not warranted by the constitution. Judge Story fully answered this argument from inconvenience, forty years ago, in reply to the claims of those strict constructionists who would so tie up the powers and resources of the government as to leave it helpless, at the mercy of its enemies. See Story on the Constitution, §§ 425 *et seq.* and 939 *et seq.*

The congress of the United States, representing all the people, who can change its composition and send members reflecting their views at any time, must be trusted not to destroy the State governments. As to them, it is, measurably, "a case of confidence." *M'Culloch* v. *Maryland*, 4 Wheat., 431.

The supreme court of the United States, without deciding the point here raised, have given an intimation of opinion in *Pugh* v. *McCormick*, 14 Wallace, 361; and *Campbell* v. *Wilcox* does not even intimate that an unstamped note should be received in evidence.

III. This case is not even brought within the exceptions of the act in force when it was executed. It does not appear that the omission to stamp was unintentional on the part of Mr. Emery, who was as much bound to see that it was stamped as Mr. Hobson was; and, as he did not show the contrary, the fair presumption is that he did intentionally omit to have the stamp affixed. So held in *Howe* v. *Carpenter*, 53 Barb., 382.

Every man is presumed to intend the natural—not to say, the inevitable—consequence of his acts.

A failure to stamp an instrument, in the haste of making, may be accidental; but to keep it for years, entirely ignoring the stamp-law and the provisions for remedying an omission, to put it in suit and in evidence without stamping it; evinces clearly the plaintiff's purpose that the United States shall not be paid the tax by its laws imposed on this document. Though Joseph Hobson might have no intention to defraud the revenue, it does not follow that Mr. Emery has no such intention, since the contrary is the inevitable result of his acts.

William L. Putnam, for the plaintiff.

An omission to stamp, being without fraudulent intent, has been decided, both in this State and in the U. S. Supreme Court, not to impair the validity of an instrument. *Campbell* v. *Wilcox*, 10 Wallace, 421.

The provision of the U. S. Statute that unstamped instruments shall not be used as evidence in any court has been restricted to U. S. Courts, in Massachusetts and many other States. *Carpenter* v. *Snelling*, 97 Mass., 452; *Green* v. *Holway*, 101 Mass., 243, and cases there cited; *Clemens* v. *Conrad*, 19 Mich., 170; *Griffin* v. *Rumery*, 35 Conn., 239; *People* v. *Gates*, 43 N. Y., 40; *Spooner* v. *Gifler*, 1 Heisk., 633; *Davis* v. *Richardson*, 45 Miss., 499; *Bumpa* v. *Taggart*, 26 Ark., 398; *Duffey* v. *Hobson*, 40 Cal., 240; *Daily* v. *Coker*, 33 Texas, 815; *Wallace* v. *Craven*, 34 Ind., 534.

The reasons governing the majority of the above courts are, in the main, two.

First. It is conceded that if there is no fraudulent intent, the unstamped instrument is valid. Now being valid, it is urged the exclusion of it is a mere regulation of evidence, which congress cannot impose on the State courts.

Second. By the rule of construction given in *Green* v. *Holway*, *ante*, p. 249, the statute does not include the State courts.

With such a multitude of cases, it would seem irksome to discuss the questions involved. We think our court must yield to such preponderating weight of authority.

In *Moore* v. *Quirk*, 105 Mass., 49, it was held that the whole of the provision of the U. S. Statute in question, including that relative to recording, had no application to State officials. It is not easy to explain *Sawyer* v. *Parker*, 57 Maine, 39, and *Brown* v. *Thompson*, 59 Maine, 372, on any other principle of construction. We therefore claim that the question has already been settled in our favor.

Leavitt v. *Leavitt*, 4 Maine, 161, is subject to the same observations as were made upon the case in Johnson's Reports in *Green* v. *Holway*, *ante*.

By the stamp act promissory notes include memoranda, checks, receipts, and other written or printed evidence of an amount of money to be paid on demand. Stamps on mere receipts were not required after October 1, 1870. U. S. Stats. 1870, c. 255, § 4. This paper is dated October 3, 1870, and we claim is a mere receipt.

The paper contains no promise to pay, and no language that imports anything except an obligation to credit the amount to plaintiff. Whether defendant would ultimately owe the amount and be compelled to pay it would depend on other evidence, and perhaps on an examination of mutual accounts.

RESCRIPT.

This is an action of assumpsit on an unstamped written instrument of the tenor following:

"$1,321 77–100 PORTLAND, Oct. 3, 1870.

Received of Daniel F. Emery, thirteen hundred and twenty-one dollars and seventy-seven cents on account, with interest at the rate of twelve per cent. JOSEPH HOBSON."

To the admission of this instrument in evidence the defendant seasonably objected upon the ground that it was not stamped as required by the Acts of Congress of the United States. The

plaintiff testified that the omission to stamp was with no intent upon his part to defraud the revenue, nor with any other fraudulent intent on his part. The instrument was properly admitted.

NOTE BY THE REPORTER. Since the foregoing rescript was sent down the case of *Moore* v. *Mason* taken before the U. S. Supreme Court by writ of error to the supreme court of Maine, raising the identical question here discussed, has been argued before the supreme court at Washington, at its October term, 1873, after the death of Chief Justice Chase and before his successor was appointed, and the eight associate justices were equally divided in opinion, so the matter is still left open for determination in the ultimate tribunal.

INHABITANTS OF FALMOUTH *vs.* INHABITANTS OF WINDHAM.

Evidence. Exceptions. New trial. Practice.

Where the testimony is conflicting and that claimed to be newly discovered might have been ascertained before, by the use of reasonable diligence, a new trial will not be granted.

Though, according to the practice in this State, the cross-examination of a witness is not confined to matters inquired of in the direct examination, exceptions will not be sustained to a ruling thus limiting it, if it be evident that the excepting party was not prejudiced thereby.

ON EXCEPTIONS AND MOTIONS FOR A NEW TRIAL.

This action was to recover for the support of a pauper alleged to be chargeable to the defendant town. The main issue was whether or not Alexander Pride, the father of Joshua T. Pride, the pauper's husband,—her settlement being derivative—had resided in Windham the five years next preceding the time when Joshua became twenty-one years old; this issue turning upon the controverted question of the date of Joshua's birth. The verdict was for the plaintiffs and the defence moved to set it aside as against the weight of the evidence, claiming that Alexander Pride was contradicted by other witnesses, and discredited by his inconsistent statements of dates and occurrences. A motion was after-

ward filed to set aside the verdict on account of newly discovered evidence.

The plaintiffs called Wm. H. Varney, one of the selectmen of Windham, to the stand and proved by him that his town took the pauper from the Portland alms house in May, 1871, in response to a notice to remove her. Upon cross-examination, he was asked if he then gave notice to Westbrook (her true settlement being uncertain) and replied in the negative, and was then asked when he did give notice. The plaintiffs objected and the court excluded the question, upon the ground that the defence on cross-examination were confined to the subject matter of the direct examination. The defendants excepted.

Howard & Cleaves and *Cobb & Ray*, for the defendants.

Strout & Holmes, for the plaintiffs.

RESCRIPT.

The testimony is conflicting. The result depends upon the credibility of the witnesses, and there is no decided balance of testimony either way. In such cases, a motion for a new trial because the verdict is against the weight of testimony will be overruled.

As to the motion on the ground of newly discovered testimony, it is quite apparent that this testimony, so far as it is material, might have been discovered before the trial by the use of ordinary diligence. For that reason this motion must be overruled.

The exceptions to the ruling excluding the question put to the plaintiffs' witness, Varney, cannot be sustained. It is true that the ground on which it was made is not in accordance with the rule heretofore adopted and practiced upon in this State. But the case does not show that the defendants were prejudiced by the ruling, so far as it is erroneous, but the reverse. The witness afterward testified in full for the defendants, and it does not appear that they had any occasion to avail themselves in the examination, or otherwise, of any of the privileges usually accorded to a party in regard to an opponent's witness.

Motions and exceptions overruled.

JAMES L. FARMER *vs.* CITY OF PORTLAND.

Amendment.

An amendment introducing a new cause of action is not allowable.

In an action brought under R. S., c. 26, § 10, to recover compensation for the destruction of a building by the municipal officers of a city to prevent the spreading of a fire, an amendment setting forth a cause of action under R. S., c. 123, § 8, for the destruction of the building mentioned in the original declaration by a riotous mob, is not permissible.

ON EXCEPTIONS.

As originally brought, this was an action on the case under R. S., c. 26, § 10, to recover the value of a building torn down to stay the progress of the great fire in Portland, July fourth and fifth, 1866. At the April term, 1873, when the cause came on for trial, the plaintiff moved to amend his declaration by adding a count under R. S., c. 123, § 8, relating to the liability of municipalities for three-quarters of the value of buildings destroyed by mobs. The presiding justice, being of the opinion that this would introduce a new cause of action, so ruled as matter of law, and therefore refused to permit the amendment to be made, and the plaintiff excepted.

Howard & Cleaves and *M. P. Frank*, for the plaintiff.

The new count was for the same cause as the original one—namely, the destruction of the plaintiff's house at the corner of Pearl and Cumberland streets, on the fifth of July, 1866. The same act is the common basis of them all. The only difference relates to the means of establishing the case, and the circumstances attending the injury which has always been the ground of complaint. *Brewer v. East Machias*, 27 Maine, 489; *Mc Vicker* v. *Beede*, 31 Maine, 314; *Ball* v. *Claflin*, 5 Pick., 303; *Selden* v. *Beale*, 3 Green, (Iowa) 178.

Charles F. Libby, for the defendants.

Would the same evidence which would support the original declaration sustain the proposed new count? Are the material averments of the latter the same, in a legal sense, as in the former? If not, then a different cause of action is stated.

Originally, the gist of the action was the destruction of the building by the municipal officers for the public safety. *Taylor* v. *Plymouth*, 8 Metc. 465; *Ruggles* v. *Nantucket*, 11 Cush., 433; *Parsons* v. *Pettingell*, 11 Allen, 507. The allegations of the new count indicate the reverse of this: proceeding upon the ground that the house was destroyed by a mob, in a riotous and tumultuous manner, without any official authority, and in pursuance of an unlawful design. It would be difficult to imagine two causes more divergent. Compare this with these cases, in which it was held that the proposed amendment was properly refused. *Annis* v. *Gilmore*, 47 Maine, 152; *Milliken* v. *Whitehouse*, 49 Maine, 527; *Cooper* v. *Waldron*, 50 Maine, 80.

It is no answer to say that the facts remain the same. Certain occurrences may sustain an action of trespass or trover, or (waiving the tort) of assumpsit; but whichever the plaintiff elects to bring, he cannot amend so as to maintain the other. He makes his own election at first, at his own peril. *Ware* v. *Percival*, 61 Maine, 391.

Appleton, C. J. The plaintiff brings a special action on the case to recover compensation for the destruction of a building, of which he was a tenant in common, by the authorities of the defendant city, for the purpose of preventing the further spreading of a conflagration then endangering its safety.

At common law, the pulling down a building in a city in time of fire is justified by the great doctrine of public safety when necessary, but no compensation was allowed or afforded to the individual whose property was thus destroyed. *Taylor* v. *Plymouth*, 8 Metc., 462.

By R. S., c. 26, §§ 8, 9, and 10, which are re-enactments of pre-

vious stats., and Public Laws of 1871, c. 207, "if the pulling down or demolishing any building except that in which the fire originated is the means of stopping the fire, or if the fire is stopped before it comes to the same, the owner of such building, shall be entitled to a reasonable compensation therefor from the town, to be recovered in a special action on the case." The writ originally contained only counts under those statutes.

By R. S., c. 123, §§ 7 and 8, when persons unlawfully and riotously assembled, pull down and destroy any dwelling house and the injury amounts to fifty dollars or more, "the town where such property is situated shall indemnify the owner thereof for three-fourths of the value of such injury, to be recovered in an action on the case, if he uses all reasonable diligence to prevent such injuries, and to procure the conviction of the offenders; and the town paying such sum may recover it in an action on the case against the persons doing such injury."

The plaintiff offered an amendment setting forth a case under these sections, which the presiding judge rejected, because it introduced a new cause of action. In so doing there was no error. The counts as originally drawn set forth no tortious acts of the municipal officers of the defendant city. The acts done were acts of necessity—for the safety of the city—and done by its officers in the discharge of their official duty. The acts set forth in the count offered by way of amendment were the acts of rioters in violation of law, and for which those committing them were liable to punishment by fine and imprisonment. It was clearly an attempt to amend by introducing a new and entirely different cause of action; and this, it has been repeatedly settled, is not allowable. *Milliken* v. *Whitehouse*, 49 Maine, 527; *Cooper* v. *Waldron*, 50 Maine, 80. *Exceptions overruled.*

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

ALBION B. GEE *vs.* FRANK G. PATTERSON.

What justifies arrest on mesne process for debt.

In an action for false imprisonment of the plaintiff, procured by the defendant's affidavit that he believed the plaintiff was about to leave the State, &c., (under R. S., c. 113, § 2,) a verdict for the plaintiff will not be set aside as against the weight of evidence, if it be apparent that the defendant did actually believe these statements in his affidavit, unless it be also evident that he had reason so to believe.

A verdict of $600 held not plainly excessive in this case.

ON MOTION FOR A NEW TRIAL, because the verdict of $600 for the plaintiff was against the weight of evidence and excessive.

Mr. Gee was arrested December 11, 1872, upon a writ in favor of the defendant, in an action upon an account annexed for $580, upon Mr. Patterson's affidavit, under R. S., c. 113, § 2, that he had reason to believe and did believe that Mr. Gee was about to depart and reside beyond the limits of this State, &c. Gee, called as a witness in his own behalf, testified that he was arrested at Yarmouth just as he was leaving the hotel after supper to go to the hall where he had a dancing school; that he had seven or eight schools in different towns in Maine, which began in October and November, 1872, and were to continue three months, i. e., giving one lesson per week to each school for twelve weeks; that for eighteen years he had lived in Bridgton and still resided there, and (in December, 1872) had no intention of leaving the State. He introduced a very severe and threatening letter written to him June 13, 1872, by the defendant, to whom (he said) he was not indebted. The defence introduced testimony showing that Gee had been at Conway, N. H., one boarding season with his family, and at the Glen House, N. H., himself another summer, and had said he was going away to get business, and Patterson testified that, when he made his affidavit, he verily believed its statements to be true, from all he could learn of the facts.

Mr. Gee was carried to Portland and put in jail, despite offers of security for his appearance the next day, and was arbitrarily treated in other particulars.

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

Bradbury & Bradbury, for the defendant.

RESCRIPT.

Case, for damages alleged to have arisen from imprisonment on mesne process on contract—this defendant (the plaintiff in the original action) having made the oath prescribed in R. S., c. 113, § 2.

The jury returned a verdict for the plaintiff for $600, which the defendant moves to set aside for the alleged reasons that it is against the weight of evidence and that the damages awarded are excessive.

The jury must have found either that the defendant did not "have reason to believe," or did not "believe, that the plaintiff was about to depart and reside beyond the limits of the State" &c. Taking it for granted that the jury believed the defendant's testimony as to his actual belief, we do not think the testimony in relation to his "reason to believe" is so preponderant as to warrant us in disturbing the verdict for that reason.

Nor can we say under all the circumstances disclosed by the evidence—the time and manner of arrest and the animus shown by the defendant's letter—as well as by the evidence of actual injury—that the damages are excessive. *Motion overruled.*

ARTHUR H. HARRIS *vs.* WILLIAM BROWN.

Depositions out of the State—how taken, and on what notice.

Depositions taken out of the State, and not under a commission, must be taken by a person legally competent, and upon due notice to the adverse party or his attorney.

Due notice is such, as under the circumstances of each case, will enable the party or his attorney reasonably to attend at the time and place of caption, and its sufficiency is a matter addressed to the discretion of the presiding judge.

ON EXCEPTIONS to rulings in the superior court.

The plaintiff (the verdict being against him) excepts to the admission in evidence of the deposition of John T. Hayslett, taken in New Bedford, Mass., before a justice of the peace there, on the twenty-fourth day of September, 1872, at the request of the plaintiff, upon notice served upon the defendant's attorney in Portland on the fourteenth day of the same month, the distance between these two places being 166 miles. The superior court was in session September 14, 1872, but adjourned on and from the sixteenth to the thirtieth day of that month.

T. H. Haskell, for the plaintiff.

Court was in session when notice was served upon me. Rule 27 of superior court is like rule 23 of this court. It should have been given after adjournment, allowing due time. *Holmes* v. *Sawtelle*, 53 Maine, 179. Excluding (as they should be) the days of service and caption, there were only nine days between them, one of which (of course) was Sunday; so that we did not have "due notice," which is statute notice. *Brown* v. *Ford*, 52 Maine, 479. That the 14th and 24th should not be counted, see *Bigelow* v. *Wilson*, 1 Pick., 485; *Windsor* v. *China*, 4 Maine, 298.

Bradbury & Bradbury, for the defendant.

DANFORTH, J. The principal question in this case is that which arises from the exception to the admission of the deposition of John T. Hayslett. The objection is two-fold; that it was taken in term time, and that due notice was not given.

Depositions, instead of the personal attendance of the witness, can be used only when authorized by statute. Consequently, in order to make them admissible, all the provisions of the statute in relation to them must be complied with.

While the statute prescribes in detail the manner of taking depositions within the State, and leaves nothing to the discretion of the court, there are but two imperative provisions in relation to those taken without the State; and in all other respects they are to be received or rejected as the discretion of the court shall dictate. By R. S., c. 107, § 8, it is provided that, "when a deposition is taken out of the State, and not under a commission, the adverse party or his attorney shall have due notice thereof. By § 20 of the same chapter, "the court may admit or reject depositions taken out of the State by a justice, notary, or other person lawfully empowered to take them." These two provisions are all we find in relation to depositions taken out of the State and not under a commission. The one now in question was so taken. Did the adverse party have due notice of the caption? As it is so prescribed in the statute, without it the deposition cannot be used. *Brown* v. *Ford*, 52 Maine, 479.

The answer to the above question must depend upon the meaning to be given to the words "due notice." It is claimed in the argument that they refer to and mean the same as the provision in relation to notice of taking depositions within the State, and *Brown* v. *Ford* above cited is relied upon as authority for that view. But that case decides only that the person notified was not the attorney of the adverse party, and no question was made as to the kind or length of notice given.

The statutes of 1821, c. 85, § 2, provide for the same notice as is now required for depositions taken within the State, while, by § 6 of same chapter, none whatever was required for those taken

abroad unless "the adverse party or his attorney shall live within twenty miles of the place of caption." The rule of court then and still in force, 1 Maine, 420, prohibited the admission of a foreign deposition taken without a commission, "unless the adverse party was present, or was duly and seasonably notified but unreasonably neglected to attend."

In the revision of 1841, c. 133, § 14, we find a change in the law upon this subject, and the language of the rule of court substantially adopted. It reads, "the adverse party or his attorney shall be duly notified." This provision, with a slight verbal alteration, was continued in the revision of 1857, c. 107, § 8, and there reads as in the last revision; "the adverse party or his attorney shall have due notice thereof."

It seems that, from the beginning, depositions taken within and without the State have been admitted upon distinct provisions of law, including that relating to notice. If the legislature had intended to require the same notice in the one case as in the other, it would have been easy and natural to have said so, much more natural than to have kept up the distinction all the way through. This distinction would seem to require that, while we give full force and meaning to the words requiring the shortest notice that shall be given when the deposition is taken within the State, we should also give the proper meaning to the words requiring notice for taking depositions out of the State. In this view due notice would be that which is suitable, fit or proper; that which will reasonably enable the adverse party to be present at the taking of the deposition. The court must have so understood it when the twenty-fourth rule was adopted; otherwise the provision for admitting the deposition when the adverse party was present at the caption would be in conflict with the statute.

In accordance with this view has been the practice and decisions of this court.

In *Clark* v. *Pishon*, 31 Maine, 503, two depositions taken out of the State were admitted, though objected to for want of sufficient notice, on the ground that "the allowance of the depositions was at the discretion of the judge."

In *Freeland* v. *Prince*, 41 Maine, 105, though this precise question was not before the court, Rice, J., in the opinion remarks: "the extent of this discretion is undefined. Under it the practice has been to admit depositions taken out of the State by competent persons, in all cases where the presiding judge is satisfied that there has been a substantial compliance with the statute; when the deposition was fairly taken, and the adverse party was present, or had reasonable notice, and an opportunity to be present, and where there is no reason to believe that the party taking the deposition, the magistrate or the deponent have conducted improperly in the matter, though the caption may not be, in all respects, technically correct."

The rule of the superior court, like that of this court, simply requires the presence of the adverse party or that he shall be "duly and seasonably notified, but unreasonably neglected to attend."

The result is that, while the statute in every case imperatively requires "due notice" to the adverse party or his attorney, what is due notice must depend upon the circumstances of each case, and must be settled by the sound discretion of the presiding judge. In this case we perceive no lack in the exercise of that discretion.

The other objection, that it was taken in term time, is not sustained by the facts. The taking was while the court was not in session and there was ample time after the notice and after the adjournment for the adverse party or his attorney to have attended. *Holmes* v. *Sawtelle*, 53 Maine, 179.

In all other respects the rulings of the court to which exceptions were taken are clearly right.. *Exceptions overruled.*

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

SAMUEL R. JACKSON *vs.* CITY OF PORTLAND.

Damages upon location of way.

Damages awarded by a committee for the location of a drain are to be only those resulting from its proper construction. If injury arises by reason of an improper construction of the drain, the remedy, if any there is, must be sought in some other form.

ON EXCEPTIONS.

APPEAL for damages by location of the outfall of a sewer over Mr. Jackson's land, under Private Laws of 1854, c. 77, § 1. The claim was heard by a committee, as provided in the ninth section of the city charter, and their report was offered for acceptance at the April term, 1873, of this court, and accepted, the presiding justice overruling the defendant's objections to the report, *pro forma*. Exceptions were taken and allowed to this ruling. The grounds of objection are stated in the opinion.

Charles F. Libby, for the defendants.

The damages to be awarded are for the location. *Gay* v. *Gardiner*, 54 Maine, 479. It must be a gross sum in money that is awarded and not the performance of any other act, or a sum liable to be diminished upon the happening of any contingency. The committee had no power over costs. *Gordon* v. *Tucker*, 6 Maine, 247; *Walker* v. *Merrill*, 13 Maine, 173; *Porter* v. *Buckfield Branch R. R.*, 32 Maine, 539; *Hanson* v. *Webber*, 40 Maine, 194; *Day* v. *Hooper*, 51 Maine, 178.

Strout & Holmes, for the appellant.

WALTON, J. Damages occasioned by the location of the outfall of a public drain in the city of Portland are to be assessed in the same manner as for the location of a public street. Public

Laws of 1854, c. 77, § 1. Damages for the location of a street are to be assessed in the first instance by the city council; but any one aggrieved by their decision may appeal and have the damages assessed by a committee or reference, if the parties so agree, or by a jury. City charter, § 9; Special Laws of 1863, c. 275.

It will be noticed that the damages here referred to are such only as are occasioned by the location, not the improper or imperfect construction, of the street or outfall in question. The location is one thing; the construction is another. It is the damage occasioned by the location only that can be recovered in the manner here pointed out. The damage, if any, sustained by reason of an improper or defective construction must be sought for in some other form of proceeding.

In this case the committee award $261 damage, "caused by the deposit of filth, sand, and other substances from said sewer and outfall in the dock of the appellant, to April 1, 1873; and the further sum of $116 annually until a cess-pool is constructed which shall receive and retain the sediment or wash coming from said drain." This was erroneous. Their only duty was to award in a round sum the damage caused by the location of the outfall of the drain upon the appellant's land. They had no authority to determine whether a cess-pool should or should not be constructed, and to award annual damages, to be paid in the future, till such cess-pool should be built by the city.

Exceptions sustained.
Report rejected.

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

PATRICK KELLEY *vs.* WILLIAM E. MORRIS.

Execution—when not to issue against the body under R. S., c. 113, § 19.

Under R. S., c. 113, § 19, which provides that no person shall be arrested on an execution issued on a judgment founded on a prior judgment on contract, where the amount of the original debt remaining due is less than ten dollars, "the amount of the original debt remaining due" is the original debt for which such prior judgment was rendered, and not that debt with the addition of interest.

ON REPORT.

PETITION FOR MANDAMUS, commanding the respondent, in his official capacity, as judge of the municipal court of Portland, to issue an execution upon a judgment in favor of Patrick Kelley against Edwin C. Greely, running against the body of the latter. Judge Morris declined to do so, unless so ordered by this court, but tendered one running against the goods and chattels of the debtor, upon the state of facts set forth in the opinion.

J. H. Williams, for the petitioner.

Nathan Webb, for the respondent.

APPLETON, C. J. The petitioner, on the ninth of July, 1855, recovered judgment founded on a contract for six dollars debt or damage, and three dollars and four cents cost, before the police court of the city of Portland against one Edwin C. Greely, upon which execution issued, but no part of said judgment has been satisfied.

March 22, 1873, the petitioner commenced his action on said judgment in the municipal court of Portland, of which the respondent is judge, and on the last day of said March, said Greely was defaulted, and judgment rendered against him and in favor of the petitioner for eighteen dollars and ninety-six cents debt, and three dollars and forty-seven cents, cost of suit.

The petitioner duly demanded an execution running against the body of his debtor, which the respondent refused to issue, whereupon the plaintiff petitioned this court for its writ of mandamus, commanding him to issue such execution on said judgment.

By R. S., c. 113, § 2, "any person . . . . . may be arrested and held to bail or committed to prison on mesne process on contract express or implied, if the sum demanded amounts to ten dollars, or on a judgment on contract, if the debt originally recovered and remaining due is ten dollars or more, exclusive of interest," &c.

It is obvious that it was the intention of the legislature that no one should be arrested on mesne process when the "sum demanded" in the writ, or the debt originally recovered and due, exclusive of interest, does not amount to ten dollars.

By § 19, it is provided that "no person shall be arrested on an execution issued on a judgment founded on a contract express or implied, when the debt is less than ten dollars, exclusive of costs; or on a prior judgment on contract when the amount of the original debt remaining due is less than ten dollars, exclusive of costs."

The first provision in § 19 corresponds with the first in § 2. The debt, or the sum demanded, must both be less than ten dollars.

The debt in the prior judgment on which this suit is founded was but six dollars. With the addition of interest to the present time it exceeds ten dollars. Shall execution run against the body of the debtor?

Is "the amount of the original debt remaining due" less than ten dollars? The amount of the debt remaining due is one thing. The "amount of the *original* debt remaining due" represents something materially different. The amount of the debt remaining due includes interest. The amount of the original debt remaining due excludes interest, for interest is never part of the debt in its origin. It is what subsequently accrues.

The amount refers to the original debt as stated in the prior judgment, and not to the debt with the increment of interest. It requires that of the original debt, as recorded in such judgment, there shall be an amount due not less than ten dollars.

There is no perceptible reason why there should be a difference in the debt for which one may be arrested on mesne process, or on execution; and the antecedent legislation on this subject shows that the legislature never intended there should be any difference between the two cases.

Prior to 1835, the amount for which a debtor on contract was exempted from arrest was five dollars. In that year, by c. 195, § 1, it was enacted that "no person shall be arrested on any suit founded on contract, express or implied, bond, or other speciality, or on a judgment on contract when the sum demanded, nor in any execution issued on any judgment when the debt or damages are less than ten dollars, nor on any suit on a judgment or an execution issued on a judgment founded on any prior judgment, when the original debt or damages are less than ten dollars."

It is apparent that by this statute, the "sum demanded" on the original debt, to authorize an arrest must not be less than ten dollars.

In the revision of 1840, this section was broken up and its parts distributed under the several heads of arrest on mesne process and on execution, and the language then adopted has been continued in the subsequent revisions without verbal alteration to the present time. R. S. of 1840, c. 148, §§ 1, 2, 18.

Now, in the process of revision and in the distribution of the several parts of former statutes, verbal changes may take place, when it is obvious that no change in the meaning was intended. In *Hughes* v. *Farrar*, 45 Maine, 72, it was held that in the revision of statutes, a mere change in the phraseology is not to be deemed a change in the law, unless such appears to be the evident intent of the legislature. The legislation of the State, from 1835 to the present time, has been more and more favorable to the debtor class. The changes since made have been in that direction. It is not to be believed that such an anomaly was intended as that for the same debt one may be arrested on execution, and not arrested on mesne process. The same rule, rather, applies in each

case. This, we think, is the true construction of the statute and best conforms to the will and design of the legislature.

Writ denied.

Costs for the respondent.

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

Dissenting opinion by

VIRGIN, J. On July 9, 1855, the petitioner recovered a judgment founded on a note, for $6.00 debt or damage, and $3.04 costs. On March 31, 1873, he recovered a judgment founded on the former judgment, for the sum of $18.96 debt or damage, and $3.47 costs. The debt in the latter judgment includes the debt recovered in the original or former judgment ($6.00) and interest thereon from its date to the date of the latter judgment, $6.38; thus making the debt and interest amount to $12.38. The question is, shall the execution issued on the latter judgment run against the body of the judgment debtor. I think it should.

By R. S., c. 113, § 2, "any person may be arrested . . . . on mesne process on contract if the sum demanded amounts to $10 . . . . exclusive of interest;" or he "may be arrested on mesne process" on "a judgment on contract, if the debt originally recovered and remaining due is $10 or more, exclusive of interest." Or to express it in another form,—no person shall be arrested on mesne process on contract where "the sum demanded" is less than $10, "exclusive of interest;" or on mesne process "on a judgment on contract," where "the debt originally recovered" in the judgment declared on, "and remaining due" at the time the process is sued out, is less than $10 "exclusive of interest." That is to say, notwithstanding the contract be interest bearing, as for instance a promissory note payable with interest, no arrest can be made under this statute, unless the principal is at least $10.

How different is the language applicable to executions. By the first clause of § 19, "no person shall be arrested on an execution issued on a judgment founded on a contract, where the debt is less

than $10, exclusive of costs." By § 20, "in all other cases, except where express provision is by law made to the contrary, an execution shall run against the body of the judgment debtor."

What is the meaning of the word "debt" in § 19? Obviously, the sum determined to be due as damages. In the original statute (act of 1835, c. 195,) the language is, "where the debt or damages is less than $10." In judgments on contracts, the debt is made up by adding to the principal sum the interest from the date of the writ at least. Hence, in some instances, although the writ cannot run against the body, for the statute reason that the interest being expressly excluded from the computation, "the sum demanded" does not "amount to $10;" nevertheless, the execution issued on the judgment on that writ, may, for the reason applicable to executions, that the interest not being excluded, the debt or damages is not "less than $10, exclusive of costs."

Take an illustration: A. sues B. to recover payment for several items of groceries which "amount" to only $9.00 B. cannot be arrested on the writ, because "the sum demanded" "exclusive of interest" does not "amount to $10." If, however, the plaintiff, at the trial prove a demand made twenty-two months and seven days previously, he will recover as debt or damage, $9.00, ("the sum demanded") and $1.00 interest, making the "debt" recovered $10.00, together with a certain other sum as costs. The execution to be issued on that judgment will, therefore, run against the body of the judgment debtor, for the reason (unlike that applicable to the writ,) that the "debt" is not "less than $10.00, exclusive of costs."

But the decision of the case at bar depends upon the proper construction of the second clause of § 19, which is as follows:—No person shall be arrested on an execution issued on a judgment founded "on a prior judgment on contract, where the amount of the original debt remaining due is less than $10.00, exclusive of costs."

What is the meaning of the words—"the amount of the original debt?"

We have already seen what "debt" means. "Original debt" must mean the debt recovered in the former or original judgment as distinguished from that in the latter. "Amount;" (say the lexicographers) means "the sum total of two or more particular sums or quantities." So when we speak of the amount of a bill of goods, we are understood to refer to the aggregate of all the items; and the amount of a note means the principal and interest added. Adopting this signification, "the amount of the original debt" would seem to mean the original debt with interest thereon.

Such is the meaning of the word in R. S., c. 82, § 28, which provides that "interest is to be allowed on amount found due for damages and costs in actions on judgments," &c.

It will be noticed that in § 2 the language is—"the debt originally recovered . . . . exclusive of interest"—the word "amount" not being used for the reason that "interest" is excluded; while in § 19, the language is—"the amount of the original debt . . . . exclusive of costs"—the word "amount" being used for the reason that costs only are excluded. The phrases "debt originally recovered" and "original debt" mean the same thing. But can it be said that the phrase "debt originally recovered exclusive of interest" means the same thing as the "amount of the original debt exclusive of costs," especially when it is considered that the debt is interest-bearing; that the interest is expressly excluded in one, and costs and not interest in the other; that the two phrases are used by the same commissioners, in the same chapter treating of the same general subject-matter of arrest? I cannot so understand them.

But it is said that in the process of revision and in the distribution of the several parts of the act of 1835, c. 195, § 1, under the respective heads of arrest on mesne process and on execution, mere verbal changes were made without any intentional change of meaning. But, to my understanding, the force of this suggestion is entirely overcome when, by a comparison of verbal changes, I find them so different, though applying to the same thing. For instance —the act of 1835, c. 195, § 1, provided—"no person shall be ar-

rested . . . . on any suit on a judgment or on an execution issued on a judgment founded on any prior judgment, where the original debt or damages is less than $10.00." When the section was distributed in the revision of 1841, that portion which applied to arrest on mesne process founded on a judgment was made to read—"if the debt originally recovered . . . . is $10.00, exclusive of interest." The changes are merely verbal, and do not change the meaning; and if the same phraseology had been put into § 19 the meaning would have remained. But the language is so different I cannot resist the conclusion that the change was intended by the commissioners who made it, and the legislature which adopted it.

If we invoke the rule of construction prescribed by R. S., c. 1, § 4—"words and phrases are to be construed according to the common meaning of the language," the same conclusion is inevitable; unless the "common meaning of the language" is to be sought for among the *profanum vulgus;* for among the lexicographers the meaning contended for is not to be found. Moreover, I cannot believe that C. J. Mellen, chairman of the commissioners whose report formed the basis of the revision of 1841, and in which this phrase first occurred, used the word "amount" in an unauthorized sense, and that C. J. Shepley, who re-wrote the entire statutes in 1856, fell into the same "common" error.

It will also be noticed that the word "original" qualifies the word debt and not the word "amount."

Lest this literal view alone be obnoxious to the charge of sticking *in cortice*, let us inquire into the probable intention of the legislature in enacting the statute as it has stood since the revision of 1841.

It will not be seriously questioned that under the act of 1835, if a note for $8.00 and interest, executed in the presence of an attesting witness January 1, 1860, were sued, and judgment recovered January 1, 1861, the debt or damages would be $8.48, and consequently the execution could not run against the body; whereas if the judgment were not recovered until January 1, 1870, the debt or damages would be $12.80; in which case the execution

would run against the body. Now, if the judgment were recovered as first above supposed, and that judgment were sued, and judgment recovered thereon January 1, 1870, the debt or damages exclusive of costs, would be $13.06—that is $8.48 ("original debt") and $4.58 (interest thereon), making the amount of the original debt $13.06. In such case, the respondent contends that the execution should not run against the body. Why shouldn't it? Why should the intervening judgment prevent it? A judgment is "the highest evidence of debt known to the law, upon which execution may be issued forthwith. . . . A judgment recovered, *ipso facto*, imports a debt due which may be assimilated to a contract to pay a certain sum with interest, and hence interest is recoverable by way of damages for the detention of the debt, and as part thereof." *Edwards* v. *Moody*, 60 Maine, 255. Such considerations among others, it is believed, induced the change of the statute so far as it is applicable to executions issued on a judgment on a prior judgment on contract.

The reason why different rules should be applied to arrest on writs and executions, the one excluding interest from the computation and the other impliedly at least including it, is found in the consideration, that the amount of interest recoverable on contracts, express or implied, depends upon many and various contingencies —such as the terms of the contract; the time of demand, concerning which the evidence may be conflicting; the construction and alleged fulfillment, &c., &c. On account of this uncertainty the legislature, in constructing a general rule, excluded interest entirely. But when the matter of interest had been passed upon by the court, and the sum fixed, it then became a part of the debt, subject to the other rule.

The reason why the legislature excluded costs when constructing the rule in relation to arrests on executions issued on judgments recovered on prior judgments, is equally obvious. The fact that the debt or damages in every successive judgment on a prior judgment includes the costs of the preceding one, enables the creditor to increase his debt against his debtor very rapidly. But all

such increment is excluded when computing the amount for which he may be arrested.

For the foregoing considerations, I am of the opinion that the writ of mandamus should be granted.

WALTON and PETERS, JJ., concurred.

JAMES S. LIBBY *vs.* CHARLES M. BRAINARD and trustee.

Nature of contingent interest which is not trusteeable.

Brainard sold to a company, composed of himself and two others, certain property, the disposition and proceeds of which were committed to one member of the firm in trust, to apply the moneys thence arising toward the payment of certain debts of Brainard, and, (if any surplus remained,) the residue was to entitle him to a proportionate interest in the capital stock of the company; *held*, that his interest in the property by him conveyed, and its avails, was contingent and, therefore, not liable (under R. S., c. 86, § 55) to attachment by trustee process.

ON REPORT.

Immediately after the great fire of 1866 in Portland, Charles M. Brainard commenced the marble and stone business there and continued it alone, by the aid of Sumner Adams and Thomas H. Weston till the fall of 1868, when, finding himself lacking in capital, it was proposed by him that Mr. Weston should join him and one Winslow Baker, the copartnership to carry on the marble and freestone business in Portland. Mr. Weston advised the formation of a corporation, under the general laws of the State, agreeing to take stock in it. This was never actually done but, in preparing to do it, Mr. Weston did some things which, as matter of law, made him a partner, to a certain extent, with these other gentlemen, though such was not his intention, nor his understanding of his acts. Their association was called the Portland Marble and Freestone Company, and a building and machinery were purchased to extend its operations, which were conveyed to Winslow Baker,

as agent of the concern, and other preparations were made, chiefly by Baker, as agent. Upon the seventeenth day of October, 1868, in pursuance of a previous agreement to do so, Brainard sold and conveyed to this company all the property theretofore used by him in carrying on his business, with an agreement that the company should manufacture and sell the same and apply the proceeds, above the costs of manufacturing, first in payment of notes for $6000 to Mr. Adams; then, of Mr. Weston's account against Brainard; and, third, "for the balance of said proceeds the said company agrees to issue an equal amount of the stock of said company to said Brainard." This statement was incorporated into the bill of sale given by Brainard to the company, and a separate agreement was delivered him, setting forth, in similar manner, the mode of ascertaining the extent of Mr. Brainard's interest in the firm by determining the proportion which the excess of the proceeds of his property aforesaid, above his debts specified, should be found to bear to the whole assets of the firm.

In November or December, 1868, Brainard removed to New York, and Mr. Baker removed to Minnesota the next spring, so nothing was ever done by said company toward carrying on the business as contemplated by them October 17, 1868. The sums received for the property conveyed by Brainard to the company were insufficient to pay the notes to Adams and Mr. Weston's account. Mr. Weston was summoned in this action as the alleged trustee of Brainard.

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

As the contemplated business arrangement of October 17, 1868, was never carried out, the bill of sale of that date failed of effect, and the property remained that of Brainard. As Weston is trustee of chattels, not of money, he cannot deduct his own claims. R. S., c. 86, §§ 4, 15.

J. H. Drummond, for the trustee.

A partnership was formed October 17, 1868. A building and machinery were afterwards purchased by the firm for their busi-

ness. Whether they prosecuted their undertaking or not is immaterial. After the delivery of the bill of sale of October 17, 1868, and of the property it conveyed, Brainard never had any individual interest in the chattels; only a possible contingent interest in the proceeds of sale.

DANFORTH, J. Whether the trustee in this case is to be charged or discharged, must depend upon the validity and construction of the written agreement entered into October 17, 1868, between the Portland Marble and Freestone Company and Charles M. Brainard, the principal defendant. That company was not incorporated, but a mere partnership, and at the date of the agreement referred to, existed by virtue of a contract between the members thereof and had not only made preparation for, but actually entered upon, the business contemplated by that agreement. The partnership was then competent to purchase such property as they might need in the prosecution of their business. The property which the plaintiff claims to have attached was of that kind, and was conveyed to them by the principal defendant as his part of the agreement referred to, before the attachment. This conveyance was absolute and unconditional. By it the property passed, and the only interest left in the vendor, aside from that which he might have as a member of the company, was not a title to the property itself, but a mere contingent interest in the proceeds, not liable to attachment in a trustee process. Whether the company subsequently failed to carry out its contemplated projects is immaterial. The conveyance of the title must depend upon the state of things existing at the time of the sale. If the partnership is subsequently dissolved for any reason whatever, its title to property is not thereby affected.

Nor does the disclosure or testimony reveal any such want or failure of consideration as to affect the title. There is no provision whatever in the writing that the title shall remain in the vendor until the accomplishment of the agreement by the vendees, nor for a reversion in case of failure to perform. The vendees can

fulfil only by having an absolute title. The covenants are not mutually dependent but independent, and the consideration obtained is just what was contemplated by the agreement, viz: a payment of the notes therein enumerated, with the debt to Weston and Company, at least so far as the proceeds may go, and if there should be any balance or interest in the company to that extent. This interest, if any, may be larger in the liabilities than in the assets, but this is a contingency assumed at the time of the sale, and one which may cause loss to creditors as well as to the debtor *Trustee discharged.*

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

CORNELIUS MAHONEY

vs.

ATLANTIC & ST. LAWRENCE RAILROAD COMPANY.

Action. Defendant corporation not liable for management of its road while leased. Railroad.

By virtue of their lease of the Atlantic & St. Lawrence Railroad the Grand Trunk Railway Company, for certain purposes, became owners of the road leased, *pro hac vice.*

While the lessees operate that road under their lease, the lessors are not liable under their charter or the statutes of the State, for an injury sustained thereon by a passenger, caused by the wrongful acts of the agents or servants of the lessees toward him.

Nor is there, in such case, any privity, either of contract or by implication of law, between the passenger and the lessors as common carriers of passengers, by which they are rendered liable for such an injury.

The remedy of the passenger, for an injury thus caused, is against the lessees who had the exclusive use, care, direction and control of the road, whose agent the alleged wrong-doer was, and with whom alone the passenger contracted.

ON EXCEPTIONS to a ruling of the justice of the superior court.

TRESPASS for on assault upon the plaintiff and expelling him

from a train running over the defendants' road. It appeared that the road was then operated by the Grand Trunk Railway Company of Canada, under a lease from the defendant corporation. The judge was asked to instruct the jury, that if they found that the defendants had leased their road to the Grand Trunk Railway Company, and it was operated by the latter corporation, under such lease, at the time the acts complained of were done, then this action could not be maintained; but the presiding justice held the contrary, and a verdict having been rendered for the plaintiff for $700, the defendants excepted.

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

S. C. Strout and *H. W. Gage*, for the plaintiff, cited *Whitney* v. *Atlantic & St. Lawrence Railroad Company*, 44 Maine, 362; *Stearns* v. *Same*, 46 Maine, 117.

Dickerson, J. The principal question reserved is whether this action is maintainable against the defendant company.

The Atlantic and St. Lawrence Railroad Company leased its entire road to the Grand Trunk Railway Company of Canada in 1853 under the authority of an act of the legislature. That act contained the following provision: "Nothing in this act, or in any law or contract that may be entered into under the authority of the same, shall exonerate the said company, or the stockholders thereof, from any duties or liabilities now imposed upon them by the charter of said company, or by the general laws of the State, nor shall any thing herein contained, in any manner limit or circumscribe any power of the legislature of this State to enact laws, affecting the rights, privileges, or duties of said company." Special Laws of 1853, c. 150, § 1.

The charter of the company, § 1, provides that it shall have all the powers, privileges and immunities, and be subject to all the duties and liabilities, provided and prescribed respecting railroads in c. 81, of the revised statutes of 1842. Section 21 of that chapter makes railroad corporations liable for all damages sustained

by any person in consequence of any neglect of any of their agents. R. S., c. 51, § 35, subjects railroad corporations to liability for injuries occasioned by the negligence or carelessness of any person employed in conducting their trains.

For injuries thus occasioned there is no question but the defendant company would be liable, notwithstanding the lease of their road. It was held in *Whitney* v. *Atlantic & St. Lawrence Railroad Company*, 44 Maine, 367, that the defendant company are liable under their charter obligation to maintain sufficient fences, and in *Stearns* v. *Same*, 46 Maine, 117, that the lease does not relieve them from their statute liability for damages by fire. The decision in both these cases is expressly placed upon the ground that the act of the legislature, authorizing the lease, does not exonerate the defendants from liabilities expressly imposed upon them by their charter or the statutes of the State.

But this action does not proceed upon any "negligence," "neglect" or "carelessness" of the defendants, or their agents or servants, or in the violation of any obligation or duty prescribed in their charter or enjoined by the statute. The act complained of, which occasioned the alleged injury, is alleged to be the misconduct, the positive wrong, of one of the agents of the defendants, by reason of which the defendants are guilty of a breach of their contract with the plaintiff as common carriers of passengers. It is contended by the counsel for the defendants that they are not liable for the alleged injury because of the lease of their road to the Grand Trunk Railway Company, by authority of an act of the legislature, which company had the whole care, direction and control of the road at the time of the alleged injury, and whose agent the person charged with the wrongful act was. In other words, it is argued that this action must fail for want of privity between the plaintiff and the defendant company.

The plaintiff's contract was with the Grand Trunk Railway Company. The consideration, if any, moved from hence to that company. The obligation of safe transportation and the duty of

proper treatment devolved upon that company alone, and the liability for a breach of these, if any, was incurred by them. The defendants were strangers to that contract and its fulfilment: there was no privity, in fact, between them and the plaintiff, nor did any arise by implication of law, in consequence of any contract between the two railroad companies. The defendants on record, as we have seen, are not liable to the plaintiff by virtue of any express provision of their charter or of the statute. If the defendants are liable, it must be because of the legal disability devolved upon them to exonerate themselves from liability by the lease of their roads to another railroad corporation. Does such disability exist?

It is argued, in support of such disability, that the performance of the duties and liabilities imposed upon the defendants by their charter, and the statutes of the State, was the consideration upon which their charter was granted, and which entered into the contract with the State, and that to allow them to divest themselves of these duties and liabilities by leasing their road to another railroad corporation, would be to recognize their authority to make the substitution without the consent of the other party to the contract. This would, indeed, be a grave objection, if the lease had been made without the authority of the legislature. But the defendants' lease to the Grand Trunk Railway Company was authorized by a previous act of the legislature. The other contracting party thus assented to the substitution. The act of the legislature granting to the defendant corporation the power to lease their road, and the lease made in conformity therewith, are as authoritative and obligatory upon the defendants' lessees to perform the duties and discharge the liabilities thus devolved upon them, as was the original charter upon the defendants themselves. By these acts both parties to the charter of the defendant company assented to the change made, and both they and the public must abide the result.

To a specified extent and for certain defined purposes the Grand Trunk Railway Company was substituted for the defendant company, and became the owner *pro hac vice* of the defendants' rail-

road. The act of the legislature authorizing the change was no less public than the original charter, and parties having business relations with the same are bound to take cognizance of it.

This conclusion accords with the general current of judicial decisions upon this question. In *Fletcher* v. *Boston & Maine Railroad*, 1 Allen, 9, it was held that a railroad company is responsible for an injury occasioned by a want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction and control, although the train belongs to another railroad company, and if the injury results from the negligence of another railroad company, which has a joint right to use the road under a lease from them, and which is accordingly running trains over their road on its own account, the lessors are not responsible.

So in *Murch* v. *Concord Railroad Co.*, 29 N. H., 35, which was an action against the defendants, as owners of the road, for an injury to the plaintiff, sustained thereon, while used by the Northern Railroad Company under a contract with the defendants, the court held that the defendants were not liable, and that the claim of the plaintiff, if any, was upon the Northern Railroad Company, with which he contracted. In delivering the opinion of the court in that case, Mr. Justice Bell says: "By using the railroad of another corporation as part of their track, whether by contract or mere possession, they (the Northern Railroad Company) would ordinarily make it their own for many purposes, and would assume towards those whom they have agreed to receive as passengers, all the duties resulting from that relation as to the road, and there would be no privity between such passengers and the proprietors of the road so used.

This doctrine was affirmed by the court in the same State in a recent case where it was held that the lessee corporation becomes the owner *pro hac vice* of the road leased, and is liable for damage accruing by fire or steam from a locomotive run by them upon the track of the leased road. *Pierce* v. *Concord Railroad Co.*, 52 N. H., 593."

It is true that in *Langley* v. *Boston & Maine Railroad*, 10 Gray, 103, the court held that the owners of a railroad cannot lease their road to a corporation created by another State, and thereby discharge themselves from the duties and liabilities they have incurred as a consideration for the charter granted to them. But that case is clearly distinguishable from the one at bar, since that lease was executed without, while this had the sanction of, legislative authority; in that case, one party alone undertook to change the contract, while in this, both parties assented to the change.

The remedy of the plaintiff, if any he have against either corporation, is against the Grand Trunk Railway Company, with which he contracted. For such injuries, that company is liable in the same manner as the defendants would have been, if they had been in the use, occupation and control of the road themselves. 1 Redf. on Railways, 4 ed., 610; *Sprague* v. *Smith*, 29 Vt., 421.

The requested instruction that, upon the evidence submitted, the action could not be maintained against the Atlantic & St. Lawrence Railroad Company should have been given. There being evidence in the case that would authorize the jury to find exemplary damages, if the plaintiff was entitled to recover at all against these defendants, the requested instructions upon that point were properly refused. *Exceptions sustained.*

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

WALTON, BARROWS and VIRGIN, JJ., did not concur, not perceiving the distinction between this case and those in which it has been held that the defendants were liable.

AARON MCKENNEY *vs.* ALLEN HAINES.

Damages—measure of.

In assumpsit for breach of contract to return borrowed bank stock on demand; *held*, that the measure of damages is the market value of the stock on the day of demand, with interest.

ON REPORT.

ASSUMPSIT to recover balance due for twenty shares of the stock of the Second National Bank of Portland, borrowed by the defendant of the plaintiff, June 5, 1869, upon an agreement to return them on demand, and in the meantime to pay to Mr. McKenney all the dividends declared upon them. To secure performance of this agreement the defendant conveyed to the plaintiff real estate in Portland. Circumstances rendering it impossible for Mr. Haines to return the shares when demanded, and the property taken as collateral being insufficient security, it was agreed that Mr. McKenney should take the land at an appraisal, and Mr. Haines be holden to him for the balance: this case is reported to determine what that balance is, and the legal principles upon which it is to be ascertained. The demand for a return of the stock was made in August, 1872, when it was selling at $125 per share. The land was appraised October 22, 1872, at $1,394. The bank subsequently closed up its business and paid $145 per share to each stockholder.

Joseph A. Locke, for the plaintiff.

A. Haines, pro se.

VIRGIN, J. On June 5, 1869, the defendant borrowed of the plaintiff twenty shares of bank stock, conveyed to him certain land as security and contracted to pay him all dividends on the stock, and return the same number of shares on demand upon receiving a reconveyance of the land.

Circumstances having rendered it impossible for the defendant to return the stock, the parties, on October 18, 1872, agreed that the plaintiff should retain the land at an appraised value, and that the defendant should pay the difference. The defendant failed to fulfill the latter agreement, and this action was brought for a determination of the rights of the parties—the principal question being the measure of damages.

The general rule of damages for the refusal of a vendor to deliver goods according to the terms of sale is well settled everywhere—to wit;—the market value of the goods, at the time the contract was broken, allowing the jury to add the interest for the delay. This rule has frequently been recognized by this court. *Smith* v. *Berry*, 18 Maine, 122; *Warren* v. *Wheeler*, 21 Maine, 484; *Furlong* v. *Polleys*, 30 Maine, 491; *Berry* v. *Dwinel*, 44 Maine, 255; *Bush* v. *Holmes*, 53 Maine, 417.

But to this general rule an exception has been made in the courts of some States and countries; and so far as the exception is concerned there has long been a conflict of authority. Thus in England, in cases of contracts for the transfer of stocks, and in some jurisdictions in cases of the sale of goods paid for in advance, vendees have recovered the value of the stocks or goods on the day when by the terms of the contract they ought to have been delivered, or, on the day of trial, at the option of the plaintiff. "The true measure of damages" in such cases being held to be "that which will completely indemnify the plaintiff for the breach of the engagement." *Shepherd* v. *Johnson*, 2 East, 210; *M'Arthur* v. *Lord Seaforth*, 2 Taunt., 257; *Downes* v. *Back*, 1 Stark., N. P. C., 318; *Harrison* v. *Harrison*, 1 C. & P., 412; *West* v. *Pritchard*, 19 Conn., 212, and cases there cited.

In New York, this rule is carried out to its logical result; for there the measure of damages is declared to be the highest market price of the chattels up to the last trial. *Lobdell* v. *Stowell*, 51 N. Y., 70, and cases there cited.

In Vermont it is held unqualifiedly that the market value or price on the day of the breach of the contract controls the meas-

ure of damages; and that the fact of payment in advance by the vendee does not affect the rule. *Rider* v. *Kelley*, 32 Vt., 268; *Hill* v. *Smith*, 32 Vt., 433; *Copper Co.* v. *Copper Min. Co.*, 33 Vt., 92.

Such is also the rule in Massachusetts. *Wyman* v. *Am. Powd. Co.*, 8 Cush., 168, and cases there cited.

The question underwent a very elaborate examination in New Hampshire, in *Pinkerton* v. *Manch. & Law. Railroad*, 42 N. H., 424. The court held in a case of refusal to deliver stock, that the measure of damages is the value of the stock at the time of the demand with interest, and not the value at the time of the trial, or at any intermediate period. Bellows, J., after thoroughly reviewing the authorities in the various jurisdictions, says: "The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule, and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, to hold that the plaintiff might elect as the rule in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in re-

gard to which the rule in England originated, there are doubtless cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him not indemnity merely, but a power, in many instances of unjust extortion, which no court could contemplate without pain."

After a full examination of the subject, Mr. Sedgwick, says: "The value of the article at the time of the breach, with interest for delay . . . . seems to me as near an approach to the actual loss sustained as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction." Sedgwick on Meas. of Dam., 305. To the same effect is *Berry* v. *Dwinel*, 44 Maine, 268. And with these views we are satisfied. According to the agreement of the parties, the entry must be

Judgment for plaintiff, for $1,131 *and int. from Oct.* 22, 1872.

Appleton, C. J., Walton, Dickerson, Barrows and Danforth, JJ., concurred.

HORATIO MERRILL *vs.* EDWARD P. MERRILL.

Statute of limitations. R. S. c. 81, § 83. Witnessed note.

An action for money had and received sustained by a valid promissory note, signed in the presence of an attesting witness, is an action on such note within the meaning of R. S., c. 81, § 83, and may be maintained within the same limitation as if the note had been specifically declared upon.

ON EXCEPTIONS.

The writ by which this action was commenced bore date the tenth day of October, 1871, and was returnable to the January term, 1872, of this court for this county. The plea was the genral issue and the statute of limitations. When the cause came on for trial the plaintiff moved for leave to amend by adding two special counts, one upon a note of the defendant to the plaintiff, dated July 7, 1857, for $1780.00 payable in one year from date with interest, and the other upon a note between the same parties, for $1775.00, payable in one year with interest, which amendment the presiding justice declined to allow. The case was submitted to the presiding judge, with the right to except, who found as matter of fact that the defendant gave his promissory note to the plaintiff on the seventh day of June, 1857, bearing that date for $1780.00, payable in six months from date with interest; that the note was signed in the presence of an attesting witness and was destroyed in the great fire in Portland, July 4, 1866; and ruled, as matter of law, that the statute of limitations was a bar to this action: to which ruling the plaintiff excepted.

A. Merrill, for the plaintiff, cited 1 Chitty on Pleading, 113, 372; 3 Burr., 1516; *Fairbanks* v. *Stanley*, 18 Maine, 402; *Howe* v. *Saunders*, 38 Maine, 352; *Sturtevant* v. *Randall*, 53 Maine, 149.

T. B. Reed, for the defendant.

R. S., c. 81, § 79, bars "all actions of assumpsit," &c., not

brought within six years from the time the cause accrued; section 83, excepts those brought upon witnessed notes. This is an action for money had and received, not one brought upon a note, that document having only been resorted to as a piece of evidence in the suit, not as the foundation of it.

RESCRIPT by

DANFORTH, J. An action for money had and received, sustained by a valid promissory note, signed in the presence of an attesting witness, is an action upon such note, within the meaning of R. S., c. 81, § 83, and may be maintained within the same period of limitation as if the note had been specifically declared upon.

Exceptions sustained.

APPLETON, C. J., CUTTING, BARROWS and PETERS, JJ., concurred.

Dissenting opinion by

DICKERSON, J. This is assumpsit for money had and received, submitted to the presiding justice with the right to except. The exceptions do not show whether the justice, in disallowing the amendments, made the ruling in the exercise of his judicial discretion, or as matter of law. As exceptions lie only in the latter case, we are thus unable to pass upon the question intended to be presented by the exceptions upon this branch of the case. They must, therefore, be dismissed.

The justice found as matter of fact that the defendant gave the plaintiff his promissory note, dated July 7, 1857, for the sum of $1780.00, payable in six months from date with interest, and that this note was signed in the presence of an attesting witness. He also ruled, as matter of law, that the action was barred by the statute of limitations. To this ruling the plaintiff alleged exceptions.

R. S., c. 81, § 79, provides that all actions of assumpsit shall be commenced within six years from the time the cause of action accrued and not afterwards. By § 83 of the same chapter this lim-

itation does not apply "to actions brought upon promissory notes when signed in the presence of an attesting witness."

The ruling of the justice was correct unless this is to be regarded as an action upon a promissory note. In terms it is an action for money had and received. The plaintiff does not declare upon any note. How then can this be deemed an action upon a promissory note? But it is contended by the counsel for the plaintiff that it is competent to introduce a promissory note, as evidence in support of the count in the writ, and that, for this reason, the action may properly be regarded as an action upon the note thus introduced. But the writ and declaration fix the character of an action; that is established before the evidence is introduced, and the evidence cannot change it. The *factum probandum* is money had and received. *Non constat* that a promissory note will appear in the case; the gist of the action may be established by parol evidence that the defendant has received the plaintiff's money or by a receipt acknowledging the same, as well as by a promissory note. According to the counsel's theory this would be an action on a receipt, if the plaintiff had introduced a receipt to prove the count in the writ; and thus the same action, with the same single count in the writ, would have as many types and characters, as the different instruments, or kinds of evidence introduced to support it would indicate, though none of these should be declared on or contained in the declaration.

An action takes its form from the writ and its character from the subject matter declared on, or referred to in the count or counts contained in the declaration. In no view of the case can an action for money had and received be properly denominated "an action on a promissory note," in the purview of the statute. When, in such action, a note is introduced in evidence, it is not introduced because it is sued, nor as a note, but as evidence of the defendant's acknowledgement of the truth of the allegation in the writ, that "he had and received the plaintiff's money." The note, when introduced in evidence, is competent evidence of that fact, whether it appears to have been "signed in the presence of an at-

testing witness" or not; the attestation or want of attestation does not affect the competency of the note as evidence an iota. Nor is it material to the admissibility of such note in evidence, whether it fell due a year or twenty years before the action was commenced. The competency of the note as evidence is one thing, and the legal effect of it is quite another.

The note was given in 1857, and more than six years had elapsed from the day it fell due to the time when this action was commenced. As between the original parties, the note is evidence of the defendant's receipt of so much money, whether witnessed or not, or even though it had been invalidated as a note, by alteration. It is, moreover, evidence of "money had and received," in a technical sense. *Byles on Bills*, 424; *Bayley on Bills*, 244. But while the note is evidence of the defendant's acknowledgement of so much money had and received of the plaintiff by a kind of legal *felo de se*, it also furnishes proof, under the statute of limitations, that the plaintiff's right of action is barred by that statute. R. S., c. 81, § 79.

We have arrived at this conclusion, not without having considered the ingenious argument of the plaintiff's counsel, and the array of authorities cited in support of his position. While these authorities clearly support the doctrine that a promissory note is competent evidence to support an action for money had and received, they fail to maintain the theory of the counsel, that an action for money had and received, when supported in evidence by an attested promissory note, stands in the same relation to the statute of limitations as an action brought upon the note itself. The statute upon this point applies only "to actions on promissory notes." R. S., c. 81, § 83. This is not such an action, as the presiding justice in our judgment very properly ruled when he decided that it is barred by the statute of limitations.

VIRGIN, J., concurred in the foregoing dissenting opinion.

AMMI R. MITCHELL vs. KATE H. DOCKRAY, executrix.

Referee can determine both law and fact.

One to whom an action is referred, by an unrestricted rule of court has authority to determine the law as, in his judgment, under the circumstances, seems best; and his ruling is conclusive.

ON REPORT.

ASSUMPSIT upon four promissory notes given by the defendant's testator to the plaintiff. The cause was referred by rule of court to Hon. William L. Putnam with no special limitation of his power as referee. At the hearing it was objected that no demand for payment was proved to have been made before instituting the action but Mr. Putnam ruled that none was necessary, and in his report, after an award of $5057.35 to be paid the plaintiff, he says: "The above award is absolute on the part of the referee, unless the referee has the authority to submit to the court the following questions of law, raised by the defendant during the hearing, and herein stated and submitted to the court by the referee, and unless the court has the power to decide said questions and thereupon to modify, re-commit or set aside the award accordingly. The defendant objected at the hearing that the plaintiff had not made any demand on the defendant previous to suit. There was no proof that the notes dated October 5 and November 1, 1864, above allowed to the plaintiff, were ever demanded of the defendant . . . . but the referee ruled at the hearing that the plaintiff was not holden to prove any demand."

The defendant filed written objections to the acceptance of the report, based upon alleged error in this ruling, which he had now by the terms of his report (as above quoted) submitted to the determination of this court for revision.

Butler & Fessendens, for the plaintiff.

The want of demand was not put in issue by the pleadings. R.

S., c. 82, § 18. It should have been pleaded in abatement to avail the defendant. Chitty on Pleadings. Tit., Abatement. It was waived by filing the account in set off. Angell on Ins., §§ 242, 249; *Heath* v. *Franklin Ins. Co.*, 1 Cush., 265; *Clark* v. *N. E. Ins. Co.*, 6 Cush., 342; *Underhill* v. *Agawam Ins. Co.*, Id., 440; *Vos* v. *Robinson*, 9 Johns., 192; *Ætna Ins. Co.* v. *Tyler*, 16 Wendell, 385; *Frances* v. *Ocean Ins. Co.*, 6 Cowen, 404; *Sexton* v. *Montgomery Ins. Co.*, 9 Barb., 191.

A reference is a waiver of all errors in the proceedings. Morse on Arbitration, 71; *Hix* v. *Sumner*, 50 Maine, 290; *Forseth* v. *Shaw*, 10 Mass., 253; *Maxfield* v. *Scott*, 17 Vermont, 640; *Swift* v. *Harriman*, 30 Vermont, 607, *Waterman* v. *Conn. R. R. Co.*, Id., 610; *Reed* v. *Stockwell*, 34 Vermont, 206.

McCobb & Kingsbury, for the defendant.

By his report the referee proposes to the court for its solution the "questions of law" . . . "herein stated and submitted;" so this court has full power to determine them. *Barnard* v. *Spofford*, 31 Maine, 39; *Ward* v. *American Bank*, 7 Metc., 486; *Knight* v. *Wilder*, 2 Cush., 199; *Ellicott* v. *Coffin*, 106 Mass., 368, 369. *Greenough* v. *Rolfe*, 4 N. H., 357; *Roosevelt* v. *Sherman*, 1 Johns. Ch., 220; *Johns* v. *Stevens*, 3 Vermont, 308.

This objection was insisted upon at the hearing, not being waived by the reference. Only objections to the form of procedure is thus waived. In *Porter* v. *Dickerman*, 11 Gray, 482, the award was set aside for a gross misjoinder of plaintiffs. See also, *Austin* v. *Kimball*, 12 Cush., 485.

RESCRIPT.

This action was referred by an unrestricted rule of court. The referee had the authority to rule the law, as seemed best in his own judgment under all the circumstances of the case. Having ruled that, under the peculiar circumstances of the case, the plaintiff was not holden to prove any demand, his ruling is conclusive. Such statutory provisions may be waived. *Report accepted.*

MERRILL W. MOSHER v. GEORGE H. JEWETT.

Distraint. Judgment. Lien. Pounds and impounding beasts. Practice. Superior Court.

In a case tried before the justice of the superior court without the intervention of a jury, subject to exceptions in matters of law, his findings in matters of fact, are conclusive so far as material for a consideration of the exceptions, but are not finally conclusive till the rendition of judgment thereon.

In a town in which there is no pound nor pound keeper, a person may legally detain in his custody an animal taken upon his premises *damage feasant*, and has a lien upon such animal for expenses necessarily incurred in taking suitable care of it.

ON EXCEPTIONS, to the ruling of the present justice of the superior court.

REPLEVIN of a yearling bull, brought December 3, 1870, entered at the February term, 1871, of the superior court, tried before the then justice of that court at its April term, 1871, who found that the bull was the plaintiff's, but was found unlawfully trespassing and doing damage upon the defendant's premises, without either fault or consent on the part of the defendant, who took care of him, and then posted three notices in public places in Gorham and inserted an advertisement in the Portland Press, stating that the animal was found in his enclosure and that the owner could have him by proving property and paying charges; that within ten days after this (which was October 25, 1870) the plaintiff called and saw the bull, but was doubtful of its identity; that subsequently, to wit, November 4, 1870, the defendant offered to deliver him to the plaintiff upon proof of ownership, furnishing of indemnity against any adverse claim, and payment of five dollars for damages and keeping, but with these terms the plaintiff refused to comply and declined to take him; that no demand was made on Mr. Jewett till Dec. 1, 1870, when, upon his refusal to surrender him till compensated for his expenses and care in keeping him,

the plaintiff offered Mr. Jewett, but did not tender him, ten dollars therefor, which he rejected as insufficient; and, upon the the twelfth day of December, 1870, the plaintiff replevied the beast by the writ in the present action; that the defendant suitably kept the bull for forty-eight days, for which he ought to have twenty-four dollars; that he paid two dollars for advertising, and the bull did him damage to the amount of four dollars; and thereupon the justice ruled, as matter of law, that the plaintiff was not, at the time of the demand made by him, entitled to the immediate possession of the bull because he had not made nor tendered to the defendant payment for the keeping of the bull, for which he had a lien upon the animal; that the defendant could rightfully retain him till this lien was discharged; and he awarded damages to the defendant in the sum of thirty dollars, to which the plaintiff excepted. These exceptions were sustained, as appears by the report of the case in 59 Maine, 453,-6.

At the March term, 1873, the cause came up again before the present judge of the superior court, when the plaintiff moved for judgment in his favor "because at the trial of this case, in this court, at the April term, 1874, before the justice thereof without the intervention of a jury, the said justice found, as a matter of fact, that said bull was and is the property of the plaintiff," and because the ruling of the justice that, as matter of law, the defendant had a lien upon the beast, had been declared erroneous by the decision of the law court, in sustaining the plaintiff's exceptions; thereby determining conclusively between these parties, the issue of law and of fact, that the plaintiff owned the bull and that the defendant had no lien upon him when this suit was brought; so that "the case is now ready for judgment without further trial or hearing, which cannot properly or legally be required or had, without the plaintiff's consent," which he declined to give. The judge overruled the motion and directed a new hearing of the cause before him, to which the plaintiff excepted.

Upon this hearing the judge found substantially the same facts that his predecessor did, with the additional one, upon which the

case finally turned, "that during the year 1870 there was neither pound nor pound keeper in the town of Gorham;" and he again ordered judgment for the defendant in the sum of thirty-four dollars damages, and for his costs, to which the plaintiff excepted.

Howard & Cleaves, for the plaintiff.

Our motion for judgment should have been allowed. The facts in this case had been decided by a former judge of the superior court, and judgment should have been entered upon these facts according to the principles of law laid down in the decision of this court upon the legal issues between these parties which had been presented and conclusively determined in *Mosher* v. *Jewett*, 59 Maine, 453. No new trial was ordered; therefore, to the facts, as found by the justice before whom the cause was tried, which were a matter of record and conclusive upon the parties, it was the duty of the presiding justice to apply the law.

See the act establishing the superior court; Public Laws of 1868, c. 151, § 6; *Montine* v. *Deake*, 57 Maine, 38. The findings of law and of fact, with the single exception as to the existence of a pound, are the same as those before declared by this court to be erroneous. The additional fact here found cannot alter the legal position of the case. The court held that the law provided two remedies, to wit: distraint and commitment to the pound, or an action of trespass. R. S., c. 23, § 4; 59 Maine, 456. Because the neglect of his town deprived him of the opportunity to impound, it does not follow that he has the right to detain the beast in his own barn, when the statute indicated an easy method for him to preserve his rights and his lien; if he chose to disobey the statute, then he lost both.

The common law lien was abrogated by statute of 1834, c. 137, and has had no existence since. *Gooch* v. *Stephenson*, 13 Maine, 371; *Cutts* v. *Hussey*, 15 Maine, 237. Justifying under a statute, then, the defendant is a trespasser *ab initio* unless he shows strict compliance therewith. *Morse* v. *Reed*, 28 Maine, 490.

John A. Waterman, for the defendant.

Where exceptions are sustained to directions of a judge presiding at a jury trial, there is no pretence that the facts found by the jury are conclusively found, but a *venire de novo* is awarded. How does the present case differ from that? There is nothing in acts of 1868, c. 151, to sustain the claim, or the plaintiff's motion. Decisions of the law court, are to be certified to the superior court, in cases originating there, "with the same effect as in cases originating in the supreme judicial court." § 9.

Without any fault of his own, the defendant found himself in a very novel and embarrassing situation. He had taken possession of an animal found doing damage upon his premises, and there was no pound to which he could commit the beast and no known owner against whom he could bring his action of trespass for the damages: hence, it was a *casus omissus*, for which the statutes provided no remedy and the common law lien therefore remained. The cases cited by the plaintiff do not sustain his assumption that this lien has been abrogated by statute, in cases like the present.

VIRGIN, J. When a case is tried by the justice of the superior court "without the intervention of a jury, subject to exceptions in matters of law," his findings in matters of fact, are conclusive *pro hac vice*—so far as they become material to a consideration of the exceptions—and they cannot be revised by this court. But they are not finally conclusive until by a judgment they have become *res adjudicata*. With the exception of their not being subject to revision on motion, they perform the office of verdicts special or general; and when exceptions in matters of law are sustained in such cases, the effect is to give a new trial both as to the facts and the law, the same as if the facts had been submitted to and found by a jury.

In the case at bar the finding as to the title of the property replevied is the same in the latter as it was in the former trial. And the other material facts were substantially the same in both trials, with the exception that in the latter trial was found the additional

fact—that during the year 1870, there was neither pound nor pound keeper in the town of Gorham.

Prior to the enactment of our statutes relating to the impounding of cattle, the common law permitted a land owner "to be his own avenger, or to minister redress to himself" by "distraining another's cattle *damage feasant*." Otherwise it might "be impossible, at a future time to ascertain whose cattle they were that committed the trespass." And when cattle were distrained for that cause, it became the duty of the distrainer to put them into some enclosure denominated a pound, which might be a common, or a special pound—overt or covert—and there keep them. If in a special pound-covert, as in the impounder's own barn, he was bound to properly feed and care for them. When thus impounded they were kept in the nature of a pledge until satisfaction were made; unless the owner (*replegiavit*) took back the pledge by a replevin writ. Thus the distress was the common law security. 3 Black. Com., 6—13.

What effect did the statute have upon the common law right and method of impounding cattle *damage feasant*? Did it abrogate it altogether? *Gooch* v. *Stevenson*, 13 Maine, 371, and *Cutts* v. *Hussey*, 15 Maine, 237, do not pretend to declare that.

Statutes are not to be construed as taking away a common law right unless such intention is manifest. *Melody* v. *Reab*, 4 Mass., 472. And where a remedy existed at common law and the statute creates a new remedy in the affirmative, without a negative express or implied, a party may still seek his remedy at common law. *Coffin* v. *Field*, 7 Cush., 358, and cases there cited. Particular remedies are to be followed in the particular cases contemplated by the law created for them, but in other cases the general law furnishes the remedy. *Boynton* v. *M. M. F. Ins. Co.*, 4 Metc., 216; *Salem Tur. & Chel. Br. Co.* v. *Hayes*, 5 Cush., 458.

Now R. S., c. 23, § 1, requires towns, under a penalty, to keep and maintain pounds for the reception of beasts liable to be impounded; and § 5 requires towns "annually to choose pound keepers."

Section 4 authorizes any person injured in his land by cattle to recover his damages by distraining any beast doing it, or by an action of trespass against the owner or possessor unless such beast was lawfully on the adjoining lands, &c.

By § 11, whoever takes up as an estray, in any public way or in his inclosure or possession, any such beast, shall within ten days, if no owner calls for him, "commit him to the pound keeper of his town, who shall carefully keep him till called for by the owner, and all due charges paid . . . ; and whoever does not so commit such beast, shall lose the expense of his keeping and forfeit one per cent. on his value," &c.

But in the case at bar, there was neither pound nor pound keeper; nor was the owner of the bull known. Even the owner himself was for several weeks "doubtful of its identity;" and at the trial the question of ownership was involved in grave doubt. If there had been a pound or pound keeper in town, the defendant could have followed the statute mode of impounding. If the owner had been known, the defendant might have resorted to his action of trespass. But neither of these statute remedies was open to him for the sole reason that neither of the facts contemplated by the statute existed. And neither was the defendant in any wise in fault or responsible for their non-existence. He was therefore without remedy unless we hold that the common law mode of impounding survived in cases not covered by the statute. Such is substantially the decision of numerous courts in analogous cases embraced within the same subject matter, as for instance the construction given to the proviso in § 4. *Little* v. *Lathrop*, 5 Maine, 360; *Gooch* v. *Stevenson*, 13 Maine, 371; *Webber* v. *Closson*, 35 Maine, 28; *Thayer* v. *Arnold*, 4 Metc., 591, and cases there cited.

At common law, cattle could be impounded either in a common or a private pound, at the option of the impounder. The statutes of New Hampshire, Vermont and Massachusetts respectively require towns, under similar penalties, to erect and maintain pounds, but provide that creatures must be impounded in the public pound if there be any in the town, otherwise in the barn or inclosure of

the person taking them up. To be sure, there is no such express provision in the statute of this State, but it should practically receive the same construction. Any other construction, as is seen in the case at bar, permits such a gross absurdity as to forbid our belief that it was ever intended.

This view does not conflict with the decision of this court in this case as it was reported in 59 Maine, 453. There was no evidence in relation to the existence or non-existence of pound or pound keepers; but in the absence of any evidence, the presumption was that the town had performed its statute duty, and the decision of the court was predicated upon the presumed existence of pound and pound keeper.

If this view be correct, then the plaintiff was not aggrieved by the rulings in relation to the lien; and the result must be,

Exceptions overruled.

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

THE PORTLAND, SACO & PORTSMOUTH RAILROAD COMPANY in equity,

vs.

THE GRAND TRUNK RY. CO., and the AT. & ST. L. R. R. Co.

Contract—construction of—when equity will decree performance of residue of one partly abandoned.

The stipulation for the erection of a central passenger station found in the contract of April 23d, 1850, between the plaintiffs and the Atlantic & St. Lawrence Railroad Company has been abandoned by mutual consent.

All the other work contemplated in the contract having been performed with the exception of this item, and this being abandoned, the plaintiffs have the same rights in the works actually constructed at the joint expense, and the same right to an irrevocable lease of the western portion of the tracks laid down in pursuance of the contract, as they would have had if the proposed central depot had been constructed within a reasonable time.

The territorial division of the tracks heretofore made for the purpose of repairs indicates the part to be leased.

Until such lease is made the plaintiffs have a right in common to the use and occupancy of the tracks throughout, for the purpose of transporting and delivering at any point between the original termini of the roads, as they existed on April 23d, 1850, all freight and cars which they are hauling in pursuit of their business as common carriers, whether their own cars or the cars of connecting roads, and whether they receive them at their general station in Portland or elsewhere.

After such lease both parties shall enjoy their rights in that portion of their new tracks which is in the possession and under the immediate control of the other party, under such rules and regulations as may be mutually beneficial.

The non-fulfilment by mutual consent of one item in a contract embracing the performance of several pieces of work, will not defeat the right of a party who is not in default to require a substantial performance of the remainder of the contract, when such non-fulfilment does not affect the essential rights and interests of the contracting parties with regard to those parts of the work which are actually performed.

BILL IN EQUITY.

After stating the corporate existence of the parties and the lease of the property of the Atlantic & St. Lawrence Railroad Company, to the Grand Trunk Railway Company, which thereby succeeded to all the rights, duties, obligations and agreements of its lessor, the bill proceeds to recite that a contract was made, April 23, 1850, between the complainants and the Atlantic & St. Lawrence Railroad Company, relative to the construction of Commercial street and a sea-wall along the water-front of that street, which said last named corporation had contracted to build by arrangement with the city of Portland; by which agreement between these railroad companies this work was to be done at their joint expense, and they were also to unite in building a central depot for their equal use and benefit at some point on Commercial street, nearly midway of the same as built by them. In consideration of the plaintiffs bearing one-half of this expense it was agreed that they should have, from the Atlantic & St. Lawrence Railroad Company, an irrevocable lease of all that portion of the railroad and tracks lying westerly of the proposed union depot, and that this (westerly) part should be conveyed absolutely to the

complainants whenever they should be authorized to extend their road to this central station; and until the erection of this building, were to have the right, equally with the other road, to use and occupy the railroad and tracks so built at their joint expense; and both parties were to be "at full liberty to deliver their freight at any point between the termini of the now existing depots of the two roads free of charge, but each party shall control the portion of the road which may be constructed between their present depots and the proposed central depot, and establish such rules as may be mutually beneficial." The sea-wall, street and tracks were built and laid down at joint expense of the parties, as contemplated and provided by this contract of April 23, 1850, but the central depot never was erected, but this project was abandoned, and the contract in this respect (but not otherwise) modified; nor was any lease to the complainants, of any part of this Commercial street track ever executed; but the parties, including the Grand Trunk Railway, since it succeeded to the rights and obligations of the Atlantic & St. Lawrence Railroad Company have used this track as authorized and specified in this agreement, till the summer of 1872, when the Grand Trunk Railway Company refused to allow the complainants the free and unobstructed use of said tracks which they had enjoyed for more than twenty years, under the arrangement aforesaid. The bill was filed July 24, 1872, and prayed for a perpetual injunction to restrain the respondents from any interference with the complainants' use and occupancy of this track upon Commercial street under said contract, and that the defendants be ordered and required to give the irrevocable lease therein mentioned. The answers admitted the contract, but denied that it had ever been modified at all, and claimed that the Portland, Saco & Portsmouth Railroad Company had no right under it to draw along Commercial street cars belonging to roads that delivered them to that corporation at or near its station in Portland—evidently meaning to deny its right so to haul the cars of the Maine Central Railroad Company.

Nathan Webb, for the complainants.

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

BARROWS, J. The plaintiffs, on the twenty-third of April, 1850, entered into a written contract with the Atlantic & St. Lawrence Railroad Company one of the respondents here, lessor of the other respondent which operates and uses the railroad and property of the said Atlantic & St. Lawrence Railroad Company, and stands in their place and stead, as far as regards the fulfilment of many of their agreements, obligations and duties. Said written contract provides for the construction, at the joint and equal expense of the contracting parties, of a sea-wall and street, in pursuance of an agreement between the Atlantic & St. Lawrence Railroad Company and the city of Portland—for the erection at their joint expense of a suitable passenger depot for the accommodation and use of their respective roads, and for the purchase of such land and flats as might be necessary for such depot at some suitable location between their then existing depots—for the immediate connection of the depots then in use by a temporary track on piles—and, generally, for the performance of the contract between the Atlantic & St. Lawrence Railroad Company and the city of Portland at the joint and equal expense of these contracting parties.

Hereupon the Atlantic & St. Lawrence Railroad Company covenanted with the plaintiffs to lay out and extend the location of their line from their depot at the foot of India street to the plaintiffs' depot in Canal street, and to make an irrevocable lease of their interest in the railway to be laid down westerly of the proposed central depot and between that and the plaintiffs' depot, and whenever the plaintiffs should obtain legislative authority to extend their line to said central depot, to convey all their right and interest in the portion thus agreed to be leased, to the plaintiffs, —"and until the erection of said central depot, the said company of the first part (A. & St. L. R. R. Co.,) hereby agrees to grant to said company of the second part (the plaintiffs) the use and occupation of said track or tracks which may be laid down between and to connect the present depots of said parties."

Here follow provisions for the laying down of said track or tracks at the joint and equal expense of the parties and other provisions as to the mode in which the temporary track above referred to, should be used and operated, and stipulations with regard to the amount of the payments to be required of the plaintiffs in carrying out the object of the agreement, and the manner in which such payments should be made, and then the material portion of the contract closes thus—"On the completion of the whole work aforesaid the parties respectively shall run their passenger trains to the central depot, and shall be at full liberty to deliver their freight at any point or points between the termini of the now existing depots of the two roads free of charge, but each party shall control the portion of the road which may be constructed between their present depots and the proposed central depot, and establish such rules as may be mutually beneficial."

The contemplated sea-wall and street were constructed, the tracks connecting the depots of the contracting companies were laid, and the plaintiffs paid their part of the expense thereof in accordance with the terms of the contract; and upon the completion thereof began to use the tracks as contemplated in the contract, distributing freight from their own cars and those of connecting roads at the various wharves and along the street.

No difficulty appears to have arisen between the contracting parties respecting the use of the road until recently. The proposed central depot has never been built, nor any land or flats purchased for it, nor has either party during all the time which has elapsed since the agreement was entered into, called upon the other to take any steps towards the fulfilment of this portion of the agreement.

Now the plaintiffs allege that the erection of this central depot was by mutual consent abandoned, but that the written agreement between the parties has not been in any other respect modified; and they claim in this bill that the court should require of the respondents a specific performance of the provisions of the contract which remain to be performed on their part, and a perpetual in-

junction against any interference with the business of the plaintiffs over the tracks which were laid down at the joint expense of both companies in accordance with the contract.

The respondents deny that the erection of the central depot has been abandoned, or that there has been any modification of the contract whatever; and they deny the right of the plaintiffs to draw the cars of any other railroad company over the tracks thus laid down at the joint expense; and say that they have never denied the right of the plaintiffs to draw their own cars over those tracks, nor in any manner obstructed them in so doing; and that this is all which they can lawfully claim to do, either under the contract or under any law of this State.

The only controverted question of fact, seems to be as to the alleged abandonment of the agreement so far as it relates to the erection of a central depot and the purchase of land and flats therefor. To determine this question rightly it seems to be necessary first to ascertain the true intent and meaning of the provisions touching this matter and the relation which they hold to the other portions of the contract. It cannot be doubted that the general object of the contract was to secure to both railroads the benefit to be derived from such an extension of their lines, as would enable them to transfer freight from one road to the other without the additional trouble, delay and expense of cartage, and also to enable both roads to deliver freight at any point along the whole water-front of the city.

The Atlantic & St. Lawrence Railroad Company had the power to make a legal location of their line, which would enable them to appropriate to themselves the benefits thus accruing. But the undertaking even in those days involved a heavy outlay of money. It is evident that they were willing to share the privilege with the plaintiffs for the sake of securing their assistance in defraying the expense. Hence the contract in question, which seems to have been carefully drawn with a view to securing ultimately a substantially equal division between the railroad companies of the tracks to be laid down at their joint expense, and a separate own-

ership and control in each of that half of the new tracks which was contiguous to their previous respective termini, an ownership and control which was to be assured to the plaintiffs by an irrevocable lease from the Atlantic & St. Lawrence Railroad Company of the western portion of these tracks, and a conveyance of the whole right and interest of the Atlantic & St. Lawrence Railroad Company in said western portion whenever the plaintiffs should obtain authority from the legislature to extend their line to the proposed central depot which was to be the point of division.

Thereafterwards each of the contracting parties was to own and control that portion of the track which lay between said central depot and the previous terminus of its road; but each was to be at liberty to deliver its freight at any point or points upon the new tracks between their original termini free of charge, and the companies were to establish such rules as might be mutually beneficial. Until the erection of the proposed central depot the plaintiffs were to have the use and occupancy of the new tracks throughout. It is alleged in the bill, and not denied in the answer, that the plaintiffs paid their proportion of the expense to the full amount agreed upon. No reason appears to excuse the respondents from a full and specific performance of their portion of the agreement, according to its terms, tenor and effect, unless it has been modified by the subsequent consent of the contracting parties, and in conformity with their present equitable rights if such modification has been made.

It is obvious that the agreement was designed by the parties to it to be the basis of immediate action. They entered at once upon the fulfilment of it. No time being fixed within which specific portions of the agreement were to be performed, according to a well settled rule it is to be presumed that a reasonable time was intended. Both parties contracted in view of the condition of things then existing. They may be supposed to have had in mind the ordinary prices of land, flats, building materials, work and labor, then and there, and also the prices for which they might be procured within a reasonable time thereafter for the fulfilment of their contract.

When this process in equity was commenced, more than twenty years had elapsed after the execution of the contract. A reasonable time for the performance of the stipulations respecting the purchase of lands and flats and the erection of a central depot, if that part of the contract was ever intended to be carried out, had long gone by. If either party designed to call upon the other to perform in this respect, it should have been done before all the circumstances had changed to the extent that they must almost necessarily have done during this long period. Not long after the general fulfilment of what may be supposed to be the main object of the contract, i. e., the actual physical connection of the two roads by means of tracks laid along the street which was to be constructed in pursuance of the agreement of the Atlantic and St. Lawrence Railroad Company with the city of Portland, which makes part of the case, the respondents proceeded to erect a permanent and expensive passenger station at the foot of India street.

If these plaintiffs were under obligation to share in the expense of the erection of the proposed central depot, it would be manifestly inequitable in them to lie by, and permit the respondents thus to change their condition without interposing a reminder of the obligations under which they rested by virtue of this contract. It would be equally so for either party, after allowing the matter to slumber for almost a quarter of a century, to attempt now to impose upon the other the greatly increased expense of a fulfilment of the stipulation, so much beyond what could have been contemplated by the parties at the time the contract was executed. The respondents make no such idle proposition. They do not even suggest that they desire or design to incur any such expenditure on their own part. They only deny that the contract has been modified in this particular by mutual consent. We think that denial is controlled and surmounted by the undisputed facts in the case, the great lapse of time during which neither party has made any step towards the execution of the work, or any complaint that it is not done, and the erection by the respondents of a large and permanent passenger station at their old terminus. The only

reasonable conclusion from these facts seems to be that the contracting parties had come to an understanding, that the completion of this portion of the contemplated work was not to be insisted on. We think there is unequivocal proof of the abandonment by mutual consent, of this part of the contemplated work.

Nor do we think that this modification is of such a character as to relieve the respondents from the fulfilment of the other stipulations remaining to be performed on their part.

The uncontradicted testimony with respect to the territorial division of the new tracks so far as relates to repairs, the plaintiffs having charge of that portion extending from their station to Union street, and the Grand Trunk Company of the remainder, each company bearing the expenses of the repairs of its particular portion according to this division whether more or less, and the testimony showing the adoption of mutually beneficial regulations with regard to the delivery of freight along the whole line by the parties respectively, and the assignment of particular hours to each road for that purpose and the undisputed fact that the territorial division above referred to has existed certainly for more than ten years, (how much longer does not appear) suffice to satisfy us that neither of the parties ever looked upon the abandonment of the project of a central depot as affecting, or liable to affect, the rights of the parties in other respects and that they have for a long time looked upon the work to be done under the contract as substantially completed.

And they seem to us to stand (this project being treated as abandoned by mutual consent) precisely upon the same footing as they would "on the completion of the work." The work was completed save in that one particular, and that part has been abandoned by mutual consent. This, at least, is certain, that each party has so long neglected to call upon the other to perform this part of the work contemplated in the contract, that neither would have the right, under the great change of circumstances in all respects, to insist upon it now.

And herein we think the case differs from those in which the

courts have said that they will not order the specific performance of a contract which has been varied by parol. It rather resembles those of partial non-performance of a written contract without default of the plaintiff. It bears little or no likeness to those cases where a stipulation or variation superadded by parol makes an essential change of the effect of the contract in other respects, so as to give color to the remark that "the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties." What we mean to hold is that when the variation from the written contract asserted by a plaintiff seeking a specific performance by the other party, consists in an omission by mutual consent to perform some particular stipulation for such a length of time that neither would have the right to call upon the other to perform it, and the non-performance of that particular stipulation does not appear to have affected the essential rights or interests of the parties to the contract in other respects, such omission or variation will not defeat the rights of the party, (whose performance of the contract has been otherwise complete,) to a decree.

We cannot overlook the fact that the principal and essential matter here was the construction of the sea-wall and street, and the laying of the tracks by which the two railroads were to be connected. The erection of a central passenger station was but a mere incident, and after this lapse of time its non-completion (for which the plaintiffs at least do not appear to have been in default) cannot affect their right to the lease and conveyance and use of the respondents' half of the track in substantial conformity with the stipulations of the agreement.

It is asserted in defence that this court with its limited equity powers has no jurisdiction.

The view which we have taken of the case places it clearly within the third specification of R. S., c. 77, § 5, where the equity jurisdiction of this court is defined. To compel the performance of written contracts is one of the powers expressly conferred.

Neither do we find in the case at bar any of the objections

which have induced courts to decline in some instances to compel the specific performance of contracts for the construction of railways and branches. This contract has been so far carried out by the parties themselves, as to eliminate objections that might in the outset have prevented us from interfering.

It remains for us to determine whether the respondents' construction of the right of use of the new tracks which was agreed to be granted to the plaintiffs (and which we take to be identical with the right which each company was to have in that portion of them which was to be owned and controlled by the other "on the completion of the whole work") can be sustained.

It is asserted by the respondents' counsel that under the contract this right was only to be exercised with the plaintiffs' own cars and possibly with those of connecting roads whose cars were turned on to the plaintiffs' road and drawn for a considerable distance over it before reaching its terminus.

We are satisfied that no such limitation attaches to the use. There is nothing in the terms of the contract to suggest it. There was nothing in the situation of the parties at the time the contract was entered into, or since—nothing in the business in which they were both engaged, nor in the modes of conducting that business, or in the sources from which it is derived, that would make such a limitation consistent with the apparent intent and design of the parties in this agreement. Both were common carriers of freight for hire, deriving more or less of their business from connecting roads, bound by law to transport what was properly tendered at their stations, whether by individuals or connecting railroad companies, owing duties to the public and every individual in it who might have occasion to avail himself of the facilities for transportation which they controlled. The freight which they receive to transport for hire, whether received of individuals or connecting railroad companies, is their freight and becomes part of their business; and whether it is transported in their own cars, or cars hired, or loaned, or furnished gratuitously by other companies, or in accordance with any system or custom of exchange prevailing

in the business, it makes no difference. *Pro hac vice*, so long as they use them in the prosecution of their business, the cars are their cars. Nor is it a matter of any importance what distance they have been hauled over the plaintiffs' road, or whether they are delivered to them at their station in Portland. The profit which the plaintiffs derive from the business may be in an inverse ratio to the distance.

We understand the respondents to admit that they prevented the plaintiffs from hauling freight over their tracks coming from roads which run into Portland on their own tracks, and only connect with the plaintiffs' railroad at or near their station in Portland. But when their freight and their cars are transferred to the plaintiffs to be moved for a consideration paid to the plaintiffs, the plaintiffs are in the exercise of their legitimate functions as common carriers in moving them from one point to another in pursuance of their contract. That is their business, for which they have a right to the use and occupancy of all parts of these new tracks, (built in part at their expense, between the original termini of the railroads) by force of this agreement in writing—a right which extends not only to the westerly portion which they control and keep in repair, but to the other part also under "such rules as may be mutually beneficial."

Against any interference with this right,

The plaintiffs are entitled to a perpetual injunction, and also to a decree as prayed for, with costs.

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

INHABITANTS OF POWNAL *vs.* COUNTY COMMISSIONERS.

Commissioners' record must show town acted unreasonably.

Upon an application to the county commissioners to lay out a town road which a town has refused to accept, the unreasonableness of this refusal must be adjudged by the county commissioners and entered of record, or their location of the way will be quashed upon *certiorari*.

ON REPORT.

PETITION FOR CERTIORARI, to quash the proceedings of the county commissioners of Cumberland county, in laying out a town way in Pownal, which had been previously laid out by the selectmen of that town; but the town had refused to accept it, whereupon application had been made to the county commissioners, who adjudged the way to be of common convenience and necessity and established it. This petition alleged numerous omissions and defects in the records of the commissioners, among others that it did not therein appear that the town's refusal to accept the location was unreasonable. This court was to grant or refuse the writ, as the case required.

Strout & Holmes, for the petitioners.

Joseph A. Locke, for the respondents.

WALTON, J. On application to the county commissioners to lay out a town road, in the nature of an appeal, founded on the alleged unreasonable neglect or refusal of the selectmen to lay it out, or the unreasonable refusal of the town to accept it, the unreasonableness of the neglect or refusal must be adjudged by the commissioners, and entered of record, as the foundation of their jurisdiction, or their proceedings will be quashed on *certiorari*. An adjudication that the way is of "common convenience and necessity" is not sufficient. So held in *Pownal* v. *Co. Com.*, 8

Maine, 271; and again in *State* v. *Pownal*, 10 Maine, 24, where the question is fully discussed; and again in *Goodwin* v. *Co. Com.*, 60 Maine, 328. The record in this case contains no such adjudication. The error is a fatal one. *Writ of certiorari to issue.*

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

BRADBURY RAND *vs.* MOSES D. SKILLIN, *et ux.*

What is sufficient identification of premises in a real action.

Where the description of premises in deeds introduced by the demandant corresponds precisely with that contained in his writ, no other proof of identity is necessary.

ON EXCEPTIONS.

WRIT OF ENTRY demanding possession of certain premises in Cape Elizabeth, described in the declaration by metes and bounds, and then further specified as lots numbered 27 and 28 on a plan of Woodbury Dyer's land, made by Wm. Anson, June 29, 1847, and recorded in the Cumberland Registry of Deeds, book No. 1, page 15, being same premises conveyed to the demandant by George S. Hay, by deed of March 29, 1871, recorded in said registry, book 383, page 421. The plea was the general issue. The demandant introduced the plan and deed mentioned in his declaration and a deed from Woodbury Dyer to George S. Hay. These deeds described the lots they conveyed, including those in controversy, only by their numbers on this plan, to which, and its record, reference was made. The deed from Dyer to Hay contained the usual covenants of warranty, and they were also in that from Hay to Rand, but there was added to the words "to warrant and defend the premises against the claims and demands of all persons," the words "claiming by, through or under me, and none other, and only to the amount of the consideration hereof." Upon these

deeds and a certified copy of the plan the demandant rested his case, and a nonsuit was ordered, to which he excepted.

A. Merrill and *S. L. Carleton*, for the demandant.

Howard & Cleaves, for the tenants.

WALTON, J. In a real action tried upon the plea of *nul disseisin*, a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient *prima facie* evidence of ownership, and will authorize a verdict for the plaintiff, unless the defendant proves a better title. *Blethen* v. *Dwinel*, 34 Maine, 133. The law is otherwise where all the deeds under which the plaintiff claims are mere releases or quitclaims. *Tibbetts* v. *Estes*, 52 Maine, 566.

In this case the plaintiff introduced in evidence a warranty deed of the demanded premises to George S. Hay, and a deed, with limited covenants of warranty, from George S. Hay to himself; and also a plan of the premises; and then rested his case. Thereupon a nonsuit was moved for by the defendant, which was ordered by the presiding judge. We think the nonsuit was erroneously ordered. The only point in relation to which there could be any doubt was whether the plaintiff should not have introduced some evidence to show that the land sued for was the same land mentioned in the deeds. But where, as in this case, the description of the land in the plaintiff's writ is substantially the same as the descriptions in the deeds, we think no other or further evidence of identity is necessary to make out a *prima facie* case.

Exceptions sustained.

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

JOHN F. RANDALL et al. *vs.* CHARLES SMITH.

Usage—must not be repugnant to contract or law.

When a shipper and a carrier of goods have entered into a valid contract, the one to load the other's vessel with a cargo of coal, at a specified port and to pay freight at a certain rate per ton, and the other to carry such cargo to the place of contract for that price, a practice among persons engaged in that kind of business at such place of contract, to treat such contract as binding upon the parties only as might suit the convenience of either of them, cannot be upheld as a commercial usage to affect such written contract because of its repugnancy thereto, and to the principles of law.

In order that a contract may be regarded as having been made with reference to a usage of trade, such usage must be certain, general, known, reasonable and not repugnant to the contract, or the rules of law.

ON EXCEPTIONS by the plaintiffs to instructions of the justice of the superior court.

The facts and rulings are given, sufficiently for an understanding of the case, in the opinion. The verdict was for the defendant.

B. D. Verrill, for the plaintiff.

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

DICKERSON, J. The evidence in this case shows that the plaintiffs and defendant entered into a contract by which the plaintiffs agreed to furnish a cargo of coal in New York for the defendant's schooner, paying freight at $2.25 per ton, and the defendant to carry the cargo in his vessel to Portland for that price. It further appears in evidence that the plaintiffs were ready to fulfil their part of the contract, but the defendant refused to perform his part. To recover damages for that refusal, this action is brought.

The defendant seeks to exonerate himself from liability for breach of his contract by showing that by usage in Portland the order given by the plaintiffs for loading the defendant's vessel is treated as a permit to the vessel to load with coal if the master finds it

convenient to do so; but if not convenient, the master "throws up the order," and seeks freight elsewhere, no damage being claimed in such case, nor if the shipper refuses to furnish the coal.

Upon request of the defendant's counsel the court instructed the jury that if they should find such usage, they would be justified in finding that the arrangement between the parties was made with reference to it, and should be interpreted in accordance therewith. To this instruction the plaintiffs excepted.

The court further instructed the jury upon this branch of the case, at the plaintiffs' request, that the usage of trade is not admissible to affect the contract if it is contrary to law or unreasonable. The court further instructed the jury that if they should find such a usage proved, and that it was the general or universal usage of the trade, they might infer that the contract was made with reference to it, and the parties may be bound by it, though there should be no direct proof that it was known to them.

The general proposition elicited from the court, in respect to usage, by request of the defendant, is to be considered in connection with the other instructions upon that subject. Taken together the instructions make the usage, if proved, binding upon the parties, if it is consistent with law, reasonable, general or universal, and so ancient as to be known and acted upon by the commercial community, though not known by the parties. The chief office of a usage, when thus applied, is to give a particular effect and meaning to the words of a contract. *Murray* v. *Hatch*, 6 Mass., 465; or to explain the meaning of a new and unusual word. *Eaton* v. *Smith*, 20 Pick., 150; or make clear an ambiguity. *Shaw* v. *Mitchell*, 2 Metc., 65; *George* v. *Joy*, 19 N. H., 544.

But a usage repugnant to the terms and objects of a written contract is not competent to vary or control it; as a usage for a master cooper to send his apprentice abroad on a whaling voyage, and receive his earnings on such voyage. *Randall* v. *Rotch*, 12 Pick., 109; or where, by the terms of a contract to manufacture brick, the bricks when made, were the joint property of the contracting parties, that one of the parties had no interest in them. *Macomber* v. *Par-*

ker, 13 Pick, 181; or, in a written contract for the manufacture of retorts, that founders, in the absence of an express agreement, should not be held to warrant their castings against latent defects, or, in case of apparent defects, they were entitled to have the castings returned to them in a reasonable time. *Whitmore* v. *South Boston Iron Company*, 2 Allen, 60; or, when the contract of pledge of stock only provided that it might be transferred after default, that it might be transferred at the pleasure of the holder. *Dyke* v. *Allen*, 7 Hill, 497; or, where, by a policy of insurance, the re-insurer is to make a full indemnity within the amount of risk taken by him, that he is chargeable only for such proportion of the loss, as the amount of re-insurance bears to the original policy. *Mutual Safety Insurance Company* v. *Howe*, 2 Comst., 241; or, for an insurance company in case of a total loss to retain two per cent. per month on the balance of the premium notes from the date of the last assessment, until the expiration of the terms of the policy, when such usage limits and controls the terms of the policy. *Swampscot Company* v. *Partridge*, 5 Foster, N. H., 369; *Foye* v. *Leighton*, 2 Foster, 71; *Leach* v. *Beardslee*, 22 Conn., 404; *McGregor* v. *Insurance Company of Penn.* 1 Wash. Cir. Ct., 39. *Knox* v. *The Nienta*, Crabbe, 534.

So, no usage can be sustained in opposition to the established principles of law, as a usage to return a portion of a premium note, when the insurance is effected on a cargo from a particular port to a foreign port and back, if the vessel fails to get a return cargo. *Homer* v. *Dorr*, 10 Mass., 26; or, that a vessel warranted to be neutral is not neutral but only pretended to be. *Lewis* v. *Thatcher*, 15 Mass., 431; or to shorten the time of presentment, demand and notice in respect to promissory notes within that fixed by law, applicable to such a class of notes. *Mechanics' Bank* v. *Merchants' Bank*, 6 Metc., 13; or, to make the seller of manufactured goods, by sample, liable to the purchaser for damages occasioned by latent defects in the goods sold, not discoverable either in them or the sample, by ordinary care. *Dickerson* v. *Gay*, 7 Allen, 29; or, for the master of a stranded ship to sell the cargo

without necessity. *Bryant* v. *Commonwealth Insurance Company*, 6 Pick., 131; *Walker* v. *Transportation Company*, 3 Wall., 150; *Thompson* v. *Riggs*, 5 Wall., 663; *Dodd et al.* v. *Farlow*, 11 Allen, 430.

So, also, the law refuses to give its sanction to a usage that is absurd or unreasonable, as a usage of ship owners to pay the seamen's advance wages to their own shipping agent employed to procure a crew, and for him, in his turn, to pay the same to the boarding house keeper who brings the seamen to him. *Metcalf* v. *Weld*, 14 Gray, 210; or for merchants of a particular locality, engaged in the whaling trade to accept the bills of their masters drawn for supplies furnished abroad. *Bowen et al.* v. *Stoddard*, 10 Metc., 380.

We think that it is clear from the foregoing authorities, that the usage set up in defence is repugnant to the contract of the parties, and contrary to well established principles of law. It is not resorted to for the purpose of explaining the meaning of any new, unusual, or ambiguous words;—the import of the language used is too apparent to admit of doubt. Nor is its effect simply to modify that contract: if permitted to have effect, it is not by entering into and constituting a part of the contract, and thus limiting its scope and regulating its application. On the contrary it nullifies the contract, and subverts the very objects for which it was entered into, the carrying of the plaintiffs' goods and the beneficial employment of the defendant's vessel. A contract which is absolute in terms, it makes conditional; an obligation expressly enjoined upon both parties it makes optional with either. Under its application the defendant cannot reckon with any confidence upon employment for his vessel, or the plaintiffs upon the receipt of their goods, though they have mutually entered into a valid contract to secure both these objects. Instead of subserving the purposes of the parties, as disclosed in their contract, it dominates over and controls them. In fine, it makes the contract subordinate to the usage, and the legal rights of either party to hinge upon the convenience or caprice of the other. It is difficult to understand

how such a practice could ever have assumed the proportions necessary to give it the cognomen of a commercial usage in a commercial community; it is less difficult, however, to understand that it could never have the sanction of law.

When a practice, affecting a particular branch of business in a given locality, ripens into a usage of trade, it is evidence of the intention of the parties engaged in such business to make their contracts in reference to it. The competency of such evidence is an exception to the general rule of evidence, since by it a new provision or stipulation is sought to be engrafted upon the written contract of the parties, which cannot be done by evidence of an actual contemporaneous verbal agreement between them. Hence it behooves courts to be exceedingly watchful lest this exception should be extended so far as either to make a new and different contract of an existing written one, by poorer evidence, or entirely to defeat it and render it null and void. The danger thus to be apprehended in such cases was foreseen and stated by Judge Story in the Schooner Reeside, 2 Sumn., 569, in which he says, "I rejoice to find that, of late years, the cases of law both in England and America, have been disposed to narrow the limits of the operations of such usages and customs, and to discountenance any further extension of them." We will add that courts of law, since Judge Story's day, have not been unmindful of their duty in this respect, as the authorities we have cited abundantly show.

By the instructions given to the jury the court left it to them to determine whether or not the alleged usage was contrary to law. That was not a question of fact for the jury but of law for the court. Besides, the court in defining a usage of trade omitted an important element, directly involved in this case, that it must not be repugnant to the written contract of the parties.

Exceptions sustained.

APPLETON, C. J., concurred.

WALTON, VIRGIN and PETERS, concurred in the result.

INHABITANTS OF RAYMOND, appellants,

vs.

COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

When a technical objection is waived.

A committee appointed by this court to determine an appeal from the decision of the county commissioners locating a way should, properly, be sworn before fixing upon a time and place for hearing the parties; but if the oath is not taken until the time for the hearing arrives, this objection must be then made, or it will be considered as waived. It comes too late, after they make their report.

In cases of this kind, the court will presume that the party objecting had knowledge of the ground of objection, at the time it occurred, unless the contrary is shown.

ON EXCEPTIONS.

The appellants appealed to this court from the decision of the county commissioners of this county making certain alterations in the highway leading from Webb's Mills in Casco through Raymond, upon petition of S. S. Brown and fifty-two others, which is recited in the next reported case, upon another issue between these same parties. A committee was appointed who reported that the judgment of the commissioners should be affirmed. The appellants objected to this report because the committee were not sworn until the time arrived which they had designated for hearing the parties. The presiding justice overruled this objection and ordered an acceptance of the report, to which the appellants excepted.

Cobb & Ray, for the appellants, cited, R. S., c. 18, § 38; *Assessors of Clifton*, petitioners, &c., 33 Maine, 369; *Commonwealth* v. *Coombs*, 2 Mass., 489.

W. H. Vinton, for the appellees.

WALTON, J. The objection that the committee was not sworn before giving notice of the time and place of hearing comes too late. Objections of a purely technical character, and which, like pleas in abatement, do not go to the merits of the case, must be made at the earliest practicable opportunity, or they will be regarded as waived. Objection to a juror, (11 Pick., 468 ; 2 Gray, 281,) or a referee, (10 Pick., 275,) or a county commissioner (10 Pick., 519,) or a juror to assess damages sustained by the location or discontinuance of a highway, (2 Metc., 558,) or an officer appointed to preside before a sheriff's jury, (11 Pick., 269,) or the members of a committee to locate a road, (30 N. H., 23,) must be made before a trial is had, if then known, or it will be regarded as waived. The reason given in all the cases is substantially the same, namely, that a party shall not take the chance of obtaining a decision in his favor, without being bound by the result if the decision is against him.

And in cases of this kind the court will presume knowledge on the part of the party objecting, unless the contrary is shown.

It may be true that regularly the committee should have been sworn before giving notice of the time and place of meeting; because the giving of notice is an official act, and like all their official acts, should be upon their official oaths. But of what consequence was it to these appellants? Surely an unofficial, or informal notice, cannot be worse than no notice at all. And inasmuch as the appellants actually appeared before the committee and had a hearing, they would be in no condition to object, if no notice at all had been given. That is, at this stage of the proceedings. If no notice at all had been given; or if the notice given was informal and unofficial, because given before the committee was sworn; and the objection had been seasonably made, it might have been fatal to the proceedings. But inasmuch as the error, if any, existed before the trial; and in the absence of any averment or proof to the contrary, the appellants are presumed to have had knowledge of its existence; and they did not then make the objection, but went to trial and took the chance of obtaining a decis-

ion in their favor, it is now too late to make that error the ground of setting the decision aside.

The other objection—namely, that the county commissioners had no jurisdiction under the petition which was the basis of their action, and therefore the court had no authority to appoint the committee, is not insisted upon by the excepting party, and need not, therefore, be considered further than to say that in the opinion of the court the objection is not well founded.

Exceptions overruled.

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

INHABITANTS OF RAYMOND, petitioners for certiorari,

vs.

THE COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

Location of a new way where the petitioners used the word "alteration."

A petition to the county commissioners set forth the inconveniences of certain existing highways, and alleged that public necessity required an alteration therein, so as to shorten the distance and avoid the hills; and then, without giving the termini of the roads complained of, or otherwise describing them, or asking for anything that would in fact constitute an alteration in either of them—prayed the commissioners to examine two specified proposed routes, which terminated in different roads, and neither of them had both termini in the same old road, and to make such alterations as should adopt one or the other of these new routes: *held*, that this was in substance a petition for a new location and not for the alteration, of a way; and that, the commissioners having located a way over one of the proposed new routes, neither of the old roads were thereby discontinued.

Under the petition the commissioners had jurisdiction to make the new location, and their proceedings relative thereto should not be quashed on account of the improper use of the word "alteration" and the omission of the term "location" in the petition.

Raymond *v.* Co. Commissioners.

ON REPORT.

This was a petition for a writ of *certiorari* to quash the proceedings of the county commissioners of this county in locating or altering a certain highway or highways in Raymond, upon the petition of Samuel S. Brown and others, referred to in the preceding case. The phraseology of the petition was this—"The undersigned respectfully represent that the public highways leading from Webb's Mills in Casco, through the town of Raymond, are circuitous and very hilly, and are very subject in winter to be blocked up with snow; that the public necessity requires an alteration to be made in said highways, thereby shortening the distance, and avoiding many hills; we, therefore request that your honorable board, after due notice to all parties interested, will proceed to examine the proposed routes, and make such alterations in said highways as public necessity may require, to wit: commencing at a practicable point on said highway a little south of Albinus Jordan, and passing southerly through lands of Daniel S. Jordan, Thomas Witham and Nathaniel Staples, to make a junction with the meadow road, near the dwelling house of Frederic P. Jordan in Raymond; or, if found to be most practicable, to leave the aforesaid highway at a point between Tenney's river and the dwelling house of Joseph Allen, in Raymond, and passing in a southerly direction, upon the east shore of Panther's Pond, through land of Ai Plummer, to make junction with the county road, near the dwelling house of William Nason in said Raymond."

After due notice, and a full hearing and examination into the merits of the case, the commissioners adjudged that common convenience and necessity required "the alteration prayed for;" and they proceeded to make it by locating a way upon the first of the two roads named in the petition, commencing near the house of Albinus Jordan, and terminating in the meadow road near Frederic P. Jordan's house. Neither this "meadow road," nor the "county road," named as termini of the two routes proposed in the petition were the same as that upon which the houses of Al-

binus Jordan and Joseph Allen are situated. The route adopted by the commissioners in fact constituted a new piece of road, about three miles long, diagonally connecting the two old nearly parallel roads which are its termini. The case was submitted to the determination of the court upon these facts and the records.

Cobb & Ray, for the petitioners.

The petition is for an alteration of existing ways, not the location of a new way; and it was not competent for the commissioners to do the latter, under a request for the former action. R. S., c. 18, § 1; *Commonwealth* v. *Cambridge*, 7 Mass., 158.

