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. CHARLES W. WALTON.
HON. JONATHAN G. DICKERSON, LL. D.
HON. WILLIAM G. BARROWS.
HON. CHARLES DANFORTH.
HON. WM. WIRT VIRGIN.
HON. JOHN A. PETERS.
HON. ARTEMAS LIBBEY.

ATTORNEY GENERAL,
HON. HARRIS M. PLAISTED.

*** HON. JONAS CUTTING, LL. D., retired at the expiration of his term, and on April 23, 1875, HON. ARTEMAS LIBBEY was appointed Associate Justice in his place.

ERRATA.

Upon page 12, sixth line, strike out "truth," and insert "honesty, i. e., fair dealing."

Upon page 243, third line from the bottom, strike out "*and*" and insert "*of*," so as to read, "levy of an execution."

TABLE

OF THE CASES REPORTED.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

LLEWELLYN POWERS *vs.* THEODORE CARY.

Amendment. Evidence. Libel. Practice.

In an action for a libellous publication concerning the plaintiff in his private character, the judge may even after the testimony has been taken, allow an amendment of the declaration, by the addition of an allegation that the libel was published of and concerning the plaintiff in an official capacity.

When in a suit for a libel the first count is for damage to the plaintiff's private character, and there are other counts for injuries to his official and professional character, the permission to insert in such first count these words, "of and concerning the plaintiff in his capacity as an attorney and counsellor at law or as a collector of customs," is immaterial, the court instructing the jury that upon such first count he could recover only for injuries inflicted upon his private character, and that on the second count the jury could give damages for any injury to his character as a professional man.

When the libellous matter is contained in a newspaper article, the plaintiff need not read the whole article in evidence, but the defendant may do so.

The presumption of malice arising from the publication of a charge which, if false, is libellous, is not rebutted by proof that the publisher had reason to suspect the truth of the charges made.

The question of malice upon the part of the writer (who was not the publisher) of a libellous article is immaterial.

Whether or not the plaintiff is the person intended in the article alleged to be libellous, and whether one or more fraudulent acts are charged therein, are questions of fact for the jury.

Testimony bearing upon the general character of the plaintiff is admissible upon the question of damages only.

A witness cannot be allowed, upon direct examination, for the purpose of strengthening her testimony to state that she has made the same statement of the facts testified to by her at other times—immediately after they were said to have occurred—to various persons.

On exceptions and motion for a new trial.

Action on the case for two libellous articles published by the defendant concerning the plaintiff. The report of the evidence and the exceptions make a book of 248 pages. The declaration set forth that, at the time of these publications, the plaintiff, a citizen of Houlton, had been for many years a practicing attorney, relying for a livelihood upon his profession; holding also public office, and in good repute as a moral citizen; that the defendant, proprietor, publisher and editor of a paper called the Aroostook Times, printed weekly at Houlton, did on the twelfth and thirteenth of March, 1873, print in said paper the libellous article then set out (in the first count) consisting of an affidavit made on said twelfth day of March, by one Annie G. Cornelison, a colored servant in the family of G. B. Page, Esq., of Houlton, and of comments thereon; which, the plaintiff alleged, were "designed to cause the public to believe that he was of lewd and lascivious character," and that being a married man he had attempted to seduce the negress and commit adultery with her, &c., &c.

The second count set out that the plaintiff "for many years had been a resident of Houlton and a practicing attorney and counsellor at law in the courts of the United States and of the State of Maine, and for four years had been collector of customs at Houlton," and held these positions on the thirteenth day of January, 1873, relying upon them for support, when the defendant, desiring to deprive the plaintiff of his collectorship and to injure him in his practice, &c., &c., "did then and there publish of and concerning the plaintiff in his said capacity of collector of customs and in his said capacity as attorney and counsellor at law, in

the Aroostook Times, &c., the following false, scandalous and malicious paragraph and statement;" which is then recited, so far as it is made subject of complaint, the substance of it being (as the innuendoes averred) that, in his determination to attain wealth, the plaintiff had cheated clients and those for whom he had obtained pensions and bounties; had reported to their creditors honest business men of good standing as verging on insolvency, so as to get fees out of collections; and had some one sign as informer in order to cheat the government out of a quarter of the value of seizures, &c.

The defendant pleaded not guilty, and justified by setting up the truth of the statements. In answer to the second count he specified sixteen transactions which he proposed to prove, as sustaining the charges in the article of January 30th, 1873.

The plaintiff read so much of this article as supported his declaration, and the defendant claimed that the whole should then be read but the presiding judge ruled that the plaintiff need only read so much as he complained of, and that the defendant, if he chose, could put in the rest with his testimony.

This editorial was written by a brother of the defendant, Dr. George Cary, who was called as a witness by the defence and inquired of as to his motive in writing it, and whether or not he had any feelings of malice toward Mr. Powers; to this the plaintiff objected and it was excluded.

Miss Cornelison was a witness for the defence and was asked if she narrated the occurrences as set forth in her affidavit to Mrs. Page and others immediately after they happened; and Mrs. Page was asked if Annie told her of them, and how she (Annie) then appeared; whether angry and excited or otherwise. These questions were excluded upon the plaintiff's objection.

Against the plaintiff's objection, the defendant testifying in his own behalf was permitted to state that he had no ill-will or malice toward Mr. Powers, when the articles were published, and that he believed them to be true. His counsel argued that this rebutted the idea of malice.

The defendant claimed that the plaintiff's name did not appear in so much of the article of January 30, 1873, as was read to the

jury, and that no evidence had been introduced to prove him the person intended; and therefore that there could be no recovery upon the second count. The presiding judge left it to the jury to find from the evidence whether or not Mr. Powers was the person intended.

A large number of witnesses were called upon both sides to prove Mr. Powers' reputation for truth and chastity. The jury were told to consider this only in case they came to the question of damages.

It was contended by the plaintiff that the allegation that "clients were cheated in ways so deft," &c., (as stated in the article of January 30 upon which the second count was based) could only be justified by proof of several acts of fraud; while the defendant claimed that a single act proved would be a justification for the publication of that charge. The judge told the jury the language was susceptible of meaning several acts—a course of dealings—but left it to them to determine what it meant.

To the several rulings, adverse to his views above mentioned, and to other rulings indicated in the opinion, the defendant excepted, the plaintiff having obtained a verdict for $5,508, which the defendant moved to have set aside as against evidence and because the damages were excessive.