W. H. Vinton, for the respondents.

Barrows, J. The original petition to the county commissioners is not technically accurate. It is no model for imitation. It is not sufficient as a petition for the alteration of any highway, for want of a definite description of the way or ways to be altered, and the termini thereof, and the character of the alterations proposed. The granting of the prayer thereof by the county commissioners can have no effect to discontinue either of the "highways leading from Webb's Mills, in Casco, through the town of Raymond," or any part or portion of them. It was not apparently designed or intended to make a change in those highways or either of them—but to alter the course of travel by the location of one or the other of two new routes which are specifically described in the original petition. Neither of the proposed new routes commences and ends in either one of the old roads, but they form diagonals of different lengths between the two old roads. Herein, as well as in other particulars the case differs from *Commonwealth v. Cambridge*, 7 Mass., 158, relied on by the petitioners for *certiorari*.

It is true that the word "alteration" occurs in the original petition, and the word "location" does not; but still, unskillfully as it is expressed, we think the true intent is discoverable, and should govern. Nor is the real character and scope of the peti-

tion doubtful. Framed as this petition is, there can be no danger of misapprehension as to the nature and substance of the issue. What the petitioners desired to have the commissioners do is distinctly set forth, and it proves to be—not the alteration of either of the existing roads, but the establishment of a new route. The word "alteration" is not used in any strict or technical sense; and this plainly appears by the context and the general tenor of the petition. It is in substance a petition for a location, and not for an alteration. Thus the commissioners understood and treated it. They return that, upon due notice, they "proceeded with the parties and viewed the route prayed for in said petition, and other routes and roads connected therewith"—gave the required hearing and "adjudged and determined that common convenience and necessity do require the alteration prayed for; and in pursuance of the foregoing adjudication . . . . proceeded to make said alteration or location as follows:" and thereupon they proceed to describe a location substantially agreeing with one of the routes suggested in the petition.

While we deprecate the careless use of language, which has naturally enough resulted in this needless delay and expense, we think enough appears in the original petition to give the county commissioners jurisdiction in the premises to locate a new highway, thereby in effect making an alteration in the old course of travel, but not in fact making an alteration in any existing road. Our attention has not been called to any irregularity in the proceedings sufficient to justify us in quashing them.

Writ of certiorari denied.
Petition dismissed.

APPLETON, C. J., WALTON, DICKERSON and Peters, JJ., concurred.

RICHARD W. ROBINSON *vs.* JOTHAM C. LARRABEE.

The voluntary relinquishment, by the bailee, of possession of the subject of the bailment discharges his lien unless it is consistent with the contract, the course of business, or the intention of the parties, that it should continue.

When the bailee has parted with his possession, the presumption is that he has waived or abandoned his lien, unless his conduct, in so doing, is satisfactorily explained.

The forfeiture of a lien claim, when once incurred, is not waived by a subsequent arrangement between the parties, whereby the bailee resumes the custody of the subject of the bailment, unless such was the intention of the parties.

ON EXCEPTIONS.

TROVER, brought by the plaintiff as administrator to recover for a counter, of the alleged value of ten dollars, belonging to the estate of his intestate, and taken and converted by the defendant, who justified his possession and detention of it under a claim of lien upon it for two years' storage of it.

This action was originally commenced before the municipal court of Portland, and thence taken by the defendant, by appeal, to the superior court, where it was tried before the justice, with right to except, at its October term, 1872. The justice of that court found, as matter of fact, that the counter was left by the plaintiff's intestate at the defendant's shop, where it remained two years, under an agreement that the defendant should be paid for its storage. At the end of that time, Mr. Larrabee removed to a new store, leaving the counter in his old one, where it remained some months, till the proprietor of that building requested its owner to take it away. Thereupon, the plaintiff's intestate made an agreement with Mr. Larrabee to put the counter into his new store, which he did, and it still remains there, where he has some use for it, and therefore does not demand storage, but claims to hold it for the amount due for the two years storage of it in the shop where it was originally deposited. And the justice ruled, as mat-

ter of law, that by the interruption of the defendant's possession, while the counter remained in the old store, after he had left it, his lien for storage was lost; and therefore, the plaintiff was entitled to possession of it on the day of his demand of it, August 28, 1872, and awarded damages accordingly. The defendant excepted.

A. Merrill, for the defendant.

There was never any intention to relinquish the lien, nor any conduct inconsistent with its continuance; it was therefore retained. When the owner of the old store, ignorant of the lien, notified the plaintiff's intestate to remove it, instead of doing so himself, he at once notified Mr. Larrabee, who took it to his present store. It was really in his possession all the time; sufficiently so to preserve his lien.

R. W. Robinson, pro se.

Dickerson, J. Trover for the value of a merchant's counter.

There is no question but the voluntary relinquishment, by the bailee, of possession of the subject of the bailment discharges his lien, unless it is consistent with the contract, the course of business or the intention of the parties. The conduct of the bailee in parting with his possession is inconsistent with the preservation of his lien, and where that is proved, the presumption is, that he has waived, or abandoned it, unless his conduct in so doing is satisfactorily explained. *Danforth* v. *Pratt*, 42 Maine, 52; *Spaulding* v. *Adams*, 32 Maine, 212.

The judge of the superior court found as matter of fact, that the defendant left the counter, upon which it is conceded he had a lien for storage, in the store, from which he removed when he went into a new store, where it remained for two or three months thereafter, and until the owner of the store notified the plaintiff's intestate to remove it.

These facts, unexplained, prove that the defendant parted with his possession during that interval, and raise the presumption that

he thereby waived or abandoned his lien; and there are no other facts found by the judge, that so far explain or control these, as to rebut this presumption. The case thus far, comes strictly within the rule of law by which a lien claim is forfeited.

But it is argued by the counsel for the defendant that this infirmity, if such it is, is cured by the other facts found by the judge, that the plaintiffs' intestate made a subsequent agreement with the defendant to take the counter into his new store to which it was removed and where it remained when this action was brought. If that arrangement constitutes a waiver of the forfeiture, it must be because such was the intention of the parties. But the judge did not find such intention. On the contrary, he did find that that arrangement was a new one differing widely in terms from the former one, and independent of it.

Upon a view of the whole case the judge held, as matter of law, that the defendant had lost his lien, and we see no reason for questioning the soundness of his decision.

Exceptions overruled.

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

SYLVAN SHURTLEFF *vs.* BENJAMIN F. THOMPSON.

Review granted where defendant was defaulted by mistake.

A review will be granted, that a discharge in bankruptcy may be pleaded, where the petitioner's counsel in the original action failed to appear for him in defence, though requested so to do, through a mistaken supposition that counsel who had been employed by another defendant also represented the petitioner, and would protect his interests.

ON REPORT.

PETITION FOR REVIEW of an action of assumpsit, brought by Mr. Thompson against Alvah and Sylvan Shurtleff. The presid-

ing justice found and reported the following facts, upon which judgment is to be entered according to the rights of the parties, viz: that William L. Putnam, Esq., was retained as the attorney of Sylvan Shurtleff in his application to the district court of the United States for the benefit of the bankrupt act, as well as in the action now sought to be reviewed. The petition in bankruptcy was filed August 24, 1870, and the writ in the suit of Thompson against the Shurtleffs was entered at the February term, 1871, of the superior court. The petitioner handed the summons in that case served upon him, to his said counsel, who did not appear therein, however, because he saw that Howard & Cleaves had entered a general appearance, these gentlemen having been employed by Alvah Shurtleff, and not by this petitioner. At the March term, 1871, the plaintiff discontinued as to Alvah Shurtleff, and Sylvan was defaulted. He had no knowledge of this, or that Mr. Putnam did not appear for him in that suit, till August 10, 1872, when he was arrested upon an *alias* execution issued upon the judgment rendered therein. To obtain his release from this arrest, he gave the statute six months bond, but performed none of its conditions and an action is pending upon it. Sylvan Shurtleff obtained his discharge in bankruptcy, July 15, 1871. He expected and intended that Mr. Putnam would suggest his bankruptcy and plead the discharge in Mr. Thompson's suit, which was upon a claim provable in bankruptcy, being for goods delivered by the plaintiff in that case upon orders drawn by S. Shurtleff, in the name of the firm of A. & S. Shurtleff. While that cause was pending, this petitioner consulted Judge Howard about it, who procured these orders of Mr. Thompson's counsel, in order to show them to Sylvan Shurtleff.

Howard & Cleaves, for the petitioner.

Bankruptcy and his discharge were a perfect defence, which Mr. Shurtleff was entitled to and intended to make; but was deprived of it by accident and mistake, without consent, knowledge or fault on his part. This entitles him to a review of that action.

J. O'Donnell, for the respondent.

The burden is on the petitioner to show due diligence, which he fails to do. This respondent only pursued his claim regularly and tried to enforce it. He sued the firm of A. & S. Shurtleff. Howard & Cleaves appeared generally, and filed joint pleadings, not as attorneys for either individually. The action was tried in due course, and resulted in a discontinuance as to Alvah Shurtleff and judgment against Sylvan, on the ground that their firm was dissolved long before the goods were sold by the plaintiff, the use by Sylvan of the firm's name in the orders for them being unauthorized and fraudulent. Should such a creditor suffer, then, because Mr. Putnam did not see fit to appear, but (as well as his client) acquiesced in and ratified the general appearance of Howard & Cleaves. *Crooker* v. *Randall*, 53 Maine, 355. By consenting to a default, and allowing us to take judgment, Sylvan Shurtleff prevented our proving our claim in bankruptcy, since it was merged in the judgment of a date subsequent to the twenty-fourth day of August, 1870. *Sampson* v. *Clark*, 2 Cush., 173; *Bradford* v. *Rice*, 102 Mass., 474; *Woodbury* v. *Perkins*, 5 Cush., 86. The review would only create annoyance in the action upon the bond, which virtually satisfied the judgment. *Sturdivant* v. *Greeley*, 4 Maine, 535; *Brown* v. *Brigham*, 5 Allen, 584.

Rescript.

At the March term, 1871, of the superior court, the petitioner, one of the defendants in the original action, was defaulted without appearance. He intended to appear by counsel which he had previously retained for that purpose.

He had a full, legal defence; but his counsel failed to appear and make it, for the reason that the latter mistakenly supposed that the petitioner's co-defendant's counsel also appeared for the petitioner.

Held—that a review be granted.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, and JAMES GARLAND, claimant.

New trial in Superior Court. Agency. Delivery. Intention. Intoxicating Liquors.

This court has no jurisdiction over a motion to set aside a verdict in a criminal case, rendered in the superior court, on the ground that it is against evidence; such motion can only be addressed to the justice of that court.

It is a question of fact for the jury whether or not, when goods have been entrusted to a common carrier to be carried to a consignee, that is a delivery to the consignee for himself or as agent for another, though the existence of any such agency has never been disclosed to the vendors.

The disposition to be made of liquors libeled, as kept for unlawful sale, must be decided by the determination of the jury as to the intention, in this respect, of the person who owns them, or who has authority from the owner to sell them. A design on the part of one who is a mere bailee of the owner (without authority from him to make sales) illegally to sell such liquors in this State, will not work a forfeiture.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL, on the ground that the verdict rendered for the State upon the trial of this case at the January term, 1873, of the superior court for this county was against the law and the weight of evidence. The facts and rulings are indicated in the opinion.

Charles F. Libby, county attorney, for the State.

J. B. Eaton, for the claimant.

APPLETON, C. J. This is a libel for the condemnation of certain intoxicating liquors claimed by James Garland. The case comes before us on exceptions.

Whether the verdict was against evidence, or the weight of evidence, is not a question for us to determine. By the act creating the superior court for Cumberland county, approved Feb-

ruary 14, 1868, c. 151, § 9, the supreme judicial court have the same jurisdiction of all motions for new trials originating in the superior court, as if they had originated in the supreme judicial court. But in criminal cases it was determined in *State* v. *Smith* that this court sitting *in banc* has no jurisdiction of a motion to set aside a verdict as against evidence or the weight of evidence, but that such motion must be decided by the justice presiding at *nisi prius*. It follows, that all questions as to the sufficiency of the evidence to justify the verdict must be presented to, and determined by, the justice of the superior court.

The questions presented to the jury for their determination were, whether the liquors seized were the property of James M. Jewett or of the claimant, James Garland, and whether or not, whoever might be the owner, they were intended by him to be sold in this State in violation of its laws.

There were but two witnesses on the subject of ownership. James M. Jewett called by the State testified, among other things, that he ordered the liquors of Dunbar & Co., for the claimant; that when they were sent from Boston to Portland he was to do with the liquors whatever Garland ordered; that he was doing business with Garland, who said he was using considerable liquor, and wanted him (witness) to get it for him, so that he (Garland) could save something; that he had a commission for doing the business. The witness further states that Dunbar & Co. did not know Garland; that they relied on him (Jewett) for pay; that the bills were made out to him, (Jewett.)

James Garland, the claimant, testified that he resided in New Hampshire; that he was a pedlar of essences, patent medicines, &c.; that he used liquors in his business; that Jewett could obtain liquors for him at a discount, if he would take them in quantity, and that he engaged him to do it.

One of the questions in issue was, whether Jewett purchased the liquors in Boston for himself, or whether in the purchase he was acting as the agent of Garland. The controversy was, as to the ownership of the liquors. It was essential to the right deter-

mination of the cause to ascertain who was the owner, because as the intent to sell in violation of law was the ground of forfeiture, it must be the intent of the person owning or having authority to dispose of the liquors; not of one having no title to them, nor authority to dispose of them by way of sale.

The judge, after calling attention to the evidence of Jewett, said: "The delivery of the liquors by the parties in Boston to the steamboat company was, of course, a delivery to Jewett." This was a settlement of the fact in issue by the judge. It was a withdrawal of its determination from the jury. It may or may not have been rightly determined, but that is not the question. It should have been left to the jury, under proper instructions.

Though the goods may have been purchased by an agent without disclosing the name of his principal, yet the principal would be bound for their price if they came into his possession, or the agent was acting in their purchase within the scope of his authority. 2 Kent Com., 631. It is obvious, therefore, that it was not absolutely necessary that Dunbar & Co. should know that Jewett was purchasing for, and as the agent of Garland, to vest the title in him, if in fact he was so purchasing. Hence the importance of a correct instruction, for if the purchase was by the agent for his principal, then the delivery to the agent would be to him, not in his own right but for his principal.

The court further instructed the jury, as follows: "If you find they (the liquors) were intended for unlawful sale within the limits of this State, it will be unnecessary for you to inquire into the ownership of them, because, in that case they could not be recovered by the claimant here. If you find they were not intended for unlawful sale within the limits of this State, then you will come to the question whether or not Garland is the owner of them and entitled to the possession of them."

As the case was presented, it is evident the liquors belonged either to Jewett or Garland. The intent to violate the law must be the intent of the one or of the other. If Garland was the legal owner, entitled to the possession of the liquors and having no

intent to sell them in this State in violation of law, it cannot affect his rights that Jewett or any other stranger, without right or title should have an intent to sell the same in this State in violation of its laws. It is the intent of one having the title or authority to sell or dispose of the liquors in violation of law, which is to be regarded, not that of a mere wrong-doer, having no authority whatever to dispose of them. Now the judge told the jury that it would be unnecessary to inquire into the ownership of the liquors, if intended for sale within this State in violation of its laws. But this was the very thing to ascertain, preliminary to settling whether there was an illegal intent which would justify or require a forfeiture. By the instruction as given, the owner, having no intent to violate the law, because somebody else, who had no title to, or legal control over, the liquors had such intent, might find his liquors forfeited without any wrongful act or thought on his part. *Exceptions sustained.*

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

STATE OF MAINE *vs.* CHARLES PETTIS.

Larceny—what declarations are inadmissible. Proof of ownership.

Upon a trial for larceny, it is not competent to introduce testimony of the prisoner's declarations, after the goods came into his possession, that he found them.

The allegation of ownership in a complaint is sustained by proof that the person named had them in his possession by loan from, or contract for their purchase with the owner.

ON EXCEPTIONS.

The city marshal of Portland, on the twenty-third day of January, 1873, made complaint to the municipal court, that Charles Pettis, on the second day of the same month, "one cradle, of the

value of two dollars, of the goods, chattels and property of Charles A. Dalton, in the possession of said Dalton being found, feloniously did steal, &c." At the trial before the superior court the government called but two witnesses; Eliza J. Googins who said that the cradle was hers; she lent it to Phebe Dalton, to whom she partly bargained it for fifty cents; afterwards saw it, newly painted, at Pettis' house; he said he found it in the street, all broken to pieces. Phebe Dalton, testified that her husband was Charles A. Dalton; that she borrowed the cradle of Mrs. Googins; left it in their house with the rest of their furniture when they went away in October; was gone from the house two months, but retained the key; that the cradle was there when she visited the house in November, and she next saw it, in January, at Pettis' house.

The defendant called a witness who swore he saw this cradle between November and December, first in the gutter; and afterwards in the yard of the house in which the Daltons lived; and another witness by whom he proposed to show that he (Pettis), four days after the cradle came into his possession, stated to the witness, in the latter's shop, that he found the cradle in the street and had repaired and painted it, but the court excluded this testimony, and the respondent excepted.

With regard to the ownership of the cradle, the jury were instructed that, although the general property was in Mrs. Googins, yet "if the property had been loaned to Dalton, and was in his possession under a loan, especially if there was some contract for sale existing between the parties, then there is sufficient evidence to sustain the allegation that the cradle was the property of Charles A. Dalton." A general verdict of guilty was found, and the respondent excepted to this instruction.

James O'Donnell, for the defendant.

Starkey should have been permitted to testify that Pettis publicly proclaimed in his (Starkey's) shop, his (Pettis') possession of the cradle and how it came there, as showing his good faith, and negativing the idea of larceny. Such endeavors to discover the

owner are always admissible. *Regina* v. *Reed*, 41 Eng. Com. Law, 170; *People* v. *Anderson*, 14 Johns., 293; *People* v. *Cogdell*, 1 Hill, 94.

The ownership was not truly alleged. It should have been stated either as in Eliza J. Googins, the general owner, or Phebe Dalton, the bailee. 2 Russell on Crimes, 154, 168; *State* v. *McAloon*, 40 Maine, 133.

Charles F. Libby, county attorney, for the State.

DICKERSON, J. It is not competent for a person charged with larceny of goods to introduce evidence of his declarations made after the property came into his possession, that he obtained them by finding.

The allegation of property in a complaint for an alleged larceny of goods is sustained, if the complainant at the time the larceny was committed, held possession of them under a loan from, or contract of sale with the owner.

The rulings and instructions of the judge of the superior court being in accordance with these principles, afford no legal ground of exception. *Exceptions overruled.*

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

APPLETON, C. J., and BARROWS, J., did not concur upon either point. They thought the declarations of Pettis admissible as tending to disprove any felonious intent, and that no property, general or special, in Charles A. Dalton was shown by the evidence.

STATE OF MAINE *vs.* JEREMIAH REGAN.

Indictment. Variance between statement and record of former convictions. Exceptions.

An indictment for larceny alleged that the defendant had been previously thrice convicted of the same offence before "the municipal court begun and holden at Portland;" on the introduction of the record it appeared that these convictions were had before "the municipal court for the city of Portland;" *held*, no variance.

An objection that there was no proof of defendant's identity will not be considered where the exceptions do not show this fact, or that any objection was taken, for this cause, at the trial.

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

The respondent was charged with stealing twenty-five pounds of lead, valued at two dollars and three-quarters, Nov. 4, 1872, at Portland. The indictment further charged that he had been convicted of similar petty thefts on three former occasions, to wit, November 19, 1870; January 17, 1871, and June 26, 1871, "at the municipal court begun and holden at Portland aforesaid," thus exposing him to punishment as a common thief under R. S., c. 120, § 5. Upon the trial the prosecuting officer introduced records of the defendant's conviction of the offences, and at the times stated, before "the municipal court for the city of Portland;" to the admission of which the defendant objected, on the ground of variance; but the judge allowed them to go to the jury and the defendant excepted.

T. H. Haskell, for the defendant.

H. M. Plaisted, attorney general, for the State, cited *Thompson* v. *People*, 3 Parker's Crim. Cases, 208; 2 Barb., 220; *Commonwealth* v. *Call*, 21 Pick., 521.

WALTON, J. Indictment for larceny. Former convictions are alleged, with a view, undoubtedly, to increased punishment. The question is whether there is such a material variance between the description in the indictment of the court before which the former convictions were had, and the descriptions of it in the records offered in proof, as will prevent such increased punishment. We think there is not. We think the words used in the indictment are the exact equivalents of those used in the records.

The objection that there was no proof of the identity of the defendant with the person of the same name mentioned in the records, is not open to the defendant. The exceptions do not show whether there was or was not such proof at the trial. Nor do they show that any such objection was then made.

Exceptions overruled.

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

STATE OF MAINE *vs.* JONATHAN WATSON.

Indictment. Evidence. Practice. Exceptions.

In an indictment under R. S., c. 119, § 1, charging the respondent with setting fire directly to a dwelling-house which was thereby burned, it is not necessary to allege an intent to burn it; *aliter*, when the respondent is charged with setting fire to another building whereby a dwelling-house is burned.

When an indictment contains several counts, each relating to the same transaction and charging but one substantive offence, with different degrees of aggravation, the legal effect of a verdict of guilty upon one or more of the counts is an acquittal on the counts upon which the jury are silent.

If the jury return a verdict of guilty upon one of the counts in an indictment and are silent upon another count which is identical with it, the court will disregard the other count, or direct the prosecuting attorney to enter a *nol pros.* upon that count, and the case will proceed to judgment on the verdict.

Upon the trial of the respondent on an indictment for setting fire to and burning a dwelling-house, it may be material for the State to prove upon the question of motive, that he held a policy of insurance thereon at the time of the alleged burning.

When in such case the preliminary evidence introduced without objection shows that the respondent then held such a policy but had surrendered it before the trial to the agent of the company who was out of the jurisdiction of the court, parol evidence of its contents is admissible to show the respondent's motive for setting the fire.

By R. S., c. 82, § 94, the record of a previous conviction of the respondent of a criminal offence is admissible to affect his credibility though it is not the record of a conviction for an infamous crime.

A letter written to a third person purporting to enclose a deed with directions to such person to deliver the deed to the grantee upon a specified contingency, is not admissible in evidence without proof or an offer to prove that it was received.

If the counsel for the government in his argument to the jury transcend his legitimate province, the counsel for the respondent should interpose his objection at the time, or the point will not be available.

The court will not sustain exceptions to refusals to give special instructions when their substance has already been given in the charge, or in any other form, or where the judge before the end of the trial substantially and correctly states the law upon the points raised by the excepting party.

Nor will exceptions be sustained on account of abstract errors in instructions when no injury could have resulted therefrom.

On exceptions to the ruling of the justice of the superior court for this county.

Indictment for arson in setting fire to the barn of the defendant, in Scarborough, on the night of the twentieth of January, 1873, whereby it and his adjoining dwelling-house were consumed. The ownership of these buildings is thus stated in the first count and that the barn was set on fire for the purpose of destroying the house in which certain persons then lawfully were. The second count alleges the mode of setting the fire in the same way, but avers that these buildings were the property of Simon Jordan, and omits the statement of any persons being lawfully in the house.

The third count charges setting fire to the dwelling-house of Simon Jordan whereby it was burned, but does not say that this was so intended by the prisoner, nor that anybody was in it. The fourth count avers the direct setting fire to the house owned by the defendant, in which divers persons were, with intent to destroy it, and that it was thereby destroyed.

The fifth count declares that the prisoner "feloniously, wilfully,

and maliciously did set fire to the dwelling-house of one Simon Jordan" whereby it was burned; but contains no other statement of intention or that any one was in it. The jury returned a verdict of guilty; by the consent of the prosecuting officer, and at the request of the prisoner's counsel, the court asked them upon what counts they based this finding, and they said "upon the second and third counts."

After the respondent had testified in his own behalf, the government were permitted to introduce a certified copy of the record of his conviction before the court in Penobscot county at its February term, 1868, upon an indictment for an assault with intent to commit rape; to which his counsel took exception: and, against objection, the prosecuting officer was allowed to prove by parol the contents of a policy of insurance obtained by Watson upon the property destroyed, which policy had been surrendered by him, after the fire and before trial, and carried out of the State by the general agent of the company that issued it.

Simon Jordan had given a conditional deed of the premises, of which the buildings burned were part, to Jonathan Watson; disagreement arose between these parties while both were occupying the estate; suits followed; and, finally, their whole controversy was referred to Sewall C. Strout, Esq., who awarded that Watson should reconvey the property to Jordan. A question arose as to whether or not the deed made in pursuance of this award had been delivered at the time of the fire, Mr. Jordan's counsel testifying that he had it in his hand in December, 1872, and considered it then delivered, while the prisoner claimed that it was left with the referee to be delivered on the first of February, 1873, and that he signed a written agreement to that effect, which he proposed to introduce in evidence but the court excluded it. It read thus:—

"PORTLAND, December 18, 1872.

S. C. STROUT, Esq., Portland:

Dear Sir: The deed of myself to Simon Jordan of Cape Elizabeth, I herewith deposit with you for safe-keeping for

me until February 1, 1873. Unless otherwise ordered by me, you will please deliver said deed to said Jordan, or his attorney, on said day. JONATHAN WATSON."

There was no evidence that this letter ever came to the hands or knowledge of Mr. Strout, to whom it is addressed. The deed was not finally surrendered to Jordan, and placed on record, till February.

The respondent's counsel also excepted to the admission of Mr. Jordan's testimony as to threats and abusive language used by the prisoner toward him; and that when he (Jordan) vacated the house he intended to return thither, and so left his furniture in it; and to the statement of an old member of the fire department as to the appearance of hay after it has been burned in a mass; Stanford, a government witness, upon cross-examination said that Benjamin Dyer, also a witness for the prosecution, told him that he (Stanford) was summoned to swear that Watson had said to him (Stanford) that "when he (Watson) left the premises, he would leave nothing but the soil;" to which Stanford replied to Dyer, that it was false, Watson never made any such statement to him. Dyer was then recalled and swore to having a conversation with Stanford on the marsh road in Scarborough in which he mentioned that Watson had made the foregoing declaration: the defence objected to this evidence.

In his charge the judge remarked that "it is the duty of the jury and the court to pass upon the case as they find it to exist, in accordance with the law; and the law itself recognizes the possibility that a sentence should not be carried out to its full effect, but that a pardon or change may be granted;" that stress had been laid upon the fact that innocent men had sometimes been convicted; conceding that nothing can be worse than for an innocent man to be convicted of a capital offence, that consideration applies only to an innocent person, and not to one proved guilty beyond a reasonable doubt; and it should never be invoked as a shield to protect such criminals; "while, on the one hand, nothing can be worse than the conviction of an innocent man, what can be worse

in its effect upon society than for a man, guilty in fact of notorious crimes, to walk our streets with impunity ?"

After alluding to other topics, such as the prisoner's threats, his declaration as to his own losses by the fire, and whether these were true or false; his statement of the time when he released Jordan's cow, compared with the moment of her being seen in Mr. Libby's yard a half-mile distant, the allowance to be made for his position in the case, the nature of the offence and purpose of punishment, &c., &c., the judge said :—"These are pertinent and legitimate considerations for the jury—not as bearing on the guilt or innocence of the accused, which must first be determined strictly according to the evidence in the case—but if you find your minds incline to the decision that the crime is proved beyond a reasonable doubt, then these considerations are pertinent in urging you to render a verdict according to your judgment no matter what the penalty may be." To which instructions and observations the respondent excepted.

No evidence of the prisoner's character was introduced, but the prosecuting officer, in his closing argument, attacked it, and suggested his capability of doing the act wherewith he was charged, from the nature of the crime of which he had previously been convicted. No objection was interposed to this line of argument at the time.

Various requested instructions were refused; only one was relied upon at the hearing upon the exceptions, and that was this: The county attorney argued that the question of guilt lay between the witness, Dyer, and the respondent; that an acquittal of Watson convicted Dyer, and amounted to a conviction of all the government witnesses of perjury; thereupon the court was requested to instruct the jury that "it was not a question between Benjamin Dyer and this respondent; the only question is the guilt of the accused, whether he committed the crime charged or not, and an acquittal would not convict anybody of perjury;" having already stated to the jury that they must be satisfied beyond a reasonable doubt of every fact essential to establish Watson's guilt before he could be convicted, the judge declined to give this instruction.

Howard & Cleaves and *Nathan Webb*, for the respondent.

The second and third counts, upon which the defendant was convicted, set out no offence under the statutes of this State. The second says that "by the kindling of the fire so set to said barn, the dwelling-house was set fire to, burnt and consumed," not stating that any one was in it; neither does the third state what the fact was in this particular.

The third and fifth counts are identical in legal effect; Watson was convicted on the former, and, by the silence of the jury, acquitted on the latter; *State* v. *Phinney*, 42 Maine, 384; *Girts* v. *Commonwealth*, 22 Penn., 351.

A verdict thus repugnant is too fatally defective to sustain any judgment. *Baron* v. *People*, 1 Parker's Cr. Cas., 246; *State* v. *Sutton*, 4 Gill, (Md.,) 497; *King* v. *Hayes*, 2 Ld. Raymond, 1521. Stanford only testified what Dyer told him in Portland; the latter was then allowed to state their conversation in Scarboro'; both being government witnesses. *Commonwealth* v. *Buzzell*, 16 Pick., 154; *Commonwealth* v. *Starkweather*, 10 Cush., 59; *Commonwealth* v. *Welsh*, 4 Gray, 535.

Only the record of conviction of infamous crime is admissible to impeach the credibility of a witness. See R. S., of 1857, c. 82, § 89, and more recent statutes. The paper signed by Watson should have been admitted to show Mr. Sweat's mistake as to the time when the deed was delivered, and why he looked at it in December.

Charles P. Mattocks, county attorney, for the State.

Dyer's testimony was properly admitted because Stanford swore that he never made the alleged statement. 1 Green. on Ev., § 462; *Ware* v. *Ware*, 8 Maine, 53. The letter to Mr. Strout was never delivered; nor anything done in accordance with its terms. It was simply a letter Watson once thought of sending but did not send. *Pope* v. *Machias Co.*, 52 Maine, 535; *Hackett* v. *King*, 8 Allen, 144; *Burke* v. *Savage*, 13 Allen, 408. Objection to the line of argument adopted by me is made too late. *Commonwealth* v. *Cunningham*, 104 Mass., 545.

The requests were mostly denied because correct instructions upon the same subject had already been given and these were superfluous, even if right. The prisoner cannot be aggrieved that he was not convicted upon more than two counts. *State* v. *Whittier*, 21 Maine, 347; *State* v. *Burke*, 38 Maine, 574; *Commonwealth* v. *Tuck*, 20 Pick., 366.

In all cases where silence upon a count has been held equivalent to an acquittal, such count has been different from those on which a verdict of guilty was found. *State* v. *Phinney*, 42 Maine, 384.

The second and third counts are sufficient; one sets out the setting fire to a barn with intent to burn a dwelling-house, and the other a setting fire to the house itself, which implies the intent. R. S., c, 119, § 1; *State* v. *Hill*, 55 Maine, 365. The verbal criticism on the use of the word "kindle" is not worth noticing. A finding upon a single count and silence as to the rest, is sufficient in law. *Jones* v. *Kennedy*, 11 Pick., 125; *French* v. *Hanchett*, 12 Pick., 16. And judgment may properly be rendered on that count. *U. S.* v. *Stetson*, 3 Woodb. & M., 164.

Dickerson, J. This case is presented on exceptions to the order of the presiding justice overruling the motion in arrest of judgment, his exclusion and admission of testimony, his instructions to the jury, and refusal to give certain instructions requested by the defendant.

Several causes are assigned in the motion for arrest of judgment, but they may all be conveniently considered under two general heads.

I. It is alleged that no statute offence is set out in the second and third counts upon which the respondent was convicted. We do not think that this objection is well taken. The second count charges the setting fire to a barn with intent to burn a dwelling-house which was thereby burned. This is clearly an offence under the statute. So, also, is the charge in the third count of setting fire to, and burning a dwelling-house, though no intent is

alleged. In the one case there may have been an intention to burn the barn, and no intention to burn the dwelling-house. Hence the necessity of alleging an intention to burn the dwelling-house. In the other case the setting fire to the dwelling-house and burning the same, necessarily imply an intention to burn it; hence there is no necessity for alleging this intention. R. S., c. 119, § 1; *State* v. *Hill*, 55 Maine, 368.

II. The motion in arrest of judgment further alleges that there is a repugnancy in the finding of the jury, since they convicted the accused upon the third count, and were silent upon the fifth, which is identical with the third; their silence upon the fifth, as is argued, being, in legal effect, an acquittal of the accused upon that count. In other words, it is argued that the jury convicted and acquitted the accused upon the same substantive charge.

The authorities are not in harmony as to the legal effect of the silence of a jury in respect to one or more of the counts in an indictment when they return a verdict of guilty upon the other counts. Some of them hold that such silence renders the verdict void; some that it operates as an acquittal of the accused upon such count or counts; others that the court will disregard the counts upon which the jury are silent, and proceed to judgment upon those on which a verdict is returned; others, still, that the verdict will be sustained, and the court will order a *nol pros* of the counts on which the jury omitted to return a verdict. The better opinion would seem to be that, as the accused is entitled to a verdict upon each and every substantive charge in the indictment, where the indictment contains several counts, each relating to the same transaction, and charging but one substantive offence, with different degrees of aggravation, the legal effect of a verdict of guilty upon some of the counts, is an acquittal upon the other counts. This doctrine was held in *State* v. *Phinney*, 42 Maine, 384.

This principle applies to the first and fourth counts in the indictment but not to the fifth, as that is identical with the third upon which the verdict of guilty was rendered. The jury cannot

be presumed to have, at one and the same time, convicted and acquitted the accused upon the same charge. The more reasonable view of the verdict in this respect is, that having found the accused guilty upon the third count, they did not deem it necessary to convict him again of the same charge set forth in another count of the indictment. The judgment and punishment under the verdict found being the same as it would have been if the jury had returned a verdict of guilty upon the fifth count also, the accused could not have been prejudiced by their omission to return a verdict upon that count. Besides, there can be no question but a judgment upon the existing verdict would be a bar to any indictment based upon the fifth count. Our conclusion is, that the ver dict is to be regarded as an acquittal of the respondent upon the first and fourth counts, and that the fifth count being the same as the third upon which he was convicted, should be disregarded, or that, at least, a *nol pros* should be entered upon that count, and that the case should proceed to judgment upon the second and third counts. *State* v. *Phinney*, *ante*; *State* v. *Coleman*, 3 Ala., 14; *Sweeney* v. *State*, G. & M., 576.

The objection of the defendant that the record of his former conviction of a criminal offence was improperly admitted is obviated by R. S., c. 82, § 94. Under that statute the record of a previous conviction of a criminal offence is admissible to affect the credibility of the respondent in a criminal case, although the conviction may not have been for an infamous crime. That statute had its origin in the outgrowth of the modern idea that the sources of evidence ought to be enlarged. It would be contrary to the letter and spirit of this statute to restrict its application to records of conviction for infamous crimes as claimed by the counsel for the respondent.

Nor is the objection to the admission of parol evidence of the contents of the policy of insurance upon the buildings and personal property of the respondent destroyed by the fire, well taken. It was important for the State to show that the property was insured in order to establish the respondent's motive for setting the

fire. The preliminary evidence introduced without objection, shew that the defendant held such a policy, and that he had surrendered it before the trial to the agent of the company who was out of the jurisdiction of the court. Under these circumstances we see no objection to the admission of parol evidence of the contents of the policy with respect to the buildings and other property of the respondent destroyed by the fire, as bearing upon the question of motive. 1 Greenl. on Ev., § 558; *Kidder* v. *Blaisdell*, 45 Maine, 461.

It is further argued in defence that the presiding justice erred in excluding the writing of December 18, 1872, signed by the respondent, in which it is stated that the deed of the premises, Watson to Jordan, was to be deposited in the hands of S. C. Strout, Esq., for safe keeping for the grantor, till February 1, 1873, when it was to be delivered to the grantee. The government had introduced evidence tending to show that the deed was delivered previously to that time, when this writing was offered.

The respondent was convicted upon the second and third counts in the indictment which charged him with burning the buildings of Jordan. Whether they were his property or not depended upon whether the deed from Watson to him had then been delivered. The writing offered is not an *ex parte* declaration of the grantor, but was made with the knowledge and consent of the grantee's counsel, and for the very purpose of preserving the evidence of the agreement of the parties in respect to the time of the delivery of the deed; and yet by the exclusion of the writing, human memory was allowed to take its place. We do not think that the writing offered is inadmissible because of the failure of the evidence to show that it ever reached Mr. Strout, since that fact could not affect the intention of the parties in respect to the delivery of the deed. The materiality of this evidence becomes apparent when it is considered that the fire occurred before the time fixed in the writing for the delivery of the deed. Upon this ground the exceptions must be sustained.

The other exceptions to the rulings of the presiding justice in

excluding or admitting evidence do not appear to have been very much relied upon by the counsel, and cannot be sustained.

The objections to the charge of the presiding justice, for the most part, allege that it is metaphysical, argumentative, or unduly prejudicial to the respondent in its inferences, suggestions, illustrations, or assumptions. But we are satisfied that the exceptions upon this branch of the case cannot be sustained upon any of the grounds therein alleged. The justice undoubtedly, in a case of this importance, deemed it his duty to comment somewhat upon the evidence, that he might thereby afford the jury some guide toward the discovery of the truth. This is always a delicate, but in some cases, an indispensable duty of the court. The remark of the justice, so severely criticised by the counsel for the respondent, that considerations growing out of the enormity of the offence and the duty of protecting society, were pertinent to urge them to render a verdict according to their judgment, no matter what the penalty might be, if their minds should be inclined to the decision that the crime charged was proved beyond a reasonable doubt, was simply an admonition to the jury to do their duty fearlessly, and without undue sympathy for the prisoner—a caution by no means gratuitous, considering the skill, ability and learning of his counsel. There is no intimation that such "considerations" should supply the place of satisfactory proof of guilt, or that "inclination" of mind should be allowed to supersede conviction.

The authorities cited by the county attorney in his able and exhaustive argument, show that the exceptions cannot be maintained on account of the refusal of the presiding justice to give the requested instructions. If the county attorney in his argument to the jury transcended his legitimate province, the counsel for the respondent should have interposed their objection at the time, that the court might have set the matter right before the jury. Not having done so, it is too late to raise that question. *State* v. *McAllister*, 24 Maine, 139; *Commonwealth* v. *Cunningham*, 104 Mass., 545.

The charge of the presiding justice shows that he substantially gave all the requisite instructions upon the other requests. *Dunn* v. *Moody*, 41 Maine, 239; *People* v. *Lahman*, 2 Barb., 219; *Shorter* v. *The People*, 2 N. Y., 192. *Exceptions sustained. Verdict set aside and a new trial granted.*

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

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

SOUTH BOSTON IRON COMPANY *vs.* WARREN BROWN.

Promissory note—what estops maker to deny consideration.

Where, at the request of the party with whom he deals, one makes his promissory note (which is to be a partial payment for a piece of work to be done for him) payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party in good faith, the maker cannot set up a failure of consideration, as between himself and the party with whom he deals, in defence of a suit upon such note, in the name of the payee.

The governing principle in this case is not distinguishable from that which was laid down in *Munroe* v. *Bordin*, 65 E. C. L. R., 862.

ON REPORT.

ASSUMPSIT upon a promissory note, defended upon the ground of want, or failure, of consideration. The terms and tenor of the note, and the circumstances under which it was given, appear in the opinion.

J. H. Drummond, for the plaintiffs.

Though the machine he expected never was delivered to the defendant, so that he never received the anticipated benefit, yet he gave the note to the Irving Bark Extract Co., making it at their request, run to the South Boston Iron Co., (which had no dealings with Brown) and the Extract Co., according to their original intention, as indicated by the very tenor of the note, passed it to

the plaintiffs for a full and valuable consideration between these parties. As the Irving Bark Extract Co., received from the Iron Co., the full value of the note for it, it is immaterial whether or not Brown ever received any equivalent for his note. 1 Parsons on Notes, 183, 199, and cases there cited.

Strout & Holmes, for the defendant.

It appears by Mr. Johnson's testimony that in taking this note, which was delivered to the plaintiffs at the same time with the order for the machine, for which it was part payment, he acted for, and as the agent of the South Boston Iron Co., who were authorized to manufacture machines for the licensees of the Irving Bark Extract Co., the proprietors of the patent. His agreement with Mr. Brown was never carried out by the company he represented in making it, who never made any machine for Mr. Brown, and therefore he was fairly entitled (as Mr. Reed, the company's agent at its Boston office, told him) to have his note returned to him, since the consideration for it had utterly failed.

Barrows, J. Where, at the request of the party with whom he deals, one makes his promissory note, which is to be a partial payment for a piece of work to be done for him, payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party, in good faith, the maker cannot set up a failure of consideration as between himself and the party with whom he deals, in defence of a suit upon such note in the name of the payee.

The governing principle in this case is not distinguishable from that which was laid down in *Munroe* v. *Bordin*, 65 E. C. L. R., 862.

On the twenty-seventh of April, 1868, the defendant gave to an agent of the Irving Bark Extract Co., a written order addressed to said Extract Co., to make for him a "complete set of works for the making of extract according to your patents, such as are being made by the Boston Iron Co.," not to exceed in cost five thousand dollars (with a stipulation that he

should have as much deduction from that price as the most favored customers) "to be paid in a note for $1,500 on four months this day given," and the balance in four months from date of delivery. The note here spoken of is the note in suit made payable by the defendant directly to the South Boston Iron Co., with the knowledge that the Iron Co. was manufacturing the machines, while the Extract Co. were the exclusive owners of the right to make and use them. He dealt with the Extract Company. His order is addressed to them, and the business was transacted by one Johnson, a member of the Extract Co., who was also their general sales agent. While Johnson testifies that he was authorized to act for the plaintiffs also, this claim of authority is denied by the plaintiffs, and with the single exception of this note, all the transactions among the parties so far as they were committed to writing appear to favor this denial, and to contradict Johnson who is the principal witness for the defence.

The plaintiffs' testimony seems to establish the following state of facts: They had been employed in making castings according to patterns furnished by the Irving Bark Extract Co., who were largely in their debt; they had a contract with that company to build five bark mills like one previously made by them for the Irving Bark Extract Co., for $4,500 each—cash on delivery in Boston, the work to be done under the supervision of one B. Irving, constructing engineer of the Irving Bark Extract Co.; and they proceeded under his direction, having no model, but working under Irving's direct supervision some months, and having one of the machines delivered and the other four partially constructed; when the work was finally stopped by the consent of the Irving Bark Extract Co., (and for aught that appears without any fault or deficiency on the part of the plaintiffs who were informed by the Irving Bark Extract Co., that the machines though thus built according to the directions of their own contracting engineer, did not answer the purpose it was expected they would,) the Irving Bark Extract Co., remained largely indebted to the plaintiffs. While the work was in progress the plaintiffs agreed to

receive the defendant's note here sued in part payment of their account against the Irving Bark Extract Co., and did thus receive and credit it. Upon this showing the case falls within the rule laid down in the outset, and the defence fails.

If Mr. Brown, by reason of a misplaced confidence in the Irving Bark Extract Co., and the value of their invention, and the practical utility of the machines they were constructing, has given his note to a *bona fide* creditor of theirs, it is to them that he must look for a reimbursement when he has paid his note. The plaintiffs were under no obligation to him. A good consideration passed from them to the Irving Bark Extract Co. That the defendant did not receive what he contracted for, from the party with whom he dealt, was no fault of the plaintiffs, nor can Mr. Brown resist the payment of this note, on the ground of a want or failure of consideration, any more than he could allege such a defence if he had given the same note purely as a matter of accommodation to the Irving Bark Extract Co., in payment of their debt to the plaintiffs. The defendant claims to be let into his defence upon the ground that Johnson of the Extract Co., was the agent of the plaintiffs, and that he dealt directly with the plaintiffs for the machines. But this is contradictory of his own order to the Irving Bark Extract Co., with whom he dealt on different terms, both as to price and time of payment, from those upon which the Iron Co., were making the machines for the Extract Co.

Then the defendant says, if he did give the order in the first place to the Extract Co., it was made over with his consent together with the note to the Iron Co., who (he claims) took the note with the understanding that they were to take the contract off the hands of the Extract Co., and assume its performance so far as Mr. Brown was concerned. If the Iron Co., were content to do this and to guaranty the sufficiency and utility of the machines, when they had no interest in the patent, and to become responsible for the delivery of the machine to Mr. Brown, it would put a different face upon the case.

It is not worth while for us to spend time now in inquiring

whether this was a reasonable or probable thing for either party to do under the circumstances, or whether there is any evidence to sustain this view; for the case is not submitted to us to dispose of upon the facts as well as the law.

The stipulation in the report is that if the court shall be of opinion that the action is legally maintainable upon the admissible evidence, the case is to stand for trial; and such is the result.

Case to stand for trial.

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

ALBERT STEPHENSON *vs.* J. H. J. THAYER.

Exceptions. Practice. Trover—evidence as to damages.

In our practice, complaints of the rulings, opinions or directions of the justice presiding at *nisi prius* as to matters of law, must be presented in the form of exceptions, unless the case is reported by him for the consideration of the full court.

Objections to his proceedings in the conduct of the cause in other respects, or to his comments upon the evidence or to his expressions of opinion as to matters of fact, cannot of themselves be deemed sufficient reasons for setting aside a verdict.

Anything in his remarks or instructions to the jury which does not constitute a valid ground of exception cannot be made available under a motion to set aside the verdict, unless it appears upon a report of the whole case that the verdict was manifestly wrong, and that the suggestions of the judge may have misled the jury.

To misstate material facts in a charge to the jury, or to charge upon facts not proved nor admitted nor fairly inferable from the evidence in the case, if the attention of the judge is called to the misprision by the counsel of the losing party in season to have the error corrected before the case is given to the jury, would be good ground of exception; but suggestions as to matters of fact, or expressions of opinion by the presiding judge with regard to the state of facts in a case, so long as the determination of the facts is not withdrawn from the jury, were not subjects of exception, prior to Public Laws of 1874, c. 212.

In an action of trover by the promisee against the promisor for sundry notes of hand, the pecuniary ability of the defendant to pay them is not a subject of consideration in estimating damages.

On exceptions and motion for a new trial.

Trover, originally brought in the superior court and subsequently transferred to this court, to recover the amount of three promissory notes made by the defendant, payable to the plaintiff; one dated January 3, 1870, for $425 and interest; another, of the same date, for $66.86, with interest, and a third dated January 8, 1870, for twenty-three dollars; all of which the plaintiff says the defendant wrongfully obtained possession of upon the eleventh day of June, 1870, and converted to his own use.

Mr. Stephenson testified that, after considerable pressure on his part for the money, Mr. Thayer told him, on the tenth day of June, 1870, that if he would call the next day the notes should be paid; accordingly he went to that gentleman's store at the time appointed, placed the notes upon the desk and, in response to an inquiry, said he thought the interest was correctly computed; that Mr. Thayer hastily took the notes, and went into the front part of the store; that he told him (Stephenson) to wait a minute; that Mr. J. S. True came in and was present when the plaintiff again demanded payment or return of the notes and the defendant replied that he had paid them, which the plaintiff denied and requested Mr. True to search him to see if he had about him any such sum of money as they amounted to, and the defendant to see if he had the notes. The defendant advised Mr. True not to get himself into trouble by mixing up in a scrape that did not concern him. Mr. True declined to search. There was evidence introduced by the defendant that the notes from him to Mr. Stephenson were for a sum less than the amount of usurious interest he had paid Mr. Stephenson. He also offered to prove his insolvency and requested the judge to instruct the jury that this fact was to be considered in determining the value of the notes alleged to have been so converted, but this instruction was refused.

In the course of the trial the defendant's counsel asked the plaintiff if he had not caused the defendant's stock, worth $4500, to be attached upon the same debt now in suit, but he was not permitted to answer. While upon the stand, Mr. Thayer testified that, at the time the appointment for meeting at his store to settle was

made, Mr. Stephenson stated to him the amount and items of indebtedess, and he wrote it down upon a card, and his counsel offered to put in the card, which the court excluded.

After Stephenson had left the store the fragments of the note for $66.86 were picked up from the counting-room floor by Frank Houghton, in the presence of John Williamson, the clerk, whose attention was called to the bits of paper (before they were picked up) by the defendant, whose counsel proposed to show by Williamson what conversation thereupon was had by these three persons, but the court declined to admit it.

There was a demurrer filed to the declaration (which was in the usual form of trover) at the first term which was overruled and exceptions taken to this ruling, as well as to all of those above recited. The plaintiff obtained a verdict for $506.44. The motion to set it aside not only claimed that it was against law and evidence, but that the charge of the judge was incorrect, misstated facts, assumed facts not proved, and had a tendency to make an erroneous impression upon and mislead the jury.

Mattocks & Fox, for the defendant.

Charles F. Libby, for the plaintiff.

Barrows, J. The plaintiff brought trover against the defendant for three promissory notes signed by the defendant and made payable to the plaintiff. He claimed and offered testimony to show that the defendant wrongfully got them from his possession without paying them on a certain occasion when he presented them for payment. The defendant brings the case before us upon exceptions and upon a motion to set aside the verdict against him.

The causes alleged in this motion include, besides the customary assertions, that the verdict is against law, evidence and the weight of evidence, certain complaints respecting the manner in which the judge presiding at the trial dealt with the facts and testimony in the case in his charge to the jury.

A careful examination of the evidence and charge, both of which are reported in full, satisfies us that the defendant has no just cause

of complaint. It is apparent that in the trial of such an issue as was here presented, everything must depend upon the conclusion to which the jury came as to the truthfulness of the testimony given by the plaintiff and defendant respectively. To that inquiry the presiding judge carefully directed their attention. It is obvious that the unwillingness of the defendant to permit True to make the search of both parties upon the spot, which was proposed by the plaintiff, and the testimony of the defendant's clerk as to the number of the notes outstanding in January, 1870, must have weighed heavily against the defendant; and supposing the parties to stand equal in the estimation of the jury, this testimony might fairly be expected to create a preponderance in favor of the plaintiff.

We see no reason to believe that the suggestions of the presiding judge, of which the defendant complains, misled the jury, or even that they affected the result. The motion cannot be sustained.

Hereupon, before proceeding to consider the exceptions filed in this case we remark:

I. In our practice complaints of the rulings, opinions or directions of the justice presiding at *nisi prius*, as to matters of law, must be presented in the form of exceptions, unless the case is reported by him for the consideration of the full court. *First Parish in Brunswick* v. *McKean*, 4 Maine, 508.

II. Objections to his proceedings in other respects, or to his comments upon the evidence, or to his expressions of opinion as to matters of fact, cannot of themselves be deemed sufficient reasons for setting aside a verdict. *Palmer* v. *Pinkham*, 37 Maine, 252; *Phillips* v. *Kingfield*, 19 Maine, 375; *Gilbert* v. *Woodbury*, 22 Maine, 246; *Dyer* v. *Greene*, 23 Maine, 464; *Frankfort Bank* v. *Johnson*, 24 Maine, 490; *Hayden* v. *Bartlett*, 35 Maine, 203.

III. Anything in his remarks or instructions to the jury, which does not constitute a valid ground of exception, cannot be made available under a motion to set aside the verdict unless it appears upon a report of the whole case that the verdict was manifestly wrong and that the suggestions of the judge may have misled the jury. *Loud* v. *Pierce*, 25 Maine, 241. This condition seems to

have been deemed essential by the Massachusetts courts in *Curl* v. *Lowell*, 19 Pick., 28.

IV. To misstate material facts in a charge to the jury, or to charge upon facts not proved, nor admitted, nor fairly inferable from the evidence in the case,—if the attention of the judge is called to the misprision by the counsel of the losing party in season to have the error corrected before the case is given to the jury,—would be good ground of exception or for setting aside the verdict if the case was presented on report. *Pierce* v. *Whitney*, 22 Maine, 113.

V. But suggestions as to matters of fact or expressions of opinion by the presiding judge with regard to the state of facts in a case, so long as the determination of the facts is not withdrawn from the jury are not subjects of exception. *Phillips* v. *Veazie*, 40 Maine, 97.

With these rules in view, looking now at the exceptions here filed, we find that the only point raised in them which is insisted on in argument, is the right to instruct the jury, that if they found a conversion it was their duty to take into consideration the defendant's ability to pay his debts at the time of the conversion in estimating the damages. Herein we see no error.

A debtor cannot, after wrongfully depriving his creditors of the evidence of his indebtment, mitigate the damages to be recovered against him for this act by setting up his own worthlessness. The sum which the defendant himself realizes by the act of conversion must surely be the lowest measure of damages. If a man takes up his own paper in that manner, the amount which he would have been legally bound to pay to retire it regularly, is surely the amount which he has realized by its conversion. The remark made by the presiding judge in refusing the request was doubtless correct; and the distinction thereby recognized between the position of a man who wrongfully converts securities upon which he is himself liable, and him who converts securities outstanding against third parties (which may be of more or less value according to the ability of those parties to pay) is just and sound. Nor is there anything in the authorities cited by defendant's counsel to

militate against the rule laid down in the charge. *Matthew et al.* v. *Sherwell*, 2 Taunt., 439, was a suit brought by the assignees of a bankrupt against one who had received the bankrupt's check after the act of bankruptcy and the sole ground upon which the plaintiffs could be supposed to have any claim at all was that the check was invalid. The plaintiffs then mistook their remedy in claiming damages for the conversion of a piece of paper which they themselves contended had no legal force or efficacy. In *O'Donoghue* v. *Corby*, 22 Mo., 393, the plaintiff sued an officer of a corporation in trover for withholding an account which bore a certificate of approval by an auditing committee. The defendant answered that the account contained false charges and was allowed by the auditing committee under a mistake of facts which were well known to the plaintiff, and that payment of the account had been withheld by the direction of the president of the company. The court held that the amount apparently due was *prima facie* the amount of damages for the conversion, but that it was competent for defendant to show in reduction of damages—not that the company was unable to pay—but that the document was of less value than it purported to be or even that it was of no greater value than the paper it was written upon by showing payments, or the facts set up in the answer or any facts impeaching the validity of the instrument. The case does not sustain the position taken by the defendant here. He had the benefit of all that went to show that less was due upon the notes than appeared by their tenor. More than this he could not rightfully claim.

The several matters mentioned in the exceptions as having been offered by the defendant in testimony and excluded were all plainly inadmissible. As we have already seen the assertions that the judge charged upon facts not proved, or misstated material facts to the jury, if they had had any foundation in fact, should have been presented in the form of exceptions. Not being so presented they are not regularly before us. But we do not see that they have any substantial basis. *Motion and exceptions overruled.*

Appleton, C. J., Walton, Dickerson, Danforth and Virgin, JJ., concurred.

JANE P. THURSTON *vs.* CITY OF PORTLAND.

Title is proper to be considered in estimating land damages.

Where, upon an appeal for land damages, occasioned by taking for a street land alleged to belong to the appellant, the parties agreed to "refer" the question of damages "to the following committee," naming them, and the clerk issued a rule to the persons named as referees, who without objection heard the parties, and made their report as follows : "That Jane P. Thurston, at the time of laying out, and establishing of Howard street, named in her appeal, did not own any portion of the land taken by said street and was not, and is not entitled to recover any damages from the city therefor :" it was *held*, that the title was a proper element for the consideration of the referees in estimating the damages claimed by the appellant ; and that she cannot now object that the persons to whom was submitted the determination of the question of damages, acted as referees, rather than as a committee.

ON EXCEPTIONS.

The claimant's appeal was referred by agreement of parties to Nathan Webb, Frederic Fox and Ezra Carter, who reported that she had no title to the land taken for public use. She objected to the report upon the ground that they were not authorized to pass upon the question of title. The court sustained the objection, and rejected the report, and the city excepted.

Charles F. Libby, city solicitor, for the appellees.

J. O'Donnell, for the appellant.

VIRGIN, J. The city council of the city of Portland located Howard street upon certain land claimed by the appellant, without awarding her any damages for the land thus taken; and thereupon she appealed, alleging that she feels "aggrieved by the refusal to award damages to her," and duly entered her appeal in this court. At the October term, 1871, the parties "referred the matter to a committee" mutually agreed upon. After a hearing, the committee at the succeeding October term made their report: "that Jane P. Thurston, at the time of laying out and establishing of Howard street, named in her appeal, did not own any por-

tion of the land taken by said street, and was not, and is not, entitled to recover any damages from the city of Portland therefor."

The appellant now contends that the report of the committee should be rejected, for the reason that the question of the appellant's title was not submitted to them.

So much of the city charter as regulates appeals in such cases, is as follows:

"Any person aggrieved by the decision or judgment of the city council in establishing, altering, or discontinuing streets, may, so far as relates to damages, appeal therefrom to the next court having jurisdiction thereof in the county of Cumberland, which court shall determine the same by a committee or reference under a rule of court, if the parties agree, or by a verdict of its jury, and shall render judgment and issue execution for the damages recovered," &c.

It will be noticed that the charter does not expressly authorize "the committee to decide upon the title of the appellant, so far as it respects damages," as do the R. S., c. 18, § 8, in cases of highways and town-ways in towns. But we do not perceive any good reason why the committee may not consider that question, so far as it respects damages without any express authority in the charter. Such a power has been in the general statute ever since the organization of the State. It is the foundation of the claim. "It is too plain to need argument, that one cannot be damnified by the location of a road over land in which he has no interest." *Minot* v. *Cumberland County Commissioners*, 28 Maine, 125.

The peculiar language of the parties whereby they agreed that the petition for damages may be "referred to the following committee," might well be construed by the clerk as an agreement that the question was to be determined by the persons named as "referees, instead of committee." There is no evidence that the respondent made any objection to the proceedings until the report was made, and came up for acceptance. *Exceptions sustained.*

Report accepted.

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

JOHN G. TUKEY *et al. vs.* ROBERT GERRY, JR.

Account annexed—note as an item. Demurrer—cannot be filed after general issue.

The plaintiffs having an account and also a protested draft against the defendant sued him for both, declaring only in a count upon an account annexed, which stated the items of merchandise and the date, amount and terms of the draft; *held*, sufficient upon the general issue, under R. S., c. 82, § 9.

They entered their suit at the November term, 1872, of the superior court, and within fourteen days after the entry—the time within which the rules require pleadings to be filed—the general issue was pleaded in defence. When the cause came on for trial, at the December term, 1872, of that court, the defendant filed a demurrer to the declaration which the plaintiffs refused to join, and it was rejected by the court, as not seasonably filed. This ruling was correct.

ON EXCEPTIONS.

The plaintiffs sold the defendant goods from time to time, for part of which they held his draft on A. S. Greeley for $275, dated August 3, 1872, payable on sixty days to his own order and by him indorsed. It was dishonored and protested. The plaintiffs then brought this action in the superior court declaring only upon an account annexed, that account consisting of seven items of merchandise, this draft, giving its amount, date and terms, and interest, charges of protest and statute damages. The writ was entered at the November term of that court, by the statutes creating which the defendant's pleadings are to be filed within fourteen days. Within this time the general issue was pleaded. At the next term, the cause came on for trial, when the defendant offered a demurrer, which the judge rejected as coming too late, the plaintiff refusing to join it and joining the general issue. When the draft was offered, the defendant objected to its reception, but it was admitted, and judgment given for the amount of the plaintiffs' claims. The defendant excepted.

Deane & Verrill, for the defendant.

W. L. Putnam, for the plaintiffs.

BARROWS, J. The plaintiffs having a bill for merchandise against the defendant, and being also the holders of an overdue and protested draft drawn by him on one Greeley, added two or three undated items to their account, charging the amount of the draft with a brief description of it, the interest accrued, and the cost of protest, and the statute damages, and sued out a writ from the superior court declaring for their whole claim (thus indicated), in a single count upon an account annexed. We do not design to commend any such loose and hasty mode of declaring upon negotiable paper, but we think the laches of the plaintiffs has been cured by that of the defendant, who was required by the statute creating that court to file his pleadings within fourteen days after the entry of the action, upon pain of being defaulted on the first day of the next term, unless the court, for good cause, should grant him leave to file a plea, or should otherwise lawfully dispose of the action. Public laws of 1868, c. 151, § 6. Here, the defendant pleaded the general issue within fourteen days after entry, and at the second term proposed to put in a general demurrer to the declaration, which the court rejected as not seasonably filed. At the trial on the general issue, the defendant objected to the reception in evidence of the draft above referred to, which appears to correspond with the charge in that item of the account, so far as it is therein described. The defendant had endorsed it in blank, and it was duly protested and notice was given.

The court overruled the objection to its admission, and to this, and to the rejection of his demurrer, the defendant excepts. He claims the right to file the demurrer under R. S., c. 82, § 19. But the general provision there found, even if it were applicable in this case would not be suffered to control the specific clauses in the public laws of 1868, c. 151, § 6, designed to facilitate the prompt administration of justice in the county of Cumberland; and not in any manner changed or affected by the revision of 1871. But those clauses are not in any manner repugnant to R. S., c. 82, § 19. They serve only to limit the time within which a demurrer to the declaration or other pleadings of the defendant may

be filed in the superior court except on leave granted, for good cause, by the judge. That section (R. S., c. 82, § 19,) does not contemplate the filing of a demurrer to the declaration "at any stage of the pleadings;" but only that either party may, within the time allowed by law and the rules of the court, where the process is pending, thus test the sufficiency of his adversary's next previous pleadings, and the demurrer shall always be joined, and neither party allowed to retract, except upon special leave granted within a time fixed after the final decision on the demurrer, and upon payment of cost.

No reasonable construction of R. S., c. 82, § 19, will conflict in any manner with the plain mandates of Public Laws of 1868, c. 151, § 6.

The ruling that the demurrer came too late was correct. The question before the court then was:—"Did the defendant promise?" not,—"Is the plaintiff's declaration technically correct?" Lord C. J. Holt is reported (2 Str., 933) as saying "that he was a bold man who first ventured on these general counts in assumpsit." This is the furthest venture in that line that has fallen under our notice.

In view, however, of R. S., c. 82, § 9, which prohibits the abatement, arrest or reversal of any civil process or proceeding for want of form only when the person and case can be rightly understood, and in view of the fact that there was in the account stated a sufficient description of this draft to identify it and to exhibit the ground on which the plaintiffs claimed to recover it, we think the judge of the superior court was justified in receiving the draft in evidence under this plea of the general issue, and, upon finding all the facts necessary to entitle the plaintiffs to recover on it, in rendering judgment for the amount as an item proved in the account. *Exceptions overruled.*

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

JOTHAM VARNEY *vs.* HENRY M. BOWKER.

No such officer as field-driver. Impounding certificate must clearly state cause.

There is no such town officer as field-driver known to, or recognized by, the statutes of this State.

Impounded beasts may be replevied before they are advertised, as well as after.

A certificate lodged with a pound keeper by one signing it as field-driver reciting two causes for impounding, viz.: that the cattle impounded were "found by him at large without a keeper, in the highways;" and the other "in the inclosure of Bowdoin College in said town," is defective, and furnishes no justification to the impounder.

ON EXCEPTIONS.

REPLEVIN of four cows which, claiming to act in the capacity of field-driver in Brunswick, the defendant took up as estrays in that town on the third day of July, 1872, and committed to the town's pound, giving the pound-keeper a certificate of committal, describing the cows, and then saying that they were "taken up as estrays in the highway of said town, and as being found at large by me, the subscriber, without a keeper in the highways of said town, and in the inclosure of Bowdoin College in said town, which are the causes for impounding the same, and the said Henry M. Bowker demands three dollars for forfeiture by law, and the unpaid fees and charges for impounding the same," &c. The beasts were taken by the defendant at eight o'clock in the morning, put into the pound that forenoon, and replevied at nine o'clock that evening before any advertisement of them had been posted.

For these reasons, the defendant alleged, in his brief statement, that the cattle were not in his possession when the writ was served on him, nor were they impounded so as to authorize a resort to this process; but the judge of the superior court, before whom the matter came by appeal of the plaintiff from the municipal court of Brunswick, ruled that the writ was not prematurely sued

out, and that it properly ran against the defendant, whose certificate he held to be defective, in stating two causes of commitment and in leaving it uncertain what number of the cows were in the highway and what were in the college grounds; and therefore, that it afforded no justification to the defendant. He awarded the plaintiff nominal damages, and the defendant excepted.

Henry Orr, for the defendant.

These beasts were taken up as estrays, under R. S., c. 23, § 11, wandering part of the time in the highway and part of the time upon the college grounds, which he mentions as descriptive of the places where they were unlawfully roaming without a keeper, but not as the reason for impounding them. That was done because they were estrays, which is a sufficient legal cause.

George Barron, for the plaintiff.

VIRGIN, J. In the certificate deposited with the pound keeper, the defendant describes himself as "field-driver of said town," (Brunswick). But the statute of 1821, c. 128, § 1, which provided for the annual election of "three or more suitable persons for field drivers," &c., was repealed by the statute of 1834, c. 137, § 13, since which time towns have not been required to choose any such officers, nor are there any duties imposed upon such officers or authority given them to impound. *Hills* v. *Rice*, 17 Maine, 187; *Eastman* v. *Hills*, 18 Maine, 249.

R. S., c. 23, §§ 2 and 4, provide two distinct causes for the impounding of cattle—§ 2 for the recovery of a forfeiture for being "found at large without a keeper in the highways," &c., and § 4 for the recovery of damages to land.

Section 8 provides what facts shall be stated in the certificate of the impounder together with its purport.

Thus far the statute provides remedies for two wrongs—one, for the injury and danger of the public, and the other a private injury as when the beast is taken *damage feasant*. These provis-

ions are for the benefit of the public and the individual suffering damages.

But § 11 is of a different character, and its provisions are intended for the benefit of the owner of the beasts. It authorizes any person to take up, "as an estray," "any such beast" found (1) "in any public way;" or (2) "in his inclosure or possession." When thus found, the person taking up the estray may keep him "ten days;" and "if no owner calls for him, commit him, with a certificate as described in § 8 to the pound-keeper of his town," who shall keep him till called for by the owner, "and all due charges paid."

It will be perceived that the owner is liable only for "all due charges"—no "damages" or "forfeitures" as in cases under §§ 2 and 4.

The certificate is faulty in two respects. (1) It states two causes for impounding—one because the cattle were "found by him at large without a keeper in the highways," and the other "in the inclosure of Bowdoin College in said town." For the latter cause this defendant had no authority to impound—and (2) because he claims a forfeiture, when he had no authority to claim it, but only the "charges" mentioned. *Exceptions overruled.*

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

JOHN A. WATERMAN, Judge of Probate,

vs.

JAMES J. HAWKINS, *et als.*

Provision in will—what is. Liability of executor for assets.

By his will a testator left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and bequeathed the residue of his estate to his father. Two months after the testator's death, a child was born of his widow: *held*, that the reversionary clause above mentioned was not a provision for the child, under R. S., c. 74, § 8, and that, by virtue of that section, she took the same share in the estate that she would, had her father died intestate.

Waterman *v.* Hawkins.

The judge of probate can only be relieved of the duty cast upon him by R. S., c. 74, § 8, of assigning to a posthumous child its share of its father's estate, by provision being made specifically for the unborn child. He cannot be disinherited, like a child living when the will is made, by its appearing that the omission to name him was intentional.

The widow seasonably waived the provisions of the will intended for her benefit; *held*, that the child's share was properly taken wholly from the estate given to the residuary legatee.

That the executor has delivered the bequeathed property to the legatee of it, before the birth of the child, is no defence to a suit brought for the child's benefit upon the executor's bond, to obtain her share of it; especially where the court of probate has made a decree, not appealed from, establishing and assigning her share under R. S., c. 74, § 8.

On exceptions.

Debt, upon the bond of the executor of the will of the late John P. McGlinchy, who died at Portland, February 2, 1869, leaving his widow, *enciente*, and his father, surviving him. Two months after her father's death, Gertrude, the child for whose benefit this suit is brought, was born. The decedent made his will, January 7, 1869, by which he gave to his wife the house, land and furniture in Cape Elizabeth, where they lived, for her natural life, if she remained unmarried; providing, however, that "in case of her marriage the same is to become the property of my heirs, and its use to revert to them; and, in any event, after her decease, the same is to descend to my heirs." This bequest was expressed to be in lieu of dower. All the rest of his property he gave to his father.

The widow seasonably waived the provisions made for her in the will. This posthumous child, Gertrude, was the sole heir-at-law of her father.

At a probate court, holden at Portland, on the first Tuesday of June, 1871, upon a petition of this infant, representing the facts hereinbefore stated, and that the executor, James J. Hawkins, upon settlement of his account as such, at the probate court held the preceding month, was found to have a balance of $557.39 in cash in his hands, not needed for the payment of debts, nor specifically devised, and that no provision was made for her in her father's

will, and praying that she might be declared his heir, and that said sum be assigned to her, as her share of her father's estate, and said Hawkins be ordered to pay it to her. Conformably to the statute, that court found and decreed her to be the heir of John P. McGlinchy, and the other facts as set forth in the petition, and assigned her two-thirds of the $557.39, balance in the hands of the executor, being $371.50, which sum it directed to be taken from this residuum "which otherwise would have been the share of Hugh McGlinchy." No appeal was taken from this decree, nor was the sum specified ($371.50) paid said Gertrude, though demanded May 6, 1872.

Prior to her birth, the residuary legatee had taken possession of the personal property, with the consent of the executor.

The present proceedings were instituted to enforce payment of this $371.50. The defendants, by brief statement under the general issue, pleaded that the suit was not duly authorized, and a performance of the conditions of the bond. The case was submitted to the presiding justice, with the right to except, who found the foregoing facts, and that the suit was authorized, and ruled that the child was not provided for in the will of her father, and that her remedy was against the executor and not against the residuary legatee, and thereupon ordered judgment for the penalty of the bond, and execution to issue for $371.50, with interest from May 6, 1872, and costs. The defendants excepted.

William L. Putnam, for the defendants.

The reversion of the real estate, upon the death or marriage of the mother, was a provision made for the child in the will; so the probate court had no jurisdiction. Hugh McGlinchy had the right to the possession of the property delivered to him by the executor, upon the same principle that the heir apparent enters upon land descended, and receives the profits till the posthumous child is actually born; for, *non constat* that it will ever be born alive. 3 Greenl. Cruise, 330. In the meantime the executor ought not to enjoy the property, but should deliver it to the legatee; having done so, the remedy is against the legatee for the specific

property. R. S., c. 74, § 8, provides that the share shall be taken "from the devisees," which is also equitable.

W. H. Vinton, for the plaintiff.

Barrows, J. One McGlinchy died February 2, 1869, leaving a widow and father to whom he gave property in his will. Two months after his death a posthumous child, for whose benefit this suit on his executor's bond is brought, was born.

The testator devised and bequeathed to his wife, during her life and widowhood, his house and land with the furniture and other personal property on the premises—to become the property of his heirs upon her death or marriage. To his father he gave all his other property, wherever found or situate, specifying all the property in and about his store, and all his horses, wagons and teams.

The widow seasonably waived the provision made in the will for her, preferring to take her dower and allowance.

On the first Tuesday of May, 1871, the executor settled his first account, showing a balance remaining in his hands not necessary for the payment of debts or expenses of administration, of $557.39. Upon the first Tuesday of June following, the judge of probate under R. S., c. 74, § 8, decreed to the posthumous child, as not being provided for in the will, the sum of $371.50, being two-thirds of the balance aforesaid, to be taken from said residuum, which would otherwise have been the share of the testator's father, the residuary legatee. The decree was in precise conformity with the statute provision; for as the widow waived the provision made for her in the will, none of the property, whether specifically bequeathed or not, could pass by the will to the prejudice of the claim of the posthumous child for her share; and under these circumstances that share must, of necessity, all come from that of the residuary legatee. The decree was not appealed from. But upon demand made upon the executor in behalf of the child, he declined to pay over according to the decree, having allowed the property to go into the hands of the legatee before the birth of the child. The presiding judge, to whom the case was sub-

mitted ordered judgment for the penalty of the bond, and execution to issue for $371.50, and interest from the date of the demand and legal costs.

The defendants except, claiming:

I. That the probate judge had no jurisdiction to make the decree, because (they say) the child was provided for in the will, in the clause which gives the reversion of the property devised to the wife, to the heirs of the testator upon her death or marriage: and,

II. That, however this may be, the child's remedy is against the legatee, who has got the property, and not against the executor and his sureties. We are clear that neither point is well taken.

A child of a testator, born after his death, cannot, in any proper sense of the term, be deemed "provided for in his will" by a general devise of a reversion to the heirs of the testator.

There is nothing in such a provision to suggest that the child was thought of by the testator. The form of expression would indicate the contrary. To relieve the judge of probate from the duty imposed in R. S., c. 74, § 8, there must be provision made specifically for the unborn child. He cannot be disinherited like a child, or the issue of a deceased child, when it appears that the omission to refer to him was intentional. Unless he is "provided for," the conclusive presumption is that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate. A general devise of a reversion to the heirs of the testator constitutes no such provision. It would rarely be available for the support of the child when support is most needed; and while the insufficiency of the provision in the will might not entitle the posthumous child to claim a distributive share, in order to bar him it must definitely appear that some provision relating expressly to him was made. Nor can the executor relieve himself, or his sureties, by showing that he incautiously allowed the property to fall into the hands of the legatee. He is responsible first and always for the proper appropriation of the estate to the discharge of all legal claims upon it.

When he settles his account, showing a balance to be legally

disposed of according to the order of the judge, it is no sufficient excuse for the non-fulfilment of the decree that he had misapprehended his duty in the premises, and had allowed the property to go where it did not belong. Even though it may have gone wrong with the consent of the judge of probate, founded on erroneous information as to existing facts, it will not relieve the accountant and his sureties who are responsible throughout for the correctness of his doings. *Williams, J.*, v. *Cushing, Ex.*, 34 Maine, 370. *Exceptions overruled.*

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

THOMAS O. WINSLOW *vs.* JOHN W. LANE.

Probable profits not a proper basis for damages.

In this case the defendant covenanted to use all reasonable and proper diligence in the manufacture and introduction into the market of a patented invention, and that he would pay for said patent five thousand dollars from the net profits arising from the sale and manufacture thereof, as soon and as rapidly as such profits shall be realized from said sale. For a breach of the former covenant, the plaintiff would be entitled to at least nominal damages; if he would recover more the burden of proof is upon him to show the amount.

Probable profits are not a proper basis upon which to estimate damages and therefore, under the testimony as reported in this case, nominal damages only can be recovered.

ON EXCEPTIONS.

COVENANT BROKEN by alleged non-fulfilment of a written contract entered into November 7, 1871, whereby, in consideration of a conveyance to him of all the plaintiff's interest in a patent churn and meat-chopper, the defendant agreed and bound himself to "forthwith undertake the manufacture of the said patented invention, and the introduction of the same into the market," and to use all due diligence in doing so and to pay Mr. Winslow $5000

from the net profits "arising from the sale and manufacture" of these articles as soon and as rapidly as said profits are realized, and in case of failure to use such diligence the assignment and agreement were to be null and void. In case of disagreement, as to whether or not a proper degree of diligence had been used, there was a provision for a reference. The general issue was pleaded in defence with a brief statement of performance, the use of due diligence, a failure to realize any profits, and that no suit was contemplated or authorized by the agreement, but submission to referees with a penalty of forfeiture of all right to the patent and not of pecuniary damages. The plaintiff introduced testimony to show a lack of the requisite diligence on the part of the defendant, his abandonment of the manufacture, a refusal to refer the question, and a rejection of an offer of $5000 for the right to make and sell the churn and chopper in Illinois; but did not show the realization of any profits.

A nonsuit was ordered, to which the plaintiff excepted.

William H. Clifford, for the plaintiff.

C. W. Goddard, for the defendant.

DANFORTH, J. This is an action of covenant broken, in which a nonsuit was ordered upon the plaintiff's testimony. The first covenant in the instrument sued upon is as follows. "Be it known that I hereby agree and bind myself that I will forthwith undertake the manufacture of the said patented invention and the introduction of the same into the market, and that I will use all reasonable and proper diligence in the prosecution of said manufacture and introduction into the market." There is evidence of the admissions of the defendant that he did not use due diligence in the matter, and other testimony tending to show that he declined to have anything further to do with the patent. This, standing uncontradicted as it does, is sufficient to show a breach of the latter part of the covenant, and for this the plaintiff is entitled to recover at least nominal damages. If he would recover more than

this, the burden is still upon him to show that he has suffered more. The five thousand dollars, agreed to be paid in the covenant next following, cannot be taken as a measure of damages for a breach of the first. The payment of the amount specified depends upon the net profits arising from the sale. It may be that the damages could not exceed the five thousand dollars, as that is the extent of the plaintiff's interest in the contract, but it can come up to that amount only when the profits equal that. It may also be, that if in good faith the defendant might have realized that, or any less amount, as profits, the damages would correspond to such an amount. It is the profits, and that alone, in which the plaintiff has any interest, and some must have been made, or failed to have been made through the fault of the defendant, before plaintiff can recover more than nominal damages as above stated. In the case as it now stands there is no proof of profits realized or that might have been realized even with the greatest diligence. It is not sufficient that profits might probably have been made. Such profits are too uncertain and contingent, for a basis upon which to rest an estimate of damages. It appears from the testimony that the defendant had an offer of five thousand dollars for the State of Illinois. But it does not appear from the agreement that he was to sell territory, or that he was accountable for any profits arising from that source. His covenant was to use due diligence in the manufacture and sale of the invention, and the other covenant upon which rests his liability is, that he will pay as he realizes profits from the sale and manufacture.

But were it otherwise, a fair construction of the contract requires only the exercise of defendant's best judgment in making sales, and there is no proof that he did otherwise in rejecting this offer, but inasmuch as his interest required all the sales that could be advantageously made, the presumption is that in this respect he acted in good faith.

For the breach of covenant proved in this case the plaintiff is entitled to recover nominal damages at least, and such further damages as will equal an amount of profits which would have been

realized from the manufacture and sale of the patented invention named in the agreement sued, if the defendant had used such diligence as he covenanted to do, if any such shall be proved, not exceeding five thousand dollars and interest from the time it should have been paid according to the written agreement.

Exceptions sustained.

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

WILLIAM L. BRADLEY *vs.* HORATIO B. PINKHAM *et als.*

Poor debtor's bond includes officer's fees.

The fees of an officer for service of an execution by arrest of the defendant are properly included in "the sum due thereon," which is to be doubled to fix the penalty of the bond to be given by the debtor to obtain his release from such arrest, under R. S., c. 113, § 24.

ON EXCEPTIONS.

Debt on a bond given to obtain Pinkham's release from arrest on an execution against him in favor of the plaintiff issued by the superior court upon a judgment entered up November 29, 1872, for $144.66 debt, and $13.03 costs. He was arrested January 10, 1873, on the first execution, and the officer charged his fees for service at $2.90, which was included in the amount doubled to arrive at the penalty of the bond which was thus fixed at $321.48. No attempt at performance of either of its conditions was made but the defendants now contended that it was a common law bond and asked to have it chancered because the fees for arrest were included in determining the penal sum, whereas the statute R. S., c. 113, § 24, provides that this shall be only double the sum due on the execution.

The justice of the superior court, where this question arose, ruled that this was a good statute bond. The defendants excepted.

Henry Orr, for the defendants.

Under the former revision this would be a good statute bond; but under the present one the phraseology is different and this is not conformable to the existing law. Nor does R. S., c. 113, § 25, help the plaintiff, since that only contemplates a miscalculation in doubling correct items, not the inclusion of improper items. *Ross* v. *Berry*, 49 Maine, 434; *Call* v. *Foster*, Id., 452. It is intended to cover mistake of fact, not errors of law.

The officer's fees are not due on the execution. They are independent of it, and are a debt from the plaintiff to the officer.

Weston Thompson, for the plaintiff.

The officer's fees for arrest upon an execution are part of the sum due thereon, and are to be included in the computation by which the penalty of the bond is determined. The R. S., of 1857, c. 113, § 22, provided that the bond should be for double the sum for which the debtor was arrested, which defendants' counsel admits includes service of the execution. That section was never amended till 1871, and the last revision adopts a different phraseology merely for condensation, not to effect a change of the law. The language of the precept expresses this idea. It commands him, besides the sums specifically named as debt and as costs up to the time of judgment, also to satisfy himself for his own fees out of the debtor's property taken on execution. Hence, they are part of the sum due thereon; and the statute provides for their recovery in a suit on the bond. The variance is less than five per cent. of the execution; therefore, it is immaterial. Before the passage of the law of 1868 which is now R. S., c. 113, § 25, the inquiry was whether or not there was any variance from the true amount; now, it is how much is the variance, if any; and if less than five per cent. it does not in any way affect the validity of the bond. It is absurd to say that a statute enacted because of the construction given in the cases in 49 Maine Reports did not change the law.

APPLETON, C. J. This is an action of debt on a poor debtor's bond given to obtain release from arrest on execution.

The bond is in double the amount of "the debt, interest, costs and fees arising on said execution." It is insisted that this is a bond at common law and therefore the subject of chancery because the officer's fees constitute a portion of the sum, in double of which the bond was given.

By R. S., 1857, c. 113, § 22, "when a debtor is arrested or imprisoned on execution issued on a judgment in a civil suit, he may be released by giving bond to the creditor in double the sum for which he is arrested or imprisoned," &c.

By R. S., c. 113, § 24, "when a debtor is arrested or imprisoned on execution, he may be released by giving bond to the creditor in double the sum due thereon," &c., one of the conditions of the statutory bond being to "pay debt, interest, costs and fees arising in said execution."

It is conceded that the bond would be a good statute bond under R. S., 1857. It is denied that it is so under the provisions of R. S., 1871.

The section (24) authorizing the giving of a bond for the release of a debtor from arrest or imprisonment on execution assumes a previous arrest or imprisonment from which release is thereby to be had. The officer, by the mandate of the execution after satisfying the debt and cost "of the goods, chattels or lands of the said debtor," is authorized to satisfy himself for his own fees, which are so far due that their payment is necessary for his discharge from arrest or imprisonment—or if a bond is given, one of its conditions is required to be, to "pay the debt, interest, costs and fees arising in said execution." In case the debtor fails to fulfill the condition of his bond, judgment in a suit thereon is to be rendered, by § 40, "for the amount of the execution, costs and fees of service, with interest thereon against all the obligors," &c.

The insertion of the officer's fees as a component part of a bond, one of the conditions of which, in case of forfeiture, is that they shall be paid, can hardly be regarded as destructive of its statutory character, especially when in case of suit on the bond, the statute requires that the judgment should include such fees.

The change in the phraseology of the statute was for the purpose of condensation, not for that of effecting any alteration in its meaning. *Exceptions overruled.*

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

CUMBERLAND BONE COMPANY *vs.* ATWOOD LEAD COMPANY.

Of the mutual assent necessary for an agreement.

The defendants promised to furnish to the plaintiffs sulphuric acid for their "works." Neither the terms of payment nor the time for which the arrangement should continue, was agreed upon;—*Held*, that either side to the contract could terminate it at pleasure.

ON REPORT.

ASSUMPSIT upon an agreement said to have been entered into on the third day of May, 1870, at Cape Elizabeth, between these two corporations, there located, the plaintiffs being engaged in the preparation of superphosphate of lime, in the course of which they had occasion to use large quantities of sulphuric acid, the making of which was part of the defendants' business. The declaration, as originally drawn, alleged that, in consideration of the plaintiffs' promise to buy of the defendants all the "chamber acid" required in the prosecution of the Bone Company's business, the Lead Company agreed to sell the same to them, at a price stated, to be of a specified quality and strength, for a term of five years from the third day of June, 1870, being the time for which the Bone Company had hired certain premises, across the street from those of the Lead Company, payment for the acid to be made monthly, or sooner, after the delivery of the acid, if the defendants should require; that the Bone Company, relying upon this arrangement, went on making superphosphate, and constantly increasing its production and sales, until January 1, 1873, the Lead Company

furnishing and the plaintiffs receiving and paying for all the "chamber acid" required in this business, under said agreement; but that from and after the day last mentioned, the Lead Company refused to furnish acid of the stipulated strength and kind, and in the quantity needed, and on the eleventh day of June, 1873, refused to supply the Bone Company with any more acid at all, to the great injury and interruption of the plaintiffs' business, and to their damage in the sum of twelve thousand dollars.

The plaintiffs subsequently moved to amend their declaration by striking out the statement that the defendants agreed to furnish what acid they required for five years and insert that they were to supply whatever quantity was required, till either party should terminate the agreement, which the defendants did not do till June 11, 1873.

The general issue was pleaded in defence, with a brief statement that the supposed agreement was not in writing, nor to be performed within one year, and that the acts of the plaintiffs had excused performance of it by the defendants. It appeared in evidence that the Bone Company removed their works from Duck Pond, where they commenced operations in 1865, to the grounds of the Kerosene Oil Company, in Cape Elizabeth, opposite the defendants' manufactory, in the spring of 1870; that they made the change with an expectation of having the acid needed for their business from the Lead Company's chambers, and that a pipe was laid under the street through which the chamber acid ran, by force of gravitation, from the defendants' factory to that of the plaintiffs; and that all that was required was thus supplied till the spring of 1873, when other contracts were made by the Lead Company with large manufacturing establishments in Lewiston and elsewhere that exhausted their producing capacity, and prevented their furnishing any acid to the Bone Company. The reason for entering into other engagements was an expectation that the plaintiffs would discontinue their business, owing to heavy losses of southern customers.

There were various conversations between the presidents of the

two corporations before the Bone Company moved to Cape Elizabeth, but it was contended that letters which passed between them in May, 1870, established the contract. That of Mr. Goodale, for the Bone Company, dated May 3, 1870, commenced thus :—"To avoid forgetfulness or misapprehension of the arrangement in regard to acid, let me here note what I understood to be agreed upon, and please advise me if it be correctly stated, viz: That the Atwood Lead Company will furnish the Cumberland Bone Company what sulphuric acid may be required, from the chambers, of strength from 42 ° to 47 °, ... Settlements for acid by Cumberland Bone Company monthly, &c., as heretofore." . . . .

To this Mr. Atwood, for the Lead Company, on the ninth day of May, 1870, replied :—"Yours of the third instant is at hand, contents noted. Your statement of the agreement in regard to acid is the same as I understood it, with the exceptions of the terms of payment which I did not intend to settle, but leave for our treasurer to arrange." . . . .

Submittted to the court for determination.

S. C. Strout and *H. W. Gage*, for the plaintiffs.

The amended declaration sets out a contract not within the statute of frauds, since the contingency upon which it depended was liable to happen within a year. Brown on the Statute of Frauds, §§ 274, 275, 276. The letters were a sufficient reduction of the contract to writing. Id., §§ 346—353 ; *Salmon Falls Company* v. *Goddard*, 14 Howard, 446.

Strout & Holmes, for the defendants.

If, as the amended declaration states, the arrangement was determinable at the pleasure of either party, then a refusal to furnish acid enough was as much a termination of the agreement specified as a refusal to furnish any.

Peters, J. The defendants were furnishing to the plaintiffs sulphuric acid for their "works." There was some general understanding about it, but no contract that was binding. The parties

undertook to have a contract in writing. The plaintiffs made a proposition, communicated by letter. The defendants replied, accepting it, with the exception of the terms of payment, which were to be arranged. They never were arranged. In this correspondence no time was named, during which the acid should be furnished by the one side and taken by the other. We think that no binding executory agreement was entered into. Either side could retire from such an arrangement, whenever they pleased. There was not a perfect assent of the parties. Prof. Parsons says, "it becomes a contract only when the proposition is met by an acceptance which corresponds to it entirely and adequately." It is evident enough that a complete and established agreement of parties was not negotiated by the correspondence and other testimony in the case. *Jenness* v. *Mt. Hope Iron Company*, 53 Maine, 23. The action, either in the original or amended form, is not maintainable. *Plaintiffs nonsuit.*

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

ISAAC DYER *vs.* LUTHER FITCH *et als.*

Right of party to compensation, where contract is ambiguous.

By written agreement between these parties, the defendants repaired, used and occupied the plaintiff's canal. They were to collect and account for the tolls of all merchandise, including their own; and, "after deducting all costs, expenses and charges for repairing and running said canal," were to pay the net profits to the owner. A subsequent clause provided that the defendants should account for and pay over "the whole of said receipts, after deducting the expenditures in making said repairs." *Held*, that the defendants were entitled to retain from the tolls received by them a suitable compensation for their supervision of the canal and its repairs, though no express stipulation to that effect was to be found in the contract.

Reading the instrument by the light of all the attending circumstances—especially considering the subject matter, its extent, liability to need repairs, and the consequent necessity for constant supervision—the object in view,

that the canal should be made and kept available for public use, and that the defendants received no special benefits from their responsibility; the court think a reasonable construction requires the allowance to the defendants of the amount fixed by the auditor, for their superintendence of the canal and its operations during the season it was under their charge.

ON REPORT.

ASSUMPSIT, submitted upon the report of an auditor. The facts are given in the opinion.

Mattocks & Fox, for the plaintiff.

S. C. Strout and *H. W. Gage*, for the defendants.

VIRGIN, J. The plaintiff, owning three-eighths of the Cumberland and Oxford Canal, granted the defendants written permission to repair, use and occupy it during the season; to collect and account for tolls upon merchandise transported thereon by and for themselves as well as others; to keep and render a true account of their transactions; "and after deducting all the cost, expense and charges for repairing and running said canal," to pay the plaintiff "one full three-eighths part of the net receipts and earnings derived from the use and occupation of said canal," and the remainder to the owners of the other five-eighths, "in full compensation for the license and permission given."

In consideration thereof, the defendants agreed to "keep a just and true account of all moneys expended in making the necessary repairs, and also of all moneys received for tolls or revenue upon and for the use of said canal, as well as that due and payable upon all goods and merchandise transported by or for themselves," render to the plaintiff and other owners a true account of such expenditures and receipts, "and pay over to said Dyer three-eighths part of the whole of said receipts after deducting the expenditures in making said repairs."

Although the parties took pains to reduce their agreement to writing, they do not understand it alike in one respect. Of this matter of difference the contract makes no express mention. But

the defendants, calling attention to the clause in the first part of the contract relating to the mode for ascertaining what they are to pay, claim that they have a right to deduct as "cost, expense and charges for repairing and running said canal," a reasonable sum (which the auditor finds to be $640) for superintending the operation.

On the other hand, the plaintiff, turning attention to the clause relating thereto in the second part, contends that the defendants thereby expressly and unqualifiedly agree to pay him an aliquot part "of the whole receipts, after deducting the expenditures" for "repairs" alone.

But upon examination of all its provisions, and giving effect to all—reading the whole instrument by the light of all the attending circumstances; especially considering the nature of the subject matter—its extent, liability to need repairs and the consequent necessity for constant supervision; the object in view—that it should be kept open for the use of the public for whose benefit it was incorporated; together with the fact that the defendants receive no special benefits for their responsibility, but are bound to account for all tolls upon "all goods and merchandise transported by or for themselves," the same as upon those of all other persons —we think a reasonable construction requires the allowance to the defendants of the sum found by the auditor for their superintendence of the operation during the season.

The plaintiff's counsel do not urge their objection to the four other items. Therefore, by the terms of the report, the entry must be

Judgment for plaintiff for $191.83 *and interest from December* 28, 1867.

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

Isaac Dyer *vs.* John Fredericks.

Evidence—when secondary is admissible.

The burden is upon the plaintiff to prove that neither of duplicate bills of lading can be produced, before introducing parol testimony of the contents. If he offers the latter, and it is received, the presumption is that he satisfied the court of his inability to procure either part; which presumption is not overcome by the fact that the defendant, a shipmaster, delivered his part to one of his owners at the end of the voyage, ten years before.

If the plaintiff thinks this copy is still in existence, it is his duty to summon the owner to produce it; if he does not do so, he cannot except to the introduction by the defence of parol testimony of its contents, to rebut like evidence introduced by himself.

On exceptions.

Assumpsit to recover a hundred dollars said to have been collected by the defendant for the plaintiff, but retained by the latter, contrary to the terms of a bill of lading, executed in duplicate by the plaintiff and the owners of a brig of which the defendant was master. Having introduced testimony tending to show the loss of the bill of lading delivered to him, the plaintiff was allowed to prove its contents by parol. Captain Fredericks, when called as a witness in his own behalf, testified that he gave his copy to Charles M. Plummer, one of the owners of the brig, at the end of the voyage, ten years ago. Both parts were conceded to be alike. The defence, without calling Plummer to show the loss of the paper given him, were permitted to show by the captain and another witness, the contents of the bill of lading, the plaintiff objecting that this should not be done till the defendant had proved the loss of the copy left with Plummer, or the impossibility of compelling his attendance with it. The verdict was for the defendant, and the plaintiff excepted to the ruling admitting this testimony.

Mattocks & Fox, for the plaintiff.

Strout & Holmes, for the defendant.

RESCRIPT.

When the plaintiff offers parol evidence of the contents of a bill of lading upon which he relies, originally executed in duplicate, the burden is upon him to show that neither of the parts can be produced. If the parol testimony which he offers is received, the presumption is that he has satisfied the court of this; and where there is no ground for suspicion that either part is in the possession or under the control of the defendant, that presumption is not overcome by the naked fact that the defendant, a master of a vessel, testifies that one of the parts was once in his possession and was delivered by him to one of the owners of the vessel at the end of the voyage, ten years previous to the trial.

If the plaintiff believes that there is a reasonable probability that the ship's bill thus referred to can be produced it is his duty to move the court for leave to summon the owner to produce it.

If he does not do this, the burden being upon him to account for the non-production of other of the bills, he cannot object to the defendant's use of parol testimony to rebut the same kind of evidence adduced by himself. *Exceptions overruled.*

ISAAC J. DUNN *vs.* CHARLES P. HILL.

Nul tiel record *is the proper plea to a domestic judgment.*

Nil debet, pleaded to a domestic judgment, is demurrable. The proper plea is *nul tiel record.*

ON EXCEPTIONS from the superior court.

DEBT on a judgment of the superior court, to which the defendant pleaded that he did not owe, and filed a brief statement of payment and fraud. The plaintiff demurred to the plea. The de-

murrer was joined and sustained, and the plea adjudged bad; to which the defendant excepted.

M. P. Frank, for the defendant.

T. T. Snow, for the plaintiff.

APPLETON, C. J. This is debt on a judgment recovered before the superior court for the county of Cumberland, to which the defendant has pleaded *nil debet*. To this plea a demurrer has been filed.

It is well settled when the action is grounded on a record or specialty that *nil debet* is no plea. This rule is the result of the authorities. *Bullis* v. *Giddens*, 8 Johns., 82. The proper plea is *nul tiel record*, when the judgment upon which the action is brought was recovered before a court of record of this State.

Exceptions overruled.

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

WILLIAM H. FESSENDEN *vs.* FOREST PAPER COMPANY.

Recoupment—must be between the parties originally contracting.

The plaintiff repaired for the defendants certain machines originally made by a firm of which Fessenden had been a member; *held*, that the company could not have deducted from the cost of the repairs anything on account of defects in the original construction of the articles.

ON REPORT from the superior court.

ASSUMPSIT upon an account annexed for repairs made by the plaintiff for the defendants upon two bleaches, which were originally manufactured for the paper company by the firm of Charles Staples and Son, in which firm Mr. Fessenden was then a partner, succeeding to its business upon the dissolution of the partnership.

The defendants claimed that these bleaches or boilers were not constructed properly, nor according to contract, when made; and claimed to deduct the damages, alleged to have thence arisen, to the corporation from the plaintiff's bill for repairs. Their right to do so was submitted to this court.

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

An unsettled claim against a firm cannot be set off or recouped against a debt due one of the partners, even if it arises out of the same transaction. R. S., c. 82, § 50; *Banks* v. *Pike*, 15 Maine, 269; *Adams* v. *Ware*, 33 Maine, 228; *Bridgham* v. *Tileston*, 5 Allen, 371; *Hunt* v. *Pierpont*, 27 Conn., 301; *Milliken* v. *Bartlett*, 37 Penn., 456.

William L. Putnam, for the defendant.

Fessenden was individually liable to make good the obligations of the firm of which he was a member and to which he succeeded; which liability might be enforced against him alone by other parties, by equitable set-off. *Tucker* v. *Oxley*, 5 Cranch, 34, as explained in *Gray* v. *Rolls*, 9 Bank. Reg., 340. It is not a strict statute set-off, but matters arising out of the same transactions. *Reab* v. *McAllister*, 8 Wend., 117; 2 Story's Eq. Jur., § 1436; *Moody* v. *Towle*, 5 Maine, 415; *Burnham* v. *Tucker*, 18 Maine, 179; *Dorr* v. *Fisher*, 1 Cush., 271.

Rescript.

The plaintiff and others manufactured certain articles for the defendants who paid the price therefor, although some defects of manufacture existed therein. This plaintiff, under his individual contract with the defendants, repaired the articles, and thereupon brings this suit to recover for such repairs. The defendants cannot have deducted from the sum due him anything on account of their claim for over-payment to the original manufacturers.

Therefore, there must be

Judgment for the plaintiff.

GRAND TRUNK RAILWAY COMPANY
vs.
MARIA M. LATHAM, Administratrix.

Liability of servant to master for consequence of misconduct. Practice.

A servant is liable to an action at the suit of his master, when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct.

The servant is liable for the costs and counsel fees in such suit, incurred in the defence, he having been notified of its pendency, and having requested his master to defend.

A requested instruction must be correct in its entirety; otherwise, it is properly refused.

ON EXCEPTIONS.

ASSUMPSIT to recover the amount of a judgment recovered by David W. Benson and wife against the Grand Trunk Railway Company, together with the costs and expenses of the corporation in defending against that suit, which was brought to obtain damages for the maltreatment of the female plaintiff, and the misconduct of the defendant's intestate, Addison A. Latham, then a conductor upon said railroad, having charge of its train upon which Mrs. Benson was a passenger. The verdict there was in favor of Mr. and Mrs. Benson for $475. The whole expense of that case to the Grand Trunk Railway Company, including the verdict, costs, its counsel and witnesses' fees, &c., was $792.20. Upon the trial of the present action, the judgment in that case was put in evidence, and the only witness called upon the stand (the attorney for the railway company) detailed substantially the evidence upon which it was obtained; that it was on account of Latham's gross misbehavior toward Mrs. Benson, repeatedly calling her a liar, &c., &c. The witness added that he told the deceased that the company would hold him liable to reimburse them, and advised him to settle, but Latham thought this could not be done for any reasonable sum, and requested that a defence be made, which was

done, he attending the trial, suggesting questions to be asked, testifying himself, &c. The controversy between him and Mrs. Benson arose from her claiming the right to ride to West Paris upon a ticket which, he said, only entitled her to be carried to South Paris, the difference in distance being nearly ten miles. The jury returned a verdict for the whole expense incurred by the railway company relative to the Benson suit, including counsel fees, costs, &c.

At the plaintiffs' request the jury were instructed that, "an employer may recover in an action against his servant for all the loss and damage caused by the servant's breach of duty. It was the duty of Latham, in the exercise of his vocation as conductor, to treat all passengers civilly and respectfully; and if he failed to do so, and in consequence of such failure his employers sustained loss and damage, he is liable for all the loss and damage so sustained."

The defendant asked the court to rule, "That this action cannot be maintained; that, if maintainable, the plaintiffs cannot recover for counsel fees and disbursements in conducting the suit, Benson *vs.* Grand Trunk Railway Company; or, necessarily, the amount of the judgment paid by them, but only the actual damage to Mrs. Benson, caused by the improper conduct of Latham, if any there was." The court declined so to rule, and the defendant excepted to the instruction given, and to the refusal to give those requested by her counsel.

S. C. Strout and *H. W. Gage*, for the defendant.

No written demand made on defendant, as administratrix, thirty days before suit, and none proved, as required by R. S., c. 87, § 12, as amended by Public Laws of 1872, c. 85, § 12.

The deceased was never notified to defend the Benson suit, or given any opportunity to assume charge of the defence. Therefore this is not like the cases of *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 119, and *Portland* v. *Richardson*, 54 Maine, 46. The talk was with the counsel of the railway company, in the course

of his prosecution of the defence for the corporation; otherwise, if it was as Latham's counsel, it could not be given in evidence. Latham should have been offered the opportunity and invited to defend, to have the judgment binding upon him. Freeman on Judgments, § 181; *Turpin* v. *Thomas*, 2 Hen. & Manf., 139; *Davis* v. *Wilborne*, 1 Hill, 28; *Paul* v. *Whitman*, 3 W. & S., 407; *Sampson* v. *Chelsea*, 22 Cal., 200; *Thrasher* v. *Haines*, 2 N. H., 443; *Jones* v. *Steele*, 50 Barb., 397.

In cases where punitive damages are recoverable it does not follow that the party responsible over is liable for the full amount of the original judgment; because this class of damages is based partly upon the wealth of the defendant. *Goddard* v. *G. T. Ry. Co.*, 57 Maine, 221.

Shall a poor employee be held responsible for punitive damages, based upon the millions of property owned by his employer?

Mrs. Benson received no actual injury; the damages were entirely punitive.

In an action of trespass, or trespass on the case, the estate of a deceased person is liable only for actual damages. R. S., c. 87, § 9. Shall more than this be recovered indirectly, simply by changing the form of action?

The verdict was erroneous, in that it included counsel fees. Sedgwick on Damages, *78, *96; *Bernard* v. *Poor*, 21 Pick., 378; *Reggio* v. *Braggiotti*, 7 Cush., 166; *Cushman* v. *Blanchard*, 2 Maine, 266.

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

The Benson suit settled that Latham's conduct to Mrs. Benson was a clear breach of duty; whatever damages his employers thereby sustained were recoverable from him, and he was liable to make full indemnity. Story on Agency, § 217; *Ashley* v. *Root*, 4 Allen, 504, and cases there cited. *Proprietors of Locks and Canals* v. *Lowell Horse Railroad Co.*, 109 Mass., 225. The record of the Benson judgment established liability and amount; and parol evidence was admissible to show the grounds of decision. *Merritt* v. *Morse*, 108 Mass., 275.

APPLETON, C. J. A judgment was recovered against the plaintiff corporation for the misconduct of the defendant's intestate—a servant in their employ. This suit is brought to recover compensation for the loss and injury by them sustained in consequence of such misconduct.

The presiding justice instructed the jury that an employer might recover in an action against his servant for all loss and damage caused by the servant's breach of duty, and that it was the duty of Latham (the defendant's intestate) in the exercise of his vocation as conductor, to treat all passengers civilly and respectfully; and if he failed to do so, and in consequence of such failure his employer sustained loss and damage, he is liable for all the loss and damage so sustained.

Every servant is bound to take due care of his master's property entrusted to him. If guilty of gross negligence, whereby it is injured, he is liable to an action. So, too, if guilty of fraud or misfeasance, whereby damage has accrued to his master.

A servant is liable to an action at the suit of his master, when a third person has brought an action, and recovered damages against the master, for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against him, is evidence as to the *quantum* of damages, though not, according to some of the English authorities, as to the fact of the injury. Smith's Master and Servant, 66.

The evidence shows that Latham was notified of the pendency of the suit against the plaintiffs; that he was present and a witness at the trial; that he was advised and requested to settle; and that the defence was made by the plaintiffs at his request, and that he was fully informed that he would be held responsible for the amount recovered against the plaintiffs. The principles established in *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 119, and in *Portland* v. *Richardson*, 54 Maine, 46, are applicable to the case at bar.

The defendant's counsel requested the court to instruct the jury

that the plaintiffs could not recover for counsel fees and disbursements in conducting the suit against the plaintiffs; or, necessarily, the amount of the judgment paid by them, but the only actual damages to Mrs. Benson, (the plaintiff in that suit) caused by the improper conduct of Latham, if there was any.

This instruction the court declined to give.

The defendant's intestate had been guilty of gross misconduct. It was his duty to settle the suit brought against his employer for damages caused by such misconduct. Instead of so doing he requested that a defence should be made. Having requested the plaintiff to defend, and being present at the trial as a witness, he cannot object to the costs and expenses which accrued in consequence of complying with his request.

The instruction, as requested, should not have been given. It is unnecessary to consider the other portion of the requested instruction, for it is not the duty of the court to dissect a request and eliminate its errors. It is sufficient, therefore, that the request, in its totality, was erroneous. It is not, therefore, important to discuss the residue. *Exceptions overruled.*

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

GEORGE C. PERKINS *vs.* JOHN W. MCDUFFEE.

Attorney's statute qualifications must be proved, to recover for his services.

An attorney at law cannot recover for professional services, without proof of the qualifications required by statute; evidence that he is a practicing lawyer in this State is not sufficient; but he may recover for disbursements.

An objection, upon this ground, to his right to recover, is not too late, when taken after the arguments, but before the charge of the judge.

ON REPORT.

ASSUMPSIT on account annexed, amounting to $95.83, of which

$75 were for professional services rendered by the plaintiff, as an attorney at law, to the defendant in his suit against one Bruce, and the balance for disbursements in the same case. The defence was that Mr. Perkins agreed to make no charge unless successful, and that Bruce was the prevailing party. The plaintiff denied making any such arrangement, and this was the issue tried and argued to the jury; but as the judge was about to give the charge he was requested by defendant's counsel to instruct the jury that "the plaintiff, not having proved that he possessed the qualifications, had taken the oath and paid the duty referred to in R. S., c. 79, § 20, was not entitled to recover for his professional services." The position of the case, at the time this instruction was asked for, was this: the plaintiff had testified that he was an attorney at law, practicing in Portland, was employed by the defendant, &c., as appeared by the dockets of the superior court, introduced in evidence, showing the name of Mr. Perkins under the action of *McDuffee* v. *Bruce*, and in several other cases. The papers in the Bruce suit showed that Mr. Perkins joined the issue and signed the exceptions as attorney. He contended this was sufficient evidence to go to the jury, and that the course pursued during the trial was a waiver of the objection. Thereupon it was agreed that these questions should be reserved for the determination of the full court, submitting that of damages to the jury, who assessed them at ninety-seven dollars and twenty-six cents. Judgment is to be rendered as the law requires.

George C. Perkins, pro se.

The objection came too late. *Smith* v. *Keen*, 26 Maine, 422. It was waived by implication. *Lewis* v. *Monmouth Ins. Co*, 52 Maine, 498; *Lawrence* v. *Chase*, 54 Maine, 199.

M. P. Frank, for the defendant.

This case is like that of a public school teacher. *Jose* v. *Moulton*, 37 Maine, 367. Or of a physician. *Thompson* v. *Hazen*, 25 Maine, 104; *Jackson* v. *Hampden*, 20 Maine, 40. Or any person

who is licensed. *State* v. *Crowell*, 25 Maine, 171; *State* v. *Churchill*, Id., 306; 1 Greenl. on Ev., § 79.

PETERS, J. The plaintiff cannot recover for so much of his account as consists of professional services rendered by him as an attorney and counsellor at law. The statute forbids it. R. S., c. 79, § 20, reads thus: "no person commencing practice as an attorney or counsellor at law in any other State or place, or in any court in this State, without the qualifications, oaths, and payment of the duty aforesaid, shall be entitled to demand or receive any remuneration for his professional services rendered in this State." The plaintiff produces no evidence that he has the qualifications required.

The necessity of such evidence was not dispensed with by the defendant, by allowing the plaintiff to prove, without objection, that he has been a practicing lawyer here or elsewhere. It does not follow that he can recover for professional services because he has been in the habit of rendering such services. Proof that he has appeared upon our dockets, does not show that he was authorized to do so. The facts do not go far enough to prove what the statute requires, either directly or indirectly. It was just such a case as this, (if the defendant was not legally admitted to practice) that the statute was designed to hit. It is aimed expressly at a person practicing "as an attorney or counsellor at law," who does not possess the prescribed qualifications.

Nor does the objection to the plaintiff's right of recovery come too late in the trial. He should be prepared for it; or, if surprised by the point, should have asked for delay, to obtain the necessary evidence, if obtainable. It would be too stringent a rule of practice, to exclude a party from the right of raising a point, after argument and before the charge, when fairly presented by the evidence. This court has gone in that direction no farther than to decide, that a losing party cannot avail himself of a point of law, not raised at the trial, as a ground of setting aside a verdict, on a motion for a new trial. *Whittaker* v. *West Boylston*, 97 Mass., 273;

Lawrence v. *Chase*, 54 Maine, 199. The earlier doctrine was not as stringent as this. See *Goddard* v. *Cutts*, 11 Maine, 440.

The plaintiff can recover the amount of his disbursements.

Defendant defaulted for $20.83, *and interest from date of writ.*

APPLETON, C. J., WALTON, DICKERSON and VIRGIN, JJ., concurred.

JOANNA HUSTON, Libellant, *vs.* STEPHEN HUSTON.

Demurrer. Divorce:—what are sufficient allegations in libel. Pleading. Practice.

When the allegations in a libel for divorce are sufficient to give the court jurisdiction of the case, and to grant a divorce under its discretionary power, the libellee cannot avail himself of merely circumstantial omissions to defeat the libel by demurrer.

If, in such case, the libellee desires greater particularity of statement, he should move the court, at *nisi prius*, to order the libellant to furnish it.

ON EXCEPTIONS.

The respondent demurred to the libel for divorce given below. His demurrer was joined and overruled, and he excepted.

"TO THE HONORABLE JUSTICE of the supreme judicial court, next to be holden at Portland, within and for the county of Cumberland, on the second Tuesday of April, A. D. 1874.

Respectfully represents Joanna Huston, wife of Stephen Huston, of Falmouth, in our county of Cumberland, that she was married to said Stephen by Rev. Sargent Shaw, in April, A. D. 1837. That for more than thirty years she and her said husband have lived together as man and wife in said Falmouth, where they have accumulated a fair property, though at the commencement her said husband was largely in debt, and where they have raised a large,

and she fondly hopes, a likely family of children. That she has at all times been true to all her married rites, vows and obligations, and has been to her said husband a true, chaste and faithful wife; but her said husband, being wholly regardless of married vows and obligations, has from time to time during all these years, so conducted as to render her married life exceedingly unpleasant, and one of great hardship; but nothing sufficiently serious occurred to be mentioned now, until about thirteen years ago her said husband introduced into his and her house and family a certain English woman of loose, lewd and lascivious behaviour, and persisted in keeping her there until, forbearance ceasing to be a virtue, she, the said woman, was obliged to leave by the persuasion, or rather command, of the libellant; since which time her said husband has treated her with extreme abuse and cruelty, has repeatedly called her a whore, and has denied the legitimacy of his children, has repeatedly threatened to kill her, and exhibited a razor for that purpose, has jammed her against the wall, and threatened to grind her to powder, has repeatedly wished her dead, has told her to leave his house, has put her out of bed, and she has been obliged to sleep with her daughter; and there so sleeping, he has broken into the room and assaulted her. Being thus threatened, assailed and tormented, and being afraid longer to live with her said husband, and by the advice of her neighbors and children, she left her said husband's house on the eleventh day of August last past, and now resides with her sister.

Wherefore, believing it to be reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, she prays that the bonds of matrimony between her and her said husband, may be dissolved by this honorable court; and also that this honorable court will decree her such alimony out of her said husband's estate, as to right and justice may appertain. JOANNA HUSTON.