The court inquired if counsel had any requests to make for instructions, and the defendant presented eleven which he desired to have given to the jury. The first was: "That, inasmuch as the libel set out in the first count is not alleged to have been published of and concerning the plaintiff in his capacity as attorney and counsellor at law, or as collector of customs, or as a married man, but only of and concerning him individually, he can recover damages only in that one capacity." To this the judge replied that, as the trial and testimony had proceeded as if the writ were in due form, he should allow an amendment by inserting the words "of and concerning the plaintiff in his capacity as an attorney and counsellor at law, or as a collector of customs."

Joseph Baker for the defendant.

A. G. Jewett, C. M. Herrin and *L. Powers* for the plaintiff.

APPLETON, C. J. This is an action for a libel in which the plaintiff obtained a verdict. The case comes before the court upon exceptions to the ruling of the justice presiding, and upon a motion for a new trial.

Numerous exceptions have been alleged which we propose to examine and discuss.

I. The first count relates to the plaintiff as an individual. The libellous article upon which it is based does not refer to him as an attorney or as a collector of customs. There is no imputation of professional or official misconduct. With the insertion of the proposed amendment to which exception was taken, the count still refers to a libel imputing personal, and not professional or official misbehavior. To maintain an action on the ground that the libel was injurious to the plaintiff in his professional or official character, it must relate to such character and must impute misconduct therein. If the publication is libellous in itself an averment of the plaintiff's professional or official character is not a ground of demurrer, though the libel cannot apply to such character. *Gage* v. *Robinson*, 12 Ohio, 250. With the amendment, the plaintiff could recover for damages only so far as the libel refers to him as an individual. Even though he had not been an attorney or collector of customs, he could have recovered for the individual damages though describing him as such when it was not the fact. *Lewis* v. *Walton*, 3 B. & C., 138.

In relation to the first count, in which the amendment was made, the counsel for the defendant requested the court to instruct the jury "that inasmuch as the libel set out in the first count, is not alleged to have been published of and concerning the plaintiff in his capacity as attorney and counsellor at law, or as collector of customs, or as a married man, but only of and concerning him individually, he can recover damages only in that one capacity."

The presiding judge had already instructed the jury "to take into consideration and give damages for the injury necessarily inflicted upon the character of the plaintiff, if any, under the count which is set forth on the affidavit, which pertains to private character, for any injury inflicted upon his private character."

That there may be no mistake in this respect, when referring to the second count, he instructs them that they may give damage under that "for any injury to his character as a professional man." The instructions as to the first count, after the amendment, remained without change or modification. They were to give damages "for any injury inflicted upon his (plaintiff's) private character." It was not necessary that they should be repeated. This instruction would have done no good. Nor indeed was it requested. The instructions as given were the guide and rule for the jury in relation to the first count and they were left unchanged.

As no instructions had been given authorizing the jury to give damages on account of the plaintiff's relations as a married man, there was no need of negativing his right to recover because of such relations. The grounds upon which damages could be given were expressly stated, and this statement excluded what was not so stated. The remark however of the justice presiding, impliedly affirmed, if affirmance was required, the proposition of the counsel for the defence.

The amendment could have done no injury, as the basis of damages was not thereby enlarged. As the jury were not authorized to increase the damages in consequence of the amendment, we cannot presume they did so.

In *Barnes* v. *Trundy*, 31 Maine, 321, it was held that no action could be maintained for words spoken of a person with reference to his occupation, unless the declaration contained a distinct averment that they were spoken of and concerning him and of and concerning his occupation. But the first count contains no averment whatever, concerning the occupation of the plaintiff, nor were the jury in any way authorized to consider his occupation in assessing damages for the libel set forth in the first count, but were specially directed not to do so.

II. The plaintiff to make out his case read the libellous matter on account of which he claimed to recover. The defendant claimed that he should read the whole article. The court did not

require him so to do, but said the defendant might put in the whole libel which he did.

The plaintiff put in what constituted the grievance of which he complained. His case was then made out. There was nothing more for him to do if the words were libellous. The defendant read the rest of the article which contained the libellous matter. The whole was before the jury. If the rest of the article mitigated, modified or destroyed the injurious effects of what the plaintiff had read, the defendant had the full benefit of this.

The counsel for the defendant in support of his exception to the judge's not requiring the plaintiff to read the whole article has referred to 2 Greenl. on Evid., § 423, where it is said: "if the libel is contained in a letter or a newspaper, the whole writing or paper is admissible in evidence." But the whole paper was received and read in evidence. The citation is far from supporting the doctrine contended for that the court as matter of law was required to compel the plaintiff to read more than was necessary to make out his case. The case of *Cooke* v. *Hughes*, R. & M., 112, is cited by Greenleaf in support of the text. Upon recurring to that case, it will be found that the ruling of the justice presiding was precisely in accordance with the law laid down. The plaintiff had read all that he deemed necessary. The defendant's counsel claimed that he had a right to have the whole article read, but this was strenuously resisted by the counsel for the plaintiff. Abbott, C. J., says: "I do not recollect an instance of an action in which the defendant has been prevented from reading the whole of the publication complained of. . . . I have always understood the defendant has a right to have the whole publication read." It was so read.

III. The plaintiff had called one Clark to prove publication by the defendant. In his direct examination he had inquired as to what the defendant said when the libel was handed him.

The defendant being called, the question was put by his counsel, as to what was said on that occasion about the publication. To this inquiry the plaintiff's counsel objected, but upon the sugges-

tion of the defendant's counsel that it related to the conversation with Clark, the court permitted it to be answered, remarking at the same time that it was only admissible to contradict him.

The objection of the plaintiff's counsel to the question was overruled at the instance of the defendant's counsel. It nowhere appears that the counsel for the defendant desired it to be admitted generally or objected to the limitation imposed upon the evidence by the court. The questions proposed by him had been answered notwithstanding the objections interposed, and if he desired any qualification of the limited admission, which he deemed important, he should have so requested.

IV. The defendant was asked by his counsel if he had any ill will or malice toward the plaintiff, to which he replied that he had not.

He was then asked if he had heard similar reports in relation to the plaintiff to those contained in the affidavit of Annie G. Cornelison, and whether that fact was an additional inducement to publish the article in question.

Both these inquiries were excluded and properly excluded. The first involved the admission of hearsay evidence, and was inadmissible. The second assumed the first as answered, and is based upon the assumption of the answer given; but as the first inquiry was not permissible upon legal principles the second must abide the same result.