The demurrer was special, alleging the following causes of demurrer to the declaration; that is to say, that the place of

the marriage therein alleged between the libellant and libellee, is nowhere set forth; neither is it alleged in any part of said libel, that the Rev. Sargent Shaw, by whom the said marriage is alleged to have been performed, was at the time of the said marriage, authorized by lawful authority to solemnize marriages; neither is it in any part of said libel alleged that the said libellant and libellee were at any time lawfully married. That the allegations in said libel as follows, "where they have accumulated a fair property, though at the commencement her said husband was largely in debt, and where they have reared a large, and she fondly hopes, a likely family of children," are uncertain, informal, and insufficient as to the kind, value and location of property, the amount of debt, names and number of children, as well as to time. That the allegation in said libel contained commencing with the words, "but her said husband being wholly regardless," and ending with the words, "but nothing sufficiently serious to be mentioned now," is in all respects, uncertain, informal, inconsistent, contradictory, evasive, repugnant and insufficient. That the said libel sets out as ground of divorce, the introduction into his family, by the libellee, of a certain person styled in the language of said libel, " a certain English woman," but does not set out the name of said person, neither that the name of said person is unknown to the libellant. That no time is alleged at which the various acts of cruelty and abuse, alleged to have been committed by the libellee, were committed; and that there is no certainty whatever as to the time of the commission of the said alleged acts of cruelty and abuse, other than that they were committed at some time within the space of about thirteen years last past; so that it does not appear but what if any such alleged acts of cruelty and abuse on the part of the libellee have been committed, they may have all been long since condoned by said libellant; and so that it is impossible for the said libellee to answer or to prepare his defence to the said libel, from the vagueness and uncertainty of time of the commission of the said alleged acts of cruelty and abuse. That no place whatever is alleged at which the said alleged acts of cruelty and abuse,

alleged to have been committed by the libellee, were committed. That no jurisdiction is, in any part of said libel, alleged or shown to be in this honorable court, for the granting of the prayer thereof; neither are any grounds upon which said court can find said jurisdiction therein set forth. And also for that the said libel is in other respects uncertain, informal and insufficient."

Mattocks & Fox, for the libellee.

A demurrer will lie to a libel for divorce. *Mix* v. *Mix*, 1 Johns. Ch., 108; *Rose* v. *Rose*, 11 Paige Ch., 166; *Vance v. Vance*, 17 Maine, 203. Lack of particularity of statement can thus be taken advantage of. *Hill* v. *Hill*, 10 Ala., 527. The name of the "lewd woman" should have been given. *Church* v. *Church*, 3 Mass., 157; *Choate* v. *Choate*, Id., 391; *Richards* v. *Richards*, Wright, 302; *Miller* v. *Miller*, 20 N. Y. Eq., 226. Also the time and place of the commission of each offence. 2 Bish., Mar. & Div., § 654; *Tourtelot* v. *Tourtelot*, 4 Mass., 506; *Farr* v. *Farr*, 34 Miss., 597. There must be an allegation of a lawful marriage. *Leighton* v. *Leighton*, 14 Jur., 318. And a statement where it took place. *Greenlaw* v. *Greenlaw*, 12 N. H., 200. No averment that the ceremony was performed by a person authorized thereto. Counsel also cited *Adams* v. *Adams*, 16 Pick., 254; *Klein* v. *Klein*, 11 Abbott's Pr., (N. S.), 450; *Wilson* v. *Wilson*, 2 Dev. & Bat., 377.

W. H. Vinton, for the libellant.

Dickerson, J. Where the allegations in a libel for divorce are sufficient to give the court jurisdiction of the case, and to grant a divorce under its discretionary powers, the libellee cannot avail himself of merely circumstantial omissions to defeat the libel by demurrer.

If, in such case, the libellee desires greater particularity of statement he should move the court at *nisi prius* to order the libellant to furnish it. *Exceptions overruled.*

Appleton, C. J., Walton, Barrows, Virgin and Peters, JJ., concurred.

HENRY A. JONES *vs.* THE BOSTON & ALBANY RAILROAD COMPANY.

Trover. Carrier's lien.

The plaintiff contracted with the Red Line Transit Company, composed of several railroad companies, including the defendants, to forward from Delevan, Ohio, to East Boston, Mass., a car-load of corn, intended to be ultimately taken to Springvale, Maine. By mistake, either of the shipper or of the railway clerk, it was way-billed for Springvale, N. H.; and by another mistake, made by the agent of the transportation company, at Toledo, Ohio, the word Springfield was substituted for Springvale in the way-bill. Instead of delivering the corn to the plaintiff, upon its arrival at East Boston, it was sent to West Andover, N. H., the nearest point by rail to Springfield, N. H., in which town there is no station. It was thence returned to East Boston, where plaintiff claimed to receive it upon tender of the freight charges from Delevan to East Boston; but the defendants demanded payment for its carriage to Springfield and back to East Boston and declined to deliver it unless this was paid; and, upon the plaintiff's refusal to comply with this demand, the defendants sold the corn at auction; *held*, that they were liable, in an action of trover, for its value.

ON EXCEPTIONS to a ruling in the superior court. The facts are fully stated in the rescript.

Butler & Libby, for the plaintiff.

I. T. Drew and *E. Eastman*, for the defendants.

DICKERSON, J. The plaintiff contracted with the Red Line Company, consisting of several railroad companies, including the defendant company, to transport a quantity of corn from Delevan, Ohio, to East Boston, Mass. The corn was intended for Springvale, Maine, but by mistake of the shipper, or of the clerk of the railroad company at Toledo, Ohio, was billed to Springvale, N. H. By mistake of the agents of the Red Line Company at Toledo, the word "Springfield" was substituted for "Springvale" in the way bill. Upon its arrival at East Boston one car-load of the corn was sent to West Andover, N. H., the nearest railroad sta-

tion to Springfield, N. H., there being none in that town. The corn was sent back to East Boston, where the plaintiff demanded its delivery to him upon his tender of payment of all the charges from Delevan to East Boston, which the defendants declined to do unless the plaintiff would also pay the charges incurred by the trip from East Boston to West Andover and back. Upon the plaintiff's refusal to do this, the defendants sold the corn at public auction, after notice to the plaintiff, against his protest, and tendered the balance to him after deducting charges, which he declined to receive.

Held, that the plaintiff was not liable to pay the charges incurred in transporting the corn from East Boston to West Andover and back, and that the refusal of the defendants to deliver it to him upon his tender of the amount of the charges from Delevan to East Boston, and their sale of it constituted a conversion of the corn for which they are liable in trover.

Exceptions overruled.

APPLETON, C. J., WALTON, BARROWS, VIRGIN and PETERS, JJ., concurred.

ENOS L. JORDAN *et al.*, in equity, *vs.* THOMAS B. HASKELL *et als.*

Location of lot for school house under R. S., c. 11, § 33.

The provision of R. S., c. 11, § 33, that a school house lot shall revert to an owner, when a school house has "ceased to be thereon," for two years, does not apply to a case where no house has been placed on such lot within two years from the time the lot is designated for location by the municipal officers of a town.

The location of a school house lot is not invalid, merely because the bounds of the location, by mistake in some way, overlaps upon a public road.

BILL IN EQUITY, brought by Enos L. Jordan and Clement Jordan, junior, against the respondents, who were the selectmen of Cape Elizabeth at the date of filing the bill, setting out that their pre-

decessors in that office in 1870, acting as selectmen, made and located some alterations in a way known as "the Fowler road" in Cape Elizabeth, which changes the town voted to accept only upon conditions that were never performed, so that the original laying out of that road in fact remains unchanged; that such proceedings had been had that the selectmen of said town had designated land of said Enos L. Jordan for a lot upon which to place the school house of district number eight, and gave its clerk a certificate of the location and boundaries of said lot on the second day of June, 1871; and, without any new hearing or action on the part of the district, but of their own will and motion, proceeded, on the twentieth day of June, 1873, to employ a surveyor to make a survey and new location of said lot, with different boundaries from those so given the district clerk, and to erase the old boundaries from the certificate given the clerk and insert new ones therein; giving him no new certificate of their location; both of which locations, as originally made and as amended, extend a number of feet into the legally-existing limits of said Fowler road, and, at one end, nearly across the entire width of said road, in violation of the rights of the complainants and of all the inhabitants of the town, county and State. And the complainants further show that the school house of the district has ceased to be upon either of the lots so located and defined by the selectmen for more than two years since said location whereby said lot (if ever legally taken) has reverted to said Enos L. Jordan, who was and still is sole owner thereof; but the defendants, claiming to act officially in so doing, now threaten to place the school house upon said lot, and have contracted for its removal thereto forthwith, and preparations to accomplish it are now being made; wherefore an injunction is prayed to prevent this being done. The defendants demurred to the bill, and the hearing was upon the demurrer. The removal of this school house has been for years a subject of litigation between the owner of the lot and those desiring to place this building upon it. *See Jordan* v. *School District No.* 8, *in Cape Elizabeth*, 60 Maine, 540, and the report of an action at law brought by Mr.

Jordan against these respondents, immediately following this case, page 193.

F. O. J. Smith, for the complainants.

Howard & Cleaves and *J. H. Drummond*, for the respondents.

PETERS, J. This bill presents, substantially, that proceedings were had, by which, in June, 1871, the municipal officers of the town of Cape Elizabeth established a new location for the school house of school district No. 8, in that town; that they gave a certificate of their determination, as required by law, to the clerk of the district within ten days afterwards; that, in 1873, they made a new survey and location of the lot with different boundaries to the same, and altered their certificate, already in the clerk's possession, so as to conform thereto; that both the original and amended locations include therein some portion of a public way in said town; that the lot taken for the school house was a portion of the land of one of the complainants, and that the lot has reverted to him because there has been no school house thereon within two years since the location was made; that the respondents are about removing the school house upon the lot referred to; and the prayer is that an injunction may be granted to prevent such removal.

It is not alleged, whether the removal is to be upon the premises as described in the original or the amended return; nor what the difference in the two certificates may be, or whether essential or not; nor whether the removal is to be upon any part of the located lot claimed to consist of the public way; nor is it alleged that the proceedings in the first location were irregular at all, or that the complainant, whose land was taken, was in any way unfairly dealt with in taking the same, as far as damages for his land or anything else was concerned. It is inferable that there can be only such causes of complaint as are expressly alleged. Two questions are thus presented, provided they are properly before us with these parties and this form of proceeding.

First: Has the lot reverted to the complainants? The statute

provides that, when such school house as is required of the town or district "has ceased" to be thereon for two years, the lot may revert to the owner. Here the house has not ceased to be, nor begun to be, thereon. There must be the beginning before the end. This provision was intended to apply to an occupancy once had and abandoned. Any other construction might result in wholly preventing locations for school house purposes. By R. S., c. 11, § 34, the owner of the land taken has a year thereafter to apply to the commissioners for a jury to change the location and increase his damages, and the proceedings shall be conducted as in case of damages for laying out highways. Questions of law arising at such hearings can be brought here for the consideration of this court. This might take more time than two years. The district would take great risk to proceed in the meantime, as the location would be uncertain till the dispute was finally determined. We happen to know, through our relations with other cases, that this particular location has been contested by this complainant, in a litigation of just the kind referred to, which did not terminate until December, 1873.

The next question is, whether a location is void because including some part of a public way. For it nowhere appears that there was any design to block or occupy the way. Nor does it appear that the lot was not sufficiently large for all purposes without it. Nor is there any pretence that the district has to pay anything for that part of the location which covers the way. We do not see how this question can affect anybody but the school district itself in its corporate capacity. Enos L. Jordan has no right to complain. If his land is taken, the presumption is that he has been fully compensated for it.

Nor has the other complainant any cause of complaint. It is difficult to see why he appears as a party here. It does not appear that he lives in the school district, or that he has any property or interest there or elsewhere, other than what follows because he is a resident of the town. There would seem to be too many, or too few, parties complainant. If Clement Jordan, Jr., is not a proper

party, the bill cannot in its present shape be maintained. If a proper party, then the bill cannot be maintained, for want of other parties. Every other man in town is as necessary a party as he is. The town is not made a party, nor is the school district. Nor is there any allegation that the bill is brought in the complainants' names for and in behalf of other parties who are too numerous to join. There would seem to be an essential non-joinder or misjoinder of parties.

Demurrer sustained.
Bill dismissed with costs.

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

ENOS L. JORDAN *vs.* THOMAS B. HASKELL *et als.*

What acts estop owner from denying the legality of the taking of his land.

Where an owner of land, on which a school house has been located, petitions the county commissioners for a change of location and an increase of damages, and proceedings are fully had on such petition, he cannot afterwards maintain an action for the occupation of the lot upon the ground that there were irregularities in the proceedings to take his land.

ON FACTS AGREED.

TRESPASS *quare clausum* for the removal of a school house, belonging to district No. 8, in Cape Elizabeth, to and upon a lot of land of the plaintiff, which had been located and designated by the defendants, as selectmen of the town, as the school house lot of that district. The defendants admit and justify the doing of the acts complained of, as done in the discharge of official duty, under authority of law. There was no dispute but that the fee of the land was in the plaintiff at the time of taking it for the purposes aforesaid. The records of the district and of the proceedings in locating the lot made part of the case, but the only points raised with reference to them sufficiently appear in the opinion.

and in the abstracts of the arguments. The papers in the equity case, the report of which immediately precedes this, also made part of this case. The minority of the district, upon whose application the lot was first designated for the school house, petitioned the defendants, as selectmen, September 26, 1873, to put the house upon it, and it was removed a few weeks afterward, the plaintiff's motion for a temporary injunction upon his bill in equity having been denied by the justice to whom it was made and argued. The appraised value of his land was tendered to Mr. Jordan before he appealed from the award of the municipal officers, and the amount due according to the finding of the jury that were summoned to estimate damages, was offered to him November 10, 1873, before the house was moved, but he refused it, saying he had not sold his land and would not take any sum from them for it.

Such judgment was to be entered by this court as the law and facts require.

F. O. J. Smith, for the plaintiff.

I. The district meeting at which this subject was acted upon, and upon which the location by the selectmen rests, was illegally held, and its action void, because it was called by a justice of the peace, while the district had a clerk to whom no application to call it was made. That agent's affidavit that he was elected at a meeting called by one having no authority, and that he was therefore never really agent, and for that reason refused to act in that capacity, was inadmissible, not being the best evidence, and there being no explanation of the omission to furnish the best. He had acted as agent before his alleged refusal, and was therefore agent *de facto*, which is sufficient. *Brown* v. *Lunt*, 37 Maine, 428; *Tucker* v. *Allen*, 7 N. H., 131.

II. The action of the selectmen in assuming to locate was void, because there had been no "disagreement" of the district as to the plaintiff's land, or any specific lot. At the meeting of April 14, 1871, called by Charles E. Jordan, before he discovered his incapacity to act as agent, there was voted, twelve in favor to ten against, relative to moving the building to "the four corners,

near Clement Jordan's hill," but the majority was so scanty that it was thereupon immediately voted to dismiss the whole subject, and the meeting dissolved. At the meeting of May 6, 1871, there was only a vote, fifteen to eleven, to move the school house, without specifying any place or vicinity to which it should be moved! R. S., c. 11, § 24, cl. 2; *Tozier* v. *School District No. 2 in Vienna*, 39 Maine, 556; *Powers* v. *Sanford*, Id., 186.

III. The judicial proceedings are inadmissible, because there can be no such recognition by an individual of illegal official acts, done ostensibly under statute authority, and relating to the public interests, as to give them validity. *Pope* v. *Linn*, 50 Maine, 85; *Commonwealth* v. *Metcalf*, 2 Mass., 118. They are shown now to have been based upon an erroneous construction of the plaintiff's rights and of the defendants' acts, and so ought not to estop him.

Howard & Cleaves, for the defendants.

The proceedings of the meeting of school district No. 8, held March 25, 1871, were illegal because called by Charles P. Jordan who was elected at the meeting held April 9, 1870, of which no notice was ever given: and consequently that of May 6, 1871, called by a justice of the peace, was the only safe basis of action. R. S., c. 11, §§ 18, 19 and 60; *Fletcher* v. *Lincolnville*, 20 Maine, 439. The plaintiff has sanctioned and adopted all subsequent proceedings and made them the basis of legal action, thereby waiving all legal objections to them. *Pinkham* v. *Chelmsford*, 109 Mass., 229.

PETERS, J. The defendants were selectmen of the town of Cape Elizabeth. They are sued for removing a school house to a lot upon the land of the plaintiff, which had been taken for that purpose by the officers of the town. The plaintiff denies the validity of the location. The points relied on in support of his position are, that the meeting of the school district in which the proceedings for a location originated was not a legal one, because called by a justice of the peace when the district had an agent who should have called it; and that the vote at this meeting, which

was the foundation of the proceedings which resulted in the location subsequently made, was indefinite and incomplete and therefore void. Other minor matters of objection are found upon the plaintiff's brief, but they are not much urged.

As to the first point: It seems that the person alleged to have been an agent, was chosen at a meeting no notice of which appears to have been given, as far as the records disclose, and none was shown or attempted to be shown *aliunde* the record. Such person, although he took the oath of office when elected, afterwards regarded himself as illegally chosen, and for that reason "declined and refused" to act. As to the second objection: The vote was "to move and repair the school house the present year." But there had been at a previous meeting the same spring, (which proved a nullity for want of a proper call,) a vote, which at this meeting was in the minds of those present, in favor of locating "at or near the four corners known as Clement Jordan's hill." The municipal officers afterwards established the location at that place by metes and bounds. The district indirectly ratified the location, after it was made by the town officers, by votes in reference to it; such as a refusal "to change the location . . . made by the municipal officers . . to the location where the house now stands;" and a vote, "to choose a committee to move and repair the house," after the location was established.

It is not necessary for us to decide, whether the objections taken to the validity of the location would have any importance under other circumstances or not. We are clearly of the opinion that they are not such as the plaintiff can take an advantage of. He has waived them. It seems that after damages were awarded to him for the land taken, he petitioned the county commissioners for a jury to consider the question of a change of location and to get his damages increased. He succeeded in getting the damages somewhat increased. The proceeding involved a protracted and expensive litigation. It imposed upon the district nearly four hundred dollars of additional costs. This was undoubtedly a waiver by the plaintiff of any mere irregularities in the location, if such

exist. The very foundation of his petition was that there had been a valid location. He had substantially to aver or count upon it. It is too late, to await the end of that proceeding, and being dissatisfied with the result of it, to repudiate it altogether, in order to set up new grounds of opposition totally inconsistent therewith. The case of *Pinkham* v. *Inhabitants of Chelmsford*, 109 Mass., 225, cited by the defendants, is in point.

The plaintiff claims, even if the location was legal, that the lot reverted to him, because no school house was placed thereon for two years after the land was taken. This point has been decided adversely to the plaintiff in another case.

Judgment for the defendants.

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

INHABITANTS OF OTISFIELD *vs.* JOSEPH S. MAYBERRY.

Maker entitled to note on payment. Trover lies for its non-delivery.

The maker of a note upon payment is entitled to its possession; and if the holder or payee then refuses to deliver it to the maker, or transfers it as a note due and unpaid, he will be liable in trover to the maker.

ON EXCEPTIONS.

TROVER for the alleged conversion of a note, dated August 20, 1870, given by the plaintiffs, through their treasurer, promising to pay Sumner Burnham or bearer $600, on demand with interest. The declaration set out that the defendant was duly elected and qualified as a selectman of Otisfield; and that this note, so given, came into his hands while he was acting in his official capacity, for the purpose of cancellation and destruction, that it should no longer be outstanding as an evidence of indebtedness; that it was his duty to obliterate and cancel it, so that it could not again be circulated, it having been paid January 18, 1871, out of

the treasury of the town; but that the defendant knowingly and fraudulently retained possession of the note, did not cancel or destroy it, but fraudulently again put it into circulation, and transferred it to a *bona fide* holder for value, who bought it without notice of the fraud; by reason whereof the town was induced to, and did pay the note a second time to such innocent holder. There was a second count, omitting the statement of his official position, and a third and fourth alleging a fraudulent conversion of town orders, not connected with this note.

The exceptions were taken to a ruling of the justice of the superior court sustaining a demurrer to this declaration. It was agreed that, if the action could be maintained in any form, upon the facts set forth in the declaration, the writ may be amended, if desired, to conform to the opinion of the court, and that the defendant might plead over if the exceptions were sustained.

Strout & Holmes, for the plaintiffs.

"Fraud and damage concurring the law must give relief" in some form. *Miller* v. *Wills*, 23 Conn., 31; and that adopted seems most appropriate. *Stone* v. *Clough*, 41 N. H., 290.

S. C. Strout and *H. W. Gage*, for the defendant.

As the declaration alleges, the note had been paid by the treasurer, and its vitality exhausted. Then it became valueless. No larceny could be committed of it; and, if put again put into circulation, it created no liability upon the part of the town, in the hands of any one. Dillon on Mun. Corps., § 409; *Canal Bank* v. *Supervisors*, 5 Denio, 517; *Lowell Savings Bank* v. *Winchester*, 8 Allen, 109.

If through mistake of fact the town has again paid it, their money can be recovered of the person to whom they paid it. If voluntarily paid, that does not authorize an action of fraud against this defendant, any more than it would in favor of one whose name is forged against the forger, since a paid note is as utterly void as a forged one. The only remedy is by indictment. This is always the remedy for the neglects or misdoings of an officer, and not by suit brought against him by the town. Dillon on

Mun. Corps., 209; *White* v. *Phillipston*, 10 Metc., 108; *First Parish* v. *Fiske*, 8 Cush., 264; *Trafton* v. *Alfred*, 15 Maine, 258.

APPLETON, C. J. Assuming that the defendant, one of the selectmen of the plaintiff town received on a settlement with its treasurer, or in any other way a promissory note payable to bearer issued by said town, for cancellation, the same having been paid, and instead of cancelling, should transfer it to a *bona fide* holder, by whom the same was presented to the treasurer for the time being, and paid by him, in ignorance of the facts, is he liable in trover to the town for such conversion of its paid promissory note?

The maker of a note has a right to its possession upon payment. In his hand it is evidence of such payment. In the hands of a stranger it is *prima facie* evidence of indebtedness. If a suit is brought it imposes upon the maker the necessity of a defence—the procurement of testimony—the employment of counsel, and the delay, expense and vexation of litigation. The possession of it by the maker is of importance to him. The conversion of it by another may become a source of indefinite injury. Accordingly, it has been held in this State in *Neal* v. *Hanson*, 60 Maine, 84; in Vermont in *Buck* v. *Kent*, 3 Vermont, 99; *Pierce* v. *Gilson*, 9 Vermont, 216; and in *Spencer* v. *Dearth*, 43 Vermont, 98; and in New Hampshire in *Stone* v. *Clough*, 41 N. H., 290, that trover may be maintained by the maker against the payee for the conversion or wrongful withholding of his paid promissory note.

The note in controversy has been paid a second time. It belonged to the plaintiff upon payment. The defendant's fraudulent conduct has caused such second payment. It is not for him to take advantage of his own wrongdoing. Nor can he allege negligence on the part of the officers of the plaintiff town. In the changes incident to municipal governments new officers are chosen, who are necessarily, to a certain extent, ignorant of the doings of their predecessors. Mercantile accuracy cannot be ex-

pected in their book-keeping. If the defendant, a selectman, having a paid note of his town should represent it as unpaid to a treasurer, ignorant of its payment, and credit being given to his false representations, should receive its amount, he would unquestionably be liable to the town, in assumpsit for the money thus by him received. He is none the less liable because, representing it as due by the very act of its transfer for value, he has transferred to a holder to whom upon the faith of the paper as it appeared and of its want of cancellation it has been paid by the treasurer of the town in ignorance of the facts.

The withholding the note on demand or its fraudulent transfer for value as evidence of the existing indebtedness of the town would constitute an act of conversion for which the defendant would be liable. The damages to which the plaintiff would be entitled would depend upon the injuries sustained. In *Stone* v. *Clough*, the defendant surrendering the note, the plaintiff was content with nominal damages and costs. In the present case, upon the facts assumed, the damages must be deemed commensurate with the note and interest. The defendant by disposing of the note and receiving its value, converted it to his own use. He has had the full benefit of it, and it is not for him to say the town might have defended against it. *Exceptions sustained.*

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

LOUIS H. PRIME *vs.* EDWARD COBB.

***Replevin** may be maintained without demand against one having no title.*

No previous demand upon a *bona fide* purchaser of a chattel from one who had no authority to sell it is necessary to enable the true owner to maintain replevin.

Such purchaser is not lawfully in possession as against the owner.

Prime *v.* Cobb.

ON MOTION FOR A NEW TRIAL.

Replevin of a white horse, known as "the McGlinchy horse." At the trial in the superior court, the plaintiff testified that he lived in the "Barracks" in Portland with his mother, in whose name as next friend this suit was instituted, he being a minor; that his business was emptying ashes; that he drew his earnings from the savings bank and bought a horse for $38; that the next day a Frenchman, named Verdun, came and said he could get him a harness and another horse for that one, and did exchange him for a gray one, which Verdun said was worth $40 or $50, but as Louis was not satisfied with him Verdun swapped again for a red horse, which the boy led home and put up, and then discovered had but three feet, one hoof being gone, whereupon he took him back and left him in Verdun's yard, who subsequently traded him off for this McGlinchy horse. When Louis went for this last animal, Verdun told him if he did not keep away he (Verdun) would kick him, and the Frenchman afterwards sold the beast to the defendant.

Mrs. Prime testified to the same effect, except that Verdun promised that he would swap the horse first purchased for a horse and wagon, and would lend the boy an old harness, so that he could have a whole team to work with; and that her son did not notice that the red horse had but three feet, till she called his attention to this defect.

She was corroborated as to the promises of a wagon and harness by a neighbor who heard them made. The officer who served the writ swore that, before executing it, he demanded the horse of Cobb, who did not deliver him, and thereupon he took him by force of his precept.

Felix Verdun, called by the defendant, said he bought the red horse for the boy for twenty dollars, and told his mother he would take him, at the same price, when he found they were dissatisfied; but that he could not pay her till he sold the horse; to all of which they assented; that he then swapped for the horse replevied, paying four dollars to boot, and offered Mrs. Prime her $20, which

she refused to take, claiming this McGlinchy horse instead; and that he then sold this last horse to Mr. Cobb. Upon cross-examination he added a statement that he had paid the boy twenty dollars, received for the gray horse, before he bought the red one. The jury returned a verdict for the plaintiff and assessed the damages for the detention of the horse at twenty-five dollars, all but one of which the plaintiff remitted. The defendant claimed that the verdict was against law and evidence, and showed there was no demand upon Cobb before the writ was given the officer; wherefore he asked to have it set aside.

Cobb & Ray, for the defendant.

Motley & Blethen, for the plaintiff.

Barrows, J. It was for the jury to determine the character and result of the negotiations between the plaintiff and Verdun. Their transactions were verbal throughout, and it was the business of the jury to ascertain what they said and did, and their mutual intentions in the premises.

The jury appear to have found that up to the time when Verdun refused to permit the plaintiff to take the horse in dispute he had been acting as the plaintiff's agent in the various trades.

This finding is not so clearly inconsistent with the evidence as to authorize us to set it aside. The horse here replevied appears to have been procured by Verdun in exchange for one which he had got for the plaintiff. If the plaintiff notwithstanding the losses incurred in the previous trades was still willing to abide the result of further operations by Verdun, we see no good reason why he should not claim the possible benefit accruing therefrom. This he seems to have done, and to have demanded the horse of Verdun who refused to surrender him and subsequently sold him to the defendant.

The defendant, at best, is but a *bona fide* purchaser from one who had no right to sell the property in controversy. Under these circumstances he cannot be held to be lawfully in possession as

against the true owner. No demand upon him was necessary in order to maintain the action. *Galvin* v. *Bacon*, 11 Maine, 28. Out of abundant caution the plaintiff has remitted all but nominal damages. Hence no question arises upon this point.

Motion overruled.
Judgment on the verdict.

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

JOSEPH RUSSELL *vs.* JOHN B. BROWN.

Trespass qu. cl. lies for a continuance of a wrongful erection.

The mere continuance of a structure tortiously erected upon another's land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass *quare clausum* will lie.

ON REPORT.

TRESPASS *quare clausum*, brought March 17, 1873, for continuing upon the plaintiff's land a wall nine inches wide and one hundred and six feet long. The declaration was in the usual form, alleging a breach and entry, &c., to which the defendant pleaded in bar a former judgment, recovered for building the wall, and satisfaction, as fully appears in the opinion. If this action is maintainable, the damages are to be assessed by a jury.

S. C. Strout and *H. W. Gage*, for the plaintiff.

"Every continuation of a trespass is a fresh trespass." *Percival* v. *Stamp*, 9 Exch., 167–174; quoted with approval in Broom's Com. Law, 781; 2 Hilliard on Torts, 74 and 75; *Loweth* v. *Smith*, 12 M. & W., 582; *Filer* v. *N. Y. Cent. R. R. Co.*, 49 N. Y., 44; *Bailey* v. *Bulcher*, 6 Grattan, 144; *Holmes* v. *Wilson*, 10 Ad. & El., 503; *Bowyer* v. *Cook*, 4 Com. B., 236; *Earl of Manchester* v. *Vale*, 1 Saunders, 24, *note*; *Moncton* v. *Pashley*,

2 Lord Raymond, 976; *Hudson* v. *Nicholson*, 5 M. & W., 437; *Weeton* v. *Woodcock*, Id., 594; *Winterbourne* v. *Morgan*, 11 East, 395; *Esty* v. *Baker*, 48 Maine, 495.

An unlawful entry is not always essential to the action. *Pickering* v. *Rudd*, 1 Starkie, 46; *Prewitt* v. *Clayton*, 5 Monroe, 4; *Spencer* v. *Weatherly*, 1 Jones, 327.

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

The gist of the action is the unlawful entry, for which judgment and satisfaction have once been had. The remedy now, for continuing the wall, is case.

APPLETON, C. J. The plaintiff upon the tenth day of January, 1873, brought an action of trespass *quare clausum* against the defendant for breaking and entering their close upon the eighth day of June, 1867, digging up the soil, and erecting a stone and brick wall, nine inches wide, thereon and continuing the same to said tenth day of January, 1873, in which they recovered judgment, which was fully satisfied.

March 17, 1873, they commenced the present action of trespass *quare clausum* for breaking and entering the plaintiff's same close on the eleventh day of January, 1873, digging up the soil, making certain erections thereon, and continuing the same to the seventeenth day of March, 1873—the date of the writ.

The former judgment is pleaded in bar; but it does not afford an answer to the plaintiff's claim. It was said in *Esty* v. *Baker*, 48 Maine, 495, that the mere continuance of a building on another's land, even after the recovery of damages for its erection, was a trespass for which an action like the present would lie. This is in entire accord with all the decisions. Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which he has already recovered compensation; and a recovery, with satisfaction, for erecting it does not operate as a purchase of the right to continue such erection. *Holmes* v. *Wilson*, 10 A. & E., 503. "A recovery of damages for a nuisance to land," remarks Patterson, J., "will not prevent another action for

continuing it." In *Bowyer* v. *Cook*, 4 M., G. & S., 236, (56 E. C. L., 235) the plaintiff brought an action of trespass for placing stumps and stakes on his land. The defendant paid into court 40 s. which the plaintiff took in satisfaction of that trespass. He then gave the defendant notice, as was done in the case at bar, that, unless the stakes and stumps were removed, a further suit would be brought. It was held that leaving the stumps and stakes on the land was a new trespass. "You do not dispute," remarks Wilde, C. J., to the counsel for the defence, "that the leaving the stakes on the plaintiff's land was a trespass." "The plaintiff," observes Creswell, J., "has recovered damages for a trespass committed on his land, by erecting something thereon. He afterwards gave the defendant a notice that unless he removes the thing so improperly erected, its continuance will be treated as a new trespass and another action brought;" upon which Wilde, C. J., says: "can we, sitting in court, doubt that, which no man out of court could for a moment hesitate about?" In *Loweth* v. *Smith*, 12 M. & W., 582, Parke, B., says: "But staying and continuing in a house appears to be a divisible trespass in point of time; there is a fresh trespass on each day."

The original erection of the defendant upon the land of the plaintiff was a trespass and so is its continuance.

Case to stand for trial.

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

FRANCIS B. SMITH *vs.* SEWALL C. STROUT *et als.*

Promise without consideration. Rights of one who holds collateral.

A creditor, who holds railroad bonds as collateral security for a debt is not bound by an unexecuted promise to the debtor, made without consideration, to give them up.

Nor does he lose his right to hold such bonds by suing the principal debt, and recovering execution, and arresting the body of the debtor thereon.

Smith *v.* Strout.

On exceptions.

Trover to recover the value of four bonds of the Portland & Oxford Central Railroad Company, held by Paddock, one of the defendants, as collateral security for a loan to the plaintiff, still unpaid. After maturity of the note given for this loan, a judgment and execution were obtained upon it, the debtor arrested, and gave the six months' bond authorized by R. S., c. 113. The plaintiff contended that these proceedings were a waiver and discharge of the creditor's claim to hold the collateral security, but the justice of the superior court, to whom the cause was submitted, ruled otherwise.

Mr. Paddock, after the arrest of his debtor, and upon the latter's demand for them, promised to surrender the collateral, but upon the advice of his counsel, the other defendants, in whose possession they were, declined to do so. The judge held this refusal was no evidence of a conversion. The plaintiff excepted.

F. O. J. Smith, for the plaintiff.

By taking the body the creditor surrenders, for the time being, the right to take the property of his debtor. *Miller* v. *Miller*, 25 Maine, 110; *Lyman* v. *Lyman*, 11 Mass., 321; *Legg* v. *Willard*, 17 Pick., 140; *Knowlton* v. *Homer*, 30 Maine, 555; *Spaulding* v. *Adams*, 32 Maine, 212.

Paddock's express agreement was, clearly a waiver of his lien; and the other defendants only justify under that.

S. C. Strout and *H. W. Gage*, for the defendants.

Peters, J. The plaintiff owed one of the defendants, and gave him certain railroad bonds as collateral to the debt. The defendant afterwards said to the plaintiff that he would surrender the bonds to him, but failed to do so. The principal debt is not yet paid. This is not a waiver of a right to hold the bonds by the creditor. It is, at most, but a promise to waive. Being unexecuted and without consideration, the creditor was not bound by it.

The debtor further contends that the creditor has forfeited his right to the bonds, because, after taking them as security, he sued the original debt and recovered execution, and arrested the body of the debtor thereon. But this point cannot be maintained. The law does not extend a double remedy to a creditor to collect a debt by the use of a *capias* and an attachment upon the same process. But parties may superadd to the remedy at law, by agreement between themselves, such arrangements for securing the payment of debts as they please. The very essence of a collateral agreement of this kind is, that the security may be resorted to for a satisfaction of the principal debt, if its payment shall not otherwise be obtained. The principle established in a class of cases, like *Legg* v. *Willard*, 17 Pick., 140, relied on by the plaintiff, is not applicable here. There the creditor caused the property, held in pledge by him, to be attached upon a writ sued out upon the very claim for the security of which the property was pledged. The two claims of the creditor in that case were inconsistent. In this case, the continued possession of the bonds by the creditor was not at all inconsistent with any of the means adopted by him to endeavor to collect his debt.

Exceptions overruled.

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

WILLIAM J. SPECK *vs.* E. Z. C. JUDSON.

Probable cause in actions for malicious prosecution.

In an action for malicious prosecution, where the facts are disputed by which probable cause, or the want of it, is to be shown, a verdict will not be set aside, when it appears that it may be supported by the testimony—though the question of probable cause is for the court, where the testimony is undisputed, or upon such facts as are found by the jury.

ON EXCEPTIONS, taken in the superior court.

Speck *v.* Judson.

This was an action for false imprisonment of the plaintiff by an arrest upon a prosecution for larceny of defendant's property. Mr. Speck had been in the employ of the Prairie Scout Company, of which Mr. Judson was manager, and had charge of the stage property. Speck was discharged at Portsmouth, N. H., for getting some Indians, members of the dramatic company, drunk; but he came from there to Portland with the company and claimed that Judson owed a trifling balance of wages and was bound, under their engagement, to pay his fare back to Chicago. This claim he left with an attorney for collection and it was sued. Some French pistols had been missing for several weeks; Judson professed to suspect Speck of purloining them and had his trunk searched. The pistols were not found but a case and some cartridges for them were; and it was for stealing these, valued in the complaint at two dollars and a half, that Speck was arrested. He was discharged by the municipal court of Portland upon the hearing. To the refusal of the justice to rule that there was probable cause, and no evidence of a want of probable cause, the defendant excepted.

Nathan Webb, for the defendant.

Bradbury & Bradbury, for the plaintiff.

PETERS, J. The only question presented by these facts is, whether the defendant had probable cause for the arrest of the plaintiff for larceny. Of course, that is a question for the court only, where the facts are not disputed; and, where they are in dispute, a question for the court, whether it is proved by such facts as the jury find from the evidence. The jury, in this case, undoubtedly believed that the defendant was revengeful and vindictive towards the plaintiff, and that he sought a pretence to prosecute him for larceny, when he had no reason to believe, and did not believe him to be guilty of it.

Upon a careful consideration of the testimony, we are unwilling to say that they were in error in arriving at such a conclusion.

Exceptions overruled.

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

ALFRED STANWOOD *vs.* AMHERST WHITMORE.

Defendant's wealth—how proved in an action for slander.

In an action of slander, evidence as to the reputation of the defendant for wealth is admissible; but it seems it should be proved by general reputation, rather than by particular facts.

ON EXCEPTIONS.

In this action, for slander in falsely charging plaintiff with forgery, the defendant excepts to a ruling, made in the superior court, requiring him to answer an inquiry as to his wealth, which the justice told the jury they might consider.

J. H. Drummond and *S. C. Strout*, for the defendant.

Bradbury & Bradbury and *T. M. Giveen*, for the plaintiff.

PETERS, J. The question raised here is settled in *Humphries* v. *Parker*, 52 Maine, 502. It was there decided that evidence such as was admitted here could be weighed by a jury. It is therefore proper to receive it.

We think, however, that the wealth of a defendant should be proved by general evidence rather than by particular facts. It is the defendant's position in society which gives his slanderous statements character and weight. Reputation for wealth, rather than its possession, generally confers position. Therefore the more proper inquiry is as to the reputation of a defendant for wealth. Of course, a presiding justice would have considerable discretion as to the form of a question in such a case, to be exercised according to circumstances. Ingraham, J., in *Kniffen* v. *McConnell*, 30 N. Y., 289, says, "it may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation as to the circumstances of the defendant."

The form of the inquiry in this case was not objected to; the objection was rather to the kind of evidence offered.

Exceptions overruled.

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

STATE OF MAINE *vs.* AUGUSTUS A. BLACK.

What are sufficient allegations of rape under R. S., c. 118, § 17. Wife may testify.

An indictment, for having carnal knowledge of a child, under R. S., c. 118, § 17, is sufficient if it sets forth the offence only in the language of the statute, without using the terms "with force," or "against the will."

The prisoner is not prejudiced if the jury is precluded by the court from finding a verdict for an assault and battery only, under such an indictment.

By R. S., c. 134, § 19, as amended by Public Laws of 1873, c. 137, § 5, a husband or wife may be compelled to testify either for or against the other in criminal cases.

ON EXCEPTIONS.

The prisoner was convicted of rape upon a child less than ten years old. Against his objection, his wife testified as a witness for the prosecution. To the ruling admitting her his counsel excepted, as well as to the refusal of the justice of the superior court, before whom the cause was tried, to instruct the jury that they were at liberty to find the respondent guilty of assault and battery. This instruction was declined, upon the ground that there were no apt words, charging a battery in the indictment; but the jury were told they might find the defendant guilty of an assault, if they thought the facts would warrant this result.

A motion in arrest of judgment set forth that the indictment charged no crime under our laws; that it did not allege that the defendant had any intent to commit a rape, or to ravish the person named in the indictment; nor that he committed an assault upon her with force or against her will; and that the allegation that the defendant unlawfully and carnally knew and abused the said child is not a sufficient allegation of the offence of rape attempted to be charged. This motion was overruled.

James O'Donnell, for the respondent.

Charles F. Libby, county attorney, for the State.

PETERS, J. It was contended for the prisoner that under this

indictment the jury were at liberty to find a verdict of guilty of an assault and battery. The court ruled otherwise. This, if material, would present an interesting question, upon which the authorities are conflicting. See Bishop on Statutory Crimes, § 491, and citations in notes thereto. But, whether the ruling was correct or not, we are satisfied that it was not prejudicial to the prisoner. It merely precluded the State from holding him for a minor, if it failed to establish against him the major, offence alleged.

It is claimed that the indictment is defective because it does not contain an allegation that the offence was committed "with force" and "against the will" of the child. But an equivalent of this requirement is found in the allegation that she was of tender years. She was legally incapable of consenting. An indictment in the common form for rape would have been sufficient. *Commonwealth* v. *Sugland*, 4 Gray, 7. But it was not necessary. The present indictment is in strict conformity with well-established precedents. It exactly sets forth all the elements necessary to constitute the offence.

It is strenuously urged that the wife of the prisoner was not a competent witness against him. A clause of R. S., c. 134, § 19, as amended by Public Laws of 1873, c. 137, § 5, reads thus: "In all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness. The husband or wife of the accused shall be a competent witness." It is argued that it could not have been the intention of the legislature to allow so wide a departure from the common law rules of evidence upon this subject, so long and universally acknowledged as productive of the public good, as to allow a wife to testify against her husband without an express and positive declaration to that effect, and that this provision only permits her to be called in his behalf. Reliance is also placed upon the fact that, in civil cases, by R. S., c. 82, § 82, as amended by the act of 1873, before cited, the husband or wife "may," and not must, be a witness; thereby presenting the incongruity of only permitting a wife to testify for or against her

husband in a civil, and compelling her to do so in a criminal case, if such is to be the construction of the statute. Notwithstanding there may be some force in the positions taken by the respondent's counsel, still, after a careful examination of the statutes referred to, we can have no doubt that it was the design of the legislature in a criminal case to compel the production of the husband's or wife's testimony in favor of or against each other. The statute law in this State upon the subject of evidence generally has had a remarkable and, as we are constrained to believe, a very salutary growth. Formerly in a criminal proceeding a wife could not ordinarily testify either for or against her husband, either with or without his consent. By the provision in R. S. c. 134, § 19, she was made a competent witness "with the consent of the respondent." By the act of 1873 she is made such without his consent. Not to testify merely in his behalf, but to testify generally. The bar is thus not partially removed, but wholly so. There is more reason that she should be compelled to testify against her husband in a criminal than in a civil cause. It might not accord with a good public policy to allow every litigant in civil suits about matters however small to have the right to search household secrets for the production of evidence. But the State should have all possible constitutional means to ferret out and punish crime. *Exceptions overruled.*

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

STATE OF MAINE *vs.* CORNELIUS CONNELLY.

Search and seizure—what are sufficient allegations.

In a search and seizure process a complaint that intoxicating liquors are kept and deposited by the defendant with the intent to sell them in this State in violation of law, is equivalent to an allegation that they are unlawfully kept and deposited, and is sufficient.

In such complaint, it is not necessary to negative the authority of the defendant to sell intoxicating liquors within this State.

One who keeps or deposits intoxicating liquors with intent to sell them in this State, in violation of law, is guilty of the offence described in R. S., c. 27, §§ 33 and 35, though he may have authority to sell them in some town or city in the State.

On exceptions.

The defendant was arraigned upon a warrant issued by the judge of the municipal court of Portland on complaint made to that magistrate under R. S., c. 27, that intoxicating liquors were there kept by Cornelius Connelly, in a place described, he "not being then and there authorized to sell said liquors within said Portland," and that the same were "intended for sale in this State in violation of law," &c. Liquors were stated in the officer's return to have been seized upon this warrant, and the respondent was brought before the court to answer the charge of keeping them for an unlawful purpose. His counsel demurred to the complaint. His demurrer was overruled, and exceptions were taken by him.

Mattocks & Fox, for the respondent.

The complaint is bad, because it does not allege the keeping and deposit to be unlawful. *State* v. *Learned*, 47 Maine, 426.

Nor is the respondent's authority to sell sufficiently negatived. He may have kept them in Portland, where he was not licensed, intending to sell them in some place where he was licensed, for all that appears in the charge against him. *State* v. *Miller*, 48 Maine, 576.

Charles F. Libby, county attorney, for the State.

Barrows, J. The respondent admits by his demurrer that he, not being authorized to sell intoxicating liquors in Portland, kept and deposited such liquors in a certain dwelling-house particularly described in the complaint, situated in said Portland, and occupied by the respondent, a part of it being used by him for the purpose of traffic, "and that said liquors then and there were and

now are intended for sale in this State by said Connelly in violation of law, against the peace," &c. The respondent concedes that the complaint is in the form prescribed in R. S., c. 27, § 57, for this process, but he insists that it does not set forth all the elements necessary to constitute the offence; that he should have been charged with an "unlawful" keeping and depositing, and that his authority to sell is not sufficiently negatived in the complaint. The substance of the offence is the keeping or depositing of intoxicating liquors at some place in this State with intent that the same shall be sold within the State in violation of law. *State* v. *Kaler*, 56 Maine, 88. Every such keeping or depositing is unlawful, and it does not need the application of the epithet to demonstrate it.

The act is prohibited and made unlawful by R. S., c. 27, § 33. Whether an allegation that the liquors were unlawfully kept or deposited by the defendant would be sufficient, and equivalent to a charge that he kept or deposited them with intent to sell them in violation of law within the State, is not decided in *State* v. *Learned*, 47 Maine, 426, though it is said on p. 429 that "perhaps it might be, inasmuch as the keeping could only be unlawful when accompanied by the intent to sell or aid in the selling."

The fatal defect in Learned's case was, that there was neither any allegation that the possession of the defendant was unlawful, nor that he had the intent which would make it so. Not so here. It is alleged, and this defendant admits that the liquors are intended for sale in this State by him in violation of law.

And with this admission in the record, it becomes immaterial whether the defendant's authority to sell was negatived or not, or in what manner, or to what extent it was negatived. One who had such authority would nevertheless commit the offence and incur the penalty if he kept or deposited the liquors with the intent to sell them within the State in violation of law.

The words in the complaint "said Connelly not being then and there authorized by law to sell said liquors within said Portland" might be omitted as surplusage, and still the charge that the defendant kept liquors intending to sell them within this State

in violation of law would remain, clearly set forth, embracing all the elements of the offence and constituting by force of the statute an "unlawful" keeping. *Exceptions overruled.*

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

STATE OF MAINE *vs.* ANDREW LANG.
SAME *vs.* JOHN HOWLEY.
SAME *vs.* MICHAEL HOWLEY.
SAME *vs.* PATRICK MCGLINCHY.

Criminal pleading and evidence.

By the nineteenth rule of this court, a motion in arrest of judgment, made while exceptions taken at the trial are pending, is not to be regarded as a waiver of the exceptions.

In an indictment under the statute for keeping a liquor nuisance, an allegation that the respondent unlawfully kept a shop, used for the illegal sale of intoxicating liquors is sufficient to negative his authority to sell.

The indictment is not chargeable with duplicity, because several different causes are set out as descriptive of the nuisance; they describe but a single offence.

It is not necessary to allege that the shop was a place of "ill fame;" nor that it "was resorted to," instead of "was used" for illegal purposes; nor to allege the names of any persons to whom sales were made on the premises; nor to describe the place any more definitely than to name the town and county where situated.

Judgments obtained in criminal cases are conclusive evidence, between the same parties, of all the facts necessarily adjudicated by them, not excepting such judgments as are based upon a plea of guilty or of *nolo contendere.*

Officers' returns upon warrants under the search and seizure process are admissible in evidence as a part of the records of judgments; and, under a conviction in such a proceeding, the presumption is that the respondent had in his possession all the liquors so described in the officer's return, where nothing to the contrary appears.

A judge is not bound to require a jury to bring in a special finding upon each count in an indictment, where the counts are in proper form, and relate to the same offence.

On exceptions.

Indictments under R. S., c. 17, § 1, which provides that, "all places used as houses of ill fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are common nuisances," alleging that the respondent on the twelfth day of October, 1873, and on divers other days and times between that day and the day of the finding of this indictment, at Portland, &c., did knowingly and unlawfully keep and maintain a certain shop, there situate, then and on said other days and times, there by the respondent kept and used for the illegal sale, and for the illegal keeping of intoxicating liquors, and then and on said other days and times resorted to for tippling purposes, with the knowledge and consent of the respondent and in which said shop intoxicating liquors were then and on said other days and times sold contrary to the provisions of law, by the respondent for tippling purposes to be drunk in said shop, and then and on said other days and times were actually drunk therein, with the knowledge and consent of the respondent, to the great damage and common nuisance of all citizens of said State, &c., &c.

The respondents were referred to in the places where the name occurred in the indictment after its first statement, as "the said Lang," "the said Howley," &c. The second count fixed the time of the offence by reference to the first count. The rulings, instructions and refusals to instruct by which the respondents were aggrieved and the grounds of the motions in arrest of judgment, which were overruled by the justice of the superior court, before whom these cases were tried, sufficiently appear in the opinion.

Mattocks & Fox, for the respondents.

Charles F. Libby, county attorney, for the State.

Peters, J. These cases were presented together in argument, under exceptions taken to the sufficiency of the indictment and to the rulings at the trial.

The counsel for the State relies upon the case of *State* v. *Wing*,

32 Maine, 581, as deciding that the motions in arrest are a waiver of any exceptions taken at the trial. The point established there was, that the motion in arrest was premature, while exceptions raised at the trial were pending. The practice then was to file such motion after the exceptions were disposed of. But the rules of this court (rule 19, 37 Maine, 574,) now require that a motion in arrest shall be made during the term in which the accused has been found guilty. So that all the questions now presented by the respondents are properly before us.

All these cases may be regarded as presenting the same points, as far as the sufficiency of the indictments is concerned. The objections taken are various, but all of them are not now insisted upon. We shall notice such as are. We think that the indictments are not obnoxious to any of the defects imputed to them.

The first count, it is contended, contains nothing to negative the authority of the respondent to sell intoxicating liquors. It is alleged therein, among other things, that the respondent unlawfully kept a shop used for the illegal sale of intoxicating liquors; and that he there sold liquors contrary to the provisions of law, and for tippling purposes. There is no exception or qualification in the enacting clause of the statute, upon which this proceeding is founded, which requires a guarding against. The negative description must be averred only when it is an essential ingredient of the offence intended to be charged. A person might legally make a single sale, or a plurality of sales, as a licensed common seller. But there can be no license to keep liquors for unlawful sale, or to maintain a tippling shop, or a nuisance. In Massachusetts, the authorities to this point are numerous. See *Commonwealth* v. *Bennett*, 108 Mass., 27, and cases there cited. *State* v. *Casey*, 45 Maine, 435.

The next cause in arrest relied on, is, that the first count is double, charging two or more separate and distinct liquor offences therein. The counsel for the State contends, that the objection to duplicity cannot be set up after verdict; but that it can be taken upon demurrer only, unless made available on a motion to quash.

It is certain that this objection to the first count is immaterial, provided the second count in the indictment is a valid one. *State* v. *Burke*, 38 Maine, 574. But it may be best to meet the point of duplicity upon its merits, as the question will probably arise again, if not already pending in other cases. We are very clear that only one offence is charged in these indictments; and that is an alleged statutory nuisance. Several independent causes are set out as constituting it. They are the facts relied on to prove the charge. Proof of either of them proves the nuisance; proof of all can prove no more. If the respondent kept a shop, used for the illegal sale of liquors to be carried away, he kept a nuisance. If he kept a shop, used for the illegal sale of liquors to be drank upon the premises, then he kept a nuisance. If he kept a shop, used for the illegal keeping of liquors merely, in such case he kept a nuisance. And if he kept a shop used for all of these purposes, and also for all the other improper purposes enumerated in the nuisance act, he then also kept a nuisance, and no more than a nuisance. The penalty therefor is not necessarily more upon proof of all, than upon proof of any one, of the various and different matters descriptive of the offence. A conviction for one kind of illegal keeping of the premises as a nuisance would be a bar to any other indictment for any or all the other kinds described in the statute, for the period of time covered by both indictments. This question has been decided in numerous cases in Massachusetts, where a statute similar to ours existed for some time before ours was enacted. *Commonwealth* v. *Kimball*, 7 Gray, 330; *Commonwealth* v. *Foss*, 14 Gray, 50; *Commonwealth* v. *Welsh*, 1 Allen, 1; *Commonwealth* v. *Carolin*, 2 Allen, 169; *Commonwealth* v. *Curtis*, 9 Allen, 269; *Commonwealth* v. *Finnegan*, 109 Mass., 363.

The next point is, not that too much, but that too little, is alleged; and that it should have been charged that the shop of the respondent was "a house of ill fame." But it results from what is before said, that such an allegation is unnecessary. This is an offence under the statute, and not at common law. This point was decided in *Commonwealth* v. *Edds*, 14 Gray, 406.

A further objection is, that it should have been alleged that the shop of the respondent "was resorted to." The words of the counts are "was used." An attempt at condensation by the revisers of the statutes may have slightly obscured the construction of R. S., c. 17, § 1, by leaving out a word or two, or by the use of inaccurate punctuation. Still the meaning cannot be mistaken. The correct reading of it, in its application hereto, is, that all places "used for" the illegal sale or keeping of intoxicating liquors, are common nuisances. See 13 Gray, 26.

We do not think that the name of the accused need be repeated in full in every statement in the counts, whenever referred to. A reference that makes a clear identification is enough. *Commonwealth* v. *Melling*, 14 Gray, 388; *Commonwealth* v. *McAffee*, 108 Mass., 458.

Nor do we think that the second count in the indictments is defective, because it does not set out the year in which the offence was committed, more distinctly than by referring to "the year aforesaid" in the first count. By a practical construction, the reference must be clearly understood to be the year last named in the first count, and not to the year named in the caption of the indictment. Such would be also the strict grammatical construction. This point is decided this way in *Commonwealth* v. *McKenney*, 14 Gray, 1.

We also think the indictments valid, although they purport to be found by the grand jury, "upon their oaths," instead of upon their "oath." In reality it is not a joint oath that is taken. The jurors are not all sworn at the same time. The distinction cannot be an important one. The same objection arose in the case of *Commonwealth* v. *Sholes*, 13 Allen, 554, and was overruled.

Another point raised upon the motion in arrest is, that the names of the persons to whom the sales were made should be stated, if known; and, if not known, that it should be so alleged. But this was not necessary. No allegation of sales was required. The offence described in the nuisance statute is not selling liquors, but the keeping and using a place for the purpose of selling. The

keeping the place is the gist of the offence. Selling in the place, without keeping it, is not the offence complained of here. *Commonwealth* v. *Kelly*, 12 Gray, 174; *Commonwealth* v. *Farrand*, Id., 177.

It is lastly objected against the indictments, and more especially one of them, that the place, kept as a nuisance, is not sufficiently described. This objection is not a good one. *Commonwealth* v. *Gallagher*, 1 Allen, 592, is a precise and pertinent authority upon this point. The case of *State* v. *Robinson*, 49 Maine, 285, relied on by the defence, relates to the carefulness and precision of description that is required in a warrant to search particular premises; a public right guarded by strict constitutional provision. This is widely distinguishable from that case. It is immaterial that one of these respondents kept two places. That might make some difficulty about proofs at the trial, but cannot affect the validity of the indictment.

Various records of judgments were admitted in evidence, against the objection of the respondents. But such evidence is as admissible in a criminal case, as in civil cases. The records were between the State and the respondents, and were judgments in criminal cases. The parties were the same. The degree of proof required was the same in the cases. The respondent could be a witness in all of them. We see no reason why the previous judgments were not conclusive evidence, between the State and the respondents, in these trials, of all the facts necessarily adjudicated by them. The law is so settled in Massachusetts. *Commonwealth* v. *M'Pike*, 3 Cush., 181; *Commonwealth* v. *Austin*, 97 Mass., 595; *Commonwealth* v. *Evans*, 101 Mass., 25. In one of the cases at bar, the objection is made, that the record was founded upon a plea of guilty; and in another upon a plea of *nolo contendere*. We regard the fact as just as conclusively shown in either of these instances, as if there had been a trial. The solemn admission of record, followed by judgment, is just as satisfactory proof of it, as a conviction could be that was in all respects resisted. As an admission, it would be *prima facie* proof only, as

between the respondent and third persons; but, between the respondent and the State, it would be conclusive.

It is objected that the officers' returns upon search and seizure processes were admitted in evidence, as a part of the record of judgments. We have no doubt about their admissibility. In fact, there could be no conviction in such a proceeding, without an officer's return. It is a part of the proceedings, without which an arraignment cannot be made. The effect of it as evidence would be another question. And here, one of the respondents takes exception to an instruction of the judge, that a record of conviction in a search and seizure process was evidence that the respondent had, at a certain time and place, the liquors described in the officers' return on the warrant, with the intention of selling the same in violation of law. The respondent contends that all the record legitimately shows is that he then and there had some of the liquors, but not necessarily all of the liquors, described in the officers' return; inasmuch as the same general verdict of guilty would have been rendered against him, upon proof of having any of them, as upon proof of having all of them. We do not think so. Nothing else appearing, the presumption is that the respondent did have in his possession all of the liquors described in the return, if there is a general verdict of guilty. The warrant contains nothing but a very general allegation. But the officer's return amounts to the presentment of a bill of particulars, to which the proofs and the judgment must apply. The return limits the more general charge, and in this way becomes a part of the allegations. When a respondent pleads, he does so as to the liquors thus described. He can plead guilty as to a part, and not guilty as to a part. And so can the record be. It partakes somewhat of the character of proceedings in the civil action of replevin. But where the conviction is a general one, the implication is that all the allegations, as limited by the officer's return, were sustained. *State* v. *Somerville*, 21 Maine, 20; *Commonwealth* v. *Stebbins*, 8 Gray, 492.

But it is alleged that the records were not admissible in evidence

for the purposes for which they were received, because of the allegation in the warrants upon which the records were based, that the respondent was "not authorized by law to sell said liquors within said Portland," instead of an allegation that he was not authorized to sell within the State. But that allegation was merely surplusage, and, as seen before, no negative allegation of that sort was necessary. See *State* v. *Connelly*, argued and decided at this term, and reported upon page 212 of this volume.

An exception is taken, in one of the cases, to a refusal of the judge to direct the jury to bring in separate findings upon the counts in the indictments. He was not bound to do so, in a case like the present, where the two counts relate to the same offence, and are in proper form. The punishment would be the same, whether the conviction is upon one or both the counts. *State* v. *Wright*, 53 Maine, 328; *Commonwealth* v. *Desmarteau*, 16 Gray, 1.

We can perceive no error in any of the other rulings. The instructions, though not in the language of the requests in all cases, were correct. Complaint is made that, in one of the cases, the judge in his charge expressed an opinion as to the guilt of the accused. We do not find the charge to be amenable to such an objection. It is inferable, that the counsel for the respondent made some appeals to the jury hardly warrantable upon the evidence in the case, and that the court undertook to correct any wrong impression which they might produce. Lord Hale said of the duties of judges, that "a jury should be told where the main question or knot of the business lies." This was the object of the judge in this case. *Exceptions overruled.*

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

State of Maine *vs.* Neal McCafferty.

R. S., c. 27, §§ 22, 34. *Intoxicating liquor. Jury. Evidence.*

Whether or not hop beer is intoxicating is a question of fact for the jury.

If an officer returns upon a warrant that he has seized liquors and arrested the custodian of them by virtue of that process, the respondent is thereby precluded from claiming that the search of his premises was without warrant, or that the proceedings should be exclusively *in rem* against the liquors.

The jury were allowed to take with them to their room a bottle containing a liquid called ale which, though no part of the liquors seized, was manufactured and sold by the same person under the same name; *held*, that there was no legal objection to this course, the jury having been instructed not to consider the qualities of the contents of the bottle, unless satisfied from the evidence that its character was the same as that of the liquors seized.

On exceptions to the ruling of the justice of the superior court.

Search and seizure process upon which certain liquors were returned as taken, and McCafferty arrested. It was brought before the superior court by appeal from the municipal court of Portland. The liquors were at first taken without any warrant, but one was subsequently obtained reciting "that the complainant believes that intoxicating liquors were therein kept by the defendant for unlawful sale," but not stating that there was probable cause for this belief. The officer serving the warrant returned that he had seized this liquor and arrested the respondent by virtue of it. The justice presiding at the trial was requested to instruct the jury that, "if the defendant purchased the liquor which was seized for hop beer, the cask containing it being so marked, and sold it as such, having no knowledge of its being any thing different, there was no intentional violation of law; that the search of the defendant's premises was made without a warrant and was therefore unlawful, and the whole proceedings void; that in case of liquors originally seized without a warrant, the precept,

when obtained, should run against the thing seized, and not against any person. These instructions were refused and the respondent excepted to the refusal, as well as to the jury being permitted to take with them to their room "a quart bottle of what was called ale," which was no part of the liquors seized but manufactured and sold by the same person under the same name. The jury were told, however, not to consider the qualities of the liquor produced, unless they found from the evidence in the case that it was the same kind as that seized.

John H. Williams, for the respondent.

Charles F. Libby, county attorney, for the State.

DICKERSON, J. The first requested instruction assumes that hop beer is not intoxicating, a fact to be found by the jury. The points raised in the second and third requested instructions are not open to the respondent, since the case shows that "the officer served the warrant and made return thereon of the seizure, and arrested the defendant."

The leave granted to the jury by the court to take to their room a bottle of the liquor introduced in evidence, not as the liquor seized, but as liquor manufactured and sold by the same person under the same name as the liquor seized, was unobjectionable, coupled with the instruction to the jury not to consider the qualities of such liquor unless they should find from the evidence in the case, that it was the same kind as that seized.

Exceptions overruled.

APPLETON C. J., WALTON, BARROWS, VIRGIN and PETERS, JJ., concurred.

STATE OF MAINE *vs.* GEORGE E. WARD.

Plea in abatement bad for duplicity.

A plea in abatement, to the sufficiency of a grand jury, is bad on special demurrer, where defects in the drawing of several jurors are alleged, which are not dependent for proof upon the same evidence.

ON EXCEPTIONS.

The respondent, indicted for maintaining a nuisance, under R. S., c. 17, § 1, plead in abatement errors in the drawing of sixteen of the grand jurors by whom the indictment was found, coming from various towns and summoned by different officers and venires. The county attorney demurred specially to the plea and his demurrer was sustained by the judge of the superior court, and the respondent excepted.

S. C. Strout and *H. W. Gage*, for the respondent.

Charles F. Libby, county attorney, for the State.

PETERS, J. The respondent pleads in abatement, that the grand jury were not legally qualified to find this indictment. He objects, *inter alia*, that the juror from Scarborough, was not drawn at a meeting held within the limits of that town; that the juror from Yarmouth was not drawn at a meeting held within the limits of that town; that the juror from Bridgton was drawn at a meeting the hour of which was not notified, and that four days' notice of the meeting was not given as required by law. The attorney for the State demurs to this plea, upon the ground of duplicity.

It is argued by the State that the plea contains divers and distinct matters, of a material character, any one of which would be a sufficient answer, without the others. On the other hand, the respondent insists that his defence is not double, and that it con-

tains but a single matter; and that is, the illegal constitution of a grand jury.

The rule of law invoked by the State is clear enough; but it is sometimes difficult correctly to apply it. The respondent must confine his plea to a single point. The point is not necessarily confined to a single fact. It may embrace as many facts as constitute one proposition or matter, making but one defence; but it must not consist of distinct and independent facts, making several matters or defences. Good reasons for this strictness are found in all the books upon pleading at common law.

We think the demurrer should be sustained. The position of the respondent would be more tenable, if his objection applied to one venire or one juror. But here several issuable facts are alleged, which have no necessary connection, dependent upon different evidence for proof. To be sure, there is some resemblance between this plea and some of the forms in the authorities, which have been held good upon special demurrer; as where a defendant pleaded that he arrested a plaintiff on suspicion of felony, and was allowed to set forth any number of circumstances of suspicion, though each circumstance was alone sufficient to justify the arrest, inasmuch as all of them together amounted to one connected cause of suspicion. But, upon the whole, we think the plea in this case falls rather within the kind of objection, that, at common law, lies against charging distinct offences in one count; or several breaches in one assignment; or against alleging two causes to sue, and the like. The respondent relies on the form of a plea in abatement, found in 2 Wharton's Indictments, § 1158, which was sustained by the court in Mississippi. But the defect alleged there, in drawing a grand jury, was equally as applicable to all the jurors as any of them. The objection was an entirety. Here it is not. *Exceptions overruled.*

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

ALMON A. STROUT *vs.* DONALD M. STEWART.

New trial, for evidence newly discovered and not cumulative.

In an action to recover for professional services, rendered in the superior court upon an engagement made through another attorney, residing in the same city with the defendant, the defendant denied that he ever authorized the employment of the plaintiff; and had a verdict, based upon his testimony to this effect. Subsequently, the plaintiff learned that, long prior to the trial of the present case, Mr. Stewart had several times stated to acquaintances in Ellsworth, where he lived, that Mr. Strout was his counsel in Portland, in his litigation there; *held*, that this was not only newly discovered evidence, but that it was not cumulative; and therefore it entitled the plaintiff to a new trial.

ASSUMPSIT.

MOTION FOR A NEW TRIAL by the plaintiff, upon the ground that the verdict against him, rendered at the April term, 1874, of the superior court for Cumberland county, was contrary to the law, and the evidence, and the weight of the evidence. At the May term, 1874, of that court the plaintiff filed another motion to set aside the verdict on account of newly discovered evidence relative to the matters at issue between these parties.

In September, 1869, there was a suit entered in the superior court in favor of J. B. Mathews and others against Donald M. Stewart, in the defence of which Mr. Strout appeared, in compliance with a request to do so contained in a letter from George S. Peters, Esq., of Ellsworth, Mr. Stewart's attorney there. The services were charged upon the plaintiff's books to Mr. Peters, but this was done through misapprehension upon the part of the bookkeeper, without any directions from Mr. Strout and without his knowledge. Mr. Peters, called as a witness by the plaintiff, testified that he engaged Mr. Strout at the suggestion of the defendant. Mr. Stewart, testifying in his own behalf, swore that he never employed, or authorized the employment of, any other counsel than George S. Peters, Esq.; did not suggest the engagement of

any Portland lawyer, and did not know there was any such man as Mr. Strout living.

To support his motion for a new trial upon the ground of newly discovered evidence the plaintiff introduced the depositions of two citizens of Ellsworth, each of whom deposed that Mr. Stewart had repeatedly stated that A. A. Strout, Esq., was taking care of his cases for him in Portland; that he had authorized Mr. Peters to engage Mr. Strout's services in these matters.

Strout & Holmes, for the plaintiff.

Clarence Hale, for the defendant.

DICKERSON, J. Though the verdict in this case is against the weight of the evidence, it is not so manifestly wrong as to require the court to set it aside for that cause alone.

The newly discovered evidence is material and not cumulative, consisting mainly of the admissions of the defendant. As this evidence was not known to the plaintiff at the time of the trial, and could not have been discovered by him by the exercise of due diligence, and, as it is obvious, that, if introduced, it would have reversed the verdict, the motion for a new trial on account of newly discovered evidence is sustained, and a *New trial granted.*

APPLETON, C. J., WALTON, BARROWS, VIRGIN and PETERS, JJ., concurred.

WILLIAM B. THOMPSON *vs.* MARY A. GRAY.

Note on time is agreement for delay, which is a sufficient consideration.

The taking of a promissory note for an antecedent debt, imposes upon the creditor an obligation to wait for his pay till the note matures, without any special agreement to that effect, or any understanding that the debt shall be thereby extinguished; and the delay thus obtained is a sufficient consideration for the note. Therefore, the note of a married woman, given for the antecedent debt of her husband, is not void for want of con-

sideration, if it is made payable at a future day. The court is not satisfied that at the time of the giving of the note in suit the defendant did not have an intelligent understanding of what she was doing; nor that there was any such fraud or imposition practiced upon her as ought to avoid the note.

On report.

Assumpsit upon a note given by the defendant to the plaintiff for $190, dated August 17, 1872. A brief statement was pleaded with the general issue, admitting the signature to the note, but saying that it was without any valid legal consideration; that, at the time of its execution, Mrs. Gray was in a feeble and impaired condition of body and mind, and was mentally incompetent to transact business with intelligence, understanding rationally what she was doing; and that the plaintiff procured her signature by artifice, deception and fraud.

The note was given to take up one of her husband, maturing in the bank, for necessaries supplied to their family by the plaintiff.

There is no occasion to rehearse the testimony as to the issues of fact presented, since no legal questions arose upon that branch of the case.

Howard & Cleaves, for the plaintiff.

The agreement for delay, which was implied by the act of taking this note, was a sufficient consideration. 1 Parsons on Contracts, *369; *Smith* v. *Alger*, 1 Barn. & Ad., 603; *Pillaus* v. *Millsop*, 3 Burrows, 1674; *Jones* v. *Ashburnham*, 4 East, 459; *Wheeler* v. *Slocumb*, 16 Pick., 52; *Boyd* v. *Freize*, 5 Gray, 554: *Breed* v. *Hillhouse*, 7 Conn., 523; *Jennison* v. *Stafford*, 1 Cush., 168; *Walker* v. *Sherman*, 11 Metc., 172; *King* v. *Upton*, 4 Maine, 387; *Langley* v. *Bartlett*, 33 Maine, 478.

A. Merrill, for the defendant.

The groceries had long before been furnished and consumed, and the debtor-husband's note taken therefor had matured. Then the whole consideration was past, and there was no new one sufficient in law to support this promise.

Though love and affection suffice in case of a sealed instrument,

it is otherwise as to a note. Story on Prom. Notes, §§ 184, 186, &c.

That delay may become a consideration, there must be an agreement not to sue; and none such is shown here. *Mecorney* v. *Stanley*, 8 Cush., 85.

In his absence, Mrs. Gray signed this note to take up that of her husband in the bank; and the plaintiff promised so to use it but did not, paying that note himself. Thus it was obtained upon a false pretence, and was not applied to the use intended. As the trust upon which it was delivered was not executed by him, the plaintiff cannot now recover of the maker upon it. *Nutter* v. *Stover*, 48 Maine, 163. He should have returned it to her when he found it unnecessary to use it for the purpose specified.

WALTON, J. The promissory note of a married woman given for the antecedent debt of her husband is not void for want of consideration if it is made payable at a future day. Such a note necessarily operates as a suspension of the right of the creditor to enforce payment of his debt till the note matures; and it is a rule of law too well settled to require the citation of authorities in support of it, that such a suspension of the right of the creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it. It is not necessary that there should be an express agreement for delay. The taking of a new security payable at a future day, by operation of law, and without any special agreement to that effect, imposes upon the creditor the duty of waiting for his pay till the new security matures. *Andrews* v. *Marrett*, 58 Maine, 539, and authorities there cited. *Eisner* v. *Keller*, 3 Daly, (N. Y.) 485.

The objection, therefore, that the note in suit was given without consideration is not sustained.

Nor are we satisfied that, at the time of the giving of the note in suit, the defendant did not have an intelligent understanding of what she was doing. Nor are we satisfied that there was any such fraud or imposition practiced upon her as ought to avoid the note. She probably felt that if there was no legal obligation rest-

ing upon her to pay the debt, still, inasmuch as it was incurred for necessaries supplied her and her children as well as her husband, and she alone had the means to pay it, that there was a moral obligation resting upon her which she was not at liberty to throw off; and the fact that she was willing to give her personal obligation to pay for such necessaries is not to our minds evidence of insanity or imposition. *Judgment for the plaintiff.*

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

INHABITANTS OF WESTBROOK *vs.* INHABITANTS OF DEERING.

Town cannot vote money to oppose its division. Liability after division.

A town cannot incur expenses in opposing, before a legislative committee, a division of its territorial limits.

The vote of Westbrook passed March 20, 1871, to build a bridge, and appointing their selectmen agents for that purpose, did not create any debt, liability, or cause of action, against the town. The contract for the bridge, first creating such liability, having been made after the act dividing the town took effect, the new town of Deering cannot be held to contribute to the expense of it.

ON REPORT.

ASSUMPSIT, upon an account annexed and the general money counts, to recover two-thirds of certain expenses of employing counsel, procuring witnesses, &c., &c., in the winters of 1870 and 1871, to oppose, before the legislative committee to whom the subject was referred, a petition for the division of the town of Westbrook. In 1870 the prayer of the petitioners was refused, but it was granted the succeeding year, the part set off from the old town being erected into the town of Deering by act approved February 16, 1871, the tenth and last section of which provided that this act should take effect March 21, 1871. Special laws of 1871, c. 628. The expenses were incurred by a committee chosen

at a legal town meeting, held December 29, 1869, which voted to authorize this expenditure. This committee disbursed over three thousand dollars in opposing a division of Westbrook. The third section of Special Laws of 1871, c. 628, making the division, provided that "said town of Deering shall be holden to pay the said town of Westbrook two-thirds parts of the debts and liabilities of said Westbrook now existing," &c.

A bridge built for the town across the Presumpscot river, at Saccarappa, in the spring of 1870, by the Moseley Iron Bridge and Roofing Company, proving defective, it was taken away by the contractors, and, upon the twentieth day of March, 1871, the town, at a legal meeting, voted to and did authorize its selectmen to contract for a new bridge in place of the other, but no agreement for building the new bridge was made with any one until March 30, 1871. It will be remembered that Deering became a town March 21, 1871, the day after it was voted to substitute another bridge for that furnished by the Moseley Company. This new bridge was erected at a cost of about six thousand dollars. The court were to enter judgment according to the facts and legal rights of the parties.

S. C. Strout and *H. W. Gage*, for the plaintiffs.

I. When the rights of a town are imperilled, or its interests involved, it can employ an attorney to defend them. *Knowlton* v. *Plantation*, 14 Maine, 20; even though it be not a party of record to the proceeding. *Briggs* v. *Whipple*, 6 Vermont, 95; *Cushing* v. *Stoughton*, 6 Cush., 389; *Lawrence* v. *McAlvin*, 109 Mass., 312.

This court have settled the question here raised, in *Frankfort* v. *Winterport*, 54 Maine, 250. This was an "existing liability" when c. 628 took effect. *Batchelder* v. *Epping*, 28 N. H., 354. There was the same necessity for informing the tribunal before which this question of division was pending, by evidence and argument, that exists in any other case, in any other form.

II. The bridge, though not actually contracted for till after

March 21, 1871, was imperatively ordered March 20, 1871, those who are now citizens of Deering being present at the town meeting of that day, and acting affirmatively upon the question. A binding obligation to make the contract was then cast upon the selectmen.

Bradbury & Bradbury and *Edward Payson*, for the defendants.

I. In relation to the first question in this case we contend (1) that no portion of the sum disbursed can be recovered of Deering; (2) or, at any rate, only so much as was necessary to present the subject fairly to a committee of the legislature, employing only a reasonable number of counsel and witnesses for the purpose, and paying fair compensation for the legal services rendered; (3) that all sums paid to counsel or agents for "lobbying," or trying to influence the legislature, must be disallowed; only the witness fees ($120,) being necessary to give the committee all needed information.

We shall cite no authorities to sustain the legal aphorism that towns are strictly limited to the powers conferred by statute; of which that of taxing its citizens for the purposes here contemplated is not one, unless these items come under the meaning of the clause "other necessary town charges." The particular interpretation of these words must be given with reference to each case, as it arises; but their general meaning has been fully determined to mean that which is made necessary by a proper discharge of the recognized functions of a town as such; that is, what is requisite to enable the town to discharge its trusts. *Stetson* v. *Kempton*, 13 Mass., 281; *Allen* v. *Marion*, 11 Allen, 109; Opinion, 52 Maine, 598. The question, then, is narrowed down to this single point: Is it the duty of a town, as such, to oppose its own division? When a town is created, is that one of the trusts committed to it, to see that it shall never be divided? This is the plaintiffs' theory. Its absurdity is seen from the following considerations: (1) If it is the duty of a town to oppose its own division, then it is compell-

ed to oppose that, the doing of which the State invites. (2) It is charged with a duty for a neglect of which no penalty is provided, and no means to compel performance. (3) It would be its corporate duty to oppose that which every individual citizen might desire to see done; in which case there would be a duty with no power of performing it; thus contradicting the principle, that where a duty is imposed, a power is bestowed for its performance. (4) If the act derives its legality from the vote of the town, it may raise money now to promote and now to oppose division; and this legal solecism is the result, that the duty of a town depends upon the vote of its citizens, and fluctuates according as majorities preponderate. But a tax, to be legal, must be uniform as to the objects to which it is applied. (5) It would be its duty to do that in respect to which, being done, every citizen finds himself as free to act as he was before the vote was passed. But a legal vote, by a town, is a law to every citizen, and more or less restrains his freedom.

The only reply to this view, which has even a color of plausibility, is that a town must have the right of self-defence. *Stetson* v. *Kempton* shows that this is true only to a very limited extent. But in the very act of creating a town the probability of its division is contemplated, and is of its essence; so that, instead of being an act of hostility, directed against its corporate rights, it is only carrying into effect that which was considered as likely to occur in the beginning. The equities of the case, and the argument *ab inconvenienti*, are also in accord with this view.

The principles above urged are fully recognized in two cases lately decided in Massachusetts, not yet reported. In one (*Minot* v. *West Roxbury*) the power of the town was invoked to promote its merger into Boston, and in the other (*Coolidge* v. *Brookline*) to oppose it. In the latter case an attempt was made to destroy the effect of the former, by drawing a distinction between an effort to preserve and one to destroy the old *status*, but the court refused to recognize it, and held the same principles equally applicable to both cases.

The practice the plaintiffs ask the court to ratify is open to great abuse, subversive of independent legislation, and contrary to sound public policy. Hitherto, we have been discussing the question of municipal authority and its limitation; but the question of prerogative—of jurisdiction—also arises, so that the action of the town becomes something more than *ultra vires*. It is an assumption of power that has not only failed to be bestowed upon itself, but has been lodged with another. The establishment and alteration of town lines has been placed in the hands of the State, whose sole province it is to determine all questions of proper corporate limits. Individuals, as citizens, may petition for a change of municipal boundaries; but how a town, as such, can assess a tax to promote or hinder that which belongs exclusively to the State, it is not easy to understand. In *Frankfort* v. *Winterport*, 54 Maine, 250, the plaintiff failed to recover the money expended in lobbying.

The case of *Batchelder* v. *Epping*, 28 N. H., 354, there cited, proceeds upon the erroneous assumption that a town, like an individual, may do any act not prohibited by law; while the truth is it can only do that which is expressly permitted by law. *Anthony* v. *Adams*, 1 Metc., 284; *Vincent* v. *Nantucket*, 12 Cush., 105.

II. It is so evident that no contract for, or liability on account of, the bridge existed till after the division, that we shall consume no time in the discussion of the question. *North Yarmouth* v. *Skillings*, 45 Maine, 133.

Virgin, J. The principal question is, can a town incur expenses in opposing before a legislative committee, a division of its territorial limits. We are clearly of the opinion both upon principle and authority that it cannot.

Towns are created by the statute. The usual act of incorporation simply provides that certain defined territory, with the inhabitants resident thereon, be incorporated into a town by the name designated. In the absence of conditional provisions therein, an act of incorporation becomes imperative and binding whenever it

takes effect, without any formal acceptance on the part of its inhabitants. It has none of the elements of a contract, or compact, conferring a vested right upon its inhabitants as against the State, that the territorial limits of the town shall continue as when incorporated for any particular period; but it is simply an act of legislation, enacted for the public good, to be amended or repealed only by the sovereign power which created it, whenever and however, under the constitution, it deems the same end may require. The citizens of the town, as such, have no power to change even its name. Thus created it becomes an institution of the State, established for certain public purposes, and for effecting those purposes, it is invested with certain corporate powers, and is charged with corresponding duties—all either expressly or impliedly provided for in the statutes, and adapted to their peculiar nature. Within the proper scope of these purposes, powers and duties, its corporate acts bind the corporation; while all others being foreign thereto, are without law and of no binding effect. *Rumford* v. *Wood*, 13 Mass., 193; *Hooper* v. *Emery*, 14 Maine, 375; *Gorham* v. *Springfield*, 21 Maine, 58; *Ham* v. *Sawyer*, 38 Maine, 37, 1 Dillon Mun. Corp., §§ 17, *et seq.*

Among the corporate powers of a town is that of "raising such sums as are necessary for the" purposes specifically enumerated in the statutes; "and for other necessary town charges," R. S., c. 3, § 35. In this section, if in any, is to be found the authority of Westbrook to incur the expenses sought to be recovered in this action. The raising of money to be expended in opposing the division, not being provided for *in totidem verbis*, must be considered unauthorized unless it may be included in the general clause —"other necessary town charges."

The full meaning of this phrase was defined before the separation of Maine from Massachusetts, by C. J. Parker, in *Stetson* v. *Kempton*, 13 Mass., 272. The question was whether the town of Fairhaven could raise money to resist the landing of British troops then lying in sight off the coast, threatening to land and lay waste the dwellings and other property of its inhabitants. The court

say—"none will suppose, that under this form of expression, every tax will be legal which the town should choose to sanction. The proper construction of the terms must be, that in addition to the money to be raised for the poor, schools, &c., towns might raise such sums as should be necessary to meet the ordinary expenses of the year; such as the payment of such municipal officers as they should be obliged to employ; the support and defence of such actions as they might be parties to; and the expenses they would incur in performing such duties as the laws imposed—as the erection of powder-houses, providing ammunition, making and repairing highways and town-roads and other things of a like nature—which are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term necessary; for these may be essential to the comfort and convenience of the citizens. . . . . With respect to the defence of any town against the incursions of an enemy in time of war, it is difficult to see any principle upon which that can become a necessary town charge. It is not a corporate duty to defend the town against an enemy. This is properly the business of the State," &c.

The construction of this clause came before this court three years after the separation, in *Bussey* v. *Gilmore*, 3 Maine, 191, by which a tax for the discharge of a contract between a town and a toll bridge corporation for the free passage of the bridge by the citizens of the town, was held illegal upon the ground that the power to raise money for "necessary charges," extends only to those expenses which are incident to the discharge of corporate duties. Weston, J., says: "The construction of the statute in relation to the authority of towns to raise, assess and collect money is so clearly stated and so fully illustrated in *Stetson* v. *Kempton*, that we have little occasion to say more than that we are entirely satisfied with the principles of that case and the deductions there drawn. The court remark that 'it is important that it should be

known that the power of the majority over the property, and even the persons, of the minority, is limited by law to such cases as are clearly provided for and defined by the statute which describes the powers of these corporations.' By that decision, this principle did become known; and believing that it is justified, as well from considerations of public policy, as from a sound construction of the law, we have no disposition to modify or change it, if we had the power to do so, which we clearly have not. . . The generality of this phrase has received, in the case before referred to, a reasonable limitation. Without enumerating the objects which this term may be understood to embrace, it may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted, or which necessarily arise in the fulfilment of the duties imposed by law."

Passing over forty years and several cases relating to this subject decided in the *interim*, this court as constituted in 1863, in answer to certain questions submitted by the governor, said: "The words 'other necessary town charges' do not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever, at the will and pleasure of the majority. They embrace only all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute. While towns may raise money to discharge all liabilities in the performance of their multiplied duties, they cannot (unless new powers are conferred, or an excess of power receives a subsequent legal ratification) transcend their authority and incur expenses in no way arising in its exercise." Opinion of the Justices, 52 Maine, 598.

So, in *Alley* v. *Edgecomb*, 53 Maine, 448, Barrows, J., speaking for the court, said: "Beyond question or controversy, the right of towns to grant or to raise money depends upon authority derived from some statutory provision. Like other corporations, they have no powers that are not either expressly granted or necessarily implied from such as are granted, to enable them to discharge the special functions for which they were created, and such duties as are by law imposed upon them."

In 1873, the court in Massachusetts, in deciding whether a town has the right to pay the expenses of a committee directed by vote of the town to petition the legislature for the annexation of the town to the city of Boston, and to appear with counsel to advocate the annexation,—by Endicott, J., said: "Upon a review of the authorities and upon principle, it is very clear that towns, deriving all their power to raise money and tax their inhabitants from the statutes, must necessarily be confined in their expenditures of money, and the consequent power to tax their inhabitants therefor, to the objects and purposes named in the statutes, and to those other objects and purposes not named, but so connected with and incidental to the objects named, and so directly within the line of their corporate duty and power in the ordinary administration of their affairs as towns, that they may fairly be presumed by necessary implication to be included in the words 'other necessary charges.' Such incidental power must spring from some power granted in terms, and relate to a subject matter set forth with distinctness in some portion of the statutes, and be one which is in some way necessary for the town to exercise in carrying out and performing its corporate duties, as an existing body politic. Else it has no power to tax its inhabitants; for the principle of a tax is that it is necessary by reason of a public duty in the town to do something in obedience to and imposed by public law." *Minot* v. *West Roxbury*, Mass. Mss.

Again in 1874, in a very lucid and exhaustive opinion drawn by the same learned judge, the same court reaffirm their decision in *Minot* v. *Roxbury*, and declare that they "are clearly of opinion that a town has no corporate duty to defend its boundaries or existence before the legislature, and therefore no right to tax its inhabitants therefor." *Coolidge* v. *Brookline*, Mass. Mss.

The last named case, after a very full examination, also decides that the provision in the statute of Massachusetts similar to our R. S., c. 2, §§ 26, 27 & 28—providing substantially that petitions to the legislature "affecting the rights of towns" shall not be acted on without notice to the town as therein provided—"cannot be

held to enlarge existing rights or give to towns any powers or privileges not already possessed. The whole scope of these sections relates to notice, and the phraseology must be construed with reference to that purpose." The opinion concludes as follows: "We think it is evident that it was the intention of this act that notice should be given to the inhabitants of towns of all petitions affecting their interests for the purpose of giving them an opportunity to take proper action, and communicate their wishes on the subject to the legislature. But it is not to be presumed from the language of the act that it was intended to arm towns as corporations with the power to raise money to prevent before the legislature, any change in the boundaries, or rights over their territory, which it is the constitutional duty of the legislature to make, if the public good requires. The legislature might well hesitate to give such power, not only because it might obstruct the action of the legislative body, but be open to great abuse, and obnoxious to a sound public policy."

In *Frankfort* v. *Winterport*, 54 Maine, 250, this court decided that the town, in its corporate capacity, cannot legally raise and expend money for the purpose of sending lobby members to oppose before the legislature a division of the town. This was the question then before the court requiring and receiving a decision. The remark in the opinion that the court does not wish "to be understood as overruling the doctrine of the case of *Batchelder* v. *Epping*, 28 N. H., 534" was foreign to the question and at most a *dictum*. The next succeeding sentence that "undoubtedly all corporations and towns, as *quasi* corporations, may use all lawful means to advance or protect their rights before any legally constituted tribunal, and for that purpose may employ agents or attorneys, but are restricted to a reasonable number," we now hold to be sound law provided the word rights has the signification hereinbefore indicated. R. S., c. 3, § 1; *Knowlton* v. *Plantation*, No. 4, 14 Maine, 20. Thus understood, we reaffirm the decision; but so far as the opinion may be considered as indicating the view that a town may raise money to pay even an attorney for

appearing before a committee of the legislature to oppose a division of the town, we think, for the reason stated, and upon the authorities cited, it cannot be sustained.

The votes of the town in relation to the building of the bridge were passed March 20, 1871. They took effect from their date. *Bigelow* v. *Hillman*, 37 Maine, 52. What was their effect? Under article three the town simply declared its determination to build such a bridge as would accommodate the public travel, and constituted their selectmen, *eo nomine*, agents. Under article four, the town authorized their agents "to raise such sums of money, by loan, as is necessary, in their judgment, to meet the expenses of building a good, substantial bridge."

It cannot be seriously contended that these votes of themselves created any debt, liability or cause of action against Westbrook. They simply made it possible for their agents to create a liability, by subsequent action within their scope. The contract made between their agents and Blodgett & Curry on March 30, 1871, by virtue of the authority granted by the votes, created the liability of the town. Prior to that time the act of incorporation of the defendant town had taken effect. *Judgment for defendants.*

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

JULIA G. BROWN *vs.* INHABITANTS OF CHESTERVILLE.

Action. School District. R. S., c. 11, §§ 16, 41 *and* 63.

A voluntary payment of another's debt by a stranger will give no right of action in the name of the payer against the debtor, nor will a mere advancement by a stranger of the sum due bar the right of action by the original creditor, or defeat a suit prosecuted in his name, and with his consent, by the payer.

Evidence of an abortive attempt to organize a school district is not of itself sufficient to rebut the presumption of the legal existence of the district arising from its exercising the privileges of a district for one year under R. S., c. 11, § 16.

Brown *v.* Chesterville.

A union school district, lying partly in Farmington and partly in Chesterville, had a school house in Farmington, and its last vote to locate their house fixed its location within that town, and the school was actually kept in Farmington, which is the oldest town; *held*, that the teacher was justified in obtaining her certificate from, and returning her register to, the superintending school committee of that town, under R. S., c. 11, §§ 41 and 63.

On report.

Assumpsit to recover fifteen dollars, being three-tenths of the sum earned by the plaintiff in teaching a school in the Union School District at Farmington Falls, lying partly in Farmington and partly in Chesterville, the amount claimed being the latter town's proportion, the former having paid the thirty-five dollars belonging to that town to pay. This action was commenced before a justice of the peace in the name of the plaintiff by, and for the benefit of, one who had paid the teacher the sum here claimed, in accordance with a previous guarantee to do so, if she would keep out the school term. Mrs. Brown knew nothing about this suit till its trial before the justice, but then assented to its prosecution. The other objections to its maintenance are stated and answered in the opinion. The court was to order entry of proper judgment upon the law and facts.

Samuel Belcher, for the plaintiff.

H. L. Whitcomb, for the defendant, cited *Moody* v. *Moody*, 14 Maine, 307; *Scituate* v. *Hanover*, 9 Gray, 420. There was no such report or statement of facts as the law requires presented at the town meeting at which it was undertaken to organize this district. *School Dist.* v. *Stearns*, 48 Maine, 568; *Allen* v. *Archer*, 49 Maine, 346. If this school district had any corporate existence its only legal location of its house was in Chesterville; hence, Mrs. Brown should have obtained her certificate from, and returned her register to, that town.

Walton, J. In 1869 the plaintiff taught a public school at Farmington Falls, in a district composed of what had formerly been school district number one in Farmington and school district

number nine in Chesterville, ten weeks at five dollars per week. Farmington's proportion of wages, thirty-five dollars, was paid to her. Chesterville's proportion, fifteen dollars, was not paid to her. This is an action against the town of Chesterville to recover the fifteen dollars. Her right to recover is resisted,—*First*, because the amount sued for has been advanced to her by a member of the school district; *Second*, because, as the defendants contend, the school district was never legally organized; *Third*, because the plaintiff obtained her certificate from and returned her register to the superintending school committee of Farmington, instead of Chesterville. In our judgment no one of these objections is sustained.

I. It is undoubtedly true that the voluntary payment of another's debt by a stranger will give no right of action in the name of the stranger against the debtor; but it is not true that a mere advancement of the money due by a stranger will bar a right of action against the debtor by the original creditor. This action is in the name of the original creditor; and the fact that she was enabled to obtain an advancement of the amount due her from an accommodating citizen, is no bar to it, the suit being prosecuted with her consent and under her authority. In fact, we are not prepared to say that the one making the advancement should not be regarded as an equitable assignee of the right of action, and entitled to the use of the plaintiff's name to recover the amount due, without her consent even. But it is unnecessary to decide this point, for she testifies that she does authorize the suit to be carried on in her name.

II. School districts, whether a part of one or more towns, that have exercised the privileges of a district for one year, are presumed to be legally organized. R. S., c. 11, § 16. It is unnecessary to determine whether this is a conclusive or a disputable presumption; for this court has already held that evidence of an abortive attempt to organize the district is not sufficient to rebut the presumption; and no other evidence is offered in this case. *Collins* v. *School District*, 52 Maine, 522. The school district in

which the plaintiff taught had then exercised the privileges of a district for more than a year; and the presumption arising from this fact, that the district was legally organized, not being repelled, we must assume, in deciding this case, that it was legally organized. The second objection to the maintenance of the suit is not therefore sustained.

III. No school teacher can recover pay, unless the register required by law is properly kept, and returned; nor unless such teacher has obtained the requisite certificate from the school committee. In the case of union districts the certificate is to be obtained from and the register returned to the superintending school committee of the town "where the school house of such district is situated, or has been located, or where the school is kept; or if there is no such school house or school," then to the committee of the oldest town from which a part of the district is taken. R. S., c. 11, § 41. It is true that this district had a school house in Chesterville. It is also true that it at one time voted to locate its school house there. But it also had a school house in the Farmington portion of the district, and its last vote was to locate the school house there; and the school was actually kept there; and Farmington was the oldest town. Under these circumstances, we think the plaintiff was justified in obtaining her certificate from, and returning her register to, the superintending school committee of the town of Farmington. The objection, therefore, that she should have obtained her certificate from the school committee of the town of Chesterville, and returned her register to them, is not sustained.

Judgment for plaintiff for fifteen dollars and interest from the date of her writ.

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

Luke W. Fowle *vs.* Ebenezer S. Coe.

Probate jurisdiction and sale. Statute of limitations.

This was a real action. Both parties claimed under Rufus Davenport of Boston, Mass., deceased, who bought of Massachusetts and gave a mortgage to that state to secure part of the purchase money. The demandant deduced his title, through mesne conveyances, by deed from Davenport's heirs, made after settlement of the estate in the probate court of Suffolk county, Mass., conveying the land subject to the mortgage; while the tenant deraigned under proceedings in the probate court of Franklin county, Maine, where the land lies, by an administrator's deed upon sale by license, for the purpose of paying the mortgage note, which had been transferred to a citizen of this State. The note was given April 30, 1836, the maker died in 1839, and administration in Mass. was closed in 1844. The administration in Maine, was granted in May, 1857. *Held*, that the note was not barred in this State by the statute of limitations; that, upon inquiry as to the jurisdiction, administration was found to have been properly taken in Franklin county, the probate proceedings here being entirely independent of those in another sovereignty; that the sale was duly licensed and made, although the preliminary oath was not recorded until the trial of the cause, and though the sale was adjourned from the forenoon to the afternoon of the day designated therefor by verbal notice, when it was sold much below its value; and that the administrator's deed, dated within (but not acknowledged till after) a year from the sale, passed title to the tenant; in whose favor judgment was, therefore, rendered.

On report.

Writ of entry to recover an undivided two-thirds of township No. 3, range three, in Franklin county, to which both parties lay claim under Rufus Davenport, who bought it of the Commonwealth of Massachusetts, in 1805. April 30, 1836, Davenport mortgaged a fraction of the land to the Commonwealth to secure his note of that date for $900 payable to its treasurer June 1, 1837, with interest. Davenport died in 1839, intestate, at Boston, leaving this note unpaid. Administration was had of his estate in Suffolk county and, upon its completion, his heirs conveyed this real estate to those under whom the demandant claims, as is fully stated in the opinion. The note having been transferred to

James N. Chandler, of Bangor, Maine, he petitioned the probate court of Franklin county at its April session, 1857, for the appointment of an administrator there upon Davenport's estate, which was granted at its next term. The validity of the note was contested before commissioners appointed for the purpose, the statute of limitations being invoked against it, but held to be no bar; and, thereupon, license was given the administrator, at his request, to sell the whole township (or all his intestate's interest therein) because a partial sale would greatly injure the residue. The requisite notice was given and, no offer being made at the hour appointed for the sale, the administrator adjourned till two o'clock of the afternoon of the same day, when the whole tract, or all of Davenport's interest in it, was knocked off to Coe, as the highest bidder, for $2396.43.

At the time of this administrator's sale, January 2, 1860, the title which passed by the deed from Davenport's heirs was vested in Lewis Loomis, Ebenezer Gilson and Daniel Lawrence, each having a one-third interest. Lawrence went down to the auction sale, Gilson supposing he would represent all of their interests there; but Lawrence, between the hour originally appointed and that to which the sale was adjourned, bargained his third to Coe for $3000, and did not bid at the auction. Gilson and Loomis subsequently sold their shares to Joel R. Clark for $19,500, and Clark conveyed the same to the demandants for $10,000.

The main reason for invalidating the sale by the administrator was an alleged failure to take the requisite oath before fixing upon the time and place of sale. A certificate of the administration of the oath dated December 10, 1859, (after notice of sale was given, and within thirty days of the time fixed therefor) was found in the probate office; but there was testimony that from April 1, 1860, till May, 1869,—after this action had been commenced by writ dated September 5, 1868—no other certificate was filed there. The gentleman who advised the administrator in making this sale, &c., testified that he seasonably administered the oath, November 26, 1859, and then certified it upon the back of the license, upon a

form prepared for that purpose, and filed it in the probate office; that he soon after borrowed it of the register and forgot to restore it to the probate files till 1869; and that, when he filled the other certificate, he accidentally substituted the day of filing for that of administering the oath. The former register, who acted in that capacity in 1859 and 1860, had deceased without having recorded the license and this endorsement thereon; but they were recorded by the present register, during the trial of this cause, and certified copies admitted in evidence, against the objection of the demandant. The court was to render such judgment as the facts, and inferences properly to be deduced therefrom, required.

Abiel Abbott and *H. L. Whitcomb*, for the demandant.

Albert W. Paine, for the tenant.

Virgin, J. Writ of entry dated September 5, 1868, to recover township numbered three, range three, west of the "Bingham Purchase," in the county of Franklin. Plea, general issue, with a brief statement claiming title in the tenant.

Rufus Davenport, of Boston, Mass., holding the legal title to the township, on April 30, 1836, conveyed in mortgage an undivided part thereof to the Commonwealth of Massachusetts, to secure the payment of his note, of that date, signed in the presence of an attesting witness, payable to "Hezekiah Barnard, treasurer of the Commonwealth of Massachusetts, or his successor in that office," for the sum of nine hundred dollars and interest, "on or before June 1, 1837." The note bears the indorsement—"without recourse—Moses Tenney, Jr., treasurer of the Commonwealth of Massachusetts."

Rufus Davenport died in September, 1839. In October following, letters of administration were granted on his estate, in Suffolk county, and the final account of the administrator was settled April 8, 1844, leaving a balance of $2614.32 in his hands which he duly distributed.

On June 4, 1853, the heirs of Davenport, by their deed of quit-

claim, in consideration of $3000, conveyed to Lewis Loomis, "all their right, title, interest and estate" to said township, being now under mortgage made by said Rufus Davenport to the Commonwealth, by deed dated the thirtieth day of April, 1836, to secure the payment of his note for $900 and interest, "subject to which the premises are now conveyed," &c. On the same day Loomis, by his deed of quitclaim, conveyed to Ebenezer Gilson, "one undivided third part of township No. 3, range 3, in Franklin county, as received from the heirs of Rufus Davenport. . . The premises being subject to the condition, reservations and incumbrances expressed in the deed of said township from the heirs of Rufus Davenport to me, of this date."

On July 16, 1866, Gilson, "in consideration of $16,000," conveyed to J. R. Clark the same premises—"meaning to convey all right, title and interest."

On May 30, 1864, Loomis conveyed one other third part to J. R. Clark, who on December 24, 1867, conveyed "all right, title and interest" to the demandants.

The title of the defendants is based on an administrator's sale, in this State; and the regularity of the proceedings in the probate court is the main question.

Although courts of probate are declared by R. S., c. 63, § 1, to be "courts of record," having "an official seal," and "power to issue any process necessary for the discharge of their official duties," still their proceedings are not according to the course of the common law, but they are creatures of the statute, having a special and limited jurisdiction only. *Fairfield* v. *Gullifer*, 49 Maine, 360. Hence we must look to the statute for the jurisdiction of such courts in a given case. And while all of their decrees, made within their jurisdiction are conclusive unless appealed from, those without their jurisdiction, may be called in question, even collaterally. *Gross* v. *Howard*, 52 Maine, 192; *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, and cases there cited. And the fact that a court of probate, in giving judgment, passed upon the question of jurisdiction, does not preclude courts of common law from

inquiring into the jurisdictional facts collaterally, and declaring the judgment of the probate court valid or void, as they shall find those facts true or false. *Jochumsen* v. *Suffolk Savings Bank*, *supra*. To this rule, however, R. S., c. 63, § 7, attaches an exception, not necessary to be considered in this case.

By R. S., of 1857, c. 63, § 4, a judge of probate may "grant letters of administration on the estates of all deceased persons . . . who died without the State leaving estate to be administered in his county, or whose estate is afterwards found therein;" but (by § 5) not "unless it satisfactorily appears to the judge, that there is personal estate of the deceased amounting to at least twenty dollars, or that the debts due from him amount to that sum, and in the latter case, that he left that amount in value of real estate."

The petitioner (Chandler) alleged in his petition to the judge of probate for the county of Franklin that the intestate (Davenport) "late of Boston," &c., "died several years since, seized and possessed of valuable real estate situated in said county of Franklin, which ought to be administered according to law. . . and that he is a principal creditor of said deceased." The truth of these facts, it would seem, was made "satisfactorily to appear" to the judge, for his decree recites that "the facts therein being fully proved," he decrees "that administration of said estate be granted to Joseph W. Fairbanks," &c.

The case finds that the intestate "died possessed of the title of township No. 3, in Franklin county," "in September, 1839;" and the inventory finds the value of the township to have been $3000 —the low figure at which it is there placed being occasioned, probably, by the doubt which the Maine Reports show existed in relation to the title. So much as to the value and locality of the real estate, as elements of jurisdiction.

As to the debt due. The amount was $900 and interest from April 30, 1836.

Whatever may have been the effect of the indorsement, (the note not being negotiable) it appears that the note became the property of James N. Chandler, of Bangor, who was the petitioner

for administration; and that it constituted the evidence of the debt against the estate.

If it be said that the debt was created in Massachusetts, where the decedent had his domicile, and that the holder having failed to present it there until it was barred there, where the administrator held a sufficient balance to pay it; and that having thereafterwards become the property of an inhabitant here, it cannot become the subject of administration, and that hence the citizen of this State has no remedy—the answer is, that the administrations of the estates of the same decedents in different States where there are creditors and property belonging to the same estate, are regarded as wholly independent of each other. *Low* v. *Bartlett*, 8 Allen, 259; that there is no privity between the different administrations; but that each is sovereign within its own limits; that the statute of limitations had not attached in Maine, even if it had in Massachusetts. *Putnam* v. *Dike*, 13 Gray, 535; and "according to present views, the debt was only barred so long as it remained within the jurisdiction" of Massachusetts. 3 Redfield on Wills, 31, note 23. We are of the opinion, therefore, that the note and the real estate here afforded the probate court of Franklin county jurisdiction.

Having jurisdiction in the appointment of administrator, and there being no personal estate, the judge of probate had authority to grant a license to sell the real estate to pay the debt, and to sell the whole. R. S., c. 71, § 1. It is objected, however, that the administrator did not seasonably take the oath required by c. 71, § 4. The license was issued on January 4, 1859. The certificate of the oath upon the back of the license bears date November 26, 1859. These were not recorded until some time during the trial, in September, 1870; when, the register who attested the license having deceased, they were recorded by his successor, in accordance with the provisions of Public Laws of 1870, c. 113, § 3. Thereupon, certified copies of the record became legal evidence. Moreover, the magistrate who administered and certified the oath testifies that "the oath was administered the day it pur-

ports to have been—the certificate was made at the time, and is now as it was originally. I know that the oath was administered before the sale was advertised." If there had been "no certificate returned," this evidence would "have the same effect as if a certificate had been returned, filed and recorded." Public Laws of 1859, c. 59.

The affidavit of the administrator, made on April 2, 1860, ("within eighteen months after the sale,") and filed in the probate office, &c., as provided by R. S., c. 71, § 26, also recites the facts of notice, oath, &c., pertaining to the sale. By this affidavit it appears that the sale did not take place at eleven o'clock, A. M.—the hour fixed in the original notice—for that "not having any offer," the administrator "adjourned to the same place, at two o'clock in the afternoon, and gave reasonable notice of said adjournment, as the law directs." This is a compliance with R. S., c. 71, § 19, which requires "such reasonable notice thereof as circumstances will permit." An adjournment for so short a time is not susceptible of a very extensive notice. The specific kind of notice would seem to be submitted to the discretion of the administrator, as is the "notice" and "reasonable time" for an execution debtor to select an appraiser under R. S., c. 76, § 1, submitted to the discretion of the levying officer. *Fitch* v. *Tyler*, 34 Maine, 463; *Howe* v. *Wildes*, Id., 566. The statement in the affidavit that the notice was given "as the law directs," is as certain and definite as the recital in the caption of a deposition that the deponent was "duly sworn" or "sworn according to law;" both of which have been considered sufficiently specific. *Dennison* v. *Benner*, 41 Maine, 332; *Bachelder* v. *Merriman*, 34 Maine, 69.

The date of the deed was within a year from the date of the license. And notwithstanding the acknowledgment was subsequent thereto, in the absence of controlling facts not found in this case, it takes effect from its date. *Poor* v. *Larrabee*, 58 Maine, 543.

The sale was public. All who desired to bid had ample opportunity. The mere inadequacy of price paid by this defendant

affords no reason for avoiding a fair sale at public auction. *Webster* v. *Calden*, 53 Maine, 203; *Brotherline* v. *Swires*, 48 Penn. St. R., 68. The original proprietor charged the land in controversy with the payment of the debt, and he and his successors notified the world of the fact by solemn declarations in their deeds. The law compels us to order *Judgment for the defendant.*

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

LEWIS PIERCE and others, petitioners for certiorari,
MOSES M. BUTLER, administrator,
SHERMAN W. HAPGOOD,
vs.
THE COUNTY COMMISSIONERS OF FRANKLIN COUNTY.

Certiorari. R. S. of 1857, *c.* 18, §§ 30-33, *amended by act of* 1858, *c.* 23. *Tax. Ways in unincorporated townships.*

Where the county commissioners under R. S. of 1857, c. 18, § 30, as amended by Public Laws of 1858, c. 23, have ordered the owners of land, over which a road located in an unincorporated township passes, to build the road, and then closed their proceedings, they will be quashed upon certiorari.

Under that statute the land-owners had the privilege of paying their proportional expense of building the road in labor; but the expense of its construction was to be defrayed by assessing upon those lands enhanced in value thereby a sum sufficient to build it; and an omission to lay such an assessment, as part of the original proceedings, will vitiate them.

In 1869 the county commissioners assumed to lay an assessment, ostensibly to "repair" a road which the land-owners had been thus ordered to build three years before, but had not, in fact, built; *held*, that such assessment was void, because the commissioners had no authority to expend taxes upon a road never legally located; also, because no notice was ever given to the land-owners of the assessment.

ON AGREED FACTS.

The plaintiffs' petitions made part of these cases and it was

agreed that the statements therein contained were true. *Mutato nomine*, they were all alike, and the two last named were submitted to abide the result of the first. They set out, substantially, that at the April term, 1864, of the court of county commissioners for Franklin county, on the petition of Abram Reed and others for a new location of a road in township No. 3, second range, the commissioners ordered notice, and, on the tenth day of October, 1864, proceeded to view the route of the proposed location, and hear the parties, and at their December term, 1864, adjudged that common convenience and necessity required the location as prayed for, which was accordingly made by them. Their record, recited in these petitions, states that the road prayed for was "on or over townships or tracts of land not within any town or plantation required to assess a State or county tax, the owners thereof being unknown." After fixing the limits of the way the commissioners say: "and we decide that each township or tract of land over which said location passes will thereby be sufficiently enhanced in value to require the proprietors or owners thereof to make and open said road across their respective lands; and we hereby require and order said proprietors or owners to make and open said road accordingly" . . . "and in our opinion no person sustains any damage by reason of said location." Three years were allowed the owners of lands over which the road passed to take off their wood, timber or trees, and to build the road. The commissioners ordered this return to be placed on file and the case continued to their April term, 1865, when, "no petition having been presented for increase of damages, it was ordered . . . that the proceedings upon said petition be closed and record thereof made."

The law then in force, relating to this subject, was R. S. of 1857, c. 18, §§ 30–33, as amended by the Public Laws of 1858, c. 23, which provided that, in cases like this, the commissioners might locate a way, the expenses of making and opening it to be paid by the owners of the lands over which it passed, "in proportion to their interests in the lands," or partly by such owners and partly by the county, as to the commissioners seemed just.

The thirty-third section of that chapter, as amended, provided that when such way was laid out the commissioners should "decide whether any tract, or part thereof, will thereby be enhanced in value; make as many divisions as are equitable, conforming as nearly as convenient to known divisions, or separate ownerships; and assess upon each division adjudged to be enhanced in value a sum proportionate to the value and to the benefits likely to result to it from the opening of the way;" the assessment to be made at such rates per acre, as to raise the required sum. The forty-first section of the same chapter directed that the commissioners should at the time when the assessment was made, or within three months thereafter, appoint a suitable agent to superintend the disbursement of the sums so assessed; and provided that, "any owners of land so assessed may pay his proportion of the assessment to the county treasurer, or in labor upon the road under the direction of the agent," within a time specified, upon giving the required notice of his intention.

From the twenty-seventh of April, 1865, when the proceedings and record were closed, nothing was done toward making the road, and no action taken in relation thereto, until the December term, 1868, of the court of county commissioners, when an assessment of taxes was made to raise moneys to be expended upon and in opening this road, and agents were appointed to superintend its expenditure, and it was ordered that notice of these assessments be published according to law. The petitioners represented that these proceedings were illegal, because no time was fixed for the county to build the road; its cost was not assessed upon each tract enhanced in value, proportionately to the benefits resulting to each; nor was any estimate or assessment of its expense made at the time it was laid out, nor any agent then appointed to build it, or to oversee the labor the land owners might claim to furnish; that all proceedings were closed in April, 1865, and no assessments till December term, 1868, and then only for the repair of an existing road; and upon a portion only of the land expressly declared to be enhanced in value; and no notice was given to the petitioners of said tax, though they had owned the

land for years, till a forfeiture for non-payment of said taxes had been declared; wherefore they prayed for a writ of certiorari to quash these proceedings.

Lewis Pierce and *Moses M. Butler*, pro sese.

T. T. Snow, for Hapgood and others.

The fundamental error was in supposing the land owners were compellable to build the road itself, and not merely to defray the expense of its being done. This should be assessed; and as no assessment was made, the error was fatal. Pingree's Case, 30 Maine, 351; Howe's Case, 46 Maine, 332.

The statute required an assessment proportionate to the degree in which the value of the lands of the respective owners is enhanced.

R. Goodenow, for the respondents.

WALTON, J. The petitioners complain that their lands have been declared forfeited for the non-payment of a tax, which they aver was illegally assessed to make or repair a road not legally located; and they pray that a writ of certiorari may issue to bring up the records of the assessment and location to the end that the same may be quashed. It is admitted that the facts stated in the petition are true.

We think the writ prayed for must issue. It appears from the copy of the records before us that the county commissioners acted upon the assumption that roads located in unincorporated townships were to be opened and built by the owners of the land over which the roads passed; and they accordingly, as part of their proceedings in locating the way in question, ordered that the owners of the land over which it passed, open and make the same, and then closed their proceedings. This was erroneous. The statute then in force permitted the owners of the land to pay their proportion of the expense in labor, but it did not require them to do so. It required the county commissioners to appoint an agent to open and make the road; and as a part of the proceedings in

establishing it, it required the commissioners to assess upon the lands that would be enhanced in value by the location, a sum sufficient to build the road, which was to be expended under the superintendence and direction of the agent. This they omitted to do. They ordered the owners of the land to build the road—an order which they had no right to make—and omitted to make an assessment for that purpose and appoint an agent to expend it, both of which the law did require them to do. These were grave and fundamental errors, sufficient to vitiate their whole proceedings. See act of amendment of 1858, c. 23, §§ 33, 41.

In 1868, more than three years after the proceedings in locating the road had been closed, the county commissioners undertook to remedy these errors by laying an assessment, which, by virtue of a statute passed the preceding winter, they had a right to do, nominally for the repair of the road, but in reality to build it; and it is for the non-payment of this tax that the petitioners' lands have been declared forfeited. We think the assessment must be regarded as illegal for two reasons. In the first place it was no more competent for the commissioners to lay a tax for the repair of a road not legally located than it would have been for them to lay a tax to build it; and in the second place, the petitioners aver that no notice was given them of the assessment of the tax, and that they had no knowledge of it whatever. This averment we must assume to be true, for it is agreed that all the facts stated in the petition are to be taken as true; and there is no evidence in the case that the notice required by law was given. The copy of the record before us shows that the commissioners ordered the statute notice to be given; but there is no evidence that the order was ever complied with. We must therefore act upon the assumption that it was not.

Our conclusion, therefore, is that the assessment of the tax, as well as the location of the way, was illegal; and that the petitioners are entitled to the writ prayed for.

Prayer of the petitioners granted.

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

EDMUND P. WAIT *vs.* JOHN P. CHANDLER.

Evidence to impeach a note.

Evidence to impeach a promissory note in the hands of a *bona fide* purchaser for value, before maturity and without notice, is inadmissible.

ON EXCEPTIONS.

ASSUMPSIT to recover the amount of two promissory notes given by the defendant to Olney & Greene, payable to them or bearer.

The plaintiff proved, by his own deposition, that he became the holder of said notes in the due course of business before the notes were due, without any knowledge of the consideration for which they were given, and that he paid a valuable consideration for the notes.

The defendant offered a writing given to him by the payees, Olney & Greene, at the same time the notes were given, and as a part of the consideration and contract, that the defendant was not to pay said notes until he could realize from the sale of a certain patent hay-fork, money sufficient to pay said notes, and offered to prove that said notes were obtained by fraudulent representations, and that he had been unable to realize anything from the sale of the hay-forks.

The presiding justice found, as matter of fact, that the plaintiff was a *bona fide* holder of the notes in suit, and ruled, as matter of law, that the writing and evidence offered were inadmissible as against the plaintiff, without notice of its existence at the time he bought, and ordered judgment for the plaintiff.

To the ruling of the court the defendant excepts.

Robert Goodenow, for the defendant.

Samuel Belcher, for the plaintiff.

WALTON, J. An action on a negotiable promissory note, brought

by a *bona fide* holder, cannot be successfully defended upon the ground that the payee obtained the note by fraudulent representations; nor upon the ground that by a separate writing it was agreed at the time the note was given that the maker should not be required to pay it until he could realize from the sale of certain property named money sufficient for that purpose. Evidence of these facts, in such a suit, is not therefore admissible, for the reason that the facts themselves, if proved, would constitute no defence. Such was the ruling in this case, and we think it was correct. *Exceptions overruled.*

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

JAMES HOWES *vs.* EZEKIEL TOLMAN.

Assumpsit. Case affirmed. Practice. Presumption of law. Report of facts. When debtor is liable to creditor for support in jail.

When a case is presented upon report, to test the correctness of a ruling at *nisi prius*, the presumptions are in favor of the ruling; and unless the party against whom it is made, and at whose instance the cause is reported, procures the incorporation into the report of sufficient facts or evidence to show the ruling to be erroneous, it will be affirmed.

To enable a creditor to recover of his debtor the sum paid for the support in jail of the debtor, after he has surrendered himself or been committed upon the creditor's execution, it is not indispensable to show a formal complaint by the debtor to the jailer, under R. S., c. 113, § 55. Any evidence which satisfies the tribunal which is to pass upon the facts that the debtor knew that the jailer required from the creditor payment of the debtor's board, and that the latter intended the former should pay it, will, upon common law principles, support an action of assumpsit for the amount paid; a promise of reimbursement being implied from these circumstances. *Spring* v. *Davis*, 36 Maine, 399, affirmed.

ON REPORT.

ASSUMPSIT to recover an amount paid by plaintiff to support the defendant in jail, when held under surrender duly made to

save the condition of a poor debtor's bond given under the provisions of R. S., c. 113, applicable to arrests on execution.

It appeared that the debtor surrendered himself into the custody of the jailer, upon said bond July 16, 1870; that he made the written complaint on oath mentioned in R. S., c. 113, § 55, October 26, 1870; that the jailer called upon the creditor, both before and after the date of said complaint, for payment of the debtor's support, and it was furnished. The jailer ultimately discharged the prisoner from custody upon the payment of the judgment and costs upon which the bond was given.

The defendant contended that he was not liable for the support between July 16 and October 26, 1870, but the presiding judge ruled otherwise, and gave judgment for the full amount. If this ruling is correct, judgment was to be entered for the plaintiff for the full amount claimed; otherwise, for that portion of it which accrued after October 26, 1870.

S. Belcher, for the plaintiff.

Robt. Goodenow, for the defendant.

The written complaint shows that the defendant surrendered himself to save the condition of a bond to Delia A. Tolman, and there is no suggestion that the plaintiff held it as assignee; nor aught to indicate that his payment of board was anything but a voluntary and impertinent interference in another's business.

Barrows, J. This case comes before us upon a report signed by the presiding justice, from the tenor of which we infer that the case was submitted to him for decision without the intervention of a jury. The report does not purport to present all the facts found by him, but is framed to test the correctness of a single ruling. The suit was assumpsit, to recover the amount paid by the plaintiff to support the defendant in jail, where he had surrendered himself in accordance with the provisions of a poor debtor's bond, and whence he was finally released upon payment of the judgment. He surrendered himself July 16, 1870. On the twenty-sixth of

October, 1870, he made oath to a complaint of his inability to support himself, &c., a copy of which is made part of the case. It recites a surrender to save the conditions of a bond given to one Delia A. Tolman. The report states that the defendant contended that he was not liable for the support between July 16 and October 26. But the presiding judge ruled otherwise and gave judgment for the full amount; and the case is reported with the stipulation that if this ruling is correct, judgment is to be rendered for the plaintiff for the full amount; otherwise, for such amount as accrued after October 26. The final clause in this stipulation is sufficient to overthrow the position now taken by the defendant that the plaintiff has no cause of action against him because the notice of October 26 refers to a bond given to Delia A. Tolman and not to the plaintiff.

The form of the ruling requested by the defendant, and the stipulation above referred to, necessarily imply that the right of the plaintiff to recover for all that he paid for defendant's board subsequent to October 26, was conceded. The reasonable inference is that among the facts proved before the judge at *nisi prius*, but not detailed in the report, was the fact that this plaintiff was the assignee and creditor in interest in the judgment upon which the bond to Delia A. Tolman was given. The report shows that the jailer called upon the creditor for payment for the defendant's board both before and after the notice of October 26, and that it was furnished. We remark:

I. When a case is presented upon report to test the correctness of a ruling of the judge presiding at the trial, the presumptions are in favor of the ruling as in the case of exceptions, and it is incumbent upon the party against whom the ruling is made, and at whose instance the case is reported, to incorporate into the report enough of the facts or evidence to show that the ruling was erroneous, otherwise it will be affirmed.

II. The legal substance of this ruling was that it was not indispensable, in order to enable the plaintiff to recover, to show a formal complaint to the jailer.

Any evidence which satisfies the tribunal that is to pass upon the facts, that the debtor knew that the creditor was required by the jailer to pay his (the debtor's) board, and that he intended that the creditor should pay it will suffice to maintain the suit for the amount paid, upon common law principles. A promise to reimburse the creditor for what he pays under such circumstances will be implied. *Spring* v. *Davis*, 36 Maine, 399.

We presume that the judge at *nisi prius* based his ruling upon such a finding. Doubtless he was satisfied that the jailer called upon the creditor for the defendant's board before the formal complaint with the knowledge and assent of the defendant and with the design on his part that the creditor should pay it. For all that he paid under such circumstances he is entitled to judgment, and according to the stipulations in the report the entry must be,

Judgment for plaintiff for the full amount claimed.

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

SAMUEL L. KNOWLES

vs.

SCHOOL DISTRICT NUMBER TEN IN CHESTERVILLE.

Powers of committee under R. S., c. 11, § 28, and when to be appointed.

The opinion of the superintending school committee that any district in their town unreasonably neglects to raise money for the repair of its school house, when communicated to the municipal officers in a written application under R. S., c. 11, § 28, is a conclusive finding of the fact of such neglect, and makes it the imperative duty of the selectmen to bring the subject before the town at its next meeting; so that errors and omissions in the records of the doings of the school district are immaterial, so far as its liability for repairs made under a vote of the town is concerned.

A statement, in the application of the superintending school committee to the municipal officers, that the district unreasonably neglects to repair its school house is a sufficient compliance with the statute, and indicates sufficiently a refusal to raise money for that purpose, so as to authorize the action of the town in the premises.

It is no defence to a suit to recover for labor and materials furnished in repairing a school house, under contract with a committee appointed by the municipal officers, by virtue of R. S., c. 11, § 28, that the building has been unlawfully removed by the selectmen from the lot belonging to the district.

Nor can it affect the contractor's right to payment if the tax assessed to raise funds for that purpose be illegally assessed or collected.

On report.

Assumpsit to enforce a lien claim for labor and materials furnished by the plaintiff to the defendants, in repairing their school house, under the circumstances indicated in the opinion.

S. Clifford Belcher, for the plaintiff.

H. L. Whitcomb, for the defendants.

Appleton, C. J. This is an action of assumpsit for work and labor done upon the school house of the defendants in repairing it under a contract with a committee appointed under the provisions of R. S., c. 11, § 28. It is admitted or proved that the labor has been done as claimed, and that the district have since occupied the house for district schools and district meetings. That the plaintiff is entitled to compensation from some source is not denied. The only question raised is whether, upon the facts in evidence, the defendants are liable.

The general issue has been pleaded. This plea admits the corporate existence of the defendants.

The fifth article in the warrant calling a meeting of the district to be holden on the sixteenth of April, 1870, was "to see if the district will raise a sum of money to repair their school house with, and if so, what sum, how raised, and how expended."

At the district meeting holden in pursuance of the above warrant, when the fifth article was presented for the consideration of the meeting it was voted, "to pass the article."

By R. S., c. 11, § 28, when, in the opinion of the superintending school committee, any school district in their town unreasonably neglects or refuses to raise money for erecting, repairing, renting or purchasing a school house or school houses and out-buildings,

such as the wants of the district require, or for purchasing or renting land for them to stand upon, and for yards and play grounds, the municipal officers, upon the written application of the superintending school committee, shall insert in their warrant for calling the next town meeting for town affairs, an article to see if the town will vote to raise money in such school district for the purposes above named. And any sum or sums of money so voted to be raised shall be assessed upon the polls and estates therein, and collected and paid over as if originally raised by the district. And thereupon the municipal officers shall appoint three suitable inhabitants of the town a committee to superintend the expenditure of the money for such purpose and they shall have all the power of a committee chosen by the district pursuant to law."

It will be perceived that the opinion of the superintending school committee is conclusive; that when that is expressed in a written application by them to the municipal officers they are required to act in accordance therewith. The school committee is to judge when the exigency requiring their action has arisen. It is not necessary, therefore, to examine the action of the district, for the opinion of the superintending school committee is binding upon it.

Upon the eleventh day of February, 1871, Justus Webster and E. H. Wheeler, as superintending school committee of Chesterville, made a written application to the selectmen of the town, stating therein that "the school house and out-buildings in school district No. 10 . . . are not such as the wants of the district require; . . . that it appears evident that the members of said district have unreasonably neglected to repair said school house sufficient to make it comfortable and convenient." They therefore petitioned the selectmen to insert an article in their next annual warrant, "to see if the town will vote to raise money in school district No. 10, to rebuild or repair the said school house and out-buildings above mentioned."

The application of the superintending school committee, we think, is a substantial compliance with the statute. The utmost nicety cannot be expected nor required in the proceedings of municipal officers.

Pursuant to the request of the superintending school committee the selectmen, on the twenty-second day of February, 1871, issued their warrant for a town meeting to be held on the seventh day of the following month, in which the seventeenth article was as follows:—"To see if the town will vote to raise a sum of money, and how much, to be assessed upon the polls and estates of the inhabitants and non-resident proprietors of school district No. 10, in Chesterville, to rebuild or repair the school house and out-buildings in said district."

At the town meeting it was voted, under the seventeenth article, to raise $175 for the purposes named.

The selectmen on the twentieth day of April, 1871, appointed three men as committee to superintend the expenditure of the money thus voted to be raised, two of whom acted and contracted with the plaintiff to do the labor for which this suit is brought.

The money voted not being enough, a second application under § 28, signed by all three of the superintending school committee was made, bearing date February 17, 1872.

February 17, 1872, a town meeting was called, to be held on the fourth of March then next. The twelfth article in the warrant was, "to see if the town will vote to raise a sufficient sum of money to meet the deficiency remaining in the account for rebuilding the school house in school district No. 10, to be assessed upon the polls and estates of the inhabitants and non-resident proprietors of said school district No. 10."

At the town meeting held in pursuance of the above warrant, it was voted on article 12:—"to raise the sum of three hundred and twenty-three dollars and 36–100 to meet the deficiencies named in said article."

The sums voted were assessed in accordance with the vote of the town and have been in part collected. It is not necessary to determine whether the assessments were legal or not as the plaintiff can, in no view, be made to suffer for the omissions or neglects of the municipal officers, or for their failures of duty.

By R. S., c. 11, § 26, "a district may choose a committee to

superintend the expenditure of money legally raised by it, to examine and allow accounts, and to draw orders on the town treasurer for the amount raised."

By § 28 the committee appointed to superintend expenditures "have all the power of a committee chosen by the district pursuant to law."

The committee, when money has been raised, whether appointed by the district or by the town, can contract for what is to be done and draw orders for the amount due. In the present case the contract was for labor by the day. The plaintiff has received an order, for part of which he has been paid. The balance remaining due, this action is brought to recover of the district.

The committee appointed by the district would bind the district. The committee appointed by the selectmen have the same power to bind the district. They act for the district and in lieu of the committee of the district. The work was for the district, not for the town. The benefit has accrued to the district, and not to the town. The plaintiff was unable to obtain his order for the whole amount. He is entitled to his pay. The defendant is the party alone liable.

It is objected that the school house has been moved illegally to land not belonging to the district. But whether so or not, the plaintiff is in no way responsible therefor. It furnishes no reason why he should not receive his just dues.

The objection that but two of the superintending school committee applied to the municipal officers of the town in the first instance is answered by the third item of R. S., c. 1, § 4, which is as follows;—"Words giving authority to three or more persons authorize a majority to act, when the enactment does not otherwise determine." *Junkins* v. *Union School District*, 39 Maine, 220.

Defendants defaulted.

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

STATE OF MAINE *vs.* LAFAYETTE P. SKOLFIELD, Appellant.

Construction of Public Laws of 1870, *c.* 310, § 2.

Taking fish by means of numerous single baited hooks and lines set in as many holes cut through the ice, and tended by one person, is a clear violation of Public Laws of 1870, c. 310, § 2, which prohibits fishing in Webb's Pond, otherwise than by "ordinary process of angling with single bait hook and line or artificial fly."

ON FACTS AGREED.

COMPLAINT was made, on the tenth day of May, 1873, to a trial justice of this county, that the respondent on the seventh day of the preceding month, at Weld, in said county, "did take and capture fourteen fish, to wit, trout and pickerel, on hooks set through the ice at Webb's Pond, in said Weld, the way and manner of taking said fish not being then and there the ordinary process of angling with single bait hook and line or artificial fly," &c. Mr. Skolfield was convicted and appealed to this court. He admitted that he caught fish as charged in the complaint, by cutting a number of holes through the ice of Webb's Pond and dropping several baited hooks attached to lines through said holes at once, there being a line to each hole, and all the lines were supported by sticks or brush on the ice. If this constituted an offence under the statute, the case is to stand for trial; otherwise, a *nol pros* is to be entered.

P. H. Stubbs, county attorney for the State.

H. L. Whitcomb, for the respondent.

VIRGIN, J. The policy of the legislature, as clearly manifested by the numerous statutes, general and special, enacted during the past few years, has been to encourage the propagation and culture of fresh water fish, and thus to replenish and re-stock our lakes, ponds and streams. Directed to the same general result, are those

statutes which prohibit the taking of fish, at any season of the year, by spear, grapnel, net and other like means of wholesale destruction.

The statute on which this complaint is founded, limits the mode of taking fish from "Webb's Pond" to the "ordinary process of angling with single bait hook and line or artificial fly." Private and Special Laws of 1870, c. 310. The act of 1868, c. 581, of the Private and Special Laws of that year, relating to fishing in Moosehead lake, defines the lawful mode as "the ordinary process of angling, with baited hook and line, or by surface fishing with the artificial fly." Private and Special Laws of 1872, c. 60, "angling with the single bait, hook and line, or artificial fly." All these statutes were intended to remedy the same mischief, and should receive the same interpretation, notwithstanding the slight difference in their phraseology and punctuation.

Taking fish by means of numerous single baited hooks and lines set in as many holes cut through the ice, and tended by one person, is a clear violation of the statute. *Case to stand for trial.*

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

THOMAS WENDALL, Junior, *vs.* WILSON GREATON.

Costs. Nuisance. Practice. R. S., c. 82, § 107 *and c.* 83, § 1.

In an action on the case for nuisance to real estate, brought in this court, full costs are to be taxed although the damages recovered are less than twenty dollars.

ON EXCEPTIONS.

CASE for nuisance to the dwelling house of the plaintiff in Farmington, declared to be owned and occupied by him, by the erection of a privy in proximity thereto, which was allowed to remain in an offensive condition. At the September term, 1873,

a verdict was rendered for the plaintiff, assessing damages at ten dollars and fifty-two cents. Upon appeal to him from the clerk's taxation, the justice presiding ruled that full costs, amounting to thirty-three dollars and thirteen cents, were properly allowed. The defendant excepted.

H. L. Whitcomb and *S. C. Belcher*, for the defendant.

Elias Field, for the plaintiff.

APPLETON, C. J. This is an action of the case, brought in this court, for a nuisance to the plaintiff's real estate, caused by an erection of the defendant, upon his own land, by which the plaintiff's real estate was diminished in value, and he was deprived of its comfortable enjoyment. The jury rendered a verdict for ten dollars and fifty-two cents damages, in favor of the plaintiff.

The plaintiff taxed full costs, which were allowed by the court. To this allowance the defendant alleges exceptions.

The writ sets forth the plaintiff's ownership and occupation of the dwelling house injuriously affected by the defendant's wrongful acts. It is well settled that the declaration is to be regarded as part of the pleadings. *Burnham* v. *Ross*, 47 Maine, 456.

It is not necessary under R. S., c. 82, § 107, and c. 83, § 1, that the action should be trespass *quare clausum*, to entitle the plaintiff to recover full costs. It is enough that it is an action which does and may concern real estate.

In *Williams* v. *Veazie*, 8 Maine, 106, in an action on the case for digging a trench and diverting water from the plaintiff's mill, full costs were awarded the plaintiff, though the damages awarded were less than twenty dollars. So, when case is brought for obstructing a water course by throwing lathe edgings in the stream. *Simpson* v. *Seavey*, 8 Maine, 138. In an action for carelessly setting a fire by which trees on the plaintiff's land were burned, full costs were allowed though the damages recovered were less than twenty dollars. *Mellows* v. *Hall*, 49 Maine, 335. Actions, which put in issue rights to real estate, though in form personal,

are regarded as real actions within the meaning of the Massachusetts statute regulating costs in appeals from the common pleas. *Plympton* v. *Baker*, 10 Pick., 473. In an action on the case for corrupting the water of a well on the plaintiff's land, by constructing a nuisance on the adjoining land, the plaintiff is entitled to full costs, though the verdict be for less than twenty dollars damages. The plaintiff is entitled to full costs.

Exceptions overruled.

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

THE RAILROAD COMMISSIONERS, Petitioners,

vs.

THE PORTLAND AND OXFORD CENTRAL RAILROAD COMPANY.

Constitutional law. Mandamus. Railroads. P. & O. C. R. R. charter. Act of 1871, *c.* 204.

Railroads are public highways, and are to be conducted in furtherance of the public objects of their creation.

It is not within the discretion of the directors of a railroad company ultimately and conclusively to determine the manner in which the corporation shall discharge the public duties enjoined upon it by its charter; that power and duty are devolved upon the state tribunals.

The writ of *mandamus* lies to compel a railroad company to perform the public duties imposed upon it by its charter.

Railroad charters are to receive such a construction as is reasonable and consistent with the public objects to be subserved by them.

The requirement in the eighth section of the charter of the Portland and Oxford Central Railroad Company, (Special Laws of 1857, c. 122,) that "the corporation shall be obliged to receive at all proper times and places and convey persons and articles" means that "the times and places" designated for the purposes named shall in fact be reasonable, consistent with and in aid of the right of the public to use the road.

Whether or not the times and places established by the corporation are of this description is ultimately to be determined by the state tribunals.

R. R. Commissioners *v.* P. and O. C. R. R. Co.

The Public Laws of 1871, c. 204, empowering the railroad commissioners to direct a railroad corporation to erect and maintain a depot at a specified place on the line of its road, determined by them to be proper and in accordance with the demands of public convenience and necessity, is constitutional, and not inconsistent with, nor an infringement upon, the charter of the Portland and Oxford Central Railroad Company.

The law under which the railroad commissioners located the station at Hartford Centre, on the defendant's railroad, being constitutional, and not in violation of the contract created between the State and the corporation by its charter, but in strict conformity therewith; and being a proper regulation of the public use of the road; the action of the railroad commissioners is, therefore, affirmed, and the corporation is directed to conform thereto.

ON EXCEPTIONS.

Daniel Parsons and other, responsible citizens of Hartford, in this county, on the fifteenth day of May, 1871, applied to the railroad commissioners of this State, agreeably to the provisions of the Public Laws of that year, c. 204, representing that public convenience and necessity required that a depot be established at Hartford Centre, upon the line of the Portland and Oxford Central Railroad. A hearing was had upon this petition on the thirteenth day of June, 1871, and the commissioners determined that the prayer thereof should be granted, and ordered the construction of a building particularly described by them, in a place by them designated, to be erected within thirty days after service of said order upon the president of said corporation, which was made on the twenty-ninth day of June, 1871. The company refused compliance with this order, which also directed the payment of the commissioners' fees, ($150,) and the other costs of the hearing, taxed at $34.63, whereupon the railroad commissioners, in their official capacity, in behalf of the State, present the present petition to this court, setting forth both these facts, and praying appropriate action thereon.

The defendants appeared by their president and claimed that the statute under which the aforesaid proceedings were had, Public Laws of 1871, c. 204, was unconstitutional, and an infringement of the defendants' charter, (Special Laws of 1857, c. 122, § 8) violating the obligation of the contract thereby created between the State and the corporators. He also asserted that the opinion and

judgment of the railroad commissioners was against the evidence and the weight of evidence, and that public convenience and necessity did not require the erection of a depot at the locality in Hartford indicated by them.

The justice holding the *nisi prius* term at which the petition was presented ruled *pro forma* that the respondent's answer was insufficient, and ordered that the prayer of the petitioners be granted as ordered by the railroad commissioners, it being agreed that, if the ruling were sustained, the court were also to determine whether or not the respondents were entitled to a hearing before this court as to the question of the necessity and convenience of the depot ordered at the spot designed. The respondents excepted.

F. O. J. Smith and *Geo. D. Bisbee*, for the respondents, presented no brief, relying upon *State* v. *Noyes*, 47 Maine, 189.

Samuel H. Blake, for the railroad commissioners, petitioners.

The railroad commissioners on the thirteenth of June, 1871, ordered a depot to be made at Hartford Centre, where there had always been one until it was sold and removed a short time before. The commissioners acted under Public Laws of 1871, c. 204. Both parties appeared, introduced witnesses and argued the case upon its merits.

If the act of 1871 changed the defendants' charter, this was within legislative authorization; the charter being granted subsequently to March 17, 1831. R. S., c. 46, § 17.

A general law like that of 1871, c. 204, does amend all existing charters, although the particular corporations holding them are not named and the charters become as if this were incorporated into them. *Roxbury* v. *B. & P. R. R. Co.*, 6 Cush., 424, 432.

The order of the commissioners was within the charter, as thus amended.

The Buckfield Branch Railroad charter, granted July 22, 1847, Special Laws of that year, c. 54, § 9, provided that the road shall "be obliged to receive at all proper times and places and convey" . . . . freight and passengers.

And the Portland and Oxford Central Railroad Company, into which the first was merged, was chartered April 15, 1857. Special Laws of 1857, c. 122.

Section 8 of this charter has the same provision as to times and places of receiving passengers and freight.

And now the corporation and the public differ as to the "proper times and places," and the legislature, by this act of 1871, merely created a tribunal, or authorized one already existing, to hear both sides, and decide whether this was a "proper place." Just as in the case of any existing right, it confers jurisdiction of it upon such tribunal as it pleases, without impairing or increasing the right; or directs the mode of proceeding, by an action of assumpsit or case, or changes the kind of action to try and decide the right.

Besides, this charter of 1857, § 11, reserves in so many words the right to the legislature at all times "to correct and prevent all abuses of the same."

The act of 1871 is the mode the legislature adopted to "correct" the abuse of the charter in this respect. It does not "impose any other or further duties;" it only provides a way in which the discharge of old duties should be enforced.

Nor is the act of 1871, an "altering" of the charter within the prohibition of the closing paragraph of § 11; it is only an amendment under R. S., c. 46, § 17, at most; and a mode the legislature adopted to "inquire into the doings of the corporation," and the action it adopted "to correct and prevent all abuses" of chartered privileges. It is not an "alteration" within meaning of the closing sentence of § 11 of the charter, because it only provides the remedy for neglect of a duty already imposed. And there is no "express limitation" in this closing paragraph upon the mode and means the legislature might see fit to adopt to enforce the duty required of the corporation by § 8, "to receive passengers and freight at all proper times and places."

Again, although a railroad may be a private corporation, it is peculiar in this, that it is for public uses. The legislature has

never parted with the right to regulate the public uses of railroads. It is the duty of the State to take care of the public convenience and necessities of its citizens, and it cannot divest itself of the jurisdiction to do so, if it would, by any law or charter. The legislature has jurisdiction to the extent of the "public uses" over all corporations by the very law of the self-preservation of the State. The legislature might adopt any mode of regulating "public uses" not in conflict with the constitution; but the mode prescribed by the act of 1871 is not in conflict with the constitution, or even with the charter of this road. Section 11 of the charter is silent as to how the "proper places" named in § 8, shall be enforced. Nor has the road any further right to a hearing upon the merits.

The "hearing" provided for by R. S., c. 51, § 75, is a hearing "thereon" that is upon the "petition" of the commissioners to the court—and this petition is "to enforce compliance as provided by said § 75"—(see § 3, act of 1871) and has no other purpose—and hence it excludes a hearing upon the original question of necessity and convenience, —that had been passed upon and decided under act of 1871, without any provision for appeal. Nor can it reasonably be said the legislature intended an appeal from the railroad commisioners to the supreme judicial court upon the local question of the necessity for a depot. Section 75 was for an entirely different purpose, viz: for repair of roads—but it is appealed to here by act of 1871, for the single purpose of enforcing compliance with the order of the commissioners—not of reviewing merits of their decision.

State v. *Noyes*, 47 Maine 189, differs from this among other things, because there,

I. The legislative department of the government assumed judicial functions. Here, the legislature provides a tribunal to hear and decide, as in other cases of disputed duties or rights.

II. That case was to promote individual convenience; this, to answer the demand of public convenience and necessity.

III. That statute interfered with the running of trains—as to time—without pretence of abuse of franchise; this establishes a

mode to enquire whether there has been an abuse of the franchise, and a means of remedying any abuse so found. The statute becomes operative only in case of neglect by the corporation "to receive passengers at proper places," which would be an abuse of the franchise; and if the corporation do not neglect so to receive, there is no authorization for the commissioners to interfere. There is no new duty imposed thereby; nor can there be any action under the statute except upon assumption of an abuse of its power by the corporation.

IV. That statute interfered with the rules and regulations of their charter, § 6, established by the directors; this meddles with no regulations of any company, but only enforces a duty the charter required the company to perform.

This act of 1871 is no more than every day's legislation attempts—that is, to compel persons to perform their duties. It requires the company to keep and perform the obligations of the charter, by which it exists, and imposes nothing more upon it.

Suppose that the legislature should grant a charter to a railroad company across the State, in consideration of its public uses, (as is the inducement in all cases) and the corporation thus established neglects to establish any depot between Vanceboro and Kittery, and refuses to receive passengers or freight anywhere between these two points. (Yet the charter might be just like this): This would be an abuse of its chartered privileges; a disregard of the "public uses," that were the inducement to its creation—and the mere statement, it seems to me, carries with it a refutation of the hypothesis of the defendant corporation. I submit that State sovereignty should dominate over corporate sovereignty, and the public be placed in the enjoyment of those "uses" to which they are entitled as the consideration for the charter.

Dickerson, J. In pursuance of the authority conferred on them by chapter 204 of the Public Laws of 1871, the railroad commissioners, upon petition therefor and a hearing thereon, decided that public convenience and necessity required the erection

and maintenance of a depot for freight and passengers upon the Portland and Oxford Central Railroad, at Hartford Centre, and ordered the corporation to build such depot within thirty days from the receipt of the order. The corporation refused to comply with the order, and the railroad commissioners filed this petition, praying that this court will enforce a compliance therewith.

The duty of governments to provide facilities for public travel and transportation at the public expense, by means of roads, turnpikes, canals and other artificial structures, has been recognized and discharged by all civilized governments from the earliest times. Governments soon learned that such facilities could not be provided by private enterprise alone, and that nothing but the exercise of the right of eminent domain and the power of taxation could satisfy the public necessities in this behalf. In the progress of events, however, as business and population increased, and wealth accumulated, it was found that this function of government might in many cases, be conveniently and safely performed by private individuals, associated together under a grant from the government, the corporation giving the public the right to use the highway built by it, in consideration for the franchise received.

Among the instrumentalities thus employed railroads stand pre-eminent. Indeed, they have come to be a public necessity scarcely exceeded by the public wants that evoked those ruder means of transit in earlier times. They are open for the public use without discrimination. To the State's guaranty of the right of public use are superadded heavy pecuniary liabilities of the corporation in case of a breach of this right. The requirement for the payment of fare does not, by any means, conflict with the right of public use. The fare is the consideration for the service performed, whether done by the State directly, or by a corporation under a grant from the State; it is simply a substitute for the tax rendered necessary when the State builds and conducts railroads at the public expense; the corporation, upon the payment of the fare, is under the same obligation to render the re-

quired service for the public, that the State would be, if railroads were free, and conducted by State authority. Nor does the ownership of railroads, whether it be in the State or a private corporation, affect the nature of their use, since in either case the function to be exercised and the uses to be subserved are public. Neither does it make any difference in this respect that private individuals cannot use their own rolling stock upon railroads. The use is one thing, and the mode of use, is another. The use, being public, does not become private from the mode of use; that is exclusively within the discretion of the legislature, and whether the railroad corporation, the public, or the State have authority under the charter to put on and use rolling stock, the use of the road is nevertheless public.

The public character of railroads further appears from the authority granted to them to exercise the right of eminent domain. No such right is ever granted to banking, manufacturing or insurance corporations, or to academies, colleges, or hospitals established and conducted by private individuals, or private corporations. It is solely because the use of railroads is public that this distinction is made. So, too, upon the same ground of public use, the legislature may authorize municipal corporations to aid in building railroads, by taking stock in railroad corporations; and paying for the same by municipal taxation, a power denied to all municipalities in respect to purely private corporations.

The conclusion, therefore is, that railroads, whether built, owned and conducted by the State or private corporations, and whether exacting tolls, or free, are public highways. *Olcott* v. *Supervisors of Fond Du Lac*, 16 Wallace, 678; *Belfast & Moosehead Lake R. R. Company* v. *Brooks*, 60 Maine, 569; *Allen* v. *Jay*, 60 Maine, 124.

In considering the right of the public to the use of railroads, and the public interest resulting from this right, it should not be overlooked that the payment of fares is more than compensated, in general, by the reduced expense of travel and transportation by this mode over other means of conveyance, in addition to the

other advantages, public, private and local, resulting from the establishment of railroads. This is obvious from railroads so soon superseding the previously existing modes of intercommunication. This beneficial public interest is intended, among others, to be secured under the franchise granted to railroad corporations; and the public have an interest that this result should be attained and maintained by them.

In the circumstances of their origin, and in their powers, uses and duties railroad corporations are clearly distinguishable from other merely private corporations; and, unless we keep these characteristics in view when we come to determine the rights, powers and duties of such corporations, and the authority, express, implied or reserved, of the legislature and court in respect to them, we shall run the hazard of confounding dissimilar distinctions and committing grave errors. What analogy, it may be asked, do manufacturing, mining and other like corporations, evoked by no public necessity, exercising no sovereign powers, subserving no public uses, and subject to no public duties, bear to railroad corporations that both should alike have the same legal status? Do not these distinguishing characteristics make railroad corporations *quasi* public corporations in respect to the authority of the court and legislature to determine and enforce the public duties enjoined upon them? If not, what redress have the public for a neglect, infringement or violation of those duties?

The recent decisions of this court affirming the constitutional power of the legislature to authorize municipal corporations to aid in the construction of railroads, and denying its power to authorize such corporations to aid manufacturing and other purely private corporations or parties, and, also, those requiring railroad corporations to protect the passengers on their road, and making them liable for the negligence and misconduct of their servants in this behalf, as well as that further decision prohibiting railroad corporations from making injurious discriminations with respect to the persons or corporations entitled to do business over their road or the business to be done thereon, enunciate principles of great im-

portance for determining the various questions, not unlikely to arise in respect to the relations subsisting between railroad corporations and the public, the powers granted and the public duties enjoined under their charters, and the constitutional authority of the court and legislature concerning them. These decisions, it is believed, lay the foundation for a harmonious superstructure of judicial authority, upon a subject replete with apparent intricacies and antagonisms. While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted. In cases of apparent conflict between the rights and powers conferred and the duties imposed, the solution may oftentimes be rendered easy by regarding the admitted right of public use as the touchstone of judicial interpretation. *Belfast & Moosehead Lake R. R. Co.* v. *Inhabitants of Brooks*, ante; *Allen* v. *Jay*, 60 Maine, 124. *Goddard* v. *Grand Trunk Railway Co.*, 57 Maine, 202. *N. E. Express Company* v. *M. C. R. R. Co.*, 57 Maine, 194.

Railroad charters are contracts made by the legislature in behalf of every person interested in anything to be done under them. In consideration of the franchise they receive from the State, railroad corporations agree to perform certain duties toward the public. The power of determining those duties, and enforcing their performance is vested in the appropriate tribunals of the State. Without such power, there would be danger that railroad corporations, from the number and extent of their operations, might become the most powerful instruments of oppression in our whole system of administration. Being creatures of the law, entrusted with the exercise of sovereign powers to subserve public necessities and uses, they are bound to conduct their affairs in furtherance of the public objects of their creation. "It is true," observes Shaw, C. J., in *Worcester* v. *Western R. R. Co.*,4 Metc., 564, "that the real and personal property necessary to the establishment and management of the railroad is vested in the corpora-

tion, but it is in trust for the public. The company have not the general power of disposal incident to the absolute right of property; they are obliged to use it in a particular manner and for the accomplishment of a well defined public object."

In order to enforce such use of their franchises the writ of *mandamus* has been held to be an appropriate process. "This writ," says Lord Mansfield, in *Rex* v. *Barker*, 3 Burr, 1267, "ought to be used upon all occasions when the law has established no specific remedy, and where in justice and good government there ought to be one." The value of the matter or the degree of its importance to the public policy is not scrupulously weighed; if there be a legal right, and no other specific remedy, this should not be denied. This writ lies to compel persons or corporations to do a certain specific act, as being the legal duty of their office, character or situation. Ang. & Ames on Corp., 694.

In *State* v. *Railroad Company*, 29 Conn., 528, the court say "all jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by *mandamus* to do so." In that case the court compelled the company to run its cars over its track to a railroad station that it had discontinued.

This writ lies to compel a railroad company, bound by act of of parliament to set out their deviations and make their compulsory purchases within stated periods, to do those acts within the times limited, also, to compel a company to reinstate and lay down again the railway it had taken up, or a water power company to erect and maintain a bridge at its own expense, rendered necessary by extending its trench across the highway, at the suit of the attorney general where the public interests are involved, or to compel a railroad company to keep railroad crossings in repair, or to remove obstructions to navigation, caused by the improper manner in which the road is built. Ang. & Ames on Corp., 711 and 713; *State* v. *Gorham*, 37 Maine, 461; *State* v. *N. E. R. R. Co.*, 9 Pick., 212.

It has also been held, in numerous cases, that ample power over

this subject exists in the legislature. In *Buckman* v. *Saratoga*, 3 Paige, 34, the chancellor says, "the legislature may from time to time regulate the use of the franchise and limit the amount of toll which it shall be lawful to take in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road."

The court in Massachusetts had this subject under consideration in *Commonwealth* v. *Eastern R. R. Co.*, 103 Mass, 258, and sustained the constitutionality of an act of the legislature compelling the company to establish a flag station on its road and erect a station house there, at which at least two trains each day and each way should stop.

The language of the court in that case is peculiarly appropriate in the case at bar. "If," say the court, "the directors of a railroad were to find it for the interest of the corporation to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or to do any business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodations for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary powers which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute." It might be added that cases may occur where railroad directors might do this from motives of resentment or ill will, or a pecuniary interest in building up the towns or cities at the termini of the road, to the injury of intervening localities.

The charter of the Portland and Oxford Central Railroad Company, § 1, provides that "said corporation . . . shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles for the transporta-

tion of persons and articles, and be obliged to receive, at all proper times and places, and convey the same when the appropriate tolls therefor shall be paid and tendered."

By § 11, of the charter, it is provided "that the legislature shall, at all times, have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchises herein and hereby granted may have been used and employed by said corporations, and to correct and prevent all abuses of the same . . . but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered, limited or restrained, without the consent of the corporation, except by due process of law."

By § 6, the president and directors, under direction of the stockholders, have authority to exercise all the powers granted to the corporation for locating, building, completing and running the road, and all such power as may be necessary and proper to carry into effect the objects of the grant.

The duty of the corporation in respect to the subject under consideration is enjoined in that provision of the charter which requires it "to receive at all proper times and places, and convey persons and articles." It is contended in behalf of the corporation, that the power to determine what are "proper" times and places for the purposes stated is discretionary with the directors, and that their decision is conclusive and final; and, on the part of the State, it is claimed that the duty thus enjoined upon the corporation is imperative and absolute, and that the State has the power, through its appropriate tribunals, to determine whether it has been performed, and to enforce a performance, if there has been none, or only a partial one.

In determining this question, it should be remembered that the object of the grant was to secure the construction of a public highway, and that, to be serviceable to the public, such highway must be accessible and available at other places than the termini, and oftener than once a month or once a week, or indefinitely and irregularly. The charter must have a construction reasonable,

and consistent with the public objects to be promoted under it; and not such an one as tends to impair, defeat or subvert these objects.

By the same section that contains the provision in question, the corporation is required "to have its railroad in good repair and a sufficient number of suitable engines, carriages and vehicles for the transportation of persons and articles."

The language of the charter is not, that it shall be optional with the corporation what number and kind of engines, carriages and vehicles to furnish, at what times and places to receive and convey persons and freight, and what state of repair to keep the road in; or that it shall put in such rolling stock as it may deem "suitable and sufficient," build such depots as it may think "proper," and keep the road in such repair as it may pronounce "good;" but the meaning of the language is that the several things required to be done shall respectively be, "suitable and sufficient," "proper" and "good;"—in other words, that they shall in fact reasonably be of the description specified. The qualifying words do not change the rights of the parties under the charter. The duty of the corporation and the rights of the public in these respects would have been the same as they now are, if the charter had simply required the corporation to keep its road in repair, furnish it with rolling stock, and receive and convey passengers and freight along the line of its road. Under such provisions of the charter, it would be the duty of the corporation to keep the road reasonably safe, provide such rolling stock, establish such depots, and operate the road in such a manner as would afford the public reasonable safety and dispatch in the transaction of business upon the road. The duties enjoined upon the corporation are ministerial duties, to do and perform what the public convenience and necessity reasonably require, in respect to the particulars specified. Not is it within the discretion of the directors to determine ultimately what these public ministerial duties are, or the manner in which they are to be performed; to hold so would be to concede to the directors the power to promote the private interests of

the corporation, by subverting the public objects to be subserved by the charter; the power both of determination and enforcement are necessarily vested in State authority.

It has been repeatedly held that the general duty of municipal corporations "to keep their highways in repair" is ministerial, and that a writ of *mandamus* lies to compel its performance, because it is a ministerial, in contradistinction from a discretionary duty. *A fortiori*, the duties enjoined under the eighth section of the charter of the defendant corporation are ministerial, since to their public character is superadded the obligation of performance, resting in contract. Indeed, our whole system of legislative supervision, through the railroad commissioners, acting as a State police over railroads, is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and therefore liable to be thus enforced. Dillon on Mun. Corp., 293. *Uniontown* v. *Commonwealth*, 34 Penn. St. R., 293; *Hannah* v. *Covington*, 3 Metc. (Ky.) 494.

If the corporation is the ultimate judge of its duty to the public in respect to the particulars under consideration, the latter are without power to prevent, or remedy to recover compensation for, injuries to persons or property resulting from the failure of the corporation to maintain, equip and operate its road according to the requirements of section eight of its charter. An action at law to recover damages sustained from such cause, even against a responsible corporation, would be unavailing, since the corporation would offer the same defence to such action that is now made to this process.

The construction of the charter set up in defence is obviously against public policy. Suppose, for illustration, that the Eastern Railroad Company, now understood to have control of the Maine Central Railroad, with like provisions in its charter, should decide "to receive and convey persons and articles" on its railroad only at Bangor and Boston, what would the right of public use of that road be worth to the city of Portland and the people residing along its line, remotely from and between those cities? And what

would be the effect of this arrangement upon the business of those cities, and the intervening towns and cities respectively? Would not such illegal action be a substantial denial of the right of the latter to use the road, and tend to paralyze their business for the benefit of the former?

To make railroad directors the sole and ultimate judges of "the times and places" when and where the corporation will "receive and convey persons and articles" on the line of its road, would be to give railroad corporations the power to control the markets of the country, to create a surplus, or a famine, in agricultural, mineral and other products; to raise or reduce the wages of labor; and to promote, or retard, at pleasure, the growth, prosperity and welfare of towns, cities and country. A construction that leads to such results is inconsistent with the nature of the grant to the defendant corporation, contrary to its spirit, and subversive of the public objects it was intended to promote. The legislature will not be held to be so indifferent to the trust committed to it, as to divest itself and the State tribunals of authority over the manner in which the franchises granted by it are to be exercised in the important particulars under consideration, unless its intention to do so is expressed in specific terms.

The charter of the corporation in question contains no such expression. On the contrary, it explicitly negatives such intention, in the provision it makes for legislative inquiry into the manner in which the privileges and franchises granted have been exercised and employed, with a view "to correct and prevent all abuses of the same." And what more fitting occasion for such inquiry could there be than the public grievance we are considering?

This provision of the charter contemplates and sanctions the legislation of 1871 upon this subject. That act does not "enforce any new duties, liabilities or obligations" upon the corporation, but simply provides a remedy for enforcing the performance of existing ones. It does not add an iota to the burdens devolved upon the corporation by its charter, but it simply provides a mode of inquiring into the manner in which the corporation has exercised its privileges and franchises with respect to the right of the

public to use its road, and if need be, "to correct and prevent its abuses" of its franchise in this respect. Instead of inquiring into and correcting the alleged abuse, itself, as the legislature of Massachusetts have done in several instances, with the subsequent sanction of the supreme court of that State, the legislature, avoiding the imputation of exercising judicial functions, empowered an existing tribunal to determine that question; a tribunal, it may be observed, quite as likely to afford the parties a full and impartial hearing, and to render as intelligent a decision as would be secured by the direct action of the legislature. The constitutional power of the legislature to confer such jurisdiction and authority over this subject upon the railroad commissioners is unquestionable, since the legislature, as we have seen, has the right to provide for the correction and prevention of all abuses of the franchises of the corporation.

While, therefore, we are by no means of the opinion that the public would have been without remedy in respect to the grievance complained of, through the supreme judicial tribunal of the State, if the act of 1871 had not been passed, we see nothing in that act that conflicts with the rights of the corporation represented by the defendant. On the contrary, we think that the charter of that corporation contemplates and authorizes that legislation, which provides a constitutional and convenient mode of preventing and correcting the abuses of railroad corporations in respect to the public uses and benefits they were intended to subserve and confer, and to the full enjoyment of which the public have a right to be admitted.

It is suggested that the case of *State* v. *Noyes*, 47 Maine, 205 and 209, is in conflict with the conclusion to which we have arrived in the case at bar. We think otherwise. Two questions were decided in that case:

I. That inquiries into the alleged abuses of the privileges and franchises granted to railroad corporations, in given cases, come within the exclusive jurisdiction of the judicial department of the government. That objection does not lie here, as the legislature did not undertake to decide the question in controversy

itself, but conferred that power upon an existing tribunal. Besides, the supreme court in Massachusetts, as it must be conceded with great force of reasoning, both before and since the decision in *State* v. *Noyes*, have decided that question otherwise, fully sustaining the constitutional authority of the legislature to decide the question of alleged abuse itself, without the intervention of the judiciary department. *Commonwealth* v. *Eastern R. R. Co.*, ante; *Roxbury* v. *Boston & Providence R. R. Co.*, 6 Cush., 424.

II. The other question decided in *State* v. *Noyes*, was that the act of the legislature, modifying the rules and regulations of the company touching the time of departure of trains, was inconsistent with the provision in the charter authorizing the directors to establish rules and regulations upon that subject, there being no abuse in the exercise of this authority by the directors. The directors in the discharge of their duty in this respect had fixed the time for the departure of trains at the place in controversy. It was not pretended that these were unreasonable, or established in bad faith. The corporation, moreover, had a depot at that point for receiving and discharging freight and passengers, suitable and sufficient to accommodate the public in that vicinity. The act of the legislature, requiring the train first arriving at the crossing to wait twenty minutes for the arrival of the train upon another road, was held to be a modification of the regulations made by the directors under authority of the charter. In the case at bar, there is no modification of chartered rights by the legislature, but simply an inquiry instituted into an alleged abuse of the company's franchise, with judicial powers conferred upon an appropriate tribunal to enforce the performance of the public duties enjoined by the charter, if such abuse shall be found to exist. When carefully examined, the case of *State* v. *Noyes* will be found to be not inconsistent with the result to which we have arrived in the case under consideration.

The case shows that there was a full hearing of the parties, and a thorough examination of the case by the railroad commissioners, and we see no reason for a further hearing at the bar of this court. *Exceptions overruled.*

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

CHARLES P. BARTLETT *vs.* DAVID A. CORLISS.

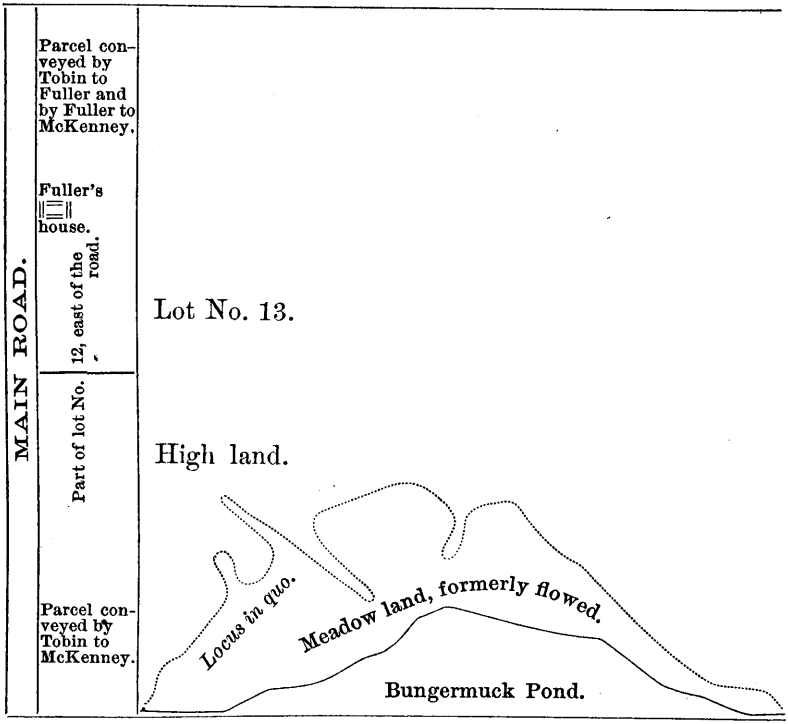
Construction of the phrase "exclusive of water," used in a deed.

The issue in this action of trespass *qu. cl.* was as to the construction to be given to the deed by which one McKenney, the defendant's grantor, obtained title to premises alleged by the defence to include the *locus in quo*. Harvey Fuller, owning a lot numbered thirteen and the northerly part of so much of the contiguous lot, numbered twelve, as lay easterly of a certain road, and between the road and No. 13, conveyed to said McKenney this northeasterly part of lot No. 12, "and enough off of the west end of No. 13 to make," with a parcel of the southeasterly part of No. 12 already owned by McKenney, "fifty acres, *exclusive of water*." McKenney subsequently transferred to Corliss the estate which passed by this conveyance. *Held*, that the land at the southwesterly corner of lot No. 13, covered with water, was not excluded from the conveyance, but only from the computation, in ascertaining the fifty acres; that, in taking off the west end of lot No. 13, the line must be drawn from its northerly to its southerly boundary, and parallel to its westerly side; and that when, by the removal of an old dam, the water receded, the land thus uncovered (being the *locus in quo*) continued the property of the defendant: nor could parol testimony be received to change this construction of the phraseology of the deed.

ON REPORT.

TRESPASS *quare clausum*, for cutting and carrying away grass from lot numbered thirteen in the sixth range of lots in Hartford, in this county, "on the flat or meadow land." The defendant justified under a claim of title in himself to this land, derived from Harvey Fuller through Silas McKenney. The sufficiency of this justification depended entirely upon the construction to be given to this language in the descriptive part of the deed from Fuller to McKenney, viz.: "said land lying on the easterly side of the road running by said Fuller's house southerly, and is the same which was conveyed to me by deed from Joseph Tobin, being a part of lot number twelve in the fifth range, *and enough off of the west end of lot number thirteen in the sixth range, including a certain piece which the said Tobin conveyed to the said McKenney by deed, to make fifty acres, exclusive of water*, and for further par-

ticulars referring to the above mentioned deed." The relative situation of the road, lots and water mentioned will be better understood, perhaps, from the accompanying plan.



Tobin's deed to McKenney was given March 1, 1828, and that to Fuller August 27, 1827, and Fuller's to McKenney (from which the above quotation was made) February 16, 1831. Tobin conveyed to Fuller a parcel of land sixty-three and a half rods long upon the road and on the line between lots twelve and thirteen, and thirty-seven rods wide, that being the distance from the road to No. 13; and to McKenney he conveyed the other parcel of the same size; so that there were little over twenty-nine acres and fifty-eight rods in so much of lot twelve as lay east of the road; requiring nearly twenty acres and one hundred and two rods from

lot No. 13 to make up fifty acres, had not any of it been overflowed.

The land from which the grass was taken was overflowed from 1819 to 1869 by means of a dam, used in operating mills below, which was removed in the latter year, and, by the consequent recession of the waters, this became meadow and grass land. It was conceded that if the land conveyed, by the deed of Feb. 16, 1831, from Fuller to McKenney, extended to the south line of lot No. 13, at that date covered by water, the grass was cut upon the defendant's own land. The court were to enter such judgment as the facts required. The plaintiff offered their depositions and some parol testimony to show that Messrs. Fuller and McKenney did not intend that any portion of the land covered by water should be conveyed by the former's deed to the latter, but agreed upon a hemlock tree as the southernmost point to which McKenney should hold in lot 13, which evidence was to be considered only in case it was legally admissible.

Pulsifer & Bolster, for the plaintiff.

Both parties claim title to the land in controversy by mesne conveyances from Harvey Fuller, who formerly owned the whole of No. 13 and all of 12 east of the highway; but the contest must be decided by the effect given to Fuller's deed of February 16, 1831, to McKenney. The description it contains, so far as it relates to No. 13, is ambiguous and uncertain as to courses, distances, bounds, location and quantity of land taken, so that the lines cannot be positively identified and traced upon the face of the earth. Hence the declarations and contemporaneous acts of the parties are admissible to show what land was intended to be embraced in the deed, and what lines and bounds they established and located. *Patrick* v. *Grant*, 14 Maine, 233; *Moody* v. *Nichols*, 16 Maine, 23; *Emery* v. *Fowler*, 38 Maine, 102; *Bradford* v. *Cressey*, 45 Maine, 9; *Knowles* v. *Toothaker*, 58 Maine, 172; *Kellogg* v. *Smith*, 7 Cush., 382.

E. G. Harlow, for the defendant.

Effect is to be given to the intention of the parties. *Pike* v.

Monroe, 36 Maine, 309; but this is to be gathered from the deed, if possible. *Long Wharf* v. *Palmer*, 37 Maine, 379; *Deshon* v. *Porter*, 38 Maine, 289.

Patent ambiguities admit of no parol explanation; and latent ones only when they arise *dehors* the record. Chitty on Contracts, 104, 105. The receding of the water carried the line to the original pond. *Hathorn* v. *Stinson*, 12 Maine, 183.

We are entitled to a strip off of the west end of No. 13, of uniform width, sufficient to make up fifty acres, without including the flowed land in the computation. The deed states this in clear and unambiguous terms, and parol testimony cannot be heard to control or vary it.

DICKERSON, J. This case calls for a construction of the description of the premises conveyed by the warrantee deed of Harvey Fuller to Silas McKenney, dated February 16, 1831, under which the defendant claims title. The wording of the description is as follows: "said land lying on the easterly side of the road running by said Fuller's house southerly, and is the same which was conveyed to me by deed from Joseph Tobin, being a part of lot number twelve in the fifth range, and enough off of the west end of lot number thirteen in the sixth range, including a certain piece which the said Tobin conveyed to said McKenney by deed, to make fifty acres, *exclusive of water*, and for further particulars referring to the above mentioned deed."

This description is to have such construction as the parties intended when the deed was given, if that is not repugnant to the rules of law; and their intention is to be ascertained primarily and mainly from the language used.

The reference in the description to the two Tobin deeds makes those deeds a part of the deed in controversy. It appears from an inspection of them that the boundaries of the respective parcels of land they convey are fully and completely given. There is, therefore, no difficulty in determining the quantity of land conveyed by them. Thus far there is no such uncertainty or ambig-

uity in the description as to allow the introduction of parol evidence to show the intention of the parties, since what in law can be made certain is to be regarded as certain.

Both parties proceed upon the assumption, quite apparent from the description of those two parcels, that the quantity of land they contain falls short of the call in the deed under consideration—fifty acres. The deed provides that this deficiency is to be made up by taking "enough off of the west end of lot number thirteen in the sixth range, exclusive of water" for that purpose.

We do not think that this clause in the description is either unintelligible, or ambiguous. In the first place the parcel of land to be taken from lot thirteen is to come "off of the west end of the lot;" that is, not from a part, but from the whole of the west end of the lot. It follows from this that the strip thus taken must be of equal width along the whole line of the west end of that lot, as there is nothing in the deed to indicate an inequality of width. In the next place, this strip must be of sufficient width to contain land enough "exclusive of water," which added to the other two parcels shall make fifty acres. The qualifying phrase, "exclusive of water," does not signify a boundary, or a limitation of the quantity of territory taken from lot thirteen by the deed, but the exclusion of that part of the land so taken, which is flowed with water, from the computation in making up the fifty acres necessary to answer the call in the deed. The meaning is the same as if that clause read, "besides," or "not computing," instead of "exclusive of," the water.

By the deed under consideration, the defendant's grantor acquired title to a strip of land extending across the whole of the west end of lot thirteen in the sixth range, of equal and sufficient width, besides the land therein flowed by water, to make fifty acres when added to the other parcel conveyed by the same deed, and to the land previously conveyed to the said grantee by Joseph Tobin.

This construction is not repugnant to any of the rules of law, gives effect to the intention of the parties, and establishes a boundary readily ascertainable from the data given in the deed.

Under this construction the defendant's title, acquired from the grantee of the deed under consideration extends to the south line of lot thirteen, making him the owner of the land where the alleged trespass was committed.

Judgment for the defendant.

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

FREDERIC M. BARTLETT *vs.* HAMLIN GRANT PLANTATION.

Assumpsit. Public Laws of 1868, *c.* 225, § 6. *Soldier. Towns.*

Military services rendered by a volunteer, without any contract between him and the town of which he is a resident relative thereto, will not raise any implied promise on the part of the town to pay for them, nor entitle the soldier to any share of the surplus received by the town from the State, if he did not count upon that town's quota; and an order given by its assessors therefor, and accepted by the treasurer, is without adequate consideration, and is void in the hands of a subsequent purchaser.

ON FACTS AGREED.

ASSUMPSIT to recover $52.83, the amount of an order drawn by the assessors of defendant plantation upon its treasurer, and accepted by him June 13, 1870, in favor of Jonathan Kimball or bearer, purchased by the plaintiff of the original payee, to whom it was given on account of the military services of his son, a citizen of that plantation, who enlisted prior to July 2, 1862, and died within six weeks after joining the army, leaving his father as his sole heir. Six persons resident in this plantation enlisted, four of whom counted upon its quota, but this plaintiff did not so count. The plantation received $317 from the State under Public Laws of 1868, c. 225, § 6, for one-sixth part of which the aforesaid order was given. This case is distinguished from *Pearson* v. *Inhabitants of Hamlin's Grant*, 60 Maine, 157, only by the giving and purchase of this order.

H. C. Davis, for the plaintiff.

D. Hammons, for the defendant.

DICKERSON, J. The statute of 1868, providing for the equalization of municipal war debts and their reimbursement by the State, gives no rights, and confers no obligations in relation to any soldiers not furnished by the municipalities respectively. *Pearson* v. *Inhabitants of Hamlin's Grant*, 60 Maine, 158.

It does not appear that the plaintiff was enlisted at the instance of the defendant plantation, or that he was put upon its quota, though he was a resident thereof, at the time of his enlistment.

The giving of the order in suit to the plaintiff by the assessors of the defendant plantation does not render it liable to pay him any portion of the trust fund received from the State to which he is not otherwise entitled. *Plaintiff nonsuit.*

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

ALPHEUS S. BEAN *vs.* A. AND ST. L. R. R. COMPANY.

Case. R. S., c. 51, § 32. Railroads.

The defendant corporation is holden, under R. S. of 1857, c. 51, § 38, to make compensation for damage done by a fire communicated from an engine used upon their track by the Grand Trunk Railway Company, to whom the defendants leased their railroad.

The statute authorizing the lease expressly provides that nothing in such lease shall exonerate the defendants from any duty or liability imposed by their charter or any general law of the State; and the liability to make compensation to adjoining proprietors for damage done by fires so set to property along their route is one of these liabilities, from which they are not relieved. That liability was imposed by Public Laws of 1842, c. 150, upon the corporation using the engine, and the verbal change made in the revision and condensation of 1857 does not change the signification.

Under these statute provisions the use of the engine by the defendants' lessees must be deemed a use for which they are responsible, within the meaning of c. 51, § 38.

On exceptions.

Case to recover for the destruction by fire, communicated from a locomotive engine used upon the defendants' track, of the plaintiff's store and contents situated in Bethel, near said track. The defence was, that the defendants were not using the locomotive which occasioned the injury, and they asked to have the jury told that, for that reason, they were not liable in this action, but this instruction was refused and a verdict rendered against them.

D. Hammons, for the plaintiff.

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

Barrows, J. The plaintiff's stock of goods situated in a store standing on a lot adjoining the line of the railroad owned by the defendant corporation was consumed March 25, 1868, by a fire which was communicated by a locomotive engine running on their road. Yet the defendants say they are not liable for the loss because, they say, they were not using the engine. It appears in testimony, that in March, 1868, and for a long time previous to the trial, the Grand Trunk Railway Company of Canada had been operating the defendants' railroad exclusively, and that their locomotives were running over the road when the plaintiff's goods were burnt. The same state of facts existed when, in 1855, the case of *Stearns* v. *The A. & St. L. R. R. Co.*, 46 Maine, 95, arose. The fire which caused the loss, in that case, was communicated from an engine bought and brought on to the line, and used, by the Grand Trunk Railway Company, and never in the possession of the defendants. That case was argued in his usual thorough and elaborate manner, before the supreme court of this State, in 1858, by the late Hon. Phinehas Barnes, an able counsellor, who never failed in the faithful performance of all his duties, as well to the court as to his clients.

But the court, affirming the doctrine previously enunciated by them in the case of *Whitney* v. *A. & St. L. R. R. Co.*, 44 Maine, 362, held that these defendants could not relieve them-

selves from liabilities imposed upon them by the charter of their company, or the general laws of the State, by merely transferring their responsibilities to a foreign corporation, inasmuch as the act authorizing the defendants to make a lease of their railroad (Special Laws of 1853, c. 150, approved March 29, 1853) expressly provided in the first section that "nothing contained in this act or in any lease or contract that may be entered into under the authority of the same, shall exonerate the said company, or the stockholders thereof, from any duties or liabilities imposed upon them by the charter of said company, or by the general laws of the State." In substance they decided that the home corporation, which had received a grant of its franchise from the State, and had had the right of eminent domain exercised in its favor, must be primarily responsible for any injuries that might accrue to our own people from the exercise of the corporate privileges granted to these defendants, whether by themselves or by their lessees, and that the residents of this State, seeking redress for such injuries, should not be turned over to a foreign corporation, against whom the remedy by any process of our courts might be doubtful or imperfect. Accordingly, in Stearns's case, they held the Atlantic & St. Lawrence Railroad Company liable for the damages caused by a fire communicated from a locomotive belonging to and used by their lessees, the Grand Trunk Railway Company.

The defendants' counsel do not ask us to reverse that decision. They seek to distinguish this case from that, on two grounds. They say it does not appear here that there was any lease to the Grand Trunk Railway Company, nor how nor why they were operating the railroad of the defendants and using upon it the locomotive which set the fire. And they say that the phraseology of the statute creating the liability was changed in the revision of 1857, so that it rests now only upon the corporation using, instead of the corporation owning, the locomotive. The omission of the lease and the special act authorizing it does not better the defendants' position, for it would be a mockery of justice for the court to overlook matters so notorious and so much akin to public history, with

a tacit admission of the existence of which the whole trial at *nisi prius* must have proceeded. There is no question but that the Grand Trunk Railway Company were operating the road with the consent of the defendants. Why should we send the case to a new trial, merely in order that there may be formal proof of that touching which no question was raised, and which all parties must have been understood as conceding? The duty of the defendants' counsel to the court, as well as to the opposite party, required them to raise the question on the spot if they ever intended to rely upon it. *Lawrence* v. *Chase*, 54 Maine, 196; *Longfellow* v. *Longfellow*, Id. 240.

Has there been any actual change in the meaning of the statute creating the liability since the case of Stearns v. these defendants arose? We think not. We think the statute of 1842 meant precisely what that of 1857 says now more distinctly, and that the liability has always rested where it does now, upon the corporation using the locomotive, and not that the title to the locomotive was the test of liability. The provision in 1842 was as follows: "When any injury is done to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible . . . and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route," &c. The legislature doubtless intended to give the right to insure the property "along its route" to the party upon whom it imposed the responsibility, and contemplated the use of locomotives by railroad corporations upon their own routes, and when they spoke of "a locomotive engine of any railroad corporation" they were not thinking of the title to the engine, but of the use of it by the company, for that was what exposed the property along the route to destruction, and in that statute the "locomotive engine of any railroad company" was the locomotive engine possessed and used by such company, whoever owned it. Such language is often employed to denote the possession of one who has only a temporary usufruct in the article referred

to. When the condensation of 1857 reduced the provision above quoted to these briefer and more distinctly intelligible terms—"when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responble for such injury, and it has an insurable interest in the property along the route," &c., no change was made in the signification of the statute. It was still, as before, the company whose use of the locomotive had caused the damage, which was made responsible. The verbal change in the statute wrought no change in its meaning or application. The legislature never intended that the responsibility should rest upon the owner of a locomotive because of his ownership, nor unless the damage was caused by his use of it, nor to relieve the corporation that was using the engine which set the fire if they did not chance to own it. It was the possession and use of the engine which made it the engine of the corporation within the meaning of the Public Laws of 1842, c 9, § 5.

There has been no change in the law, then, since the case of *Stearns* v. *A. & St. L. R. R. Co.*, before cited.

These defendants, through their lessees, are still in a certain sense "using" their corporate privileges, their franchise, their track, and the rolling stock upon it, and deriving an income from the same. If they, directly or indirectly, by themselves or their lessees, or any one acting under their authority and by their permission, burn the property of adjoining proprietors, they are responsible, because of the special provision in the act authorizing the lease, declaring that they shall not be exonerated thereby "from any duties or liabilities imposed upon them by the charter of said company, or the general laws of the State." They must look to the covenants of the lessees in their lease for indemnity, for it was settled in Stearns's case that this is one of the liabilities from which they were not exonerated. It is not now an open question.

Whether they would be responsible also for injuries to passengers who contracted directly with their lessees is another and a different question. There would be room perhaps to argue that

the liability in such a case is not one imposed by the charter or the general laws of the State, but by the principles of the common law applied to the contract of the parties, and so dependent upon the contract as not to affect any but the parties immediately contracting. But the liability to adjoining proprietors for injuries inflicted is another matter. *Exceptions overruled.*

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

SILAS H. BURNHAM *vs.* GRAND TRUNK RAILWAY COMPANY.

How far corporation is bound by ticket agent's statements.

The defendants' ticket agent represented to the plaintiff that it was necessary to purchase but one ticket to enable him to pass over the road, stopping over one night at an intermediate station, and that the conductor would give a stop-over check, to enable him to do so. At the time these representations were made, and in consequence of them, the plaintiff having informed the agent of his desire to stop over, purchased the ticket, paying the fare demanded for the whole distance. On the second day his ticket was refused by the conductor, upon the ground that it was indorsed "good for this day only," and the plaintiff, refusing to pay the fare demanded, was expelled from the cars. *Held*, that in an action against the company such representations of the ticket agent were admissible in evidence; and that the conductor, having been informed of these representations, was not authorized to expel the plaintiff from the train, without first offering to return the excess of fare paid or to deduct it from the fare demanded, though the rules of the company prohibited passengers from stopping over upon such tickets.

ON EXCEPTIONS.

Upon the sixteenth day of February, 1871, the plaintiff, then a student of Dartmouth College, left his home in Norway to return to Hanover, purposing to take the train that day at South Paris station, upon the defendants' railroad, go to Gorham, N. H. that night and thence to Northumberland and Lancaster the next day.

He asked the ticket seller and station agent at South Paris whether he should buy one ticket through from there to Northumberland, and stop over with it, or buy one to Gorham and another thence to Northumberland. He was told to buy one ticket and that the conductor would give him a stop-over check, as it had for some time been the custom to do. He accordingly did so. On presenting the ticket in the cars the conductor of that train told him the issue of stop-over checks had very recently been forbidden, but that he would doubtless be allowed to continue his journey upon that ticket the next day, under the circumstances. He left that train at Gorham, where he passed the night. Mr. Goold, the conductor of the train upon which he resumed his journey the next day, at first took his ticket, but having discovered that it bore date of a preceding day, a few minutes later came and threw it back to the plaintiff, telling him to take it and pay his fare over again or else to get off the train, and do it lively. Mr. Burnham related his conversation with the ticket seller at the time of the purchase, but Mr. Goold said it was no use arguing the matter; the plaintiff must pay his fare or get off the train at West Milan, at which station they arrived during this discussion. As the plaintiff declined either to pay or leave the train, the brakemen were directed to remove him and a fellow-student who had bought a similar ticket at the same time and place, and under similar assurances, and they were compelled to quit the cars by threats of forcible removal if they remained. As the train started, Mr. Burnham got on again, but the train was stopped forty or fifty rods or more from the station and he left it. He said he left the second time upon compulsion, while Mr. Goold deposed that the train was stopped at Burnham's request, to permit him to get off, because he did not wish to proceed without his comrade. The ticket bore upon its face its date, February 16, 1871, its number, the name of the company, the stations between which it entitled the holder to ride, in a "first class" carriage, and the words "good for this day only," but was authenticated by no signature, and contained nothing beyond what is above stated. The defendants objected

to the admission of the conversations between the plaintiff and the ticket agent and with the first conductor, but they were admitted. The court was requested to tell the jury that a contract, or rule, that tickets shall be good only for the day of their issue, and entitle the holder to a ride only on that day, is reasonable and will not entitle the holder to a passage upon any other day; that, if offered upon a day different from its date, the conductor was authorized to reject it, demand fare, and, in case of non-payment, to expel the holder from the cars at any station, in a reasonable manner; that upon the law and the evidence, the defendants were not liable; that, at least, the corporation were not liable for punitive damages, nor for any sustained by the second removal; which instructions were not given, but the jury were told that the plaintiff was entitled to recover for the first removal, being then rightfully upon the train, but that he was not rightfully there the second time. The question of damages alone was left to the jury who were directed not to award damages unless they found the expulsion to have been willful, wanton and insulting, and not an honest attempt to discharge official duty in obedience to orders. The verdict was for $450, which the defendants moved to set aside as excessive, and filed exceptions to the instructions given and refused.

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

The ticket was a contract for a passage from South Paris to Northumberland on the sixteenth day of February, 1871, and not for one from Gorham to Northumberland on the seventeenth of that month; a contract which the parties might lawfully thus make and limit. 1 Redfield on Railways, 99, 100, &c.; *Cheney* v. *B. & M. R. R.*, 11 Metc., 121; *B. & L. R. R. Co.* v. *Proctor*, 1 Allen, 267; *Beebe* v. *Ayers*, 28 Barb., 275.

A. A. Strout and *Geo. A. Wilson*, for the plaintiff.

The ticket does not express the contract. *Sears* v. *Eastern R. R. Co.*, 14 Allen, 436. The contract was verbal.

DANFORTH, J. In this case there is no conflict of testimony, so far as it relates to the liability of the defendants; no facts in relation to this point for the jury to pass upon. The instruction was that the action could be maintained, leaving only the question of damages to the jury. If this was correct, the defendants have no cause of complaint for the refusal of the requests for certain instructions made by them. On the sixteenth of February, 1871, the plaintiff purchased of the defendants' station agent at South Paris, a ticket entitling him to a passage from that place to Northumberland. Upon the ticket was indorsed the date and "good for this day only." In the absence of other testimony, this would have been proof of a contract for a passage on the train that went through on that day. But the plaintiff stopped at Gorham, an intermediate station, and the next morning got upon the cars to complete his journey, claiming the right to do so by virtue of the ticket purchased the day before, and refused, upon demand of the conductor, to pay any further fare, whereupon he was expelled from the cars. This expulsion is now justified on the ground that the ticket is the only admissible evidence of the contract between the parties, and is therefore conclusive upon that point.

But it is seldom, if ever, that the ticket embodies all the elements of the contract. The running of the trains as well as all reasonable rules prescribing the manner and facilitating the business of carrying passengers, certainly so far as known, become a part of the contract, and may be proved by either party, though not indorsed upon the ticket. *Sears* v. *Eastern R. R. Co.*, 14 Allen, 433. In the case at bar the enquiry presented is—what is the contract? Not whether the rule of the company, or the contract expressed by the ticket, is reasonable. No objection is made to the authority of the company to make such a rule or contract. But did the plaintiff have such a knowledge of the rule as to make it binding upon him, or did he in any way assent to it as a part of the contract for his passage from South Paris to Northumberland. As either party may prove terms of the contract, not expressed upon the ticket, so either party may prove the accept-

ance, or rejection, or waiver of any terms thereon indorsed. The ticket is not a written contract signed by the parties. It is, at most, evidence of some existing contract for a passage between two places named, and that the holder has paid the fare demanded.

Upon the plaintiff's ticket we find the indorsement "good for this day only." The fact that he accepted and produced it as proof of his right to a passage would certainly be *prima facie* evidence of his right to a passage on the day of its date alone, and possibly he would not be permitted to deny that he was bound by that indorsement, unless he could show that his assent had been withheld with the knowledge and consent of the company. This he attempts to do, by showing just what contract was made with the ticket agent at South Paris. But it is said this agent had no authority to change any of the rules of the company and, therefore, his acts or statements upon this point are not admissible. It may be conceded that this, or any other agent, had no authority to change or abrogate any rule established by the company, but the consequences claimed will by no means follow. He was placed there for the purpose of selling tickets, and it may be admitted, such tickets as will secure a passage in accordance with the rules of the company. The plaintiff desired to purchase just such a ticket. He was ignorant of the rules of the company, but wished to go over a portion of the road one day and another portion the next day. The rules make a part of the contract. It seems that before this the conductor had been permitted to give "stop-over checks." This custom had been abrogated but a few days previous, of which, so far as appears, no notice had been given. This is the very point upon which the plaintiff desires information. To whom shall he go to obtain it? To whom can he go but to the person appointed by the company for the purpose of giving such information, and selling the proper tickets? To that person he does go, and is informed that the custom of giving stop-over checks still continues, and that it is necessary to purchase but one ticket. Relying upon this information, as he was justified in doing, he

purchased his ticket and paid the fare demanded for the whole distance.

The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent, and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement, nor was he asked to assent to it. As between the plaintiff and agent the contract was definite, with no misunderstanding or suggestion of it.

Under that contract the plaintiff commences his journey, and on the first day asked for his "stop-over check" and is informed by the conductor, not that his ticket is not sufficient, or in any way different from those previously issued, but that his orders were not to give out any more "stop-over checks." Still he was permitted to retain his ticket, encouraged to expect that he would be permitted to complete his passage according to his understanding of the contract. On the next day, however, his ticket was refused and, upon demand being made, he refused to pay a second fare, whereupon he was expelled from the cars.

The conductor acted in obedience to orders from his superiors; the plaintiff, in obedience to information he had received from the ticket agent and upon which he had paid his money; surely, then, he was not in the wrong. But it is said the company were not bound by the contracts of the agent. Admit it. The conductor had proof from the ticket that the fare had been paid for the whole distance and from the statements of the plaintiff, which he had no reason to doubt, and which were confirmed by the custom so lately abrogated, that he had paid it upon the representations of the agent, that the ticket would carry him through. If, under these circumstances, the company, through the conductor, would repudiate or deny the contract, the least they could do would be to pay back the surplus money that they had received, or deduct it from the fare claimed, neither of which was done, or offered to be done, and this they were legally bound to do before refusing to execute

the contract made by their agent, even if they were not bound by it. *Cheney* v. *B. & M. R. R. Co.*, 11 Metc., 121; 1 Redfield on Railways, 100, note. *Exceptions and motion overruled.*

WALTON, DICKERSON and BARROWS, JJ., concurred.

APPLETON, C. J., did not concur.

VIRGIN, J., having been of counsel, did not sit.

JAMES CANWELL *vs.* INHABITANTS OF CANTON.

Soldier no claim to money paid his town by the State.

The plaintiff, an inhabitant of the town of Sumner, while in the field, on the eighteenth day of March, 1864, re-enlisted in the service of the United States, receiving at the time a bounty of $300, under the act of 1864, c. 227. The defendant town at a town meeting held November 16, 1864, voted to give a bounty of $300 to volunteers to fill their quota under the call of the president of the United States of October 17, 1863. In pursuance of this vote the selectmen of the defendant town agreed with the plaintiff to pay him this bounty, if he would procure or allow his name to be stricken from the credits of Sumner and added to the credit of the defendant town; which was done: *held*, that the plaintiff could not recover the bounty because (1) it would be in direct contravention of the provision of the act of 1864, c. 227, under which he had enlisted and received his bounty from the State, which prohibited the town paying any sum in addition to the bounty received under its provisions; and (2) because such agreement was without consideration.

Held, further, that the plaintiff was not entitled to recover the sum of $100 received by the defendant town from the State under the act of 1868, c. 225, for the equalization of bounties, on account of the plaintiff's name being among the names credited to them.

Held, also, that he had no claim under the act of 1868, c. 225, because he had already received the bounty which was the inducement for, and the consideration of, his enlistment.

ON REPORT.

The opinion contains a statement of all the facts necessary for an understanding of the case.

George D. Bisbee, for the plaintiff.

E. G. Harlow and *J. P. Swasey*, for the defendants.

APPLETON, C. J. The plaintiff, a resident of Sumner, enlisted in 1862 in the First Maine Cavalry Regiment. Although a resident of Sumner, he was through some mistake enrolled as of Canton. While in the field, he re-enlisted, March 18, 1864, and served to the close of the war of the rebellion.

The plaintiff, as the case finds, in September, 1864, first learned, while at home on a furlough, that he had been enrolled as a resident of Canton. The town of Sumner was paying at that time two hundred dollars as a bounty for soldiers to fill their quota, and offered to pay him that sum, as a bounty, if he would have the enrolment of his name so changed that he could be counted on their quota, claiming at the same time that he should be enrolled as of that town. The plaintiff went to Augusta for the purpose of having this change made. The adjutant general notified the town of Canton to appear and show cause, why this change should not be made. Thereupon J. D. Hodge, one of the selectmen of Canton, went to the plaintiff and agreed with him that if he would let his name remain to the credit of Canton, and in consideration of his agreement to do so, promised that the town of Canton should pay him a bounty of three hundred dollars which the town was then paying to soldiers enlisted upon their quota. This agreement was approved by the other selectmen.

The plaintiff performed his part of the agreement. His name remained on the roll as a resident of Canton, and was returned by the commissioners for equalizing bounties, and was counted in making up the number for which that town was reimbursed.

At a legal meeting of the inhabitants of Canton, held on the sixteenth day of November, 1863, the second article in the warrant was in these words; "Art. 2. To see what sum of money, if any, the town will vote to pay as a bounty to volunteers to fill the quota of said town under the call of the president of the

United States, dated October 17, 1863, for 300,000 men." Upon this article the town,

"*Voted.* That three hundred dollars be paid by the selectmen to each volunteer mustered into the service of the United States under the call mentioned in this article."

In addition to the bounty of $400, given by the United States upon his re-enlistment, the plaintiff has received the further bounty of $300 from the State of Maine.

The plaintiff's re-enlistment, March 18, 1864, was under the president's call of October 17, 1863, and of February 1, 1864. Is he entitled to recover the bounty offered by the town of Canton by their vote of November 16, 1863?

Towns are not bound to furnish soldiers for the government of the United States as a part of their general municipal duties. Their liability arises only by virtue of some contract specially authorized by precedent, or ratified by subsequent, legislation.

By an act approved February 20, 1864, c. 227, it is provided, by § 1, that, "there shall be paid from the treasury of the State to each person who shall enlist and be mustered into the service of the United States on the quota of this State, a bounty of three hundred dollars, subject" to certain limitations therein expressed.

By § 3, "No person shall be entitled to receive from this State, or any town in it, any sum in addition to the bounty provided for in this act."

By § 4, "Any sum paid as bounty from any source, except from the United States, shall be deducted from the amount to be paid from the State treasury."

The plaintiff's enlistment was subsequent to and under the provisions of the act referred to, for he declares in the receipt for the State bounty that he has "received no bounties or sums of money from any town on account of enlistment on its quota, which have not been considered and deducted upon this payment." Should any such payment be found to have been made, he orders the United States paymaster, or disbursing officer, to deduct from his wages or dues the amounts so paid, and not then accounted for, and

to pay the same to the order of the State treasurer or paymaster of Maine.

It is obvious, both by the receipt of the plaintiff and the provisions of the statute, that if the town bounty voted by Canton had been paid at the time of the enlistment, the plaintiff would not have been entitled to the State bounty—they being of equal amount. The third section prohibits any greater bounty than three hundred dollars to be received "from the State or any town in it."

It matters not whether the bounty of the town is paid before the payment of the State bounty, or its payment is attempted to be enforced after such payment. If before, the town bounty is "to be deducted from the amount to be paid from the State treasury;" if after such payment, as the enforcement of any further payment would be in direct contravention of the statute, the statute must be deemed a sufficient answer to any such claim, otherwise a party would receive a "sum in addition to the bounty provided for" by the State.

The plaintiff, notwithstanding the statute, claims that he is entitled to recover by virtue of his agreement with the selectmen of Canton in the September subsequent to his enlistment.

As the agreement was made long after the plaintiff's enlistment, was one of the selectmen authorized to make it, and was it based upon any legal consideration?

The quota of Canton had been filled in September, and the selectmen were authorized only to fill the quota. The contract made was in plain violation of the spirit and meaning of the statute, acts of 1864, c. 227. The plaintiff was only entitled to his three hundred dollars, and that he had received. To enforce this contract would be to give him a bounty which the town was prohibited from paying.

Further, the plaintiff was an inhabitant of Sumner. That town was legally and equitably entitled to have his name borne upon its quota. The town of Canton was not so entitled. The alleged consideration of the contract was that the plaintiff should acqui-

esce in a mistake, and permit a town not entitled to have his name borne on their quota to have it so borne, and to deprive the town which should of right have had the benefit of his name, of such benefit.

The contract of the parties as stated is not authorized by the vote of the town, is not sanctioned or ratified by any of the acts relied upon, and is in direct contravention of the law as existing at the time it was made, and cannot be enforced.

But as the defendant town has received one hundred dollars under the act for the equalization of bounties, approved March 7, 1868, c. 225, on account of his services and because his name was on the quota of their town, he insists that, at any rate, he is entitled to recover that sum. But we think not.

The plaintiff has already received all to which he is legally or equitably entitled. If the town of Canton has received money which does not belong to it, that fact does not add to the plaintiff's right. If the money obtained through mistake is not the defendants', it belongs to the State as money paid through mistake, or to the town of Sumner, of which this plaintiff was a resident.

Nor has the plaintiff any claim under the act approved March 7, 1868, c. 225, as he has already received the bounties which were the inducement for and the consideration of his enlistment.

Plaintiff nonsuit.

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

EBENEZER R. ESTES

vs.

ATLANTIC & ST. LAWRENCE RAILROAD COMPANY.

Railroad fences. *R. S. of* 1857, *c.* 51, § 23, *and laws of* 1864, *c.* 231, § 4. *Negligence; a question for the jury.*

A gate in a fence, which the defendants are bound to erect and maintain in good repair, is to be regarded as a part of the same.

It is for the jury to determine whether or not the defendants were guilty of negligence in the matter of keeping their fences in repair.

After a gate, part of such fence, had fallen, through its unsafe and defective hanging, the plaintiff had shut up his cattle in his barn-yard, for greater security, from which they escaped upon the defendants' track and were killed; whether or not he was guilty of negligence, is to be submitted to the jury.

On exceptions.

All the facts necessary to an understanding of the questions determined by the court are stated in the opinion.

David Hammons, for the plaintiff.

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

Appleton, C. J. This is an action on the case, in which the plaintiff seeks to recover damages of the defendants for killing his cattle, which escaped from his premises upon their track, in consequence of a defect in their side fence.

The plaintiff offered evidence tending to show that there was a fence which the defendants were bound to maintain; that a gate was erected by them as a part of the fence; that it was insecurely hung; that as a servant of the plaintiff was passing through it the gate fell, in consequence of its defective fastening; that he was unable to replace it in position; that the servants of the defendants were near by, and knew when it fell, but did not replace it; that the plaintiff that evening shut up his cattle in his barn yard for their security; that they broke out during the night; strayed upon the defendants' track through the gateway, (the gate remaining down) and were there killed by the defendants' locomotive. Upon this evidence, the presiding justice ordered a nonsuit.

It was a duty imposed upon the defendants by statute to make, maintain, and keep in good repair, legal and sufficient fences on each side of land taken for their railroad, where it passes through enclosed or improved land, or wood lots belonging to a farm. R. S., 1857, c. 51, § 23. If, being under obligation to make and maintain a fence, they erected a gate in the line of the fence,

whether for their own convenience or that of others, it was their duty to fasten it securely, and to maintain it in good repair. If the gate fell, it should have been replaced without unreasonable delay. The safety of the public imperatively required the continued maintenance of legal and sufficient fences, with or without a gate, to protect the track from animals straying thereon. The gate, when erected, formed a part of the fence. There is no special mechanical or architectural skill required in its construction, and its maintenance in good repair is as essential as that of the fence of which it constitutes a portion.

The evidence tended to show that no suitable and safe gate had been constructed and properly hung; that the defendants had been guilty of neglect before, and were guilty of neglect at the time the plaintiff's cattle were killed, in not having a gate safely hung, and that the fall of the gate was the result of negligence in its erection. A gate that would tumble down, when used for the purpose for which it was built, could hardly be deemed such an one as would constitute any part of a "legal and sufficient fence." Whether the fall of the gate was imputable to the negligence of the plaintiff or his servant, or to that of the defendant, was a matter for the consideration of the jury, and it should have been submitted to their determination.

It is well settled that where the plaintiff is guilty of negligence, which directly and immediately contributes to the injury of his cattle, he cannot recover of a railway company unless, by the exercise of ordinary care and prudence at the time, the company might have avoided inflicting the injury.

The plaintiff offered evidence that the fall of the gate was the result of the defendants' negligence in its erection; that his servant was unable to replace it; that the defendants' servants were near by and might have replaced it; and that for the greater security of his cattle, he shut them up in his barn-yard. The question of contributory negligence on his part was one to be determined by the jury.

There was evidence introduced on the part of the plaintiff tend-

ing to show that he was in the exercise of ordinary and common care for the preservation of his cattle, and that the damages done were caused by the negligence of the defendants. The question at issue should have been submitted to the jury. The non-suit was improperly ordered. *Exceptions sustained.*

WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.
DANFORTH, J., did not concur.

EDWARD L. FARWELL *vs.* A. & ST. L. R. R. Co.

APPLETON, C. J. The facts in this case are the same as in *Estes* v. *The A. & St. L. R. R. Co.*, ante, except that the plaintiff was pasturing his cattle upon Estes' land. But in that case, his cattle would be rightfully upon the land of Estes and his right to have his case submitted to the judgment of a jury would be the same as that of Estes. *Exceptions sustained.*

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

JONAS GREENE *vs.* ZELIA A. WALKER.

What certainty of description is requisite to support a tax title.

The assessors, in their inventory, must describe the property taxed so that it can be certainly identified, either by the language there used or by that referred to. Of the ten parcels sued for in this action, only two are thus described.

ON REPORT.

WRIT OF ENTRY, originally brought against George W. Lunt, who died during the pendency of the action, and his daughter and sole heir at law, Mrs. Walker, appeared in response to a citation and assumed its defence. The demandant claimed in his declara-

tion ten parcels of land, purchased by him at a sale of them by the treasurer and collector of taxes of Peru, where the land lay, made in 1868, to enforce taxes assessed thereon and against said Lunt as the owner the preceding year. The parcel first mentioned in the declaration was there, and in the assessors' inventory, described as "the south-east half of lot No. 2, range 2, containing fifty acres, more or less." The evidence showed that, in 1867, when the taxes in controversy were assessed, Lunt did not own the whole of this half, but had conveyed several parcels from it to different purchasers; and the same was true of that described in the inventory as "the Ellis land, so called, lying between A. J. Churchill's and Levi Randall's and adjoining pond, lot No. 7, range 3," which description was substantially followed in the declaration, in which this was the sixth parcel demanded. The second parcel named in the writ was that bearing the corresponding number in the accompanying rescript. The third parcel described in the declaration was that first mentioned in the rescript and inventory, as the "two river lots," &c. The fourth demanded parcel was that numbered three in the rescript.

The fifth parcel in the writ (for which the plaintiff had judgment) was thus described in the writ; "northwesterly half of the island opposite Samuel Holmes' farm, sixteen acres, in Lunt's lower tract;" which description was followed in the declaration.

The sixth demanded parcel was "the Ellis land," as above stated. The seventh was that numbered six in the rescript. The eighth parcel was described in the inventory, and (substantially) in the writ, thus: "Lunt's lower tract. Northwest half of lot westerly and adjoining S. Holmes' farm, lot 4, range 2, fifty acres." The ninth was that "on the east side of Worthly pond," numbered five in the rescript; and the tenth and last piece claimed was that numbered four in the rescript, "on which A. P. Cox resides."

The records of the town showed that all its officers, including William Walker, treasurer, were duly sworn in 1867, but if Mr. Walker was again sworn after his re-election in 1868, there was an omission to prove it, or that he gave any bond that year.

Bolster & Pulsifer, for the demandant.

E. G. Harlow, for the tenant.

RESCRIPT.

Neither of the following descriptions of parcels of land, in the inventory of the assessors, is sufficient to create a lien thereon, by assessment of taxes:

I. "Southwest part of two river lots Nos. 1 and 2, range 1, 100 acres, adjoining Adelia Eustis and Jonas Greene's land."

II. "A part of lot 1, range 2, 80 acres, adjoining Noah Hall's back land on northeast, bounded westerly by Peck's Grant land."

III. "A part or surplus of S. R. Newell's homestead, lot 5, range 3, 6 acres."

IV. "The northwesterly part of the lot 6, range 5, 25 acres on which Aaron P. Cox resides."

V. "A piece of land on the east side of Worthly Pond between the pond and Wm. Harlow's farm—8 acres."

VI. "The lot or part of lot lying southerly and adjoining S. R. Newell's and P. J. Hopkins' woodland—lot 3, range 4, 60 acres." *Greene* v. *Lunt*, 58 Maine, 518.

It appearing in evidence that Lunt did not own all of the southeast half of lot 2, range 2; nor all of the Ellis land, as described, but was being taxed for the whole, the sale of both is void. *Barker* v. *Blake*, 36 Maine, 433.

The town treasurer was an officer *de facto*, and the fact that he was not sworn, and had not given any bond, is no defence to this action. The result is, that for all of the ten parcels described in the writ, except the fifth and the eighth, the defendant must have judgment; and that for the fifth and eighth parcels, there must be,

Judgment for the plaintiff.

INHABITANTS OF HEBRON

vs.

COUNTY COMMISSIONERS OF OXFORD COUNTY.

For what errors and omissions certiorari will not lie.

Where on appeal, regularly taken to the county commissioners from a refusal by the selectmen to lay out a town way, the commissioners have duly located such town way, and the same has been confirmed by a committee agreed upon by the parties, and appointed by the supreme judicial court upon an appeal claimed by the town, the proceedings will not be quashed on *certiorari*, because in the petition to the selectmen, the petitioners for the road, who were, in fact, inhabitants of the town, described themselves as "inhabitants of said town, or owners of land therein;" nor because they alleged in their petition that "public convenience and necessity required the location and construction of the way;" nor because the road located extends to the town line near the residence of one living in an adjoining town and county; nor because the way located connects with a town way only at one end, terminating at the town line in a pasture.

ON AGREED FACTS.

PETITION FOR CERTIORARI, to bring up and quash the proceedings in the location of a way in Hebron, on account of the alleged errors in the record noticed in the opinion.

John J. Perry, for the petitioners.

Our only remedy is *certiorari*, which must be granted if the county commissioners had not jurisdiction. *Longfellow* v. *Quimby*, 29 Maine, 196; *Banks* v. *Co. Commissioners*, Id., 288; *Bangor* v. *Co. Commissioners*, 30 Maine, 270.

The record does not disclose jurisdiction. The petitioners say they are "inhabitants or owners of lands" in Hebron. *Non constat*, but that they are all "owners of lands" not under cultivation; in which case they could not lawfully initiate these proceedings. R. S., c. 18, § 18; *Orrington* v. *Co. Commissioners*, 51 Maine, 570. The counsel then elaborately set forth the other propositions noticed in the opinion.

Enoch Foster, Jr., for the respondents.

BARROWS, J. This petition alleges that J. R. Bearce and other inhabitants of the town of Hebron addressed a petition in writing to the selectmen of said town representing that the public convenience and necessity required the location and construction of a town way commencing at or near the house of Benjamin Dudley in said Hebron, and thence running by the most feasible and convenient route to Minot line near the dwelling house of Cyrus Bucknam in said Minot.

By the petition and records incorporated with it, and the agreed statement upon which the case is submitted for decision, it further appears that, upon due proceedings had, the selectmen refused to locate the way—the petitioners regularly and seasonably appealed to the county commissioners, and the commissioners laid out a town way three rods wide, the centre line of which is described as "beginning at a hub in a town way in said town of Hebron, near the dwelling house of Benjamin Dudley in said town of Hebron and south 50′ 30″ east, seven rods and two and a half links from the north easterly corner post of the front yard fence of said Benjamin Dudley," and thence running certain courses and distances over the lands of Daniel Bucknam, J. C. Hutchinson and Calvin Bucknam "to Minot line near the dwelling house of Cyrus Bucknam in said Minot." The town appealed to this court and a committee duly agreed upon, appointed and qualified, affirmed the doings of the commissioners and their report was accepted by the court.

The petitioners base their claim to the writ of *certiorari* upon the following alleged grounds:

I. They say that the selectmen had no jurisdiction because it did not appear in the original petition that the petitioners were inhabitants of Hebron inasmuch as they described themselves therein as "inhabitants of said town, or owners of land therein." Such a description would be very likely to be adopted if it was expected that there would be signers of both classes and it would

hardly be a reasonable construction that the petitioners were all of one class or all of the other. But if the objection ever had merit in it, it is destroyed when it appears affirmatively both in this petition and in the agreed statement that the original petitioners were in fact inhabitants of the town. The fact of their inhabitancy was doubtless well known to the selectmen, and the want of a formal allegation of it in the petition could not be deemed fatal to the proceedings.

II. That the selectmen had no jurisdiction because the petitioners allege that "public convenience and necessity require the location and construction of " the way prayed for, and hence they must be considered as asking the location of a highway, and should have addressed themselves to the commissioners in the first place.

It is true that selectmen have no jurisdiction to locate highways; but when the prayer is distinct and definite for the laying out of a town way, the character of it cannot be altered by the insertion in the petition of the above piece of argumentative surplusage.

III. That because the road extends to the Minot line near the house of Cyrus Bucknam in Minot it must be deemed a road leading from town to town and so not within the jurisdiction of the selectmen, but requiring the action of the joint boards of county commissioners of Oxford and Androscoggin counties. But this cannot be so. The way lies wholly within the town of Hebron. It is established as and for a town way subject to all the incidents and conditions of town ways, and the statute gives to the selectmen jurisdiction to lay out such ways, subject to approval by the town, upon the petition of any of its inhabitants, from any one place or point in the town to any other within its limits where it is thought advisable. That this would authorize them to lay out a town way from or to either or any of the lines by which the town is separated from adjoining towns cannot be doubted; nor would a way thus laid out be a "highway leading from town to town" such as the commissioners alone have power to establish. It would be none the less a mere town way if it led to a way

established in like manner by an adjoining town as sometimes happens. Its existence would still be totally independent of the way in the adjoining town. Nor does the fact that county commissioners have in certain circumstances authority to lay out a highway wholly within the limits of one town (as when it is to form a connecting link between highways leading from town to town) oust the selectmen of their statute jurisdiction to lay out such a way as this.

IV. Nor is there more substance in the objection that the way connects with a town way only at one of the termini, and that at the other it has no outlet, ending in a pasture. This condition of things might be serviceable as an argument against the laying out by the selectmen, against the acceptance by the town, and before the commissioners and the committee against an adjudication that the refusal of the selectmen to lay out, or of the town to accept, the road was unreasonable, but it does not affect the question of jurisdiction. The powers of selectmen and county commissioners and the distinction between town ways and private ways are fully discussed in *Orrington* v. *Co. Commissioners*, 51 Maine, 570. The fact that the town way thus laid out may prove to be convenient to travellers between the town of Hebron and the neighboring town of Minot and the city of Lewiston is certainly no good reason for quashing the proceedings on *certiorari*.

Writ denied.
Petition dismissed with costs for respondents.

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

EBENEZER R. HOLMES, in equity, *vs.* WILLIAM FARRIS *et ux.*

An execution must be wholly for a debt antecedent to conveyance to justify taking property under R. S., c. 61, § 1.

Property conveyed to the wife, for which payment was made out of the husband's property, is not liable to be taken under the provisions of R. S., c. 61, § 1, upon an execution recovered against the husband upon several debts, some of which accrued before and some after the conveyance.

When a creditor unites two classes of claims against his debtor in one suit, and obtains judgment therein upon them, he reduces that in which his rights are superior to the level of that in which they are inferior.

BILL IN EQUITY, brought under R. S., c. 61, § 1, by a judgment creditor of William Farris, to subject property conveyed by John J. Perry to Mrs. Farris to the payment of the execution issued on such judgment, upon the ground that the consideration for the conveyance was paid by William Farris from his own means. It is unnecessary to recapitulate the evidence by which it was claimed this fact was proved, as the case was decided upon another ground, fully stated in the opinion. Though two of the notes embraced in the judgment were subsequent in date to the deed from Perry to Mrs. Farris, they were given in renewal or exchange for former notes and indebtedness, originating prior to that conveyance.

Strout & Holmes, for the complainant.

John J. Perry, for the respondents.

APPLETON, C. J. This is a bill in equity in which the complainant having recovered judgment against William Farris seeks to defeat a conveyance from John J. Perry to Mrs. Farris on the ground that payment for the property so conveyed was made from the property of the husband and that his debts to the complainant were contracted before such conveyance.

The deed from John J. Perry to Mrs. Farris is dated November 28, 1863.

The judgment recovered by the plaintiff was upon three several notes;—one dated March 2, 1865, for $212.65; one dated December 27, 1864, for $64; and one dated April 15, 1863, for $68.

By R. S. of 1857, and of 1871, c. 61, § 1, "when payment was made for property conveyed to her (the wife) from the property of her husband, or it was conveyed by him to her without a valuable consideration paid therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase."

To authorize the taking of the property so conveyed there must be a judgment recovered by the creditor against his debtor. A judgment, when recovered, is an entirety. *Buffum* v. *Ramsdell*, 55 Maine, 254. The new debt is one and indivisible. *Bicknell* v. *Trickey*, 34 Maine, 273; and cannot be apportioned. Bump on Fraudulent Conveyances, 489. In this judgment, which the plaintiff recovered against the husband, there were debts contracted before and after the conveyance to the wife, which is sought to be impeached. In *Reed* v. *Woodman*, 4 Maine, 400, it was decided that, if a creditor, having demands accruing partly before and partly after the conveyance which he would impeach on the ground of fraud, blends them all in one suit, and, having recovered judgment, extends his execution on the land, he can come in only in the character of a subsequent creditor. "The demandant," observes Weston, J., "having taken judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance in question by his debtor." In *Usher* v. *Hazeltine*, 5 Maine, 471, there were items in the judgment to the amount of only $10.96 subsequent in date to the conveyance sought to be impeached, and Mellen, C. J., says "the plaintiff was not a creditor at the time of the conveyance" because this sum was included in his judgment. This doctrine was re-affirmed in *Miller* v. *Miller*, 23 Maine, 22. In *Quimby* v. *Dill*, 40 Maine, 528, it was held that a creditor, who blends together claims accruing before and after a voluntary conveyance, has only the rights of a subsequent creditor.

These views are entirely in accord with the recognized analogies of the law. In *Bicknell* v. *Trickey*, 34 Maine, 273, it was

held that the lien of a laborer was defeated, if the judgment recovered includes non-lien claims. When a plaintiff elected to join a non-imprisonment claim with one of a different character, he was deemed to have made election to look to property alone and not to person and property. *Miller* v. *Scherder*, 2 Comst., 262.

The principle to be deduced from the cases is, that when a creditor has two classes of claims against this debtor, by uniting them in one suit and obtaining judgment, he reduces that in which his rights are superior to a level with that in which they are inferior. *Baker* v. *Gilman*, 52 Barbour, 26. It is so in equity also. *Moritz* v. *Hoffman*, 35 Ill., 553.

The complainant, by the union of debts precedent and subsequent to the conveyance sought to be impeached, has voluntarily placed himself in the condition of a subsequent creditor. The judgment is a unit—one and indivisible. It cannot be part good and part bad. The plaintiff cannot set up a judgment in part as a precedent creditor, and in part as a subsequent. No case can be found in equity, in England or in any of the States, where a creditor has been held a prior creditor for a fraction of his judgment, with a right to enforce by bill such fraction, and a subsequent creditor for the residue. *Bill dismissed with costs.*

CUTTING, DICKERSON and PETERS, JJ., concurred.

WALTON, BARROWS and DANFORTH, JJ., did not concur, holding on the contrary that, where no levy has been made, the reason assigned by the court for the decision in *Reed* v. *Woodman*, 4 Maine, 400, that "the levy is entire and cannot be so apportioned or divided as to constitute a satisfaction of that part of his debt which was due prior to the deed," does not apply; and, therefore, that decision is inapplicable. And they held, further, that where a decree in equity is sought against the respondents for payment of plaintiff's demand on the ground that property paid for by the husband had been conveyed to the wife, the husband never having held the legal title, and the record or testimony shows what part of the debt accrued prior to the conveyance to the wife, no such

difficulty in the apportionment or division arises, but that which accrued subsequently may be subtracted and the creditor may have "satisfaction for that part of his debt which accrued prior to the deed," on establishing the facts, under R. S., c. 61, § 1, by a decree for the payment of so much of the husband's debt as was contracted previous to the conveyance to the wife; that the date when the debt was originally contracted, and not the date of any renewal of the promise to pay it, is the date referred to in the section cited; that the doctrine of merger in the judgment does not apply to cases like the present; because, if it did, the date of the judgment must be deemed the time when the debt was contracted, and thus previous creditors would forfeit their rights under the statute through the very process which is necessary to ascertain them.

VIRGIN, J., having been of counsel for the complainant, did not sit.

ICHABOD PREBLE, Administrator, *vs.* INHABITANTS OF GILEAD.

Soldiers' bounty—construction of town's vote of.

The defendants voted "to pay three hundred dollars to each volunteer man to fill the town's quota for the present call;" *held,* that the plaintiff whose intestate enlisted after Gilead's quota was filled was not entitled to recover the $300 from the town, nor the hundred dollars received by the defendants from the State on account of the service of his intestate, under the reimbursement act, it not appearing that the defendants, under that act, received a surplus above the amount they had actually paid out.

ON FACTS AGREED.

ASSUMPSIT. At a meeting held December 8, 1863, under an appropriate article in the warrant calling it, the defendants "voted to pay $300 to each volunteer man to fill the town's quota for the present call of three years' men, or during the war." The plaintiff's intestate, Elisha T. Preble, first enlisted, for three years,

December 12, 1861, and re-enlisted, for a similar term, February 1, 1864. The call referred to in the vote aforesaid was that of October 17, 1863, and the town's quota under it was four. The fourth man, to fill this quota, was mustered into service January 4, 1864.

Under Public Laws of 1868, c. 225, to equalize bounties, the municipal officers presented to the commissioners upon the equalization of bounties a claim for soldiers furnished by their town, among whom they enumerated Elisha T. Preble, and a hundred dollars were paid them by the State on account of his services. In a second count the plaintiff claimed to recover this $100, as received to his use. The town expended more than was reimbursed.

John J. Perry, for the plaintiff.

Enoch Foster, Jr., for the defendants.

DICKERSON, J. This action cannot be maintained upon either of the grounds alleged by the plaintiff.

I. There was no privity between the defendants and the plaintiff's intestate arising under the vote of the town of December 8, 1863, by virtue of which the plaintiff seeks to recover a bounty of $300. That vote called for "volunteer men," not to be credited upon some past, future, or indefinite call of the president of the United States, but "to fill the town's quota for the present call," which was the call of October 17, 1863. The plaintiff's intestate never complied with the terms of that vote; he rendered no equivalent for the bounty therein offered. The town's quota under that call was made up without him. Indeed, he did not re-enlist until after that quota had been filled. To bring a party within the purview of the vote of the town it was necessary that he should both volunteer, and be credited upon the town's quota under the then existing call. The minds of the parties never met to form a contract under the vote of the town. Language could scarcely make the intention of voters more explicit, or intelligible; to give the language used the construction contended for by the counsel for the plaintiff would be to distort and pervert its obvious meaning,

by extending the benefits of the vote alike to those who did not, and those who did, fill the quota designated therein. *Bickford* v. *Brooksville*, 55 Maine, 91.

II. Nor can the plaintiff recover of the town the hundred dollars it received from the State on account of the service of the plaintiff's intestate under the reimbursement act of March 7, 1868.

In order to maintain the action upon this ground it is necessary that it should appear in evidence that the town, under that act, received a surplus above the amount actually paid out. Public Laws of 1868, c. 225, §§ 7 and 8. The evidence does not show this, but the contrary. The conclusion, therefore, must be,

Judgment for the defendants.

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

OLIVER C. CURRIER *vs.* ALONZO B. SWAN *et als.*

Evidence as to motive for assault. Practice.

There was an affray between the plaintiff and one of the defendants in the afternoon. In the evening of the same day the defendants assaulted the plaintiff at his house; *Held*, that the defendants could show the fact of an affray in the afternoon, but not its details, in mitigation of damages for the last assault.

When a jury rendered a verdict, in regular form, in an action of tort against four persons, and appended to it an apportionment of the damages among the several defendants; *Held*, that the general verdict must stand, and the other finding be rejected as surplusage.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

TRESPASS *quare clausum* against Alonzo B. Swan, Gaius Swan, Lawson C. Bryant and Lorenzo Cole, for breaking and entering the plaintiff's dwelling, at Bryant's Pond, on the fourth day of July, 1872, making a noise and disturbance therein, assaulting the plaintiff there, and pushing him down stairs and out of the house.

The plea was the general issue only. It appeared that about five o'clock on the afternoon of that day an affray took place between Currier and Bryant, at the freight depot, where the latter was employed, immediately after which the plaintiff went home, and was soon after followed there by Bryant. A few minutes later Alonzo B. Swan went to Currier's house, at the request of Bryant's sister, and was soon followed by the other two defendants and other persons. The testimony as to the entry of the house by the two defendants last reaching it, and as to the character of the assault, or whether any was made, was conflicting. The defence offered to prove "that Currier went to the freight house where Bryant was and commenced a violent assault upon him, knocking him down several times, in the freight house, on the afternoon of July 4, 1872, immediately preceding the occurrences at the plaintiff's house," but the court excluded this testimony, permitting only the fact of a previous affray on that day, between Currier and Bryant, to be shown. To this exclusion of the details of that affray the defendants excepted. The jury returned a general verdict, for eighty dollars, against all the defendants; and returned to the court, with their verdict, a separate paper also signed by the foreman, and which was received and affirmed, assessing damages at five dollars against Cole and twenty-five dollars each against the other three defendants. A motion was filed to set aside the verdict on account of this irregularity.

Alvah Black, for the defendants.

D. Hammons, for the plaintiff.

PETERS, J. An affray took place between the plaintiff and one of the defendants, at a railroad depot in the afternoon, and on the evening of the same day that defendant with the others proceeded to the plaintiff's house, and inflicted violence upon him there. The defendants desired to show what took place in the afternoon, in mitigation of damages for the assault committed afterwards. The justice presiding admitted in evidence the fact that

there had been an affray, but excluded evidence of the details of it.

The ruling, both as to the admission and exclusion of evidence, was right. The admission was right, because it was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise, there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of damages recoverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit. But the further evidence, offered and excluded, was not fairly a part of the facts involved in this investigation. The assault complained of here was committed at another time and at another place, and mostly by other parties. It was immaterial whether the fault of the previous affray was in the one or the other party concerned. If the defendant was ever so right in the first affray, he should have resorted to proper legal remedies, and not assume to take the law into his own hands. If he is permitted to show the merits of the controversy in the afternoon, then the plaintiff would have as much right to show the provocation that led him into that affray, and the result would be, the trial of several causes in one; and, as said in *Mathews* v. *Terry*, 10 Conn., 459, "the jury would be distracted with a multiplicity of questions and issues." The early and leading case of *Avery* v. *Ray*, 1 Mass., 12, decided in 1812, has been recognized as a correct authority upon this subject, in most of the courts in this country, ever since. It has been invariably followed in Massachusetts, in many subsequent cases. Of course, the general principle there enunciated may be modified by controlling circumstances in other cases; as in *Prentiss* v. *Shaw*, 56 Maine, 437, cited and much relied on by these defendants. That case was decided upon its peculiar facts. The evidence introduced in mitigation there was mainly to show the innocent intention of the parties sued. They supposed (as they claimed) that they were acting under an official right to act. They had received (although improperly) an order, from

persons in authority, to make the arrest. Their own motive and good faith, in obeying the order, had much to do with the question as to how far punitive damages should be recovered. So in the case at bar, as much evidence was admitted as would fairly show what the motive of the defendants was in the assault committed by them, and with what coolness and deliberation, or otherwise, the act was done.

The other exception in this case cannot be sustained. But one verdict could be rendered. Therefore the damages must be joint, and not several. The question is, what damages has the plaintiff sustained? For those, whatever they are, all the participants in the assault are liable. There are no degrees of guilt. These principles are clearly settled and stated in the cases cited in argument. *Lincoln* v. *Hapgood*, 11 Mass., 358; *Halsey* v. *Woodruff*, 9 Pick., 555; *Fuller* v. *Chamberlain*, 11 Metc., 503. The jury undoubtedly undertook to apportion among the defendants what part of the verdict each of them, as between themselves, should pay. This amounted only to a recommendation. If it was intended as anything else, it is merely surplusage, and is to be rejected as irregular and void. The general verdict must stand.

Exceptions and motion overruled.

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

JOSEPH FRENCH, in equity, *vs.* GEORGE H. MOTLEY *et ux.*

Husband may prefer his wife before other creditors.

In the absence of proof sufficient to establish a common fraudulent intent on the part of husband and wife, his other creditors cannot complain of his preference to discharge a debt to her rather than to them.

The fact that the debt, and a note originally given therefor, have existed for a period sufficient for the statute of limitations to bar an action upon them, is not conclusive evidence of a want of good faith; nor will a mere suspicion, arising from the relation of the parties suffice for this purpose.

French *v.* Motley.

BILL IN EQUITY, brought under R. S., c. 61, § 1, by an execution creditor of George H. Motley to compel the payment of the debt out of land conveyed by Seth H. Faunce to Mrs. Motley, upon the ground that the property was purchased by the husband and paid for with his earnings and labor, and that the wife paid no part of the consideration for it. Mr. Motley cleared a piece of land for Mr. Faunce, and to compensate him therefor, these premises, were, by his direction, conveyed to his wife, it having been originally agreed that he should take his pay for his services in this land. It was set up in defence that Mrs. Motley had, some years before, lent to Mr. Motley money which she said came to her from the estate of a former husband, (Sidney P. Poole) and that it was then agreed that he should invest it in a small homestead for her, and that this one was purchased by him for her, and as her agent, in pursuance of that arrangement; and that the building placed upon the land was bought by Mr. Motley of John J. Perry, and paid for by Motley's labor, under the same arrangement. To substantiate her claim, Mrs. Motley produced a note for $375, dated at Minot, August 26, 1857, payable on demand with interest. Upon its face it purported to be witnessed by Martha Farris, mother of Mrs. Motley, but Mrs. Motley in her deposition, taken in her own behalf, testified that her husband wrote Mrs. Farris' name upon the note. The probate records and a deposition of the administrator of Poole's estate were introduced to show that the widow did not receive from that source six hundred dollars (as alleged in her answer) nor quite $375, and that part of this was not paid till after 1857. The land conveyed by Faunce to Mrs. Motley was valued by the parties at $110, which sum was indorsed on the note. The building bought of Perry was worth only about twenty dollars.