The object of the inquiry was to rebut malice, but the presumption of malice arising from the publication of a charge, which if false is libellous, is not rebutted by proof that the publisher had reason to suspect and believe the truth of the charges made. *Usher* v. *Severance*, 20 Maine, 9. A publication in a newspaper, if false, is actionable, though the editor believed it to be true and acted in good faith; and the law will imply malice from the publication. *Smart* v. *Blanchard*, 42 N. H., 137. In *Jellison* v. *Goodwin*, 43 Maine, 287, it was held that legal malice was not inconsistent necessarily with an honest purpose.

The words being libellous and not privileged and malice being an inference of law, the evidence was not admissible to disprove

malice in law, and malice in fact had been fully and absolutely negatived and disproved so far as that could be done by the testimony of the defendant.

Indeed, evidence of general reports that the defendant is guilty of the imputed offence is inadmissible, as well in mitigation as in justification. *Mapes* v. *Weeks*, 4 Wend., 659.

V. The libellous article was written by George Cary, a brother of the defendant. He was a witness in the case, and this question was proposed to him: "State whether you had any information upon which you relied to base the several charges." The answer to this question was excluded, except so far as the witness had personal knowledge of facts to which he could testify.

This question pre-supposes hearsay, and the inferences drawn by the witness from such hearsay and is obviously inadmissible. Whether there was or was not malice on the part of the witness is immaterial. The defendant was in no way responsible for the acts of his brother, or for his state of mind. He was only liable for his own acts.

VI. The first count is based upon the publication of an affidavit made by Annie G. Cornelison, whose deposition was read in the defence.

After testifying to the truth of the affidavit, this question upon the direct examination was proposed: "Please state whether you complained to Mrs. Page and others about what Powers said and did to you, and if so, to whom did you complain, and how soon after you had seen him at various times?"

Answer. "I did so complain to Mrs. Page and to Miss Esther Sutherland, and Katie Carpenter and Jennie Donnel were also present, immediately after I came into the house on the Saturday night. At other times I spoke of them soon after."

This question and answer was excluded, and rightly so. "We think it is very clear," observes Hubbard, J., in *Deshon* v. *Merchants' Insurance Company*, 11 Metc., 199, " that a witness cannot be allowed to state, on the direct examination, that he communicated to third persons, at prior times, the same or other particular facts, with a view of strengthening his testimony."

It is true that at a subsequent stage of the trial, this question and answer was received. It had been excluded, notwithstanding the defendant's objection. Its subsequent reception was at his instance, or in accordance with his views. But that could not enlarge his rights. It only removed one ground of exception which otherwise he might have had.

In this stage of the case, the defendant offered to show by Mrs. Page that on the Saturday evening in question Annie made a complaint to her and others of having been insulted, and that she appeared excited and angry, which was excluded.

This evidence was properly excluded. The affidavit and the answers in the deposition of the witness were under oath—under the highest sanction for truth known to the law. It is no corroboration to prove that when free from those sanctions she had made similar statements. It is an attempt to corroborate higher and more reliable testimony by an inferior description of proof—by what is mere hearsay. The case of *Com.* v. *Wilson*, 1 Gray, 337, applies only to a case where an attempt was made to impeach a witness on cross-examination and is entirely inapplicable to the case at bar.

Proof that the witness was excited or angry when she made certain statements was excluded. The statements being excluded, the appearance of the witness became obviously immaterial, for the cause of her excitement and anger was unknown. Besides, the appearance and manner of a witness—that she is excited and angry—when certain statements are made, are not evidentiary of the truth of such statements, unless excitement and anger are to be deemed as circumstances corroborative of what is said in those frames of mind.

VII. The plaintiff introduced the declarations of Annie G. Cornelison, contradicting what was stated in her affidavit, and that she did not know what was contained therein.

The defendant offered to prove her declarations at the time in accordance with her affidavit, and that the affidavit was read to her and assented to by her as true. This evidence was excluded.

It is well settled that a witness who is impeached cannot be corroborated by proof that at other times he has made statements in accordance with his present testimony. The discredit arising from contradictory statements still remains. *Com.* v. *Jenkins*, 10 Gray, 485.

VIII. The defendant desired the court to instruct the jury "that inasmuch as the plaintiff is not named, or in any way designated in the libel set out in the second count, nor in any part of the article read to the jury from which said count is extracted, and no evidence whatever has been introduced to show that he was meant by the article, the plaintiff cannot recover under this count." The court declined so to instruct them, but submitted it as a matter of fact for the determination of the jury, whether the plaintiff was "the person intended, alluded to and described in the article" of the 30th of January, directing them to settle that question from the facts and circumstances submitted in the evidence before them.

The requested instruction was properly refused, because it withdrew the consideration of the evidence from the jury and required the court to assume a fact which it was for them to determine.

The publication of the articles was not denied. That the affidavit referred to the plaintiff was not questioned. Indeed, it alludes to him by name. The declaration contains special averments connecting the publication with the plaintiff and showing that it referred to him. The justification and the specifications of facts upon which that justification rests refer to the plaintiff. Indeed, the whole course of the testimony unmistakably shows such to be the fact. Whether the plaintiff was the person intended in the libel was to be determined by the jury. *Van Vechten* v. *Hopkins*, 5 Johns., 211. It was submitted to their decision as it should have been.

IX. The judge instructed the jury that "upon the question whether the alleged libels are true or false, there was not to be taken into consideration on the one side or the other any testi-

mony put into the case bearing upon the general character of the plaintiff. That evidence is to have a bearing only upon the question of the amount of damages recoverable, if any are."

These instructions are strictly in accordance with the law as laid down in *Stone* v. *Varney*, 7 Metc., 93, where a justification is pleaded. "This evidence," remarks Dewey, J., "is to be applied solely to the question of damages; and it would be the duty of the court to advise the jury that it could not be used to sustain the justification, but was properly introduced because both questions were before them, and if the justification failed upon the evidence applicable thereto, they would consider the evidence of the character of the plaintiff, in assessing damages for the injury occasioned by the defamatory words; but for other purposes, the evidence would be irrelevant."

X. The article charged as libellous contained this sentence: "Riches to him simply consist in getting the money of others, and not the rendering of an equivalent for services performed. So the shortest way was the best. Clients have been cheated in ways so deft and adroit as to elicit from distinguished brother lawyers while commenting upon them the praiseworthy title of piracy."

The question was raised whether the proof of any one of the twelve specifications under this charge would be sufficient to establish a complete justification of its truth.