Sanderson & Bearce, for the complainant.

John J. Perry, for the respondents.

RESCRIPT.

A husband may lawfully pay a *bona fide* debt due from him to his wife, for money of her own lent to him after marriage, by procuring, with her assent, a conveyance to her by a third person of land paid for by him.

When such conveyance is accepted by her in payment of such debt, she holds the land as if bought and paid for by herself with her own money or means, and it is not liable to be taken as the property of the husband, to pay his debts, contracted before such purchase.

In the absence of proof sufficient to establish a common fraudulent intent and design on the part of the husband and wife, his other creditors cannot complain of his preference to discharge his debt to her, rather than to them.

The fact that the debt to the wife has subsisted more than six years prior to such payment, and that the note originally given for it is barred by the statute of limitations is not conclusive evidence of a want of good faith.

The creditor in this case fails to show to the satisfaction of the court that the wife should not be regarded as the *bona fide* purchaser, for value, of the property conveyed to her.

Mere suspicion, arising out of the relation of husband and wife, will not suffice for that purpose. *Bill dismissed with costs.*

MOSES S. SAMPSON, Executor, *vs.* ELLA SAMPSON.

Right to recover debt of heir, under Public Laws of 1872, *c.* 85, § 16. *Statute of limitations.*

Elisha T. Sampson, the defendant's father, gave to the plaintiff's testator a note payable in instalments after the payee's death,—with the right reserved to anticipate payments,—and died intestate before the payee, having paid upon the note two sums, indorsed generally, the aggregate of which was sufficient to fully pay the interest and first instalment. Administration was duly taken upon his estate. The second instalment did not become

payable until after the expiration of the period limited for the commencement of actions against executors and administrators. The note was not filed in the probate office. The defendant has received, as heir of her father, more than enough to cover this instalment of the note. *Held*, that the plaintiff could maintain an action against the defendant, as heir, under Public Laws of 1872, c. 85, to recover her proportional part of this second instalment.

The statute of limitations in force when the remedy is sought, and not that existing when the contract was made, must govern the remedy.

It is competent for the legislature to shorten the period of limitation of actions upon contracts, provided sufficient time is allowed for bringing suits upon existing claims, by the exercise of reasonable diligence, before the new enactment bars such claims.

On facts agreed.

Assumpsit upon a note of this tenor:

"Hartford, Me., March 31, 1861.

"For value received of Moses Sampson, I promise to pay him, or bearer, one thousand dollars, to be paid as follows; one third part in one year, one third part in two years, one third part in three years from the death of the said Moses Sampson, reserving the right of paying in advance upon the following conditions;—interest to be paid or allowed on all sums paid before the death of said Moses Sampson from the date of payment to the time of his death, and whatever remains unpaid after his death shall draw interest after until paid. Elisha T. Sampson."

There were two payments indorsed upon the note; one, April 8, 1864, of three hundred dollars; and the other of one hundred dollars, upon the twenty-second of the same month. The defendant is a daughter and heir of the maker of the note, who died intestate, January 2, 1869. Administration was taken upon his estate at the March term, 1869, of the probate court, and notice thereof given within three months. No cause of action accrued upon the note within two years after such notice, nor was the note filed in the probate office within that time. The plaintiff is the executor of Moses Sampson, the payee, who died April 5, 1871. Elisha T. Sampson left real estate worth two thousand dollars to his four children.

R. S., c. 87, §§ 11 to 16, inclusive, relating to actions against executors and administrators were amended by the corresponding sections of Public Laws of 1872, c. 85. As thus amended, R. S., c. 87, § 14, provides that where a creditor holds a claim against the estate of a deceased person, upon which no action accrues within two years after notice of his appointment given by the administrator, it may be filed in the probate office, and sufficient assets retained by the administrator to pay it when due, unless the heirs give bond to meet it at maturity. The sixteenth section is this: "When such claim has not been filed in the probate office within said two years, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

Alvah Black, for the plaintiff.

The action is properly several against each heir. *Howes* v. *Bigelow*, 13 Mass., 384.

J. P. Swasey, for the defendant.

Barrows, J. This action is brought to recover of the defendant, as heir at law of Elisha T. Sampson, her proportional part of a balance remaining due upon the second instalment of a note given by said Elisha T. Sampson, March 31, 1861, to his father, Moses Sampson, the plaintiff's testator, for one thousand dollars, payable in three instalments falling due respectively in one, two and three years after the death of the payee. The payee died April 5, 1871. In pursuance of stipulations in the note under which the promisor was to be entitled to interest during the lifetime of the payee upon such payments in advance as he might make, Elisha T. Sampson paid in April, 1864, as appears by two indorsements, the sum of four hundred dollars, which with the interest that accrued upon it amounts to about five hundred and sixty-six dollars.

Elisha T. Sampson died intestate, January 2, 1869, leaving real estate valued at about $2000, which descended to the defendant

and three other children. An administrator was appointed upon his estate in March, 1869, who, within three months next after, gave the notice of his appointment required by law. The note was never filed in the probate office and no right of action accrued upon it until more than two years after the administrator of E. T. Sampson gave notice of his appointment.

This suit was brought in August, 1873, and the above are the essential facts alleged in the writ, and confirmed by the agreed statement.

It is manifest that the inclination of the courts both in this and the parent State of Massachusetts, whence our statute provisions touching the matter are mostly drawn, has been so to construe these provisions as to make the liability of the heir for the debts, covenants and contracts of the ancestor only contingent and eventual, depending upon the absolute inability of the creditor or claimant, on account of the nature of his claim, to obtain satisfaction through legal process while the estate was under administration, or while the power to compel administration remained. *Royce* v. *Burrell*, 12 Mass., 395; *Hall* v. *Bumstead*, 20 Pick., 2; *Webber* v. *Webber*, 6 Maine, 127. In the latter case, Mellen, C. J., quotes approvingly certain dicta in *Royce* v. *Burrell* favoring the idea that a distinction may be made, between debts due but not payable within the period of limitation of suits against executors and administrators, and claims neither payable nor due during such period of liability, such as covenants and contracts not then broken but which may be subsequently broken—intimating that debts of the former class must be filed in the probate office pending the administration, and that it is only for those of the latter class that suits may be maintained against the heir.

Conceding the propriety of such legislation as would require a creditor having a claim not yet payable, but still subject to no contingency, to take steps to secure it from the estate before it is divided and passes into the possession of the heirs, we are nevertheless of the opinion that our statutes as they stand cannot be so construed. It is beyond the power of judicial construction to hold

that §§ 14, 15 and 16 of c. 85 of the laws of 1872 compel a creditor whose action does not accrue within the period of limitation to file his claim in the probate office upon pain of losing his remedy against the heirs.

It is not the mere existence of a debt *solvendum in futuro*, but of a right of action within the two years for the recovery of such debt, which would defeat the claim against the heir, as the legislature have seen fit to frame the statute. Taken together, these sections must be held to authorize the maintenance of a suit against the heir or devisee in all cases where an action does not accrue against the estate in season to avoid the limitation bar, and the claim has not in fact been filed in the probate office so that the creditor might either have a remedy against the heirs upon a bond to respond, or have his right of action against the executor or administrator extended until after the claim becomes due. The word *due* in § 16 must be held to be synonymous with *payable*. The true doctrine seems to be that in any case where an action accrues before the expiration of the period of limitation and might be maintained upon the demand against the executor or administrator by taking the proper legal steps, the heir is not liable; but where the action does not thus accrue, the creditor has the option either to file his demand in the probate office, or resort to a suit against the heir, to be brought within a year from the time when his claim becomes due or payable.

The question in the present case is whether an action accrued upon the claim here sued before the expiration of the time in which suit might be brought against the administrator of Elisha T. Sampson.

Under R. S. of 1857, c. 87, § 12, the term limited was four years from the giving of the notice of his appointment by the administrator. If this statute had remained in force, according to the agreed statement, this time would have expired in June, 1873, and thus a right of action for this instalment accrued within the term, which would have been a bar to the maintenance of this suit against the heir.

But by c. 9, of the laws of 1869, as amended by c. 113, § 23, of the laws of 1870, a creditor was required to present his claim against the estate of a deceased person to the executor or administrator in writing and demand payment thereof at least thirty days before commencing an action and within two years after notice is given by the executor or administrator of his appointment—in default of which no action could be maintained. R. S., c. 87, § 11, embodies this requirement and adds to it, in notable inconsistency with §§ 13, 14 and 16 of the same chapter, that no suit thus brought since February 3, 1869, shall be maintained unless the action is commenced, as well as the demand made, within two years after the notice is given by the executor or administrator of his appointment.

In c. 85 of the laws of 1872 this inconsistency was remedied by substituting two years for four years, in §§ 13, 14 and 16, and re-enacting the requirement for presentment and demand thirty days before the commencement of the action and within two years after the notice of the appointment, and establishing two years and six months from the giving of such notice as the period at which the limitation bar would attach.

The sections thus enacted took the place of certain sections in c. 87 of the revision, and the intention of the legislature that they should take effect as well in cases where administration had already begun as in the future is demonstrated by the provision in § 12 that "in any estate on which, when this act takes effect, administration has been commenced and is not finally closed, a creditor who has not presented his claim shall be allowed at least six months after this act takes effect to present it and demand payment and to commence after thirty days an action thereon."

The power of the legislature to shorten the period at the expiration of which the limitation bar shall take effect provided they allow a reasonable time for parties to bring suit before their claims shall be deemed barred by the new enactment, and do not absolutely deprive the creditor of his remedy under color of regulating it, has been too often recognized by courts of the highest respectability to be questioned now.

We cannot doubt that the remedy in this case is governed by the Public Laws of 1872, c. 85. Under that act the right of action for the first instalment of this note accrued within the time limited therein, as above quoted, for the making of a demand and the commencement of an action against an executor or administrator of an estate upon which administration has been commenced and not finally closed at the time of the passage of the act, and hence no action could be maintained against an heir for any part of that instalment.

But the case shows that that instalment was covered by the payments made by Elisha T. Sampson in his lifetime in conformity with the terms of the note itself. No appropriation of those payments having been made by either of the parties to the contract, the law appropriates them to the instalment which first became payable. *Milliken* v. *Tufts*, 31 Maine, 497; *Readfield* v. *Shaver*, 50 Maine, 36. The right of action for the second instalment did not accrue until April, 1873, before which time the statute bar was interposed.

Unless the distinction between debts due but not payable, before adverted to, could be maintained, it can make no difference that one of the instalments had become payable and might have been recovered of the administrator had it not been paid in advance by Elisha T. Sampson.

It is objected on the part of the defendant that the writ does not allege, nor the agreed statement show, that the administration had been closed nor that additional assets did not come into the hands of the administrator after the said term of two years. But whether the administration had been closed or not, all future suits against the administrator, were barred and the heirs have received the property.

Section sixteen, which gives the remedy against the heir, contains no reference to the exception which makes the administrator liable by the reception of assets after the expiration of the two years term, and such a matter, if it existed and could avail the defendant, would be for him to show by way of defence. *De non*

apparentibus, &c. The suit is rightly brought against one of the heirs for that proportion of the debt which it belongs to her to pay, for the reasons suggested in *Howes* v. *Bigelow*, 13 Mass., 391. Upon the agreed statement, therefore, the plaintiff is entitled to recover of this defendant one fourth part of the balance of the second instalment remaining unpaid at the death of Moses Sampson, and interest thereon from that date.

The result is that there must be,

Judgment for the plaintiff for $24.77, *and interest thereon from April* 5, 1871.

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

CHARLES H. ROBERTS *vs.* JOHN T. PLAISTED.

Deceit. Exceptions. Practice.

Exceptions will not be sustained because the presiding judge declines to adopt the precise language of a requested instruction, though it be pertinent and correct, if instructions substantially equivalent and equally intelligible are given.

When the testimony does not exhibit any want of ordinary care on the part of the plaintiff in an action of deceit, but the reverse, the jury may properly be instructed that it will not relieve the defendant from liability to come into court now, and say to the plaintiff "if you had exercised more diligence and circumspection, it would have frustrated my plan for deceiving you, and therefore you cannot recover."

And in such a case it is not necessary to instruct the jury though requested thereto, that the plaintiff was bound to use ordinary diligence and care to ascertain the truth independently of the defendant's representations, for the reason that when the statement of an abstract rule, however correct, is not pertinent to the case presented by the testimony, it ought to be withheld as tending only to mislead and confuse.

ON EXCEPTIONS.

The plaintiff purchased of the defendant a farm in Biddeford, on the sixth day of March, 1868, having examined the premises

the previous month, alone, and with his father and uncle. At the time of these examinations the defendant professed himself unable, by reason of ill-health, to accompany them over the ground, but stated, in reply to inquiries about the boundaries, that if they kept between the fence and the creek they could not get off his land. The plaintiff's uncle wrote the conveyance between these parties, and, in obtaining the description, asked if the bounds stated orally, and contained in old deeds brought forward by Mr. Plaisted, included all the land they had been over, and all between the creek and the fence, and Mr. Plaisted replied that it did, and more too, because there was a heater piece down by the creek which was outside the fence. Between the creek and the fence, as it then stood, was a parcel of land, called "the Hooper lot," for which the defendant had bargained, and paid the price, but had taken the note of the owner instead of a deed, saying that, as he (Plaisted) proposed to sell his farm, it would be as well for Mr. Hooper to make a deed direct to Plaisted's vendee, then take up his note; and Hooper had once executed such a conveyance, at Plaisted's request, but it was not used, owing to a failure to complete the sale of the farm. This lot, of course, was not specified in the old deeds by which Plaisted took title, and which he furnished to the scrivener as containing the data for a proper description of the estate to be conveyed. The defendant denied using the language attributed to him, but said he directed the plaintiff and his relatives to follow the fence down to the creek, and that he referred to an old fence, different from that to which the plaintiff supposed the land extended. This old fence had long fallen into decay, and its ruins were covered up with snow at the time of the plaintiff's perambulation of the boundaries. The deed from the defendant to the plaintiff did not convey the Hooper lot, the title to which never was in Plaisted, but only conveyed lands which Mr. Plaisted had purchased of his grandfather and brother, whose deeds were referred to in that to Mr. Roberts. In the June following his purchase, the plaintiff discovered that he had no claim to the Hooper lot, and after several ineffectual efforts to

have the mistake rectified, brought this action, Dec. 22, 1868, to recover damages for the fraud and deceit practiced upon him relative to the boundaries of this land.

The presiding justice, in the course of his charge, instructed the jury: "I do not apprehend, gentlemen, there is any question here as to the intention of the grantor in making the deed, at the time he made and delivered it. He declares it to be his intention to convey this piece of land which he received from his grandfather and brother; which declaration is written down in the deed in the presence of the plaintiff, and accepted by him. So far, then, as the intention of the party making the conveyance, and the intention of the party inquiring as to the extent of the premises, are concerned, there is no dispute. What the plaintiff says is, that, though Plaisted's intention was only to convey these two pieces named, he led Roberts to believe that the deed embraced another piece of land, and that he did this fraudulently, for the purpose of deceiving the plaintiff, who brings this action to recover for the injury thereby sustained. This should be borne in mind, because to determine this case upon the defendant's intention in making this conveyance might not bring you to the true result, since it is quite apparent that it was his intention to convey what he did convey, and nothing more." In another portion of the charge, the judge remarked: "If the plaintiff saw fit to take his deed upon the representations of the defendant, as to what pieces of land lie within a certain description, and the defendant saw fit to make such representations, it will not relieve the defendant from liability to come into court now and say, 'if you had exercised more diligence, more care, more circumspection, it would have frustrated my plans for deceiving you, and therefore you cannot recover.'"

The following instructions were requested by the defendant: "That it is incumbent upon a party purchasing real estate to use ordinary diligence and care in ascertaining the boundaries of the land he purchases, and if he does not he cannot recover in an action for deceit relative to such boundaries." This the judge declined to give, except as already given in his charge. The next

request was, substantially, that if Mr. Plaisted used the language imputed to him, but intended to apply it to the old fence between his land and the Hooper lot, while Mr. Roberts understood him to mean the other fence, across the Hooper lot, and bought with this understanding, then he cannot recover. This the judge declined to give, as requested, but said: "If Mr. Plaisted said, 'you keep between the fence and the creek, and you can't get off my land,' and meant the fence that enclosed the Hooper lot—if any fence was there—the plaintiff cannot recover, because there was then no intention to deceive or defraud him. The whole question comes up, was there an intention to deceive and defraud by making false representations."

The plaintiff obtained a verdict, and the defendant excepted.

S. K. & B. F. Hamilton, for the defendant.

Wedgewood & Stone, for the plaintiff, cited *Martin* v. *Jordan*, 60 Maine, 531.

Barrows, J. The plaintiff claims that the defendant falsely and fraudulently misrepresented to him the boundaries of a farm which he was purchasing of the defendant, and at the trial offered testimony strongly tending to prove that the defendant told him that his land included all between a certain creek and the fence. The statement was not true. Between the fence and the creek was a piece of land containing a number of acres belonging to another party.

The defendant had once bargained with the owner for the purchase of this piece and advanced to him the price agreed on, taking the note of the owner for the amount instead of a deed of the land. This arrangement subsisted for some time, and the fence which had been maintained between this piece and the defendant's farm had gone to decay, and the defendant's cattle were pastured there.

At the time that the plaintiff examined the premises the remains of the fence would seem to have been covered with snow and invisible.

The defendant denied making the representation, but the preponderance of proof was strongly against him. His counsel claimed that if any fence was referred to it was the old one nearly obliterated between this piece and defendant's farm. The jury were carefully instructed, though not in the precise terms of the defendant's request, that if he honestly meant that fence (if any fence was there) the plaintiff could not recover because the intent to deceive would be wanting.

Exceptions will not be sustained because the presiding judge declines to adopt the precise language of a requested instruction, though it be pertinent and correct, if instructions substantially equivalent and equally intelligible are given.

The defendant further excepts to an instruction, the substance of which was that "if the plaintiff took his deed relying upon the representations of the defendant as to what pieces of land were included in the description, and the defendant made such representations, it will not relieve the defendant from liability to come into court now and say to the plaintiff, 'if you had exercised more diligence and care and circumspection, it would have frustrated my plan for deceiving you and therefore you cannot recover;'" and to the refusal of the judge to give an instruction, requested in various forms, substantially amounting to this: that "the plaintiff was bound to use ordinary diligence and care to ascertain the boundaries of the farm he was purchasing independently of the defendant's representations, and if he did not, he could not recover."

The exceptions state that this was refused "except as given in the charge." The exceptions do not state what the instructions given in the charge upon this point were. But if we assume that the one above quoted and excepted to was the only one, we must still hold, in view of the whole evidence which is reported, and which we have carefully examined, that the judge was justified in withholding the statement of an abstract principle of law, which however correct, was not pertinent to the case presented by the testimony There is no testimony in the case which would

justify the jury in finding a want of ordinary care on the part of the plaintiff in the particular named. The representations seem to have been of a character to mislead not only him, but his father and uncle, who went with him at one time to examine the premises.

There is no room for a question about a mistake as to which fence was intended. Under the instruction given the jury must have found that the defendant intended to point out the fence which included the Hooper lot with the farm. The language of the description in the deed is not such as to lead any person of ordinary education and intelligence to suspect that the representation as to the boundary upon the face of the earth was untrue.

When there is no testimony in a case to which the statement of the abstract rule can properly apply, its enunciation by the judge upon the request of counsel can only tend to mystify and mislead, and it is rightfully withheld. *Exceptions overruled.*

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

SACO NATIONAL BANK *vs.* EPHRAIM SANBORN.

What is sufficient notice of dishonor of note.

The defendant was sued as indorser of a note. Seasonable notice of its non-payment was sent to his address at Baldwin, where he had formerly long resided, though at, and for several years preceding the maturity of this note, he lived at Denmark. There were three post offices in Baldwin, neither of which was designated simply by the name of the town; but notice of the dishonor of a note maturing earlier at the same bank, addressed to him at Baldwin (as this was) was received and responded to, without any intimation that it was not properly directed; and upon inquiry of those likely to know, the notary was told he still lived at Baldwin; *held*, that the plaintiff's allegation of notice was sufficiently proved, since legal notice is not, necessarily, actual notice. Reasonable diligence to communicate information of the non-payment of the note is all that is required; and that was used in this case.

Saco Nat. Bank *v.* Sanborn.

On report.

Assumpsit upon a note dated October 12, 1868, for $500, signed by Isaac Dyer, payable in four months from date, at either bank in Saco, to the order of Ephraim Sanborn, by whom it was indorsed before being sent to the Saco National Bank, where it was discounted in renewal of a note of the same parties then overdue there. The first note fell due October 12, 1868, and this one, given a few days after that, was dated back to that time. When the first of these notes fell due, notice of its non-payment was sent to the defendant at Baldwin, where he resided many years, and where the notary was informed (by friends and connections most likely to know) that he still lived, though in fact he had removed to the adjoining town of Denmark. To this notice reply was made, promising to arrange the matter, and requesting that no suit should be commenced. There was no intimation that the letter was not properly directed or that there had been any change of Sanborn's residence. The cashier testified that he was told by Sanborn in 1861, when they began to discount for him, that he lived in Baldwin; and that he was never notified of any change; but Sanborn and Dyer swore that they told the former president, since deceased, that the former was carrying on business in Denmark. The notary who protested the note in suit (who was not the one who protested the former note) was told by the cashier that Sanborn's address was Baldwin, and the notice of non-payment was sent by the next mail, directed to him there. There were three post offices in that town, viz: North Baldwin, East Baldwin and West Baldwin, but none designated by the name of the town simply. The defence was allowed to put in the New England Directory and the Maine Directory, which gave the defendant's residence as Denmark, and to prove that these books were in common use in Saco at the maturity of the note.

The court were to enter such judgment as the admissible testimony required.

Edward Eastman, for the plaintiffs.

Due diligence was used to ascertain Sanborn's residence and to

notify him of protest; and it is immaterial whether the notice ever reached him or not. *Bank of Utica* v. *Phillips*, 3 Wend., 308; *Same* v. *Davidson*, 5 Wend., 587; *Hunt* v. *Fish*, 4 Barb., 324; *Rawdon* v *Redfield*, 2 Sandford, 178; *Harris* v. *Robinson*, 4 Howard, 336; *Harris* v. *Memphis Bank*, 4 Humph., 519; *Winans* v. *Davis*, 3 Harrison, 276; *Dunlap* v. *Thompson*, 5 Yerger, 67; *Wood* v. *Corl*, 4 Metc., 203; *Cabot Bank* v. *Russell*, 4 Gray, 169.

The case of *Barker* v. *Clark*, 20 Maine, 156, and the various Massachusetts cases which the defendant cites, hold that due diligence is not exercised where inquiry ceases before positive information is obtained.

Mattocks & Fox, for the defendant.

There is a variance between the allegation of notice, and the proof. An excuse for a failure to give notice, will not support an averment of notice. *Hill* v. *Varrell*, 3 Maine, 233; *Allen* v. *Edmundson*, 2 Exchq., 719. The notary did not make sufficient inquiry as to Sanborn's residence. *Spencer* v. *Bank of Salina*, 3 Hill, 520. Directing to "Baldwin," when there was no such post office, vitiates the notice. *Beckwith* v. *Smith*, 22 Maine, 125; *City Bank* v. *Pugh*, 19 La. An., 43; *Davis* v. *Bukham*, 4 Humph., 53; *Cuyler* v. *Willis*, 4 Wend., 398.

WALTON, J. The plaintiffs aver, and they must of course prove, that the defendant was legally notified of the dishonor of the note in suit. But legal notice is not necessarily actual notice. Proof that a letter containing the proper information was seasonably put into the post office directed to the indorser at the place where, after diligent inquiry, he was supposed to reside, will sustain the averment of notice, although as matter of fact the indorser did not reside there, and the letter never reached him.

This point was directly decided in *Shed* v. *Brett*, 1 Pick., 401. The court there say that "an averment of notice will be sufficiently proved by showing that the steps necessary to give the notice

have been taken; if subsequently received, it will relate to the time when it was sent; if never received the fact of having put it in the proper train is enough."

So, in *Hill* v. *Varrell*, 3 Maine, 233, the court say that if the defendant had resided at New Orleans, a notice directed to him at that place would have been sufficient, though the letter had never reached him.

If the indorser changes his residence, and does not give the holder notice of such change, and he does not in fact know it, and is not guilty of negligence in not knowing it, notice sent to his former place of residence is sufficient. And when nothing has occurred to suggest the idea of a change, no inquiry is necessary. Men do not go into the street to inquire for another's residence when they suppose they already know it. *Bank of Utica* v. *Phillips*, 3 Wend, 408; *Gawtry* v. *Doane*, 51 N. Y., 84.

And if upon inquiry of a person likely to know, such an answer is received as leaves no reasonable doubt upon the mind of the inquirer that the indorser's residence is ascertained, no further inquiry is necessary. The inquiries should be pursued till all sources of information are exhausted, unless a satisfactory answer is sooner received; but when a satisfactory answer is received, the inquiries may stop. *Bank of Utica* v. *Bender*, 21 Wend., 643.

And if there are two or more post offices in a town, notice directed to the town generally is sufficient, unless the sender knew, or was negligent in not knowing, the particular office at which the indorser was in the habit of receiving his letters. *Morton* v. *Westcott*, 8 Cush., 425; *Cobet Bank* v. *Russell*, 4 Gray, 167.

These familiar principles are, in our judgment, a sufficient answer to all the defendant's objections. In other words, the evidence satisfies us that, upon the dishonor of the note in suit, the plaintiffs did exercise reasonable diligence to communicate knowledge of that fact to the defendant. And we further hold that the averment of notice in the plaintiffs' declaration is sufficiently proved by the evidence that a letter, containing the proper information, was seasonably put into the post office, directed to the

defendant at the town, where the plaintiffs had reason to believe, and did in fact believe, he resided.

Judgment for the plaintiffs.

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

LUKE SMITH *vs.* JOHN SWETT.

Action for malicious prosecution against an officer.

The plaintiff in an action against an officer of the law for malicious prosecution cannot maintain exceptions on account of an imperfect definition in the judge's charge of malice in fact, when the case shows that the defendant acted upon information derived from others, apparently sufficient to establish the existence of probable cause, and there is nothing in the case, as presented to this court, to indicate that injustice was done by the verdict.

ON EXCEPTIONS.

The plaintiff was arrested upon a warrant issued upon a complaint for larceny against him, made to the municipal court of Portland, by the defendant, as city marshal of that city, upon information furnished by the person whose property had been stolen and by the city marshal of Biddeford and others. After a return of, and hearing upon the warrant, the defendant was discharged. Upon the question of malice the jury were instructed that, "there is another element which it is conceded by both parties must enter into the proceedings, in order to entitle the plaintiff to recover, and that is the prosecution must have been instituted from malicious motives. Both parties concede that it must be malice in fact as contra-distinguished from malice in law. It sometimes becomes a little difficult to draw the exact dividing line between the two. Wilfully doing an unlawful act is malice in law, as to the man whose rights are invaded; but it does not always follow that it is malice in fact, which has the ordinary signification attached to it; it is the entertaining of some hostile

feeling towards an individual, and not simply doing an unlawful act knowing it to be unlawful, but it is the entertaining of some hostile feeling towards some individual, and doing the act in that hostility toward him."

The jury were then referred to the evidence to ascertain whether or not there was this malice in fact; and were directed to consider the fact that there was no previous acquaintance between these parties, or knowledge of each other's existence; the defendant's official capacity; his reason for making the complaint; whether or not he had any selfish end to answer, or any possible motive to punish the plaintiff; very pertinent questions in determining whether or not there was malice in fact. To the foregoing instruction and remarks the plaintiff excepted. It appears by the exceptions that the jury were also told that malice in fact might be inferred; might be proved as conclusively from facts and circumstances as from declarations; that the prosecution of a charge without any knowledge of its truth, or of the person accused, or any evidence of his guilt, though made by one having no acquaintance or dealings with the accused, and, therefore, not supposed to have any particular enmity against him, might, under some circumstances, justify a jury in finding there was malice in fact, because the law presumes a man to intend the natural consequences of his act. At the plaintiff's request, the presiding justice further instructed the jury "that if a party proceed against another without any probable cause, except the knowledge that an offence had been committed, from that fact, if I were a juryman, I should feel at liberty to infer actual malice, because the law presumes that a man intends the natural consequences that flow from his acts." The verdict was for the defendant.

S. W. Luques, for the plaintiff, cited *Humphries* v. *Parker*, 52 Maine, 507; *Parker* v. *Farley*, 10 Cush., 281; *Mitchell* v. *Jenkins*, 5 B. & A., 594, and 1 Hilliard on Torts, 464, 465.

Jos. W. Symonds, for the defendant.

VIRGIN, J. To maintain an action for malicious prosecution not only malice on the part of the defendant must be proved, but also a want of probable cause.

The case finds that the defendant was the city marshal of Portland, and as such made the complaint upon the information derived from others among whom were the owner of the property and the city marshal of Biddeford. There being no other evidence reported upon this branch of the case, it apparently is sufficient to show there was probable cause.

The judge's instruction on the subject of malice was imperfect, and technically incorrect; but the illustrations were quite as favorable to the plaintiff as he was entitled to. Actions of this nature against officers are not to be too much encouraged since in a large majority of cases, as in this, they are obliged to act at once, and upon information derived from others. *Cloon* v. *Gerry*, 13 Gray, 202.

There is nothing in this case as presented to this court to indi cate that injustice was done by the verdict.

Exceptions overruled.

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

NATIONAL EXCHANGE BANK *vs.* WILLIAM H. ABELL.

Pleading. General demurrer overruled if any count is good.

To the plaintiff's declaration, containing four counts, to wit, two in debt on a judgment, one upon a promissory note, (averring a promise to pay its amount) and the fourth an omnibus count, (also averring a promise), the defendant filed a general demurrer: *held*, that it was properly overruled.

ON EXCEPTIONS.

The defendant was summoned to answer to the plaintiff "in a plea of debt," stated in four counts, the first of which was upon

a judgment recovered in Rhode Island; the second upon the same judgment together with the costs of levying the execution which issued thereon; the third on the note upon which the judgment was founded, alleging its transfer to the plaintiff, as indorsee, and the fourth, the ordinary form of the general omnibus count. The third and fourth counts were not stated to be "in a plea of the case"—nor was there any plea stated to any count after the first—but otherwise these last two were in the usual form of declaring (in such counts) in assumpsit. A general demurrer to the declaration was filed, joined and overruled; and the defendant excepted.

Goodwin & Lunt, for the defendant.

There is a misjoinder of debt and assumpsit in the counts of this declaration, which renders it bad on general demurrer. Bacon's Ab. Tit., Actions in General, C.; 1 Chitty's Pl., 199–201 and 205; Gould's Pl., c. 4, § 90.

The third count is evidently in assumpsit; if in debt, the plaintiff has misconceived his remedy, since assumpsit is the only remedy of an indorsee against the maker of a note. 1 Chitty on Pl., *103, 109 and 114; Chitty on Bills, (7th ed.), 428; 2 B. & P., 78; 1 Taunton, 540; Oliver's Prec., 502, *et seq*; 1 Tidd's Prac., 10, *et seq*.

The rule laid down in *Blanchard* v. *Hoxie*, 34 Maine, 376, and *Swett* v. *Patrick*, 11 Maine, 181, do not apply, because there the causes of action were similar, and the counts of the same nature.

Misjoinder of counts can be taken advantage of by general demurrer. 1 Chitty on Pl., 663, 665; *Fairfield* v. *Burt*, 11 Pick., 244. And thus only. *Fernald* v. *Garvin*, 55 Maine, 414.

Wm. Hobson and *Edwin B. Smith* for the plaintiff.

Debt lies in favor of an indorsee. *Raborg* v. *Peyton*, 2 Wheat., 385; *Wilmarth* v. *Crawford*, 10 Wend., 340; *Carroll* v. *Weeks*, 3 Porter, 226. And upon a *quantum meruit* or *valebant*. *Smith* v. *First Cong., &c.*, 8 Pick., 178, and cases cited. An allegation of a promise does not change the nature of the plea. *Norris* v.

Sch. Dist., 12 Maine, 293–299. A general demurrer cannot be sustained if either count is good. *Dole* v. *Weeks*, 4 Mass., 451; *Swett* v. *Patrick*, 11 Maine, 181; *Blanchard* v. *Hoxie*, 34 Maine, 376,

In *Fernald* v. *Garvin*, 55 Maine, 414, the court do not modify previous decisions. That case merely holds that the demurrer must be to the whole declaration, and not to a single count; but it must be a special demurrer to the declaration; otherwise it will be overruled if either count is good; as was done in a case similar to this by the court of Virginia. *Roe* v. *Crutchfield*, 1 Hen. & Mun., 361, citing 1 Williams' Saunders, 286, note 9; *Pinkney* v. *Rutland*, 2 Saunders, 380, note 14.

Appleton, C. J. The declaration contains four counts, one in debt on a judgment recovered in Rhode Island, one in debt on the same judgment including the cost of levy, one upon a note of hand by the indorsee against the maker and a general count for money lent, paid, laid out, had and received, &c.

The authorities all concur that an action of debt may be maintained upon a promissory note. An indorsee may maintain an action of debt against the maker. *Wilmarth* v. *Crawford*, 10 Wend., 340; *Raborg* v. *Peyton*, 2 Wheaton, 385. So it lies on a *quantum meruit* and *quantum valebant*. *Smith* v. *First Cong., &c.*, 8 Pick., 178.

The defendant demurred generally to the whole declaration. The count on the judgment is not questioned to be correct. The objection to the other counts is, that they are not technical in form. They allege an existing liability on the part of the defendant and a promise to pay in consideration thereof.

In *Norris* v. *School District*, 12 Maine, 293, the motion was made in arrest of judgment that counts in debt and assumpsit were joined. In delivering the opinion of the court, Parris, J. says: "In the case under consideration, the plaintiff alleges that the defendant, being indebted, promised to pay. This is setting forth a contract, upon which the law says either debt or assump-

sit will lie. If the indebtedness only had been alleged, it would have been sufficient in an action of debt. Is it so insufficient as to be the ground of arresting the judgment, because of the allegation that the indebtedness was admitted by an express promise? If the indebtedness had been directly alleged, the declaration would be good on special demurrer. As it is, we think it is not so defective as to require us to sustain this motion." In *Payne* v. *Smith*, 12 N. H., 34, the motion was made in arrest that the declaration was neither in debt nor assumpsit, the objection to the counts being similar to those applicable to some of the counts in the declaration under consideration. But the motion was overruled. "In 1 Chitty's Pleading, 348," observes Upham, J., "it is said that debt on *quantum meruit* and *quantum valebant* counts resemble those in assumpsit, except the words 'agree to pay,' are usually inserted instead of 'promise to pay.' This is, undoubtedly, the more accurate form, though we do not regard it as essential. Debt will lie on a promissory note, *Martin* v. *Root*, 17 Mass., 222; *Mandeville* v. *Riddle*, 1 Cranch., 290. In such case the evidence shows a promise to pay, which is sufficient; and if sufficient as a matter of evidence, it would seem to be sufficient in the declaration."

The further objection was taken that the count contained no allegation *per quod actio accrevit*, and that the count should so conclude. "The answer to this exception is," say the court, "that the declaration complies with the rule in substance. 'The declaration, after stating the legacy and assets received, alleges that the executor assented to, and promised to pay the same, whereby the defendant became liable to the plaintiff to pay said legacy,' which is equivalent to saying, 'whereby a right of action hath accrued for the same.' In either case, it is a mere assertion of liability to a suit, and, after verdict, we have no doubt, it is a sufficient allegation that a right of action has accrued."

These cases show conclusively, that, if there had been a verdict in this case, a motion in arrest of judgment would have been overruled.

In *Downer* v. *Shaw*, 3 Foster, 125, the court held, in debt on a foreign judgment recovered in another State on a promissory note, that the declaration might be amended by adding a count on the note. "The plaintiff," remarks Perley, J., "might originally have joined a count on the note with his count on the judgment. This is a usual precaution in actions on foreign judgments, and then, if the judgment is found to be invalid, as it was in this case, the plaintiff may recover his debt in the original form."

The demurrer is general. It has repeatedly been held that a general demurrer to a declaration containing several counts, is not to be sustained, if any of the counts are good. *Blanchard* v. *Hoxie*, 34 Maine, 376.

The counts on the note are to be regarded as defective counts in debt. The defendant is called to answer in a plea of debt only. There is no count in which the defendant is required to answer to a plea of the case.

Besides, we think, as the demurrer is general, that the defendant is in no better condition, than he would be in case after verdict he should move in arrest of judgment, and it has been seen that such motion would be overruled. *Exceptions overruled.*

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

DANIEL DENNETT, Executor, *vs.* SAMUEL HOPKINSON.

Devise. Emblements. Executor. Will, construction of.

Unharvested crops go to the devisee of the land, and not to the executor. As against the heirs at law they go to the executor; but as against a devisee they do not, unless it appear by the will that the testator so intended.

Hay in a barn passes under a bequest of "all the household furniture and other articles of personal property in and about the buildings."

ON FACTS AGREED.

TROVER for the conversion of certain hay in a barn and other

crops, corn, beans, &c., gathered and stored upon the premises which belonged to the plaintiff's testator, Nathan Hopkinson, at the time of his death. The defendant admitted the taking and justified it under the terms of the will of which the plaintiff is executor, and the parties submitted the question of the true construction of this instrument, and the rights of the parties under it, to the determination of this court upon the facts as agreed upon by them.

Upon the sixth day of February, 1864, said Nathan Hopkinson made this will, by the first clause of which he devised the farm, upon which the hay and crops in dispute grew, to the son of the defendant, in these terms, viz.: "First. I give, devise and bequeath to Nathan Hopkinson, son of my cousin, Samuel Hopkinson, now residing in the State of Illinois, my homestead farm; also all the live stock of all kinds and all the farming utensils, implements and tools not otherwise disposed of which I may leave at my decease, to have and to hold to the said Nathan Hopkinson, his heirs and assigns forever."

Then followed twenty-two pecuniary legacies to distant relatives, friends and former employees of the testator and to a literary institution. Then item "24. Until Nathan Hopkinson, named in the first devise and bequest in this will, shall arrive at the age of twenty-one years, I give and bequeath the use, improvement and income of my said farm and of the live stock and farming tools, utensils and implements to the said Samuel Hopkinson, his father; provided and on condition that the said Samuel shall keep the farm, buildings and fences, tools and utensils, in as good order and condition as when they shall be left by me, and shall keep the stock good without diminution or depreciation and shall support and properly educate said Nathan till he arrives at full age. And I also give and bequeath all the household furniture and other articles of personal property in and about the buildings to the said Samuel, to be used by him till the said Nathan becomes of age, and afterwards to the said Nathan as his own property."

By the twenty-fifth clause, the testator declared his intention to

dispose of his whole estate and directed the division of any surplus, after payment of debts and legacies and satisfying devises, among those to whom pecuniary bequests are given. The next and final clause appointed Daniel Dennett, executor.

The testator died August 31, 1868, never having been married, and having neither parents, brother nor sister. His namesake, to whom he devised his farm, was living in Illinois with his father, Samuel Hopkinson, and was then about six years old. The death of the testator was not communicated to Samuel and his family till October 24, 1868. They came to Maine and entered upon possession of the farm and property connected therewith January 19, 1869, and afterwards consumed and sold the hay and other crops which they found stored in the buildings upon the place.

The item of chief value was the hay, worth several hundred dollars, which had been cut and stored in the barns, before August 31, 1868, the day of the testator's death. The other crops, corn, beans, potatoes, &c, were gathered and placed in the buildings upon the estate after that date by the plaintiff, claiming to act as executor. He subsequently demanded these articles of produce, including the hay, of Samuel Hopkinson, after the latter entered into possession of the premises; and upon his refusal to deliver them, or pay for them, this action of trover was commenced, which was submitted to the court upon the foregoing facts and such inferences as might properly be drawn therefrom. The substance of the issue was that each party claimed title in himself to the property in controversy under the above recited testamentary provisions.

L. B. Dennett, for the plaintiff.

This is a question of intention. The word "income" in the devise to the defendant is preceded by the words "use and improvement," showing that it is only the income derived from such use and improvement that is given him, and not the income already acquired before the testator's death.

If the intent be doubtful, then the general principle, that "he who sows shall reap the crop," which always carries emblements

to the executor against the heir, applies. The language employed, as well as the omission to expressly so state, rebuts any presumption that the testator desired the crops to pass to his devisee. 1 Washb. Real Prop., 122, § 14; *Drinkwater* v. *Drinkwater*, 4 Mass., 358.

The hay was not necessary for carrying on the farm,—only convenient and profitable for that purpose,—and therefore not necessarily an incident to the transfer of the land. *Lawton* v. *Lawton*, 3 Atkyns, 16; which case answers the defendant's argument from utility and inconvenience. The hay cannot pass under the general bequest of "household and other articles of personal property," &c., because not *ejusdem generis* with the items specified.

Edwin B. Smith, for defendant, relied on the distinction between the rights of a devisee and an heir at law as to crops growing at the time of the testator's death, citing: Noy's Maxims, (99); 2 Redfield on Wills, (1st ed.) 141, c. V., sect. VI., § 21, item 3, (3); *Spencer's case*, Winch, 51; *West* v. *Moore*, 8 East, 339; 2 Bouvier's Inst., 164; Tollar on Executors, (4th Am. Ed.) 203; 3 Dane's Ab., c. 76, Art. 6, § 8; Roberts on Frauds, 364, 365; Amos & Ferrard on Fixtures, *173, *174; *Henshaw* v. *Blood*, 1 Mass., 35; *Dean* v. *Dean*, 3 Mass., 258; *Drinkwater* v. *Drinkwater*, 4 Mass., 354; *Willard* v. *Nason*, 5 Mass., 240; *Gibson* v. *Farley*, 16 Mass., 280; *Stinson* v. *Stinson*, 38 Maine, 593; *Mills* v. *Merryman*, 49 Maine, 65: *Hobson* v. *Yancey*, 2 Grattan, (Va.,) 73; *Fay* v. *Holloran*, 35 Barb., (N. Y.,) 295, and numerous other authorities and cases, claimed to be applicable either directly or by analogy.

For the purpose of properly carrying on the estate, the hay was *ejusdem generis* with the other articles mentioned; though different in mode of use and in character.

WALTON, J. Unharvested crops go to a devisee of the land, and not to the executor. As against the heirs at law, they go to the executor; but as against a devisee they do not.

It is not easy, says Mr. Hargrave, to account for this distinction,

which gives corn growing to the devisee, but denies it to the heir. Mr. Broom also expresses the same opinion. Lord Ellenborough thought the distinction "capricious." But they all agree that such is the law.

Mr. Broom's statement of the law is as follows. He says that where a tenant in fee or in tail dies after the corn has been sown, but before severance, it shall go to his personal representatives and not to the heir; but if a tenant in fee sows the land, and then devises the land by will, and dies before severance, the devisee shall have the corn, and not the devisor's executors. Broom's Legal Maxims, 4th ed., 269.

Lord Ellenborough's explanation of the distinction is as follows. He says that in the testator himself the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heirs, though as against the executors it goes to the devisee of the land, upon the presumption that such was the intention of the devisor in favor of his devisee; but that this presumption may be rebutted by other words in the will, which show an intent that the executor shall have it. *West* v. *Moore*, 8 East, 339.

And in a case tried before Holt, C. J., where the question was whether corn growing passed to the devisee of the land or his mother, the widow, to whom the testator had bequeathed "all his goods, chattels, etc., and the stock of his farm," the case of Spencer, Winch., 51, was urged, where it was resolved that the devisee of land sown should have the corn, and not the executor of the devisor; to which it was answered, "that is true, if the intention of the testator does not appear to be otherwise." And Holt, C. J., held that in that case it did appear that the intention of the testator was otherwise. It has been doubted whether Chief Justice Holt's construction of the will was correct; but the decision is valuable as showing, first, that the general rule of law is that a devisee of the land will hold the unharvested crops; second, that the rule is based on the presumption that such was the intention of the testator; and third, that this presumption

may be rebutted by other clauses in the will showing that such was not his intention. *Cox* v. *Godsalve*, 6 East, 604, note.

And such, we take it, is the settled rule where the common law is in force. It is not only so laid down in the text books and cases already cited, but in many others. Buller's Nisi Prius, 34; Coke Litt., § 68, note 2; 4 Bacon's Ab., Bouvier's ed, 83; 1 Chitty's General Practice, 92; 2 Bl. Com., Sharswood's ed., 122, note 2; 2 Red. on Wills, 141; Broom's Legal Maxims, 4th ed., 269; Gilbert on Ev., 214; Cro. Eliz., 61; Spencer's case, Winch, 51; *Cox* v. *Godsalve*, 6 East, 604; *West* v. *Moore*, 8 East, 339.

We find on examination that in many of the States this matter is regulated by statute; but we are not aware of any such statute in this State. There is a provision, that when from any cause there is a delay in granting letters testamentary, or of administration, a special administrator may be appointed, whose duty it shall be to collect all the goods, chattels, and debts of the deceased, control and cause to be improved all his real estate, and collect the rents and profits thereof, and preserve them for the executor or administrator thereafter appointed, etc. R. S., c. 64, § 33. And we find another provision, declaring that if any part of the real estate is used or occupied by the executor or administrator, he shall account for the income thereof to the devisees or heirs in the manner ordered by the judge of probate, etc. R. S., c. 64, § 55. But these provisions were obviously intended for other purposes, and were not designed to change the rule of the common law with respect to the ownership of unharvested crops.

And we are inclined to think the law is best as it is; that although the rule which gives to the devisee of the land the unharvested crops, and denies them to the heir at law, may seem to be unphilosophical, it is nevertheless founded in practical wisdom. Not unfrequently the heirs at law are mere children, without discretion of their own, to enable them to care for the growing crops, and without legal guardians to aid them. They are sometimes scattered and far away. The death of the ancestor may be sudden, and the condition of his family such, that the crops, unhar-

vested as well as harvested, may be needed for their immediate support. Will it not be better, therefore, in the great majority of cases, that all the crops, the unharvested as well as those that are harvested, should be regarded as personal property, and go to the administrator? We cannot resist the conviction that it is better that it should be so.

Not so, however, of a devisee of the land. He is the selected object of a specific donation. If for any cause it is probable that he will not be in a condition to take charge of it at the donor's death, the contingency can be provided for in the will. It is a matter which the testator would be likely to think of, and provide for, if necessary. If there is no such provision, and the gift is unconditional, without words of limitation or restraint, we think it may fairly be presumed that it was the intention of the donor that his donee should take the land, as a grantee would take it, with the right to immediate possession, and the full enjoyment of all that is growing upon it, as well the unsevered annual crops, as the more permanent growth.

In this case the homestead farm of the testator was devised to his cousin and his cousin's son—the father to have the use, improvement and income of it till the son should arrive at age, the son then to have it as his own property. There is nothing in the devising clauses, or in any other part of the will, to rebut the presumption that the devisees were to have the unharvested crops that might be growing upon it at the time of the testator's death. On the contrary the presumption is very much strengthened by the fact that the testator gave all his live stock and farming tools, and all his household furniture and other articles of personal property in and about the buildings to the same persons. It is impossible to except out of these two sweeping clauses, any of the crops, whether harvested and in the barns, or still growing upon the land unharvested. If harvested and in the barns, they would pass by virtue of that clause in the will which bequeaths all articles of personal property in and about the buildings. If not harvested they passed as part and parcel of the realty.

The result is that this action, which is trover by the executor against one of the devisees named for the conversion of these same crops to his own use, cannot be maintained. As against the executor, the defendant's was the better title.

Judgment for defendant.

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

WILLIAM EMERY *vs.* DAVID G. LEGRO.

Deed—proof of execution. Practice as to errors and omissions in cases brought up on report. R. S., c. 82, §§ 3 and 4.

It is competent for the clerk to correct a mistake or omission in the copies of those papers which make part of a case reported to the law court for decision after the case has been entered upon the law docket.

A mistake in the initial of the middle name of one of the appraisers in the record of a levy in the registry of deeds will not vitiate the levy.

If an inhabitant of another State against whom a writ has been sued out, and whose property has been thereon attached here, comes within the State and is here personally and seasonably served with an order of notice before the suit is defaulted, it is not necessary to have the case afterwards continued, or that the plaintiff should file a bond before taking out execution, if the defendant fails to appear.

Objections to the admission of evidence, if it is apparent that they might readily have been obviated had they been specifically presented at *nisi prius*, will not be entertained when first suggested upon the final hearing of the case before the law court, even though the case is submitted for decision upon so much of the evidence as is admissible.

It is sufficient proof of the execution of a deed, if the magistrate whose name appears as a subscribing witness testifies that he witnessed the deed on a certain day and took the acknowledgment of the grantor upon a certain other day at which time the deed was delivered. Such testimony imports the due execution by the grantor, in the absence of anything tending to discredit it.

ON REPORT.

WRIT OF ENTRY to recover certain land in Lebanon, in this county, of which James C. Blaisdell was the owner in fee on the

twenty-third day of March, 1869, on which day it was attached upon a writ in favor of Samuel Tompson against him, dated March 22, 1869, returnable to and entered at the May term, 1869, of this court. Blaisdell resided in Somersworth, N. H., and this fact appearing in the writ, which had not been served on him before entry, the court, at the September term, 1869, ordered notice to him. An attested copy of the writ and order was served upon him in this county by a deputy of the sheriff within the time designated therefor. He did not respond to the action but was defaulted at the January term, 1870, and judgment taken out at the September term of the same year. Execution issued thereon October 12, 1870, and was levied upon the real estate in controversy, which Tompson subsequently conveyed to Mr. Emery—this constituting the demandant's title. The tenant claimed by deed of warranty from Blaisdell, delivered March 30, 1869. By the papers in the case, as originally presented, it appeared that George H. Furbish was sworn as an appraiser by the levying officer, while George F. Furbish acted in that capacity, and signed the return. This difference, as to the initial of the middle name, between the officer's certificate and that of the appraiser, appeared upon the record of the levy in the registry of deeds. The officer's return upon the execution stated that he had selected George F. Furbish as an appraiser. By a certified copy produced subsequently to the law court, the clerk indicated that the middle letter was F. in the officer's certificate upon the original execution. A commission issued to take the deposition of Edward E. W. Thompson; under it the deposition of Edward W. E. Tompson was taken, who swore that he witnessed the deed from Samuel Tompson to the demandant December 30, 1870, and took the acknowledgment March 7, 1871, when it was delivered, and he annexed the original deed to the deposition. The judgment against Blaisdell was recovered in favor of Samuel Tompson, of Boston, in the county of Suffolk, while the deed described the grantor as of Brookline, in the county of Norfolk, and there was no extrinsic evidence of the identity of these persons.

In the copies first filed the officer's return of service of the abstract of writ and the order of notice thereon upon Blaisdell was not signed; but subsequently the clerk sent up another copy, showing that the original was duly signed; and a copy of Tompson's judgment against Blaisdell, omitted from the papers first transmitted to this court, was also sent up. By the terms of the report this judgment made part of the case; and the court were to make such disposition of the action as the law, upon the evidence legally admissible, required.

William Emery, pro se.

William J. Copeland, for the tenant.

The levy was void because no bond was filed, yet execution issued within a year after judgment against an absent defendant. R. S., c. 82, § 3; *Buffum* v. *Ramsdell*, 55 Maine, 252; *Davis* v. *Stevens*, 57 Maine, 593.

A title by levy requires strict compliance with the statute. *Lumbert* v. *Hill*, 41 Maine, 475. The person sworn as appraiser did not act, but another did. This is a fatal error. *Nye* v. *Drake*, 9 Pick., 35.

There is no proof of the identity of the person who recovered judgment with the grantor in the plaintiff's deed. *Barker* v. *Stead*, 56 E. C. L., 328; *Giles* v. *Comfort*, 61 E. C. L., 653.

Barrows, J. It is true that the demandant must recover upon the strength of his own title, and that as he claims under a levy he must show all the necessary steps regularly taken to give him a perfect statute conveyance in that mode.

But it is competent for the clerk to correct a mere clerical error in the copies, and to supply copies of papers which make part of the report, even after the case has been entered upon the law docket. This being done, the defendant's objections to the maintenance of the suit on account of the alleged want of a copy of the record of judgment in the suit *Tompson* v. *Blaisdell*, and the alleged discrepancy between the name of the appraiser as

given in the certificate of the oath and the name as subscribed to the appraiser's certificate, vanish. A reference to the report shows that the record of the judgment, as well as the docket entries in the suit, were made part of the case, and also a copy of the execution, and the officer's return of the levy. By that return it appears that George F. Furbish took the oath as an appraiser and subscribed the appraisers' certificate. Even if it is the fact that, through a misprision of the register of deeds, the initial of the appraiser's middle name was erroneously recorded in that office, it would not vitiate the levy. The record as a whole would answer the requirements of the statute and give notice of the proceedings to all subsequent purchasers who might turn to the officer's return, on file in the office of the clerk of the courts, to ascertain the truth, if the record in the registry of deeds exhibited the discrepancy alleged.

The copy of the order of notice and officer's return, dated December 15, 1869, shows that Blaisdell, not being an inhabitant of the State, was, nevertheless, served with the order of notice by a copy in hand, delivered by a deputy sheriff of York county. The casual omission of the officer's signature in the clerk's copy first presented cannot avail now that the mistake has been corrected. The necessary inference from such a return by a deputy sheriff in York county is that Blaisdell was within the precinct when he made the service.

It matters not whether a non-resident was within the State when the writ against him was originally sued out, and his property attached, if he was within it and had actual notice of the pendency of the suit through a personal service by an officer of the court. To such a case the provisions of R. S., c. 82, §§ 3 and 4, for a continuance and the filing of a bond, do not apply.

It is further objected that the deposition of Edward W. E. Tompson is not admissible to prove the execution and delivery of the deed from Samuel Tompson, the levying creditor, to the plaintiff, because the commission from the court went to take the deposition of Edward E. W. Thompson, and that the identity of Sam-

uel Tompson, the levying creditor, with the Samuel Tompson who executed the deed to the plaintiff, does not appear. If there were any real question as to the identity of these persons with those named in the commission and levy, the objection should have been specifically made to the admission of the deposition at the time the case was presented at *nisi prius*. Upon these points the case falls directly within the rule and reasoning adopted and approved in *Longfellow* v. *Longfellow*, 54 Maine, 245. The deed purports to convey the grantor's interest in the land in controversy, describing it by a reference to the levy on the execution against Blaisdell; and when such a deed, which had no relevancy if the levying creditor and the grantor were not identical, is offered and received without a suggestion on the part of the party adversely interested of objection on that score, such a suggestion will not be entertained in the final consideration of the case.

It is further urged that the deposition does not prove the execution and delivery of the deed. The witness returned the original deed annexed to his deposition and testified therein that he witnessed it on the thirtieth day of December, 1870;—that he "took the acknowledgment of the said Samuel Tompson to the said deed March 7, 1871, at which time the same was delivered." There was no cross-examination. Merely formal proof seems to have been all that was called for. We think the above sufficient.

Judgment for the demandant.

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

JOHN GAINS *vs.* JAMES E. HASTY *et als.*

Evidence—one person's declarations cannot bind another not privy.

James E. Hasty exhibited to James M. Burbank a note purporting to bear the signature of Oliver S. Hasty, and to induce Burbank to sign it, declared that Oliver had signed it; *held*, that this declaration was improperly admitted.

On exceptions.

Assumpsit upon a note for $215, dated May 12, 1869, signed on its face by James E. Hasty, and bearing upon the back the names of Oliver S. Hasty, Ezra B. Seavey and James M. Burbank, payable to the plaintiff or order in three months from date.

Oliver S. Hasty denied the genuineness of his signature, which was the sole issue in the case. James E. Hasty, who had the money for which the note was given, having become insolvent and left the State, the contest was, in reality, between Oliver S. Hasty and the other defendants, as to whether Oliver should contribute to the payment of this note, made for James' accommodation. To the admission of the testimony recited in the opinion this defendant (Oliver S. Hasty) excepted.

S. K. & B. F. Hamilton and *Edwin B. Smith*, for the defendant.

Ira T. Drew and *Edward Eastman*, for the plaintiff.

Virgin, J. Assumpsit on a promissory note dated May 12, 1869, bearing the names of the defendants, as makers, payable to the plaintiff in the sum of $215. None of the defendants set up any defence to the action except Oliver S. Hasty who denied his signature in accordance with rule x of court. James M. Burbank, called by the plaintiff, was permitted to testify against the seasonable objection of Oliver S. Hasty, that James E. Hasty brought the note to the witness with the other names then upon it, and wished witness to sign it; that witness looked at the note and suggested to James that he had better get some of his neighbors; that James then said his brother (Oliver) and Seavey had signed it; that witness turned over the note and saw their names; that witness then said he knew nothing about Seavey, whereupon James replied, "you know my brother, well," and witness assented, adding, that he knew him to be a man of property; that James then said Seavey was worth as much as he.

Held, that the declarations of James to the witness were not

admissible evidence against Oliver S. Hasty; and the ruling of the presiding justice admitting them being erroneous, the exceptions are therefore sustained and a new trial granted.

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

DAVID N. GOODWIN *vs.* BOSTON AND MAINE RAILROAD.

Costs—to be paid by losing party on appeal.

Costs accruing before county commissioners, upon a hearing relative to land damages, are to be paid by the losing party upon appeal, though the verdict of the jury be for a less sum than that awarded by the commissioners.

The costs of all the trials upon the appeal are to be paid by the party losing at the last trial.

ON EXCEPTIONS.

The petitioner appealed from the award of the county commissioners assessing the damages for land taken by the defendants' location over his farm, and the jury returned a verdict at the September term, 1872, which was rejected upon the respondents' motion, and a new jury impaneled. This second jury returned their verdict to the January term, 1873, for a less sum than the county commissioners awarded. Both parties claimed costs. The judge ruled that all the costs, from the initiation of proceedings for the ascertainment of these damages, be borne by the corporation, and the respondents excepted.

George C. Yeaton, for the respondents.

William J. Copeland, for the petitioner.

WALTON, J. We think the ruling in this case was correct.

It was decided in *Bangor and Piscataquis R. R. Co.* v. *Chamberlain*, 60 Maine, 285, that a land owner, who makes and successfully maintains a claim for damages against a railroad com-

pany for land taken for their road, is a prevailing party, and entitled to costs, notwithstanding there are two trials, one before the county commissioners, and another, on appeal, before a sheriff's jury, and the amount awarded by the jury is less than the amount awarded by the county commissioners.

And with respect to the amount of cost which a prevailing party is entitled to recover, it was decided in *Fitch* v. *Stevens*, 2 Metc., 506, that where there were three trials before as many different juries, the first two verdicts being set aside for irregularities, the party who ultimately prevailed was entitled to recover the cost of all the juries, such costs being necessarily incurred in the prosecution of the cause. That was a complaint for flowage; but we think the same rule should be applied in this class of cases.

Exceptions overruled.

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

HARRIET HILL *et al.*, in equity, *vs.* WILLIAM STEVENSON.

Gift—what is sufficient delivery. Donee not bound by judgment against donor's administrator.

A delivery to a donee of a savings-bank book, with an intent to give the donee the deposits represented thereby, is a good delivery, and vests an equitable title to such deposits in the donee without an assignment, though by the rules of the bank the moneys can only be withdrawn or transferred by the depositor or his administrator, or by some person presenting the book accompanied with an order signed by the depositor in the presence of an attesting witness.

The delivery may be to the donee, or to some other person for the donee. A judgment in a suit upon an administrator's bond, in which the administrator was found guilty of official neglect in not inventorying this deposit in the savings bank,—after the rendition of which he did inventory and collect the same—is no bar to a suit by the donee to recover it from him.

BILL IN EQUITY, brought by Harriet Hill and Isabella Stevenson against the latter's husband, as administrator of the estate of

the late Alice Murch, who was the complainants' mother, setting out that, at the decease of Mrs. Murch, there was a sum of money deposited by her in the Saco and Biddeford Savings Institution, and then standing in her name, which she had given to these two daughters, and had delivered the bank book to Nehemiah Hill, the husband of one of them, at the time of such gift, which was established by the testimony of Capt. Hill, who said he had the custody of the book from November, 1862, when the donation was made, till and after the death of Mrs. Murch in September, 1867. Capt. Hill thus described the donation; "She handed me that book —put it into my hand—and said that she gave the money in that bank—on that book—to my wife and Isabella Stevenson. She said, 'I give that to Harriet and Isabella.' She said she wanted me to take the book, and take care of it, and, after her decease, to divide the money equally between Harriet and Isabella. She said this money was her own private property, and no part of her husband's estate; that her husband gave each of the boys a homestead and about $1000, but didn't give the girls anything. I took the book and have held it ever since till last January, when it was used in evidence in a case tried before the supreme court at Saco, and left with the clerk of the court with the papers in that case."

The depositions of the complainants, tending to support this statement, were also put in as proof. The bill complained that, knowing these facts, the respondent refused to draw the funds from the savings bank or to give the complainants the book and an order for payment of the money to them; and prayed for a decree requiring him to do one or the other of these things.

The answer admitted the truth of the statements of the bill, according to the belief of the respondent, who further replied that because of such knowledge, information and belief, he omitted to mention this deposit in the inventory of his intestate's estate, regarding it as the property of these complainants; that, upon petition of the heirs of Alice Murch—other than Mrs. Hill and Mrs. Stevenson—he was cited before the judge of probate to show

cause why this sum should not be included in his inventory and accounted for by him in his official capacity; and, upon appeal taken by the heirs from the decree of the judge, the supreme court of probate ordered and decreed that he return an additional inventory of this money and charge himself with the same, in his capacity of administrator, and with the interest accrued thereon, though he represented to said court the claim of these complainants to this property; that, in accordance with said decree, he inventoried said sum and charged himself in his administration account with its amount, $1078.96; that suit was commenced, in the name of the judge of probate, upon his official bond, for the benefit of the heirs (except these complainants) the breach alleged being the failure to return a true and perfect inventory, in that this deposit was not inventoried; that the jury returned a verdict for the plaintiff, on which—the exceptions taken being overruled —judgment was rendered. See the report of this case, *Bourne* v. *Stevenson*, 58 Maine, 499.

For these reasons, the respondent averred that his refusal to draw the money, or to aid the complainants in doing so, was proper and reasonable.

Goodwin & Lunt, for the complainants.

The fact of a gift will not be disputed; still, Alice Murch was the legal creditor, in whom alone a right of action for the money vested. *Tillinghast* v. *Wheaton*, 8 R. I., 536. Thereafterwards she and her legal representative became the trustee of the plaintiffs, to uphold their legal right of action.

The refusal of the trustee to execute his trust entitles the beneficiaries to this process, to compel performance. Hill on Trustees, part II, c. 4, § 1, and part III, c. 2, § 1; *Trowbridge* v. *Holden*, 58 Maine, 117.

The probate appeal and decree, and the judgment at law, so far as these complainants are concerned, were *res inter alios*. *Lewis* v. *Bolithe*, 6 Gray, 137. We are entitled to a decree. *Johnson* v. *Ames*, 11 Pick., 181.

Edward Eastman, for the respondent, relied upon *Bourne* v. *Stevenson*, 58 Maine, 499, and the facts ascertained by the verdict in that case and the decree in the probate appeal. The rules of the savings bank, printed in the book, and constituting part of the contract between it and the depositor, provided for a withdrawal or transfer of the funds, or any part of them, only by the depositor or upon a written and attested order.

APPLETON, C. J. A delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits. Camp's Appeal, 36 Conn., 88. Such delivery vests the equitable title in the donee without assignment.

The delivery may be to the donee or to some other person for the donee. *Dole* v. *Lincoln*, 31 Maine, 422; *Marston* v. *Marston*, 21 N. H., 491; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Wells* v. *Tucker*, 3 Binney, 366.

The evidence satisfactorily shows that Alice Murch the mother of the plaintiffs gave the money she had in the Saco & Biddeford Savings Bank to the plaintiffs by a delivery of her savings bank book to Nehemiah Hill for their use and benefit; that after such gift she ceased to have the possession of said book, or to exercise any control over the money deposited; and that the plaintiffs assented to and acquiesced in said gift. The plaintiffs have made out a perfect title to the money in controversy.

The defendant, as administrator on the estate of Alice Murch, was sued on his administration bond for a breach of duty in omitting to include in his inventory the money deposited by his intestate in the Saco & Biddeford Savings Bank. In that suit, upon the evidence before them, the jury found he was guilty of official neglect. The case came before the court upon exceptions to the ruling of the justice presiding at *nisi prius*. *Bourne* v. *Stevenson*, 58 Maine, 499. The exceptions were overruled, and the decree of the court was that the defendant should file an addi-

tional inventory including the above amount, which, in pursuance of such decree, he did. This judgment and decree is relied upon as a bar to the plaintiffs' claim.

The plaintiffs were no parties to the suit of *Bourne* v. *Stevenson*. They neither introduced proof, nor were heard by counsel. The judgment was between other parties. The rights of the plaintiffs were not affected by that judgment. *Lewis* v. *Bolitho*, 6 Gray, 137. The defendant has the money of these plaintiffs in his hands, and must be held to account for the same.

The bill in equity may be sustained. The facts are similar to those in the case at bar, in *Gardner* v. *Merritt*, 32 Maryland, 78; and in *Coutant* v. *Schuyler*, 1 Paige, 317.

Decree as prayed for.

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

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LUCY LORD, in equity,

vs.

EDWARD E. BOURNE *et al.*, executors.

A man's widow takes nothing under a testamentary bequest to his heirs.

The residuary clause in the will under which the plaintiff, widow of the testator, claims to recover, is as follows: "The reversion of the foregoing life estate given to my wife, and all the residue of my property, real and personal, I give to my legal heirs." *Held*,

I. That this clause is not void as a testamentary bequest over.

II. That the plaintiff is not entitled to any part of the residuary estate as reversioner, nor as one of the testator's legal heirs.

Mace v. *Cushman*, 45 Maine, 250, has been overruled.

A devise or bequest to the heirs of an individual will belong to the next of kin, and vests the property in the persons, (exclusive of the widow) who would take the personal estate, in case of intestacy, under the statute of distributions.

BILL IN EQUITY brought by the widow of the late Capt. Thomas Lord, who died, testate, in December, 1861, leaving no issue. The

defendants were designated by him, and appointed by the probate court as executors of his will, which was dated December 19, 1857, by the second clause of which he gave to his wife, Lucy Lord, $1,000 in money, all the household furniture, plate, &c., &c., absolutely, and the use of the homestead, and the interest or income of $6,000, during her life. Then followed a series of special bequests. The thirteenth clause, the true construction of which this bill is brought to determine, was this: "The reversion of the foregoing life estate given to my wife, and all the residue of my property, real and personal, I give to my legal heirs."

Just before his death Capt. Lord estimated his whole property at $25,487. The estate was originally inventoried at $25,802.92, but the executors realized from it $30,278.24; of which there was left in their hands, after investing the $6,000 for the widow and paying the specific legacies, for distribution among his legal heirs, under the thirteenth item of the will, the sum of $3,503.17, which they paid and distributed to and among the mother, brothers, sisters and nephews of the decedent, according to the meaning and intent of the testator, as they understood it to be expressed by the terms of his will above quoted.

The complainant avers that the residuary clause is void, because it gives the residue the same direction that it would take, had nothing been said about it; and claims that by our statutes she is made an heir, and is, therefore, entitled to one-half of this balance of $3,503.17, under R. S., c. 75, § 9, regulating the descent of personal estate, and prays for a decree that the respondents pay her this proportion of the funds in their hands.

Judge Bourne testified that he wrote a former will for Capt. Lord three years before this one was made; that the "literature" of the present will was his (Bourne's); that Capt. Lord came to his (Bourne's) house, and desired to have a new will drafted, on account of the death of the testator's only child, which required a new disposition of the estate; that he brought with him the old will; that they examined the will, as probated, item by item, and those containing the provision for Mrs. Lord and the residuary

clause occasioned some perplexity in drawing to suit the draughtsman's purpose; that, after this thorough examination, he advised Capt. Lord to have Mr. Wallingford, an expert penman, make a handsome copy of it, which was done; and Mr. Wallingford's draught was executed and probated. Mr. Wallingford, called by the complainant, testified that he wrote the will in question, which was proved by his testimony, and admitted to probate in Cumberland county, because one of the executors, Mr. Bourne, was judge of probate in York county; that he wrote it at his office; that Capt. Lord brought him his former will, written by Judge Bourne, saying that the circumstances of his family were so changed that he desired to alter his will; that this will was then written by him (Wallingford) from a memorandum that Capt. Lord furnished; that, after finishing so much of it as related to the specific legacies, "there was a conversation about what should be done with the balance of the testator's property, if there should be any left after the legacies were all paid; whether it should be given to his wife, his heirs, or to some other person or persons. After thinking the matter over a few moments, the testator said, 'let it go to the heirs, then my wife will get her portion of it, of course,' or words to that effect."

A. Wiggin, for the complainant.

Had this will contained no residuary clause, the widow would have been entitled to one half of the residue of the personal estate. The burden, therefore, is upon the executors to show that their testator had an intention, made effective by the terms of the will, to deprive her of her statute rights. Had such been his purpose, however, he could have easily put the matter beyond controversy by the use of apt words. Of this, there is no evidence, unless found in the clause itself. The intention of the testator, if ascertainable, is the controlling principle. We say this was to let the residue go to those who would have it had no will been made; while our opponents say it should go to those who would have inherited the real estate in that event. Our theory is sus-

tained by the statement of the scrivener who wrote it for Capt. Lord, and who testifies to his express declaration to this effect.

The defendants' case, upon the construction of the residuary clause, is included in two propositions: First, that the word "heirs" is a technical term, meaning those to whom intestate real estate descends: Second, that technical words are presumed to be used in a technical sense.

The complainant's case, upon the construction of the residuary clause, is likewise included in two propositions, to wit:

I. That the word "heirs," though it may be used in a technical sense, is not so used in the vocabulary of ordinary life, but, as commonly employed, means those persons who by law take intestate estate, real or personal:

II. That, in the interpretation of a will, words, that have a general as well as a technical signification, must be given that general meaning, and not the restricted, artificial or technical one. A purely technical word has always one and the same meaning, such as "fee simple," "estate tail," and the like; while many others that, in their restricted and technical sense have one meaning, have another in ordinary usage, such as "infant," "heir," &c. When such words are used, as in this case, by non-professional men, it is to be presumed that their ordinary purport, and not the technical one, was contemplated. It is true that "heirs" formerly meant those to whom the real estate of an intestate descended; being the result of the legal fiction that a person could not be heir to personal estate. In ordinary life, who ever regards—how many have ever heard of—this artificial distinction?

In the popular understanding, the person upon whom the law casts the personal estate is as much the heir as he upon whom it casts the realty; indeed, both are taken by the same title, and held by the same right—namely, the statute. It is not blood, but the statute, that disposes of the estate, though the enactment may be based upon considerations of consanguinity. As Blackstone says: "he is the heir upon whom the law casts the estate." Where

the same section gives one portion of an intestate estate to the lineal descendants, or other blood relations, of the decedent, and the other portion to his widow, why are they not all equally heirs, since all take by force of the same statute provision, and thus only?

Such is the popular use of the word, as is shown by the definition substituted by Webster of the word "heir" in the later, revised editions of his unabridged dictionary for that contained in the earlier editions. He now defines it, primarily, as "one who receives, inherits, or is entitled to succeed to the possession of any property, after the death of its owner; one in whom the title to an estate vests on the death of the proprietor; one on whom the law bestows the title or property of another at the death of the latter." We may summarize our argument on this point thus: if a word has a general meaning, grammatically and properly employed in common and prevailing use, and also has a meaning that is restricted, artificial and technical;—whenever a person, whose pursuits do not familiarize him with the technical use of the word, employs it in a manner entirely consistent with its general signification, and there is no indication that a technical use of it is intended, the probability and presumption are that its general and not its technical sense was the one contemplated by the one using the word.

Mr. Wallingford's deposition shows that such was actually the fact as to this clause of the will. Jarman's seventeenth rule, that technical words are, presumptively, employed in their legal sense, applies only to words purely technical. This rule, as first formulated and laid down by Powell, related exclusively to the testamentary disposition of real estate, with reference to which there are many technical terms, especially as to devisory titles. The best English authorities have always denied the applicability of the rule to personal estate. Williams on Executors, 972–996; Kay, 375; *Parker* v. *Marchant*, 1 Phillim. C. C., 360.

Jarman's sixteenth rule is, that words in general use are to be taken in their ordinary and grammatical sense, unless the contrary be shown.

The latest English cases, determined in its highest tribunal, have broken away from the narrow construction, and held that the words employed in a will are to have the natural, ordinary meaning which they have in the vocabulary of common life. *Jenkins* v. *Hughes*, 8 H. of Lords' Cas., 571; *Yonge* v. *Robertson*, 4 Macq., H. of Lords' Cas., 314; *Hall* v. *Warren*, 9 H. of Lords' Cas., 420. Of these cases Judge Redfield speaks approvingly in 1 Redfield on Wills, 429, note. So held in Maine, in *Cushman* v. *Mace*, 45 Maine, 250, which is decisive in our favor. Though the defence assume that this has been overruled, there is no evidence of this in the official reports of your decisions, where only the profession generally can look to ascertain how and what cases have been judicially determined.

Though we claim that Mrs. Lord is entitled to her half of the residue of the personalty under this thirteenth clause of the will, if valid, yet we deny its validity, and say that her half comes to her as from undevised estate; because "it is a well settled rule of law, that a devise to an heir of the same estate, in nature and quality, as that to which he would be entitled by descent, is void; in that case he takes by descent and not by purchase." *Parsons* v. *Winslow*, 6 Mass., 178–179; *Whitney* v. *Whitney*, 14 Mass., 90; *Ellis* v. *Page*, 7 Cush., 161; *Sears* v. *Russell*, 8 Gray, 93; *Sedgwick* v. *Minot*, 6 Allen, 171. The same rule applies to personal estate. Williams on Executors, 997; *Abbott* v. *Bradstreet*, 3 Allen, 587; *Smith* v. *Harrington*, 4 Allen, 566.

Dane & Bourne, for the respondents.

By this bill the widow of Thomas Lord seeks to obtain a legacy —or failing in that, a distributive share—out of his estate, in this court, as a court of equity jurisdiction. The executors have, so far, pursued the settlement of their testator's estate in the court of probate having jurisdiction; but if this court is of opinion that, in view of R. S., c. 65, §§ 27–31, it has equity jurisdiction, so as to bind both the executors and heirs by its decree, the respondents will not object to the form of remedy adopted, but desire a speedy

determination of the question whether or not Mrs. Lord has any such right as is claimed by her.

The husband's will containing a special provision for the wife, the fair presumption is that this was all he intended for her; if not satisfactory, she might have waived it; but instead of doing so, she elected to accept it, and has acquiesced in it for twelve years, and until the estate has been fully settled. She ought to be barred by her own laches, even if she ever had any valid claim.

At any rate, if she now sets up a different claim, the burden must surely be upon her to maintain it. It is not the presumed intention of the testator merely—but that intention as expressed in the will—that is to control. So stringent is this rule that a positive enactment was required to give to a child whose name was accidentally omitted from his father's will, any portion of the estate. The complainant's solicitor has laid down two propositions to be maintained by him, and an equal number which he awards to us. While we by no means assent to his presentation of our case, and shall take the liberty to enlarge our foundations somewhat, we will first consider his own propositions, as he states them, when applied to the facts.

We take issue with him, then, on the popular signification of the word "heir;" and say that, in the general understanding of the term, it has this restricted sense, that it does not include the widow. We frequently hear, in common conversation, of contests arising between the widow and the heirs; that she has her thirds, and that the rest goes to the heirs, &c., &c.

Mace v. *Cushman*, 45 Maine, 250, upon which the complainant relies—and on the strength of which this bill was probably filed—was overruled soon after it was promulgated, more than a dozen years ago, in *Cushman*, appellant, v. *Mace*, never reported.

The evidence must satisfy the court that, though the mere penmanship of the will was the work of Mr. Wallingford, who is not a lawyer, yet its "literature" (as he expresses it) is Judge Bourne's, who carefully weighed each word of this clause till he made it suit his purpose of expressing the testator's intention. It is tech-

nical language, adopted by a legal mind, to effect a particular end by legal proceedings.

Mr. Wallingford evidently misrecollects the conversation (if any) had with Capt. Lord, so many years ago. As he now states it, it is absurd. Would Capt. Lord, who knew he had not disposed of the fee of his valuable homestead and of the $6,000 after his wife's death—comprising about half of his whole estate—say, "*if there is anything over*, let it go to the heirs," &c. And would he say, "then my wife will get her part," when it was to be distributed only after her death?

The truth is, the memorandum which Wallingford says Capt. Lord brought with him, was that made by Judge Bourne, and it was copied, *in totidem verbis*, into the will. Mr. Wallingford's services were required only because Mr. Bourne was judge of probate, as well as executor.

A bequest to one's heirs belongs to his next of kin. 1 Roper on Legacies, c. 2, §§ 3 & 6; 2 Jarman on Wills, (4 Am. ed.) 2 and 28.

After an extended and elaborate argument upon the meaning of this clause, and the construction to be given it, the complainant's solicitor turns round and declares it void!! After long and repeated denunciations of technicalities, he seeks to avoid this provision, by the merest technicality in the whole administration of the law!!

But the rule he invokes has never been applied to personal estate. *Dingley* v. *Dingley*, 5 Mass., 537; *Emerson* v. *Cutler*, 14 Pick., 115.

And it only applies to realty when the devisee would have under the will precisely the same estate that the law gives him; in which case, Coke says, he is deemed to be in under the latter as "the worthier title." Such is not the present case.

The will says, "the reversion of the foregoing life estate given to my wife. . . . . I give to my legal heirs." In other words, I give the estate, after the death of my wife, to my legal heirs; showing the testator could not have intended to include her; or

that she should take, as one of his heirs, after her death. The case of *Sears* v. *Russell*, 8 Gray, 96, cited by the complainant, says that to hold the testator's daughter entitled to an equitable estate during life and a vested right to a conveyance in fee simple upon her death would be manifestly absurd.

Taking Capt. Lord's own valuation of his property, it is evident that he made for his wife all the provision he deemed necessary; and that he expected that, together with the other specific legacies, it would exhaust his estate with the exception of the reversion of the real and personal estate of which his widow was to have the use during life; and this the thirteenth clause gives to his heirs. The balance that the inflation of values has created he did not anticipate when he made his will, nor the increase of the expense of living which has caused the provision to become less adequate than he imagined it would be when it was made.

DICKERSON, J. This is a bill in equity brought by the complainant, widow of Thomas Lord, formerly of Kennebunk, deceased, against the defendants as executors of the will of said Lord. The bill alleges that after the executors had paid and made over to the complainant all that was specifically devised and bequeathed to her, and all the other legacies, and debts of the testator and the funeral charges and expenses of administration, there remained in their hands a large amount of personal estate not specifically disposed of by the will. The complainant claims that the clause in the testator's will giving "all the residue" of his property to his "legal heirs," is void as a testamentary bequest, and that said "residue" can only be legally distributed in accordance with the provisions of the statutes by which she is entitled to have and receive one-half of all the personal estate of said "residue," and, further, that if said residuary clause is valid she is entitled to have and receive one-half of all the personal estate of the "residue" aforesaid.

The answer among other things denies that the residuary clause in the will is void as a testamentary disposition, and that the com-

plainant is entitled by law to one-half, or any part, of said residue. The answer admits that there remained in the hands of the executors, after executing their trust in all other respects, for distribution among the heirs of the testator, three thousand five hundred and three dollars and seventeen cents, which they afterwards paid and distributed to and between the mother, brothers, sisters and nephews of said testator, according to the requirements of the will. The defendants further answer that they have fulfilled all the directions and requirements of the will, administered upon all the estate, and duly rendered to the probate court, at proper times, full and true accounts touching said estate, and of their doings in the settlement thereof; and they pray to be hence dismissed with their costs.

The clause in the will calling for construction is as follows: "The reversion of the foregoing life estate given to my wife, and all the residue of my property, real and personal, I give to my legal heirs."

Though in the reverse order adopted by the learned counsel in their able and exhaustive arguments we will consider the questions raised by the bill in the order therein presented.

I. The validity of the residuary clause in the will.

The controlling principle in the construction of wills is to ascertain and give effect to the intention of the testator. A will, in a testamentary sense, contains the solemnly recorded wishes of the testator upon matters of grave moment, and in which he feels a deep solicitude. Both the language and meaning of a will are the testator's; and in order to ascertain what the meaning is, it is oftentimes necessary to examine and compare clause by clause, or paragraph by paragraph in the light of the testator's standpoint. When the intention of the testator has been once ascertained, effect will be given to it, unless it is contrary to some positive rule of law.

The language of the clause of the will under consideration is too clear, explicit and intelligible to leave any doubt as to the testator's intention to give the reversion and residue of his real and

personal estate to his legal heirs; there being nothing in the context to qualify or control this language he must be taken to mean what he said.

The rule of law invoked by the complainant to defeat the intention of the testator by rendering the residuary clause in the will void is of ancient origin, and though altered by statute 3 and 4 William 4, c. 106, has been recognized as the common law of Massachusetts, and has not been changed by statute in this State. *Sears et al.* v. *Russell et als.*, 8 Gray, 93.

That rule is, that a devise to an heir, of the same estate in nature and quality as that to which he would be entitled, is void; in such cases the heir takes by descent and not as purchaser.

One of the tests to try the applicability of this rule is to ascertain whether the heirs take an estate different in quantity or quality from that which they would have taken if no will had been made. *Ellis et als.* v. *Page et als.*, 7 Cush., 161.

If we apply this test in the case under consideration it is clear that the rule does not apply. Without any will, the heirs would have inherited the "residue" of the real estate in fee simple, subject to the widow's life estate in one-third part thereof; under the will, they take it by the same tenure, without that incumbrance. Thus the heirs receive a material advantage from the will. If the rule is applicable to personal property the difference is still greater, as the heirs get the whole of the residue of the personal property under the will, whereas under our statutes they would be entitled to only one-half of it, if no will had been made. But we think the rule does not apply to personal property. The reason assigned for it exists only in reference to real estate; it is, that the title by descent is the worthier and the better title, by taking away the entry of those who might have a right to the land. Moreover, the exception to the rule which we have considered can have no application to personal estate, as the words quantity and quality, when used in their legal, technical sense, refer only to the nature and tenure of real estate. Further, personal property does not come within the rule because it is not the subject of inheritance in

the sense that real estate is. Coke on Litt., 22, b.; *Whitney* v. *Whitney*, 14 Mass., 90; *Ellis et al.* v. *Page et als.*, ante; 1 Story's Equity, 542; *Emerson* v. *Cutler*, 14 Pick., 115; *Dingley* v. *Dingley*, 5 Mass., 537.

II. WHO ARE "LEGAL HEIRS."

The word heir has a technical signification, and we will first consider what its meaning is when used in a technical sense. "Heir," says Jacobs, "is he who succeeds by descent to lands, tenements, and hereditaments, being an estate of inheritance." Jacob's Law Dict., "Heir." Bouvier defines "heir" to be one born in lawful matrimony who succeeds by descent, right of blood, and by act of God to lands, tenements and hereditaments, being an estate of inheritance. Bouvier Law Dict., "Heir."

"A bequest," says, 1 Roper on Legacies, c. 2, § 3, part 2, "to the heirs of an individual without addition or explanation will belong to the next of kin."

A devise or bequest to next of kin vests the property in the persons (exclusive of the widow) who would take the personal estate in case of intestacy, under the statute of distribution. 2 Jarman on Wills, 28, 4th Am. ed.

The distinction between widow and heir, or next of kin, was recognized in statute 21 Henry 8, c. 5, which provided that administration was to be granted to the widow or next of kin or both. Under that statute the husband is not heir to the wife, nor she to him, and she takes administration not as next of kin, but as widow. *Holt* v. *Watt*, 3 Vesey, 247.

So, under our statute, if administration is not taken out within the time limited by law, when a person dies leaving personal property, such property becomes the widow's, or if none, it goes to the next of kin; and administration of intestate estates is granted to the widow, husband or next of kin, &c. R. S., c. 64, § 1.

It is obvious from these citations that the term "legal heirs," when used in a technical sense, does not include the widow.

But is this term, as used in the residuary clause of the will, to be construed according to its technical meaning, or is it to receive

a more enlarged signification? The general principle is that the word heir, like other legal terms, when unexplained and uncontrolled by the context, must be interpreted according to its strict, technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question, in cases of intestacy. 2 Jarman on Wills, 9. But this is only the *prima facie* construction, which may be repelled by evidence of a contrary intention of the testator. 1 Roper on Legacies, c. 2, § 6.

There is nothing in the context of the testator's will which shows an intention to include his wife as a beneficiary, under the residuary clause. Nor do we think that the evidence *aliunde* is sufficient to overcome the *prima facie* case established by the will, which excludes the complainant from taking as one of the testator's "legal heirs."

The residuary clause of the will was drawn by an eminent counsellor at law, after full consultation with the testator in regard to his purposes. With the knowledge and experience that counsellor had, he must be presumed to have used the term "legal heirs" in its technical sense; and he testifies that he remembers that he drew the clause containing these words to suit his (defendant's) purpose. That purpose undeniably was to use such language as would in law carry into effect the declared intention of the testator, in regard to the final disposition of the reversion and residue of his estate. This testimony of the solicitor is strongly corroborative of the theory that the technical meaning of the testator's language is in strict accordance with his actual intention. It would be establishing a dangerous precedent to allow the technical meaning of the will, thus fortified by parol evidence, to be overcome by the testimony of the scrivener who simply copied the will, at the suggestion of the solicitor who drew it, as to a remark made by the testator while he (Wallingford) was thus acting as a copyist. Such testimony, given nearly thirteen years after the occurrence to which it relates transpired, cannot be permitted to have the effect claimed by the counsel for the complainant. We

are entirely satisfied that the complainant is not entitled to any share of the residuary estate of the testator, either as his widow, or as one of his "legal heirs."

The counsel for the complainant has cited *Mace* v. *Cushman*, 45 Maine, 250, to establish his theory that the widow is a "legal heir" of her deceased husband. But that case has been overruled, though the report of the case in which it was overruled, through some mistake or inadvertence, was never printed.

Bill dismissed with costs for the respondent.

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

WILLIAM B. NASON *vs.* EBENEZER RICKER.

Tax title—for certain errors void.

Each lot of land is a distinct subject of taxation, and liable to a lien upon it for payment of the tax upon it; hence, a valuation and assessment in gross upon two distinct parcels is void, because it deprives the owner of the privilege of redeeming either separately.

The treasurer's notice of the sale of a non-resident's real estate to pay a tax must contain such a description as will identify the premises.

The record must show a sale at auction. A recital of that fact in the treasurer's deed is no evidence of it.

ON REPORT.

WRIT OF ENTRY to recover possession of land in Lyman, conveyed to the demandant by Cyrus K. Conant, and which the tenant claimed under a tax deed from the treasurer of that town, who sold it for non-payment of a tax there assessed against said Conant, as a non-resident, in 1862. The taxes for subsequent years were paid by the demandant, who tendered ten dollars in full for the tax, expenses and charges of 1862.

The assessment roll of 1862 simply mentioned the property as

forty acres belonging to Doctor Cyrus Conant, valued at $275, and taxed $1.68. The inventory contained the same statement of quantity and value with this description added: "two lots; one joins land of Ebenezer Ricker and the highway; the other N. Low, Charles Emmons and the road."

The tax was returned by the collector to the treasurer as unpaid. In his notice of a sale of the land the latter only gave the number of acres (40) and the value, and the name of the owner.

It was advertised to be sold at auction, but there was no evidence that it was so sold, unless the recitals of the treasurer's deed be proof of that fact.

Dane & Bourne, for the demandant.

Ira T. Drew, for the tenant.

DICKERSON, J. Both parties claim title to the demanded premises through Cyrus K. Conant, the former owner, the plaintiff by deed of said Conant to him, and the defendant through a deed from Benjamin Lord, Jr., treasurer of the town of Lyman for non-payment of taxes assessed against said Conant as a non-resident. The rights of the parties turn upon the validity of said tax deed.

We are satisfied that the tax deed cannot be upheld for the following reasons:

I. The valuation and assessment were made upon two separate lots in gross. Each of those lots was a distinct subject of taxation, and liable to a lien for the payment of that portion of the owner's tax only which should be assessed upon that particular estate. The owner had a right to redeem each of those lots by paying the taxes specifically assessed thereon, without being obliged to pay the tax assessed upon the other lot also, which constituted no lien upon the lot he might wish to redeem. The assessment and valuation of both lots in gross, if upheld, would deprive the owner of this right by compelling him to pay the taxes assessed upon both lots, or forfeit his right to relieve either from the lien

imposed by the tax upon it. The law does not contemplate nor will it sanction the aggregation of the several separate and distinct estates owned by a non-resident proprietor, into one valuation and assessment. *Greene* v. *Lunt*, 58 Maine, 533; *Wallingford* v. *Fiske*, 24 Maine, 386; *Hayden* v. *Foster*, 13 Pick., 492.

II. The notice of the treasurer's sale contains no sufficient description of the estate to be sold. It contains the name of the owner, the number of acres, valuation and amount of the tax, but does not give the number of the lot, or the range, or any boundary or other facts by which a purchaser could obtain sufficient knowledge of the identity of the land to form an intelligent judgment of the value. Even "the short description taken from the inventory," as required by statute, is not inserted in the notice. This being a proceeding *in invitum* the rule of law is that the notice should contain such a description of the land as will enable the owner and purchaser to identify it with reasonable certainty. The cases are numerous where even greater particularity in the description of the land advertised to be sold for non-payment of taxes has been held insufficient. *Greene* v. *Lunt*, cited sup.; *Griffin* v. *Crippin*, 60 Maine, 270; *Larrabee* v. *Hodgkins*, 58 Maine, 412.

III. The case does not show that the sale was by public auction. The only evidence upon this point is contained in the recitals in the deed, and these may be true and the sale have been private. But it has been repeatedly held that the recitals in a tax deed, unless made so by statute, are not in themselves evidence of a compliance with the statute in making the sale, but the burden is on the party claiming title under such deed to prove such compliance by other evidence. *Worthing* v. *Webster*, 45 Maine, 270; *Phillips* v. *Sherman*, 61 Maine, 548.

These objections to the validity of the tax deed being decisive of the case, it is unnecessary to pass upon the remaining objection raised by the learned counsel for the plaintiff, that the deed itself is void for uncertainty in the description of the land conveyed.

The plaintiff having seasonably made the tender provided by

the statute in order to authorize him to contest the validity of the tax sale is entitled to judgment.

Judgment for the demandant.

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

RICHARD C. THORNTON *vs.* RICHARD LEAVITT, Appellant.

Jurisdiction—when acquired by voluntary appearance.

When a defendant appears and files an account in set-off, in an action pending in an inferior court which has jurisdiction of the subject-matter, that court acquires jurisdiction of the person and the cause.

ON EXCEPTIONS.

ASSUMPSIT upon a promissory note, brought originally in the municipal court of Saco, in which city the plaintiff resided, the defendant living in Scarborough, in Cumberland county. At the return day of the writ, the fourth Tuesday of August, 1871, it was entered in that court, and the defendant appeared and answered thereto, and filed an account in set-off; it was thence continued from term to term, until the second Tuesday of October, 1871, when the defendant moved its dismissal, for lack of jurisdiction in the court over the person of the defendant. The motion was denied, and he appealed to this court, where it was renewed and again overruled, and the defendant excepted.

By Private Laws of 1869, c. 205, incorporating the municipal court of the city of Saco, that tribunal has jurisdiction, concurrently with the supreme judicial court, over personal actions, in cases where the title to realty is not brought in question, where the damages demanded do not exceed one hundred dollars, and the defendant is a resident of York county, if a citizen of this State.

Edward Eastman, for the defendant.

Municipal courts are of limited jurisdiction, and are strictly confined to the powers and cases delegated to them by the acts by which they are created, and nothing is inferred in their favor.

This court not having authority over a citizen of Cumberland county, its want of jurisdiction, being apparent upon inspection of the writ, need not be pleaded in abatement, but could be taken at any time. *Bailey* v. *Smith*, 12 Maine, 196; *Tibbetts* v. *Shaw*, 19 Maine, 204; *Maine Bank* v. *Hervey*, 21 Maine, 38. There is no rule of the municipal court, fixing any time for filing motions and pleas in abatement, and it is not affected by the rules of the supreme judicial court upon this subject. Actions brought in the wrong county shall be abated. R. S., c. 81, § 9.

H. Fairfield, for the plaintiff.

DANFORTH, J. By Private and Special Laws of 1869, c. 205, the municipal court of the city of Saco had jurisdiction over the subject matter of this suit.

The general appearance of the defendant, and filing an account in set-off, gave that court jurisdiction of the person. Hence, the motion to dismiss was made too late. *Brown* v. *Webber*, 6 Cush., 560. *Exceptions overruled.*

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

GEORGE H. WAKEFIELD, Petitioner,

vs.

BOSTON AND MAINE RAILROAD.

The premises to be viewed by the jury under R. S., c. 18, §§ 12 and 13, embrace the land of the petitioners, both without and within the location of the railroad; and it is the right of the jury to view the premises from both these standpoints. The ruling of the presiding officer in this case that the jury must take their view of the premises solely from that portion within the location, is erroneous.

On exceptions.

Hearing upon a motion, filed by the petitioner, to set aside the verdict of a sheriff's jury, assessing the damages done to the petitioner's land by the location over it of the respondents' railroad. The ground of the motion was that the person appointed to preside at the hearing instructed the jury that, in making a view of the premises damaged, they had no right to go outside of the exterior limits of the railroad location, nor to go upon the remaining parts of the tract of land, through which said location runs; and, at that view, the jury were prevented by the presiding officer from going upon, or examining the remaining parts of the injured premises, except so far as they could be seen by standing upon the location, although the petitioner's counsel requested that the jury be taken around and over the remaining portions cut off by the location, and part of the jurors started to go off the location for that purpose, when they were recalled by the presiding officer, who then instructed them that they must keep within the location lines.

The premises were a field of twenty-two acres of such nature that it was impossible to see the whole tract from the location limits.

The justice presiding at *nisi prius* ruled *pro forma*, in order to present the question arising upon these exceptions, that the verdict be accepted and confirmed, and the petitioners excepted.

H. Fairfield, for the petitioner.

George C. Yeaton, for the respondents.

Dickerson, J. This case is presented on a motion to set aside the verdict of a sheriff's jury on the ground that the presiding officer prevented the jurors from going upon the parts of the premises which were outside the railroad location, and from viewing such parts thereof as could not be seen from said location. The justice presiding found that the jurors were thus prevented, but ordered the verdict to be confirmed, in order to present the ques-

tions in the case, and that further evidence be taken, and a plan of the premises submitted to the law court. To this order the petitioners excepted.

In such cases the jury are "to be sworn," and are "to view the premises, hear the testimony, and the arguments of parties or their counsel." R. S., c. 18, §§ 12, 13. The provision for "viewing the premises" is as imperative as are the other requirements.

"To view," says Webster, means "to look at with attention," or "for the purpose of examining," "to inspect," "to explore." "It differs," says the same author, "from look, see, or behold, in expressing more particular or continued attention to the thing which is the object of sight." "The premises" embrace the tract of land owned by the petitioners, over which the railroad passes, both without and within the location. Both parts are to be "viewed" by the jury, that is, "inspected" or "explored." The company has no more right to insist that the "view" shall be made solely from within, than the petitioners have that it shall be made only from without, the location.

In order to enable the jury to form a correct judgment of the amount of damages sustained by reason of the location of the railroad, they should "view the premises" from such standpoints, and in such a manner as will give them an accurate knowledge of the considerations that go to make up the damages, such as the value of the land taken and the use to be made of it, the effect of the severance upon the character, situation, present and prospective use of the remainder of the lot, and any other facts that diminish the value of the premises. *Bangor & Piscataquis R. R. Company* v. *McComb*, 60 Maine, 298.

The presiding officer has the right "to keep order and direct the course of proceedings." R. S., c. 18, § 12. This authority in this respect is not paramount, but subordinate to, and in furtherance of the other provisions, and the general purposes of the statutes. "The view of the premises" is for the enlightenment of the jury alone, and the verdict found and rendered upon their oaths must be theirs exclusively. In contemplation of the statute the

"view" is a portion of the evidence to be submitted to, and considered by the jury in determining their verdict, and whether taken upon the premises within or without the location, or both, it is competent evidence, and the presiding officer has no right to exclude it by denying to the jury the opportunity to receive it. If the presiding officer may restrict the jury in making the "view" to one of those standpoints, he may to the other, and thus make the verdict, in some degree, the exponent of his will, rather than the judgment of the jury found in accordance with the requirements of the statute.

The jury were kept upon the location by the presiding officer, and required to make their "view" from that alone, although "they desired to go off the location on to the remaining portions." "The premises" were a field of uneven surface, containing twenty-two acres. The fair inference from the evidence is, that a portion of the field could not be seen from any point within the location, and that not more than two-thirds of it could be "viewed" from the most favorable position thereon. The verdict, therefore, expresses the judgment of the jury upon such partial view of the premises as they made from the standpoints designated by the presiding officer, not what it might have been if they had viewed them as they had a right, and desired to do. The jury were prevented from making the view of the premises contemplated by the statute, and the exceptions must be sustained.

It is begging the question to argue that the petitioners were not aggrieved by the ruling. This court has not sufficient evidence to enable it to determine what effect a "view" of the unseen portions of "the premises" would have had upon the verdict of the jury. Indeed, only a part of the evidence actually submitted to the jury is before us. Besides, the petitioners have a right to the verdict of the jury found and rendered upon such evidence as the statute authorizes them to receive and consider. Such evidence was excluded by the presiding officer.

It is to be observed in conclusion, that the right of examination is not always co-extensive with the claimant's land, but should

be confined within what, under the circumstances of the case, would be reasonable limits. *Exceptions sustained.*
Verdict set aside.

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

GEORGE A. WIGGIN *vs.* EDWARD S. GOODWIN.

Effect of sale by one partner to another. Contract varied by subsequent parol agreement.

Where one member of a firm, at its dissolution, sold all his interest in the property and accounts of the firm to his partner, who gave his note therefor, the defendant in a suit upon the note by the payee, cannot set off against such note, an account due from the plaintiff to the firm at its dissolution.

A written agreement may be waived, varied or annulled by a subsequent oral agreement of the parties.

In case of a mistake in the drafting of a contract, if the parties subsequently settled upon the basis of the contract as it should have been written, and a promise is made to pay or allow the balance thus found due, such promise will be enforced.

ON REPORT.

ASSUMPSIT upon a note dated February 21, 1871, for $800, given to the plaintiff by the defendant in payment for the former's interest in the assets of a partnership previously existing between them. The defendant filed a small note of the plaintiff, and an account, in set-off. The plaintiff, after reading the note in suit, admitted his liability for the $75 note filed in set-off and $60.40 of the account, and rested his case.

The defendant introduced the agreement of February 21, 1871, between the parties, fully copied into the opinion, and then proposed to show by the scrivener who wrote it, that he asked Wiggin what he meant by the words "personal account" as there used, and Wiggin replied, "our dealings in the ladder business." This testimony was excluded, as well as that offered to prove by parol that

the writing was only part of the agreement, and that it was further agreed that whatever balance was found due from Wiggin to the firm of Wiggin & Goodwin should be paid Goodwin or deducted out of this note.

The court also refused to permit the defendant to show that, subsequently to the delivery of the agreement, it was arranged that the parties should meet and settle the amount which each party owed the copartnership at the time of its dissolution, and that such balance (if any) as was found against Wiggin he should pay Goodwin, or allow it upon this note; and that afterwards, on the first day of March, 1871, the parties did meet, examine and adjust their partnership account; that it was found that Goodwin owed the firm, at its dissolution, $157 and that Wiggin then owed it $776; and that the balance ($619) due from him Wiggin agreed to pay Goodwin, or to allow it upon the note in suit; and that Wiggin afterwards stated to the scrivener that he had been down to settle with Goodwin and found his bill was about as large as the note. After the exclusion of the proof of these facts sought to be set up in defence, the defendant consented to a default, to be taken off and the cause to stand for trial if any part of the testimony offered by him and excluded was legally admissible.

Wm. J. Copeland, for the defendant.

George C. Yeaton, for the plaintiff.

APPLETON, C. J. The plaintiff and defendant were partners. The plaintiff sold out his interest in the partnership by a contract in the following terms:

"This certifies that I, George A. Wiggin, have this day sold unto Edward S. Goodwin, my former partner in the ladder business, all my right and title in said business, and do hereby sell and relinquish all my claim upon all the property, both real and personal, heretofore owned by the firm of Wiggin & Goodwin. Also all accounts now due said firm. In consideration of the sum of eight hundred dollars ($800) paid to me by said Edward S. Good-

win, receipt whereof I do hereby acknowledge. It is understood that the personal accounts now existing between myself and the said Edward S. Goodwin are not included in this agreement.

Signed at South Berwick, Maine, this twenty-first day of Feb ruary, A. D., eighteen hundred and seventy-one.

Witness, H. A. STONE. GEORGE A. WIGGIN."

This paper was duly stamped.

The note in suit is the one then given for the sum of $800 and referred to in the above agreement.

The sale by the plaintiff to the defendant was a dissolution of the partnership. The interest of a partner in the estate of a solvent firm is the share to which he would be entitled in the final adjustment of its affairs. His interest would be what would remain after deducting the amount he might owe the firm. The sale to the defendant amounted to a liquidation of the affairs of the partnership. The claim of the firm must be regarded as extinguished. *Lesure* v. *Norris*, 11 Cush., 328.

There is no ambiguity, either latent or patent, in the transfer made by the plaintiff of his interest in the partnership. The personal accounts existing between him and said Goodwin exclude partnership accounts due from him to the firm. The phrase relates only to accounts between them as individuals. The evidence to show what the scrivener meant by personal accounts was properly excluded.

The defendant offered to show that, subsequently to the delivery of the note and contract, it was agreed that the parties should meet and settle the amount each owed the partnership at the time of its dissolution; and that the balance against the plaintiff, if any should be found, should be allowed the defendant on this note, or be paid him; that they did meet on March 1, 1871, and adjusted their copartnership accounts, and it was found that Goodwin owed the firm, at the time of its dissolution, $157; that Wiggin then owed it $776; that the balance was found to be $619, which Wiggin agreed to pay or allow on the note in suit. This testimony the court excluded.

This evidence was of an agreement subsequent to the date of the assignment of the plaintiff's interest in the firm. "The rule, that parol evidence is not to be received to vary a written instrument," observes Shepley, J., in *Marshall* v. *Baker*, 19 Maine, 405, "excludes all previous and contemporaneous declarations, but it does not exclude independent and collateral agreements made after the contract is completed, whether on the same occasion or at a subsequent time. Such testimony is not used to vary the terms of a written contract, but to prove, that it has become inoperative by reason of a subsequent and independent one." In *Goss* v. *Lord Nugent*, 5 Barn. and Ad., 65, Lord Denman states the law on this subject thus: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any measure to add to, or subtract from, or vary or qualify, the terms of it, and thus to make a new contract; which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement." If the parties for reasons satisfactory to themselves modify their original agreement, they have a perfect right to do it, and when done it is not readily perceived why proof of such modification should not be received.

This evidence was admissible upon another ground. It was urged that there was a mistake in the assignment as originally drafted; that it failed to truly represent the actual contract, as made and understood. If there was a material mistake, and it was fully established, a court of equity would reform the contract in which the mistake existed. If a mistake may be rectified and the instrument reformed by a court of equity, much more may it be done by the parties. If done by them, it is equally valid as if done in pursuance of a decree in chancery. The evidence offered tends to show that the defendant was entitled to an allowance as claimed; that the plaintiff admitted that fact; that a settlement was made of the affairs of the partnership accordingly; that a bal-

ance was found due the defendant; that the defendant promised to allow such balance upon the demand in suit. If the defendant can prove all this, he should be permitted to do it. The demands of justice require it. *Default off. Case to stand for trial.*

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

JOHN H. CLARK *vs.* INHABITANTS OF LEBANON.

Defective highway. Proximate cause. Misconduct of jury.

When a horse, through fright at the striking of the carriage to which he is attached against an obstruction in the highway, becomes uncontrollable, runs away and injures the driver by throwing him out, the defect in the highway is the proximate cause of the injury.

The misconduct of jurors, when the parties to the suit are not in fault, is no ground for a new trial, unless it is probable that the party asking for it has been prejudiced by the irregularity.

ON EXCEPTIONS and MOTION FOR A NEW TRIAL.

CASE, for injuries occasioned by defective highway. While riding in the defendant town, the plaintiff's wagon struck against some "raised logs" in the travelled part of the road, on account of which his horse became uncontrollable, ran an hundred and twenty-five feet or more, when plaintiff was thrown out and injured.

There was evidence tending to show that the horse, after running the distance mentioned above, turned back; but the plaintiff's unconsciousness, occasioned by the accident, rendered him unable to recollect whether he was thrown out before or after the wagon turned.

The defendants' counsel requested the presiding justice to instruct the jury that "if the horse became uncontrollable, and in that condition turned and ran back, and, being so uncontrolled, threw the plaintiff out while turning back, the plaintiff could not

recover." The judge, however, instructed them that if there was a defect and want of repair in the road, of which the town had reasonable notice, and the plaintiff was in the use of common and ordinary care, with a suitable team, and his horse, without his fault, by reason only of coming upon such defect within the limits of the actual travelled way, became frightened and uncontrollable, and in such condition, without the power of the driver to stop him, or direct his course or movements, ran away, and the plaintiff was, by reason of such fright and running, thrown out and injured, he can recover. The verdict was for the plaintiff for $900. To this ruling, and the refusal to instruct, the defendants excepted.

Testimony was introduced concerning the width of wagon wheels, and, at a recess during the trial, some of the jurors measured the width of the wheels of a wagon standing in the court house yard. The defendants moved for a new trial, on account of this alleged misconduct of the jury.

George C. Yeaton, for the defendant, cited, in support of the exceptions, *Titus* v. *Northbridge*, 97 Mass., 265; *Cook* v. *Charlestown*, 98 Mass., 80; *Babson* v. *Rockport*, 101 Mass., 93; *Sanford* v. *Moulton*, 51 Maine, 127. And, in support of the motion, cited *Benson* v. *Fish*, 6 Maine, 141; *Whitney* v. *Whitman*, 5 Mass., 405; *Sargent* v. *Roberts*, 1 Pick., 337; *Hix* v. *Drury*, 5 Pick., 302; *Merrill* v. *Nary*, 10 Allen, 416; *Sheaff* v. *Gray*, 2 Yeates, 275; *Heffron* v. *Gallupe*, 55 Maine, 563; *Tyrrell* v. *Bristow*, Alc. and Nap., 398; *Peacham* v. *Carter*, 21 Vt., 515; *Sam* v. *State*, 1 Swan, 61; *Brunson* v. *Graham*, 2 Yeates, 166; *Farrar* v. *Ohio*, 2 Ohio St. R., 54; *State* v. *Smith*, 6 R. I., 33; *Deacon* v. *Shrieve*, 2 Zab., 176; Hilliard on New Trials, c. 10, § 19.

Ira T. Drew, for the plaintiff.

WALTON, J. The defendants contend that if a horse through fright becomes uncontrollable, and while in that condition runs

away and throws the driver out and injures him, he cannot recover damages of the town, although a defect in the road was the sole cause of the fright. They insist that in such a case the defect is not the proximate cause of the injury; that the fright, loss of control and running away of the horse are intervening causes which crowd the defect back into *causa remota*. We think not. We think that in such a case the defect must be regarded as the true proximate cause of the injury. *Willey* v. *Belfast*, 61 Maine, 569. In *Marble* v. *Worcester*, 4 Gray, 395, where a horse was frightened and became uncontrollable by the sleigh pitching into a hole in the road, and after running a distance of fifty rods, run against and knocked down a stranger and injured him, it was held by a majority of the court that inasmuch as the person injured had no connection with the team, being neither owner, rider, nor driver, and was at a considerable distance from the defect when struck by the horse, he could not recover damages of the city. But it was conceded that if the driver, or one riding in the sleigh, had been thrown out and injured, he could recover. "If the young man in the sleigh," said Judge Thomas, "had been carried fifty rods, and then thrown out and injured, no question of the liability of the city could have been raised."

Another ground, on which the defendants claim a new trial, is the alleged misconduct of the jury in measuring the distance between the wheels of a wagon, after evidence had been introduced at the trial, as to the width of wagons. It is insisted that this was such misconduct as ought to give the defendants a new trial. We think not. The proceeding, though not, perhaps, strictly proper, seems to us to have been a very harmless one. There is no pretense that the wagon measured was the one in which the plaintiff was riding at the time of the accident; and of course the jurors would understand that wagons differ in width. The misconduct of juries, where the parties to the suit are not in fault, is no ground for granting a new trial, unless it is probable that the party asking for it has been prejudiced by the irregularity.

There is no evidence of prejudice to the defendants in this case, and we think it is not a case where prejudice is to be presumed.

Motion and exceptions overruled.

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

THOMAS M. DAVIS, petitioner for mandamus,

vs.

THE COUNTY COMMISSIONERS OF YORK COUNTY.

Mandamus will not generally lie to restore a cause to the docket.

The issuing, or refusal to issue, a writ of mandamus rests in judicial discretion.

The dismissal of judicial proceedings, for want of prosecution, is discretionary with the court before which those proceedings are pending.

When proceedings have been dismissed for want of prosecution, and upon application for their restoration to the docket of the court before which they were pending, after full argument of the motion, such restoration was denied, this court will not (unless to prevent great injustice) interfere by mandamus to order such restoration.

PETITION FOR MANDAMUS.

In the spring of 1871 the county commissioners of York county located a way partly over the land of Thomas M. Davis, and awarded him sixty dollars as damages. Being aggrieved by this estimate, Mr. Davis presented his prayer to have it increased at the April term, 1872, of the court of county commissioners. No agreement was made, or entered of record, to submit the matter to a committee, nor was any selected, nor the cause submitted to a jury, nor any action taken till the April term, 1873, of that court, when the commissioners, of their own motion, without the knowledge of Mr. Davis, and during the sickness and absence of his attorney, dismissed the proceedings. Immediately upon learning of this action there was an application made by Mr. Davis to have his petition for increase of damage reinstated upon the docket of

the court of county commissioners, which was rejected after full argument by counsel in support of it. The present petition to this court was for a writ of mandamus, commanding the county commissioners to restore the petition for an increase of damages upon the docket of their court. The respondents filed an answer in which they state that the omission to issue a warrant for a jury was by request of Mr. Davis' counsel, who asked, when he presented the petition, that no warrant issue, and no action be had, until requested by him; that there were fourteen adjournments of the case from one day designated to another, without any appearance by Mr. Davis or his counsel, and it was finally dismissed at their regular April session, 1873, for want of prosecution, because they thought it had been abandoned and that there should be no further delay; that his motion for its restoration was argued before them at great length, and was refused, because they thought Mr. Davis had been guilty of negligence, and had not acted in good faith, and that his request, for these reasons, ought not to be granted.

If the petitioner was not precluded by the answer from traversing the facts alleged therein, he was to have opportunity to do so in such manner as to this court seemed fit.

Charles E. Clifford, for the petitioner.

W. F. Lunt, county attorney, for the respondents.

Appleton, C. J. The writ of mandamus is not a writ of right. The issuing, or the refusal to issue it, is a matter resting in judicial discretion. *Belcher* v. *Treat*, 61 Maine, 580.

The petitioner presented to the county commissioners of this county a petition for an increase of damages from a road located over his land. The petition, after remaining some time upon the docket of the court, was dismissed for want of prosecution. The petitioner then made an application to the court for the restoration upon its docket of the original petition, which, upon a hearing, was denied.

This is a petition to this court for a writ of mandamus commanding the county commissioners to reinstate the petition for an increase of damages.

The dismissal of an action, or other judicial process, for want of prosecution, rests in the judicial discretion of the court in which the proceedings are pending. So, when an action, or other judicial process has been dismissed, whether it shall again be restored to the docket is equally a matter of discretion on the part of the court to which the application is made.

The general rule is that when a question is submitted to the discretion of a judicial officer, his judgment is conclusive. He is not to be controlled by any discretion but his own. Where an inferior court has discretion in relation to the proceedings pending before it, and proceeds to exercise it, the court will not control that discretion by mandamus. *Hull* v. *Supervisors of Albany*, 19 Johns., 259; *Ex parte* Bacon & Lyon, 6 Conn., 392. If it appear that the sessions have exercised a discretion in a matter which properly belongs to their jurisdiction, it is almost an invariable rule that the court of King's Bench does not interfere. *Rex* v. *Norfolk*, 1 D. & R., 74; Tapping on Mandamus, 13. The exercise of their discretion is not to be revised by any other tribunal. *Gibbs* v. *County Commissioners of Hampden*, 19 Pick., 298.

Such is the general rule, as stated above. There are, however, cases which show that, if the discretion of the court below is exercised with manifest injustice, the court is not precluded from commanding its due exercise. Tapping on Mandamus, 14. But the present case does not justify, nor require, our interference. The tribunal before which the petition was pending heard the parties and their counsel and, in the exercise of their discretion, refused to allow the petition for increase of damages, which had been dismissed for want of prosecution, to be again restored. With their decision we are not inclined to interfere.

Writ denied.

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

GEORGE A. FROST, in equity, *vs.* THEODATE FROST *et als.*

Trust—by what writing created and evidenced. Statute of limitations. Trustee—bill in equity against.

Robert Moon conveyed an undivided half of a tract of land on which there was a mill privilege without consideration to Ichabod Frost, who, reserving a right to make improvements on the same, gave back a bond, of the same date as the deed, to Moon, conditioned to reconvey the premises upon demand and the payment of all improvements he might make upon the tract, if he should not sell it within ten years from date; and further conditioned, in case it should be sold, to pay Moon one hundred dollars, he (Moon) accounting, in that event, for half of the expenses incurred in improvements; he (Moon) to receive the rents and profits of the whole tract during that time; *held*, that Frost held the estate so conveyed to him in trust for Moon.

The form in which a trust in writing is created is immaterial. It may be by letter, memorandum, the recitals of an indenture or a deed, or the conditions of a bond.

The provision of R. S., c. 111, § 6, by which, when a party who had contracted in writing to convey real estate dies, the other party, seeking a performance, is required to bring his bill against the heirs, devisees, executors or administrators, within three years from the grant of administration, &c., and give the executor or administrator written notice of the existence of the contract within one year from such grant, does not apply to the case of a trust evidenced by writing.

By the terms of the contract Frost was to sell the whole estate before he was entitled to have half upon payment of an hundred dollars.

When a trustee wrongfully conveys the trust estate, and subsequently receives a reconveyance of it, he holds the estate, after regaining title, as trustee, subject to the original trust.

A demand by Moon upon Frost for a deed, when Frost refused to deliver one and rendered no account of any expenses by the way of improvements, was valid, without any tender of such expenses.

A demand, binding upon the obligor, is binding, in case of his death, upon his heirs, devisees, executors and administrators.

As between the trustee and the *cestui que trust* the statute of limitations, in case of a written trust, does not run against the *cestui que trust*; at any rate, not until there has been an open and express denial of his right, and what amounts to adverse possession on the part of the trustee.

It is only necessary that a bill should be verified by oath when it is for the purpose of discovery or for an injunction.

Frost *v.* Frost.

BILL IN EQUITY.

April 8, 1845, Robert Moon owned land bordering upon the Mousam river in Sanford, at a point where it was supposed a dam and mills could be profitably erected. To facilitate a sale of it for this improvement, Moon conveyed an undivided half of it, on that day, to the late Ichabod Frost since deceased, taking back the bond of the same date, the condition of which is recited in the opinion. Just before the expiration of the ten years within which the power of sale was intrusted to said Frost, he went to Saco and there made a conveyance of the half of the premises deeded to him by Moon to one Boyd who, at the same time and as part of the same transaction, reconveyed it, by deed of warranty, to Frost, who put his deed to Boyd upon record soon after, but retained the one from Boyd to him for more than a year before recording it.

Robert Moon conveyed his interest in this property to his son, Duxbury Moon, who transferred it to the complainant. The respondents are the widow and children of Ichabod Frost and hold whatever title he had.

A demurrer was filed by all the defendants, and they all answered, and documentary proofs and depositions were put in on both sides. The questions presented and decided appear by the opinion.

Asa Low, for the complainant.

I. S. Kimball and *Howard Frost*, for the respondents.

APPLETON, C. J. This is a bill, in which the plaintiff, as assignee of Robert Moon, seeks to compel the reconveyance of certain real estate originally held in trust by Ichabod Frost for the benefit of said Moon or his assignees, and which has descended to said defendants as heirs at law of said Frost charged with said trust, and in which the said Theodate claims dower as the widow of said Frost.

The defendants have severally demurred and answered to the

bill. Numerous questions have been presented by the bill, answer and proof, as well as by the demurrer, which it will become necessary severally to consider.

I. Robert Moon, from whom the plaintiff derives his title, by deed dated April 8, 1845, conveyed to Ichabod Frost, deceased, an undivided half of a certain tract of land therein described. On the same day said Frost gave back to said Moon a bond relating to said land, the condition of which was as follows: "That whereas the said Moon had conveyed as aforesaid, the said Ichabod Frost is to use his endeavor to sell said tract of land and a mill privilege being thereon, for the purpose of erecting a dam and mill on said Mousam river; but if said Frost shall not sell said mill privilege as aforesaid within the space of ten years hereafter, then said Frost is to convey said tract or parcel of land to said Moon, his executors, administrators or assignees, by a good and sufficient deed of quitclaim of said premises on demand and upon payment for all improvements which said Frost, at his own expense shall make upon said premises. And, furthermore it is conditioned, that if said Frost shall make sale of said premises as aforesaid within said space of ten years, then said Frost is to pay said Moon one hundred dollars upon demand made upon him by said Moon, or by his lawful agents, representative or attorney; and in the meantime—that is to say, previous to the sale as aforesaid to be made by said Frost, said Moon may occupy and improve said tract of land for his own benefit and receive all the rents and profits thereof without molestation by said Frost; reserving to said Frost the right to enter and sell and make improvements on said land, or to erect a dam across said river, or to erect any mill or mills on said land, within said time, if he may deem it advisable; provided moreover, that said Moon shall pay one-half of all expenses, which may be reasonably incurred in selling and erecting a dam across said river on said premises."

No other consideration for the deed to Frost is satisfactorily shown to exist than the bond bearing the same date therewith. The form in which a trust is created is immaterial. A mere mem-

orandum, a letter, or any writing of an informal and untechnical character will suffice, if it clearly express the gift in trust and connect the trustee with the subject matter of the trust. Hill on Trustees, 64. So the declaration of a trust may be contained in an indenture between parties, in the recitals of a deed, or in the conditions of a bond. *Bragg* v. *Paulk*, 42 Maine, 502.

It is obvious that Frost was not the purchaser of the land conveyed, for there was no sale. He was not the mortgagor, for there was no debt to secure. He had not the uncontrolled disposition of the property conveyed to him, for he did not own it. He held the land for the purpose of selling the mill privilege thereon within ten years, with the further right of making improvements on his own, or on joint account; the grantor, Moon, in the meantime to occupy and improve the land for his own benefit and receive the rents and profits therefrom. If the land was not sold at the expiration of the time limited in the bond, Frost was to reconvey the premises to his grantor, upon payment of all improvements he might have made. The conclusion from an examination of the contract is, that Frost held the premises in trust.

II. It is provided by R. S., c. 111, § 6, "if a person, who has contracted in writing to convey real estate, dies before making the conveyance, the other party may have a bill in equity in the supreme judicial court to enforce specific performance thereof against his heirs, devisees, executors or administrators, if commenced within three years from the grant of administration, or the time when he is entitled to such conveyance, but not exceeding four years after the grant of administration, if written notice of the existence of the contract is given to the executor or administrator within one year after the grant of administration." It is insisted, that, as there was no written notice given within the year after the grant of administration, this bill is not sustainable.

But the premises in question being held in trust, the above section does not apply. That relates to cases where the owner of land contracts to convey on certain terms and conditions land of his own, not when he holds property in trust. This provision was

not intended to diminish or to destroy the rights of the *cestui que trust*. The object was to enforce the performance of a contract within a limited time after the grant of administration. The purpose of this bill is to enforce the execution of a trust.

III. By the terms of agreement, Frost in case of a sale of the premises within ten years was to pay Moon one hundred dollars upon demand. But the sale contemplated was to be a sale of "the premises" not of an undivided half thereof. The compensation Frost was to receive, was the excess above one hundred dollars for the half conveyed to him in trust. He had no right to sell his half by itself. It was not conveyed to him for such purpose. It would, if it were so held, be a mere gift, which was not intended.

IV. It appears that on the third day of March, 1855, Ichabod Frost conveyed an undivided half of the premises to Amos H. Boyd, who, on the same day, reconveyed said half to Frost. The conveyance was fraudulent and collusive, and for the purpose of procuring a title to Frost discharged from the trust. The deed was made and executed at the expense of Frost, and there was no consideration at the time of either conveyance passing between the parties thereto. The rule of law is accurately stated in Saunders on Uses and Trusts (Am. ed.,) 211. "If a person purchase of the trustee for a valuable consideration, without notice, he will hold discharged of the trust; but if the original trustee re-purchases the estate he will again be converted into a trustee." The reconveyance to Frost from Boyd, left him in the same condition that he was in before he had collusively and fraudulently parted with the title. He still remained trustee.

V. The tender of an hundred dollars in gold, which Frost made in March, 1855, gave him no new rights. "The premises" had not been sold. It was never the intention of the parties that it was to be a mere sale of half for a given sum. Frost was to sell the whole, and when sold, to pay Moon one hundred dollars, the balance over that sum being the compensation for his agency in the matter. The condition upon which Moon would be entitled

to his hundred dollars never happened, and the tender made was of no avail.

VI. It appears in evidence that Robert Moon, in his life time, made a demand on Frost for a reconveyance; that Duxbury Moon, who is shown to have acquired title by legal conveyance, made a demand in 1859; and that on the eleventh or twelfth of May, 1863, Asa Low, as attorney for the complainant, made a like demand for a reconveyance upon said Frost. Frost refused to convey, alleging as a reason that he had conveyed the premises to Boyd, and "could do nothing." At the time of the several demands for a reconveyance proved, no statement was given by Frost of the expenses incurred by him, nor claim made for their payment. The bill bears date August 31, 1868. It matters not whether the defendants are heirs or devisees of Ichabod Frost. They have his title in the one mode or the other. In either event, they have only his rights, and if a demand was necessary and was duly made upon him, they take subject to his liabilities.

VII. The statute of limitations constitutes no bar to the plaintiff's claim. The right to a reconveyance did not attach until April, 1855, for up to that date Frost held the estate in trust. After that date, repeated demands for a reconveyance are shown to have been made on him. Now, "as between trustees and *cestui que trust*, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time; for, in such cases, there is no adverse possession; the possession of the trustee being the possession of the *cestui que trust*." Hill on Trustees, 264. Time does not begin to run until the trust is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Besides, the bond evidencing the trust is under seal.

VIII. It was not necessary that the bill should be verified by oath, as it is not for the purpose of discovery, nor for an injunction. Rules of Chancery Practice, I, 37 Maine, 581.

The plaintiff's title is clearly established by the evidence, and

there is no rule of equity that requires that those from whom he derives an unquestioned title should be made parties. The same remark applies to the defendants, whose title as set forth in the bill, is established by the proofs and is not controverted by any of the parties to this litigation.

The plaintiff is entitled to a conveyance. But it appears that Ichabod Frost, during the time he held the estate in trust, incurred some slight expenses in the charge of the estate and in the erection of a frail dam upon the premises. The case is therefore referred to a master to ascertain what sum the plaintiff should be held to pay before the defendants should be required to release their interest in the estate, a conveyance of which is sought to enforced by this bill. *Decree accordingly.*

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

ALBRA A. GUPTILL *vs.* HENRY HORNE.

Assignment, delivery and indorsement of a promissory note by a married woman. Amendment.

Where a woman assigns by delivery a note payable to her order and afterwards marries the maker, her indorsement after such marriage transfers the legal title.

The return day of a writ may be amended according to the evident original intention.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note for $79.00, dated April 8, 1872, given by the defendant to Clarilda A. Guptill, payable to her order in six months from date with interest. The consideration of the note was personal services. Being indebted to her brother, the plaintiff, for board, the original payee transferred and delivered to him, without indorsement, this note as part payment. She subsequently married Mr. Horne, the promisor, and after that, but prior to the commencement of this action, she wrote across

the back of the note her name, and maiden name, thus: "Clarilda A. Horne," "Clarilda A. Guptill," and drew a penmark through the surname of this last signature, or, rather, the lower of these two signatures on the back of the note, it not appearing, except as an inference from these facts, which of these two names was in fact first written. Since the date of the writ, October 19, 1872, Mrs. Horne wrote the name, "Clarilda A. Guptill," across the back of the note. The case having been submitted to the presiding justice he found the foregoing facts and that these several indorsements were made for the purpose of perfecting the plaintiff's title to the note, and ruled that those made before suit brought, transferred the legal title to the note to the plaintiff, and that he was entitled to recover its amount in this action.

The return day in the writ as made was the first Tuesday of January, 1872, a day long past when the writ was made. The action was entered at the January term, 1873, and was answered to generally, but when it came on for trial the defendant moved to dismiss it, because not entered at the return term named; the court overruled this motion and allowed that of the plaintiff for leave to correct this mistake. To all these rulings the defendant excepted.

William J. Copeland, for the defendant.

Until her marriage the payee in the note had a right of action. The marriage extinguished that right. The Statutes of Maine give no mutual right of action to the husband and wife and none such exists by common law. *Smith* v. *Gorman*, 41 Maine, 408.

In 1868 this court, *per* Appleton, C. J., said the statute did not contemplate a suit by the wife against the husband, nor that he should be arrested and imprisoned at her instance.

Such has been the uniform construction of this and similar statutes in this State and Massachusetts. *Crowther* v. *Crowther*, 55 Maine, 358.

The statute of Massachusetts, Gen. Statutes, c. 108, is similar to our own. The wife having no right of action can transfer none.

It having been once extinguished she has no power to revive it by transferring it to the plaintiff. *Chapman* v. *Kellogg*, 102 Mass., 246. *Abbott* v. *Winchester*, 105 Mass., 115, is directly in point. A note was given to payee before marriage for her services. The court held that her right of action was not even revived by the death of her husband, and that the plaintiff to whom she indorsed the note after her husband's death, could maintain no action thereon against his administrators. *Tunks* v. *Grover*, 57 Maine, 586, depends upon a different statute and different circumstances, and does not conflict with *Smith* v. *Gorman* and *Crowther* v. *Crowther*, before cited.

The indorsement by the payee by writing her maiden name upon the note was a fraudulent alteration and avoided the note. It is a fraudulent attempt to sustain the plaintiff's action by making it appear that the note had been indorsed to the payee before her marriage, and without such an indorsement there was a variance between the allegation and the proof. Every alteration which in any event may alter a previous liability is material and vitiating, so is any alteration which changes the evidence or mode of proof. 2 Parsons on Notes & Bills, 564.

George C. Yeaton, for the plaintiff.

I. The amendment was authorized by R. S., c. 82, § 9; *Ames* v. *Weston*, 16 Maine, 266; *Barker* v. *Norton*, 17 Maine, 416; *Pattee* v. *Lowe*, 35 Maine, 121.

II. Indorsement sufficient at common law.

(1.) Title passed at time of transfer and delivery;—the subsequent act of writing the indorsement, a merely clerical act, relating back to time of transfer. *Ranger* v. *Cary*, 1 Metc., 369. Validity of contract of indorsement between payee and holder not in issue here; simply whether the title of note passed to holder. *Brown* v. *Donnell*, 49 Maine, 421. Equity would have compelled an indorsement, and to such a bill coverture could have been no answer. Story on Prom. Notes, (6th ed.,) 120, and authorities cited.

(2.) Analysis of such cases as *Smith* v. *Pickering*, Peaks, N. P. C., 50; *Anonymous*, 1 Camp, 492, n., (Ld. Ellenborough); and *Lampriere* v. *Pasley*, 2 T. R., 485, (two being transfers of notes, and the last a bill of lading with bankruptcy intervening before indorsement,) in which plaintiff prevailed, and cases like *Whistler* v. *Forster*, 14 C. B., (N. S.,) 248, and *Lancaster Nat. Bank* v. *Taylor*, 100 Mass., 18, (both transfers of notes voidable for fraud in hands of payee, unindorsed until overdue,) in which plaintiff could not prevail, because he could take no better title than payee had, seems to evolve this rule, as to transfer for value of notes, requiring indorsement, not in fact indorsed until subsequently, to wit: when such note, invalid in the hands of payee, is transferred by delivery alone, no subsequent indorsement, when overdue or after notice of its vice, can make it in hands of holder a better contract than it originally was; but when such note, valid in hands of the payee, is so transferred, no merely personal disability, supervening before the subsequent indorsement, can affect the holder's title.

(3.) R. S., c. 61, §§ 1–5, conferred full power upon the payee to indorse after marriage. *Duren* v. *Getchell*, 55 Maine, 241; *Mayo* v. *Hutchinson*, 57 Maine, 546.

APPLETON, C. J. This is an action of assumpsit on a note signed by the defendant and payable to the order of Clarilda A. Guptill, and by her assigned and delivered to the plaintiff before her intermarriage with the defendant and subsequently indorsed by her.

No question is raised as to the sufficiency of the consideration of the note or of its assignment.

The note having been assigned by delivery the equitable title thereto passed to the assignee. The assignor henceforth ceased to have any control over it. Having transferred it, she was bound to do whatever was necessary to protect the assignee in the enjoyment of his property. He had a right to sue the note in her name and in case of the satisfaction of the judgment by a levy, a court of

equity would compel her to execute a release of the estate upon which the execution was extended.

In the case at bar the subsequent marriage of the assignor with the maker of the note prevented the bringing of a suit in her name. But the husband acquired no right in, or control over the note by such marriage. Nor was the assignee without remedy. When by mistake, accident or fraud an assignment of a negotiable note is made without indorsement a court of equity will compel the assignor to do whatever may be necessary to render the assignment available to the assignee. "When a note," remarks Lord Eldon, in *Walton* v. *Maule*, 2 Jac. and Walk., 237, "is handed over for a valuable consideration, the indorsement is a mere form; the transfer for consideration is the substance; it creates an equitable right and entitles the party to call for the form. The other is bound to do the formal act in order to substantiate the right of the party to whom he has transferred it and he is bound to do it." Thus in *ex parte* Mowbray, 1 Jac. and Walk., 148, the assignees in bankruptcy were ordered to indorse a note assigned by delivery before bankruptcy—but without personal liability. This equitable right attaches at the time of the transfer by delivery.

As the wife could have been compelled by a court of equity to indorse, her voluntary act is as effectual to transfer to the indorsee the legal right to sue as if it had been the result of legal compulsion.

But by the statutes of this State, c. 61, § 4, the wife is liable for any debt created for "any lawful purpose." If liable as indorser or surety upon any contract of indorsement or suretyship, much more may she perform the merely clerical act of indorsement. *Mayo* v. *Hutchinson*, 57 Maine, 546.

The amendment of the writ by substituting 1873 for 1872, was properly allowed. It was made to correct an obvious mistake. *Barker* v. *Norton*, 17 Maine, 416. *Exceptions overruled.*

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

TRAFTON HATCH *et al. vs.* SIMON H. BROWN.

Real action. Deposition. Evidence.

The demandant filed a statement of his deduction of title, under R. S., c. 104, § 3, deriving its origin from Stephen Willard, but did not trace it to him at the trial; *held*, that it was not indispensable that he should do so, but sufficient for him to go back in the line indicated far enough to show a better title than that of the tenant.

In this case the demandants had taken the tenant's deposition. Brown was present at the trial, but was not called as a witness. *Held*, that the plaintiffs had a right to put in the paper containing his statements (given as a deposition) to prove his admissions, and that it is only the use of it as a deposition that is prohibited by R. S., c. 107, § 17, where the cause for taking no longer exists. Any other legitimate use which the party taking it can make of it is not thereby forbidden.

Where a party uses a deposition taken by his opponent, he makes it his own, and the adverse party has the same right of objection to the questions and answers which he would have had if the deposition had been taken by the party offering it, and is not estopped by the fact that the interrogatories he objects to were propounded by himself.

Mary Ann Mayberry, a witness for the defendant, was asked, upon cross-examination, whether or not her brother Stephen claimed to own the demanded premises in the life time of their mother, from whom Brown now deduced his claim of title; *held*, admissible, not only as a test of the memory and truthfulness of the witness, but also because the demandants had introduced testimony to prove that the defence was fraudulently manufactured by said Stephen, so that his acts relating to the property became pertinent and material evidence.

Other witnesses were properly allowed to state other acts of said Stephen, for the same reason.

Held, that exceptions will not be sustained, because a witness was allowed to state a collateral fact of little (if any) importance, though it was matter of record.

The defendant relied upon inferences from secondary evidence to establish title in Jane Mayberry, from whom he claimed; *held*, that the demandants could rebut these inferences by similar testimony.

ON EXCEPTIONS.

WRIT OF ENTRY demanding possession of certain premises in Sanford, in this county. There was no derivation of title in the

declaration but the demandants filed the "informal statement" provided for by R. S., c. 104, § 3, in which they named Stephen Willard as the original holder of their title, and thence traced it through Morse & Mayberry, Thomas Hobbs and Ira T. Drew to themselves. At the trial they did not introduce any evidence of ownership in Willard, going back no further than to Morse & Mayberry, whom they said bought of Stephen Willard, but the deed of Willard to Morse & Mayberry was never recorded, and the plaintiffs believed it to have been destroyed, or else in the possession of the Mayberry family, and suppressed by them. Such a conveyance was referred to in those subsequently made by Morse. Willard, N. D. Appleton, Esq., who wrote the deed from Willard, Judge Bourne, who wrote Morse's deed to Hobbs, are all dead, and Morse is supposed to be so, nothing having been known of his whereabouts for a dozen years. From 1846 to 1848, Morse & Mayberry operated on the lot. Subsequently a disagreement arose between them as to their business connection, Morse claiming a general partnership, and Mayberry that there was only a special agreement, by the terms of which he held half the property simply as collateral security for his advances. They submitted their disputes to referees, the late Judge Allen and Timothy Shaw, Jr., who found, September 15, 1856, that there was a special agreement. Thereupon, Judge Clifford, as counsel for Mayberry, tendered Morse a quitclaim of half the Willard lot, and demanded payment of the sums advanced by him in their operations on this land. Three actions were left to these referees, two in favor of William Mayberry against Benjamin Morse, and one in favor of Stephen P. Mayberry against Morse & Mayberry. Mr. Shaw, the surviving referee, was allowed, against objection, to state the names of these suits and the fact of their being referred, and that Stephen P. Mayberry was a witness, the last witness called, and was present at the hearing of all the cases, and the decision to which the referees came. When Stephen P. Mayberry obtained his execution, he levied it upon this lot as the property of Morse & Mayberry, but his attachment

failed, so that he took nothing by his levy. Upon the second day of November, 1858, he conveyed the larger part of these premises, by deed of warranty, to one Isaiah Perkins, who conveyed the same land to the tenant, September 10, 1868. The plaintiffs took Mr. Perkins' deposition. He remembered nothing about these conveyances, except that some deeds were made and executed to and from him at the request of Stephen P. Mayberry, without Perkins ever seeing the property, or knowing anything about it, or recollecting the prices at which he bought or sold, or whether or not he paid or received anything for it; and he did not, in fact, remember ever taking a deed from Stephen, but thought it was from William Mayberry; nor could he tell to whom he made conveyance.

The tenant claimed that Stephen Willard's deed was to Jane Mayberry, the wife of William, and that William never had any deed from Willard; that Mrs. Mayberry had died intestate, leaving this land to descend to her son, (Stephen P.) and two daughters, the latter having quitclaimed their interest, thus acquired, to Simon H. Brown, December 21, 1869, the son's interest as heir also enuring to Brown, by way of estoppel, through the deeds to and from Isaiah Perkins. No deed from Stephen Willard to Jane Mayberry was introduced, but the tenant claimed that it had been lost or burned, in the destruction of William Mayberry's store by fire, without having been recorded; while the demandants contended that no such instrument was ever executed, but that this was an afterthought, a fictitious document, manufactured after it was discovered that the levy of Stephen P. Mayberry's execution was ineffectual, and after the deaths of the parties; and that the paper, seen by one or two witnesses, was spurious, prepared by some member of the Mayberry family, and never, in reality, signed by Willard. Samuel Tripp, register of deeds of the county, was allowed to testify to repeated visits of Stephen P. Mayberry to the registry for the purpose of making extended examinations of the records, and taking extracts therefrom, which he did, without aid from the register, except in one instance when

he looked up the proceedings in his suit against Morse & Mayberry.

Mary Ann Mayberry, called by the defence, was asked, upon cross-examination, whether or not her brother Stephen claimed the land during her mother's life, and against the tenant's objection, was allowed to testify that he did. This was permitted to test her memory.

The demandants had taken Brown's deposition, and read it to the jury, his counsel objecting, because Brown was present at the trial; but, it being offered "as a writing in reference to this case and title signed by Simon H. Brown," and not as a deposition, it was admitted. It appeared by it that Brown had never been in Sanford in his life; that Stephen P. Mayberry was his agent, through whose intervention his litigation relating to this land was carried on, and he did not know what attorney was employed, had paid none of its expenses, and did not know whether it was still pending or not, and swore that the land was situated in Alfred. He had no personal acquaintance with Isaiah Perkins; had never paid any taxes; did not have the deed in his own possession; did not know whether it was a quitclaim or warranty; said he had no other title than through the Perkins deed; denied all knowledge of any conveyance from the Mayberry girls to him; said that all the business was done through Stephen P. Mayberry, to whom he sent $500 by mail, to make the purchase, and had no conversation with Perkins himself, and did not know from whom Perkins obtained his title, or that he had any, except that Mayberry told him Perkins had a good title. He could not recollect the price he was to pay for the land; only knew that he sent the $500, and gave one note for $1,400, and another for an amount not remembered, both of which he thought were on demand, but he had heard nothing from them since they were given, and did not know where they were, nor whether or not they were ever delivered to Perkins.

A witness from Bethel, where Brown resided, was allowed to state that he had known Brown as a day laborer in a mill for sev-

eral years, occupying a hired tenement, reputed to be worthless, and having no means to the witness' knowledge, though the witness could only judge from living near by Brown as to his property. The plaintiffs also took the deposition of Henrietta W. Mayberry, but did not use it. It was read to the jury by the tenant, and the demandants objected to several interrogatories which they had themselves put to the deponent and to the answers thereto, some of which were admitted and some excluded. William and Stephen P. Mayberry were present with Brown during the trial, but none of them were called to the stand.

The verdict was for the demandants, and the tenant excepted to the various rulings adverse to him, and filed a motion for a new trial, because the verdict was against law and evidence, and a subsequent one upon the ground that it had been discovered that Samuel Mayall would testify that an attempt was made by William Mayberry to sell him the land in controversy in 1848 or 1849, and he was then shown what purported to be a deed of it from Stephen Willard to Jane Mayberry.

R. P. Tapley, for the tenant.

Nothing but title in the plaintiffs can prevail over the defendant's possession. Of this title an informal statement must be filed. R. S., c. 104, § 3. The plaintiffs have done this, stating the origin of their title to be Stephen Willard; and they must show a perfect connection of their title with his. No number of conveyances, disconnected with this origin, will convey the estate, because they allege the title under which they claim to have been in Stephen Willard, and the tenant is in a better condition than they are if they cannot reach that source, since they have declared, substantially, that their title being derived from Willard, they have none unless from him. Otherwise the statement is useless. Its averments being vitally material should be proved. As the plaintiffs do not connect themselves with Willard, they fail to make title; while the defendant does establish that connection between himself and Willard. The verdict, therefore, is against the evidence.

The plaintiffs should not have been allowed to exclude the questions put by themselves to a deponent, nor the replies.

The question of Brown's solvency was immaterial, and should not have been admitted. It was of no consequence, upon the present issue, whether he paid $5 or $5,000. *Leavitt* v. *Leavitt*, 4 Maine, 161; *Hovey* v. *Hobson*, 55 Maine, 275. Nor ought the acts of Stephen P. Mayberry ten years ago, testified to by Mr. Tripp, to have been admitted to our prejudice.

Brown was compelled to depose. *Bliss* v. *Shuman*, 47 Maine, 248. When he appeared in court at the trial, the cause of taking was removed; therefore, under R. S., c. 107, § 17, the deposition could not be used; nor does merely calling it by another name make it admissible.

Ira T. Drew and *Strout & Holmes*, for the demandants.

No deed to Jane Mayberry is proved. A wholesome recollection of the case, *State* v. *Mayberry*, 48 Maine, 218, restrained Mary Ann Mayberry from testifying to any such thing. Consequently, Brown had no title; so the admission of his statement in writing did not prejudice him; but it is simply as a deposition that it is excluded when the cause of taking no longer exists.

Barrows, J. I. It is not always indispensable that the plaintiff in a real action should trace his title back to the first person named as owner in an informal statement of title filed by him, under the direction of the court, in pursuance of R. S., c. 104, § 3. It is sufficient if he goes back in the line indicated far enough to show a better title than the defendant. To hold otherwise would often needlessly protract and complicate trials.

The alleged failure of the plaintiffs to show title in themselves from Willard cannot avail the defendant.

II. The question put to Mary Ann Mayberry in cross-examination was within the discretion of the presiding judge as a proper test of the memory and truthfulness of the defendant's witness, were it not admissible on other grounds. But the defendant put in as a muniment of title a conveyance of the property in dispute

made by Stephen P. Mayberry, to whom the question related; and it was part of the plaintiffs' case to establish the fact that the defendant's title accrued through the fraudulent contrivances of this man, and thus his acts and doings in relation to the property were pertinent, as we shall have occasion hereafter more fully to observe and show. The proof of fraud generally consists of proof of acts and omissions inconsistent with the pretences put forth by the fraudulent actors. Viewed in this light the question had a legitimate bearing upon the case, whether the answer afforded the inference anticipated or not.

III. When a party uses a deposition taken by his opponent, but not offered in evidence by him, he makes it his own, and his opponent has the same right of objection to the interrogatories and answers which he would have had if the deposition had been taken by the party offering it; and he is not precluded by the fact that the interrogatories objected to were propounded by himself when the deposition was taken. Considered as questions propounded by the party using her deposition, the questions put to Henrietta Mayberry were rightly excluded.

IV. In order to understand how the testimony of Timothy Shaw, Samuel Tripp and Cyrus M. Wormell became relevant and admissible against the defendant's objection, it is necessary to revert to the respective positions of the parties. The plaintiffs claimed that the land in controversy was conveyed by Willard to Benjamin Morse and William Mayberry by a deed never recorded, and now either lost or in the possession of the Mayberry family, who, (they assert) are the defendants in interest in this case.

The plaintiffs derive their title through a quitclaim deed of William Mayberry, made and delivered to Morse in 1856, in pursuance of an award of referees who were selected to determine all matters in controversy between said Morse & Mayberry, and thence through a warranty deed from said Morse to Thomas Hobbs given May 27, 1857. The defendant offers in support of his claim a deed from Stephen P. Mayberry to one Perkins, given in 1858, purporting to convey the title acquired by him by a levy made

November 12, 1857, upon an execution against Morse and William Mayberry. But he also relies upon a quitclaim deed from Mary Ann and Henrietta Mayberry, purporting to have been given in the fall or winter of 1869, and thereupon he claimed that the original deed from Willard, which he says is lost, was made not to Morse & Mayberry but to Jane Mayberry, who died in 1860, the wife of William, and mother of Stephen P., Mary Ann, and Henrietta Mayberry, who still compose one family. The defendant is a kinsman of the Mayberrys. His own admissions, put in evidence by the plaintiffs, show that he took his title to the valuable lot here in controversy without even having been in the town where it is situated, upon the recommendation of Stephen P. Mayberry, of whom he speaks as his agent in matters apparently connected with this, and by and through whom he transacted most of the business relating to his alleged purchase of the lot, and that he did not know of the existence of the deed of Mary Ann and Henrietta to himself until long after the time when it purports to have been given, although he spent a fortnight with the family in the fall of 1870, which was a year subsequent to its date. In fine, there is much in his own account of his connection with this business that tends to justify the inference that he is but the representative of Stephen P. Mayberry herein. The plaintiffs contend that whatever there is of testimony tending to prove the existence of a deed from Willard to Jane Mayberry was fraudulently created by Stephen P. Mayberry, when he found that his title under the levy upon the lot as the property of Morse & Mayberry must fail for want of a valid attachment; and, if the jury were satisfied by the admissions of the nominal defendant, taken in connection with the other evidence in the case, that Stephen P. Mayberry was in fact the defendant in interest, all his acts and doings touching the premises and even his declarations became pertinent. *Bigelow* v. *Foss*, 59 Maine, 164, and cases there cited.

Looking now at the testimony objected to, we remark that Shaw's testimony, respecting the names of the parties between whom he acted as arbitrator, was as to a purely collateral fact of

trifling importance, if any,—one which might well be proved by parol, though there was written evidence of it, because it does not come within the reason of the rule which calls for primary evidence, which is declared by good authority to be "the presumption of fraud arising from its non-production."

It could matter little here who the parties were, and the evidence seems to have been offered by way of inducement to the more pregnant fact that Stephen P. Mayberry was then and there present and testified under circumstances which made it apparent that he must have known of the deed from his father to Morse of his interest in the land in controversy. Shaw's testimony as to the finding of the referees was competent, as elucidating the circumstances under which this deed was delivered. It took its place with other circumstances developed in this trial, of greater or less importance, tending to show that the idea of a deed to Jane Mayberry was an afterthought to supplement the title by levy which must otherwise fail. It was not objectionable as secondary, for there is no reason to believe that such a matter would appear in the report of the referees. One of the questions to be settled between these parties was whether there was any force and effect in the conveyances of the Mayberrys to this defendant by reason of a pre-existing but lost deed from Willard, the original owner, to Jane Mayberry. It was remote and secondary proof that the defendant relied on to support his hypothesis. It was competent to meet it by proof of circumstances which tended to counteract the inferences that might otherwise be drawn from such testimony as the defendant produced.

From this review of the position of the parties and the case, we see the admissibility of Tripp's testimony to the long and oft-repeated searches of Stephen P. Mayberry in the records, and of Wormell's to the poverty and consequent inability of Simon H. Brown to make any such purchase as these conveyances to him, if *bona fide*, would indicate.

V. The plaintiffs, soon after the commencement of the suit, had summoned the nominal defendant and taken his deposition con-

taining some damaging admissions tending to show that he was a mere instrument in the hands of others and not the *bona fide* owner of the lot which he claims, and not at that time well instructed in the part he was to play. The exceptions state that when the plaintiffs offered this deposition, defendant's counsel said he would take the ruling of the court upon its admissibility, "defendant being in court." It does not distinctly appear whether he was in fact in court, but we think the fair construction of the exceptions is that he was—though neither he nor Mayberry, who appear to have attended the taking of some of the depositions and at consultations with counsel, offer to testify in the case. But that question should have been settled upon the spot unless the ruling was to be made upon the hypothesis that he was in court when his deposition was offered. Thus we have considered it, and are satisfied that, offered as this was, not as a deposition, but as a writing signed by the opposite party containing admissions of which the plaintiffs desired to avail themselves, it was rightly received.

The defendant relies upon R. S., c. 107, § 17, which provides that a deposition shall not be used at a trial if the adverse party shows that the cause for taking it no longer exists. This we think means simply that it shall not be used as a deposition. The obvious design of the provision was to secure, where it was practicable, the more satisfactory test of the credibility of a witness by an examination before the jury in open court. The reason of the enactment has no application to the deposition of an opposing party who can have no temptation to pervert the truth against himself. It was only as a paper containing his written admissions that the deposition was offered and received. However obtained, they were competent evidence, subject to such explanations or additions as he might be able to make. It was not as a witness that the plaintiffs proposed to present him to the jury.

Take another case where a similar question might be supposed to arise. A witness who has given his deposition at the request of one party is subsequently induced by the opposite party to attend

court and give testimony in his behalf. If it conflicts with that which he has previously given, we think it would be a misuse of the statute to hold that it prohibits the party who took the deposition from reading it as he might any other written statement of the witness to affect his credibility. It is its use as a deposition only which is prohibited. Any other legitimate use which the party taking can put it to is not forbidden. This disposes of all the matters to which our attention has been directed in the exceptions.

The motion to set aside the verdict as against law and evidence cannot prevail.

The evidence called newly discovered bears upon its face sufficient proof that with reasonable diligence it might have been had at the trial.

Motion and exceptions overruled.
Judgment on the verdict.

APPLETON, C. J., WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

LOUISA P. HOLMES *vs.* SAMUEL L. HOLMES.

A decree of divorce, fraudulently obtained, annulled.

The respondent in order to obtain a divorce from his wife, falsely alleged in his libel that his domicil was in Saco in York county, when he had no residence within the State; and that his wife's residence was unknown to him, when he knew where she was. He thus got an order of notice in a newspaper with a design of concealing from her any actual notice of the proceeding, and obtained a divorce without any knowledge on her part. *Held*, that for such a fraud imposed upon the court, the decree of divorce can be set aside upon the petition of the party injured by the fraud, although the respondent has contracted a new marriage since the first was dissolved, and before any proceedings were commenced to set the decree aside.

ON EXCEPTIONS.

This was a petition to have a decree of divorce between these parties, procured in this court in York county, in 1871, upon the husband's libel, set aside for fraud. The facts upon which this

petition is based are stated in the opinion. The prayer of the petition was granted at *nisi prius* and the respondent excepted.

Clifford & Clifford, for the respondent.

Cases cited from other States do not affect proceedings in this State, where the whole matter is regulated by statute.

R. S., c. 60, § 9, expressly provides for a new trial where no new marriage has been contracted by either party; thus, by clear implication, prohibiting it where new marital relations have arisen. *Edson* v. *Edson*, 108 Mass., 590, and *Adams* v. *Adams*, 51 N. H., 388, upon which the petitioner relies, are to the effect that a new trial may be granted under conditions, under which our statute prohibits any new trial.

The jurisdiction of this court is purely statutory. It derives no aid from the common law. Therefore, the statute must be strictly pursued.

Here was a judgment, founded upon a record containing all the necessary jurisdictional facts; can it be impeached by petition, and reversed for causes which would not avoid it upon writ of error? The libellee was a non-resident. Notice by publication was proper. *Non constat*, that this order was granted solely by reason of the statement of the libellant's ignorance of the residence of the libellee. The statute did not then require such a statement to justify a resort to published notice.

Goodwin & Lunt, for the petitioner, cited *Edson* v. *Edson*, 108 Mass., 590; *Adams* v. *Adams*, 51 N. H., 388; and argued that it would be grossly unjust toward the petitioner to allow her to be deprived of rights of the highest importance, without an opportunity to be heard, and by fraud, which vitiates everything—even judgment.

Peters, J. The evidence in this case shows: That neither the libellant nor libellee ever had a residence within the county of York since their intermarriage in 1849; that neither of them had a residence in this State, at the time the divorce was petition-

ed for by him or when it was decreed; that the libellee had been living in Wisconsin since 1865; that during all the time she was there the libellant knew precisely where she was; that in order to obtain a divorce from her without notice or knowledge on her part, he falsely pretended in his petition for divorce, that his own residence was in Saco, in York county, and that his wife was in some place to him unknown; that the object of selecting York county in which to prosecute a divorce was, to procure an order of notice on his libel in a newspaper of limited circulation that would not be seen by her or her friends; that, in 1871, he obtained a divorce without any actual notice to her, and without any suspicion by her that any proceedings for a divorce were to be had. It is, therefore, clear that the court had only an apparent and not a rightful jurisdiction in the premises, and that that jurisdiction was obtained in York county by the fraud and deceit of the libellant. A gross imposition was also practiced by him upon the court, in his allegation of ignorance as to the whereabouts of his wife. He therefore got a decree of divorce without actual notice to her, when actual notice of some kind would undoubtedly have been ordered by the court, had her place of residence been disclosed. For these causes the petitioner moves the court that the decree of divorce be set aside.

Nothing is more clearly settled than that the court has the right and power so to do. It is hardly probable that such a proposition would be seriously questioned in a case not fraught with momentous consequences to the parties concerned, as this case is. Lord Coke said, "fraud avoids all judicial acts, ecclesiastical or temporal." In Freeman on Judgments, a reliable authority, it is said, that "the denial of the power of the courts to set aside their judgment has probably been made in no State but California. Here the power to vacate a judgment is exhausted at the close of the term." It is not stated, whether this is a matter regulated in that State by statute or not. The author further says, "this power has been fully recognized and liberally employed in England and in the United States, both at law and in equity." It is

not necessary to cite numerous authorities in support of our view of this question. The same question has lately been exhaustively discussed by the courts in Massachusetts and New Hampshire, in whose opinions upon this subject we fully agree. *Adams* v. *Adams*, 51 N. H., 388; *Edson* v. *Edson*, 108 Mass., 590. The same doctrine is strongly advocated and applied in *Allen* v. *Maclellan*, 12 Penn. St. R., 328. There is very little, if any, weight of authority the other way.

The respondent has much to say, in argument, about the inviolability of judgments. This would very well apply to judgments that are properly, and not to those that are surreptitiously, obtained. He urges that all the forms have been right. But what is there inviolable about a judgment obtained by an abuse of the forms of court and the perpetration of an imposition on the court itself? It is regarded as reprehensible for a party to take a judgment, when he knows that a defendant has not had any notice to be present and heard. A judgment got without notice to a party defendant, may upon proper motion and notice be set aside. *Penobscot R. R. Co.*, v. *Weeks*, 52 Maine, 456. But what essential difference is there between a judgment obtained upon a notice designedly and fraudulently so given as to prevent actual notice to a defendant, and a judgment where there was no notice at all? Shall fraud be skilful enough to impose a sham upon a court of justice, to the injury of innocent parties, without any adequate remedy or reparation therefor? We are not willing to concede it.

But it is argued, that the power of the court to vacate the decree of divorce is terminated, because the libellant, before this motion was made, contracted a new marriage. That would furnish a reason why the court should exercise the power and discretion belonging to them in such a case with more carefulness and caution perhaps; but the authority and right to act is the same after a new marriage as before. In the Pennsylvania case, referred to, Gibson, C. J., says: "It may seem an arbitrary act to expunge a sentence of divorce with a stroke of a pen, bastardize after begot-

ten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was operative at the time. But the legitimate husband also has rights; and if any one must suffer from the invalid marriage, it is he who procured it." In this case the second wife is no more placed *in extremis* than is any woman, who innocently marries an already married man. Her misfortune is imputable to nothing but the guilt of her husband, or perhaps to a carelessness of her own. On the other hand, if a decree fraudulently obtained cannot be vacated, then the court can be used by a reckless man as an instrumentality to deprive an innocent wife of a support from her husband, of the right to dower in his estate, of the possession of her children, besides stamping her name, it may be, with an unmerited disgrace. Such a retribution should not fall upon her at least.

The respondent further contends, that this proceeding amounts to a new trial of the divorce case, and that it cannot be entertained, because the statute prohibits a new trial as to the divorce, when either of the parties has contracted a new marriage since the former trial was had. But this position cannot be sustained. A new trial is not asked for. If this motion prevails, none can be had. It cuts deeper than that. It seeks to nullify a previous proceeding. To use the forcible phrase of the respondent's counsel, "it wipes out a record." It proceeds upon the ground that no trial has been had; and that the record of the trial is no better than it would be, if there had been no notice or order of notice to the libellee. It is not a motion to review or reverse, but to vacate a judgment, on account of a fraud practiced upon the court, injurious to a party who has not been heard. It is not pretended that, under this motion, an error of the court could be corrected, or that there could be any remedy for false testimony given at the trial on the merits of the cause. But the court can determine that an apparent and not a real jurisdiction was obtained by fraud, and that a decree made without legal notice in pursuance of it shall be null and void.

Our only hesitation has been, whether it would be politic and

prudent to exercise the discretion of the court to annul the decree in this case, without complete proof that all the material allegations contained in the original libel were false. Evidence was offered by the petitioner for that purpose. So far as it was excluded, it was at the respondent's request. He offered no evidence upon that point himself. Nor was he present at the hearing. The principal allegations in the libel were desertion and ill treatment of the husband and sons. Testimony bearing on these points was necessarily introduced, to make out the petition in other respects. We think these allegations are abundantly disproved. We feel compelled, upon the facts before us, to believe that the demands of justice require that the decree of divorce be annulled.

Exceptions overruled.

The decree of divorce annulled.

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

JOHN THOMPSON *et al. vs.* RICHARD H. GODING.

Creditor may relieve officer of duty of recording levy.

The assignee of a judgment entrusted the plaintiff of record in the suit in which it was recovered with the execution for the purpose of having it extended upon the debtor's land, and paying the expenses of the levy. The agent, having the execution in his custody, delivered it to a deputy sheriff who made a levy and then, by direction of the judgment plaintiff, handed the execution to an attorney who promised to see that it was seasonably recorded, but failed to do so;—*held*, that the officer, and his principal, the sheriff, were not liable for neglect, in not procuring the record to be made within three months after the extent.

ON MOTION FOR A NEW TRIAL.

This action was brought against a recent sheriff of York county, for an alleged neglect of his deputy, in not leaving for

record with the register of deeds, within three months after the levy, an execution and extent made thereof by the deputy, whereby the plaintiffs lost the benefit of the levy.

The judgment, recovered by the nominal plaintiffs here against one Staples, was assigned to Wells & Eastman, who wrote a notice of this assignment to them upon the face of the execution and then entrusted it to Thompson to deliver to an officer for the purpose of making a levy of it. Mr. Thompson was to choose an appraiser, receive seizin and pay the expenses of the levy. Wells & Eastman denied giving him any authority beyond this. Thompson seasonably delivered the execution to the defendant's deputy and the levy was duly made, but it was not recorded in the registry of deeds, nor returned to the office of the clerk whence it issued, within the ensuing three months. The defendant claimed that the execution was handed to the officer by Mr. Guptill, an attorney at law; that this gentleman was then acting under employment by Thompson; that a special arrangement was made between these three, by which the deputy was paid but five dollars in full of what he had done, and that the recording was to be attended to by Guptill for the creditors. There was a conflict of testimony on this point, and whether Guptill was to have the recording done as the agent of Thompson, or of the officer, or at all. The officer swore that he did not notice the memorandum of the assignment upon the execution. The instruction given to the jury, upon these facts, to which the plaintiffs except, the verdict being against them, is found in the opinion.

R. P. Tapley, for the plaintiffs.

M. A. Drew, for the defendant.

WALTON, J. It is undoubtedly the duty of every officer making a levy on real estate by appraisal, to cause the execution and his return thereon to be recorded by the register of deeds of the county where the land lies, within three months after such levy. But this is a duty from the performance of which the creditor may

relieve the officer. And there was evidence in the case tending to show that the officer was thus relieved by one of the two judgment creditors. In reply to this it is said that the judgment had been assigned, and that the creditor who undertook to relieve the officer from the performance of this duty had no authority to do so.

Upon this point the presiding judge instructed the jury that "if the execution creditor was entrusted by the assignees of the judgment to procure the levy to be made, and pay the expenses of it, and to choose an appraiser and accept delivery of seizin, and no disclosure was made to the officer what the authority was, and there was a bargain or arrangement made between the creditor, Thompson, and the officer, or between Guptill (an attorney employed by Thompson) and the officer, in the presence of Thompson, and with his approval, that the execution and extent should be left for registry by Mr. Guptill for the creditors, and was not to be left by the officer or by Guptill for the officer, and the officer had no orders or notice to the contrary from the assignees, in such case the officer would not be liable for a neglect to make such delivery for record in the registry of deeds."

We think this ruling was correct. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

EDWARD E. BOURNE, Judge of Probate, *vs.* ABBY M. TODD *et als.*

Right of sureties to show their principal had ceased to be administrator.

In an action upon an administration bond, under R. S., c. 72, § 9, a judgment against the administrator in favor of the creditor of the intestate for whose benefit this suit is brought does not estop the sureties from showing that, prior to the commencement of the action in which such judgment was recovered, the administrator's authority had become extinguished.

When the plaintiff relies upon such a judgment, with a demand and refusal to pay, or to show property to pay the execution, and a return of *nulla bona* thereon, proof that the administrator's authority had become extinguished before the creditor brought his original suit will defeat the action upon the bond.

On report.

Debt, brought in the name of the judge of probate for this county, for the benefit of Mark F. Wentworth, upon a bond given by the defendants for the faithful performance by Abby M. Todd of her official duties as administratrix of the estate of the late Nathaniel Todd, deceased. The bond was dated August 6, 1867, the day upon which she became administratrix.

In January, 1872, Dr. Wentworth recovered judgment against Mrs. Todd, as such administratrix, upon an account annexed for medical services rendered the deceased, upon which an execution issued January 16, 1872, for $100 debt and $8.58 costs. The officer to whom this execution was delivered for collection made return thereof, on the thirtieth day of January, 1872, that he had demanded payment of it of the defendant (Mrs. Todd) who refused to pay it, or to show personal property of her intestate wherewith to satisfy it, and so he returned it wholly unsatisfied. This action was thereupon instituted, February 24, 1872, upon the administration bond. The defendants offered to prove that the estate of Nathaniel Todd was represented insolvent, and commissioners were appointed, who duly reported the claims presented to them; that no citation issued to her, and no decree was passed in probate court, concerning this estate, after the acceptance of their report; that said Abby M. Todd was married February 16, 1870, to Henry Manson. The plaintiff objected to this evidence as incompetent, and claimed that the defendants were estopped to set it up. If admissible, notwithstanding the objection, and it constituted a defence, the plaintiff was to be nonsuit; otherwise he was to have judgment for the penal sum of the bond, and execution for the amount he was entitled to recover.

Goodwin & Lunt, for the plaintiff.

Insolvency is no defence here; it could only avail the administratrix by being pleaded in the original suit. *Thompson* v. *Dyer*, 55 Maine, 99. Nor can the alleged marriage be pleaded in defence now. Mrs. Todd was sued by Dr. Wentworth as admin-

istratrix. The allegation that she was administratrix was a substantial and material one, which she is estopped by the record to deny. The fact of marriage, as terminating her authority, was a traversable one, which it was competent for Dr. Wentworth to deny, and disprove by showing that no marriage was attempted, or that it was illegal.

If then Mrs. Todd, the principal in the administration bond, is estopped to set up the fact of her marriage, her sureties, by the privity existing between them and her, are equally estopped by the same judgment. *Dickinson* v. *Bean*, 11 Maine, 50; *Woodbury* v. *Hammond*, 54 Maine, 340; *Heard* v. *Lodge*, 20 Pick., 53.

There was a breach of the bond by the failure to account within one year after taking administration, and again by the failure to account within six months after the commissioners filed their report. *Dickinson* v. *Bean*, 11 Maine, 50.

The defendants' argument proceeds almost entirely upon the assumption that the marriage is a fact proved in the case, whereas we say that if a fact at all, it is one out of this case, and that cannot affect its determination. Nor do their citations refer us to any decision supporting their theory, that this judgment is void, by reason of the marriage. In *Morse* v. *Toppan*, 3 Gray, 411, the fact of coverture was admitted, instead of proof of it being objected to. *Loring* v. *Folger*, 7 Gray, 505, does not apply. There is no analogy between our judgment and one rendered against a person in his grave. Even if a *feme covert*, the principal on this bond still survives to avail herself of her day in court; to sue and be sued, plead and be impleaded. If she would have the benefit of coverture she must plead it. 1 Chitty on Pleading, 449, 479, &c.; 4 T. R., 631, and books *passim*. Not having seasonably put in such plea, is she now entitled to the same advantage as if she had done so? Even one never administrator must so state upon the record to protect himself from a valid judgment, if sued in that capacity.

Dawes v. *Shed*, 15 Mass., 6, is distinguishable from this; in that the statute of limitations was a bar. This statute was a mat-

ter of law equally known to both parties; Mrs. Todd's coverture (if she had remarried) was a fact known to her and not to the plaintiff.

The other defendants are her sureties, and must be equally liable with her, since by the legal import of their obligation they undertake to make good and effectual the liability of their principal.

Dane & Bourne, for the defendants.

Only those "personally interested" in an estate—and whose interest has been specifically ascertained by a decree or judgment —can maintain a suit in the name of a judge of probate, upon an administration bond to him, without his special authority. R. S., c. 72, §§ 9 and 15. It is only where an "estate is not insolvent, or the claim is one not affected by insolvency" that a judgment creditor can sue without special license. R. S., c. 72, § 12. Here, the estate was insolvent, and the creditor has obtained no valid judgment "against the administratrix" of it. The commissioners of insolvency made their report in February, 1870, and Mrs. Todd afterwards, on the sixteenth day of the same month, was re-married. Dr. Wentworth's claim, not being a preferred one, was extinguished and barred by the failure to present it; yet nearly two years after her second marriage, Mrs. Todd is sued upon it as administratrix, in the Biddeford municipal court, and judgment recovered upon it by default.

R. S., c. 64, §§ 21 and 22, speaking of administrators who have been removed, or who have resigned, either directly or by incapacitating themselves by marriage, says they are to be considered "as dead," so far as the further duties of their trusts are concerned. This judgment, then, is analagous to one against a dead person, which is absolutely void. *Loring* v. *Folger*, 7 Gray, 505. So a judgment against a *feme covert* is void. *Morse* v. *Toppan*, 3 Gray, 411.

It is not merely liable to be reversed; it is void; and there is no necessity to reverse a void judgment. *Laflin* v. *Field*, 6 Metc., 287; *Boynton* v. *Foster*, 7 Metc., 415, 416.

She is not estopped by the judgment, because the suit was not against her individually, but solely as administratrix. In the only capacity in which she was called upon to appear, to represent the estate, she could not appear; because, as administratrix, she had long before ceased to exist, and her right to defend in behalf of the estate had terminated. There could be no admission by estoppel, because there was no party defendant. The very principle, upon which the doctrine of estoppel is based, negatives the idea that it can be applied to a person under a disability.

If the defendant had been physically dead when Dr. Wentworth recovered his judgment, could it not have been shown in a suit upon the judgment? Her marriage is as much a matter outside the record as her death would have been. Both, of necessity, must be proved *aliunde*. And as she was legally dead to her official relations, and could not appear to defend the estate, we are not now estopped to prove the insolvency. In this respect the case differs from that of *Thompson* v. *Dyer*, 55 Maine, 99, where the suit was brought against the debtor, who died during its pendency, and his administrator (duly qualified) appeared in defence, but did not suggest insolvency.

At all events, the sureties are not estopped, since they are responsible only that the official duties of the principal shall be discharged faithfully, so long as he holds that trust, and not after the term of office has expired. No act or plea of hers—*a fortiori*, no omission or failure to plead—after the termination of her official relations by marriage, can estop or affect these sureties, who were not parties to the record in the former suit. *Dawes* v. *Shed*, 15 Mass., 6, is directly in point; approved in *Heard* v. *Lodge*, 20 Pick., 53, cited by the plaintiff.

In the present action the plaintiff cannot set up the failure to account. This is a matter in which all the creditors are interested, and suit for that cause can only be instituted by special authority. *Barton* v. *White*, 21 Pick., 58.

Virgin, J. Debt on an administration bond executed by Abby M. Todd, as principal, and by the other defendants, as sureties.

The plaintiff in interest makes out a *prima facie* case by the production of a judgment in his favor against the said Abby M. Todd, as administratrix, together with the execution and officer's return thereon. R. S., c. 72, §§ 9 and 12; *Thurlough* v. *Kendall*, 62 Maine, 166.

In defence, the sureties offer to prove that on February 16, 1870, the said administratrix was again married, whereupon, by the express provisions of R. S., c. 64, § 22, her official authority was "thereby extinguished;" and that the action on which the judgment produced was recovered was not commenced until January 3, 1872—nearly two years after she had ceased to be administratrix. The evidence offered is to be considered as true. If admissible against the seasonable objection of the plaintiff, and the fact thereby proved will constitute a sufficient defence, then, by the terms of the report, "the plaintiff is to become nonsuit."

Before a creditor of an estate can maintain an action under R. S., c. 72, § 9, for the recovery of his claim, he "must first have its amount ascertained by judgment of law against the administrator." § 12. Such a judgment, recovered without fraud or collusion, is conclusive upon the sureties in the administration bond, in respect to all matters of defence affecting the "amount due" on the claim. *Heard* v. *Lodge*, 20 Pick., 53. The effect of such judgment upon the sureties would seem to be based upon the ground that their stipulations in the bond, taken in connection with the provisions of §§ 9 and 12, render them responsible that their principal will pay—"or show personal estate of the deceased for that purpose"—any creditor's debt against the estate on demand, after the "amount due has been ascertained by a judgment against him in his official capacity." Neither a judgment against the intestate, nor any other evidence of indebtment of the estate will suffice, for there may be nothing due on them. A judgment of law "against the administrator" is the only statute mode of ascertaining the amount due from the estate; and when that fact has been judicially determined "against the administrator," the sureties are estopped to controvert it, being privies in contract to that determination.

Therefore a judgment against one not the administrator, but who had long before its recovery ceased to be such, can have no such effect. So long as their principal continues in his official capacity, the sureties are bound to respond for such of his official derelictions as come within the true interpretation of their obligation; but when his "authority" is "extinguished," his power to bind his sureties is thereby extinguished also.

If the principal defendant had been removed by a decree of the judge of probate instead of by marriage, would this judgment conclude the sureties from showing the facts, and thus prove that the judgment was not "against the administrator," and hence not such as is recognized by the statute? If it would, how long after such removal can creditors of an estate continue to thus conclusively fix the liability of sureties, who cannot plead such matter in defence to such actions, not being parties thereto and having no notice of the pendency thereof, and who have not stipulated that their principal should appear and plead to suits brought against her in her representative capacity years after it had become extinguished.

In Massachusetts before the separation, it was held in an action on an administrator's bond that "if an administrator suffers judgment to be recovered against him in an action barred by the statutes limiting suits against executors and administrators, his sureties in his bond are not bound by such judgment, but they may have the benefit of the statute in an action against them on the bond." *Dawes* v. *Shed*, 15 Mass., 6. This decision has never been questioned by the court who made it, that we are aware of, but on the other hand it was cited with special approbation in *Heard* v. *Lodge*, 20 Pick., 53; and, in support of the principle that an administrator cannot waive the special limitation bar, in *Wells* v. *Child*, 12 Allen, 336. Although the action forming the basis of the judgment before us was not commenced within the special limitation period, still that question, not being within the terms of the report, is not before us; and we have no occasion to express any opinion in relation to these decisions so far as they bear upon

the limitation question. But if *Dawes* v. *Shed*, and *Heard* v. *Lodge*, are sound as to the effect of the judgment upon the sureties, they must be deemed authorities having some bearing upon this case.

The question of the admissibility of the evidence offered is not affected by any pleadings in the case; so if admissible under any appropriate pleadings we must give judgment to the defendants. And we are of the opinion that it is admissible. For if to the plea of general performance, the plaintiff had replied, substantially, the recovery of the judgment, demand, refusal and return of *nulla bona*, and the defendants had rejoined the extinguishment of the administratrix' authority, we think the rejoinder would constitute a good answer to the replication so far as the sureties are concerned, and the evidence offered admissible and would sustain it. If sustained, then the effect of the judgment as evidence of the breach of the bond would be annulled, and this action would fail.

As the action is brought under the provisions of § 9, the other breaches suggested in the plaintiff's brief need not be considered.

Plaintiff nonsuit.

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

FRANKLIN BLANCHARD *et als. vs.* OLIVER MOULTON *et als.*

Damages. Evidence. Practice. Title by prescription. User, adverse.

In an action against one for wrongfully obstructing a way with a building, evidence that the site occupied was the most eligible for the purpose is not admissible even to mitigate damages where punitory damages are claimed.

An adverse user is such a use of the property as the owner himself would make, asking no permission, and disregarding all other claims to it, so far as they conflict with this use. Continued for twenty years such a use is equivalent to a grant.

On exceptions.

The plaintiffs sued the defendants for obstructing with a building a way leading from the highway to the formers' buildings. It was asserted that the way originated in necessity, the premises to which it was appurtenant being carved out of the estate of the plaintiffs' grantor; and a claim to it by prescription was also set up. There was testimony that one of the defendants told the carpenter who erected the building—upon his inquiry why it was placed there, so near to the defendants' house—that "he wanted to put out the lights of that building [plaintiffs' house] and to drive those fellows out of there that were lugging off his wood," referring to the persons to whom the house was leased.

Upon this state of facts, the plaintiffs claimed to recover exemplary damages. The jury were instructed that they were authorized to award such damages, if the obstruction was maliciously or wantonly placed across the way. To rebut any presumption of malice, Henry Dow, called by the defence, was asked this question: "What would be your judgment, as to that being a suitable place for his [Moulton's] office?" Upon plaintiffs' objection this inquiry was excluded. In the charge, the judge—after remarking that perhaps the plaintiffs' argument involved the theory of a way by prescription, "that is, that the way had been used by the plaintiffs and their grantors for a period of more than twenty years, adversely to the interests of the owners of the land"—said: "Adverse user is nothing more than such a user of the property as the owner himself would exercise. Where a party, in this manner, for the purposes of a way, having received no permission from the owner of the soil, does use the way as the owner would use it, disregarding his claims entirely, and uses it as though he owned the property himself, that is an adverse user; and if he continue to use the property in that way for a period of twenty years or more, then he will have acquired a right equivalent to an actual grant of the right of way, and as good in law, to all intents and purposes, as though he had a warranty deed of it. If, without any permission on the part of the owner, the plaintiffs' grantors

did use these premises as a right of way in this manner, for this period, and for the purpose of a way, then, even if no right of way existed by necessity, they would have acquired one by prescription." To this instruction, the exclusion of Dow's answer, and the ruling as to vindictive damages, the defendants excepted, the plaintiffs having obtained a verdict for $177.

E. F. Pillsbury, for the defendants.

A. Libbey and *L. Clay*, for plaintiffs.

APPLETON, C. J. This is an action on the case against the defendants for obstructing a way over which the plaintiffs claim the right of passage. It comes before the court on exceptions to the ruling of the presiding justice and on a motion to set aside the verdict as against law and evidence.

The obstruction of which the plaintiffs complained consisted in erecting a building upon the land over which the way passed.

The defendant asked this question of a witness: "What would be your judgment as to that being a suitable place for defendants' office?" The answer to this question was properly excluded. If the defendants had a right to make the erection, they were the judges of its suitableness, and whether suitable or not was no matter of concern to these plaintiffs. If they had no such right, its suitableness or convenience for their use, would give them no right to erect it to the inconvenience of the plaintiffs. In either alternative the question was irrelevant.

The plaintiffs claimed the way as one of necessity, as well as by prescription. No exceptions are taken to the rule given as to what would constitute a way of necessity.

The parties to the suit are adjacent proprietors and near neighbors. The presiding justice instructed the jury that to establish a way by prescription, it must have been used prior to the erection of the building in controversy, by the plaintiffs and his grantors, as a way, for a period of more than twenty years adversely to the interests of the owners of the land; that adverse user is

nothing more than such an use of the property as the owner himself would exercise; and that when a party, in this manner and for the purposes of a way, has received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding his claims entirely, using it as though he owned the property himself, that is an adverse user, and if he continue to use the property in that way for twenty years or more, he will have acquired a right equivalent to an actual grant of the right of way. These instructions are in accord with the rules of law on this subject. If further or more definite instructions were desired the defendants should have made specific requests therefor. It is not required of a judge that he should give the whole law on any given topic.

The exception to the instruction as to damages does not seem to be relied upon.

The facts were submitted to the jury. The question for their determination was clearly and accurately stated. There was much evidence on both sides. In such case it is no part of the duty of the court to interfere with the conclusions of the jury.

Motion and exceptions overruled.

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

FRED W. HARMON *vs.* WILLIAM H. HARMON.

Evidence. Exceptions. Practice. Pleading. Stenographer's report.

When the stenographer's report of the evidence is made a part of the bill of exceptions, and there is a conflict between it and the facts alleged in the formal part of the bill of exceptions, the report will control.

The allegation, in the writ, of an agreement by the defendant to support the plaintiff and his wife during their lives, is sustained by evidence that such support was to be furnished upon the farm conveyed by the plaintiff to the defendant to secure such support.

ON EXCEPTIONS and MOTION FOR A NEW TRIAL.

ASSUMPSIT on a contract for the maintenance of the plaintiff

and his wife during their lives, in consideration of the conveyance to the defendant of a farm owned by the plaintiff.

The verdict was for the plaintiff, and the defendant filed the following bill of exceptions: "The evidence tended to show that the consideration of the contract was the conveyance by plaintiff to defendant of certain personal property, and not the farm as alleged in the writ.

And the evidence, also, on both sides proved that the agreement between the parties was for the maintenance of plaintiff and his wife at the house on the Harmon farm where they then lived. The defendant's attorney requested the presiding judge to instruct the jury that, if the consideration for the agreement by the defendant was the conveyance of the personal property and not the farm, it was a variance from the contract set out in the writ and would not support the action; that if the contract between the parties was that the defendant should support the plaintiff and his wife at the house on the Harmon farm, and was not for their support without any place of performance being stipulated, it would be a variance from the contract set out in the writ, and the action could not be maintained."

The presiding justice refused both requests and instructed the jury that they might regard the evidence as sufficient to support the action.

As appears in the opinion, the evidence, as reported by the stenographer and made a part of the case, was in conflict with the statements in the exceptions.

A. Libbey, for the defendant.

E. F. Pillsbury and *W. P. Whitehouse*, for the plaintiff.

Dickerson, J. The first requested instruction was properly refused because the evidence did not warrant it, as appears by a report of the evidence which is made part of the bill of exceptions, and must control its allegations as to matters of fact. The plaintiff testified that nothing was said about the stock when the

deed was given, and that the agreement then was that he and his wife were to be supported. The defendant testified that no such agreement was made when the deed was given, but that, at a subsequent time, he agreed to support the plaintiff and wife, and that the stock was then given to him. The testimony of the defendant's two brothers, and his other testimony, upon this branch of the case tends to show that the stock was a gift from the plaintiff to the defendant, rather than the consideration for the contract of support. The evidence upon both sides negatives the proposition that the personal property was the consideration of the alleged contract, and if the jury had returned a verdict for the defendant upon the ground that it was, it would have been set aside as against the evidence.

The second requested instruction was, also, properly refused. Proof is not evidence, but the effect of evidence. A fact or proposition is said to be proved when the result of the evidence adduced in support of it is undoubting assent to its certainty. The report of the evidence produces no such result as is affirmed in the second requested instruction. The evidence on both sides by no means proves that the agreement between the parties was for the maintenance of the plaintiff and his wife at the house on the Harmon farm. The variance between the request and the evidence was a sufficient reason for refusing to give the requested instruction.

But if the language of the requested instruction is to be understood as affirming that there was evidence on both sides tending to prove the proposition it contains, it was, also, properly refused. The conveyance set forth in the writ is identical with the one proved. The variance alleged does not relate to the contract of conveyance, but to the consideration therefor. Even in this respect, upon the plaintiff's theory of the evidence, it does not contradict, and is not inconsistent with, but is only additional to, the allegation in the writ. The defendant's complaint is, that the writ does not set forth the whole of the consideration of the conveyance, inasmuch as it omits to state the place of per-

formance. We think there is sufficient legal identity between the allegation in the writ and the evidence. Greater latitude in this respect is allowable with regard to the consideration than to the operative part of the contract. *Brackett* v. *Evans*, 1 Cush., 79; *Smith* v. *Webster*, 48 N. H., 142.

But the alleged variance, if any, is immaterial in this case, as the complaint of the plaintiff is, not that the defendant refused to support him elsewhere than upon the farm conveyed, but that he refused to support him there, in consequence of which he was compelled to leave it; and the defence is, that if the defendant is bound to support the plaintiff, he has fulfilled his obligation, or has ever been ready to do so. The defendant, therefore, was not aggrieved by the ruling, and has no legal ground of exception.

Nor can the motion be maintained. The evidence was conflicting, as is usual in cases of family broils. The jury were fortunate in being able to agree upon a verdict in the midst of such a maze of contradictions, criminations, and recriminations; and the court is little inclined, without stronger reasons than have been called to its attention, to reopen this, as is to be hoped, the last of a series of suits that have been scarcely less discreditable to the parties concerned than expensive to the county.

Motion and exceptions overruled.

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

WILLIAM H. POTTER,

vs.

THE MONMOUTH MUTUAL FIRE INSURANCE COMPANY.

Rescission of settlement obtained by fraud essential to a recovery.

Where an insurance company show, in defence to a suit upon a policy, that the plaintiff has accepted a specific sum in adjustment of his loss and the assured replies that the settlement was procured by fraud practiced upon him by the defendants, it will be necessary for him to prove that he has returned the money received upon such settlement before commencing his action; otherwise it cannot be maintained.

On exceptions.

Assumpsit upon a policy issued by the defendants to the plaintiff, insuring the buildings upon his farm and the personal property in them for a term of four years, to the amount of $1450. The policy was delivered September 18, 1867, and the property was destroyed by fire September 1, 1869. Between these two dates Mr. Potter had mortgaged his farm. After the loss there was debate and difficulty about its adjustment, which resulted in its being settled by payment of a thousand dollars in full on the fifteenth day of October, 1869, by a draft of that date and amount, payable in thirty days. This action was instituted November 15, 1870, to recover the other $450 upon the policy, and was in the ordinary form of declaring upon such an instrument, no mention being made of the compromise, which (at the trial) the plaintiff testified he was induced to assent to by reason of fraudulent misrepresentations, by some of the directors of the insurance company, that his having mortgaged the estate, without notice to them, was such an alienation of it as to avoid the policy. He said he was told there was a statute to that effect. In defence it was stated that the main objection urged to him, when he presented and adjusted his claim, was that there was an over-valuation, he having paid between thirteen and fourteen hundred dollars for the farm of sixty acres with these buildings upon it. It appeared, however, that the effect of the mortgage was discussed and part of the syllabus of the case of *Pollard* v. *Somerset Ins. Co.*, 42 Maine, 221, was read to him. The legislation of 1861, c. 34, and of 1862, c. 115, had changed the law in this State, but this was not known to Mr. Potter; whether or not it was known to the defendants' directors was not made clearly apparent.

The verdict was for the plaintiff. Though several exceptions were noted at the trial the only one insisted upon in argument by the company was the refusal of the judge to give this instruction requested by them, viz: "Fraud does not render contracts void, except at the option of the party defrauded; and, where there is a settlement of a claim for a sum less than appears to be due upon

the face of it, after such settlement, before an action can be maintained upon the original cause of action, upon the ground of deception, misrepresentation or fraud, on the part of the debtor in effecting the settlement, the creditor must (within a reasonable time) rescind the contract of settlement, and return or tender to the debtor whatever sum was paid and received in effecting it." The presiding justice told the jury that though "there may, perhaps, be some question with regard to that, I have thought best, on the whole, to instruct you that this action may be maintained, if the plaintiff has succeeded in defeating the effect of that instrument [his agreement] although he did not return the money received by him."

Joseph Baker and *E. O. Bean*, for the defendants, cited a number of cases from the Maine Reports in support of their exceptions.

A. Libbey, for the plaintiff.

VIRGIN, J. Assumpsit on a policy of fire insurance in the sum of fourteen hundred and fifty dollars, for four years from September 18, 1867. The writ is dated November 15, 1870. The property insured was totally destroyed by fire on September 1, 1869.

In addition to the general issue, the defendants pleaded by way of brief statement that on October 15, 1869, the plaintiff agreed in writing to accept one thousand dollars in thirty days in full satisfaction for the loss of his property covered by the policy in suit, which they then agreed to pay and did pay within the time specified; and that the plaintiff accepted the same in full discharge and satisfaction thereof.

The plaintiff introduced testimony tending to prove that he was induced to sign the agreement and accept the money by the fraudulent misrepresentations of the defendants; that he was deceived thereby; and that he should not otherwise have made the agreement or received the money. The defendants denied all fraudulent practices in the premises.

The verdict was for the plaintiff for the balance; and the only ground on which it can be based, under the instructions given, is that the jury must have found the defendants guilty of the fraud imputed to them by the plaintiff's testimony. Hence the first request by the defendants became material; and the presiding justice erred in not giving to the jury the law upon the subject of rescission.

The contract of insurance and that of accord and satisfaction could not contemporaneously exist and be in force; for the latter if *bona fide* would operate as a cancellation of the former. R. S., of 1857, c. 82, § 44. If not *bona fide* but voidable for fraud of the defendants, the plaintiff, by seasonably rescinding it, but not otherwise, might then bring the action which he has brought, upon the policy. But he could rescind only by paying back or tendering the one thousand dollars. *Bisbee* v. *Ham*, 47 Maine, 543, is precisely in point. *Exceptions sustained.*

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

HENRY K. BAKER *vs.* DUDLEY W. MOOR.

Administrator's attorney not a creditor of the estate.

Services rendered to an executor, in his official capacity, in the settlement of the estate under his charge, do not constitute the person rendering them a creditor of the estate, nor give him any interest therein sufficient to entitle him to institute an action, in the name of the judge of probate, upon the executor's bond to recover compensation. His remedy is only against the executor individually.

ON REPORT.

DEBT, brought February 12, 1872, in the name of the judge of probate for the benefit of a judgment creditor, upon the bond of the executors of the estate of the late Nathaniel Gilman. The

defendant's intestate was one of the sureties upon the bond. The plaintiff introduced the record of a judgment by him recovered against the executors, based upon an account annexed to his writ in his suit against them,—in which an attachment of the estate of their testators in their hands was directed,—"for a balance for services rendered and disbursements made for them, in their said capacity, in settling of the estate of said Nathaniel Gilman." That suit was specially answered to at the return term. At the next term, notice was ordered to be given by publication, upon suggestion that the executors were non-residents; and, at a subsequent term, upon proof of such notice, judgment was taken upon default against the executors and their own property, and execution issued thereon for $1253.77 debt, and $26.72 costs, to be levied upon their testator's estate in their hands. Satisfaction not having been obtained, but a return of demand at the last residence of the executors in this State being made, with a statement that no personal demand could be made because the defendants were not to be found within the State, permission was granted the creditor to institute the present action, in the name of the judge of probate, to enforce payment of said judgment.

Baker & Baker, for the plaintiff.

This judgment is properly a claim against Nathaniel Gilman's estate. The services were necessary to defend and protect that estate. *Cony* v. *Williams*, 9 Mass., 114; 2 Williams on Executors, (Ed. of 1832) *1086, *et seq.*

The judgment itself does not show upon what claim it was recovered; nor that it did not accrue in the testator's lifetime—since an account annexed is no part of the record. *Kirby* v. *Wood*, 16 Maine, 81; *Valentine* v. *Norton*, 30 Maine, 194; *Came* v. *Brigham*, 39 Maine, 35; *Starbird* v. *Eaton*, 42 Maine, 569; *McArthur* v. *Starrett*, 43 Maine, 345; *Buckfield Branch R. R. Co.* v. *Benson*, Id., 374.

The form of the original action cannot be objected to here. R. S., c. 82, § 9; *Page* v. *Danforth*, 53 Maine, 174. Nor by a mere

surety on the bond. *Hayes* v. *Seaver*, 7 Maine, 237; *Cony* v. *Barrows*, 46 Maine, 497; *Willard* v. *Whitney*, 49 Maine, 245; *Milliken* v. *Whitehouse*, Id., 527; *Dane* v. *Gilmore*, 51 Maine, 544; *Paine* v. *Stone*, 10 Pick., 75; *Heard* v. *Lodge*, 20 Pick., 53.

A. Libbey, for the defendant.

No demand, such as the statute requires, has been shown. R. S., c. 87, § 11.

The claim of the plaintiff in interest was against the executors personally.

VIRGIN, J. Debt on the official bond of the executors of the last will and testament of the late Nathaniel Gilman. The writ is sued out in the name of the judge of probate for this county, against the administrator on the estate of one, who, in his lifetime, was one of the sureties in the bond, now deceased.

To maintain this action under the provisions of the statute, it must appear that the real plaintiff is interested personally in the bond; that his interest has been specifically ascertained by judgment of law against the executors; that he has made a demand therefor against them; and that they have neglected or refused to satisfy the same, or show personal estate of the said Gilman for that purpose. R. S., c. 72, §§ 9 and 12.

Generally all these facts would be conclusively established by the judgment in behalf of the plaintiff against the estate in the hands of the representative of the deceased; for such judgments when regularly recovered and entered up, are conclusive upon the sureties in the bond. *Bourne* v. *Todd*, ante, 427. *Heard* v. *Lodge*, 20 Pick., 53. But on inspection of the copy of the record introduced by the plaintiff, we find his action was against "Charles B. Gilman and Anna K. Gilman, of New York, executors," &c.; the declaration a count on an account annexed formally alleging their indebtment to the plaintiff according to the account, "for services rendered and disbursements made for them in their said capacity as executors in settling the business of the estate of Nathaniel Gil-

man," and their promise to pay. The record,—after reciting that the defendants not being inhabitants of this State, notice by publication was ordered and complied with,—concludes, "And now in this (Oct. T., 1870) term the defendants . . . do not appear but make default. The plaintiff appears and prays judgment. It is therefore considered by the court here that said plaintiff recover against the said defendants the sum of $1253.67 damages and costs of suit," &c.

Thus it is seen that the judgment for the damages is not against the estate of the said Nathaniel Gilman, in the hands of the said Charles B. and Anna K. Gilman, as executors, but against the "defendants." This judgment therefore fails to show that the plaintiff is interested in the bond in suit and that he has had his interest specifically ascertained by judgment of law.

If, however, the plaintiff had been entitled to a judgment against the estate, and the present form of the record had been erroneously made up by the clerk, we could doubtless have ordered it to be corrected. *Piper* v. *Goodwin*, 23 Maine, 251; *Atkins* v. *Sawyer*, 1 Pick., 351. But the judgment is in proper form. The plaintiff is not entitled to a judgment against the estate, being in no wise a creditor thereof for the services rendered; and hence is not interested in the bond. The services and disbursements were for the defendants against whom he has a judgment. *Burke* v. *Terry*, 28 Conn., 415. Upon looking into the account annexed (which being a part of the declaration is a part of the record and should be fully recorded. *Piper* v. *Goodwin*, supra; *Bennett* v. *Davis*, 62 Maine, 544,) it is seen that it all accrued since the decease of Nathaniel Gilman. If payment for such services and claims are recoverable at all, it must be through another tribunal —by the executors charging them in their probate account and procuring their allowance there. This court sitting as a common law court cannot, but only when sitting as the supreme court of probate after due proceedings in the probate court and appeal therefrom, can it render any judgment for such claims against the estate of Nathaniel Gilman. Reasonable fees paid for necessary

and beneficial legal services rendered to executors and administrators in the settlement of large estates especially, though not expressly permitted by the statute, are frequently allowed by judges of probate.

This view renders an examination of the other points in the case unnecessary. *Plaintiff nonsuit.*

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

JOHN BUTLER *vs.* REUBEN A. HUSE *et als.*

Complaint for flowage—not maintained if either defendant had the right.

A complaint for flowage cannot be sustained if either of several respondents had the right to flow the complainant's premises, in the manner and to the extent stated in the complaint. The conveyance of a dam and mills, by necessary implication, carries with it the right to flow the grantor's land then flowed by such dam, and which inevitably must be flowed by a fair and proper use of the dam and mills.

Mill owners have a right to maintain their dam as it was at the time of the deeds to them; and if, through want of repair for a series of years subsequent to that, it lets the water escape, the owners have the right to repair and tighten it, although the water is thereby raised higher and retained longer than it was while the dam was in a dilapidated condition.

Where the owner of land flowed by a dam and of two-thirds of a mill privilege upon that dam conveys one-third of the privilege and dam, with an incidental right to flow so much land as was then flowed by said dam, no subsequent deeds of the flowed land or of the other third of the dam—and no reservations or limitations in such deeds—can affect this right of flowage, as it existed at the time of the conveyance of the third first conveyed.

Where the rights of both parties depend upon deeds—neither setting up any claim by prescription—parol evidence of the manner in which these rights have been exercised, and of declarations respecting them, are irrelevant and inadmissible.

ON EXCEPTIONS.

COMPLAINT FOR FLOWAGE of the plaintiff's meadow by the defendants' dam, between the middle of May and the first of Sep-

tember of 1867, and of each year since 1867, when the dam was repaired and rebuilt. The defendants claimed that they did not then raise the dam any higher than the old dams were, and that they had a right to build and maintain it as they did under their deeds.

In 1818 Samuel Quimby owned the whole estate of these parties, all of whom now claim under him. December 27, 1848, he conveyed the portion now owned by the plaintiff to Jeremy Dunn, reserving "the right of flowing the stream on and around the above described premises as usual, from the first of September to the fifteenth of May in each year; the remainder of the time in each year the said Quimby is to draw, or cause to be drawn off, the water in said pond to the top of a large pine stump, standing near the dam of said mill, or so low as not to flow the meadow." Upon the twenty-seventh day of December, 1852, Mr. Dunn transferred to the plaintiff the title thus obtained, "with the same reservations as set forth in the deed" aforesaid from Quimby to Dunn.

More than thirty years before this conveyance to Dunn, Mr. Quimby, by his deed dated November 3, 1818, sold to Phineas Taylor, certain property, by metes and bounds, "containing the whole of the land formerly belonging to the mill privilege," of which this dam is part, "with a privilege to said Taylor and his heirs to take from the mill-dam a sufficient supply of water for the tanning business in all its branches, viz., one gate for the grinding of bark and one for fulling of hides and rolling of leather, reserving, nevertheless, to myself the right of taking a sufficient supply of water for a grist mill, should I at any time hereafter erect such; and I, the said Quimby, do further agree with the aforesaid Taylor, his heirs and assigns, and bind and obligate myself, my heirs and assigns, to put in good repair two-thirds of said dam in thirty days from the date of this deed, and to support and keep in due and constant repair the same two-thirds; and the said Taylor, his heirs and assigns, is to do the same for the remaining third part, so that no stoppage or obstruction shall arise, so far as regards said Taylor's privilege, or share of this property."

In the spring of 1824, Phineas Taylor transferred his title to Samuel H. and Orrin E. Taylor; and on the nineteenth day of November, 1838, Samuel Quimby conveyed to Orin E. Taylor "all that part of said privilege which I deeded to Phineas Taylor the third day of November, 1818, which I then, in said deed, reserved to myself, to wit: the right to restrict the said Taylor in said privilege to water for no other purpose than a tannery; and the said Orrin E. Taylor shall have and occupy all the rights and privileges of the one-third part of the Page privilege aforesaid, together with the right of flowage, the same as though no restrictions had been made to the said Phineas Taylor."

After the death of Samuel Quimby, his heirs at law, on the fifth day of February, 1855, conveyed to Merrill Hunt certain premises embracing five parcels, the first of which enclosed a section of the dam in question; the second parcel of land adjoined that first described, and was conveyed "with all the mills, buildings, dams and fixtures thereupon and thereunto appertaining, with all the estate, interest and right to the dams, water and head of water, and right of flowing said Taylor's pond and stream, which the late Dr. Samuel Quimby had in and to the same at the time of his decease." The other lots had no connection with this controversy. Merrill Hunt's title passed to the defendants prior to 1867. There was testimony tending to prove that the top of the pine stump, mentioned in the deed from Quimby to Dunn, was recognized and held by Dr. Quimby and some other owners of the mills to be the point of highwater mark from May to September, for some years after 1847. One Haines, while owning an interest in the dam and mills, removed the stump.

The plaintiff called J. F. Fellows, who operated the saw mill, under a lease from Dr. Quimby, from 1848 to 1850, and asked him what he had to do with that stump, with regard to water? "By instructions of the owners, or anybody else, what was your practice with regard to the water? What instructions or declarations had you from the owners in regard to it?" To each of these questions the defendants interposed an objection and they were all

excluded, to which the plaintiff excepted, as well as to the following instructions in the charge to the jury. The judge said: "From sundry conveyances, from 1818, down to the present time, these defendants have become the owners of this dam; not conveyances, as I understand it, of an undivided share, but each one of a certain portion of the dam. The first question that arises is as to their rights. Well, they are coupled all together in this complaint, and I am not aware of any provision of law that would authorize an action against them in any other form; the statute provides that they shall be joined, and therefore I hold that if one of them has the right to flow back this water as it has been flowed, then this action cannot be sustained; because it would be immaterial to the plaintiff, if he was subject to this right of flowage, whether one had the right or two or three of them. We come then directly to this right of flowage. For the purposes of this trial, I instruct you that the several deeds in this case would give the right to flow the land as the dam stood at the time of the several conveyances." . . . "There has been no complaint of flowage down to 1867. I do not understand that the plaintiff complains that there has been any more flowage up to that time than the parties had a right to flow; and I understand the counsel now, that if it had only been flowed subsequently to that time as it was previously, there would have been no complaint at this time. That narrows the case down to a very small compass. It brings it substantially, and perhaps solely, to the single question whether or not, when that dam was rebuilt or repaired in 1867, it was built any higher than it was before. That is really the question for you to settle. The plaintiff's testimony tends to show that there was more water retained by that dam, after its repair, than there was before. That might arise from the greater height of the dam, or from its greater tightness. . . . Now these parties have a right to this dam as it was at the date of their deeds; and if it became out of repair, and by this means let off the water for a series of years subsequent to that, and they then chose to tighten it, they would have a perfect legal right to do so; a right to all

that was conveyed to them, and just what was conveyed to them. Therefore, they would have a right to sustain the dam in good repair, as it was when their deeds were made. . . . . If the dam was built higher, and by that means flowed back to a greater height, and there was injury; or in consequence of its greater height, retained it longer, the plaintiff will be entitled to recover; but if it was built no higher, then the defendants will be entitled to your verdict."

The verdict was for the defendants.

E. Kempton, for the plaintiff.

The ruling at *nisi prius* was that the defendants' deeds gave them the right of flowage. The correctness of this construction is the first and principal question in this case. The gravamen of the complaint is that the plaintiff's meadow has been flowed between the fifteenth of May and the first of September. The defendants claim the right to flow it, at all seasons of the year, as high as the dam of 1867 could flow. Quimby's deed of November 3, 1818, to Phineas Taylor contained no grant of any right to flow any land whatever, but only to use a definite amount of water for a specific purpose, the grantor retaining in his own hands the management of the water and dam. And by his deed of November 19, 1838, to Orin E. Taylor, Dr. Quimby only removed the restrictions of the former deed, but did not enlarge the grant. In fact, there is no evidence that Quimby then had any right to flow any lands; especially any not immediately adjoining the dam. There is no proof that, prior to 1867, the plaintiff's land, now flowed, was flowed at all; and the burden was upon the defence to prove this affirmatively, if they relied upon it.

But all the deeds show they had no right to flow this meadow between May 15, and the first day of September; and the testimony of Fellows should have been admitted as the declarations of those in possession of real estate as to the nature and limitations of their title and rights therein. *Chapman* v. *Twitchell*, 37 Maine, 59.

The instructions excepted to, relative to the extent of the right to flow, would have been correct had a prescriptive right been claimed; but they do not apply to one claimed to exist by positive grant, evidenced by deeds produced in court. According to the instruction, if a sale of mills and a water power was made and a conveyance had when the plank and flush boards were all in their places, when the pond and dam were full, and the lands above all over-flowed—the grantee would acquire a good and perfect title to the whole and a legal right to maintain the dam, and retain the water as it then was—or as the dam stood at the time of the conveyance. He would be entitled to all these regardless of the right or title of the grantor.

It would seem more reasonable that a man could convey no right to flow any higher than he legally might himself flow, even at the date of his conveyance his dam did raise the water to a higher point. The height of the dam, instead of the height of the water, in 1867 was made the criterion of the defendant's rights.

The issue to be tried was the right to flow the plaintiff's meadow; no matter how high the dam was prior to 1867, if it had never before retained water enough to flow this land.

A. Libbey, for the defendants.

The rights of Orin E. Taylor, (one of the defendants) under his deeds, are a defence to all. *Prescott* v. *White*, 21 Pick., 341; *Morse* v. *Marshall*, 11 Allen, 229; *Richardson* v. *Bigelow*, 15 Gray, 154.

Neither party claimed by user, but both by deeds; hence, the questions excluded and not answered were immaterial.

Virgin, J. The presiding justice instructed the jury that the respondents "have a right to the dam as it was at the date of their deeds; and if it became out of repair and by that means let off the water for a year or a series of years subsequent to that, and they then chose to tighten the dam, they would have a legal right to do so, because they would have a right to all that was conveyed to them and just what was conveyed to them. . . The only ques-

tion then is whether or not the dam in 1867, when it was repaired, was made higher than the one which had previously existed." The jury found for the defendants. With this finding the complainant has expressed no dissatisfaction. He does, however, except to the instruction; but the only testimony he has given us is that contained in the deeds put into the case.

The instruction is in strict accordance with the principle established by a large multitude of decisions including several in our own State.

By his deed of November 3, 1818, Quimby, under whom both parties claim, conveyed by metes and bounds the east third of the Page mill privilege and dam, with certain restrictions as to the use of the water. By that of November 19, 1838, he conveyed "all that part of said privilege which I deeded November 3, 1818, which I then reserved, to wit,—the right to restrict the said Taylor in said privilege of water for no other purpose than for a tannery; and the said Orin E. Taylor shall have and occupy all the rights and privileges of the one-third of the Page privilege aforesaid together with the right of flowage, the same as though no restrictions had been made."

These deeds taken together granted not only what is expressly mentioned therein as they then existed, but by implication of law, all things necessary to the beneficial use and reasonable enjoyment of the premises mentioned, which Quimby then owned and could convey; and the manner in which this privilege was for so long a time openly and notoriously used and permitted to be used is swift evidence of what the parties to the grant intended and understood to pass by it. Quimby then owned the whole territory including the meadow flowed which subsequently came to be owned by the complainant. When he conveyed a part to Taylor the latter took it with all the necessary benefits which appeared at the time to belong to it, as between it and the remainder, retained by Quimby, among which was the right to flow the remainder as the dam then flowed. A subsequent conveyance of any portion or all of the remainder by Quimby could in nowise

deprive Taylor of any rights acquired by his deeds. If the meadow was then subject to be flowed Quimby could only convey it subject to such servitude. *Hathorn* v. *Stinson*, 10 Maine, 224; *Preble* v. *Reed*, 17 Maine, 169; *Rackley* v. *Sprague*, Id., 281; *Elliot* v. *Shepherd*, 25 Maine, 378; *Dunkle* v. *Wilton R. R. Co.*, 24 N. H., 495, and cases there cited; Angell on Watercourses, § 158, *et seq.*

The reservation in relation to flowing in Quimby's deed to Dunn, of December 27, 1848, and in Dunn's deed to the complainant, of December 27, 1852, could not restrict the rights of the defendant, Taylor, previously acquired. The testimony offered by the complainant and excluded, was not material to the issue and was rightfully excluded. Though Quimby bound himself not to flow the complainant's meadow "between the fifteenth of May and the first of September in each year," this could not bind the defendant Taylor—and "the gravamen of the complaint is" (using the language of his counsel) "that the complainant's meadow has been flowed between the fifteenth of May and the first of September."

In a process of this nature, all the owners of the dam must be joined as respondents. *Moor* v. *Shaw*, 47 Maine, 88. The defendant, Taylor, by his deeds from the complainant's grantor has the right to flow the complainant's meadow without compensation. It is therefore immaterial to the complainant whether or not the other defendants have the right. If that had become essential to the defence we should find no difficulty in finding it in the same deeds. *Exceptions overruled.*

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

AMOS M. CAPEN *vs.* AUGUSTUS C. CROWELL.

Evidence; declarations of witness, when inadmissible to corroborate him.

The question at issue was whether or not one of a series of notes had been altered by an addition to the interest clause, fixing the rate at two and a half per cent. a month after maturity. To refute the defendant's testimony that it had been thus altered, Capen notified the defendant to produce all the notes of the series which had been paid, two of which were not produced because (as the defendant said) they were lost; but one note, containing this penalty clause, was produced by the defence and another which did not contain it; this last the plaintiff contended had obviously been altered by erasure; and proved that it was surrendered to Crowell by a bank cashier, in exchange for the note produced upon notice, which did contain the clause, and which was paid (according to its tenor) at maturity; the plaintiff then offered his letter to the cashier, directing him to see that this penalty was inserted in the new note to be taken (i. e., the one in which the alleged erasure was) as it was in the one for which it was exchanged (i. e., one of those not produced), and the court received the letter against the defendant's objection: *Held*, that it was improperly admitted.

ON EXCEPTIONS.

ASSUMPSIT upon a note dated June 14, 1870, for $557.58, payable at the Ticonic National Bank of Waterville, in four months from date. The defence was that it had been altered by adding a penalty clause, for the payment of interest at the rate of two and a half per cent a month after maturity. The facts relative to the series of notes, of which this was one, partially appear in the opinion, and in the similar case of *Pulsifer* v. *Crowell*, ante, page 22.

There were five of these notes originally; one for $390, on thirty days; one for the same amount on sixty days; one for $555.05, on three months; the one in suit, and one for $1400 in two years. The first (on thirty days) was paid in stockings before it became due; the one on sixty days, which was payable in stockings, was surrendered by the cashier of the Ticonic National Bank, where they were all left, upon receiving in exchange therefor a cash note upon three months, agreeably to the proposition made

by Crowell to Capen and the latter's directions to the cashier, as contained in their letters which will be found on pages 22 and 23 of this volume. This cash note was paid September 17, 1870, when it became due, and also the $7.20 express charges mentioned in Mr. Capen's letter to the cashier. Suit was commenced upon the third note—for $555.05—December 18, 1870, and it was paid, with the penalty interest computed, by his counsel and his daughter March 4, 1871. Notice was given Mr. Crowell to produce all notes bearing date June 14, 1870, which he had given to Mr. Capen and had taken up, and the one he had received from the cashier when the exchange was effected. Neither the sixty days' note, surrendered to him by the cashier, nor the three months, cash note given in lieu of it were produced; the defendant saying they could not be found. The three months' note which was sued December 18, 1870, and paid March 4, 1871, as aforesaid, containing the penalty clause, was produced; and the thirty days' note, paid in stockings, was also produced. This last-mentioned note did not have in it that clause; but the plaintiff claimed that it was obvious, upon inspection, that it had been seriously mutilated, and argued that these words in dispute had been erased. The plaintiff then offered the two letters before mentioned, and found on pages 22 and 23, ante; they were both received, against the defendant's objection, and he excepted thereto. The cashier had no recollection of the circumstances, but had no doubt he followed his usual custom of obeying instructions.

Edmund F. Webb, for the defendant.

The letter to the cashier was a narrative of past occurrences, given by the plaintiff to a third person. 1 Greenl. on Ev., § 110; *Burnham* v. *Ellis*, 39 Maine, 319. It was no part of any *res gestæ* between these parties. *Wilson* v. *Sherlock*, 36 Maine, 295; *Chapin* v. *Marlboro*, 9 Gray, 244; *Emerson* v. *Lowell*, 6 Allen, 146; *Fearing* v. *Kimball*, 4 Allen, 125; *Commonwealth* v. *Cooper*, 5 Allen, 195; *Commonwealth* v. *Edgerly*, 10 Allen, 187.

The letter did not relate to the note in suit; and was addressed

to the plaintiff's agent, who merely supposes he followed his usual custom.

Solyman Heath, for the plaintiff.

These notes were all one business transaction; so that whatever relates to the making and tenor of one or more of them is part of the *res gestæ* as to the others. The letter was written in reply to the one from Crowell to Capen, and referred to a transaction to which both of them and the cashier were all parties.

VIRGIN, J. On June 14, 1870, the defendant (residing in Waterville, Me.,) gave to the plaintiff (residing in New York) two notes on thirty and sixty days respectively, payable in socks, and three promissory notes on three, four and twenty-four months respectively.

On July 5, 1870, the defendant sent to the plaintiff by express, socks sufficient to pay the thirty day note, and proposed by letter to the plaintiff to substitute a three months promissory note for the sixty day note. On July 8, 1870, the plaintiff inclosed the defendant's letter, together with the thirty day note and the sixty day note, in a letter written by himself to the cashier of a bank in Waterville, with instructions to surrender the thirty day note on the defendant's paying the expressage on the socks, and to exchange the sixty day note as proposed; all of which was done; and the defendant paid the substitute (three months' note) at its maturity.

The original three months note was sued, but subsequently paid, according to its terms, by the defendant's attorney.

The present action is on the four months promissory note. At the *nisi prius* term, the defendant seasonably made affidavit, under the rule, that the note in suit had been materially altered since it was executed, without his consent, by adding the clause, "with interest at rate of two and one-half per cent. each month, after due, until paid." The defendant was seasonably notified to produce at the trial the four notes taken up; but he produced neither the sixty day note nor its substitute, alleging that they were lost. The

plaintiff contended that the thirty day note produced showed on inspection that it had been mutilated. The original three months note sued, and paid by the defendant's attorney, produced, contained the same interest clause as the note in suit.

The defendant testified that none of the notes contained the interest clause when he signed them; and that he did not know that the one paid by his attorney did until some time after it had been paid.

On the other hand, the plaintiff testified that the clause was in each of the original notes when they were signed by the defendant, and put in the latter's letter proposing the exchange and before alluded to.

The cashier, called by the plaintiff, testified substantially; that he received the plaintiff's letter with the notes and defendant's letter inclosed; that he entered the notes on his books; that he had no recollection or knowledge of the transaction except such as he inferred from his books; that he always followed the instructions of his correspondents; that his books show a note given for one received, and that it was paid at maturity; and that he could not testify that it contained the interest clause.

The plaintiff thereupon offered in evidence his letter of July 8, 1870, to the cashier, which instructed the cashier among other things to "insert in note you take, the 2½ per cent. penalty clause, which you will observe in the others." The letter was admitted against the objections of the defendant—and the question is—was it admissible. We are of the opinion that the ruling was erroneous.

The letter made no reference to the note in suit.

So far as it referred to the first two original notes, it simply intimated that they contained such a clause by calling the attention of the cashier to them.

Neither can it be admitted as an answer to the defendant's letter of July 5, 1870, for it was not written to, nor seen by, the defendant; and if it had been, the matter therein contained in relation to the interest clause, was not in reply to anything written by the defendant.

Whether the note contained the interest clause or not was a fact susceptible of direct proof. It was not a fact which the directions in the letter could explain or illustrate. The writing of the note was independent and subsequent to the directions contained in the letter and was not necessarily governed or controlled by them. *Nutting* v. *Page*, 4 Gray, 584.

Exceptions sustained.

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

JOHN COLLINS *vs.* JAMES H. BUCK.

Pledge—created by delivery and preserved by possession.

To constitute a pledge, there must be a delivery and retention by the pledgee of the thing pledged.

The lien created by a pledge can be maintained only by a continued possession of the property pledged.

ON EXCEPTIONS.

REPLEVIN of thirty cords of bark, formerly the property of the late William H. Horn, deceased. The plaintiff claimed it by virtue of a pledge as collateral security to a note which he signed as surety for Horn, and subsequently had to pay; and the defendant by sale from Horn's administrator. The verdict was for the defendant. The plaintiff excepted to the judge's instructions to the jury relative to the nature and formality of the contract of pledge and to the kind of possession to be retained by the pledgee, to preserve his lien. The paragraphs of the instructions which were specially excepted to are quoted in the opinion.

These thirty cords were part of a large quantity, all ranged in piles together, and no particular thirty cords had ever been measured and set apart for the plaintiff. His counsel contended that this was not necessary, and that the instructions as to the neces-

sity of exclusive possession, when applied to property of this character, were erroneous.

E. F. Pillsbury and *G. C. Vose*, for the plaintiff.

A. Libbey, for the defendant.

APPLETON, C. J. This is an action of replevin for a quantity of bark.

It is admitted that the title to the bark was originally in one Wm. H. Horn, who has deceased.

The plaintiff claims that he signed a note as indorser for Horn, and that in pursuance of a verbal agreement with Horn to that effect, the bark was delivered to and retained by him to secure him against his liability as indorser.

The defendant justifies as the servant of one Edson to whom the administrator of the estate of Horn sold the bark for an adequate consideration and in good faith under a license from the judge of probate.

There was evidence tending to show that the plaintiff took and retained possession of the bark and to the contrary—and that the note was paid after the death of Horn and before the last day of grace.

The plaintiff claims that, by virtue of a verbal agreement with Horn he received the bark replevied as a pledge to secure him for signing the note, which he subsequently paid. The main question, therefore, which arises, relates to the correctness of the legal positions as stated by the presiding justice in relation to the legal rights of the pledgee.

The court, among other things, instructed the jury that the plaintiff, in order to make the contract of pledge, must make out that the property pledged was delivered to him and that he retained it in his possession. "Now," continues the court, "if a party receives a pledge as collateral security and in course, or at any time after he receives it, suffers it to go back into the posses-

sion of the persons by whom it was pledged, the moment that he yields up the possession of it, he yields his right and any subsequent purchaser or an attaching creditor would be entitled to hold it against him."

These general propositions are in entire accord with the authorities upon the subject. In *Beeman* v. *Lawton*, 37 Maine, 544, the court say: "To constitute a pawn or pledge there must be a delivery and retention of the possession of the thing pawned. If the pawnee gives up the possession to the pawner, his rights are gone." To the same effect are the decisions in other States. *Kimball* v. *Hildreth*, 8 Allen, 167. The lien created by a pledge can be maintained only by a continued possession of the property. *Walcott* v. *Keith*, 22 N. H., 196.

The pledgee must have exclusive possession of his pledge. Whether there was an agreement that the plaintiff should hold the bark in controversy as a pledge; whether it was separate, or an undistinguishable part of a larger pile; whether the plaintiff had exclusive control and possession of it or not; or whether the same went back into the possession of Horn, and so remained until sold by his administrator, were questions for the jury and were fairly submitted to them for their decision.

The concluding words of the presiding justice left nothing wanting; "So that," he observes, "this case resolves itself into these two points: Was the contract, as claimed by the plaintiff, made between him and Horn, by which he was to hold the bark as a pledge to secure him against his liability for signing the note? If it was, did he take that property into his possession? was it delivered to him by Horn, and did he take it and retain it in his possession until it was taken from him? If he has made out these points in his favor, he would be entitled to recover; if he has failed in either of them, why then your verdict should be for the defendant."

It is not perceived that there is any expression of opinion as to the facts, to which any exceptions can justily be taken.

The exceptions state that there is a motion for a new trial—but there is no report of the evidence and it must be overruled.

Exceptions overruled.

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

GEORGE W. DOUGLASS *vs.* ALONZO P. GARDNER.

Party—in R. S., c. 80, § 42, means of record. Pleading. Replevin.

A replevin writ may be served by a deputy sheriff upon one in whose hands another deputy of the same sheriff has placed the goods replevied, for the purpose of safe keeping, after having attached them as the goods of a person other than the plaintiff in replevin.

The word "party," as used in R. S., c. 80, § 42—requiring writs in suits to which a sheriff or his deputy is a party to be served by a coroner—means a party of record.

The objection that a replevin bond is not for double the value of the property replevied must be pleaded in abatement, or it cannot defeat the action; even though the defendant first learned the fact from evidence elicited at the trial.

It is no defence to a replevin suit that the defendant did not take the property from the owner, or his agent, but merely took charge of it for an attaching officer; since an unlawful detention, as well as an illegal caption, will support the action.

Where the plaintiff does not claim the property by virtue of any mortgage, pledge or lien, but by absolute bill of sale, and the goods are not replevied from the attaching officer, but from his keeper, the notice of the plaintiff's claim mentioned in R. S., c. 81, § 42, is not necessary before bringing replevin.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

REPLEVIN of a sled, harness and rope, which had been attached by William H. Libby, a deputy of the sheriff of this county, upon a writ in favor of Alonzo P. Gardner against Donham Campbell, and placed by the officer in Mr. Gardner's hands for safe keeping. They were taken from his possession, upon this writ of replevin, by George Wheeler, another deputy of the same sheriff, on the

seventeenth day of September, 1871. The defendant plead in abatement that he was merely holding the property as agent of the officer, who was the party interested, and therefore that the writ should have been served by a coroner, and not by a deputy-sheriff. This plea was overruled and he excepted.

By the act approved Feb. 17, 1872, c. 13, a precept in which a deputy-sheriff is a party may now be served by a deputy of the same sheriff; but this statute did not affect the determination of the present case.

A demand upon the defendant for this property was made by the plaintiff before suing out his writ, and there was a refusal to surrender it. The defendant claimed, however, that the action could not be maintained against him, because he did not take these articles from Mr. Douglass, nor from Campbell, but was only a custodian of them for Mr. Libby, acting in his official capacity; also because there was no notice of his claim and its amount under R. S., c. 81, § 42, given by Douglass to Mr. Libby before bringing this suit, the defendant contending that, although the title to the harness was by an absolute bill of sale of it, and of property which the plaintiff said was exchanged for the sled, these articles were held as collateral security for a loan by Douglass to Campbell; but the court did not sustain this objection. The defendant alleged that the transaction between Douglass and Campbell was fraudulent, and that the taking of a bill of sale absolute in form to secure a loan, the property remaining in the possession of the debtor, was fraud in law; the question of fraud was left to the jury with the remark that the form of the writing and the retention of possession might be considered by them, as evidence upon that point. There was testimony introduced by the plaintiff that the property was worth more than the value placed upon it in the replevin writ and bond; whereupon the defendant contended that the action must be dismissed for that reason, the fact not being known to him till developed at the trial; but the judge declined to dismiss it. The defendant asked to have the jury told that the action should have been brought against Mr. Libby, instead of

Mr. Gardner, but the justice ruled otherwise. To all these rulings, and refusals to rule, the defendant excepted.

S. Lancaster, for the defendant.

L. Clay, for the plaintiff.

VIRGIN, J. By R. S., c. 80, § 42, "every coroner shall serve and execute, within his county, all writs and precepts in which the sheriff thereof or his deputy is a party." "Party" as here used, means the person whose name is expressly mentioned in the record as plaintiff or defendant. It does not include any person simply interested in the suit but not named, and somtimes denominated "party in interest," as in R. S., c. 89, § 1. The latter clause of § 42 contains the phrase "is a party or interested," thus showing the statute recognition of the distinction between a "party" and a person "interested." This statute early received this construction. *Walker* v. *Hill*, 21 Maine, 481. And a similar statute in Massachusetts, so long as it retained the same language, received the same construction. *Merchants' Bank* v. *Cook*, 4 Pick., 405. The question raised by the plea in abatement was, therefore, decided correctly by the presiding judge. *Perry* v. *Kennebunkport*, 55 Maine, 453.

The fact that the replevin bond was not "in double the value of the goods replevied," as required by R. S., c. 96, § 10, was matter in abatement; and the defendant could have availed himself of it by plea filed within the time prescribed by the rule, but not after a trial on the merits, although he was ignorant of the fact until it came out in the evidence.

It is objected that this defendant being the keeper appointed by the attaching officer, did not "take" the property; and being the servant of the officer, the action should have been brought against the latter, and that it cannot be maintained against the former. But "it is not always necessary to prove a taking of the goods since the action may be maintained against a bailee, by proof of an unlawful detention." 2 Greenl. on Ev., § 561; R. S.,

c. 96, § 8; *Ramsdell* v. *Buswell*, 54 Maine, 546. The property was in the actual custody of the defendant. If it really belonged to the plaintiff, and he was actually entitled to its possession, we perceive no legal reason against the plaintiff's making him the party defendant. *Eveleth* v. *Blossom*, 54 Maine, 447; *Richardson* v. *Read*, 4 Gray, 441.

Again, the bill of sale was absolute in its terms. The property was not claimed by the plaintiff "by virtue of any mortgage, pledge or lien;" and neither was the "action against the attaching officer," and hence the notice provided in R. S., c. 81, § 42, was not necessary.

The requests to pass upon the evidence were properly declined.

No motion to set aside the verdict as being against the evidence in the case has come into the possession of the court; but judging from the defendant's brief, we are led to believe that such a motion was in fact filed. But upon a careful examination of the whole case, we see no reason for disturbing the verdict. The charge of the presiding judge was full and correct in its law. If the testimony introduced by the plaintiff is true, the verdict is well found. *Motion and exceptions overruled.*

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

JAMES H. DUDLEY *vs.* WILLIAM R. KENNEDY.

Accord, without satisfaction, no bar. Nuisance by obstructing navigation.

The plaintiff had contracted to carry sand and ballast by boats down the Kennebec river (a navigable stream,) but was prevented from doing so by the erection of a boom by the defendant across the river, between the place whence the material was to be taken and that to which it was to be transported; *held*, that he could maintain case for this public nuisance by which he suffered special injury.

Dudley *v.* Kennedy.

The plaintiff demanded a passage for his boats. The defendant replied that he could not furnish one, but would pay all damages; subsequently, when called upon, he refused to do so; *held*, that this promise was no bar to the action.

Accord, without satisfaction, is no bar to a suit.

On exceptions.

Case for a nuisance by closing the navigation of the Kennebec river, to the special injury of the plaintiff, under the circumstances stated in the opinion. A nonsuit was ordered, upon proof of the facts alleged, and the plaintiff excepted.

E. F. Pillsbury, for the plaintiff, cited *Knox* v. *Chaloner*, 42 Maine, 150, and cases there cited; *Cole* v. *Sprowl*, 35 Maine, 161; *Brown* v. *Watson*, 47 Maine, 161; *Norcross* v. *Thoms*, 51 Maine, 503; *Stetson* v. *Faxon*, 19 Pick., 147; *Alexander* v. *Kerr*, 2 Rawle, 83; *Griesley* v. *Codling*, 2 Binney, 263; *Heiser* v. *Hughes*, 1 Bing., 463.

A. Libbey, for the defendant.

The declaration and proof was of a common nuisance, by which the plaintiff suffered no injury peculiar to himself, but only one shared by the whole public; for this a civil action will not lie. *Stetson* v. *Faxon*, 19 Pick., 147; *Holman* v. *Townsend*, 13 Metc., 297; *Seeley* v. *Bishop*, 19 Conn., 128; *Georgetown* v. *Alexandria*, 12 Peters, 91.