As to this the court instructed the jury "as matter of law, that the language of that charge is capable of the meaning that more than one instance of cheating was intended by it; and that they were authorized to find from the evidence, whether such was the fact or not; that if they found that it was intended by the defendant to charge more than one instance of committing fraud, then not less than two instances should be proved to make out a justification under such charge, and that proof of two instances would be sufficient justification; that if only one act of fraud was charged, only one need be proved, to make out the justification; that if more than one fraudulent transaction was charged against the plaintiff in this libellous article, and one only was proved, while such proof would

not amount to a complete justification of the charge, it would go in extenuation of the liability of the defendant for this libellous matter, and in mitigation of damages therefor."

If the meaning of the language referred to in the charge is to be determined by the court, we think that upon a fair construction it refers to more than one instance of professional delinquency, and therefore that to make a complete justification the defendant was bound to establish two of his specified cases of professional misconduct. The charge in this view of the law is therefore favorable to the defendant, inasmuch as they were authorized, if they thought such the meaning of the words, to acquit the defendant so far as relates to this charge, if only one instance was proved. In other words, they might acquit with one instance only proved, when upon the true construction two would be necessary for a complete justification. The charge if erroneous was so to the injury of the plaintiff.

But the charge as given was in strict accordance with the authorities. The meaning of the defendant is a matter for the jury. It is equally so, whether the words are ambiguous or not. If ambiguous, the ambiguity was submitted to the jury, who were to determine what was the meaning of the words used. In *Street* v. *Bragg*, 10 A. & E., 59 E. C. L., 906, the objection here taken was interposed. "A question has been raised," remarks Wilde, C. J., in delivering his opinion "whether it was competent for the jury to find the truth of the innuendo; and it is said that the matter should not have been left to the jury. Undoubtedly it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury whether the publication has the meaning so ascribed to it. I think the letter was capable of the meaning ascribed to it." So in the case before us. The words were capable of the meaning ascribed to them by the plaintiff. Whether the meaning so ascribed was the true meaning, and if not, what was the meaning, was precisely what was submitted to the jury.

XI. The instruction in relation to seizures by the plaintiff was entirely favorable to the defendant. The court instructed the jury that the article charged an impossible offence; that if the plaintiff through mistake of the law attempted an impossible fraud, proof of such attempt would be a justification; and that if there was no justification made out the damages would be only such as would arise from a charge of an offence, which on its face could not possibly have been committed. The instructions on this point could not have harmed the defendant.

An examination of the exceptions satisfies us that the defendant has no just ground of complaint on account of the rulings of the justice presiding at the trial.

The defendant moves to set aside the verdict on the ground of excessive damages. The charges made were grave, affecting the personal, professional and official character of the plaintiff. They concerned him socially, politically and in all the relations of life. The defendant justified the charges made in some sixteen specifications of misconduct and failed in his justification. A justification does not disprove malice, but rather confirms it. The defendant is a gentleman of respectability and wealth. The charges were sent broadcast over the community. Coming from such a source, it could hardly be otherwise than that they should injure the reputation and wound the feelings of the one against whom they were made. There were numerous witnesses whom the jury saw and heard. The trial occupied much time. The case was elaborately and ably argued. The charge was clear, correct, impartial and sufficiently favorable to the defendant. The verdict is large. The charges were of conduct, which if true were utterly destructive of character. The question of damages is one which the law submits to the jury. No imputation is made upon their integrity of action. Parties litigant must bow to their decision as to that of the ultimate tribunal for the determination of facts. *Exceptions and motion overruled.*

Cutting, Walton, Barrows, Danforth and Peters, JJ., concurred.

PARKER P. BURLEIGH, in equity,
vs.
RUSSELL H. WHITE, administrator, *de bonis non, et als.*

Resulting trust—how established.

Under R. S., c. 82, § 87, the plaintiff in a bill in equity, prosecuted against the administrator and heirs of a deceased person, is precluded from testifying, except in reference to such facts as are testified to by the administrator or heirs, or in reference to such books or other memoranda of the deceased as they put in.

To establish a resulting trust by parol the proof must be full, clear and convincing, and must show a payment made at the time of the purchase by or in behalf of the party asserting the existence of such trust for some definite portion of the lands purchased.

Such payment may be made by a loan of cash or credit by the party taking the title to the party claiming the trust to the amount of such latter party's share of the purchase money, in case he then and there becomes absolutely responsible to the lender for the amount.

In this case there is satisfactory proof in the legal testimony and exhibits of such a loan, and the lands purchased are subject to a resulting trust in favor of the plaintiff to the amount of one-half of the lands and their net proceeds upon proof of payment of all sums for which the trustee had an equitable lien thereon.

When a voluntary conveyance is made for an illegal purpose, e. g., to defraud or delay creditors, no trust arises which the fraudulent grantor or his heirs can enforce in equity.

But where the only evidence of such fraudulent design is that the party was in embarassed circumstances; and there were just debts to be secured and legitimate ends to be answered by such conveyance, the fraudulent intent will not be inferred.

The plaintiff at and before the time of the purchase was agent for the owners of the lands, having the care and management thereof for them. But the sale was negotiated with the owners personally; a fair price was paid, and there was no evidence of any unfair practice on the part of the plaintiff to procure the sale; the owners never complained, or sought to avoid the sale; *held*, that under these circumstances the plaintiff was not precluded from asserting a resulting trust in his own favor as to an undivided half of the lands purchased.

BILL IN EQUITY to obtain account and conveyance of one-half of certain lands, the legal title to which was in the late James White, but in which the complainant claimed an equitable interest under the circumstances sufficiently stated in the opinion.

Albert W. Paine and *Madigan & Donworth* for the complainant.

Joseph Granger, *L. Powers* and *C. M. Herrin* for the respondents.

BARROWS, J. The complainant claims that certain valuable tracts of wild land situated in Amity, Deerfield and Littleton, and conveyed by different parties in 1859, 1868 and 1869 to the late James White of Belfast, deceased, (of whose estate his son Russell H. White is administrator *de bonis non*, and the other respondents are heirs at law) were purchased upon the joint account and for the equal benefit of himself and the said White, and that said White at the time of his death held one-half of the unsold portions of said lands in trust for the complainant together with a considerable balance in cash and notes, the proceeds of partial sales made and permits granted.

The trust asserted is a resulting trust which the complainant contends arises under an agreement entered into and subsequently acted on by and between himself and said White prior to the first purchase and substantially renewed as to each of the succeeding purchases, the essential elements of which as stated by the complainant were "that the land should be purchased for the equal benefit of both parties, that said White should make advance of whatever cash might be necessary for the first payment, the same to be charged against the property purchased, to be regarded as a loan to be repaid out of the proceeds of the land, and that all subsequent and further payments should be made from the avails of the land purchased, the title of the land for convenience of doing the business and for the security of said White to be taken in said White's name, but in trust notwithstanding for the equal benefit of both, the said Burleigh assuming on his part and agreeing as an offset and in consideration of said loan to oversee, manage and control said property, grant permits, make sales, collect and pay over the proceeds to said White for the payment of the purchase money and interest and other expenditures."

The defendants deny the existence of any such agreement between the plaintiff and the intestate and contend that, without the plaintiff's own deposition, which they insist is not admissible, the case lacks that full, clear and unambiguous proof which is required to establish the existence of such a trust—that evidence of the declarations of White is to be carefully scrutinized and cautiously received—that the alleged agreement is void by the statute of frauds, not being in writing and signed by White—and that no payment having been made by the plaintiff at the time of the purchase, nor any binding agreement to take and pay for his share of the lands, no trust can arise by implication of law, because such resulting trust must arise, if at all, at the time of the purchase by reason of payments made at that time by the *cestui que trust* for some aliquot part of the land—that the plaintiff was the agent of the grantors of these lands and cannot be permitted to assert an interest in the purchase of them, because of his confidential relations with the prior owners; and finally that it appears in plaintiff's deposition that at the time of the first of these purchases he was considerably involved in debt and that that was the reason that the purchase was made in White's name, and therefore the law will not lend its aid to enforce a trust thus created with a fraudulent design.

The testimony and exhibits laid before us are voluminous.

The case has been ably and thoroughly argued for both parties with scrupulous attention to the minute details of the testimony.

A statement of our conclusions upon the principal questions of law and fact presented without particular allusion to the manifold items of evidence, seems to be all that can now be useful or necessary.

I. Although the plaintiff's claim was asserted in the life time of James White, and White's attention was directly and urgently called to it by the plaintiff, as shown by the correspondence between them, this suit is prosecuted against his administrator and heirs.

We are clear that the plaintiff is precluded by R. S., c. 82, § 87,

from testifying except in reference to such facts as are testified to by the administrator or heirs, or in reference to such books or other memoranda of the deceased as they put in. *Trowbridge* v. *Holden*, 58 Maine, 117.

Touching this matter, the rule is the same at law and in equity; the amendment in Public Laws of 1873, c. 145, is not permitted to affect cases then pending.

The result is that so far as it tends to establish a case in his own behalf, the deposition of the plaintiff becomes comparatively unimportant. Little if anything contained in it can be regarded as competent evidence under either of the exceptions stated in § 87.

Nor is this conclusion one which we would even seek to avoid. The doubt expressed by chancellor Kent in *Boyd* v. *McLean*, 1 Johns. Ch., 582, whether parol evidence ever ought to have been admitted to establish a resulting trust, in view of the danger and uncertainty of this mode of proof and its tendency to induce perjury and consequent insecurity of paper and record titles, weighs heavily against the admission of the testimony of a party to the suit, seeking to establish such trust when the testimony of the party originally adversely concerned, cannot be had because of his death, and his representatives and heirs are thus without the means of meeting a claim, which may be purely fictitious, by any direct evidence.

We regard the limitations imposed by our legislature upon the right of parties to testify in suits where the heirs and representatives of deceased persons are parties, as eminently wise and just. It is better that a negligent man should occasionally suffer a loss which he has in part at least deserved by his carelessness, than to subject the property of all to the machinations of the numerous horde of unscrupulous adventurers in litigation at such an evident disadvantage.

II. Nor are we inclined to relax in any degree the rule adverted to in most of the cases that in order to establish a resulting trust by parol evidence, the proof must be full, clear and convincing.

Obviously a claim so inconsistent with the tenor and ordinary effect of deeds conveying real estate ought not to be allowed except upon proof sufficient to satisfy a reasonable mind of its validity. The rule was early recognized in this State and so far as we know has been rigidly adhered to. *Buck* v. *Pike*, 11 Maine, 9; *Baker* v. *Vining*, 30 Maine, 121.

III. In the case before us, setting aside the plaintiff's deposition, upon a careful consideration of the legitimate evidence, we feel constrained to say that this satisfactory proof is found in the acts and correspondence of the original parties—in the direct and distinct admissions of James White to J. V. Putnam as to the purchase of the Amity lands under circumstances and at times when there seems little chance of mistake or mis-recollection—in the numerous mutual accounts partly in the handwriting of James White, and all found in his possession and among his papers, which are not intelligible except upon the theory of a mutual expectation of joint and equal payments—in the frequent expressions in the letters of White which are equally unintelligible except upon that theory, and finally in the dilatory and faint denial (if it can be called a denial) of the trust as to the lands in Amity when the plaintiff called upon him to sign a written statement of the contract, a denial which in itself implies an admission so far as regards the Deerfield and Littleton lands, which appear to have been managed in the matter of keeping the accounts in the same manner as the earlier purchase in Amity, and very differently from that which is indicated by the punctual annual settlements in respect to the lands in Linneus for which the plaintiff acted as Mr. White's agent.

We are satisfied that the agreement respecting the purchase of the several tracts was in substance as alleged in the plaintiff's bill, and notwithstanding the ingenious effort of defendants' counsel to show that there was no loan of cash or credit from White to Burleigh, which Burleigh was bound to repay, we think the contrary is manifest, and that the case comes within the principles laid down in *Buck* v. *Pike*, *ubi supra*; *Dudley* v. *Bachelder*, 53

Maine, 407; *Boyd* v. *McLean*, 1 Johns. Ch., 582; *Jackson* v. *Stevens*, 108 Mass., 94.

No promise in writing is necessary to bind a man to repay a loan, and the mode in which that loan is invested with the consent of the borrower would not affect his liability to make good the amount to the lender.

Nor is it material, as we see in *Buck* v. *Pike*, that the loan should be in cash. A loan of credit may be equivalent.

We cannot doubt that under the original agreement between Burleigh and James White, the former became at once responsible to the latter for his half of the purchase money of the lands as advanced for him by White, who also had as security therefor the title to Burleigh's half of the lands, and a personal claim against Burleigh for the amount thus advanced in his behalf and for his benefit, as valid (though not so readily susceptible of proof) as if Burleigh had given him on the spot his promissory notes for the same.

IV. We think the whole case shows that it was for the legitimate purpose of securing White for his advance of Burleigh's half of the purchase money, and to facilitate the transaction of the prospective business in relation to the lands, that the title to the whole was taken in White's name, and not, as is now contended by defendants' counsel, with the unlawful design of defrauding Burleigh's creditors.

That no trust which he or his heirs can enforce in equity will result to the grantor in a voluntary conveyance made for any illegal purpose, (as assuredly it would be, if made for the purpose of defrauding or delaying creditors) is doubtless true. Perry on Trusts, § 165; and numerous cases there cited.