He did not load his boats and attempt to use the river; he only lost an abstract right to use it.

The parties settled the whole matter by contract.

Appleton, C. J. The plaintiff alleges in his writ and in substance proves that, being the owner of two scows, he had contracted with the A. & W. Sprague Manufacturing Company to transport in said scows upon the Kennebec river, rocks, gravel &c., from its banks above the dam of said company to their dam, to be used for ballasting the same;—that the defendant had obstructed said river, which was a navigable one, by constructing a boom across the

same, so that he could neither pass nor repass with his scows between said dam and the place from which he had engaged to transport rocks, gravel, &c.; that he was then and there ready to transport the same and requested the defendant to remove said obstruction which he neglected and refused to do, whereby he was unable to pass and repass with his scows and to perform his contract, and was thus deprived of the employment of his scows, and obliged to remain idle for the term of twenty days or more; for all which loss and damage he seeks to recover compensation in this suit.

It is not denied that the Kennebec is a navigable river, nor that the defendant constructed his boom across the same, thus preventing the public from passing and repassing over its waters.

It is well settled law that the obstruction of a navigable river is a public nuisance for which the person so obstructing is liable to indictment. So any person specially injured by such obstruction may maintain a special action on the case to recover damages for the loss by him sustained. *Brown* v. *Watson*, 47 Maine, 161; *Dobson* v. *Sutton*, 58 E. C. L., 991. Here the plaintiff is proved to have sustained special damages over and above those inflicted upon the general public.

It seems that at one time the defendant promised to pay the plaintiff for the damages arising from the obstruction to navigation caused by his boom. But the plaintiff subsequently made a demand for a passage for his scows, to which the defendant replied, "there is no need of demanding a passage for your boats, because what I have seen of the collectors (of logs) are willing to do what is right. This thing will be settled without any trouble." The defendant, when afterward called upon, refused to make any compensation, saying that he had been ordered not to pay a cent damage, and should not.

It is insisted that a settlement for damages has been shown, but such is not the case. The plaintiff made a demand to pass with which the defendant did not comply. Whatever promise the defendant may have made, he absolutely refused to perform the

same. Here is no accord and satisfaction. Instead of that there is a denial of satisfaction. Accord and satisfaction to constitute a legal bar to an action must be full, perfect and complete. *Clarke* v. *Dinsmore*, 5 N. H., 137. An unexecuted agreement to pay is not payment. Accord without satisfaction is no answer. *Coxon* v. *Chadley*, 3 B. & C., 591. An accord, to be available as a defence, must be fully executed. A mere readiness to perform is not enough. *Blackburn* v. *Cruisby*, 41 Penn. St. R., 97.

Exceptions sustained.

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

SAMUEL M. JENNINGS *vs.* INHABITANTS OF WAYNE.

Who is a keeper of animals upon the highway, under R. S., c. 23, § 2.
Who is a traveller upon a way.

The phrase "at large without a keeper," in R. S., c. 23, § 2, means without the charge of any one having the right of control. Such charge does not necessarily imply physical power of control, but includes the human voice, gestures, and similar methods of guiding animals, regard being had to their nature, age and dispositions.

It is sufficient to constitute the owner of animals their keeper in a given case, if it appears from the evidence that he possessed the means upon which a person in the exercise of ordinary care, intelligence and judgment, would rely to control their actions.

Whether or not animals are thus in charge is a question of fact to be determined by the jury, under proper instructions.

The owner of a mare and colt turned them out upon the highway to water, when the colt ran away, and the owner, upon the back of the mare, started in pursuit, and while in such pursuit, the accident, for which suit is brought, occurred; *held*, that the jury were properly instructed that if the plaintiff regained possession of both the animals, so as to be their keeper, before the accident happened, and they escaped without his fault, he would have a right to pursue them upon the highway, though he originally turned them out without a keeper.

In the absence of any special finding showing the ground upon which the jury based their verdict, the court will not set it aside as against the evidence upon one branch of the case, when the evidence is sufficient to warrant it upon another branch.

On exceptions and motion for a new trial.

Case for injuries from defective highway. The plaintiff, the owner of a mare and colt, turned them out to water, one Sabbath afternoon, upon the highway in the defendant town. The colt started into a trot and ran away, when the plaintiff caught the mare, took a "turn in the halter around her nose," mounted upon her back, and started in pursuit. While so driving and riding her, the mare broke through a culvert, causing the injuries for which this suit is brought to recover damages.

The defendants requested the presiding justice to give the jury eleven specific instructions, two of which (the ninth and eleventh) they relied upon in argument, and which were as follows: that "if the plaintiff intentionally turned his horses into the road without a keeper, it was an unlawful act; and that if any injury happened to him while going to get them back, he cannot recover, though the road was defective, and the town had notice;" and, if by turning them out without a keeper, on Sunday, he created the necessity for riding upon that day, he could not recover. "That if the want of a saddle, or bridle, or bits, or the character of the horse, or the manner or speed of driving, contributed in any degree to aggravate the plaintiff's injury, he cannot recover."

The verdict was for the plaintiff, and the defendants excepted to the refusal of the presiding justice to give the foregoing instructions and to other instructions given as stated in the opinion, and also filed a motion for a new trial, on the grounds that the verdict was against the evidence and that the damages were excessive.

Baker & Baker, for the defendants.

E. O. Bean, for the plaintiff.

Dickerson, J. This case is presented by the defendants on motion and exceptions. Evidence in regard to the alleged defect, notice and ordinary care was introduced upon both sides. It is the province of the jury to determine the weight of the evidence,

and we find nothing in their verdict so variant from that as to require us to set it aside as against the weight of evidence, upon either of these points. The matters of fact submitted to jurors in this class of cases are so closely interwoven with their common knowledge and experience, that it would be unwise and dangerous to set aside their verdict, as against the weight of evidence, except in cases of flagrant mistake or manifest disregard of the evidence. The instructions to the jury in these respects were appropriate and afford no legal ground of exception.

But the learned counsel for the defendants further contends that the verdict is against the law in respect to contributory negligence. To reach this conclusion the counsel assumes that to constitute the plaintiff the lawful keeper of the animals, he should have led them to water; the plaintiff not having done this, the counsel argues that the animals were at large without a keeper, and that the unlawful act of the plaintiff in thus turning them out, contributed to the accident.

We do not think that this objection is well taken. The law does not require the owner of animals, in all cases, to take the precaution to lead them to water in order to make him their keeper. The phrase "at large without a keeper" must have a reasonable interpretation applicable to the subject matter. "A keeper," says Worcester, "is one who has something in charge." To be "without a keeper" in the purview of the statute is to be without the charge of any one having the right of control, or "not under the care of a keeper," as the statute of Massachusetts expresses it. Such charge or care does not, in all cases, imply direct physical power to control the actions of the animals; in some cases moral means would be sufficient for this purpose, such as the proximity of the owner to the animals, the human voice, gestures, and like means. Whether in a given case, physical or moral power over the animals is necessary depends upon their nature, age, character, habits, discipline, and business or use at the time, and whatever other circumstances have a bearing upon the subject. What would constitute a person a keeper of one ani-

mal would not made him keeper of another under different circumstances. It is sufficient to constitute the owner of animals their keeper, in a given case, if it appears that he possessed the means upon which a person in the exercise of ordinary care, judgment and intelligence upon these matters, would rely to control their actions. Whether or not animals are thus in charge, is a question of fact to be determined by the jury under proper directions. We think that this question was so left to the jury, and see no occasion for setting aside their verdict as against law or evidence upon the ground alleged. *Bruce* v. *White*, 4 Gray, 347.

Objection is also taken to the instruction that if the plaintiff regained possession of both the animals, so as to be their keeper before the accident happened, or he made the ride which resulted in the accident, and they escaped without his fault, he would have a right to pursue them upon the highway, though he originally turned them out upon the highway without a keeper. The plain import of this instruction is, that the lawful owner and keeper of domestic animals, which escape from him without any fault on his part, has a right to use the highway in pursuing them. We see no legal objection to this instruction. The law regards the status of the plaintiff in respect to the animals, at the moment of their escape, and not what it had been at another time. If he was their keeper then, he enjoyed all the rights that attach to that relation irrespective of his antecedent acts. If the defendants could go behind that status, in order to divest the plaintiff of his rights under it once, they might an indefinite number of times, and thus there would be no end to the investigation, and no security for the plaintiff's rights.

The counsel for the defendants insists in his argument upon this branch of the case, that if this instruction is correct, the verdict is against the evidence, for the reason, as he claims, that the evidence shows that only one of the animals became subject to the plaintiff, as keeper, while the instruction required that the plaintiff should have become the keeper of both of them. But, *non constat* that

the jury predicated their verdict upon this instruction. There is no special finding to that effect, and we have seen that they were authorized to find for the plaintiff upon another ground. Under such circumstances the court will not set aside the verdict as against the weight of the evidence. Nor is it necessary to inquire into the state of the evidence upon this subject.

The defendants' counsel admits in his argument that all his requested instructions were substantially given except the ninth and eleventh, and we think that the jury were properly and sufficiently instructed upon the topics embraced in those requests.

The motion to set aside the verdict for excessive damages does not seem to be very much relied upon in the argument, and is not sustained by the considerations that require us to grant it.

Motion and exceptions overruled.

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

SIMON PAGE *vs.* JOHN F. MCGLINCH *et al.*

Capacity to sue admitted by general issue. Landlord and tenant—how that relation arises.

That one who sues as surviving partner has not given the bond required by law must be pleaded in abatement, to defeat the action, since a plea of the general issue admits the plaintiff's right to sue in the capacity stated in his writ.

The father of the defendants, for several years preceding his death, used a water power under a lease from the plaintiff, and the defendants continued their father's business after his death, and to use this water power therein in the same manner he did; *held*, there being nothing to repel the presumption thence naturally arising, that a jury would be justified in finding that the defendants went into possession under the letting to the father, and kept it as his successors or assigns, by permission of the plaintiff; and that a nonsuit, upon this state of the facts, was improperly ordered.

The law refers a possession rather to a rightful than to a wrongful title; hence, in the absence of evidence to the contrary, it will presume in a case like the present, that the defendants are privy to the term granted to their father; if their possession was referable to some other title, it was for them to show it, for this must be a matter lying within their own knowledge.

The correct doctrine seems to be that, in such cases, a contract may be implied, so long as it is left to mere implication to determine whether the occupation is with or without the assent of the owner, and whether it is in submission to his title or adverse.

It was competent for the plaintiff to introduce in evidence the lease to the father, to explain the use and occupation of the defendants upon some other theory than that of disseizin.

ON REPORT.

ASSUMPSIT upon an account annexed, brought by the surviving member of the firm of Stickney & Page, for the use and occupation of a water power under the circumstances detailed in the opinion. After the facts there stated had been elicited, the presiding justice directed a nonsuit, which was to stand if the action could not be maintained upon the evidence, and was to be taken off if these facts would support the action.

Baker & Baker, for the plaintiff.

This court has recently decided that a failure to file a bond as surviving partner must be plead in abatement or the objection will be waived. Yet this was probably the ground of the nonsuit.

The law will, generally, imply the existence of a tenancy where there is an ownership of land on one hand, and an occupation by permission on the other. Taylor's Lan. & Ten., § 19; Woodfall's Lan. & Ten., 654 and 655, and cases there cited.

The lease was for an indeterminate period, at an annual rent. This created a tenancy from year to year, which does not terminate with the death of either party. 1 Washb. on Real Prop., *383, *391; Comyn's Dig., Lan. & Ten., 286; *Doe* v. *Potter*, 3 T. R., 16.

Even were the defendants' possession tortious, the plaintiff might waive the tort and bring assumpsit for use and occupation. Woodfall's Lan. & Ten., 647; 3 Starkie's Ev., 1517; *Church* v. *Imperial Gas Co.*, 6 Ad. & El., 854; *Ibbs* v. *Richardson*, 9 Ad. & El., 853.

G. C. Vose, for the defendants.

This action must be grounded upon the relation of landlord and

tenant, existing by some agreement, express or implied. Taylor's Lan. & Ten., 294; *Bancroft* v. *Wardwell*, 13 Johns., 491; *Longfellow* v. *Longfellow*, 54 Maine, 240; *Goddard* v. *Hall*, 55 Maine, 579; *Rogers* v. *Libbey*, 35 Maine, 200.

Mere ownership on one hand, and occupation on the other, is not sufficient to maintain assumpsit. *Porter* v. *Hooper*, 11 Maine, 170. No presumption of an agreement can arise from the lease to Isaiah McGlinch, since that is *res inter alios acta* as to us, and cannot bind these defendants.

They did not succeed their father—theirs was not a continuance of his possession—but one Sallie McGlinch, succeeded him and the plaintiff recognized the possession and tenancy, and sued her for rent.

In cases like this a tort cannot be waived and assumpsit maintained. *Ryan* v. *Marsh*, 2 Nott & McCord, 156; *Henwood* v. *Cheek*, 3 Sergt. & Rawle, 500.

Barrows, J. This action of assumpsit for the use and occupation of certain water power on the Vaughan brook, from April 1, 1867, to May 1, 1869, comes before us on a report of the evidence offered by plaintiff tending to show the following state of facts. The action is brought by Simon Page, surviving partner of the firm of Stickney & Page, who owned the right to use the water, and in 1859 leased their surplus to the amount of thirty-six inches or more to Isaiah McGlinch by a written lease under seal for an indefinite term, McGlinch agreeing to pay for the use of the water "at the same rate and in the same ratio under the same head that Holmes & Robbins pay Robert H. Gardiner" for the use of water from the dam on the Cobbossecontee stream. Isaiah McGlinch, after the lease, used the water and paid rent for some years, though, owing to other transactions between the parties and by reason of mutual accommodation, not at the rate specified and not exceeding ten dollars a year. But he never surrendered his holding and died in 1867 with the rent somewhat in arrear. The defendants are his sons and after his death continued to carry on his

business and use the water during the time covered by the writ, never gave any notice of an intention to surrender to the plaintiffs and have never paid any rent. Stickney, the plaintiff's partner, died in 1868. It does not appear that the plaintiff has given bond as surviving partner. He brought a suit in 1870 against Sallie McGlinch, as administratrix of Isaiah, for the use of the water, but discontinued it, not having given the notice to the administratrix required by the statute before its commencement. He now presents testimony to show the amount of rent payable by the terms of the lease, and also testimony showing what the use of the water is fairly worth, and claims to recover against these defendants for the use of water during the time in which they occupied jointly after their father's death.

Assuming that the whole case is here truly presented, we think the plaintiff has shown enough to entitle him to judgment. The objection to his right to recover for want of proof that he has given the bond required by statute from a surviving partner, not having been taken in abatement, cannot avail to defeat his suit. *Strang* v. *Hirst*, 61 Maine, 9.

It is true, as contended by the defendants, that this action of assumpsit for use and occupation must be supported by such evidence as will show the existence of the relation of landlord and tenant between the parties, or that the defendant held the possession under such circumstances as will estop him from denying the existence of such relation:—in other words that the action can be based only upon a promise either express or implied, and that it cannot be maintained against a disseizor. *Goddard* v. *Hall*, 55 Maine, 579: *Rogers* v. *Libbey*, 35 Maine, 200; *Porter* v. *Hooper*, 11 Maine, 170. But we are of the opinion that, in the absence of testimony to repel the presumptions naturally arising from the evidence produced on the part of the plaintiff, the jury would be justified in finding that the defendants went into possession under the letting by the plaintiff to their father and kept it as his successors or assigns by permission of the plaintiff. In *Doe* v. *Merless*, 6 M. & S., 110, approved in *Doe* v. *Williams*, 13 E. C. L.

R., 105, it seems to have been held that "the defendant being in possession, the law will refer that possession to a rightful rather than a wrongful title, and there is a course through which that title may be fully derived, viz: by supposing the defendant to be privy to the term granted to his father:" and that "if his possession was referable to some other title, it was for him to show it, for this must be a matter lying within his own knowledge."

In truth the correct doctrine seems to be that in such cases a contract may be implied so long as it is left to mere implication to determine whether the occupation is with the assent of the owner and in submission to the legal title.

In the cases cited by defendant it was made to appear that the occupation was adverse to the plaintiff's title. It was competent for the plaintiff, in showing his title to and control of the premises, to put in evidence the lease to the father of the defendants, and it tended to account for the subsequent use and occupation by the defendants who succeeded to their father's business upon some other theory than that of disseizin.

It is not necessary now to pass upon the effect of that lease, or to determine whether the holding under it terminated with the death of Isaiah McGlinch.

The abortive attempt to collect the rent of their father's administratrix is not so entirely inconsistent with the idea of an implied promise on the part of the defendants as to justify the ordering of a nonsuit. *Case to stand for trial.*

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

OLIVER S. PHILBRICK *vs.* INHABITANTS OF PITTSTON.

Traveller—who is, within the meaning of R. S., c. 18, §§ 40 *and* 65.

One who received an injury while crossing planking placed over a gutter within the located limits of a public street, but outside of the wrought portion thereof—put there to facilitate access to and from the street and a private way or court—is not a traveller upon said street within the meaning of R. S., c. 18, §§ 40 and 65, so as to entitle him to maintain an action against the town liable to keep it in repair.

ON REPORT.

CASE, to recover for injuries sustained by the plaintiff upon Windsor street in Pittston, a way which that town was bound to keep in repair, but which the declaration alleged to be defective and that the plaintiff suffered an injury, while lawfully and carefully travelling over and along said street, by reason of such defect. After the plaintiff rested his case, the presiding justice directed the entry of a nonsuit, which is to be taken off if the jury would be authorized to find a verdict for the plaintiff upon the evidence, of which a summary is given in the opinion.

E. F. Pillsbury, for the plaintiff.

L. Clay, for the defendants.

BARROWS, J. The testimony offered by the plaintiff may be considered as proving that at a certain place on Windsor street, in the village of Pittson, where the travelled part of the street is turnpiked, there has been for a number of years (ten or more) a plank covering to what may be called the gutter, which piece of planking is some twelve feet north of the south line of the street as located, and from three to six feet south of the travelled part of it. It does not appear who placed it there, or that the town authorities prior to the occurrence of the accident had ever made any repairs upon it except to clear out the watercourse beneath it.

It was used to give access to a private way or court which led to three or four houses standing south of Windsor street, the access from the plaintiff's house to Windsor street was not over these planks, but the nearest way from his garden to go down the street was to go into this private way, or court, and thence across these planks into the public street. There were three or four planks about twenty-four feet in length. A week before the accident a neighbor's horse had broken one of them five or six feet from the end and it dropped into the gutter which was then about a foot in depth and dry. The plaintiff knew the plank was broken and at first designed to replace it by a plank of his own. Not finding his plank where he thought it was, he merely readjusted the broken ends so that no defect was apparent, proposing to see the highway surveyor.

Thus it seems to have remained until the morning of the accident when the plaintiff, having occasion to go down the street from his garden with a basket in his hand, went out through the private way and, as he approached the planking, was hailed by a neighbor across the street, and while walking on and talking with him, unfortunately stepped upon the broken plank so near the fracture that it gave way under his weight and he fell on one knee receiving bodily injury. At some time subsequent to this a new plank was put in by the highway surveyor.

The plaintiff claims that he is entitled to be considered a traveller on Windsor street, and that his injury was in consequence of a defect therein.

If towns were legally responsible for injuries received by persons going to and from the highways over the crazy and neglected platforms that lead across the gutters to their own or their neighbor's premises because those structures have been suffered to exist within the located limits of the highway it would be likely to add a somewhat important item to their liabilities.

But such is not the law. It is no part of the duty of towns to provide a safe and convenient access to any man's house lot or garden in a country village from the street, and when a man avails

himself of such conveniences as the abutters have seen fit to furnish in order to pass to or from the wrought and travelled part of the street, he cannot be accounted a traveller for whose security the town is bound to make the way safe and convenient.

There is nothing in the testimony to indicate that the locality is one where the safety and convenience of travellers require the whole width of the street to be wrought. The plaintiff lived in the immediate vicinity and knew all the facts, and the accident occurred in the daytime. Hence the cases where claims for damages have been sustained, on the ground that the town permitted the existence of a nusiance or trap in the highway dangerous to those who were in the legitimate use thereof as travellers, are inapplicable. The plaintiff relies upon the case of *Hall* v. *Unity*, 57 Maine, 530, where the claim was to recover for an injury received by reason of a defect in a path leading out of the regular course of travel to a watering trough erected by an individual under the sanction of the statute within the limits of the highway.

But a glance at the remarks on page 540, touching side paths made by individuals for private use leading from the main road to their dwellings or fields will demonstrate that those members of the court who held views respecting the duty of towns most favorable to the plaintiff distinguished between paths calculated to invite the traveller to deviate for a lawful purpose connected with his journey, and those which he may use to leave the highway if he so desires.

The plaintiff's allegations that he was travelling on Windsor street and received his injury in consequence of a defect therein are not sustained by the proof. He had not reached that part of the street which was appropriated to public travel or prepared by the town for that purpose.

We repeat, as directly applicable to the present case, a remark heretofore made in considering a case of injury received by reason of a defect outside of the wrought or travelled part of the street. "It is well settled that even though there be a defect or obstruction within the limits of the highway as located, if it is not in the

travelled part of the road nor so connected with it as to affect the safety or convenience of those using the travelled path, the town is not responsible for an injury sustained by one using the road for the purpose of passing to or from a private way or his own land." This point has been more recently discussed in *Leslie* v. *Lewiston*, 62 Maine, 468; *Morgan* v. *Hallowell*, 57 Maine, 376. The testimony does not show any such action on the part of the road surveyor as comes within the prohibition contained in R. S., c. 18, § 52.

It is unnecessary to determine whether the jury would have been authorized to find that the plaintiff was in the exercise of ordinary care. He was not a traveller upon Windsor street within the purview of the statute. *Nonsuit to stand.*

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

TICONIC WATER POWER AND MANUFACTURING COMPANY

vs.

JOHN D. LANG AND THOMAS S. LANG.

Conditions of subscription to stock must be complied with to authorize an assessment.

While Thomas S. Lang was in Europe, his father, John D. Lang, without any authority from the son to do so, subscribed for ten shares of the capital stock of the plaintiff company, in their joint names. So soon as Thomas S. Lang, after his return home, learned of this subscription, he repudiated it; but entrusted a proxy for the shares to a person interested in the enterprise, upon an agreement that they were only to be used in case certain obnoxious individuals could be excluded from the board of directors; in which event Mr. T. S. Lang promised to fill this subscription. Finding that the election of these persons as directors could not be prevented, the proxy was not used, but was destroyed, according to the understanding upon which it was obtained; *held*, that this transaction was no ratification of the subscription, and that Thomas S. Lang was not liable to be assessed upon, or to pay for the stock.

John D. Lang's subscription—made in his own and his son's name, as aforesaid—was, like that of all the original subscribers, conditioned upon $75,000 being

taken up within a month—which time was subsequently extended to June 14, 1867. At this latter date, $75,300 had been subscribed—$75,100 by responsible parties, including that of the Langs—but several of these subscriptions (amounting to $12,000) were upon condition that "the citizens of Waterville and Winslow will take the balance." Nineteen of the shares were subscribed for by persons not resident in these towns; so that (the par of the shares being $100) there were not unconditional subscriptions to the amount of $75,000 upon the fourteenth of June, 1867, and the condition upon which one hundred and twenty of the shares had been subscribed for was not complied with. All of the responsible subscribers (for 75,100), except the Langs, paid their subscriptions without insisting upon the failure to perform the conditions; *held*, that the action of the other corporators, in waiving these conditions, could not affect the right of John D. Lang to insist upon that attached to his subscription; and that this not having been complied with, he was not bound to take the stock, nor liable to be assessed to pay for it.

On report.

Assumpsit to recover four assessments of twenty-five per cent. each, upon ten shares of the stock of the plaintiff corporation, which they say the defendants subscribed for. The company was chartered by the Private and Special laws of 1866, c. 40, as amended in 1867, c. 229, with authority to manufacture various materials, and to hold real and personal estate to the amount of two millions of dollars and make improvements upon the Kennebec river, at Waterville, for that purpose. During the month of April, 1867, a considerable number of shares had been subscribed for—among them those alleged to have been taken by the Messrs. Lang—upon condition that "$75,000 be subscribed for within one month;" and to one hundred and twenty of these shares there was attached the further condition that the balance of the $75,000, (above these one hundred and twenty shares) should be taken by citizens of Waterville and Winslow. Upon the seventeenth of May, 1867, an agreement in writing was signed by many of the subscribers, including "John D. Lang, for himself and Thomas S. Lang," extending the time for fulfilling the conditions of their subscriptions to June 14, 1867. When that day arrived, seven hundred and fifty-three shares (or $75,300) were subscribed, all of which were subsequently paid for except the ten shares assessed here to Messrs. Lang, and one share each subscribed for by two other

persons. Nineteen of the shares included in the foregoing number and amount were subscribed for and taken by persons not resident in Waterville or Winslow, but those to whose subscription this condition of citizenship was attached did not insist upon it, but all subsequently paid in the full amount subscribed for their one hundred and twenty shares.

During the spring and summer of 1867, Thomas S. Lang was in Europe. The subscription upon which it was sought to charge him was made by his father, thus—"John D. Lang for himself and Thomas S. Lang, ten shares"—no authority ever having been given by Thomas S. Lang to his father to make this subscription, nor was the latter his son's general agent.

After his return home, Thomas S. Lang was called upon by a gentleman interested in getting up the company, and requested to execute a conveyance of some land upon the river's bank to the company, which he did, but declined to allow the consideration to be applied toward this subscription, but required and received his money for it, saying he had never authorized the subscription, and then learned of it for the first time. After some conversation, however, he gave the gentleman a proxy to vote upon the shares at the ensuing annual meeting for the choice of officers, with the express understanding and promise that it should only be used in case two of the directors, who were not satisfactory to Mr. Lang, should be left off of the board; in which event the proxy might be used, and he (T. S. Lang) would then fill his subscription. The gentleman ascertained, before the annual meeting was held, that this change of directors could not be accomplished, and therefore the proxy was destroyed without being used. The court were to render such judgment as the evidence and law required.

E. F. Webb, for the plaintiffs.

After Thomas S. Lang knew of the subscription, he availed himself of it by giving a proxy to change the directors to suit himself. This is a ratification. It could not concern him who

were directors of a corporation of which he was not a member. He is bound by his attempt to derive advantage from the subscription. *Bryant* v. *Moor*, 26 Maine, 87; *P. & K. R. R. Co.* v. *Dunn*, 39 Maine, 601; *Codwise* v. *Hacker*, 1 Comst., 527.

John D. Lang is bound by his own hand. It cannot concern him that certain persons attached a condition of citizenship to their subscription which they all afterwards voluntarily waived. It was to suit their views, and had nothing to do with his subscription.

A. Libbey, for the defendants.

There were not valid, binding subscriptions to the amount of $75,000 on the fourteenth day of June, 1867. Whether they were subsequently made good or not, by the subscribers waiving the conditions, cannot affect Mr. John D. Lang's rights or liabilities, which are to be determined by the position of affairs on that day.

As to Mr. T. S. Lang, no liability for this stock was ever incurred by him.

DANFORTH, J. This action is brought to recover the value of ten shares in the stock of the plaintiff corporation, alleged to have been subscribed for by the defendants. The subscription book is produced, by which it appears that John D. Lang subscribed for ten shares for himself and Thomas S. Lang, the other defendant. It does not, however, appear, that John D. had any authority thus to subscribe for Thomas S., for that or any other number of shares, but directly the contrary. But it is claimed that the subscription was subsequently ratified by the action, or want of action on the part of the latter. We see no ground for ratification by a want of action, for the case shows that immediately upon receiving notice of what had been done, he repudiated it, and refused to act with the company, or to recognize his liability under it. It is true that he was at one time without his knowl edge chosen a director, but, if he ever was notified of that election, he did not accept or act under it.

Nor was the giving of the proxy under the circumstances shown by the testimony any ratification. Undoubtedly if he had acted with the company, or if the stock subscribed for had, by his procurement or assent, been represented at any meeting thereof, he would be estopped from denying the binding force of the subscription. But no such action or representation is shown by the testimony in the case. It is true he did at one time sign a proxy authorizing Edward G. Meader to represent him at one of the annual meetings of the company. But this paper was signed under a special agreement that it was to be used only upon certain conditions, and the stock to be taken only in case it was used. Before the time for its use had arrived, it was found that the conditions could not be complied with, and it never, so far as appears, was even delivered to the person for whom it was intended, and the case shows affirmatively that it was not used, but destroyed according to the agreement. Thus the plaintiff fails to sustain the action upon any ground against Thomas S. Lang.

It is, however, claimed that the action may be maintained against John D. Lang for the whole amount. If a recovery can be had against either of the defendants it must be by virtue of a contract entered into by the parties for the sale and purchase of stock. In this case the agreement to take stock contained the condition that the sum of $75,000 be subscribed by responsible parties within one month. Before the month had expired the time was extended to June 14, 1867. At the last named date the full amount had been subscribed, and no question is raised as to the responsibility of the parties. But a considerable portion of this amount was taken upon the further condition that the balance should be taked "by citizens of Waterville and Winslow." This latter condition was not fulfilled. The testimony shows that nineteen of the shares were taken by persons who were not citizens of either of the towns named. There was not, then, on June 14, 1867, a binding subscription of $75,000, as required by the terms of the contract in order to hold the defendants.

But it is said that subscriptions, sufficient with that of the defendants to make up the whole amount, were subsequently paid, and

thus the condition attached to them was waived, and it is claimed that this waiver relates back so as, in effect, to render the original subscription subject only to the same condition as that of the defendants, thereby fulfilling the condition upon which the defendants subscribed. It may be that the payment for stock is a waiver of all the unfulfilled conditions upon which that stock was taken. But one party cannot waive a right for another. If the citizenship of the subscribers had been waived before the expiration of the time allowed for taking the stock, it may be that defendants would have had no cause of complaint that such condition had been originally attached to the contract. But such waiver was after the expiration of that time. It was certainly competent for the parties to make time an element of the contract and they saw fit to do so. It was, therefore, binding upon them, and the other stockholders could not deprive these defendants of their right to insist, not only that the amount agreed upon should be obtained, but that it should be obtained within the time limited. Whatever might be the condition of the stock book subsequent to June 14, 1867, at that time the conditions, upon which the defendants subscribed, had not been fulfilled, their proposition to take stock had not been accepted, and they were released from any obligation which before that might have rested upon them. After such release their obligation could not be restored by any act of the other parties to the contract without their consent. It was not necessary that their subscription or proposition should be formally withdrawn, it ceased to have any vitality by its own limitation. As already seen, the acts of one of the defendants do not amount to a ratification of the assumed agency of the other, and for the same reasons they would not be a waiver of his right to have the condition of the alleged contract fulfilled, if such contract had been recognized by him. As to the other defendant no subsequent acts on his part are claimed as affecting his liability.

Judgment for defendants.

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

GRENVILLE HOVEY *et ali.*, in equity,

vs.

ALFRED STORER AND JOHN BABSON.

An agreement void from public policy, the court will not aid.

In February, 1862, the owners of the the ship James Hovey authorized their agent to charter their vessel to the United States for a hundred dollars a day, relinquishing to him all obtained above that sum. Through the intervention of John Babson, a government charter at $150 per day was secured, and the vessel employed one hundred and forty-two days at that rate. The whole amount paid by the United States came into the hands of Alfred Storer (one of the owners) by order of the ship's agent upon Babson; and Storer paid Babson $5000 of the $7,100 difference between what the United States paid and what the owners agreed to take, and retained $2,100 of it in his own hands to the time of the filing of this bill for an account of the ship's earnings: *Held*, that, although the arrangement was void, as contrary to public policy, and could not have been enforced at law by Babson for this reason; yet, so far as it had been executed, the court would not disturb it, to aid parties *in pari delicto*, but would permit him to retain the $5000 he had received; but that the balance of $2,100 in Storer's hands must be divided among the owners of the James Hovey.

BILL IN EQUITY. The facts upon which it is based, and the end sought to be accomplished by it, are fully stated in the opinion.

John S. Abbott and *J. Ruggles*, for the complainants.

A. P. Gould, for Alfred Storer.

Bradbury & Bradbury, of Portland, for John Babson.

VIRGIN, J. Bill to recover the difference between one hundred dollars per day which the plaintiffs actually received, and one hundred and fifty dollars per day which the United States government actually paid, for the charter of the ship "James Hovey" one hundred and forty-two days employed in transporting troops to the "Department of the Gulf."

The original bill, brought by Grenville Hovey, Myron M. Hovey, Farley O. Hovey, heirs at law of James Hovey, deceased,

Eliza A. Hovey his widow, each owning one-eighth, and George W. Robinson, master, and owning one-quarter of the ship, was against Alfred Storer, ship's husband, and owner of the remaining quarter. Subsequently, when most of the testimony had been taken, the bill was amended and John Babson made a party defendant.

The substantial claim is that Storer, by certain alleged false and fraudulent representations, induced the plaintiffs to consent to the chartering of the ship to the government at the rate of one hundred dollars per day; that through one Kennedy—an administrator on the estate of James Hovey—aided by Babson, Storer chartered her in fact at the rate of one hundred and fifty dollars per day; that he received from the government at the latter rate, $21,300; that of the surplus $7,100, he delivered $5000 to Babson, returning $2,100 for his own benefit; and that, by concealing the facts, and by falsely pretending that the whole surplus of $7,100 was claimed by and allowed to the officers and agents of the government, he fraudulently persuaded the plaintiffs into a settlement with him on the basis of one hundred dollars per day.

From the large mass of evidence in the case we find these material facts:

In the early part of 1862, the Gulf expedition, with its temporary headquarters at Boston, having been fully inaugurated, regiments organized and equipped and munitions of war prepared, the quarter-master's department wanted vessels for transportation. A large number of vessels were offered. On February 7, John H. Kennedy, having chartered one of his own vessels for the expedition, telegraphed from Boston to Storer, at Waldoboro, for the lowest sum for which the James Hovey could be chartered—she then lying unemployed in New York harbor, with her register there recorded showing one-half of her belonging to the estate of James Hovey, on which Kennedy was one of the administrators. On the next day, Storer answered (as the result of his consultation with Robinson) "one hundred dollars per day;" and he and Robinson went immediately to Boston, where Grenville Hovey (who

represented his mother and brothers) resided. There all the parties had frequent consultations during the succeeding two or three days; and Robinson, Storer and Grenville Hovey agreed that their vessel should be chartered at the rate of $100 per day. Accordingly, on February 12, 1862, Robinson, in a power of attorney describing himself as "master and one-quarter owner" authorized Storer "to charter said ship;" whereupon Storer made and signed the following indorsement thereon. "I, Alfred Storer, owner of one-quarter of ship James Hovey, make over the above power of attorney to John H. Kennedy, and authorize him to charter the aforesaid one-quarter and my one-quarter, he being the representative of the other half, to the United States government, at such price as he may see fit, in his own name; and we will exact from him at the rate of $100 per day, and all above that sum we relinquish to him—that is, we charter the ship to him at $100 per day, to be employed by government."

On February 17, Kennedy chartered her at the rate of $150 per day; and she continued in the employment of the government under the charter-party until July 9, 1862, when it was terminated.

Robinson went master and received a copy of the charter-party (the consideration left blank) at Ship Island in April following, and wrote to Grenville Hovey "to ascertain how much the government was paying for the Hovey." Hovey wrote to the War Department, at Washington, and on May 29, received an official answer that the government were paying $4,500 per month—$150 per day. This information Hovey communicated to his mother and brothers whom he represented, and to Captain Robinson, on his return with his ship to Boston, on July 7. On July 8, Capt. Robinson, as master, drew $2000 from the quarter-master in Boston, with which to pay off his crew and indorsed that sum on the charter party.

Between the 7th and 11th of July, Robinson, Storer and Grenville Hovey had frequent consultations in relation to the amount they should claim, and finally agreed that Storer should claim only at the rate of $100 per day. Accordingly Storer called upon

Kennedy, who being sick at home, delivered to Storer an order on Babson for the proper vouchers to draw the money, on condition that Storer would pay the surplus to Babson. Thereupon Storer obtained the vouchers, drew the whole amount less the $2000 advanced to Robinson, paid to Babson $5000 of the surplus, and by the directions and for the benefit of Kennedy, retained the remainder of the surplus ($2,100) for the alleged purpose of paying certain outstanding bills; and on August 27, Storer settled with the master and the other owners upon the basis of $100 per day. All the plaintiffs concur in testifying that this settlement was deliberately and understandingly made and that they never notified Storer that they were dissatisfied with it until this bill was served upon him.

The plaintiffs charge Storer with practising a gross fraud upon them and contend that he in fact chartered his and their ship to the government using the hand of Kennedy as a cover for his alleged fraudulent representations as to the rate, by which he procured their consent to it, and that he in fact was to share with Babson the surplus.

We do not think the evidence sustains these allegations. Shipping was dull. Their vessel was unemployed. It is quite certain that she could not have been employed in that service except through the intervention and recommendation of Babson. Her value, as stated in the charter party, was $35,000. Storer was directly interested in her. He might well be satisfied with a rate that would pay for her in a year, regardless of the sum which the broker might realize. It was the most favorable service, pecuniarily, she was ever employed in, considering the term of employment. This, together with the stout denial of Storer in answer and depositions, weighs heavily against the plaintiffs' charges.

The contract made through Babson was clearly against public policy; and if it had remained executory, he would have sought in vain the aid of courts in any attempt to recover the price agreed upon for his services and good will, notwithstanding they may have resulted beneficially to the plaintiffs. *Tool Co.* v. *Norris*,

2 Wallace, 45, and cases cited. But it has been fully executed, save the payment of the $2,100 now remaining in Storer's hands.

But if it be conceded that Storer misrepresented the rate and thereby fraudulently induced the plaintiffs to assent to a chartering at the false rate, they all agree that they learned from the highest official source what the real rate was. This information was known to all except Robinson as early as the latter part of May. Robinson's suspicions induced him to write for information while at Ship Island and he received it from Grenville Hovey immediately upon his arrival in Boston. If he then had any doubts they must have all been removed on July 8, when he saw the charter party itself and indorsed thereon the money advanced for the paying off of his crew. Such full and timely knowledge —obtained before any attempt at collecting the ship's dues— succeeded by frequent consultations of all the owners, resulting in their unanimous unqualified agreement to claim only the lower rate, followed by a settlement deliberately and understandingly made upon that basis, after six weeks more time for consideration and investigation, would deprive them of all claim for the interference of a court of equity, especially when the parties have suffered no damage. *Pratt* v. *Philbrook*, 33 Maine, 17.

But, as already seen, Storer is not proved to be guilty of fraud upon his co-owners. He, in accordance with their agreement and advice, collected what they considered to be due them and him; but in doing so, and in order that he might promptly obtain it, the whole charter-money came into his hands, and he has paid over to Babson only a portion of the surplus, which, according to the terms of the illegal contract, would belong to, and which is claimed by, Babson. So far as this unpaid balance is concerned, the contract remains executory. Babson could not recover it. It not having actually been paid and applied in execution of the contract, the owners may retain it. *Bone* v. *Eckless*, 29 L. J. Exch., 438.

Out of this $2100, we think Storer should have his commissions and the master his primage; and the balance should be appor-

tioned *pro rata* among the several owners, deducting from Robinson's share $283.82 advanced to him by Storer and giving Storer the benefit of that sum—the clerk to ascertain the particular sums belonging to the several owners according to the foregoing principles.

Under the circumstances of this case no costs are to be allowed to either of the parties. *Decree accordingly.*

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

RUFUS NEWBIT *vs.* INHABITANTS OF APPLETON.

What is sufficient notice under R. S., c. 24, § 32.

A notice and request delivered to one member of the board of overseers of the poor is a sufficient compliance with the requirements of R. S., c. 24, § 32, to enable an inhabitant, who is not liable for the support of a pauper, to recover expenses which he has necessarily incurred for the relief of such pauper, after giving such notice.

ON EXCEPTIONS.

ASSUMPSIT under R. S., c. 24, § 32, to recover for the support of the plaintiff's minor grandchild, after notice and request to the overseers of Appleton to provide for the child, who had no father. The plaintiff testified that he was not of sufficient ability to maintain the boy, and that he notified one of the overseers of the poor of the town that they must take care of him, but they did not pay any attention to the request, and this suit was brought to recover the expenses of relief subsequently furnished. The overseer denied that any such notice or request was made to him. The presiding justice instructed the jury that notice and request to a single member of the board of the overseers of the poor would be sufficient under the statute to charge the town for subsequently accruing expenses; and remarked that negative testimony might merely imply a failure to recollect an occurrence, but that a posi-

tive statement that a certain thing transpired could only be attributed to perjury, if false. To this instruction and remark the defendants excepted, the plaintiff having obtained a verdict, which they also moved to set aside as against law and evidence.

Hiram Bliss, Jr., for the defendants.

Hanly & Son, for the plaintiff.

PETERS, J. The defendants contend that the "notice and request," required by R. S., c. 24, § 32, to enable an inhabitant to recover of a town the expenses incurred in support of a pauper, is insufficient, if made to only one member of the board of overseers. The language of the statute is, "after notice and request to the overseers." The decision of this point depends upon the further question, whether it is the duty of one overseer, when such notice and request is made to him, to communicate it to the other overseers. A notice to one overseer may well be supposed by him, as intended as well for his colleagues as for himself. Having no clerk or records of proceedings, overseers should interchangeably inform each other of any and all matters pertaining to their official duties, which may come to their knowledge individually. We think a fair and practical construction of the statute requires them to do so. In this view a notice of the kind in question given to one overseer may properly enough be regarded as a notice to the entire board. It is upon the same principle that it was early held, that a knowledge upon the part of individual inhabitants of a town of a defect in a highway was a sufficient notice to the town in its corporate capacity. It being the duty of such inhabitants to communicate such knowledge to the executive officers of the town, they may be presumed to have done so, or the whole inhabitants are in fault for their neglect. As between towns, the written notice required to be sent by one board of overseers to another must ordinarily be received by a single officer in the first instance, and the notice would practically be to him alone, unless communicated by him to his fellows. The precise question pre-

sented in this case does not appear to have been decided in any judicial opinion in this State. In *Perley* v. *Oldtown*, 49 Maine, 31, cited by plaintiff, the same point was involved in the facts, but does not seem to have attracted the attention of either the counsel or court. But in *Rogers* v. *Newbury*, 105 Mass., 533, the point is distinctly raised, and settled in accordance with our determination here. The case of *Underwood* v. *Scituate*, 7 Metc., 214, is in the same direction, as far as it goes. The case of *Ilsley* v. *Essex Co.*, 7 Gray, 465, is not in conflict with it. There it was decided that a written notice, served upon one county commissioner, was not sufficient to charge the county with the penalty imposed by the statute for the neglect of the commissioners to erect bounds at the termination and angles of a county road. But county commissioners have the use of an official clerk, and keep a record of their doings, and have stated meetings for business. Any notice or requests upon them would, therefore, seem to be appropriate, ordinarily, only as made upon them in open session while acting as a court. A heavy penalty was involved in that suit, which further distinguishes it from the case at bar.

Upon the facts, the plaintiff's case was, perhaps, not a strong one; but the jury, under proper instructions in all respects, have pronounced it sufficient, and we are not convinced that it is not right. *Motion and exceptions overruled.*

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

WARREN WESTON *vs.* JAMES B. GILMORE.

Verdict—cannot be changed, as to damages, after affirmation.

A jury were allowed to seal up their verdict after adjournment of court for the day, and then to separate for the night; in the morning it was opened and affirmed by eleven, by consent, the twelfth being absent by leave after this consent was obtained. The verdict, as affirmed, was for nine dollars and thirty-one

cents; a few minutes after its affirmation—the jurors having retained their seats—they made known to the court that they intended to give a verdict for $74.31; being $65 sued for and $9.31 interest, and that by mistake, only the latter sum was inserted in the blank. The defendant's counsel would not consent to its correction. After awaiting the return of the twelfth juror, and finding that he confirmed the statement of his fellows, the court allowed the jury to retire, and bring in a new verdict for the sum of $74.31; *held*, that it must be set aside, and a new trial granted.

On exceptions.

This was an action for money had and received to recover sixty-five dollars, paid for a certain patent right, the plaintiff claiming that he had rescinded the contract for fraud of the defendant, and also contending that the contract was only a conditional one, and that the money was recoverable back because the condition had not been performed.

The case was committed to the jury just before adjournment at night, with authority to seal the verdict after adjournment of court for the day, and return the same to court upon the following morning. In the morning the sealed verdict was opened, declared and affirmed by the jury for the sum of nine dollars thirty-one cents, and the clerk minuted the figures of it in pencil upon the docket. This was done by eleven of the jurors, by the consent of counsel on both sides, the twelfth juror not being in his seat. Some time afterwards, but before the jury had separated or left their seats, and before the succeeding cause was called for trial, the foreman called the plaintiff's counsel to him and asked if it would be improper to inform the court that there was a mistake in the verdict; and thereupon the said counsel informed the court, and upon inquiry by the court, all of the eleven jurors affirmed to the court that the nine dollars thirty-one cents was the sum by them ascertained to be due as interest upon the $65 claimed, and that they intended to render a verdict for a sum equal to said sum of $65 and nine dollars thirty-one cents added together.

Whereupon counsel for defendant was requested to allow the eleven jurors to retire for the purpose of correcting their verdict, subject to the same objections that would exist against the twelve

jurors doing so, but he refused, upon which the jury were kept in their seats, while another cause was on trial before another jury, and for several hours till the other juror returned in court, when he made the same statement as to the error, which his fellows had; and the court then ordered the jury to retire and correct their verdict, by making it what they intended to make it. The jury did so, returning a verdict for seventy-four dollars and thirty-one cents, which was accepted and affirmed as the verdict in the case. The twelfth juror had gone home on business, the clerk obtaining consent for him, after counsel had consented to take the verdict in his absence.

To this order and direction of the court the defendant excepted.

R. K. Sewall, for the defendant.

Wm. H. Hilton, for the plaintiff.

Barrows, J. The two classes of cases relating to erroneous or defective verdicts, and the mode of correction to be pursued, are carefully considered in *Little* v. *Larrabee*, 2 Maine, 37.

From that case and the cases there cited, and subsequent decisions in the same line, we gather that in those of the first class, where the error is merely formal, and has no connection with the merits of the cause, and the amendment when made in no respect impairs or changes the rights of the parties, the verdict may be amended under the direction of the court after it has been affirmed and constructively recorded, and after the jury have separated, and even at a subsequent term. *Hoey* v. *Candage*, 61 Maine, 263; *Barnard* v. *Whiting*, 7 Mass., 358. But in those of the second class, where the error has been committed by the jury, either by returning a verdict for the wrong party, or for a larger or smaller sum than they intended, and by the amendment proposed the verdict would be reversed, or the damages increased or diminished, and the substantial rights of the parties thus changed, when the verdict has been affirmed in open court, and the jury have separated and become accessible to the parties, the only

remedy for a mistake is by setting the verdict aside and granting a new trial.

In *Goodwin* v. *Appleton*, 22 Maine, 453, the verdict had not been affirmed nor does it appear that the jury had separated, but the case was re-committed to them on the spot with further instructions by the presiding judge.

In *Ward* v. *Bailey*, 23 Maine, 316, relied on by the plaintiff, the jury had not separated and no opportunity for any unfair practices with them had occurred. The absolute impossibility of such a thing is made the ground of distinguishing that case from *Little* v. *Larrabee*, and justifying the re-commitment to them with more precise instructions.

But the case at bar cannot be distinguished in any of its essential facts from *Snell* v. *Bangor Steam Navigation Co.*, 30 Maine, 337. In that case the court saw no reason to doubt that the error which the jury had been allowed to correct after the affirmation of a sealed verdict was one of a clerical character, or capable of being corrected by computation merely, upon the principles on which the jury must necessarily have acted in finding for the plaintiff, and they expressly declare that there was no suggestion that the jury had in fact been influenced by any one, or that any conversation had taken place between any member of the panel and other persons during the separation—still they sustained the exceptions.

We have not the remotest suspicion that there was any unfair practice in the present case; but we think it better that a party should occasionally suffer the delay and expense of a new trial, than that such a source of embarrassing and troublesome inquiries, with doubtful and possibly pernicious results, should be opened as would inevitably follow the allowance of the re-commitment of cases to juries after verdict rendered and affirmed, and opportunity afforded for them to be influenced by conversation with the parties or others.

Jurors should understand that the affirmation of their verdict in open court is not a matter of mere form—that it is their duty

to attend to it as it is read to them, and not to allow it to go upon record as their verdict unless it truly expresses the conclusion which they reached and agreed upon. That their duty to the case is not at an end until their verdict has been not only rightly written out, but rightly read to and affirmed by them, may be seen by a reference to the case of *Bucknam* v. *Greenleaf*, 48 Maine, 394. In that case it was held that the judge had no power to direct the correction of a verdict wrongly read and affirmed, even though the written verdict, as well as the affidavits of the jurors, showed how they intended to decide the case. It is not necessary to carry the doctrine we hold to such an extreme in order to conclude that in the case before us, the entry must be

Exceptions sustained.

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

INHABITANTS OF BOWDOINHAM *vs.* INHABITANTS OF PHIPPSBURG.

Proceedings under R. S., c. 143, relative to support of insane paupers.

A complaint, made by a relative of an insane person under R. S., c. 143, § 12, is sufficient, if such person be designated as the wife of the complainant without giving her name.

An omission to object to the admissibility of the record of the adjudication of the selectmen upon such complaint, on the ground that it was not attested by the town clerk, is a waiver of the right to claim in argument that the record is not what the law requires, because of the want of such attestation.

When in an action between two towns, arising under R. S., c. 143, §§ 12 and 20, the supplies were continuous, and the defendant town has not paid any of the expenses of support incurred and paid by the plaintiff town, a notice, or notices, by the town furnishing and paying for the supplies, to the town chargeable, is sufficient to authorize a recovery for a period of time commencing three months before the first notice was given, and ending at the date of the writ, provided the suit is commenced within two years from the time when the cause of action first accrued.

Bowdoinham *v.* Phippsburg.

The verdict of the jury, finding the marriage of the pauper, cannot be set aside as against law or evidence where (as in this case) the evidence shows that the marriage ceremony was duly performed by an ordained minister of the gospel, accustomed to solemnize marriages; that the intentions of marriage were published in the town where the reputed husband resided at the time of the alleged marriage, and the parties subsequently lived together several years, as and claiming to be, husband and wife.

When a pauper's settlement is shown to have once been in the defendant town, the burden is upon the defence to prove that another was subsequently gained, if its liability is sought to be avoided on that ground.

On exceptions.

Assumpsit to recover sums paid at various times between June 24, 1871, and November 9, 1872, the date of the writ, for the support of Rebecca J. Stackpole, wife of Joshua B. Stackpole, in the insane hospital. The first notice given by the overseers of the poor of Bowdoinham to those of Phippsburg was dated June 9, 1871, when the first bill from the hospital was received by the former. As other bills for support were, from time to time, sent to Bowdoinham, by whose municipal officers the commitment to the hospital was made, new notices were sent to the overseers of Phippsburg.

Mrs. Stackpole was visiting in Bowdoinham when she became so insane that, upon the twentieth day of April, 1870, her husband made complaint to the selectmen of Bowdoinham, agreeably to the provisions of R. S., c. 143, § 12, and asked that she be committed to the insane hospital, which was done after hearing the testimony, upon the same day. The complaint read thus: "To the selectmen of Bowdoinham. The undersigned complains and says that he came into this town with his wife to visit her sister, and that she is insane, and ought to be sent to the insane hospital.

Joshua B. Stackpole."

The certificate of the proceedings for commitment was not authenticated by the town clerk. The judge was asked to instruct the jury that the application was not sufficiently definite to justify proceeding upon it because it did not contain the name of the person alleged to be insane; and that there was no proof of proper

proceedings because they lack the verification of the town clerk; both of which requests were declined.

The defendants contended that none of the notices sent them by the plaintiffs were sufficient, but the judge ruled otherwise.

In the preliminary proceedings and commitment the insane person was called Rebecca C. Stackpole, except that in one place in the commitment the initial of the middle name was J. The declaration was for the support of Rebecca J. Stackpole. It was claimed that her settlement was derived from her husband, wherever his might be. The record of the intention of marriage was between Joshua B. Stackpole and Rebecca C. Preble. The defence contended that there was no proof of identity, but this question was left to the jury. In the notices she was uniformly called Rebecca J. Stackpole.

The defendants claimed that the plaintiffs could not recover because there was no certificate of the examiners that the insane person and her relatives were not of sufficient ability to support her; or, at any rate, a dollar a week should be deducted from the board paid; but the court did not so hold. For eight or ten years Mr. Stackpole and his wife lived in Boston, Mass.

The defendants requested the judge to instruct the jury that the burden was upon the plaintiffs throughout; but the court ruled that if the plaintiffs had first satisfied them that Joshua B. Stackpole once had his settlement in Phippsburg, the burden was upon that town to show he had subsequently gained one elsewhere. The judge then remarked that "the question of the burden of proof becomes important only when the testimony is so nearly balanced upon a point that the jury are unable to say that their minds incline either way with relation to it. Whichever way the jury finds the proof inclines their minds, they accept that view of it. If the testimony is equally balanced, so that they are unable to say that their minds incline to either side of the case, then the party fails upon whom the burden of proof rests, as he does if the proof inclines against him." To this the defendants excepted. The defence argued that, under the circumstances, it would be a

hardship and against natural justice, to have the support of the woman cast upon Phippsburg; and that, inasmuch as the plaintiffs were insisting upon a strict statutory right, the jury ought to hold them to clear proof of all the facts, and give them the benefit of no doubtful presumption; thereupon, the judge said: "We are to look to the law to see what constitutes a legal settlement, and to find out how it is acquired. It is all a matter of statute provision. You have heard something on both sides, about the hardship of this statute. You have nothing to do with that at all. Natural justice has nothing to do with the case. It is a matter purely of statute right, statute liability." To this instruction the defendant excepted. The verdict was for the full amount expended by the plaintiffs and interest.

W. Gilbert and *Francis Adams*, for the defendants.

The first notice that anything had been paid by Bowdoinham was February 27, 1872. Those prior to that simply said that bills had been received from the hospital—not that they had been paid. The expenses are not incurred by the town till they are paid; hence all notices prior to payment are nugatory. *Eastport* v. *Belfast*, 40 Maine, 262; *Bangor* v. *Fairfield*, 46 Maine, 558; *Verona* v. *Penobscot*, 56 Maine, 11; *West Gardiner* v. *Hartland*, 62 Maine, 246. The statement as to the burden of proof was wrong. *Wilmington* v. *Burlington*, 4 Pick., 174.

When residence and domicil within the State ceased, the pauper settlement ceased. R. S., c. 24, §§ 1 and 2.

Tallman & Larrabee and *E. J. Millay*, for the plaintiffs.

Dickerson, J. We do not think that the objection to the complaint and the warrant of commitment is well taken. The statute does not prescribe the form of the complaint. That should state that the person for whom relief is asked is insane, and give the name of such person or such information as readily shows who is intended. The designation of the insane person, as the wife of the complainant, is as intelligible for this purpose, as though her name

had been given. The certificate of commitment contains all the requisites of the statute which make it sufficient evidence to charge the plaintiffs in the first instance.

No objection appears to have been made to the introduction of the record of the adjudication of the selectmen upon the complaint. The defendants having waived this objection were not in a situation to request the presiding justice to rule that the record was invalid for want of the attestation of the town clerk. If the objection had been seasonably interposed it might, perhaps, have been obviated by the proper authentication. The presiding justice properly declined to give the requested instruction upon this point.

The objections to the notices relate to an alleged misnomer of the pauper, and the unseasonableness of some of them to cover certain amounts of the expenses incurred and paid. The first objection is removed by the presiding justice in submitting the question of identity to the jury, and the second by the other circumstances in the case. The supplies were furnished continuously, and the defendants had paid no part of the expenses incurred when the plaintiffs commenced their suit. In such cases it is not necessary that a new notice be given when each payment is made to the hospital. It is sufficient if one of the legal notices, or, as in this case, a number of them, covers the time when all the sums were paid, including the sums paid three months prior to the first notice, and all sums afterwards accruing and paid, unless barred by the statute of limitations. *Jay* v. *Carthage*, 48 Maine, 357; *Veazie* v. *Howland*, 53 Maine, 39.

The instructions given to the jury in regard to the burden of proof were correct. The settlement of the wife follows that of her husband, whether he gained his settlement in his own right, or by derivation from his father. A settlement once acquired continues until a new one is gained. Where the settlement of a pauper is proved to be in a town the burden is upon such town to show that the pauper has gained another settlement, if it would avoid liability for his support. *Monson* v. *Fairfield*, 55 Maine, 119.

The objection to the validity of the marriage of the pauper to Joshua B. Stackpole cannot be sustained. The presiding justice left the question of the identity of the parties to the jury, and there is ample evidence to sustain their finding the fact of the marriage, nor is their verdict in this respect against law as the authorities clearly show. *Hiram* v. *Pierce*, 45 Maine, 367; *Taylor* v. *Robinson*, 29 Maine, 323; *Milford* v. *Worcester*, 7 Mass., 48; *Newburyport* v. *Boothbay*, 9 Mass., 414.

There is nothing in the other points made in defence that would justify us in setting aside the verdict. *Exceptions overruled.*

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

JAMES M. HAGAR

vs.

NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

New trial. Referees are judges both of law and facts.

Unless it clearly appears from their award that the referees, intending to be governed by strict legal principles, have submitted the question of the legal correctness of their conclusions to the court, their award will not be set aside, whether their view of the law was erroneous or not—since they constitute the chosen tribunal for the determination both of law and fact.

A motion for a new trial of a cause, decided by arbitrators, will not be granted where the testimony claimed to be newly discovered came to the knowledge, and was in the control, of the losing party before the case was argued; nor where the report fails to show the materiality of the newly discovered evidence, or whether it was anything more than merely cumulative.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT upon an insurance policy issued by the defendants upon the plaintiff's ship, Ida Lilly, claimed to have been injured in Charleston harbor, S. C., in the summer of 1866, during the life of the policy, and by a peril of the seas therein insured against.

Suits were instituted, at the same time with this, against three other companies, upon as many policies, covering the same risk. They were all alike, and were all referred together to three gentlemen, who had one hearing upon all these cases.

The award as to all of them was that the defendants recover their costs. The plaintiff claimed that the referees, though intending to proceed according to law, erred in the admission and rejection of testimony particularized in his motion to have the award set aside; and that, desiring to be governed by legal principles, they mistook them.

The declaration was for injuries received in Charleston harbor, as before stated. By the ship's log-book, put into the case at the hearing before the arbitrators, it appeared that the vessel encountered heavy weather during a considerable portion of the voyage thence to Liverpool, which might have caused the injury for which these suits were brought. The plaintiff now says that he learned, after the testimony was closed, and in the course of Mr. Gould's argument, that the master and mate of his ship had interpolated these statements as to boisterous weather, throwing the vessel on her beam-ends, water in the hold, &c., &c., after her arrival in Liverpool; and that it was done to exonerate her owner from any liability for damage done by water to her cargo.

There was no report of any of the testimony given before the referees, except one or two isolated passages mentioned in the affidavits taken upon the motion for a new trial. The justice at *nisi prius* overruled the motions to set aside the award for errors of law, and on account of this testimony as to the alterations in the log-book, and the plaintiff excepted.

W. Gilbert and *Tallman & Larrabee*, for the plaintiff.

A. P. Gould and *Jos. W. Spaulding*, for the defendants.

Dickerson, J. The exceptions must be overruled. The parties chose their own tribunal. No conditions or limitations were imposed upon the referees in the rule under which they acted, nor

was any provision therein made for a reference of questions of law to the determination of the court. In such cases the award of referees, when acting within the scope of their authority, is, in general, conclusive upon all questions of law and fact which directly or indirectly arise in the trial. Their authority extends to the admission or exclusion of evidence, the credit due to, and the inferences drawn from, the evidence, and the principles and rules of law that should guide their investigations, and control their decision. In *Hall* v. *Decker*, 51 Maine, 31, it was held that where an action is referred by rule of court without any condition or limitation, the authority of the court is transferred to the referees, and they are made the judges of the law and the fact; and if there be no suggestion of improper motives on their part, their doings will not be inquired into by the court. The decision of referees thus appointed, upon a particular matter, is regarded as *res judicata*, and is not to be readjudicated any more than the judgment of a court of competent jurisdiction upon the same subject. *Manufacturing Company* v. *Fox*, 18 Maine, 117; *Sweeny* v. *Miller*, 34 Maine, 388.

There are, indeed, exceptions to this rule. The court will inquire into a mistake of law arising from matter apparent on the award itself, or where the referees in their award raise the question of law, and make their award in the alternative, with or without expressing an opinion, or where it is obvious from the award itself that the referees intended to decide according to law but misconceived the law. So an award may be set aside for a mistake in fact apparent upon the face of the award, as where there has been a manifest error in computation, showing that the result stated is not that intended and does not therefore express the real judgment of the referees.

The general principle, however, is that the court will not inquire into an alleged mistake of referees in law or fact, not apparent upon their award, unless there is a suggestion of corruption, partiality, or misconduct on the part of the referees, or some fraud or imposition on the part of the party attempting to set up the award,

by means of which the referees were deceived or misled. *Boston Water Power Co.* v. *Gray*, 6 Metc., 168, 169. The case at bar does not come within the exceptions to the general rule of law upon this subject, and must be determined accordingly.

The rules which govern the court in considering and determining motions for new trials on account of newly discovered evidence have been so often stated and applied that they have come to be familiar to the profession as the rudiments of the law. One of these rules requires that in order to be available the new evidence must have been discovered too late to be produced at the trial by the exercise of reasonable diligence. What constitutes reasonable diligence in a given case depends upon the facts in that particular case. In this case the evidence was discovered after the testimony was closed and before the cause was argued. It was communicated to the plaintiff about five o'clock in the afternoon, at the place of trial, by the mate of the ship, after he had been fully examined as a witness for the plaintiff. The plaintiff did not request the mate to remain and testify to the new evidence, nor did he inform either of his counsel of the discovery until the next morning; and even then no suggestion of its existence was made to the referees. The new evidence, so called, consisted of certain additions made in the log-book by the mate at the suggestion of the master of the ship, after her arrival in port. The log-book, just as it was, was introduced in evidence before the referees.

Thus the plaintiff had knowledge of the new evidence and, also, the power to produce it before the referees, at the trial, if he had used reasonable diligence. His omission to do so precludes him from having the new evidence used now to enable him to reverse a result which he claims would have been otherwise, if he had produced such evidence at the trial.

But there is another serious objection to granting a new trial. It is a familiar rule regulating judicial discretion in this class of cases, that the court will not grant a new trial unless there is reason to believe that the new evidence would reverse the result.

By presenting his motion the plaintiff assumes that this would be the case, and the burden is upon him to show it.

This can be done best, and oftentimes only, by producing a report of the evidence introduced at the trial, which has not been done in this case. We are, therefore, left without the proper means of determining the materiality of the alleged interpolations in the log-book, and whether or not evidence of their having been made in port would be likely to change the result. If the evidence introduced at the trial in regard to the state of the weather, the condition and behavior of the ship on the voyage, agreed with the memoranda complained of in the log book, it would seem to be immaterial whether they were made during the voyage or after the ship arrived in port. The evidence before us fails to show that the entries made in the log-book after the ship arrived in port were untrue, or contrary to the evidence introduced before the referees. We are not authorized, therefore, to say that the newly discovered evidence would be likely to reverse the decision of the referees.

Exceptions and motion overruled.

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

SARAH HAGAR *vs.* HARRISON SPRINGER.

What is a mutual account, within the statute of limitations.

The last item of the plaintiff's account annexed was of a date more than six years before the suing out of her writ. At the trial she introduced the record of a suit brought by Mr. Springer against her upon an account annexed, several of the items of which were within six years of the date of the last item in the account annexed to her writ, and were within six years of the date of her writ: *held*, that the statute of limitations in force when this suit was brought (Oct. 13, 1867) was no bar to the maintenance of the action.

It is sufficient for the plaintiff, in order to remove the statute bar, to show mutual dealings between the parties, and that the last item upon either side of the account was within six years of the commencement of the action.

Hagar *v.* Springer.

ON FACTS AGREED.

ASSUMPSIT upon an account annexed, brought October 31, 1867. The statute of limitations was pleaded in defence, as appears by the opinion in which the facts are stated.

A witness, called by the plaintiff, testified that Mr. Springer examined the books and pronounced the account upon them correct; but added that the last four items of the account annexed to the writ were not then upon the books.

This case has been brought into the law court before. See 60 Maine, 436.

J. W. Spaulding, for the plaintiff.

J. D. Brown, for the defendant.

VIRGIN, J. The question is whether the plaintiff's account is barred by the statute of limitations. This involves the construction of R. S., of 1857, c. 81, § 99, as amended by Public Laws of 1867, c. 117, that being the statute in force when this action was commenced.

R. S., c. 81, § 99, as amended, provided: "In actions of debt or assumpsit to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to accrue at the time of the last item proved in such account. And it shall be deemed a mutual and open account current when there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both."

It is not essential that the plaintiff state both sides of the account, strike the balance and declare for that specific sum in order to render his action one "to recover the balance due." The mutual dealings between the parties constitute together the items of but one "account." Either party or both may sue their individual side of the account. In his action each may state his own or both sides of the account. If one party sue his side only, the defendant may or not, at his option, file his side in set-off; and if he does not, he does not necessarily waive his right to recover it in

another action. If none of the plaintiff's debit items be within six years next preceding the date of his writ, and the defendant do not file any account in set-off, or prove anything as payment, it will be incumbent upon the plaintiff in order to avoid the bar, to prove some item of credit, i. e., some item of the defendant's side of the account within six years. When he has done that, he will have taken out of the statute such items in his own side as are within six years of the credit item proved; for "the last item proved in such account" includes the last item on either side. *Baker* v. *Mitchell*, 59 Maine, 223; *Penniman* v. *Rotch*, 3 Metc., 216.

The witness called by the plaintiff testified substantially, that he superintended the ship yard of the plaintiff's intestate in 1857, and until the death of the intestate in 1862; that he, by a clerk, kept the account of everything which came into and went out of the yard, including the items in the account annexed, except the last four, and had a personal knowledge at the time of their delivery; that the book produced was the intestate's book of accounts of the ship-yard; that it had been constantly in his possession except a few days in 1867, when he left it with the intestate's son; that in 1867 witness saw the defendant examine the account in the intestate's son's office and heard him say and finally "agree that it was all right," and that he would "come in and settle it up;" and that the account annexed except the four items named is copied from the book.

The book itself has not been before this court—neither party has objected—but simply a copy of the debit items. Whether there are or not any credit items in the book, the case fails to show. We therefore presume that all the material parts of the book are before us. Upon this undisputed evidence we think all the items in the account annexed excepting the last four are sustained so far as the general issue is concerned.

The account annexed contains no item of credit. Moreover the last item of it proved is dated May 28, 1859—nearly eight years and a half prior to the date of the writ, October 31, 1867. Hence

if the evidence stopped here, the action would be barred. But the plaintiff has put into the case a copy of the writ and account annexed therein, in the action of this defendant against this plaintiff, and of the judgment on the whole amount of that account. Upon looking at that account we find the account commenced as early as 1855, and several items in 1857, 1864 and in 1865. This we think is legitimate evidence of such items; and they being within six years of the date of the plaintiff's writ, and also within six years of the items in her account annexed, the action is not barred.

Judgment for plaintiff for $47.70, *and int. from Oct.* 31, 1867.

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

JAMES M. HAGAR *vs.* UNION NATIONAL BANK.

Dividends—bank has lien on; demand therefor premature while lien continues.

A bank has the right to hold a cash dividend as pledged for the indebtment of the shareholder to the bank.

A bank had sued an overdue note of a stockholder, discounted by the bank, and attached his shares. During the pendency of this action, the stockholder demanded payment of the dividends declared upon the attached shares, which was refused. He subsequently settled that suit and then, without renewing his demand, brought the present action for his dividends; *held*, that it could not be maintained.

ON FACTS AGREED.

ASSUMPSIT to recover dividends declared by the defendants upon forty-five shares of their capital stock, owned by the plaintiff on the first day of January, 1872, and ever since; and, during all that time, standing in his name upon the books of the bank.

July 1, 1872, a semi-annual dividend of three per cent. was declared, and the plaintiff demanded the $135 thus accruing upon his

shares, on the thirteenth day of August, 1872. Upon the first day of January, 1873, a dividend of four and a half per cent. was declared; and, on the second day of April, 1873, Mr. Hagar demanded his $202.50. Neither of these demands was complied with, because the bank had sued Mr. Hagar upon the twenty-first day of June, 1872, upon two notes signed by him, one for $1000, due May 21, 1872, and the other for $1500, due June 19, 1872, and attached the plaintiff's stock, if the officer's return and notice were sufficient to constitute an attachment. This attachment was made by the officer filing with the cashier an attested copy of the writ, with an attested copy of his return of the attachment of said forty-five shares thereon.

The action of the bank against Hagar was returnable to and was entered at the September term of the superior court for Cumberland county (the bank being established at Brunswick) and was thence continued from term to term, till the May term, 1873, when the plaintiff paid the notes, July 10, 1873, and the action was, on the same day, entered "neither party." Subsequently to the dates before given the plaintiff never made any other demand for the dividends aforesaid upon his forty-five shares before bringing this present action. It was conceded that the plaintiff could show that the dividend declared July 1, 1872, was mostly earned before the attachment of the shares June 21, 1872, if that fact was legally admissible; and, if allowable, he could also show that the writ, though dated June 25, 1873, was in fact made July 14, 1873, and ante-dated so as not to interfere with the July dividend of 1873. Judgment to be entered according to law upon these facts.

J. W. Spaulding, for the plaintiff.

Though by a sale of stock, dividends subsequently declared pass to the purchaser, without reference to when they were earned, *March* v. *Eastern R. R. Co.*, 43 N. H., 515, an attachment of shares only takes that upon which the statute gives a lien, namely, the accrued (i. e., already earned) dividends. R. S., c. 81, § 25, and c. 84, § 15.

Certainly, those subsequently accruing do not belong to the creditor, whose suit may be settled, as that against Capt. Hagar was. *Hixon* v. *Schooley*, 2 Dutcher, (N. J.,) 461.

No demand necessary to maintain suit for dividends. The only effect of demand is upon the right to claim interest. See opinion by Chase, C. J., in *Keppel* v. *Petersburg*, in 3 Am. Law. Rev., 389; *Rich* v. *Jones*, 9 Cush., 329.

The writ was really made after the dissolution of the attachment; and we are authorized to prove this fact, notwithstanding its date. R. S., c. 81, § 91; *Johnson* v. *Farwell*, 7 Maine, 373; *Davis* v. *Drenkle*, 9 N. H., 545.

At all events, a valid, existing attachment could only be plead in abatement. 2 Dutcher, 461. There was no valid attachment. Only necessity, which did not exist here, could justify the bank in taking its own shares. National currency act of 1864, 13 U. S. Stats. at Large, c. 106, § 35. This necessity they must show, since they assume it as the basis of action.

J. H. Drummond, for the defendants.

The bank had a right to retain the dividends of a stockholder indebted to them upon overdue paper. Ang. & Ames, on Corps., § 569; *Rogers* v. *Huntingdon Bank*, 12 S. & R., 77.

The dividends were held by the attachment while that continued, and when the demand was made. Dividends are only payable on demand, at the bank. None was made there for these dividends, after the attachment of the shares was dissolved.

VIRGIN, J. There are two fatal objections to the maintenance of this action:

I. A bank has the right to hold a cash dividend as pledged for the indebtment of the shareholder to the bank.

It has been expressly decided in the supreme court of the United States, that since the National Bank act of June 3, 1864, went into effect, neither by the act itself, nor by any by-law based upon any authorized provision in the "articles of association," can a national bank create a lien upon the shares of its stock-

holders for their indebtment to the bank. That such a lien is contrary to the whole policy of the act is manifested by the repeal of such a provision in the act of 1863, and inconsistent with the spirit of § 35 in the act of 1864. *Bank* v. *Lanier*, 11 Wall., 369; *Bullard* v. *Bank*, 18 Wall., 589. See also, *Evansville Nat. Bank* v. *Metropolitan Nat. Bank*, 10 Am. L. Reg. (N. S.), 774. To the same purport is *Bank of Louisville* v. *Bank of Newark*, decided by the Kentucky Court of Appeals, and reported in 7 Chicago Legal News, 70.

The rule has long prevailed in many jurisdictions that a corporation has no implied lien on the shares of its stockholder for debts due from him and cannot hold them against a purchaser or attaching creditor. *Sargent* v. *Franklin Ins. Co.*, 8 Pick., 90; *Mass. Iron Co.* v. *Hooper*, 7 Cush., 187; but that a bank deals with its stockholders in the same manner as it does with its general customers, taking the same security and not relying upon its stock. A different rule was adopted in relation to dividends declared. They were considered as so much money in the possession of the bank belonging to the stockholder, but which should be considered as pledged towards the payment of any just debt then due from him. *Bates* v. *N. Y. Ins. Co.*, 3 Johns. Cas., 238. This rule was considered a "reasonable one," and was adopted by the court in *Sargent* v. *Franklin Ins. Co.*, *supra*. We fail to perceive any real objection to such a rule. It is not inconsistent with any provision in the bank act, and neither is it in conflict with any principle of public policy. It cannot affect the free sale and transfer of shares, for the dividend does not pass with the transfer of the share, being the property of him who is the shareholder when it is declared. So long, then, as the plaintiff's overdue notes remained unpaid, he could not recover the dividends declared upon his shares, because of this equitable lien.

And neither could he maintain an action therefor without a previous demand. *Scott* v. *Cent. R. R. Co.*, 52 Barb., 45. The law does not require a bank, after declaring its dividends, to hunt up and tender to its stockholders their respective dividends, in

order to avoid the liability of actions therefor. Dividends are usually declared payable at the banking-room, whither the owner may go and there on demand receive them—provided his indebtment to the bank does not contravene. To be available the demand should have been made when and where the bank was bound to pay. If made while the money was considered as pledged for the indebtment of the demander, it would be as useless as if made before the dividends had been declared. As well might a mortgager of chattels demand them before he had discharged the debt secured thereby, and after payment bring his action without renewing his demand. In the case at bar the plaintiff, after dissolving the lien by payment of his notes, could doubtless have obtained the dividends by asking for them at the banking-room; but, for some reason, he chose to sue without any other demand; and we think his action was prematurely commenced. *Hagar* v. *Randall*, 62 Me., 439.

II. It had a special lien created by the attachment of his shares on June 21, 1872, which continued until July 10, 1873, when the attachment was dissolved.

The net profits of a bank remain the property of the bank and are inseparable and undistinguishable from it, and will pass by the name of stock by sale, bequest or levy, until by the resolution of the directors, they are separated and set apart as dividends. This almost necessarily results from the utter impracticability of ascertaining the real circumstances of the bank until the expiration of the full period for which they are declared; and when declared they become the property of the then stockholders. *Goodwin* v. *Hardy*, 57 Maine, 143; *March* v. *Eastern R. R. Co.*, 43 N. H., 515; *Foote*, appellant, 22 Pick., 299; *Granger* v. *Bassett*, 98 Mass., 469; *Minot* v. *Paine*, 99 Mass., 101.

Shares are a peculiar property, but are declared by all modern charters to be personal property. The title is a legal one, created and defined by law, and it may be transferred by contract, bequest or levy. The mode for securing a lien thereon and passing the title by levy, is expressly provided by our own statute, as follows:

"When the share or interest of any person in any incorporated company is attached on mesne process, an attested copy of the writ with a notice thereon of the attachment, signed by the officer, shall be left with the clerk, cashier or treasurer of the company; and such attachment shall be a lien on such share or interest, and on all accruing dividends." R. S., c. 81, § 25.

The attachment was perfected in strict compliance with this provision. We can hardly conceive of a better "notice" of an attachment than an attested copy of the officer's return of the attachment, indorsed upon an attested copy of the writ. The attachment being valid, it created a lien on the shares "and on all accruing dividends," i. e., all dividends declared on such shares during the continuance of the attachment regardless of the time when the acquisitions out of which they are declared may have accrued. In perfect accord with this view, the statute further provides that "if such shares were attached in the suit in which the execution issued," the purchaser at the sale on execution "shall have all dividends which accrued after the attachment." R. S., c. 84, § 15.

The plaintiff invokes § 35 of the Act of Congress of 1864, (13 Stat. at Large, 102,) viz: "That no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser nor holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith;" and contends that this provision forbids the attachment by the bank of any shares of its own capital stock, "unless it shall be necessary to prevent loss," &c. We do not understand that the attachment or sale on execution of shares implies a purchasing or holding on the part of the creditor. Shares are personal; and any person may purchase at the sale. If, like a levy on real estate, the title necessarily passed to the creditor, the construction contended for by the plaintiff would be much strengthened. But although, to use the language of Mr. Justice Davis, in *Bank* v. *Lanier*, supra., "so marked is the policy of Congress on this subject, that it does not allow a

bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt," &c., and "that if the power were given to a bank to loan money on the security of its shares, it would imply a power to become the owner of those shares, and this Congress intended to guard against," we are not prepared to believe that Congress intended to require a bank to go out and accurately inform itself of the necessity before it can by the forms of law attach the shares of a stockholder for his debt due the bank and sell them to whomsoever may purchase.

If the defendant did have a lien on the shares by reason of the attachment, then the demand will not avail the plaintiff in the maintenance of this action. *Plaintiff nonsuit.*

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

EDWARD K. HARDING *vs.* JAMES M. HAGAR.

A United States license to a firm will not protect the acts of individual members.

One who has no license from the United States as a commercial broker cannot recover commissions for procuring charters for vessels.

If a firm procure a license to carry on commercial brokerage, this will not authorize an individual member of the partnership to continue the business after the retirement of his associates, without having the license assigned to him in the manner specified by the laws of the United States, but he will be considered as carrying it on without authority, and cannot recover for services rendered in the exercise of that occupation.

ON REPORT.

ASSUMPSIT to recover two and a half per cent. commissions for services in procuring charters from the government, in December, 1864, for the defendant's two ships, the Mayflower and the Ida Lilly, for the transportation of hay. The plaintiff testified that he then resided at Bath, where he carried on a brokerage business —chartering ships and selling hay; that he and his son entered

into partnership for that purpose, and procured a license from the United States, under the firm name of George E. Harding & Co.; that in July, 1864, his son retired from the business altogether, having never been an active member, but from the beginning all the business was done, and all the bills were paid, by the plaintiff, who continued the business at the same place,—sometimes in the firm name and sometimes in his own,—during the remainder of that year, procuring no new license, and no assignment of the old one. He said he was told by the assistant collector of internal revenue at Bath that one member of a firm who assumed the business, upon dissolution of the partnership, could continue it under the old license, and he accordingly did so.

In December, 1864, he contracted with Mr. Hagar to charter these vessels to the government at $4 per ton per month, and was to have as commission two and a half per cent. of their gross earnings, payable when they were discharged from the service. According to this contract, he claimed $359.60 on account of the Mayflower, and $403.58 on account of the Ida Lilly. The plaintiff then offered in evidence the license to George E. Harding & Co., which was excluded, the presiding justice ruling that the action could not be maintained. If this ruling was correct a nonsuit is to be entered; otherwise the case to stand for trial.

Tallman & Larrabee, for the plaintiff.

The license was in fact assigned to the plaintiff with the assets and appliances of the firm upon its dissolution, and the government official was notified of the transfer. But if the license was ineffectual to protect Mr. Harding from the penalties of carrying on business without one, this would not invalidate the contract. This statute operates upon the person and not upon the business. The tax is not laid upon each transaction, but upon the business or calling. The illegality does not attach to every contract, but consists in not paying the tax imposed upon the business. *Larned* v. *Andrews*, 106 Mass., 435, 437.

N. M. Whitmore and *W. Gilbert*, for the defendant.

APPLETON, C. J. The plaintiff is a commercial broker within the act of congress of June 30, 1864. By § 71 of that act, all persons, firms, companies and corporations are prohibited from carrying on certain trades, business or professions mentioned in the act, including that of commercial broker, under a penalty of fine and imprisonment, as provided by § 73.

It was held in *Harding* v. *Hagar*, 60 Maine, 340, that a commercial broker cannot recover compensation for services rendered without proof that he has the license required by the act. It was early held, that an action founded upon a violation of the laws of the United States could not be maintained. *Maybin* v. *Coulon*, 4 Dall., 298. "It would make prohibitory acts nugatory and of no effect," observes Deady, J.,—in *The Pioneer*, Deady, 72,—"if parties could act and contract in violation of them." It was held in *Holt* v. *Green*, 74 Penn, 201, that a commercial broker could not recover his commissions unless he had taken a license as required by the act of congress of June 30, 1864. "The moment he opened his case," observes Mercur, J., in delivering the opinion of the court, "he showed that he was engaged in a business directly contrary to a clear and express act of congress, and that for so doing he was liable to fine and imprisonment. The intent with which he did it cannot be inquired into in this action. His right to commissions as shown rested upon his illegal acts. His right to recover in law must rest upon his legal right to perform his services. The facts show he had no such right. Without the aid of his illegal transactions he could not and did not show any services performed. His case, as he exhibits it, is based upon a clear violation of the statute. He grounds his action upon that violation. Thus resting his case, he cannot successfully invoke the aid of the court." So in England, a person who in London acted as a sworn broker, but who was not qualified to act as such according to the provisions of 6 Anne, 16, could not recover his commissions, though he might his advances. *Cope* v. *Rowlands*, 2 M. & W., 149.

The license given under §§ 71 and 72 is to persons, associations

of persons, partnerships or corporations. A license to individuals will not protect partnership transactions, though the individuals licensed may be members of the partnership. Neither will a license to a firm protect the several members of the firm in their individual business. The plaintiff has shown no license. The one given to a firm of which he was formerly a member protects the transactions of the firm, but not those of its different members. Nor does the plaintiff bring himself within the provisions of § 75. He must therefore be regarded as acting without a license, and is not entitled to recover. *Nonsuit confirmed.*

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

ELIZABETH MESERVE *vs.* ALBION G. MESERVE.

Rights of women married before March 22, 1844, to property acquired after that date.

By the will of her father, made in 1837, and taking effect upon his death in 1850, certain real estate was devised to the plaintiff, who was married prior to the passage of the act of March 22, 1844, relative to the rights of married women; *held*, that this was property coming to, and held by, her in her own right, which she could manage, sell, convey and devise, agreeably to R. S., c. 61, § 1, without the joinder or assent of her husband; her father's will speaking, not from the date of its execution, but from his death.

In such case, the wife can maintain an action against a disseizor justifying under her husband.

ON EXCEPTIONS.

FORCIBLE ENTRY AND DETAINER to obtain possession of certain premises devised to the complainant by her late father, Crispus Graves, by a will executed June 5, 1837, by which he gave the use and income thereof for life, to Jenny Graves, his wife, who died in December, 1866; and also bequeathed to said Jenny, certain personal property, and then provided that all the rest and residue of his estate "should descend and be distributed agreeably

to the laws of this State, in the same way and manner as though this last will and testament had not been made." He then added this clause: "Believing that my daughter Elizabeth, now wife of Joshua Meserve, is in comfortable circumstances, and stands in need of no special provision in this my last will," and appointed an executor. Mr. Graves died in 1850, and his will was probated June 18, 1850. The respondent claimed that Joshua Meserve, the plaintiff's husband, was entitled to hold the possession of the premises for his life, by reason of the coverture which existed when the act of March 22, 1844—Public Laws of that year, c. 117—was passed; and justified his own possession and detention of the estate under the license and authority of said Joshua, whose son he is, born of this plaintiff prior to 1837.

The case was submitted to the presiding justice, who ruled that the action could be maintained, and that the complainant was entitled to the possession of the demanded premises, and the respondent excepted.

Henry Orr, for the respondent.

W. Gilbert and *J. W. Spaulding*, for the complainant.

Barrows, J. The first question for determination is whether the premises, the possession of which the plaintiff seeks to recover in this process, are to be deemed her property in her own right—such property as under the statutes of our State, she, though a married woman, may manage, sell, convey or devise without the joinder or assent of her husband.

The position of the defendant, who is the plaintiff's son, is, that the plaintiff's husband, under whom he holds, has a life estate therein.

The property was once the homestead farm of Crispus Graves, the plaintiff's father, who died testate in March, 1850, leaving a widow, and an only child, (this plaintiff) who was married to her present husband and gave birth to the defendant prior to the passage of the act of March 22, 1844. The will of Crispus Graves

made and executed in 1837, was duly probated shortly after his death in 1850. To make sufficient and secure provision for the support of his wife during life seems to have been its main object. To her, among other things, he gives a life estate in the homestead farm now in controversy, which she held until her death in 1866. The plaintiff claims that she has title to it, and the right to control it independent of her husband, under the residuary clause in the will which runs thus: "All the rest and residue of my estate whether real, personal or mixed, of every description whatever, it is my wish and will should descend and be distributed agreeably to the laws of this State in the same way and manner as though this last will and testament had not been made."

The defendant insists that this clause refers to the statutes regulating the descent and distribution of real and personal property as they existed at the time of the execution of the will in 1837, and not to those which were framed subsequently but prior to his death in 1850; that it must be deemed the intention of the testator that his son-in-law should have the life estate which he would have had if the statutes in force when the will was made had remained unchanged till the testator's death; in other words, that the will, upon this point, speaks from the date of its execution, and not from the time when it took effect.

But we are of the opinion that when a testator directs that any portion of his estate shall descend or be distributed according to the laws of the State in which he lives, he must intend the laws that are in force when his will takes effect; and when he adds to such directions the significant words "in the same way and manner as though this last will and testament had not been made," he emphasizes that intention in a mode too clear to be misunderstood.

It is not reasonable to suppose that the testator intended to set his heirs and executors groping, at the hazard of mistake, among the ill-remembered laws of the past, to ascertain the disposition he had made of his property, when he had kept his will by him through the various changes of the statutes, and left it at last to

represent his wishes at the time of his death. For the convenience of all concerned, and the prevention of mistakes, we should say that upon this point, in the absence of any words clearly expressing a contrary intention, the presumption ought to be that the testator intended that the laws in force when his will becomes operative to pass the estate should govern, even if it were not also the general presumption that the testator expects the words of his will to speak from his death. 1 Redfield on Wills, 379, 380, and notes.

The suggestion in the will that the testator believes his daughter to be in comfortable circumstances and to stand in need of no special provision in the will was inserted to show that while his only child and heir was not forgotten, he deemed it his first duty to provide for his wife during life, and cannot be understood as signifying a preference of his son-in-law to her. One of the cardinal rules of construction is that "the heir is not to be disinherited without an express devise or necessary implication." Jarman's General Rules given in note. 1 Redfield on Wills, 425.

As the statutes stood at the time of Crispus Graves' death, any married woman, whether married before or after the passage of the act of 1844, might "become seized or possessed of any property real or personal by direct bequest, devise, gift, purchase, or distribution, in her own name and as of her own property, exempt from the debts or contracts of her husband." Public Laws of 1847, c. 27, §§ 1 and 3. This necessarily excludes the husband from a life estate therein.

Under R. S., c. 61, § 2, only rights acquired before the passage of the statute of 1844, March 22, are protected. As to the property here in dispute, the wife acquired no right therein until the death of her father in 1850. The husband has no interest therein and no right to control it except by permission of the plaintiff.

Nor does the coverture of the plaintiff preclude her from maintaining this process against one holding under the husband.

The wife's agents acting under her directions with regard to property held by her in her own right have always been protect-

ed from suit by the husband, and her authority constitutes a complete justification for them. *Southard* v. *Plummer*, 36 Maine, 64; *Same* v. *Piper*, id., 84.

Thus much by way of protection against a wrongful intermeddling by the husband with the wife's property, the law clearly gives, and although the decisions are adverse to the maintenance of a suit by the wife directly against the husband for such wrongful acts when the coverture is properly pleaded, we find nothing that militates against her right to maintain suits against third parties, wrongfully claiming to hold or appropriate her property under color of authority from her husband.

Even when she brought suit against her husband and a co-trespasser jointly, though the husband was discharged by reason of the coverture, the co-trespasser, acting presumably under his directions, was held liable. *Smith* v. *Gorman*, 41 Maine, 408.

Were it otherwise, the wife's property could have no efficient protection against any disposition which the husband might see fit to make of it, however unjustifiable or injurious.

Even if the coverture of the plaintiff had been regularly pleaded in abatement, it could not have availed this defendant.

Exceptions overruled.

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

PATRICK K. MILLAY *vs.* OTIS WHITNEY *et al.*

Construction of authority given an agent by telegraph.

A telegram of the following tenor, viz: "Boston, Nov. 11, 1872. To Otis Whitney:—Get cargo bonded; will hold bondsman harmless and come down if necessary. See Spaulding. C. G. Underwood,—" is not sufficient to authorize said Whitney to sign Underwood's name to a receipt for the cargo, (which had been attached upon a writ against the Great Falls Ice Co.,) acknowledging the property to be in that corporation, and agreeing to deliver it to the sheriff who had attached it upon the writ against said corporation.

On exceptions.

Assumpsit upon this receipt; "Received of Patrick K. Millay, three hundred and twelve tons of ice, the property of the Great Falls Ice Company of Washington, D. C., and which was attached by him on a writ in favor of Edward K. Harding against said Great Falls Ice Company, and which we promise to return to the said Millay or to the officer holding the execution, within thirty days after judgment, without demand. Liability on this receipt limited to three hundred and twelve dollars. November 12, 1872.

C. G. Underwood by Otis Whitney.

Otis Whitney."

The occasion of the giving of this receipt, which was written by J. W. Spaulding, Esq., after he had been consulted by Whitney, was that the ice mentioned had been attached upon Mr. Harding's writ against the Great Falls Ice Company. The testimony showed that the ice belonged to Mr. Underwood, who was then shipping it to that corporation.

The defendant Underwood contended that Whitney had no authority for such a use of his name, and objected to its reception in evidence against him. The only authority shown for so executing it was the telegram recited in the head-note and opinion, and the advice of Mr. Spaulding. After the introduction of the despatch, the presiding justice admitted the receipt and the defendants excepted, the plaintiff having obtained a verdict for $312.

W. Gilbert, for the defendants.

Tallman & Larrabee, for the plaintiff.

Danforth, J. This is an action upon a receipt given for property attached upon a writ. Underwood, one of the defendants, objects to the admission of the paper offered as a receipt, on the ground that it was not signed by him, nor with his consent. It appears that his name was put to the instrument by Whitney, the other defendant, whose only authority for so doing is found in a telegram sent from Boston by Underwood to Whitney at Rich-

mond, of the following tenor, viz:—"Boston, Nov. 11, 1872. To Otis Whitney. Get cargo bonded; will hold bondsman harmless, and come down if necessary. See Spaulding.

C. G. UNDERWOOD."

Upon the introduction of this telegram the objection to the receipt was overruled, and it was admitted in evidence. To this ruling exceptions are filed. It is now contended that the authority of Whitney was a question of fact for the jury and that the verdict has settled it in favor of the plaintiff. But it does not appear to, nor could it properly, have been left to them. The act of Whitney has no foundation upon which to rest except this telegram, which is legally a written instrument. There is no other proof connecting Underwood with the receipt. The proper construction to be given to this telegram, as to all writings, is solely a matter of law. The question then here presented, is whether this telegram fairly construed, under the circumstances of the case, authorized the act of Whitney in signing Underwood's name. We think it did not. It is conceded that the cargo to be bonded is the same property as the ice attached, for which the receipt was given. But a direction to bond property is one thing. A direction to sign one's name to an accountable receipt for that property is another, and in this case a very different, thing. Whatever may be understood by bonding, it can hardly be construed as an admission by Underwood that he had no title to the ice, or a direction to have the paper so made as to estop him from setting up such a title. That he had an interest of some kind in the ice would seem to be evident and no act or direction of his, as shown by the case, is inconsistent with the claim of ownership which he now sets up; and yet the act of Whitney, if valid, estops him from asserting title in himself.

So, too, holding a "bondsman harmless" is not the same contract as would result from putting one's own name to a bond or other like instrument. It is of no importance that the one may impose a greater or less liability than the other, or that either may equally accomplish the end intended. The party to be bound has his right

to a choice of methods, or to refuse to enter into the covenant—his consent, and that alone, binds him to the agreement.

It is suggested that the words "See Spaulding" are to be understood as an instruction to take his advice, and give such security as he might direct. This would, undoubtedly, have been a safe course had the defendant seen fit to have adopted it, and have given such information as would have enabled Mr. Spaulding to have acted understandingly. But there is nothing in the case, much less in the telegram, to show that any such intention existed, or that Mr. Spaulding in making the papers so understood it. It may be fair to presume that Whitney was to go to him to get the proper papers made, and that he prepared such as from the information he had, the case required; but it cannot be presumed that this direction was for the purpose of having any liability imposed upon the person giving it other, or different from, what his own writing had specifically pointed out and authorized. In a word, the telegram gave specific directions to Whitney as to what he was to do, and by its own terms fixed the liability to be assumed by the sender. Those directions were not followed, but a different liability was attempted to be imposed.

It is further said that Underwood was present at the trial, and did not deny upon the stand the authority of Whitney. Why should he? That authority, whatever it was, was in writing, and could not be changed in any respect by parol testimony. If he had offered his own, or any other, testimony for this purpose it would very properly have been excluded.

Exceptions sustained.

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

JOHN R. TURNER *vs.* SAMUEL WHITMORE.

How pendency of another action must be pleaded in abatement. Promissory note —joint and several.

It seems that where a defendant pleads in abatement to a suit the pendency of another action for the same cause, he should enroll in or with his plea the record, or process, upon which he relies.

Where, in assumpsit upon a promissory note against one, the defendant pleads in abatement the pendency of a prior suit brought against himself and others, he should aver that the note is not several as well as joint, or his plea will be defective.

When a contract is joint and several, there are two distinct remedies upon it; one against all jointly, and the other against each severally. The pendency of an action against all on the joint liability in no wise affects the right of action against each on the several liability; and cannot be pleaded in abatement of such several suit, by one of the promisors.

ON EXCEPTIONS.

ASSUMPSIT upon a note for $320, dated July 13, 1872, payable in sixty days from date with interest at eight per cent. There were two counts, one declaring on the note as if signed by the defendant alone, and the other stating that it was a joint and several note, executed by the defendant and two others. This action was entered at the December term, 1873, of this court for the county of Sagadahoc, when the defendant pleaded in abatement of it that one previously brought against all the makers, returnable to the same court at its December term, 1872, was still pending therein. The plea was in the form usually adopted when the pendency of a prior action is to be pleaded, not setting out or enrolling the record of such former suit, and did not state that the note was joint and several.

The plaintiff craved oyer of the record of the former suit and then demurred to the plea, setting out the former declaration in his demurrer, by which it appeared that he then declared upon a note of same amount, date and tenor as that in the present case, except that he stated that the interest was to be at the rate of eight per

cent. "until paid;" which last two words were not in the declaration, in the present action.

The presiding justice overruled the demurrer and sustained the plea, and the plaintiff excepted.

Thomas B. Reed, for the plaintiff.

The defendant should have excluded from his plea the idea (the true one) that the note sued was joint as well as several; because, if it were so, the plaintiff had the right to sue all jointly, and each severally.

The record in the previous suit should have been set out. *Fahy* v. *Brannagan*, 56 Maine, 42; *Smith* v. *Atlantic Mutual Fire Ins. Co.*, 22 N. H., 21.

W. Gilbert, for the defendant.

The case cited does not hold that the record of the former suit should be set out in the plea.

The holder of a joint and several promissory note has a right to elect whether he will proceed against all jointly or each severally, but cannot adopt both remedies concurrently.

A writ and declaration which embraces (with others) a cause of action on which a suit is already brought and pending is liable to be abated. *Buffum* v. *Tilton*, 17 Pick., 510.

Barrows, J. Pleas in abatement, seldom found useful for the furtherance of justice, are not favored by the law, which requires in them, even in matters of form, the utmost precision. The plea here presented, while its general form and conclusion appear to be correct, would seem according to the doctrine of a case quoted approvingly by this court in *Fahy* v. *Brannagan*, 56 Maine, 42, to be defective, because the defendant has not set out or enrolled in or with his plea, the record or process on which he relies.

The court should have the means of determining the truth of the plea by inspection. The record or process enrolled thus becomes part of the plea, and an incorrect enrollment or an omission to enroll is cause of demurrer. If such a rule in pleading

prior pending process in abatement had been adopted as early as the case of *Commonwealth* v. *Churchill*, 5 Mass., 175, there would have been no occasion for the court to commit what the defendant's counsel in argument here complain of as an irregularity in looking into the record. The necessity for comparing the plea and the record or process in order to ascertain whether the suits are substantially for the same or different causes, and whether the averments in the plea are bad as contradictory of the record, is obvious. And, doubtless, this may be most conveniently and regularly accomplished by requiring the record or process to be set out in or enrolled with the plea. But whether this defect should be held fatal, it is unnecessary now to determine, for we are of the opinion that the plea is defective in form and substance in not averring that the note here sued, if it be in fact the same upon which the previous suit against this defendant and others was based, is not several as well as joint.

Without such averment no cause for abating the writ appears in the plea. When a contract is joint and several there are two distinct remedies upon it; one by a joint action against all; the other by a several action against each. The pendency of an action against all on the joint liability in no wise affects the right of action against each on the several liability; and cannot be pleaded in abatement of such several suit by one of the several promisors.

This matter is discussed by Story, J., with his wonted fullness of learning in the case of *United States* v. *Cushman*, 2 Sumner, 426, 441, and thereupon he remarks as follows: "When a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument is that it supposes that the obligee has an election only of the one remedy or of the other; and that by electing a joint suit he waives his right to maintain a several suit. That I take not to be a sound legal interpretation of the contract. The remedies are concurrent. And I know of no principle of law which

would have prevented the plaintiff from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein *pari passu*."

We see no cause to question the soundness of these remarks. The plea in abatement is bad, because it does not set forth in this respect that which would justify the abatement of the writ.

Exceptions sustained.
Plea in abatement adjudged bad.

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

SAMUEL BUNKER *vs.* BENJAMIN C. MCKENNEY.

Right to possession of property under conditional sale.

Where part of the purchase money of property is paid at the time a contract is made for its conditional sale, and a note is given for the balance, containing a provision that the chattel is to remain the property of the payee until the note is paid, and subsequently an extension of time is given for the payment of the note (for a valuable consideration), this alone will not affect the vendor's right to take and retain possession of the property till paid therefor.

ON EXCEPTIONS.

REPLEVIN of a mare and two colts foaled by her. The writ was dated October 12, 1872, and the animals were taken upon it October 14, 1872, while the defendant was in New York, and service was made upon him November 19, 1872, after his return home. The defendant pleaded the general issue, and a right to the possession of the property replevied at the time they were taken. To establish his title the plaintiff introduced a note dated September 21, 1867, of this purport:

"For value received, I promise to pay S. Bunker, or order, one hundred and ten dollars and interest, for one brown or black mare, which is to be said Bunker's till this note is paid.

BENJ. C. MCKENNEY."

This note was given for the mare replevied, for which the plaintiff was to have $150, all of which except the balance due upon the note had been paid. The mare had been in the possession of the defendant from the time the note was given until replevied, and the colts were born after the date of the note, one being two years old, and the other a suckling.

The defendant claimed that he told the plaintiff on the twenty-second day of April, 1872, that his means were exhausted and he should have to go to New York to work and wanted the plaintiff to wait on him till he returned, and that Mr. Bunker promised to do so.

Upon the back of the note was written this guaranty:

"July 18, 1872. For a valuable consideration received, I hereby guaranty the payment of the within note and interest.

WISE MCKENNEY."

This guaranty was signed by the defendant's son, who testified that he did so upon the consideration that the plaintiff agreed to wait for payment of the note till their return from New York in the fall; and that he bought the larger colt of his father for $100, paying half in cash and half by note.

The plaintiff denied that he promised to wait for payment of the note, or that there was any consideration for the guaranty.

There was no other evidence of any agreement who should have possession of the property.

The jury were instructed that the plaintiff was entitled to the possession of the property, and to maintain this action, unless the defendant had satisfied them that the plaintiff agreed to extend the time of payment until the return of the defendant and his son from New York in the fall of 1872; but that if he did so agree, then the action could not be maintained till that time had expired, and their verdict must be for the defendant.

The jury gave a verdict for the defendant, and found that he was entitled to the possession of the property at the time of the commencement of the action and of the service of the writ. To the foregoing instructions the plaintiff excepted.

S. D. Lindsey and *J. J. Parlin*, for the plaintiff.

A. H. Ware, for the defendant.

BARROWS, J. The case shows that the mare was to remain the property of the plaintiff until the note given for her purchase money was paid.

The legal result is that her progeny would also belong to the plaintiff, in the absence of any special agreement to the contrary. *Allen* v. *Delano*, 55 Maine, 113. The right of possession followed the property and was in the plaintiff unless he had deprived himself of it by a valid and binding agreement. That right he could enforce by the proper legal steps before the expiration of the term of credit. *Tibbetts* v. *Towle*, 12 Maine, 341; *Pickard* v. *Low*, 15 Maine, 48. It follows that any instruction which made the plaintiff's right to maintain the action depend upon a mere extension of the time of payment to a day subsequent to the suing out of the writ must be erroneous. The jury were instructed that "if the plaintiff did so agree to extend the time of payment, then the action could not be maintained till that time had expired, and their verdict must be for the defendant."

The true question for the jury, on this part of the case, was whether, under the verbal arrangements made by the parties, the defendant was to have the right of possession until his return from New York—whether the plaintiff had made a valid agreement to forego such right.

The exceptions do not profess to present all the testimony in the case. It may be that the defendant will be ultimately found entitled to prevail upon one or the other of the grounds suggested by him in argument; but, not having the whole case before us, we can only determine that the present verdict in his favor was obtained under erroneous instructions upon what was apparently a vital point. *Exceptions sustained.*

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

GEORGE M. ALLEN *vs.* EDMUND P. HAM.

Act of 1872, *c.* 27, *giving lien on animals, not retrospective.*

A person who had a horse in his possession, under a contract (long before made) with its owner for its keeping, at the time the act of 1872, c. 27, was passed, but who had no lien at common law nor by the terms of his contract, can claim none under that act for food or shelter furnished prior to its passage; but has one for what is afterwards supplied, provided the rights of third parties are not affected thereby.

Though no lien exists for shoeing the animal, nor for the payment of taxes assessed upon him, the insertion of a count claiming a lien for those items will not invalidate the petition.

It will be a substantial allegation that food and shelter were furnished if the petitioner state that he "kept" the animal.

It is no objection to the continuance of the lien that the horse was so kept by the petitioner for more than two years.

ON EXCEPTIONS.

PETITION, under Public Laws of 1872, c. 27, as amended by those of 1873, c. 125, to enforce a lien upon the stallion "Joe Hooker," under the circumstances stated in the opinion.

The respondent demurred to the petition, for the reasons considered by the court; and excepted to the overruling of his demurrer.

D. D. Stewart, for the respondent.

The petitioner had no lien at common law. *Jackson* v. *Cummins*, 5 M. & W., 342; *Judson* v. *Etheridge*, 1 Cr. & M., 743; *Grinnell* v. *Cook*, 3 Hill, 491; *Goodrich* v. *Willard*, 7 Gray, 183.

The contract was made August 14, 1871. Subsequent legislation did not affect an already existing contract. *Hastings* v. *Lane*, 15 Maine, 134; *Given* v. *Marr*, 27 Maine, 212; *Whitman* v. *Hapgood*, 10 Mass., 439; *King* v. *Tirrell*, 2 Gray, 333; *Gerry* v. *Stoneham*, 1 Allen, 319; *Bridgewater Bank* v. *Copeland*, 7 Allen, 140.

By joining a non-lien claim for shoeing and taxes, he has vitiated his whole petition. *Fairfield* v. *Burt*, 11 Pick., 245; *Salem Bank* v. *Redman*, 57 Maine, 405.

William Folsom, for the petitioner.

BARROWS, J. This petition, to which a general demurrer was filed at the return term, December, 1873, bears date October 1, 1873, and alleges in substance that the respondent on the fourteenth day of August, 1871, being the owner of a certain valuable horse, made a contract with this petitioner to keep him for one dollar a day "for each and every day he should keep said horse," and thereupon, on the same day delivered the horse to this petitioner, "who has well and carefully kept the same . . to the present time being for the space of seven hundred and seventy-seven days;" that the keeping is well worth $777, but the respondent has paid only $118.50, leaving due $658.50, for which this petitioner claims a lien.

The petitioner further avers, in what is substantially a second count, that while thus in his keeping he expended sixteen dollars and twenty-four cents for shoeing and twenty dollars for taxes assessed upon the horse, for which sums also, "if the court judge him lawfully entitled thereto," he claims a lien; and finally he prays for notice to the respondent and a process to enforce his lien.

The first question presented by the demurrer is whether the petitioner is entitled to any lien upon the horse for his keeping.

Not being an innkeeper, or farrier, or trainer, he has no such lien by the common law. *Miller* v. *Marston*, 35 Maine, 153.

He has none by any agreement with the respondent amounting to a pledge. He claims the lien by virtue of statute. Public Laws of 1872, c. 27, amended by Laws of 1873, c. 125, under which this process is brought to enforce it.

In support of the demurrer it is argued that this statute, not enacted until some six months after the contract was entered into, cannot give the petitioner a lien which had no existence when the contract was made.

The question here raised, vital to the present process, is not free from difficulty. If the rights of any third persons not parties to the contract were to be affected, we should say unhesitatingly that the statute could not confer a lien to enforce contracts previously

made. We think it was upon this ground that the brief decision in *Kendall* v. *Folsom, Adm.*, 34 Maine, 198, was made.

In that case the plaintiffs attempted to enforce, against the administrator of a deceased insolvent, a lien which, when it accrued, was liable to be destroyed by the death and insolvency of the debtor, by force of a subsequent statute whereby the lien was made to subsist notwithstanding such death and insolvency. The lien claimed was upon a building and the lot on which it stood, for materials furnished. The case shows that the building was on land leased to the intestate by a third person, and had been sold by the administrator, under the order of the judge of probate, prior to the passage of the statute relied on. The court say in that case that the statute could only act prospectively; and this, we think, was right.

Must the same result follow when the rights of no third parties intervene, and the only effect of the statute is to give the creditor an additional remedy for the collection of his debt? In such a case we see no good reason why he may not avail himself of it. It has been settled by repeated decisions in this State that such a lien is only a part of the remedy afforded by law for the collection of the debt, and that like all matters pertaining to the remedy and not to the essence of a contract, it is wholly within the control of the law-making power and liable to be modified, or wholly abrogated, even while proceedings are pending in court for its enforcement. *Bangor* v. *Goding*, 35 Maine, 73; *Gray* v. *Carleton*, Id., 481; *Frost* v. *Ilsley*, 54 Maine, 351.

It would seem to follow from these decisions that our court have considered statutes giving, modifying, or taking away one of these liens, as not belonging to that class which are prohibited by fundamental legal principles from having a retrospective effect.

Was it intended by the legislature that it should so operate?

It runs thus: "Any person who pastures, feeds, or shelters animals by virtue of a contract with or by consent of the owner shall have a lien thereon for the amount due for such pasturing, feeding or sheltering, to secure payment thereof," &c., and by § 2 it is provided that the act shall take effect when approved.

While we think this language is sufficiently comprehensive to afford a lien to those who might thereafterwards furnish keeping for animals under a contract previously entered into, we do not think it undertakes to confer such lien for any sum that had previously accrued under such contract.

We recognize it as a well settled rule that a retroactive effect is not to be given to statutes unless the design that they shall so operate is clearly expressed, or such effect is required by necessary implication.

In view of the provision that this act should take effect when approved, and that a continued keeping of the animal under an agreement previously made must be held to be a keeping "by consent of the owner," we do no violence to the rule by holding that the statute gave a lien from the date of its enactment for all subsequent keeping under an existing agreement, and in so doing we construe it liberally in favor of the remedy; but if it had been the intention to give security for so much of the debt as had previously accrued, it would have been easy to say so, and as the statute speaks only in and from the present, the lien must be regarded as covering only the subsequent keeping.

The second cause of demurrer alleged is that the petitioner in his second count has claimed a lien for the sum paid for shoeing the horse and for the taxes assessed on him, and that, as there is clearly no lien for these items, there is a misjoinder of counts, of which the respondent may avail himself by a general demurrer. Manifestly the lien does not extend to these outlays; but we do not think the result claimed follows.

There is not necessarily a misjoinder of counts which would be available on demurrer because it may turn out that a plaintiff has no legal cause of action on one of them. With respect to the joinder of counts, one sure test of its propriety is—can the same plea be pleaded and the same kind of judgment be rendered on both? If yea, the joinder is certainly proper. But the question is not whether the party plaintiff is entitled to judgment on both. If one declares on two promissory notes one of which is void as

being given for an illegal consideration, or on Sunday, his declaration is not therefore bad on demurrer, though he has no legal cause of action upon one of his counts.

It is true that if one having a lien confounds in one judgment, lien claims and non-lien claims he forfeits his lien. But the character of this process is such that it necessarily involves a determination of the question of lien or no lien, and also of amounts due. It would be competent for the petitioner, after default, to remit all sums claimed as to which no lien existed. It would be at his own proper peril if he included them. His prayer is for a process to enforce such lien as he has by law. We cannot hold it to be good ground of demurrer that he claims more than he is entitled to, if it be found that he is entitled to something.

There is an inherent difficulty about applying the technical common law rules and forms of pleading to a statute process of this sort. It is not a writ, but a petition for such decree as the court may find proper under the circumstances to enforce the petitioner's rights.

It is further urged that the petitioner has not alleged enough to bring his case within the statute—that he should have used the language of the statute, and averred that he had "pastured, fed, or sheltered" the horse, one or all, instead of using the word "keep" to cover the whole.

The statute prescribing the form of the remedy directs the filing of a petition "briefly setting forth the nature and amount of his claim, a description of" the animal, "and the name and residence of its owner, if known to him, and a prayer for process to enforce his lien."

We think its requirements are sufficiently observed in the petition before us.

The word "keep" as applied to animals has a peculiar signification. "Keep, v. t., to tend; to feed; to pasture; to board; to maintain; to supply with necessaries of life." Web. Dic.

And the noun, "keeping" means "feed; fodder, e. g., the cattle have good keeping," Id.

The plaintiff avers that he has "well and carefully kept" this horse. We think that in the connection in which it stands, this means that he has done so under the contract which he alleges, and that it is sufficient to bring his case within the purview of the statute upon which he relies. It is further suggested that the statute was designed only to give a lien for the pasturing, feeding or sheltering of animals for brief periods, and not for any such long term as is covered by this petition. But we find nothing in the statute to limit the time except the terms of the contract, or the consent of the owner.

The respondent having demurred at the first term has the right to plead anew upon payment of costs.

Exceptions overruled.

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

BETSEY DOOLITTLE *vs.* LOIS H. HILTON.

Devisee personally liable for legacy upon land accepted by him.

The bequest to the plaintiff is a charge upon the land devised to the defendant; but the provision for its payment out of the proceeds of the sale of the lot is merely directory, and not mandatory.