But a fraudulent design is not to be presumed; it must be proved. We find no proof in the case that any creditors of the plaintiff were defrauded or delayed. The inference that such was the intention rests upon the admission of the plaintiff in his deposition, that at the time of the Amity purchase he "was considerably involved in debt, and for that reason we agreed that the purchase should be made in his name."

This is not equivalent to an admission of any fraudulent design; nor do we think that such design is necessarily or justly inferable from the statement.

The fact that Burleigh was in embarrassed circumstances might be a very good and perfectly legitimate reason why James White, who was advancing as a loan to Burleigh one-half the amount of the purchase money, should insist upon having all the security which the title to Burleigh's half of the land would give him, in addition to Burleigh's personal liability, and his promise of personal supervision; and it might also be a good reason why Burleigh should accede to such claim for security, without any fraudulent design whatever, on the part of either of the parties to the arrangement.

When the transaction can be accounted for as well upon the supposition of fair dealing and honest intent, as of bad faith and illegal design, the presumption will always be that the parties were actuated by legitimate motives. We find no substantial ground for imputing either to James White or to the plaintiff, the fraudulent purpose suggested in argument.

V. It is insisted on the part of the defendants, that inasmuch as Burleigh was the agent of the previous owners of the lands, and had the care and management of them for said owners at the time of the sale, he could not in right and equity become the purchaser of an interest in them. If he had prostituted the fiduciary relation in which he stood to the former proprietors to procure a sale upon terms disadvantageous to them or to gain any undue advantage to himself and White in the trade, this would be indeed a grave objection.

But all the negotiations for the sale were conducted by those owners personally.

There is nothing to indicate that the sales were not made upon perfectly fair terms which were justly acceptable to the proprietors. It would be for them, if anybody, to raise the objection. In the mouths of those who represent James White, who was perfectly cognizant of the fact, it has little force.

The sellers have never complained, nor sought to avoid the sale. Indeed, there is much in the case to show that they had no cause

for complaint, and that whatever profit has grown out of the purchase has been mainly owing to the skill, energy and time of the plaintiff, gratuitously bestowed upon the subsequent management of the property for the joint benefit of himself and James White. Under these circumstances we cannot hold that the fact that Burleigh had acted as an agent for the previous owners in respect to these lands, constitutes an insuperable obstacle to the maintenance of this bill.

The case is not free from difficulty, and illustrates well the dangers that beset the ownership of property in this indirect manner. At more than one point it is obvious that it approaches "the dead line," beyond which the plaintiff would have been without remedy.

But upon the whole we are satisfied that justice requires us to declare the property subject to the resulting trust claimed in the bill, and we think it may be done without violating the familiar and salutary principles in equity hereinbefore adverted to.

The plaintiff claims, and the accounts presented indicate that a sufficient sum had accrued from stumpage and partial sales of the land to pay the plaintiff's indebtedness to James White, arising from the loan by White, of plaintiff's half of the purchase money. But we find in the statement prepared by the plaintiff for White's signature (exhibit 57 G^2, C. F. W.), and in some of the accounts, that which leads us to suppose that there may have been other indebtedness from Burleigh to White, to secure which it was understood between them that White was to have a lien on the lands and their proceeds.

In fact, to guard against any mistake as to the exact condition of the accounts, the plaintiff, in his bill, tenders payment of any and all sums which may be due from him, and chargeable against the half of the lands and their proceeds which he claims.

A master must be appointed to ascertain the true condition of their mutual demands before a final decree can be entered up, unless the parties can agree upon their adjustment.

Bill sustained. Estate declared subject to the resulting trust claimed. Master to be appointed.

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

EBEN S. COE *vs.* COUNTY COMMISSIONERS.

Repealing statute. Construction of.

Public laws of 1874, chapter 171, purported to repeal R. S., c. 18, § 35, but was itself repealed by chapter 263 of the same session: *held*, that § 35 remained as if there has been no legislation with relation to it.

ON EXCEPTIONS.

Upon the petition of Edward Wiggin and others, the county commissioners located a road running from the plantation of Seven Islands to the west line of the State, in Aroostook county; from which location the appellants above named appealed, and the appeal was heard and tried at the February term, 1875, under the provisions of R. S., c. 18, § 35. The respondents at the hearing made a motion in writing to dismiss the appeal on the ground that said section was repealed; which motion was overruled by the presiding judge, and the respondents excepted.

The legislative action which was claimed to have repealed R. S., c. 18, § 35, and the positions taken in support of the exceptions appear by the opinion.

J. C. Madigan for plaintiff.

Robinson & Hutchinson and *J. P. Donworth* for the respondents.

Unless you concede to chapter 171 an existence for an instant, there was nothing for chapter 263 to operate upon, or repeal.

DANFORTH, J. This was an appeal from a decision of the county commissioners for Aroostook county, locating a way in an unincorporated place. The appeal is claimed under the provisions of R. S., c. 18, § 35, which section fully authorizes it if in force.

It is however claimed that it was not in force but repealed by Public Laws of 1874, chapter 171. This last act would have that effect but for the passage by the same legislature of chapter 263, which in terms repeals chapter 171.

But it is further claimed that as both these acts would take

effect at the same time, the first must have had an efficient existence, though but for an instant, and during that instant would as effectually repeal the thirty-fifth section as though its life had been longer, and this latter section would not be revived by chapter 263. It may be conceded that if section 35 was repealed for however short a time it would not be revived by simply annulling the repealing act. But it is difficult to see how an act destroyed at the very moment of its coming into existence can have any force whatever.

But in this case we have a more sure foundation upon which to rest our opinion. In construing a law the intention of the legislature as ascertained from the language used and the purpose of the act must prevail. Both the acts in question were passed by the same legislature; chapter 171 was the earliest in point of time; chapter 263 was subsequent in date, but passed before the first had taken effect. These facts appear in the laws themselves and are a part of them. The only possible inference to be drawn is that the legislature intended that the first act should have no force whatever; that it should never come into life for any purpose. It therefore leaves R. S., c. 18, § 35 in full force, and the ruling of the court was right. *Exceptions overruled.*

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

JOHN B. FOURNIER *vs.* SOLOMON CYR.

Bond. Validity of.

It is not necessary that the names of the obligors should appear in the body of a bond; it is sufficient if it be signed by them; and the addition of the words "principal" and "surety" to their respective signatures indicates the capacity in which it is executed.

Nor is it material that the signatures and seals are between the penal part of the bond and its condition.

Fournier *v.* Cyr.

A bond is valid though there is no date, or an erroneous one.

If a constable's bond is good at the time a writ is served by him he cannot be made a trespasser by any subsequent avoidance of his bond through the unauthorized alteration of it by another.

This action was brought against the defendant for an alleged trespass in assuming to act as constable in taking property of the plaintiff upon a writ against him, without having given the bond required by law. The constable had prepared his bond with blank spaces for his name and those of his sureties. He and they signed and sealed the instrument between the penalty and the condition, and did not insert their names in the body of it. In this condition it was handed to the selectmen for approval. The selectmen, through ignorance or inadvertence, intending to approve it, wrote their names in the spaces left for those of the obligors. While the bond was in this condition the writ in question was served. Subsequently the mistake was discovered; the names of the selectmen were erased and those of the obligors substituted, a formal approval endorsed upon the bond and signed: *held*, that the defendant was not liable in the action because the bond was good when the writ was served and was not invalidated by the subsequent correction of mistakes; and even had it thus been avoided, this would not have made the officer a trespasser *ab initio*.

On exceptions.

Debt to recover the statute penalty provided by R. S., c. 80, § 43, for serving as constable a writ of replevin in favor of Olive Cyr against John B. Fournier, without having given the bond required by that section. The action was referred to Hon. H. R. Downes who made an alternative award, as the court should find the law upon the facts stated.

Before serving the replevin writ Mr. Cyr had his bond prepared, leaving blank spaces in the body of it for the names of his sureties and the date of its execution. The obligors executed it by signing their names and affixing their seals between the penalty and the condition, and did not fill the blanks. The defendant then took it immediately for approval to one of the selectmen, who put his name in one of the spaces left for the name of a surety. The constable then took it to another selectman to be approved, and he being unable to write procured a woman to insert his name in the other blank left for a surety's name; both selectmen intending to signify their approval of the bond. In this condition the bond remained with one of the selectmen till after service of the

replevin writ aforesaid, when, some question arising as to the validity of the service, P. C. Keegan, Esq., erased the selectmen's names, inserted those of the sureties and the date, affixed a stamp and wrote an approval of the bond, which the selectmen signed May 10, 1870, after the service of the replevin writ.

The presiding justice ordered judgment for the defendant upon this report and the plaintiff excepted.

C. M. Herrin and *Edmund Madigan* for the plaintiff.

This bond only took effect upon delivery. When it finally went out of the constable's hands, it bore the name of a selectman as surety, but was not approved. It is immaterial where a man signs an instrument, and Mr. Hubert put his name in as surety in the body of the instrument. If it was necessary that the signature of the obligors should be at the bottom, then the bond was incomplete without Mr. Hubert's there, as the paper declared him to be a party. *Bean* v. *Parker*, 17 Mass., 603. And none of the persons mentioned did sign at the bottom.

This is not a suit upon the bond; but one in which it becomes necessary for the defendant to show a completed instrument before he acted.

It was a condition precedent to official action by him, that he should procure an approval of his bond by the selectmen; and it is not enough to show that he intended to obtain and each intended to give it, if they did not in fact accomplish it.

It required the joint official assent of the selectmen as a board, and not their individual signatures given at different times and places. *King* v. *Winwick*, 8 D. & E., 454; *Elliot* v. *Abbot*, 12 N. H., 549; *Edgerly* v. *Emerson*, 23 N. H., 555; *Butler* v. *Washburn*, 25 N. H., 251; Dillon on Mun. Corp., §§ 221, 222; 7 N. H., 304; *Grindley* v. *Barker*, 1 B. & P., 236; Baltimore Turnpike, 5 Binney, 481; *Crofoot* v. *Allen*, 2 Wend., 494; *Damon* v. *Granby*, 2 Pick, 345.

P. C. Keegan for the defendant.

APPLETON, C. J. This is an action of debt to recover the statute penalty for serving a writ as constable without having given bond. The defendant justifies as constable of Madawaska, and avers the giving of the requisite bond.

The defendant gave a bond as constable, the validity of which constitutes the principal question in controversy. The action was referred and the referee has made a special report of the facts upon which the objections to the bond are based.

The bond given by the defendant as constable was made out leaving the names of the sureties blank in the body of the bond and also the day of the month of its execution, and it was signed by the principal and sureties while in that condition.

It is not necessary that the names of the obligor and his sureties should appear in the bond. The principal signs and adds principal to his name and the sureties sign specifically as such. The bond being signed and sealed by the defendant and his sureties they are bound thereby. *Pequawkett Bridge* v. *Mathes*, 7 N. H., 230; *Smith* v. *Crooker*, 5 Mass., 538. "The party executing the bond," observes Parsons, C. J., "knowing there are blanks in it, to be filled by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." Though the name of a party is not mentioned in the bond, yet if he sign and seal it, he will be bound. *Ex parte* Fulton, 7 Cow., 485; *Williams* v. *Greer*, 4 Hayw., 239.

The law is well settled, that a bond takes effect from its delivery. The day of delivery may be shown whenever it becomes material. The date of a bond is not essential. It will be valid though there is no date or the date is erroneous. *Pierce* v. *Richardson*, 37 N. H., 306.

The bond was signed and sealed before the condition and immediately after the penal part, but that does not affect its validity. Where an obligor signs his name and affixes his seal in the space between the penal part of the bond and the condition thereof, the condition is as much a part of the instrument as if the signature were at the foot of it. *Reed* v. *Drake*, 7 Wend., 345.

At the time of the service of the writ against the plaintiff upon which the attachment was made which constitutes the alleged trespass, the bond was in the hands of the selectmen, and the objection is taken that it had not been duly approved. The defendant had done his duty. He had furnished a bond with sufficient sureties and had delivered it to one of the selectmen. The bond was legally binding upon the parties thereto. The constable is not responsible for the performance by the selectmen of the duties required of them. As the constable does not incur the penalty for serving the writ against the provisions of the statute, we think the service must be regarded as legal in accordance with the case of *Eustis* v. *Kidder*, 26 Maine, 97, which was re-affirmed in *Rounds* v. *Mansfield*, 38 Maine, 586.

The mistake of the selectmen in erroneously placing their signatures of approval in the wrong place cannot make the defendant a trespasser, without fault or omission of duty on his part. The erasure of a signature, placed where it should not have been, cannot be regarded as a fraudulent alteration.

The insertion of the names of the principal and his sureties in the blanks for that purpose, if made by the direction and authority of the selectmen was in strict accordance with the understanding of the parties when the bond was executed. *Smith* v. *Crocker*, 5 Mass., 538.