The defendant having taken possession of "the plains lot" devised to him, immediately after the will was probated, and being sole legatee of all the testator's estate, both real and personal, subject to the charges upon the plains lot, thereby accepted the bequest, and, after this lapse of time, is liable to pay the plaintiff's legacy, whether he has sold the plains lot or not.

ON REPORT.

ASSUMPSIT to recover a legacy bequeathed to the plaintiff by her late father, James M. Hilton, who by his will gave his whole estate to his widow, the defendant, subject to this and two or three other small legacies, which were to be paid out of the proceeds of the sale of a parcel of land called "the plains lot," unless

he sold it in his life-time; in which case they were to be paid out of his general estate. The will was dated November 5, 1867. Mr. Hilton died September 11, 1868, leaving Mrs. Hilton his executrix, the plains lot being then unsold. Mrs. Hilton entered into occupation of that together with the rest of the estate, but did not pay this legacy. The will was admitted to probate November 4, 1868, and this action was brought October 24, 1871, the plains lot remaining unsold. Upon an intimation that this suit could be maintained, the defendant submitted to a default, which was to stand or be taken off as the law and facts require.

J. H. Webster, for the plaintiff.

S. D. Lindsay, for the defendant.

Dickerson, J. By the second item in the will of the testator he bequeathed to the plaintiff the sum of twenty-five dollars, which with certain specific bequests in money to other persons, he directed "to be paid out of the proceeds of the 'plains lot' so called."

The third item in the will is as follows: "As to all the rest, residue and remainder of my estate, both real and personal, I give, bequeath and devise the same to my beloved wife, Lois H. Hilton." This bequest is made subject to certain charges and conditions which are not material in the case before us.

We think that the bequests named in the second item of the will were intended to be charges upon the "plains lot," and that the provision for their payment is rather directory than mandatory. The testator obviously had the security of those bequests in his mind when he made that provision. There is no devise of the "plains lot" in that item of the will. It was the right of the defendant to pay those legacies and keep the "plains lot," or to sell that lot and pay them out of the proceeds; their payment in either mode satisfied the requirements of the will, the defendant being the sole residuary legatee of all the estate of the testator, both real and personal, under the third item of the will.

The defendant having taken possession of the "plains lot" immediately after the probate of the will, and sold off some of the second growth, thereby accepted the bequest, and, after this lapse of time, is liable upon both principle and authority to pay the plaintiff's legacy, whether she has sold the "plains lot" or not. *Willis* v. *Roberts et als.*, 48 Maine, 259; *Smith* v. *Lambert*, 30 Maine, 137; *Greenough* v. *Welles*, 10 Cush., 576; *Swasey* v. *Little*, 7 Pick., 296. *Judgment on the default.*

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

DAVID D. STEWART *vs.* EBER DAVIS *et al.*

Deed—construction of. Mortgager and mortgagee—rights of.

The description in a deed—"The farm on which I now live in Pittsfield, being lot No. 9, in the second range of lots in said town, according to D. Stewart's plan and survey—" conveys only so much of the "farm" as is within "lot 9."

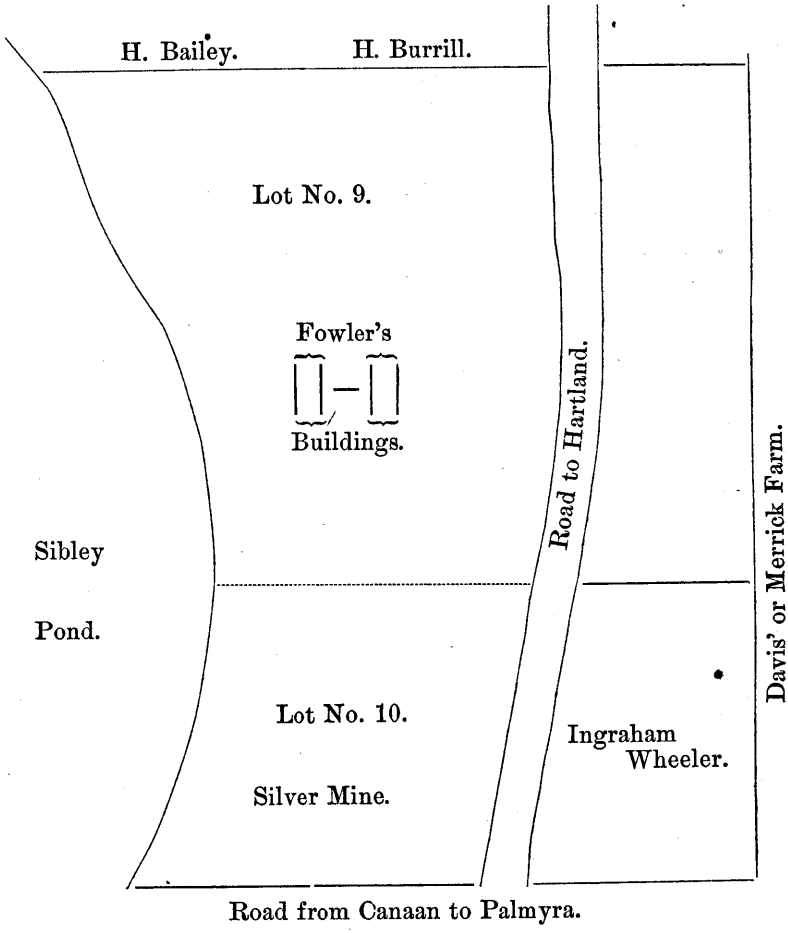
When those holding under the mortgager have entered and ousted the mortgagee in possession, he may maintain against them a writ of entry declaring on his own seizin generally, have a judgment as at common law, and claim and recover rents and profits proved.

Such a judgment will not be deemed a waiver of a prior foreclosure commenced by publication; nor will it interfere with the right of redemption.

ON REPORT.

WRIT OF ENTRY to recover possession of certain premises in Pittsfield conveyed in mortgage, August 11, 1868, by William Fowler, who then owned them in fee, to the demandant. Mr. Fowler owned and occupied during his life, which terminated in December, 1871, as his homestead farm so much of lot No. 9, in the second range of lots in Pittsfield as lay between the lands of Bailey and of Burrill on the north and lot No. 10 on the south, and between Sibley Pond on the west and the Davis or Merrick farm on the east, together with so much of the adjoining lot No. 10 as

lay between Sibley pond and the road to Hartland. The shape of his farm, and the relative situation of the boundaries appear in the following plan:



Ingraham Wheeler.

The title to so much of his farm as was included within the limits of lot No. 9, Mr. Fowler obtained from Davis and McMaster; his part of lot No. 10 came to him by a different purchase,

from another person, at a later period; but this last lot was bought by him in 1847. In 1868, he thought that a silver mine discovered upon the south westerly portion of his farm, in lot No. 10, was valuable and could be profitably developed. He then came to Mr. Stewart to borrow $1000 for this purpose, offering a mortgage of his place, including the mine, as security. Mr. Stewart examined the premises, but being unfamiliar with the ranges and numeration of lots in Pittsfield, thought the Fowler farm included all the land between that of Burrill and Bailey on the north and the road to Palmyra on the south, and between Sibley Pond on the west and the Davis or Merrick farm on the east; and was ignorant of any other purchase than that by the deed of Davis and McMaster, which he supposed included all the territory within the limits last above indicated. He was induced so to believe by the representations of Mr. Fowler. Accordingly, he consented to make the proposed loan, and drew the mortgage to himself of the farm on which Fowler then lived "bounded on the north by land of Humphrey Bailey and Hiram Burrill, east by the Merrick farm, on the south by land of Ingraham Wheeler, and on the west by Sibley pond;" not then understanding (as before stated) that Wheeler owned any land north of the road to Palmyra, but thinking the parcel which in fact belonged to Wheeler was owned by Fowler, and that all of Fowler's farm lay within the limits of lot No. 9.

In August, 1872, the mortgagee proceeded to foreclose his mortgage by publication in a newspaper. In the spring of 1873 he took possession of the premises and notified the defendants (heirs of Fowler) of it. They subsequently, however, went upon the land, cultivated it and took and carried away the hay and other crops. In his declaration he expressly disavowed any purpose of waiving his proceedings for a foreclosure.

D. D. Stewart, pro se.

H. & W. J. Knowlton, for the tenants.

Virgin, J. The plaintiff demands possession of a tract of land situated in the town of Pittsfield, in this county, described in his

declaration as "bounded on the north by land of Humphrey Bailey and Hiram Burrill, on the east by the Merrick farm, on the south by land owned by Ingraham Wheeler, and on the west by Sibley pond—containing one hundred acres more or less, and being the same farm occupied and owned when in life, by the late W. H. Fowler." By the plan and the testimony of the plaintiff, it appears that "the farm occupied and owned by the late W. H. Fowler" comprised all of lot No. 9, and about twenty acres off of the west side of lot No. 10 adjoining and south of lot 9 and bounded on the west by "Sibley Pond;" and that these premises had been owned and occupied by Fowler as his farm, from May, 1847, when he purchased the western portion of lot 10, to the time of his decease in December, 1871. The specific description does not precisely coincide, nor is it necessarily at variance with the general one; but it is simply defective in not being a full description of either lot 9, or of the Fowler farm. It does not give the correct southern boundary of lot 9, or the eastern boundary of the Fowler farm; but there is no variance between the two descriptions in any other particular than the eastern boundary, and even herein they concur so far as lot 9 is concerned. By rejecting this imperfection, we have the Fowler farm as the tract of land demanded.

The defendants have jointly pleaded the general issue only, the brief statement not having been seasonably filed. *Nul disseizin* admits that the defendants are in possession of the whole premises demanded, claiming a freehold therein, and denies the demandant's right to recover any part thereof. Having the actual possession, which neither party can deny under this issue, the possessory title of the defendants will prevail until the plaintiff shall succeed in proving a better one. The question, therefore, is—who has the better title to all, or any, of the demanded premises; for, under our statute, the demandant can recover any specific part of the premises to which he proves a title, though less than he demanded. R. S., c. 104, § 10; and no more, although the tenant set up no title. *Bruce* v. *Mitchell*, 39 Maine, 390.

The plaintiff's title rests entirely upon the true construction of

Fowler's mortgage to him, of August 11, 1868, wherein the mortgager describes the land as, "the farm in Pittsfield on which I now live"—which must mean the same as—"the farm occupied and owned by the late W. H. Fowler" in the declaration; for the undisputed testimony is that he owned but one farm and lived on that until his death. Hence, if the description stopped here, the plaintiff's title would unquestionably include the whole of the farm; but it proceeds—"bounded on the north by land of Humphrey Bailey and Hiram Burrill, on the east by the Merrick farm, on the south by land of Ingraham Wheeler, and on the west by Sibley Pond." This language is identical with that in the declaration, and as we have seen, is defective, and does not restrict the general description, since it is as applicable to the whole farm as to lot 9 alone, but is not a complete description of either. Neither does the description stop here, but continues—"being lot No. 9, in the second range of lots in said Pittsfield, according to Daniel Steward's plan and survey, containing one hundred acres more or less, and being the same premises conveyed to me by Levi J. Merrick and Daniel McMaster, by their deed dated April 14, 1838, recorded," &c. This reference to the source of title might not necessarily have been sufficient to restrict the well defined prior general description had the intention of the parties, gathered from the whole description, warranted the opinion that it was defective; *Crosby* v. *Bradbury*, 20 Maine, 61, and cases cited; but the reference to the number of lot and plan, not being false, we think is decisive and limits the plaintiff's title under his mortgage to lot No. 9. *Thorndike* v. *Richards*, 13 Maine, 430; *Allen* v. *Allen*, 14 Maine, 387.

The last named case is precisely in point. The description in the demandant's mortgage was, "my homestead farm situated in Jay, being lot No. 13, in range 4, containing one hundred acres, more or less, with the buildings thereon." The "homestead farm" comprised all of No. 13 and a portion of another lot. Weston, C. J., speaking for the court, says: "Asa Allen conveyed to Thomas Allen in mortgage his homestead farm in Jay. In the

same sentence, he describes what that homestead is, giving definite and well known bounds, 'being lot 13 in range 4.' . . He had a right to explain what he meant by his homestead, which he does in terms perfectly plain and intelligible. He may have occupied part of another lot, in such a manner that if he had used the term homestead alone, the land in controversy might have passed. But why should he be precluded from using language in the deed, explaining what he did mean to convey? And if that language is clear and unambiguous, why should not the conveyance be restricted and limited accordingly? . . The land thus described was his homestead; but it would seem not the whole of it. The term, unexplained, would be understood to mean the whole; but explained, the conveyance embraces only the homestead within the limits given, if any regard is to be paid to the intention of the grantor, which is too plainly expressed to be misunderstood." The same principle is sustained in *Herrick* v. *Hopkins*, 23 Maine, 217.

Shall the judgment be conditional or absolute? By the stipulation in the report the court "are to enter such judgment as shall be in accordance with the legal rights of the parties and the law of the case."

It appears that the plaintiff, on August 2, 1872, commenced a foreclosure by publication in a newspaper, in accordance with the provisions of R. S., c. 90, § 5, clause 1; and that in the spring of 1873, after Mrs. Fowler had left the premises, the plaintiff entered and took possession, and notified the defendants thereof. This the plaintiff had an undoubted right to do, notwithstanding he had commenced the foreclosure by publication. The legal estate and the right of possession of a mortgagee in fee result from the legal effect and operation of a conveyance in mortgage; and they continue in him until a full and complete performance of the condition, or a tender equivalent thereto. *Allen* v. *Bicknell*, 36 Maine, 436; *Smith* v. *Johns*, 3 Gray, 519. Nor is there anything legally inconsistent in his taking possession after the publication. *Concord U. Mut. Ins. Co.* v. *Woodbury*, 45 Maine, 453; *Mann* v. *Earle*,

4 Gray, 300. Such entry then being lawful, he was a mortgagee in possession.

But it also appears that soon after such actual entry by the plaintiff, the defendants, against the express objections of the plaintiff, entered, took possession, cultivated the premises and carried off the crops and hay. The defendants thereby became trespassers, and the plaintiff might thereupon bring trespass or a writ of entry against them as disseizors. *Miner* v. *Stevens*, 1 Cush., 486; *Haven* v. *Adams*, 4 Allen, 93. He elected to bring the latter, and thus try his title; which was, not his right to enter and foreclose his mortgage, but his right to maintain the possession and title which he acquired by his entry. And this is the avowed object of his action as set out in his declaration. He is therefore entitled to an absolute judgment as at common law, which, however, will not in any manner contravene any lawful right of redemption. *Haven* v. *Adams*, *ante*.

Again. It has long been the settled law in this State and in Massachusetts, that a mortgagee may declare on his own seizin generally, and have judgment as at common law against all persons except the mortgager and his successors in title; and even against them unless they pleaded their interest and prayed for a conditional judgment which the court would grant when the condition had been broken; for by so doing the necessity of bringing a bill for redemption was avoided. The substance of these decisions is incorporated in R. S., c. 90, § 7. In the case at bar, a conditional judgment is not claimed by "motion of either party," and the plaintiff has "declared on his own seizin;" hence this section does not require a conditional judgment in this case.

Nor will this action, or the judgment rendered upon it, be deemed a waiver of the foreclosure by publication, since the action was not commenced and prosecuted upon the mortgage for the purpose of foreclosing it, as in *Smith* v. *Kelley*, 27 Maine, 237; *Tufts* v. *Maines*, 51 Maine, 393; but for another expressly declared purpose.

The judgment being absolute, and the plaintiff having claimed

and proved damages for rents and profits, he is entitled to recover therefor the sum of $75; for which sum he will be obliged to account if the mortgage be redeemed. R. S., c. 104, § 11; *Treat* v. *Pierce*, 53 Maine, 79.

Judgment for plaintiff for lot No. 9, and for $75, as damages for rents and profits.

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

STATE *vs.* INHABITANTS OF MADISON.

Indictment. Pleading. Certiorari—ineffectual till writ issues.

An indictment against a town for defective highway need not allege the width of the way.

Where the indictment, in such case, alleges that the highway was duly and legally laid out and established in the defendant town, a clause describing the highway "as laid out by the town," may be rejected as surplusage.

The granting of a writ of *certiorari* to quash the proceedings of county commissioners in locating a highway, does not, *ipso facto*, quash such proceedings, but their doings, where they have jurisdiction, remain valid until and unless the writ is issued.

ON EXCEPTIONS.

INDICTMENT for a defective highway. The alleged defect was admitted, the defendants contending that they were not liable to maintain and keep in repair the way in question.

February 9th, 1827, the proprietors of Norridgewock Falls Bridge were incorporated and authorized to erect a toll bridge "across the Kennebec River between Madison and Anson," at some suitable place between Weston's Ferry and Norridgewock Falls.

During the two years subsequent to the passage of this act, the proprietors erected a bridge in accordance with the provisions of their charter from Anson southeasterly, to an island which lay

wholly within the town of Madison. There was no road at this time leading easterly from the terminus of the bridge in Madison, and the proprietors built such a road to a highway then in use in the defendant town. In building this road it was necessary to erect a small bridge, about two rods long, to connect the island with the other portions of Madison. The latter bridge was never used as a toll bridge, and was kept in repair by the proprietors till 1844, in which year a town way was laid out by the county commissioners, upon appeal, over the island, and across the small bridge. This town way was subsequently discontinued, and in 1847, the county commissioners laid out a highway from the end of the toll bridge, over the small bridge for a defect in which this indictment was found, through Madison, a part of Cornville and Skowhegan.

A writ of *certiorari* was granted upon petition therefor, to quash the proceedings of the commissioners in locating the highway; but there was no evidence that the writ was ever issued.

From 1844 to 1870 this road was maintained by the defendant town.

The defendants objected to the introduction in evidence of the record of the latter location above referred to, because the indictment described the road as "laid out by the town of Madison," and because there was no allegation in the indictment of the width of the road; but the court admitted the record. The highway was described in the indictment as legally laid out and established. At a former trial of this case the jury found specially that the channel over which the bridge in question was erected was a part of Kennebec River at the time the charter was granted, and up to the time of the trial.

The defendants contended that the legal effect of the granting of the writ of *certiorari* was to render invalid the proceedings of the county commissioners, in the location of the way; that the commissioners could not, by attempting to locate a road over the site of the toll bridge, impose upon the defendants any obligation to maintain or rebuild the bridge, nor would the location of a road

by them, over such site, impose any such obligation upon the defendants, and that, upon the admitted facts, the indictment could not be maintained; that the obligation to rebuild and maintain the bridge in controversy rests upon the Toll Bridge Corporation alone. The presiding justice refused to give instructions in accordance with these propositions, as requested, and to this refusal and the admission of the records in evidence the defendants excepted, the verdict being against them.

D. D. Stewart, for the defendants.

The acceptance of the charter by the Toll Bridge Corporation, and the taking of tolls impose upon that corporation the duty of maintaining the bridge. Angell on Highways, § 271; *Commonwealth* v. *Worcester Turnpike Co.*, 3 Pick., 327; I Bouvier's Institute, § 443; *Charles River Bridge* v. *Warren Bridge*, 7 Pick., 496; 11 Pet., 565; *Mower* v. *Leicester*, 9 Mass., 250; *Russell* v. *Devon*, 2 D. & E., 671; *Randall* v. *Cheshire Turnpike Co.*, 6 N. H., 147; *Bigelow* v. *Randolph*, 14 Gray, 543; *Chase* v. *Springfield Bridge Co.*, 6 Allen, 514; *Weld* v. *Pro. of Booms*, 6 Maine, 97; *State* v. *Gorham*, 37 Maine, 459; *Orcutt* v. *Kittery Point Bridge Co.*, 53 Maine, 500.

The verdict of the former jury establishes the fact that this smaller channel was a part of Kennebec River. The charter authorized the company to build a bridge "across the Kennebec River." They did so, and the two bridges constitute in fact but the spans of a single bridge, which the company is bound to keep in repair; and that liability rests wholly upon the Bridge Company. *Commonwealth* v. *Worcester Turnpike Co.*, *supra*; *Roxbury* v. *Same*, 2 Pick., 41; *Sawyer* v. *Northfield*, 7 Cush., 490; *Commonwealth* v. *Deerfield*, 6 Allen, 449; *White* v. *Quincy*, 97 Mass., 430; *Wheeler* v. *Worcester*, 10 Allen, 604; *Jones* v. *Waltham*, 4 Cush., 299; *Vinal* v. *Dorchester*, 7 Gray, 422; *Titcomb* v. *Fitchburg R. R. Co.*; 12 Allen, 259; *Young* v. *Yarmouth*, 9 Gray, 386; *Tinker* v. *Russell*, 14 Pick., 279.

Even if the location were valid, it would impose no liability

upon the town. But the commissioners have no authority to locate a public highway over a toll bridge. *West Boston Bridge* v. *Co. Commissioners*, 10 Pick., 272; *Commonwealth* v. *Haverhill*, 7 Allen, 523; *Central Bridge Co.* v. *Lowell*, 4 Gray, 474.

The alleged location as a town way was void because the proceedings on their face gave the commissioners no jurisdiction. *Lewiston* v. *Co. Commissioners*, 30 Maine, 19; *Scarborough* v. *Same*, 41 Maine, 604. The legal effect of the proceedings on the petition for *certiorari* was to quash the location. *Dow* v. *True*, 19 Maine, 46; *Lancaster* v. *Pope*, 1 Mass., 86; *Commonwealth* v. *Sheldon*, 3 Mass., 188. The words "as laid out by the town of Madison" are material and must be proved as laid. *State* v. *Jackson*, 30 Maine, 29; *State* v. *Noble*, 15 Maine, 476.

John S. Abbott, by request of the county attorney and consent of the court and the defendants, conducted the prosecution, relying upon the law as stated upon a former hearing of this matter. *State* v. *Madison*, 59 Maine, 538.

Dickerson, J. The party obliged by law to repair a public highway or toll bridge is liable criminally for neglecting to perform this duty, and civilly for damages caused by such neglect. The liability in both these respects depends, substantially, upon the same facts; in general an indictment lies where an action for damages lies in such cases, and *vice versa*. *Davis* v. *Bangor*, 42 Maine, 522; *Howard* v. *North Bridgewater*, 16 Pick., 190.

The most important question presented for our consideration is, whether the town of Madison is liable to indictment for not repairing that part of the bridge which is within its limits. In determining this question we shall consider the liability to indictment, and the liability for damages, as depending substantially upon the same facts. The proprietors of the Norridgewock Falls Bridge were incorporated in 1827, accepted their charter, built the bridge, took toll, rebuilt the bridge several times, and kept it in repair till 1844. In 1847 the county commissioners located a highway

over the place where the bridge now stands. A writ of *certiorari* to quash their doings was granted in 1847, but was never issued. The record shows that the commissioners had jurisdiction in the premises. It is familiar law that where the record shows that the county commissioners, in locating a highway, had no jurisdiction, their doings may be impeached collaterally. *Small* v. *Pennell*, 31 Maine, 267; *Goodwin* v. *Co. Commissioners*, 60 Maine, 332; *Scarborough* v. *Co. Commissioners*, 41 Maine, 605.

It is, also, equally well settled that when it appears from their record that they had jurisdiction, but committed some error in their proceedings, such error can only be taken advantage of on a writ of *certiorari*. *Goodwin* v. *Inhabitants of Hallowell*, 12 Maine, 276; *Inhabitants of Pownal, pet'rs for cert.* v. *Co. Commissioners*, 8 Maine, 271.

The mere granting of a writ of *certiorari* is not tantamount to issuing the writ, and quashing the proceedings thereon. No judgment to quash the proceedings of the commissioners was rendered by grant of leave for the writ to issue. *Non constat* that judgment to quash would have been rendered if the writ had been issued. A writ of *certiorari*, like any other writ, is subject to be quashed for cause shown. The highway in question, therefore, must be regarded as a valid and subsisting highway.

If the town of Madison is liable, it is made so by R. S., 1857, c. 18, §§ 61, 37. These two provisions are harmonious, and counterparts of the same enactment. The liability to indictment under § 37, attaches to "those liable to repair," and the liability for damages provided in § 61, is predicated "of the county, town or persons obliged by law to repair." The question to be determined is, whether the town of Madison is "liable" to repair the highway over the bridge in question. If it is, it is also "liable" to indictment for neglecting that duty; if it is not "liable" to repair it is not "liable" to indictment, either under the statute or by the criminal law.

The changes in the legislation upon this subject are quite significant. Towns are not now, as formerly, "bound by law," or

made "liable," in express terms, to repair highways, town ways and bridges within their limits. The statute of Massachusetts, of which our statute of 1821 was a transcript, made them thus liable "when other sufficient provision was not made therefor," thus making their liability a qualified one. The statute of 1841, on the contrary, made the liability of towns, in terms, absolute. While those statutes restricted liability to indictment to municipalities, the statute of 1857, § 37, had a broader application, and extended such liability to "those liable to repair," generally. Under that statute, railroads, bridges, and turnpike corporations, and private persons were subject to indictment, when "liable to repair," as well as towns and plantations; in this respect all parties "liable to repair" stood upon the same footing.

In considering the authorities therefore upon this subject, it becomes necessary to examine the statutes under which the cases arose. The case of *Sawyer* v. *The Inhabitants of Northfield*, 7 Cush., 490, so much relied upon by the counsel for the defendants, originated under the statute of Massachusetts making towns liable, "when no other sufficient provision was made for repairs." The distinction between that case and the one at bar is the difference between a qualified and a general liability. So the case of *State* v. *Gorham*, 37 Maine, 461, came up under our statute of 1841, making towns positively liable. While that case, for this reason, is not directly in point, the reasoning of the court applies, with equal force, in the case under consideration. "The safety and convenience of those who travel upon our public ways," observes Rice, J., in that case, "have ever been primary objects in the estimation of the legislature. The introduction of railroads and the frequency with which they cross public ways, as well under bridges, as at grade, has greatly increased the hazards of ordinary traveling. It is important that the most certain, prompt and efficient means should be provided against those new and increasing causes of inconvenience and danger to travelers. Towns have the general supervision of highways. By holding them primarily responsible a very much more convenient and

certain remedy is afforded the public than could be had against private individuals or corporations."

The court further remarks in that case that this construction of that statute does not discharge railroad corporations, or other parties, required by law to maintain and repair bridges or highways, from their liability to do so, and that towns have a remedy against such parties by mandamus, or by action on the case.

A highway was laid out and established where the bridge in question stands. The bridge was rebuilt and kept in repair for several years by the town of Madison. That town is under the same legal liability to repair that highway that it is other highways within its limits.

It was not necessary to allege in the indictment the authority by which the highway was laid out. Therefore, the clause in the indictment, "as laid out by the town of Madison," may be regarded as surplusage. The general allegation that the highway was situated in the town of Madison, and was duly and legally laid out and established, is sufficient to authorize the admission of evidence of its location by the county commissioners, or by that town, as the presiding justice ruled.

Nor do we think it was necessary to set forth the width of the highway in the indictment. It has not been usual, we think, to do this in this State, whatever may have been the practice in England. The length, direction and termini of the highway are distinctly alleged in the indictment. The defendants were thus sufficiently informed what highway was meant. An additional allegation of the width of the highway was not necessary to enable them to prepare their defence. It was incumbent on the State to show that the defects alleged existed within the limits of the highway, whether its width was alleged in the indictment or not. Failing in this the prosecution could not be sustained. The objection interposed by the defendants upon this branch of the case may have been pertinent to the sufficiency, but not to the competency, of the evidence offered. There was, therefore, no error in overruling this objection, and admitting the record evidence, offered to show

the location of the highway both by the town of Madison and the county commissioners.

The highway described in the indictment was legally located and established in the town of Madison, and it was the duty of that town to keep it "safe and convenient for travelers." The jury have found that the town neglected to discharge this duty, and we see no reason why their verdict should not stand.

Exceptions overruled.

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

LUCIUS L. MORRISON *vs.* JAMES B. DINGLEY *et al.*

Sale—When separation and delivery are necessary.

Wallace bargained to the plaintiff one hundred and twenty-five tons, *gross*, of coal, parcel of a cargo of about double that number of tons. The rest of it was sold to the defendants. After the plaintiff's teamster had taken from the wharf—upon which the whole cargo had been discharged, in an indistinguishable mass—one hundred and twenty-five tons, *net*, the defendants interposed, and prevented the removal of any more of it, claiming that they should first take therefrom the same quantity that the plaintiff had received, and that the balance then remaining (if any) should be divided between the parties; *held*, that the plaintiff had acquired no such title to any portion of the coal remaining unweighed upon the wharf, as to enable him to maintain trover against the defendants.

MOTION FOR A NEW TRIAL.

TROVER for the conversion of fourteen tons of coal. In the summer of 1869, Mr. Morrison wrote from Skowhegan to Wallace & Co., coal merchants of Boston, for a small cargo, of one hundred and twenty-five gross tons, of Cumberland coal. Not readily finding a vessel of suitable size for this quantity, they shipped from Baltimore to Gardiner, per brig Waredale, July 8, 1869, two hundred and fifty tons of that coal, consigned to their own order. They sent a bill of the whole to Mr. Morrison, which he

declined to accept, and on the eighteenth day of August, 1869, they made out a new bill for the one hundred and twenty-five tons, which he paid. July 22, 1869, Mr. Morrison wrote to Bartlett & Wood of Gardiner, in response to some telegram from them not put into the case, that this bill for two hundred and fifty tons had been sent him, but that he only wanted one half, one hundred and twenty-five tons; that he did not design to assume the balance, but if it could be disposed of should be glad to oblige Mr. Wallace, concluding his letter with this sentence: "They can give me two thousand two hundred and forty pounds to the ton, or weigh all and divide loss or gain." Upon its arrival the cargo was discharged in one heap upon Gay's wharf. The plaintiff employed the teams of one Potter to draw his portion of the coal from the wharf to the cars, by which it was to be taken to Skowhegan. When one hundred and twenty-five tons, net, had been delivered at the cars, the defendants forbade Mr. Potter hauling any more for Morrison until they had taken the same quantity, when the balance could be divided; and directed Potter to dump the load then upon his cart in their cellar, which he did. The difference between a hundred and twenty-five net tons, of two thousand pounds each, and the same number of gross tons, of two thousand two hundred and forty pounds each, would be between thirteen and fourteen gross tons, or just fifteen net tons. It is the value of this difference which this action was brought to recover. After his teamster was stopped, as aforesaid, Mr. Morrison had no more of the coal, and there was one witness called by the plaintiff who testified that the defendants offered to sell him all that remained upon the wharf. It appeared that some inconsiderable portion, more or less, of it was swept from the wharf by a freshet in October, 1869.

The defendants made their trade for their part of this coal with Bartlett & Wood, who acted as brokers, and who passed the money paid by the Dingleys to Wallace & Co., deducting ten per cent. brokerage commission for effecting the trade; but the defendants contended that their purchase was under, and accord-

ing to the terms of, the plaintiff's letter to Bartlett & Wood, and that their election was "to weigh all and divide loss or gain," instead of allowing him one hundred and twenty-five tons gross weight; and that so much of the coal as had not been weighed remained undisturbed upon the wharf when the suit was brought, Sept. 3, 1870.

The verdict was for the plaintiff, and the defendants ask to have it set aside as against law and evidence. Exceptions were also filed, but they involve no question which requires a statement of them.

S. D. Lindsay, for the defendants.

H. & W. J. Knowlton, for the plaintiff.

APPLETON, C. J. This is an action of trover for the alleged conversion, by the defendants, of a quantity of coal belonging to the plaintiff.

It is in proof that on the eighth day of July, 1869, the firm of William Wallace & Co., shipped from Baltimore, Md., to Gardiner, Maine, consigned to their own order, two hundred and fifty tons of coal. The coal arrived at Gardiner, and was there sold to the parties to this suit.

The defendants claim that they purchased half of the cargo, and the plaintiff half; that the coal was left on Gay's wharf in bulk, in one pile; that no division was made, while it so remained on the wharf; that the mode of division agreed upon was, that each was to take one hundred and twenty-five tons net from the pile, and the remainder was to be equally divided between them; that the plaintiff took over one hundred and twenty-five tons net, and the defendants one hundred and twenty tons net and some odd pounds. Upon this state of facts it is obvious that the plaintiff, who has received more than his share, cannot recover anything of the defendants, who have had less than their share.

According to the plaintiff's statement of the case, he was to have one hundred and twenty-five tons *gross*, and, after he had

had that amount, the defendants were to have the same quantity, if so much remained. But the plaintiff was to have precedence.

The coal, while in bulk and remaining on the wharf, and before it was weighed and delivered, was the property of William Wallace & Co. There was weighed and delivered to the plaintiff one hundred and twenty-five tons *net*. With this coal, the defendants have no right to interfere. The residue of the coal, until it was weighed and delivered, belonged to the shippers.

It is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified. 2 Kent's Com., 496. While the coal remained in bulk, and before separation and weighing, there was no specific portion, which belonged to the plaintiff. The title did not vest in him until a separation had taken place. Such seems to be the uniform result of the authorities on this subject. In *Rapelye* v. *Mackie*, 6 Cowan, 251, it was decided that when anything remains to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price of the article sold, there is no delivery, and the property does not pass, though the price be in part paid; and that, if there be a part delivery, the other part, not yet ascertained, will not pass. The same doctrine was fully affirmed in *Scudder* v. *Worster*, 11 Cush., 573; and in *Houdlette* v. *Tallman*, 14 Maine, 400; *Bailey* v. *Smith*, 43 N. H., 141; *Gibbs* v. *Benjamin*, 45 Vt., 126. The cases, in which it has been held on a sale of a specified quantity of an article, as of grain, that its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to vest the title, have been determined upon principles not at all inconsistent with those already advanced. Thus in *Kimberly* v. *Patchin*, 19 N. Y., 330, the owner of wheat lying in a mass in his warehouse, sold a specified portion thereof for an agreed price, and executed to the vendee a receipt acknowledging himself to hold the wheat subject to the vendee's order, and the title was held

to pass to such vendee. The seller, by the terms of his agreement, constituted himself the bailee of the purchaser, and henceforth stood in that relation to him and to the property. Upon the same principle was the decision in *Waldron* v. *Chase*, 37 Maine, 414, where the owner of a large quantity of corn in bulk, sold a certain number of bushels therefrom, and received his pay therefor, and the vendee took away a portion, it was held that the property in the part sold, vested in the vendee, although it was not measured or separated from the heap.

But in the case at bar, the vendor gave no receipt for the coal, nor was there any payment therefor, nor any bill of sale given until August 18, 1869, which was long after the defendants had received their part of the coal. The vendors, Wallace & Co., could not be regarded as bailees of the plaintiff, for he had not paid them for the coal, nor had they given him any receipt by virtue of which they might be so regarded. Nor, indeed, had they even given him a bill of sale of the coal, before the quantity taken by the defendants had been weighed out to, and been removed by them.

The result is, that upon the facts as proved by the plaintiff, or by the defendants, the plaintiff has title only to the coal weighed out, and delivered to him, and to no more. The verdict, manifestly, was for coal, the title to which had not passed to the plaintiff.

Motion sustained.

Barrows, Danforth, Virgin and Peters, JJ., concurred.

Dickerson, J., dissenting.

This is an action of trover to recover the value of the difference between one hundred and twenty five tons of coal gross weight, and the same number of tons net weight. The plaintiff received one hundred and twenty-five tons of the coal net, and was prevented by the defendants, as he claims, from removing the balance. The case is presented on a motion to set aside the verdict as against evidence, and the weight of evidence, and on exceptions.

In proof of his title to the fourteen tons of coal in controversy, the plaintiff testified that in May, 1869, he sent the firm of William Wallace & Co., coal merchants of Boston, an order to ship him a cargo of coal not exceeding one hundred and twenty-five tons; that in July following, they shipped a cargo of coal to Gardiner, sending him at the same time, a bill of two hundred and fifty tons, and a bill of lading for the same amount; that he declined to take more than he ordered; that they subsequently sent him a bill of one hundred and twenty-five tons; that he bought that amount at a stipulated price per ton, in July, commenced removing it immediately thereafter, and paid for it on the eighteenth day of August following, according to agreement. It further appeared in evidence that the coal was in bulk at Gardiner; that it was not re-weighed by the shippers, and that the plaintiff had removed, in all, one hundred and twenty-five tons net, by the last of September, when the defendants prevented his teamster from taking away any more of it. William P. Wallace, of the firm of William Wallace & Co., testified that he sold the plaintiff one hundred and twenty-five gross tons of coal, and that he directed his agent in Gardiner, who subsequently sold to defendants for him one hundred and twenty-five tons of the same cargo, "to see that Mr. Morrison gets one hundred and twenty-five tons gross."

The defendants denied that they prevented the plaintiff from taking more of the coal, and claimed that subsequently to the plaintiff's purchase, they bought one half of the cargo, consisting in all of two hundred and fifty tons; that their purchase was not made subject to the precedent right of the plaintiff to take away one hundred and twenty-five gross tons, and that the terms of division agreed upon were, that either party should take one hundred and twenty-five tons net, and then stop, until the other should take that amount, and that they should then divide the loss or gain. In other respects the evidence introduced by the defendants did not materially conflict with the plaintiff's evidence.

In returning a verdict for the plaintiff, the jury must have found that at the time of the alleged conversion of the coal by

the defendants, on the twenty-fifth day of September, 1869, the plaintiff was the owner thereof; and the question presented for determination, under the motion, is whether the evidence warrants such finding.

Mr. Long, in his treatise on sales, says: "Three particulars are included in a valid sale, namely, a thing which is the subject of it, a price and a consent of parties. . . . . The thing sold must be specific, or ascertained; the price must be certain, or ascertainable by reference to some criterion by which it may be fixed; and there must be a consent of the parties upon the thing sold, upon the price, and upon the sale itself." The general and inflexible rule is that where, by the terms of the contract, anything remains to be done by both parties, or by either, precedent to delivery, the title does not pass; the contract is executory and incomplete, as a sale, and not executed and perfected. But, say the court in *Kimberly* v. *Patchin*, 19 N. Y., 333, "actual delivery is not indispensable in any case in order to pass the title, if the thing to be delivered is ascertained, if the price is paid, or credit given, and if nothing further remains to be done in regard to it." In other words, all the requisites of a valid sale may exist without a delivery. "In the case of sales where the property sold is in a state ready for delivery, and the payment of money, or giving security therefor is not a condition precedent to the transfer, it may well be the understanding of the parties," remarks Dewey, J., in *Riddle* v. *Varnum*, 20 Pick., 283, "that the sale is perfected, and the interest passes immediately to the vendee, although the measure, or weight of the articles sold, remains to be ascertained."

These principles of law applied to the facts in the case at bar make the sale of the coal sued for to the plaintiff executed and complete, and show the title thereto to have been in him at the time of its alleged conversion by the defendants. In view of the evidence in the case, it does not admit of denial that the parties to the alleged sale intended that the title to the coal should be transferred to the plaintiff; their mutual consent to the sale, the one to sell and the other to buy the coal, is unquestionable. The kind and quantity

of the thing sold were ascertained, the price was certain, a credit was given, and the amount was paid long before the alleged conversion. There was no agreement of the parties that anything further should be done by both or either of them to complete the sale. Nor did anything in fact remain to be done in order to ascertain the quantity, quality, price or value of the thing sold. Moreover, more than seventh-eighths of the coal bought by the plaintiff had been removed from the pile by him when the defendants interposed to prevent his taking away the balance. The contract has all the requisites of a completed sale.

Though the sale was of a certain number of tons of coal, the article was in bulk, undistinguishable from the surrounding mass from which it was bought. For this reason, it is argued that the coal was not sufficiently identified to pass the title to it, because it was not all weighed. But how could weighing the coal render the quantity sold more clear and unmistakable? The plaintiff bought one hundred and twenty-five gross tons; there was nearly twice that quantity in the heap out of which he made the purchase; weighing the coal could not increase or diminish the quantity bought; that was necessary, not to ascertain the quantity bought—which had already been done—but to determine when the plaintiff had taken from the pile the quantity that had been sold him. Nor was the weighing necessary to fix the price of the coal, since that also had already been agreed upon by the parties. If, as in *Simmons* v. *Swift*, 5 B. & C., 857, it had been agreed between the parties that the coal should be weighed by two persons, each party to name one, in order to fix the price, and this had not been done; or, as in *Gibbs* v. *Benjamin*, 13 Law Reg., 95, the parties had not agreed upon the quantity sold, a different result would follow—as the contract would not have been complete; but nothing of the kind occurred in the case at bar; the parties by the terms of the contract of sale, having fixed the quantity and price of the coal, these could be no better known or identified after the coal had been weighed than they were before. The plaintiff knew what he bought, and bought what he knew, before he weighed it.

While it is undoubtedly true that in order to pass the title, in a sale of chattels, the articles, if not delivered, must be designated so that possession can be taken by the purchaser without any further act of the seller, this rule, from the necessity of the case, must be applied according to the nature of the article, and is to be somewhat modified or relaxed, when the article is not sold by a description of the characteristics which distinguish that particular thing, but by weight, measure, count, number or mark, as corn, coal, oil, flour, or lumber lying in bulk, especially where the parties obviously intended to transfer the title. In such case, an actual delivery is impracticable unless the whole is transferred to the purchaser, or the specified quantity sold. "As it is not possible," says Comstock, J., in *Kimberly* v. *Patchin, ante*, "in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances."

It has been seen that in the case at bar the "sale was complete in all its other circumstances." It is the same in principle with *Waldron et al.* v. *Chase*, 37 Maine, 415. In that case, the corn was paid for when the sale was effected; in this case, that was done in the first instance which was equivalent to payment—a credit was given, and the whole amount was paid for according to agreement a long time before the alleged conversion by the defendants; in both cases a part of the article sold was separated by the purchaser from the surrounding mass. In that case it was held that where the owner of a quantity of corn in bulk sells a certain number of bushels therefrom, and receives his pay, and the vendee takes away a part, the property in the part sold vests in the vendee, although it has not all been measured or separated from the heap.

The court in that case expressly recognized the fact that there is a conflict of authorities, both English and American, upon this sub-

ject, and adopted the rule which is most consonant with principle and the weight of authority. That case was decided before the case of *Scudder* v. *Worster et al.*, 11 Cush, 580, was reported, and before the opinion was rendered in *Ropes et al.* v. *Lane*, 9 Allen, 502. The principle upon which these decisions rest is clearly irreconcilable with the doctrine of *Waldron et al.* v. *Chase.* In the former cases, it was held that not even payment for the whole of the property sold in bulk, and a separation of a part thereof, will transfer the title to the vendee in the part not thus separated, while in the latter case these facts serve to vest the title to the whole property in the vendee, as well that which has not, as that which has been separated. We regard the question as *res judicata* in this State. In view of the conflicting decisions upon this subject our court adopted the rule of the early English cases, and of the court in New York, and I am unable to see anything in the reasoning of the more recent cases in Massachusetts to change that rule.

Our conclusion is that the jury were authorized by the evidence in finding that all the requisites of a valid sale of one hundred and twenty-five tons gross by the owner to the plaintiff had been complied with, and that the title to that amount was vested in him when the defendants interposed to prevent his removing the balance of that quantity. The assertion and acts of ownership on the part of the defendants in respect to all the coal remaining in bulk, and especially their refusal to allow the plaintiff's teamster to remove more of it, make out a clear case of conversion.

I do not understand that the learned counsel for the defendants seriously controverted the correctness of the instructions to the jury. However this may be, he has no legal ground of complaint, as they were quite as favorable to the defendants as the law of the case admits.

BENJAMIN GETCHELL *vs.* MICHAEL GOODEN and logs.

Lien on logs—declaration in suit to enforce.

It is not necessary to allege, in a suit brought to enforce a laborer's lien on logs, that the logs had not arrived at their place of destination for use or manufacture, sixty days before the date of the writ.

ON EXCEPTIONS.

ASSUMPSIT to recover for labor in cutting and hauling certain spruce and cedar logs.

The declaration contained a count in the ordinary form of assumpsit upon account annexed—the account being for a "balance due for labor in winter of 1871-2, in cutting and hauling spruce and cedar logs . . . . upon which logs the plaintiff claims a lien for the balance due him as aforesaid;" also, two other *indebitatus assumpsit* counts for the same services with similar averments of a claim for lien.

Notice was ordered by the court upon J. B. Foster and William P. Hubbard, claimants and owners of the logs, who appeared and filed a general demurrer to the declaration, the grounds relied upon in support of which are given in the opinion. The demurrer was sustained and the plaintiff excepted.

L. Powers and *Robinson & Hutchinson*, for the plaintiff.

Madigan & Donworth, for the claimants.

PETERS, J. The log owners contend that the writ in this case is not sufficient, because it is not alleged that the logs had not been sixty days at their place of destination for use or manufacture at the date of the writ. But the facts, which constitute the lien, are distinctly stated. We do not see that it is necessary to declare affirmatively that an alleged lien has not been lost by lapse of time. That fact is impliedly averred in the assertion contained in the writ, that the plaintiff is entitled to a lien for his

labor, and that the suit is brought to enforce the same. Moreover, if the writ is made within the sixty days, the attachment might not be made within that time; and it would be awkward to allege in a writ that an attachment upon the writ was seasonably made. The point raised is one of proof rather than of pleading. It is clearly made so by R. S., c. 91, § 36. *Parks* v. *Crockett*, 61 Maine, 489. *Exceptions sustained.*

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

ALEX. W. TIMONY *vs.* JAMES TIMONY and Logs.

Practice. Lien on logs—what notice necessary.

Where the pleadings have become complicated, and might not have been so but for an erroneous ruling at the trial, this court may send the case back to have the pleadings stricken out and the trial proceed anew, where manifest justice seems to require it.

To establish a valid lien judgment against logs it is indispensable that a general notice be given.

ON EXCEPTIONS.

The declaration in this case was similar to that in the preceding case of *Getchell* v. *Gooden*. At the return term personal notice was ordered upon William H. Smith as owner and claimant of the logs upon which plaintiff sought judgment for a lien. Mr. Smith appeared and filed a general demurrer to the declaration; whereupon such proceedings were had as are stated in the opinion.

L. Powers and *Robinson & Hutchinson*, for the plaintiff.

Madigan & Donworth, for the claimants.

PETERS, J. That the writ in this case is sufficient to enforce a lien for labor on logs, is settled in *Getchell* v. *Gooden and logs*, argued upon the same briefs with this case; *ante*, 563.

There is, however, a complication in the pleadings here. The demurrer to the writ and declaration, by log owners, was sustained by the court at *nisi prius*, upon the ground that the writ contains no allegation that it was sued out within sixty days after the logs had arrived at their place of destination. To this decision no exception was taken by the plaintiff. The plaintiff then produced in evidence a written admission of the log owners of the fact that the suit was commenced, and the attachment made, within that time. Thereupon the court decided that the alleged deficiency in the writ was supplied by such admission. To this ruling the log owners excepted.

One ruling was wrong, and the other consequently was immaterial and unnecessary. Upon the whole, we think it just to send the case back to proceed anew. In a strict sense, the log owners, at the date of these proceedings, were not properly in court. No legal notice had been served on them to appear. It is not enough that they come in voluntarily, or that they were individually summoned in. To establish a regular and perfect lien judgment, it is indispensable that a general notice, such as would be good against the world, should be given. *Sheridan* v. *Ireland and logs*, 61 Maine, 486; *Parks* v. *Crockett*, Id., 489. The case shows that such a notice, by publication, has been ordered since the trial, several terms ago.

The order is that all the pleadings since the writ be stricken out and the *Action stand for trial.*

Appleton, C. J., Cutting, Walton, Barrows and Danforth, JJ., concurred.

MARK GRAY *vs.* INHABITANTS OF HOULTON.

R. S., c. 143, § 12.

Two justices of the peace have no jurisdiction to order the removal of an insane person to the hospital, upon the neglect of the municipal officers to do so, upon application to them by virtue of R. S., c. 143, § 12, in a case where such insane person is at the time legally confined in jail upon criminal process.

ON EXCEPTIONS.

DEBT to recover for services and expenses in conveying Charles McCann to Augusta and committing him to the insane hospital, he having been adjudged insane by two justices of the peace and quorum, by virtue of R. S., c. 143, § 15. The plaintiff proved his claim and, on cross-examination, testified that his whole bill had been paid him by the county treasurer, by order of the clerk of the county commissioners, and he gave his receipt therefor; but it was shown that this was intended as an advance of the money. The application to the justices was made by McCann's brother, after a neglect on the part of the selectmen of Houlton to act in the premises. The defendants put in the record of a conviction of Charles McCann of threatening to kill certain persons, and his commitment to jail for failing to give surety to keep the peace; and that he was in jail upon that process when the magistrates adjudged him insane and directed him to be taken to the hospital. The cause was submitted to the presiding justice who ruled, *pro forma*, that the action could be maintained, and the defendants excepted.

C. M. Herrin, for the defendants.

Robinson & Hutchinson, for the plaintiff.

PETERS, J. These exceptions must be sustained. By R. S., c. 143, § 12, the municipal officers of towns, upon complaint in writ-

ing made by any relative of an insane person or by a justice of the peace, may examine into the condition of such insane person, and, upon certain conditions, send him to the insane hospital. By § 15, this may be done by two justices of the peace in case the municipal officers neglect or refuse to do it. But there can be no neglect or refusal, in the sense of the statute, under a state of circumstances where such officers have no power to act. In this case the insane person, at the time of the complaint, was legally confined upon criminal process in the county jail. They could not properly obtain possession of his person, to remove him from the jail to the hospital; and, therefore, were in no fault for not attempting to do so. In this view the justices were not legally called upon to act. Although the commitment of the insane person and his detention at the hospital may be proper enough, for the purpose of charging the town for his support while there, by virtue of sections nine and nineteen of the chapter cited; still, the action of the justices was so far irregular and unauthorized by law, that the town is not bound to pay this claim consequent upon such illegal action. *Exceptions sustained.*

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

SAMUEL T. KING *vs.* AROOSTOOK COUNTY.

Way—unincorporated township liable for repair of.

When a county road exists within the limits of an unincorporated township, the whole township is liable to be taxed to put it in repair, notwithstanding the easterly half of the township is owned by one set of persons and the westerly half by another set, and the road is wholly within the westerly half.

ON FACTS AGREED.

ASSUMPSIT to recover a tax assessed to repair a road, under R. S., c. 6, § 53, five twelfths of the expense being assessed upon the

easterly and the rest upon the westerly half of an unincorporated township. The way lay entirely within the limits of the westerly half of said township, while the plaintiff's land, assessed for this tax, lay wholly in the easterly half. The only question presented is whether or not the lands in the easterly half are liable to be assessed for ways through the westerly half, the two halves having been granted to different persons at different times, and ever since owned separately, and separately assessed for State, county and road taxes.

Madigan & Donworth, for the plaintiff.

Wm. M. Robinson, county attorney, for the defendants.

WALTON, J. The right to maintain this suit depends upon the meaning of the words "tracts of land," as used in the R. S., c. 6, § 53.

That section requires county commissioners to make an annual inspection of all county roads in the "unincorporated townships, and tracts of land" in their counties, and assess thereon a sum sufficient to put them in repair.

The question is whether, when a township has been sold by the State to different parties, the easterly half to one set of purchasers, and the westerly half to another set—the township is to be regarded as divided into two distinct tracts, so that the easterly half cannot be legally taxed to aid in putting in repair a road located wholly within the westerly half.

We think it is not. We think the true construction of the statute is, that when a county road exists within the limits of an unincorporated township, the whole township is liable to be taxed to put it in repair. That for the purposes of such taxation the township is a unit, and cannot be regarded as composed of two distinct tracts of land simply because there are two separate and distinct sets of owners. We think the words "tracts of land" are used to designate islands, gores, or other fragments not included in a township; and that they were not intended to apply to any portion of the land within a regularly located township.

This construction of the statute is conclusive against the right of the plaintiff to recover back the tax assessed and paid on the easterly half of the township mentioned in the agreed statement of facts. *Plaintiff nonsuit.*

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

HENRY M. PRENTISS *et al.*

vs.

COUNTY COMMISSIONERS OF AROOSTOOK COUNTY.

Appeal from County Commissioners. R. S., c. 18, §§ 35, 37.

An appeal from the decision of county commissioners refusing to discontinue a road laid out in an unincorporated township must be heard by the presiding judge, as provided in R. S., c. 18, § 35, and not by a committee as provided in § 37, and following sections.

ON EXCEPTIONS.

The county commissioners of this county on November 23, 1870, on petition of Caldwell *et als.*, laid out a certain road, commencing in Macwahoc plantation and running through certain other unincorporated plantations to the mills in the town of Sherman. Proceedings were closed at their July term, 1871. At January term, 1873, B. F. Coburn *et als.*, petitioned to have the road discontinued. Notice was ordered, and at the June term, 1873, the commissioners refused to discontinue. From this decision on the sixth of September, 1873, the appellants filed an appeal, and duly entered the same at the next term of the supreme judicial court, September, 1873. At that term this appeal was called up. The appellants contended the proceedings were governed by R. S., c. 18, §§ 37, 38, 39, and the respondents that the appeal must be heard at that term by the presiding judge, agree-

ably to § 35 of the same chapter. The presiding judge at that term stated to counsel that his attention had been called before to what seemed to be a conflict or want of clearness in these different sections,—that perhaps new legislation was needed, and suggested that the parties await such legislation or else report the case to the full court for the instruction to be given them. The case was thereupon continued to the present term against the will of the respondents.

The presiding judge at this term ruled, as a matter of law, that the appeal was properly cognizable at the previous term, and should then and there have been heard and tried as provided in § 35, but for the order of the justice then presiding, and that §§ 37, 38 and 39 were not applicable to the case.

The appellants, not being ready for trial at this term, filed a motion for continuance alleging the foregoing facts and other reasons, which was overruled.

The presiding judge thereupon ordered, as matter of law, that the appeal be dismissed for want of prosecution.

To which ruling and order the appellants excepted.

C. M. Herrin, for appellants.

Robinson & Hutchinson, and *Donworth*, for appellees.

PETERS, J. There is no merit in these exceptions. The case was cognizable by the court under R. S., c. 18, § 35. That section is made expressly applicable to "ways in places not incorporated." Section 37 refers to ways in incorporated places. This is made, perhaps, clearer than before, by Public Laws of 1874, c. 263. But without the aid of this act, such must be the proper construction of the sections referred to.

Exceptions overruled.

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

THEODORE CARY *et alii vs.* JOSEPH WARNER.

Merger of life estate. Title by exclusive occupation.

In this case—trespass *quare clausum*—both parties deduce title from Ebenezer Warner who, February 3, 1840, conveyed the premises in question to his sons, Joseph and Henry, taking back a life lease from them. Jan. 3, 1842, Henry conveyed his interest to said Joseph, this defendant; and March 28, 1843, their father released his life estate to Joseph. March 2, 1844, one Eells, who had recovered a judgment against Joseph, levied his execution upon the reversion of an undivided half of the premises, and on the seventeenth day of May, 1845, conveyed the rights thus acquired to John Hodgdon, who procured a partition to be made upon his petition, in which the three Warners were named as respondents, and the *locus in quo* was set off to Hodgdon, who conveyed it, April 17, 1850, to Shepherd Cary, by whom (and his heirs, the plaintiffs) the premises were exclusively occupied till the trespass complained of was committed, November 20, 1872, soon after the death of Ebenezer Warner. After Ebenezer Warner had released his life estate to Joseph, but before that release had been recorded, said Ebenezer's life interest was attached and subsequently levied upon by one Cary, who afterwards transferred his claim to Hodgdon, but Cary's suit was based upon the money counts, without specification of the claim to be made under them, and the release was recorded before judgment. The defendant contended that the plaintiffs were lawfully in possession of the *locus in quo*, until the death of Ebenezer Warner, under this levy upon the life estate, and therefore did not hold adversely; but that the levy upon the fee was so defective as to give no title. The court *held* that the life estate was merged by the release of it to Joseph; that the attachment of it by Cary was not such as to keep it alive; and that, whether the levy upon the fee and the proceedings for partition were valid or not, the plaintiffs were entitled to the premises by more than twenty years' peaceable, open, notorious, adverse and exclusive occupation of them, claiming the fee.

ON REPORT.

TRESPASS *quare clausum*, for breaking and entering a lot of land, and a blacksmith's shop thereon, on the bank of the west branch of the Meduxnekeag river in Houlton, and between that stream and the military roads and the road to Porter settlement. The entry was made November 20, 1872, simply for the purpose of asserting title, and it was agreed that if the defendant had not

the legal right to enter, the damages should be assessed at one dollar.

Prior to February 5, 1840, the defendant's father, Ebenezer Warner, had the unquestioned title to this land; upon that day he conveyed it to his sons, Joseph and Henry, who, at the same time, gave him back a life lease. January 3, 1842, Henry conveyed to Joseph the former's half of the property, taking back a mortgage of it, to secure the payment of $1200 in three years with interest. The defendant put in the deed from Henry to Joseph and the plaintiffs put in the mortgage which has never been discharged, so far as the record shows. On the twenty-eighth day of March, 1843, Ebenezer Warner transferred his interest under his life lease to his son Joseph, this defendant. Upon the third day of May, 1845, the real estate of Joseph Warner in Aroostook county was attached upon a writ against him in favor of Seth W. Eells. Execution issued February 27, 1844, upon the judgment recovered in that suit, and it was levied upon land including the *locus in quo* on the second day of the following month, the extent being upon the debtor's reversionary interest in an undivided half of the land described by the appraisers. On the seventeenth day of May, 1845, Dr. Eells transferred to John Hodgdon all rights acquired by this levy. The defendant also put into the case the record of a levy made by said Hodgdon for an execution in his own favor against Ebenezer Warner upon the latter's life interest, but it became apparent, upon comparison of its language with the plan and conveyances in the case, that it did not touch the parcel here in dispute. Mr. Hodgdon subsequently filed a petition for a partition of the land set off to Eells, naming Ebenezer, Joseph and Henry Warner as the parties adversely interested, and the tract set off to him upon these proceedings, April 29, 1847, embraced the *locus in quo*. Upon the seventeenth day of April, 1850, Mr. Hodgdon conveyed the land and title thus obtained to Shepherd Cary, the plaintiff's father, whose property and rights it is admitted that they inherited. Soon after this conveyance, Mr. Shepard Cary moved the blacksmith's shop upon

the land and he and his representatives occupied it without dispute or interruption until the defendant's entry, November 20, 1872, which is the subject of this action.

Ebenezer Warner died November 18, 1872, and the defendant, conceding the plaintiffs right to occupy the premises during the lifetime of said Ebenezer, contended that their interest terminated with his life.

Upon the eighteenth day of April, 1843, one Theodore Cary—not the plaintiff—caused all of Ebenezer Warner's interest in any real estate in Aroostook county to be attached upon a writ of that date, by which he commenced suit against said Ebenezer upon two notes described in his declaration, which also contained the general money counts, without any specification of the claim to be made under them. The transfer of the life lease from Ebenezer Warner to Joseph, though made March 28, 1843, was not recorded till May 31, 1843, subsequently to the attachment attempted to be made April 18, 1843. When Theodore Cary obtained his judgment in this suit, for precisely the amount of the two notes mentioned in his declaration, he levied his execution, March 2, 1844, upon the debtor's life interest aforesaid, assuming that his attachment of it upon the original writ was valid, and subsequently conveyed the title thus acquired to John Hodgdon, February 20, 1846. The defendant relied upon this last named levy to prevent any merger of the life interest in the fee (by both coming to him) aud contended that this gave the plaintiffs a right of occupancy during the life of Ebenezer Warner, which prevented him from ousting them and their possession from being adverse to him, or a disseizin of him.

Madigan & Donworth and *L. S. Strickland*, for the plaintiffs.

L. Powers and *C. M. Powers*, for the defendant.

Appleton, C. J. Ebenezer Warner, from whom both parties derive their claim of title, upon the fifth day of February, 1840, conveyed the premises in controversy to Henry Warner and

Joseph Warner, who, on the same day, gave back to their grantor a life lease of the premises then conveyed, to hold "during the term of his life."

January 3, 1842, Henry Warner conveyed to the defendant his undivided half of the premises deeded to him February 5, 1840, by Ebenezer Warner.

March 28, 1843, Ebenezer Warner, by deed of that date, bargained, sold, transferred, assigned, conveyed and forever quitclaimed to Joseph Warner, the defendant, all his right, title and interest in the life lease he then held of the premises.

By the last named conveyance the life estate of Ebenezer Warner was merged in the reversion of which the defendant was seized. He thus was the owner of the whole estate in fee. "Merger is the annihilation by act of law of the less in the greater of two vested estates, meeting without any intervening estate, in the same person, in the same right. Thus, for example, when A., tenant for life, with reversion to B. in fee, surrenders his estate to B., or B. releases to A. in fee. By this union A.'s life estate is absorbed in the inheritance; and the consequence is the annihilation of the estate in reversion." 3 Greenl. Cruise, Title 39, §§ 1 and 2. Merger.

In this state of the title Seth W. Eells, having obtained a judgment against the defendant, upon the second day of March, 1844, disregarding the conveyance from Henry Warner, levied upon the reversion in one half of the premises in common and undivided.

On the seventeenth day of May, 1845, Seth W. Eells conveyed the premises embraced in his levy to John Hodgdon, who filed a petition for a partition of the premises, conveyed by Ebenezer Warner to Joseph and Henry Warner, claiming an undivided half part of the same. In this petition Joseph Warner, Henry Warner and Ebenezer Warner were made parties, and due notice given them of the pendency of the petition for partition. No objection being made, partition was ordered, and commissioners appointed, who, on the twenty-ninth day of April, 1846, made

partition, by metes and bounds, of the reversion, which being returned to court, was accepted and entered of record.

It is objected that the levy of Eells and the partition of Hodgdon are defective. It is obvious, that if valid, the plaintiffs, whose title is derived from Hodgdon, are entitled to recover.

But assuming the levy and the partition as invalid, still the plaintiffs have made out a perfect title by adverse possession. John Hodgdon, on the seventeenth day of April, 1850, conveyed by deed the premises in controversy to Shepherd Cary, from whom the title passed by descent to these plaintiffs. Cary entered under his deed, and during his life, was in the open, notorious, exclusive and adverse possession of the same. The plaintiffs succeeded to his estate, and their possession had the same characteristics. This occupation, thus exclusive, continued and adverse, had continued for over twenty years, when the defendant entered upon the premises with a full knowledge, or means of knowledge, of the facts.

When Hodgdon conveyed to Cary, in 1850, there was no existent estate in reversion, so far as regards the premises in contro versy. The attachment of the life estate of Ebenezer Warner in the suit of Cary against him, was void, the writ containing the money counts. The levy subsequently made on the judgment recovered, was long after the life estate had been conveyed to the defendant, and the record of that conveyance made. The attachment of the life estate of Ebenezer Warner at the suit of John Hodgdon was followed by a judgment and levy upon lands other than those in controversy. It follows that the plaintiffs are not affected by the levies upon the execution recovered against Ebenezer Warner, to which we have referred.

If the legal proceedings under which the plaintiffs claim are valid, the defendant has no title. If invalid, his claim is barred by possession, open, notorious, exclusive and adverse, for more than twenty years. *Quacunque via data*, the plaintiffs are entitled to judgment. *Defendant defaulted.*

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

THOMAS M. PLAISTED *vs.* CALEB O. PALMER.

Lord's Day.

The defendant sold a horse to the plaintiff on Sunday ; the plaintiff gave his bank check for the price of the horse on the same day ; the defendant at the same time deposited a bill of sale of the horse with a third person, to be delivered to the plaintiff when the check was paid ; the check was paid and the horse and bill of sale were delivered all on a secular day afterwards: *Held*, that an action of assumpsit to recover back the price paid for the horse on account of a deceit practiced in the sale would not lie, because based upon a transaction tainted with illegality.

ON EXCEPTION.

ASSUMPSIT to recover one thousand dollars, paid by plaintiff for a horse under the circumstances stated in the opinion. The presiding justice ordered a nonsuit and the plaintiff excepted.

W. H. McCrillis and *A. W. Weatherbee* for the plaintiff.

J. Crosby and *A. M. Robinson*, for the defendant.

PETERS, J. The defendant sold a horse to the plaintiff on Sunday. The plaintiff gave his bank check for the price of the horse on the same day. At the same time a bill of sale of the horse was made, and deposited with a third person, who was to hold the same for the security of the defendant till the check was paid. The check was paid on Monday, and the horse and bill of sale were afterwards delivered to the plaintiff on a secular day. The plaintiff undertook to rescind the sale on account of a deceit alleged to have been practiced upon him by the defendant, and seeks to recover back, in an action of money had and received, the price paid.

There can be no doubt, that an action cannot be maintained in this State, either in tort or assumpsit, for a deceit practiced in the sale of a horse on the Lord's day. *Robeson* v. *French*, 12 Metc.,

24; *Myers* v. *Meinrath*, 101 Mass., 366; *Northrup* v. *Foot*, 14 Wend., 248, cited approvingly in *Towle* v. *Larrabee*, 26 Maine, 468. The case of *Adams* v. *Gay*, 19 Vt., 385, may be regarded as almost a single authority the other way. But the plaintiff hopes to avoid the application of this doctrine to this case, upon the ground that both the horse and bill of sale were actually delivered to him upon a day other than the Lord's day. We do not see how that fact can enable him to do so. This court has decided that a contract made on Sunday is incapable of being confirmed or ratified by any act of the parties done on a subsequent day. *Pope* v. *Linn*, 50 Maine, 83; *Tillock* v. *Webb*, 56 Maine, 100. Where a contract is partially completed on Sunday, nothing done subsequently to that day, will relieve the transaction of the taint of illegality, unless such subsequent acts substantially amount to a new contract of themselves; as where what is done on the Lord's day is of the nature of conversation or proposition merely, and on another day a bargain or sale results therefrom. As in this case, if the horse had not been delivered till Monday, and the price had not been paid; the seller might recover not the price on Sunday agreed to be paid, but what the horse was reasonably worth. This would be upon the theory that there was, by implication of law, a new and different contract made on Monday, disregarding what was done the day before. *Bradley* v. *Rea*, 14 Allen, 20; and S. C., 103 Mass., 188. But the application of such a principle here will afford no relief to the plaintiff; for, if the sale could in this case be considered as having been really made on Monday, then there will be an absence of any fraud attending it, proof of which is necessary to the maintenance of the action. The deceit was not practiced on Monday. The facts, however, cannot bring this case within the doctrine of the cases referred to. The check was delivered on Sunday. The bargain of sale was completed on that day. The defendant held possession of the horse merely as a security for the purchase money till the check was paid. Had the same transaction taken place on a week day, there would have been a sufficient consideration for the check, and, in case of non-

payment, an action would lie upon it. So, too, the purchaser, after paying his check, could have maintained trover or replevin for the horse against the seller, had he refused to deliver him. The sale could be avoided by the seller only upon a condition subsequent that the check was not paid. *Finn* v. *Donahue*, 35 Conn., 216; *Mosely* v. *Hatch*, 108 Mass., 517.

It is contended that the plaintiff overcomes the obstacle thus presented to his right of recovery, inasmuch as he can trace his claim without a resort to the proof of that part of the transaction which took place on Sunday; that proof of the representations made on Saturday, together with the production of the papers bearing date of Monday, in which the sale and receipt of the purchase money are acknowledged by the defendant to have been as of that day, are sufficient *prima facie* evidence to establish the right to recover; and that the defendant cannot set up his own illegal act against it. But this is too strict an interpretation of the rule. It is true that a plaintiff can never recover where he has to trace his title through an illegal act. But it does not follow that he can recover where he technically avoids proof of the illegal act. The defendant can show that the plaintiff's evidence is not true. If the whole evidence, properly admissible on both sides, discloses the fact that the plaintiff's claim is founded in an illegal transaction, he cannot recover. A promissory note dated on a secular day, makes out a *prima facie* case. But that is defeated by proof that such note was in fact made and delivered on Sunday. So it is admissible to show when the bill of sale in this case was made and delivered, and when the consideration was paid. *Bank of Cumberland* v. *Mayberry*, 48 Maine, 198; *Myers* v. *Meinrath*, supra; *Cranson* v. *Goss*, 107 Mass., 439, 441.

Exceptions overruled.

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

INHABITANTS OF HOLDEN *vs.* INHABITANTS OF GLENBURN.

Pauper. Notice under R. S., c. 24, § 27.

The overseers of the plaintiff town gave notice to the defendants that "Samuel Staples and his wife Angenetta, and their children," giving their names and ages, had become chargeable as paupers, with the proper requests for removal, &c. To this notice no legal answer was returned. *Held*, that the defendants were not estopped to deny the settlement of the alleged wife and children unless it appeared that they were the wife and children of said Staples, and that testimony tending to negative that fact would be admissible.

ON REPORT.

ASSUMPSIT to recover for pauper supplies, alleged to have been furnished to Samuel Staples and his family, between the tenth day of April, 1872, and the seventeenth day of May, 1873, the day of the purchase of the writ.

The notice, omitting the names and ages of the children, was as follows:

"HOLDEN, July 10th, 1872.

GENTLEMEN :—You are hereby notified that Samuel Staples and his wife Angenetta, and their children. . . . . having legal settlement in your town, have now become chargeable in this town, as town paupers. We conceive it necessary to give you this information, that you may order their removal, or otherwise provide for them as you may judge expedient.

We have charged the expense of their support, which has already arisen, to your town, and shall continue so to do, as long as we are obliged to furnish them with supplies.

A. B. FARRINGTON, } *Chairman of the overseers of the poor of Holden.*

To the overseers of the poor of Glenburn."

The defendants contended that the written notice, so far as it related to the woman and children therein referred to, was defective, erroneous and insufficient, and such as they were under no

obligation to answer; and offered to show that the persons designated as the "wife" and the minor "children" were not the wife and children of Samuel Staples, and that the persons so named and designated had never resided in the defendant town.

The plaintiffs objected to the introduction of evidence to establish these facts, and the presiding justice *pro forma* sustained the objection. The defendants thereupon submitted to a default, which by the terms of the report was to be taken off and the action to stand for trial, if the rulings were erroneous.

Brown & Simpson, for the plaintiffs.

H. C. Goodenow, for the defendants.

DANFORTH, J. The first question raised in this case is as to the sufficiency of the notice in relation to the alleged paupers. They were described as Samuel Staples and his wife Angenetta, and their children, giving the name and age of each one. The defendants "offered to show that the woman so designated as the 'wife' and the children so designated as the minor children, were not in truth and in fact, the wife and minor children of said Samuel Staples," but this evidence was excluded, on the ground that the defendants were "estopped from proving any such facts." This estoppel seems to have been claimed because no answer was returned to the notice. If the notice was sufficient in regard to these persons now in question the defendants would be estopped, otherwise they would not be.

The R. S., c. 24, § 27, requires in such cases that the notice shall state "the facts respecting the person chargeable in their town. . . . . requesting them to remove him." What facts are to be stated are not specified, but the object to be accomplished makes it sufficiently clear. The purpose is to lay the foundation for the future action of the overseers. They are required either to deny the settlement of the alleged paupers or to remove them as the facts may require. In either case to secure intelligent action the overseers must have such accurate description as will enable them

to identify the person referred to. This may be done by name, or other description, if sufficient, so "that the overseers may certainly know whom to remove." *Bangor* v. *Deer Isle*, 1 Maine, 329.

From the notice now before us the overseers of the defendant town learn that not only the removal of Samuel Staples is required but also that of his wife and children. The notice itself is distinct and in it is no ambiguity. On investigation it is found that Staples has no such wife or children. If then, the overseers desire to identify them they are unable to do so from the description. They may by diligent inquiry ascertain who was intended by the description, as in *Lanesborough* v. *New Ashford*, 5 Pick., 190, but at the same time, as in that case, they learn that the persons so intended are not those actually described, and if they undertake to remove them they must do so upon information obtained from their own inquiries, and not from such as has been given them by the notice, while the statute requires them to act upon the latter only. This is not the case of an indefinite or defective description as in *Embden* v. *Augusta*, 12 Mass., 307, and *Shutesbury* v. *Oxford*, 16 Mass., 102, and which (as held in those cases) might be waived, but a description which in a material respect is false, and tends to lead astray. If the false part is left out, we have an entirely different description and one which can only apply to different persons, and materially different, certainly under the pauper laws, because in one case the settlement follows that of the husband and father and in the other it does not follow the person so named. The notice may have been sufficient with this part omitted, but it having been inserted it cannot be disregarded.

This will perhaps be more clear when we apply it directly to the estoppel claimed. The plaintiffs have a right to an answer to a sufficient notice, unless the pauper is removed, so that they may know whether the settlement is disputed. *Ellsworth* v. *Houlton*, 48 Maine, 416. The defendants have a right to a sufficient notice so that they may know whether to deny the settlement of the persons chargeable. Hence the statute provides that when no

answer to the proper notice is returned within two months the "town is estopped to deny his settlement therein." In this case a notice was sent which beyond question was sufficient to require a removal or an answer, or to work an estoppel, as to Staples, his wife and children therein named. Defendants had no occasion to deny the settlement of Staples. His wife and children would follow his settlement, therefore they would have no more occasion to deny theirs. Hence the only answer returned was not a denial but one of inquiry. They are therefore clearly estopped to deny their liability so far as Staples and his wife and children are concerned. But the estoppel can go no farther than the notice. The settlement of such as are therein named is admitted but no others. The notice refers to the expense which has accrued in the support of Staples and his family but for no other, and for that, and no other, the defendants are holden. The question involved is one of fact. It is simply whether the plaintiffs are now seeking to recover the expense accrued on account of the same persons named in their notice, and unless they show that these are the wife and children of Staples they must fail as to them. Hence the testimony excluded should have been admitted as bearing upon that point. This conclusion makes it unnecessary to consider the other point raised. *Action to stand for trial.*

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

INHABITANTS OF GLENBURN *vs.* INHABITANTS OF OLDTOWN.

Notice under R. S., c. 24, § 27—effect of misstatement in.

A notice under R, S., c. 24, § 27, containing a misstatement as to material facts is not a compliance with that statute.

ON REPORT.

This was an action to recover for pauper supplies. Frances A. Hinckley, one of the paupers, was born in Oldtown, and has had

her settlement in that town ever since. She married one Moulton, and, while that marriage was still in force, was married again to Timothy Caton, who never had a settlement in this State. By Caton she had several children. The notice described the paupers as "Mr. Timothy Caton, his wife, Frances A. Caton, and their children," and was in other respects similar to the notice in the preceding case. Such judgment was to be entered as the case required.

Wm. H. McCrillis and *J. Varney*, for the plaintiffs.

Sewall & Blanchard, for the defendants.

WALTON, J. Overseers of the poor are to send a written notice, "stating the facts respecting a person chargeable in their town," to the overseers of the town where his settlement is supposed to be, with a request for his removal. Rev. Stat., c. 24, § 27.

A notice, which, instead of stating the facts, states what is not true in important particulars, is not a compliance with this provision of law. We do not mean to say that a mistake in an unimportant particular would vitiate the notice. But the misstatement of material facts—facts so important that they change the settlement of the pauper—will vitiate it. Thus the statement that a woman and children are the wife and children of a man named, when in fact she is not his wife, but is living with him in a state of adultery, and does not follow his settlement, but has a separate settlement of her own, and the children are illegitimate, and do not follow the settlement of their father, but have a separate settlement derived from their mother, is such a misrepresentation of material facts as will vitiate the notice, and prevent its laying the foundation for a recovery of the expense incurred in their support. It is not the mere fact of calling the woman by a name which she has no lawful right to bear, that vitiates the notice; but the fact that she and her children are falsely represented as bearing such a relation to the man named as would, if true, make them follow his settlement, when in truth they bear no such rela-

tion, and as matter of fact have separate settlements of their own. *Holden* v. *Glenburn*, ante 579.

The notice in this case is defective in all these particulars. We think it is not sufficient to sustain the action.

Judgment for defendants.

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

DENNIS O'LEARY *et ux. vs.* WILLIAM DELANEY.

Statute of Frauds. Assumpsit.

Where premises are leased by the month, the rent paid, and the premises occupied, and the landlord agrees as part of the contract to make repairs, such agreement is within the Statute of Frauds.

When such agreement is made with the husband by whom the rent is paid, and to whom the promise to repair is made, an action of assumpsit cannot be maintained upon such promise by the husband and wife jointly, for its breach, and to recover damages for an injury to the wife.

Where premises are leased by the month only, and there is an agreement to repair made when the lease is made, such agreement terminates with the lease.

ON REPORT.

ASSUMPSIT by Dennis O'Leary and his wife. The declaration alleged that in consideration of the payment of eight dollars per month by Dennis, the defendant promised that Dennis and his family should occupy a certain tenement, and that he would keep in repair the premises, including an elevated foot walk leading to the wood house connected with the tenement. The breach assigned was the defendant's neglect to keep the walk in repair, whereby it fell through and greatly injured the female plaintiff.

The presiding justice ruled that the agreement set forth was within the Statute of Frauds, and could only be proved by some memorandum in writing; whereupon the parties reported the

case to the full court, with the understanding, that if the ruling was correct, the plaintiff was to become nonsuit, otherwise the case to stand for trial.

H. L. Mitchell, for the plaintiffs.

W. H. McCrillis, for the defendant.

APPLETON, C. J. This is assumpsit upon a promise made for a valuable consideration by the defendant to the plaintiff, Dennis O'Leary, and its breach.

The plaintiffs offered evidence to show that Dennis O'Leary hired a certain tenement of the defendant at the rate of eight dollars per month, provided the defendant would keep the same in repair, put new shingles on the same, and repair an elevated foot walk connected with a part of the premises, which the defendant promised to do. The breach alleged is in not repairing the foot walk, and that the plaintiff's wife in passing over the same was severely injured in consequence of its defective condition.

It is well settled that a landlord is not under any obligation to repair demised premises unless he has expressly agreed so to do. When a house is to be used there is no implied warranty that it shall be reasonably fit for habitation, or that it shall continue so. *Libbey* v. *Tolford*, 48 Maine, 316.

In the case at bar the plaintiffs offered to show that the agreement of the defendant to repair the foot walk was made at the time of making the lease and that the plaintiff, Dennis, went into possession and paid his rent punctually, but the presiding justice ruled that the contract set forth in the declaration was within the Statute of Frauds and could only be proved by some memorandum in writing.

In *McMullen* v. *Riley*, 6 Gray, 500, a similar question arose. It was then held that an oral agreement to hire a shop for a year at a certain rent and to pay the landlord the amount expended by him in fitting it up was within the Statute of Frauds and that no action could be maintained for the amount so expended. "The

parties," observed Thomas, J., "made no agreement for a lease without the fixtures, or for the fixtures except with a view to the lease. When the contract for the lease falls, the dependent stipulation as to the fixtures falls with it. *Irvine* v. *Stone*, 6 Cush., 508; *Vaughan* v. *Hancock*, 3 C. B., 766." This is directly in point and sustains the ruling at *nisi prius*.

But the action is not maintainable upon other and different grounds. It is based upon a promise by the defendant to the husband of the party injured. No contract exists between the plaintiffs and this defendant. The defendant made his promise to Dennis O'Leary from whom he received the rent and to whom alone he is responsible for any violation of his contract. The wife of O'Leary was no party to any contract with this defendant and he has made no promise to these plaintiffs jointly. The wife was no contracting party according to the allegations in the writ.

Further, the agreement made in April, 1871, was to lease the house for a specified monthly rent. The consideration paid was for a month's occupation of the premises and their repair. But the repairs were to be made while the occupation continued. The contract applied only to the term for which the property was leased. Each month, a new contract was made either express or implied, for which a new consideration was made. But it is not alleged or pretended that any new or subsequent promise was made by the defendant, and it was not declared upon.

Plaintiffs nonsuit.

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

CHARLES YORK *vs.* SARAH A. PEARSON.

Promissory note—consideration of.

The acceptance of a negotiable promissory note for a pre-existing debt, if the note is made payable at a future day, suspends the right of the creditor to enforce the payment of his debt till the pay day of the note arrives, although there may be no special agreement or understanding that the note shall operate as an extinguishment of the debt; and this suspension of the right to enforce payment of the debt is a sufficient consideration to support the note.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT upon a promissory note, payable to the plaintiff's order in three months from its date. The defendant was administratrix of her husband's estate and the note in suit was given by her for the balance due from the estate to the plaintiff upon a grocery bill. The estate was insolvent and it was contended that there was no consideration for the note.

The plaintiff testified that he gave a receipted bill upon taking the note, and the defendant swore that no receipt whatever was given.

The presiding justice instructed the jury that if there was a settlement and a receipt in full given, so that the debt was discharged there was a good consideration for the note.

The verdict was for the defendant and the plaintiff excepted to so much of the charge as required the jury to find that a receipt in full was given and that the account was discharged in order to find that there was a valid consideration for the note; and also filed a motion for a new trial upon the ground that the verdict was against the law and the evidence.

P. G. White, for the plaintiff.

Wilson & Woodard, for the defendant.

WALTON, J. We think the verdict in this case is unmistakably wrong. The defendant's own testimony shows that there was a legal consideration for the note declared on.

The acceptance of a negotiable promissory note for a pre-existing debt, if the note is made payable at a future day, necessarily, and by operation of law, and without any agreement to that effect, suspends the right of the creditor to enforce the payment of his debt till the pay day of the note arrives; and this suspension alone is a sufficient consideration for the note.

It was not therefore important to inquire whether the debt for which the note in suit was given, was absolutely discharged or not. Undoubtedly it was. But still that was not an important inquiry; for the acceptance of the defendant's note, payable at a future day, operated to suspend the plaintiff's right to take any measures to collect his debt till the pay day of the note arrived; and this alone was a sufficient consideration for the note. *Andrews* v. *Marrett*, 58 Maine, 539, and authorities there cited.

Motion sustained.

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

CHARLES D. CHAPMAN *vs.* MARY RICH.

Assumpsit. Minor—liability of parent for.

A child, ten years of age, went to live with the plaintiff, under a verbal agreement with its mother, that she was to stay till of age for her board, clothing and schooling; and she left at thirteen years of age, by the act, or with the consent of the mother. *Held*, that the plaintiff could maintain an action of assumpsit against the mother upon an account annexed for the child's board.

ON REPORT.

ASSUMPSIT upon account annexed for board of the defendant's minor child.

The report briefly states that "the daughter of the defendant, a child ten years of age, went to live with plaintiff under the verbal agreement that she was to stay till of age, for her board, clothing and schooling, and she left at thirteen years of age."

If upon these facts the action cannot be maintained, the plaintiff to be nonsuited, otherwise the action to stand for trial.

Donigan & Chapman, for the plaintiff.

W. H. McCrillis, for the defendant.

PETERS, J. This case is very briefly made up. But we may reasonably infer therefrom, that the father of the child was not alive when the bargain was made, and that the child left the plaintiff by the act, or with the consent, of the mother. There can be no doubt that the action is maintainable. Had the mother kept the contract, although it could not be enforced at law, she would not have been liable to the plaintiff for the support of the child. But as she broke the contract without the fault of the plaintiff, she cannot keep what consideration she has received by virtue of it. The plaintiff, on account of the breach of the contract by the defendant, can treat the contract as a nullity, and recover back the value of what he has expended in pursuance of it, less such compensation as he may have received from any services rendered him by the child. The general principle of law which governs this case is well settled in many analogous cases involving different facts. A few only need be cited. *Holbrook* v. *Armstrong*, 10 Maine, 31; *Wright* v. *Haskell*, 45 Maine, 489; *Patterson* v. *Stoddard*, 47 Maine, 355; *Kneeland* v. *Fuller*, 51 Maine, 518; *King* v. *Brown*, 2 Hill, 485; *Williams* v. *Bemis*, 108 Mass., 91; and cases there cited. *The action to stand for trial.*

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

APPENDIX.

ANONYMOUS.

Practice. Verdict.

In any criminal case, (except capital cases and cases where the punishment is imprisonment for life,) any presiding judge may, at his discretion, authorize a jury, when they agree during an adjournment of the court, to seal up their verdict and separate, and have it opened, read and affirmed when the court comes in, with the same effect as if pronounced orally.

PER CURIAM.

A question has arisen, whether a jury in a criminal case, after agreeing to a verdict during a temporary adjournment of the court, can properly be allowed by the presiding judge to separate till the court opens again, and then render their verdict. The practice has varied in this State. It has been somewhat common, in cases of mere misdemeanor, for a court, without consulting with the respondent or his counsel to permit a jury to do so. The practice, to that extent, may be said to be authorized by law. In the case of felonies, short of those punishable by a life sentence, the practice has not been at all uniform with judges. It is therefore desirable that some rule should be decided upon, which shall, if possible, be convenient to court and counsel, and not at all prejudicial to the accused.

The ancient strictness of the law, in the treatment of jurors, has been greatly relaxed. Formerly, they were little less than prisoners themselves. In the march of improvement, which has taken place to ameliorate their condition, different courts have adopted different practices. In civil cases the practice has become very general, in this country, to allow a jury to seal up their verdict and separate while the court is adjourned. The same method is adopted, in some of the States, in criminal cases. This is based upon the idea found in the old system of rendering privy verdicts, and is an improvement upon that form. Anciently a jury could separate, by imparting privately to the court what the verdict was,

and this was regarded as a sufficient check against fraud or imposition. But, according to the ancient common law, a privy verdict could not be rendered in case of a felony, because of the requirement that the jurors should look upon the prisoner when the verdict is pronounced. That distinction does not seem to us to be an important one. The only binding verdict is the public one given openly in court. It is not perceived why the right of the prisoner, to be face to face with the jurors when a verdict is declared, is not preserved to him if the verdict is in writing. It must be read and affirmed in his presence. The difference to the prisoner, between declaring in his presence an oral verdict and affirming a written one, seems unsubstantial indeed. Besides a jury in a criminal case could always render a special verdict in writing.

Upon the whole, after careful advisement, our conclusion is, that in any criminal case, (except capital cases and cases where the punishment is imprisonment for life,) any presiding judge may, at his discretion, authorize a jury, when they agree during an adjournment of the court, to seal up their verdict and separate, and have it opened, read and affirmed when the court comes in, with the same effect as if pronounced orally. For this purpose, a verdict signed by the foreman, in the following form, or in any other form substantially equivalent thereto, shall be sufficient:

"STATE OF MAINE.

P. —— ss. Supreme Judicial Court,
——Term, 187

State *v.* ——

The jury find that the prisoner, (or accused or respondent,) is guilty, (or not guilty,) in manner and form as charged against him in the indictment.

——, *Foreman.*"

As bearing upon this subject, see *Guenther* v. *The People*, 24 N. Y., 105; *Lawrence* v. *Stearns*, 11 Pick., 501; *Commonwealth* v. *Durfee*, 100 Mass., 146; Bacon's Ab. & Blackstone's Com. Title, Verdict.

Dyer *vs.* Fredericks.

At the time the report in this case was prepared—see page 173, *ante*, the reporter had not received the following opinion by Judge Barrows, which subsequently came to his hands from another justice.

Barrows, J. We should be slow to infringe upon the wholesome rule which prohibits the introduction of parol evidence to prove the contents of a written instrument until it is shown to the satisfaction of the court that the written instrument itself cannot be produced.

If these exceptions show that testimony was admitted at the trial in contravention of it, they ought to be sustained.

The plaintiff complains of the admission of parol evidence offered by the defendant to rebut the parol proof which the plaintiff had been allowed to put in of the contents of a certain bill of lading signed by plaintiff and the owners of the brig of which the defendant was master more than ten years before the trial, and to prove the contents of that writing different from what was asserted by the plaintiff's witnesses—because the defendant testified that on his return from the voyage he delivered to one Plummer, an owner in the vessel, the owners' duplicate of the bill of lading, and the defendant called no one to prove the loss or destruction of that duplicate.

We should not forget that a bill of lading is both a receipt and a contract, and so far as it operates as a receipt it is open to explanation or contradiction by parol. *O'Brien* v. *Gilchrist*, 34 Maine, 554; *The Lady Franklin*, 8 Wall, 325.

Nor that the contract between the ship and the shipper is that which is contained in the bill delivered to the shipper—the "ship's bills" being designed only for the information and convenience of the master and owners, and not for evidence as between the par-

ties what the agreement was, and therefore if they differ from those in the possession of the shipper, the latter are to be deemed the true and only evidence of the contract. *The Thames*, 14 Wall., 98. It does not very distinctly appear in the exceptions how the question arose between these parties, nor what the evidence offered by the defendant tended to show. But if it be conceded that it was a case where inability to produce the writing itself must be shown in order to make the parol testimony competent, then it was incumbent on the plaintiff to do it before the secondary evidence which he offered was admitted. What proof he offered for this purpose does not appear, but the fair presumption is that he lived up to the doctrine for which he now contends.

It was settled in *Poignard* v. *Smith*, 8 Pick., 272, affirming *King* v. *Castleton*, 6 T. R., 236, that the loss of original counterparts must be shown to make secondary evidence admissible.

The well known course of business is that a bill of lading is executed in duplicate or triplicate, and the party proposing secondary evidence should show due diligence to find and produce an original in order to free himself from the suspicion of resorting to secondary evidence because the best would not answer his purpose.

The plaintiff produced in this case such evidence as was deemed satisfactory that it could not be done, and was permitted to put in the parol testimony.

If in the progress of the trial it had appeared that there was reasonable ground to believe that there was a counterpart in existence which might be produced, but which was not in the possession or under the control of either party to the suit, it was incumbent upon the plaintiff to account for its non-production upon pain of having his own parol proof struck out, which would have left him in no better condition than the verdict of the jury has done. Had there been any reason to believe that the counterpart of the bill of lading could have been produced and would have sustained the plaintiff's position he would at least have asked a postponement long enough to enable him to settle the question. He does not

appear to have done so, but contented himself with objecting to the use by the defendant of the same class of testimony upon which he himself relied.

The case differs from *Bogart* v. *Brown*, 5 Pick., 18, in this essential particular, that there, the document respecting which the plaintiff had offered the parol testimony was in the possession of the defendant himself. Under such circumstances or whenever there is ground to suspect that the party offering secondary is suppressing primary evidence he will of course be precluded. But here the testimony of the defendant that the duplicate went to the owners at the end of the voyage was nothing new nor strange. The exceptions show that the plaintiff well knew that there was once a duplicate of the instrument in existence, for it was admitted by both parties to be precisely like the one retained and lost by the plaintiff. He knew who the owners were, for it was with them that he made the contract.

The presiding judge was doubtless satisfied that neither party could produce it and therefore both were allowed to go into secondary evidence. *Exceptions overruled.*

Appleton, C. J., Walton, Dickerson, Virgin and Peters, JJ., concurred.

RESOLUTIONS AND PROCEEDINGS

UPON THE RETIREMENT OF

HON. JONAS CUTTING, LL. D.,

FROM THE BENCH OF THE SUPREME JUDICIAL COURT OF THIS STATE.

At the April term, 1875, of the supreme judicial court for Penobscot county, Hon. Wm. H. McCrillis, in behalf of the members of the bar of that county, presented the resolutions of that body upon the retirement of HON. JONAS CUTTING, with the following remarks:

MAY IT PLEASE YOUR HONOR: I have a motion to submit. I hold in my hand resolutions adopted by the bar upon the occasion of the retirement of Mr. Justice Cutting, one of the members of this court, whose term of office it is understood, expires to-day. These resolutions are intended as an expression of our estimate of the character and public services of Judge Cutting, during the period of twenty-one years he has sat upon the bench of this court.

Some of the older members of the bar (myself among the number) were associated with him in the practice of the law for many years before his promotion to the bench. When I came to the bar, now forty years ago, he was in full practice, enjoyed the unlimited confidence of the community and of his clients, and was one of the foremost lawyers, the bar then numbering among its members, Rogers, Kent, Appleton, Starrett, Allen, and many others who might be named. He was then particularly distinguished for his intimate knowledge of the law relating to real property, and such was the confidence in his decision of questions involving this intricate branch of the law, that his well-considered

opinion often settled the controversy between parties without litigation. He was also famous among lawyers for the acuteness and discrimination of his mind, and in all matters of form, and in the technical learning of the law, his opinion with us was decisive. He became known throughout the State as a profound lawyer, and his appointment to the bench was received with universal satisfaction.

The legal judgment of Judge Cutting, recorded in the Maine reports of cases argued and determined in the law court, are clear, concise, logical, and supported by sound reasoning, and abundantly prove the depth of his learning, and the diligence and patience of his research. He has been a dignified, courteous, kind, upright, impartial, and also a very learned and just judge, and now, when his official duties and his official intercourse with us have terminated, the bar desire to have entered upon the records of the court what we deem a fit and proper testimonial of our appreciation of the manner he has discharged the duties of his high office, and of the respect, veneration and affectionate regard we all entertain toward him.

Judge Cutting will carry into his retirement from office, which, in the ordinary course of human events, is unavoidable, the sincere and fervent wish of the bar, and, I believe, of the people of the State he has served so faithfully, that his life may be long spared, and that, surrounded by his family and his friends, he may enjoy the serenity and repose of a happy old age.

With your Honor's permission, I will read the resolutions:

RESOLUTIONS OF THE BAR.

Whereas, On this day the Hon. Jonas Cutting, one of the justices of the supreme judicial court of this State, 'completes a term of twenty-one years' continuous service upon the bench, and retires from the position which he has so long filled in a manner alike honorable to the State, and creditable to himself; the members of the Penobscot bar, of which he first became a mem-

ber in the year 1826, desire to place upon record, their appreciation of his character as a jurist and as a man, therefore

Resolved, That the members of the Penobscot bar, assuming also on account of locality to represent the bar of the State, take this opportunity of giving public expressson to the feeling of high respect for the great learning and unspotted integrity, which, in the history of the judiciary of this State, always attaches to the name of Hon. Jonas Cutting; that not only has his dignity, impartiality and ability as a presiding judge given character to the bench, but an imperishable tribute to, and evidence of, his judicial qualities and fitness will be found in his written opinions contained in the volumes of our State reports, which opinions are noted models of clearness, conciseness, directness and power.

Resolved, That non-partisan appointments to judicial position, such as Judge Cutting's originally was, are alone calculated to secure upon the bench the best legal talent, and thus inspire in the hearts and minds of the people, that respect for courts and decisions of courts, which are the foundation and chief safeguard of good government and social order.

Resolved, That Judge Cutting carries with him into his honorable retirement from judicial life, at a period which he had himself designated as a desirable limit to tenure of office, the high respect and affectionate regard of all with whom he has come in contact as judge, including members of the bar, officers of court, and suitors in court, as well as those outside of courts who look to the judiciary, when properly constituted, as the embodiment of what is best in the republic.

ABRAHAM SANBORN, ESQ., seconded these resolutions as follows:

MAY IT PLEASE YOUR HONOR: I rise to second the motion of my brother McCrillis, and to express my entire concurrence, not only in the sentiments of the resolves which he has reported in behalf of the bar as a tribute to the official character of the Hon. Jonas Cutting, but in the eloquent remarks with which he has accompanied them.

Twenty-one years have passed since he took his place on the bench among his learned and distinguished associates. In the last case in which he was engaged before his elevation I was opposing counsel, and we tried it before a jury sitting in yonder seats. He won the verdict and left the field of his professional fame a victor in his final contest.

How well I remember it. As I look back it seems but an hour. The upright and able judge who tried it, and many of the leading members of the bar have within that time gone down to their graves. Alas! how many of us shall survive when the expiration of a like brief span shall come around again!

Judge Cutting carried with him into his office integrity above suspicion, sound judgment and a profound knowledge of the principles of the common law. He also possessed the rare faculty and power of comprehending and analyzing complicated facts in cases that came before him, with great accuracy and rapidity, and instantly discerning and applying the law which controlled and governed them. His correct conclusions thus reached, were the result of severe logical processes, but they seemed to me, sometimes, like intuitions. But his distinguished attributes were found in "his clear head and clean heart." And he soon became eminent in the able and faithful discharge of the trying, difficult and responsible duties of a judge in the trial of questions of fact before a jury at *nisi prius*, and in the exposition and settlement of questions of law before the full court.

No magistrate ever held the scales of justice with a more even hand, or meted out its due awards more impartially than himself. And it may be as truly said of him as of any judge in this or any other land, that he lays aside the ermine without speck to mar its beauty, or a stain to soil its purity.

I will only add the wish which I believe to be the wish of this bar and of the whole bar of this State, that the close of a life so useful and honorable may be full of dignity, rest and peace.

CHIEF JUSTICE APPLETON responded as follows:

Twenty-one years of judicial labor honestly, faithfully and ably performed, have fully entitled my valued and respected associate on the bench and my life-long friend to the just and appropriate resolutions you have passed upon his judicial career. I concur, I assure you, most cordially with the bar in the resolutions presented. In parting with Judge Cutting as a fellow laborer, his associates will miss in their deliberation his quick perception, his sound judgment, his frank integrity and his accurate learning. He retires from the bench with the confidence of the public undiminished, with the respect of the bar, and with the best wishes of all for prolonged life and a happy old age. While change, which is incident to all the conditions and relations of life, is thus taking place in our midst, it is gratifying to know that the seat from which my associate retires to-day will be occupied by a successor in whose learning and integrity the public have the fullest confidence. I may, I trust, be permitted to add the hope that amid the mutations of party strife, a seat on this bench may never become in the future, as it never has been in the past, the prize of political service, but that it shall be given to the man fittest to discharge its grave, onerous and responsible duties. Let the resolutions of the bar be entered of record.

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COLLATERAL SECURITY.

1. A creditor, who holds railroad bonds as collateral security for a debt is not bound by an unexecuted promise to the debtor, made without consideration, to give them up. *Smith* v. *Strout*, 205.

2. Nor does he lose his right to hold such bonds by suing the principal debt, and recovering execution, and arresting the body of the debtor thereon. *Ib.*

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COMPLAINT FOR FLOWAGE.

1. A complaint for flowage cannot be sustained if either of several respondents had the right to flow the complainant's premises, in the manner and to the extent stated in the complaint. The conveyance of a dam and mills, by necessary implication, carries with it the right to flow the grantor's land then flowed by such dam, and which inevitably must be flowed by a fair and proper use of the dam and mills. *Butler* v. *Huse*, 447.

2. Mill owners have a right to maintain their dam as it was at the time of the deeds to them; and if, through want of repair for a series of years subsequent to that, it lets the water escape, the owners have the right to repair and tighten it, although the water is thereby raised higher and retained longer than it was while the dam was in a dilapidated condition. *Ib.*

3. Where the owner of land flowed by a dam and of two-thirds of a mill privilege upon that dam conveys one-third of the privilege and dam, with an incidental right to flow so much land as was then flowed by said dam, no subsequent deeds of the flowed land or of the other third of the dam—and no reservations or limitations in such deeds—can affect this right of flowage, as it existed at the time of the conveyance of the third first conveyed. *Ib.*

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JURISDICTION.

When a defendant appears and files an account in set-off, in an action pending in an inferior court which has jurisdiction of the subject-matter, that court acquires jurisdiction of the person and the cause.

Thornton v. *Leavitt*, 384.

See INSANE HOSPITAL. PRACTICE, 15. SUPERIOR COURT, 2.

JURY.

The jury were allowed to take with them to their room a bottle containing a liquid called ale which, though no part of the liquors seized, was manufactured and sold by the same person under the same name; *held*, that there was no legal objection to this course, the jury having been instructed not to consider the qualities of the contents of the bottle, unless satisfied from the evidence that its character was the same as that of the liquors seized.

State v. *McCafferty*, 223.

See ABATEMENT, 1. LAW AND FACT. NEGLIGENCE, 1, 2. NEW TRIAL, 3. VERDICT.

JUSTICE OF THE PEACE.

See INSANE HOSPITAL.

LAND DAMAGES.

1. Are to be assessed as for a way to be properly constructed.

Jackson v. *Portland*, 55.

2. Where, upon an appeal for land damages, occasioned by taking for a street land alleged to belong to the appellant, the parties agreed to "refer" the question of damages "to the following committee," naming them, and the clerk issued a rule to the persons named as referees, who without objection heard the parties, and made their report as follows : "That Jane P. Thurston, at the time of laying out, and establishing of Howard street, named in her appeal, did not own any portion of the land taken by said street and

LEVY.

A mistake in the initial of the middle name of one of the appraisers in the record of a levy in the registry of deeds will not vitiate the levy.
Emery v. *Legro*, 357.

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LICENSE.

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LIEN.

1. One who—in a town where there is no pound nor pound keeper—finds upon his premises an animal *damage feasant*, may legally detain it in his custody and has a lien on it for the necessary expenses of keeping it.
Mosher v. *Jewett*, 84.

2. The voluntary relinquishment, by the bailee, of possession of the subject of the bailment discharges his lien unless it is consistent with the contract, the course of business, or the intention of the parties, that it should continue.
Robinson v. *Larrabee*, 116.

3. When the bailee has parted with his possession, the presumption is that he has waived or abandoned his lien, unless his conduct, in so doing, is satisfactorily explained. *Ib.*

4. The forfeiture of a lien claim, when once incurred, is not waived by a subsequent arrangement between the parties, whereby the bailee resumes the custody of the subject of the bailment, unless such was the intention of the parties. *Ib.*

5. The lien created by a pledge can be maintained only by a continued possession of the property pledged. *Collins* v. *Buck*, 459.

6. A person who had a horse in his possession, under a contract (long before made) with its owner for its keeping, at the time the act of 1872, c. 27, was passed, but who had no lien at common law nor by the terms of his contract, can claim none under that act for food or shelter furnished prior to its passage; but has one for what is afterwards supplied, provided the rights of third parties are not affected thereby. *Allen* v. *Ham*, 532.

7. Though no lien exists for shoeing the animal, nor for the payment of taxes assessed upon him, the insertion of a count claiming a lien for those items will not invalidate the petition. *Ib.*

8. It will be a substantial allegation that food and shelter were furnished if the petitioner state that he "kept" the animal. *Ib.*

9. It is no objection to the continuance of the lien that the horse was so kept by the petitioner for more than two years. *Ib.*

LIMITATIONS, STATUTE OF.

LORD'S DAY.

The defendant sold a horse to the plaintiff on Sunday ; the plaintiff gave his bank check for the price of the horse on the same day ; the defendant at the same time deposited a bill of sale of the horse with a third person, to be delivered to the plaintiff when the check was paid; the check was paid and the horse and bill of sale were delivered all on a secular day afterwards: *Held*, that an action of assumpsit to recover back the price paid for the horse on account of a deceit practiced in the sale would not lie, because based upon a transaction tainted with illegality. *Plaisted* v. *Palmer*, 576.

MALICIOUS PROSECUTION.

The plaintiff in an action against an officer of the law for malicious prosecution cannot maintain exceptions on account of an imperfect definition in the judge's charge of malice in fact, when the case shows that the defendant acted upon information derived from others, apparently sufficient to establish the existence of probable cause, and there is nothing in the case, as presented to this court, to indicate that injustice was done by the verdict. *Smith* v. *Swett*, 344.

See LAW AND FACT, 2.

MANDAMUS.

1. Lies to compel a corporation to perform the public duties imposed by its charter. *R. R. Comm'rs* v. *P. & O. C. R. R. Co.*, 269.
2. The issuing, or refusal to issue, a writ of mandamus rests in judicial discretion. *Davis* v. *Co. Comm'rs*, 396.
3. The dismissal of judicial proceedings, for want of prosecution, is discretionary with the court before which those proceedings are pending. *Ib.*
4. When proceedings have been dismissed for want of prosecution, and upon application for their restoration to the docket of the court before which they were pending, after full argument of the motion, such restoration was denied, this court will not (unless to prevent great injustice) interfere by mandamus to order such restoration. *Ib.*

MARRIAGE.

See PAUPER, 5.

MASTER AND SERVANT.

1. A servant is liable to an action at the suit of his master, when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct. *G. T. Ry. Co.* v. *Latham*, 177.

MERGER.

In this case—trespass *quare clausum*—both parties deduce title from Ebenezer Warner who, February 3, 1840, conveyed the premises in question to his sons, Joseph and Henry, taking back a life lease from them. Jan. 3, 1842, Henry conveyed his interest to said Joseph, this defendant; and March 28, 1843, their father released his life estate to Joseph. March 2, 1844, one Eells, who had recovered a judgment against Joseph, levied his execution upon the reversion of an undivided half of the premises, and on the seventeenth day of May, 1845, conveyed the rights thus acquired to John Hodgdon, who procured a partition to be made upon his petition, in which the three Warners were named as respondents, and the *locus in quo* was set off to Hodgdon, who conveyed it, April 17, 1850, to Shepherd Cary, by whom (and his heirs, the plaintiffs) the premises were exclusively occupied till the trespass complained of was committed, November 20, 1872, soon after the death of Ebenezer Warner. After Ebenezer Warner had released his life estate to Joseph, but before that release had been recorded, said Ebenezer's life interest was attached and subsequently levied upon by one Cary, who afterwards transferred his claim to Hodgdon, but Cary's suit was based upon the money counts, without specification of the claim to be made under them, and the release was recorded before judgment. The defendant contended that the plaintiffs were lawfully in possession of the *locus in quo*, until the death of Ebenezer Warner, under this levy upon the life estate, and therefore did not hold adversely; but that the levy upon the fee was so defective as to give no title. The court *held* that the life estate was merged by the release of it to Joseph; that the attachment of it by Cary was not such as to keep it alive; and that, whether the levy upon the fee and the proceedings for partition were valid or not, the plaintiffs were entitled to the premises by more than twenty years' peaceable, open, notorious, adverse and exclusive occupation of them, claiming the fee. *Cary* v. *Warner*, 571.

See JUDGMENT.

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See COMPLAINT FOR FLOWAGE.

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See ASSUMPSIT, 3. LEVY. PRACTICE, 14. REVIEW.

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See LIMITATIONS, 2.

MORTGAGE.

1. When those holding under the mortgager have entered and ousted the mortgagee in possession, he may maintain against them a writ of entry declaring on his own seizin generally, have a judgment as at common law, and claim and recover rents and profits proved. *Stewart* v. *Davis*, 539.

2. Such a judgment will not be deemed a waiver of a prior foreclosure commenced by publication; nor will it interfere with the right of redemption. *Ib.*

See REPLEVIN, 7.

NEGLIGENCE.

1. It is for the jury to say whether or not the defendants were guilty of negligence in the matter of keeping in repair fences they were bound to maintain. *Estes* v. *A. & St. L. R. R. Co.*, 308.

2. After a gate, part of such fence, had fallen, through its unsafe and defective hanging, the plaintiff had shut up his cattle in his barn-yard for greater security, whence they escaped upon the defendants' track and were killed; whether or not he was guilty of negligence, is a question for the jury. *Ib*

3. The assignee of a judgment entrusted the plaintiff of record in the suit in which it was recovered with the execution for the purpose of having it extended upon the debtor's land, and paying the expenses of the levy. The agent, having the execution in his custody, delivered it to a deputy sheriff who made a levy and then, by direction of the judgment plaintiff, handed the execution to an attorney who promised to see that it was seasonably recorded, but failed to do so;—*held*, that the officer, and his principal, the sheriff, were not liable for neglect, in not procuring the record to be made within three months after the extent. *Thompson* v. *Goding*, 425.

See DECEIT, 2, 3.

NEW TRIAL.

1. Where the testimony is conflicting and that claimed to be newly discovered might have been ascertained before, by the use of reasonable diligence, a new trial will not be granted. *Falmouth* v. *Windham*, 44.

PLEADING.

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REVIEW.

A review will be granted, that a discharge in bankruptcy may be pleaded where the petitioner's counsel in the original action failed to appear for him in defence, though requested so to do, through a mistaken supposition that counsel who had been employed by another defendant also represented the petitioner, and would protect his interests. *Shurtleff* v. *Thompson*, 118.

SALE.

Wallace bargained to the plaintiff one hundred and twenty-five tons, *gross*, of coal, parcel of a cargo of about double that number of tons. The rest of it was sold to the defendants. After the plaintiff's teamster had taken from the wharf—upon which the whole cargo had been discharged, in an indistinguishable mass—one hundred and twenty-five tons, *net*, the defendants interposed, and prevented the removal of any more of it, claiming that they should first take therefrom the same quantity that the plaintiff had received, and that the balance then remaining (if any) should be divided between the parties; *held*, that the plaintiff had acquired no such title to any portion of the coal remaining unweighed upon the wharf, as to enable him to maintain trover against the defendants. *Morrison* v. *Dingley*, 553.

See DECEIT, 1. LORD'S DAY. POSSESSION, 5. REPLEVIN, 1, 2.

SAVINGS BANK.

See GIFT.

SCHOOL.

A union school district, lying partly in Farmington and partly in Chesterville had a school house in Farmington, and its last vote to locate their house fixed its location within that town, and the school was actually kept in Farmington, which is the oldest town; *held*, that the teacher was justified in obtaining her certificate from, and returning her register to, the superintending school committee of that town, under R. S., c. 11, §§ 41 and 63. *Brown* v. *Chesterville*, 241.

SCHOOL DISTRICT.

Evidence of an abortive attempt to organize a school district is not of itself sufficient to rebut the presumption of the legal existence of the district arising from its exercising the privileges of a district for one year under R. S., c. 11, § 16. *Brown* v. *Chesterville*, 241.

SCHOOL HOUSE.

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TAX.

See WAY, 6, 7, 10.

TOWN.

See ASSUMPSIT, 2. INDICTMENT, 9, 10. SOLDIER'S BOUNTY. WAY, 8, 9.

TRUSTEE PROCESS.

USAGE.

See INDICTMENT, 2, 3.

WAIVER.

See LAND DAMAGES, 2. MORTGAGE, 2. PAUPER, 3. PRACTICE, 11. PRESUMPTION, 1, 2.

WAY.

1. The damages to be awarded upon a location are those arising from a proper construction of the way. *Jackson* v. *Portland*, 55.

2. A committee appointed by this court to determine an appeal from the decision of the county commissioners locating a way should, properly, be sworn before fixing upon a time and place for hearing the parties; but if the oath is not taken until the time for the hearing arrives, this objection must be then made, or it will be considered as waived. It comes too late, after they make their report. *Raymond* v. *Co. Comm'rs*, 110.

3. In cases of this kind, the court will presume that the party objecting had knowledge of the ground of objection, at the time it occurred, unless the contrary is shown. *Ib.*

4. A petition to the county commissioners set forth the inconveniences of certain existing highways, and alleged that public necessity required an alteration therein, so as to shorten the distance and avoid the hills; and then, without giving the termini of the roads complained of, or otherwise describing them, or asking for anything that would in fact constitute an alteration in either of them—prayed the commissioners to examine two specified proposed routes, which terminated in different roads, and neither of them had both termini in the same old road, and to make such alterations as should adopt one or the other of these new routes: *held*, that this was in substance a petition for a new location and not for the alteration, of a way; and that, the commissioners having located a way over one of the proposed new routes, neither of the old roads were thereby discontinued. *Raymond* v. *Co. Comm'rs*, 112.

5. Under the petition the commissioners had jurisdiction to make the new location, and their proceedings relative thereto should not be quashed on account of the improper use of the word "alteration" and the omission of the term "location" in the petition. *Ib.*

6. Under R. S. of 1857, c. 18, § 30, as amended by act of 1858, c. 23, the land-owners had the privilege of paying their proportional part of the expense of building a road through their lands in labor, but the expense of its construction was to be defrayed by assessing upon those lands enhanced in value thereby a sum sufficient to build it; and an omission to lay such an assessment, as part of the original proceedings, will vitiate them. *Pierce* v. *Co. Comm'rs*, 252.

7. In 1869 the county commissioners assumed to lay an assessment, ostensibly to "repair" a road which the land-owners had been thus ordered to build three years before, but had not, in fact, built; *held*, that such assessment was

WAY, DEFECTIVE.

WILL.

WORDS.

WRIT.