If the bond was a valid one, when the defendant served the writ upon which the attachment was made, he cannot be made a trespasser by what occurred subsequently.

Exceptions overruled.

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

CHARLES F. COLLINS *vs.* CHRISTOPHER C. BRADBURY.

Promissory note—when negotiable. Practice.

A note in the ordinary form, payable to order at a definite time, for a specified sum in money, is negotiable, notwithstanding the addition of the words, "said promise made for a colt, this day taken; said colt holden for the payment of said amount."

A nonsuit will not be ordered for a slight verbal variance between the note in suit and the declaration, when "the person and case can be rightly understood," and it is apparent that the declaration was intended to and does embrace the note in suit.

ON EXCEPTIONS.

ASSUMPSIT upon a promissory note, which is recited in the opinion. The declaration was as follows:

"In a plea of the case, for that the defendant, at Fort Fairfield, on the 24th day of June, 1869, by his promissory note of that date, by him signed, for value received promised the Joseph Chandler to pay him or order, the sum of $90, half in March next, the dollars balance in September next, and cents, with interest. Said promise made for a colt this day taken, said colt holden for the payment of said amount. And said Joseph Chandler thereafterwards, on the same day, indorsed, sold and delivered said note to the plaintiff, by reason and in consideration whereof, the defendant became liable, and promised the plaintiff to pay him the contents of said note, according to the tenor thereof."

The defendant moved for a nonsuit upon the ground that the note was not negotiable, and because the one offered in evidence did not correspond with that described in the declaration; and to the refusal to grant this motion, he excepted.

Madigan & Donworth for the defendant.

I. The words in respect to which the note and declaration differ are seen to be many and material, upon a careful comparison. Certainly the omission of the word "after" from the declaration is a fatal variance because it declares upon a note bearing interest

from date, while the one offered, only bore interest after maturity of last instalment. The amount of the note is certainly matter of substance, to be proved as stated. 1 Greenl. on Ev., § 63; 2 Greenl. on Ev., § 160; 2 Pick., 222; 16 Pick., 359; 7 Mass., 65 and 325. By the use of the word "next" in the declaration, without saying "then next," the suit is apparently upon a note not due; as "March next," and "September next," must mean next after the date of the writ.

II. This is not simply a note, but a contract for the retention of a colt; and therefore not negotiable, nor suable in the name of an assignee, as the law then stood; nor was copy filed as required by present law. It should be treated as though the contract as to the colt were written out, *in extenso*.

L. Powers for the plaintiff.

APPLETON, C. J. This is an action of assumpsit by the plaintiff as the indorsee of a note of which the following is a copy:

"FORT FAIRFIELD, June 24, 1869.

For value received, I promise to pay Joseph Chandler or order ninety dolls., one-half of which to be paid in March next, the remainder in Sept. next, after with interest. Said promise made for a colt, this day taken, said colt holden for the payment of said amount. C. C. BRADBURY."

Indorsed: "without recourse to me. JOSEPH CHANDLER."

It is objected that the note is not negotiable, inasmuch as by the last clause the consideration of the note is stated, and that the colt should be holden for its payment.

The essentials of a promissory note are, that it is payable to order or bearer, in money, at all events, and not upon any contingency, nor out of any particular fund.

The note in suit has all these elements. That it states the consideration for which it was given; and that, if recorded, it might operate as a mortgage, does not render it any the less a promissory note. Thus, in *Fancourt* v. *Thorne*, 58 E. C. L., 310, the note was in the following terms: "On demand I promise to pay

H. or order, £500, for value received, with interest at the rate of," &c.; "and I have lodged with the said H, the counterpart leases signed by D.," &c., "for ground let by me to them respectively as a collateral security for the said £500 and interest," and the court held that it was a promissory note, and might be sued as such. In *Arnold* v. *Rock River Valley R. R. Co.*, 5 Duer, 207, it was decided that an instrument, which in its terms and form, is a negotiable promissory note, does not lose that character because it also states, that the maker has deposited bonds as collateral security for its payment, and that he agrees on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such sale. "The terms of this contract," observes Bosworth, J., "do not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it, a sum certain, and on the day specified." So here, that there may be property holden to secure its payment, does not prevent the note in suit being negotiable.

Objection is taken that the note does not sustain the declaration. True, the writ is not a model of artistic pleading, but we think there is no fatal variance. The note has "ninety dolls.;" the declaration, "$90" (in figures); the note says, "remainder," the declaration, "balance;" the note says, "Sept.," the declaration, "September;" but all this does not prevent the person and case from being rightly understood. The note is payable with interest. "The remainder in September next after," is next after the preceding payment, which was to have been made in March.

Exceptions overruled.

Dickerson, Danforth, Virgin, Peters and Libbey, JJ., concurred.

JAMES H. CHAMBERLAIN, *et al.*, in equity, *vs.* GEO. N. BLACK.

Construction of written contract, when affected by parol testimony.

This bill in equity was brought to compel specific performance of a written contract to convey certain lands, with warranty against incumbrances, upon payment of stipulated sums at appointed times. The first payments were made and the last instalment tendered and a deed with the agreed covenant demanded; this Mr. Black declined to give because of a permit to cut upon the land which he had given to one Hall prior to contracting with the complainants; but he offered a deed with the exception from the warranty of this permit, which conveyance the complainants would not accept. It was apparent from all the evidence, admitted without objection, that the fact of the existence of Hall's permit was understood and considered in making the agreement for the purchase and sale of this land between these parties; the only dispute being as to the length of time which Mr. Black told the complainants that permit had to run. The court found that Mr. Black truly stated the terms of the permit; that the obligation for a deed was made subject to it, mention of it being omitted by mistake; and ordered that Black make a deed to the complainants of the land, reserving and excepting all rights under the permit, upon payment of the amount due him; holding that the written contract was to be enforced as though the verbal understanding of the parties was incorporated in it; and that, the testimony having been admitted without objection, it was too late for the complainant's solicitor to interpose, in his argument, the objection that the written contract could not be varied by parol testimony.

BILL IN EQUITY, brought to compel the performance of a written contract, dated May 18, 1865, for the sale and conveyance by Mr. Black to the complainants of certain timber lands, therein particularly described, upon payment of two notes dated December 20, 1864, for $907.50 each, one payable on demand and the other in one year with interest annually. The bill stated that the negotiations for the purchase commenced in October, 1864, between Mr. Black and Mr. Stover, acting for himself and Mr. Chamberlain; that the sole inducement to buy was the timber standing on the land; that Mr. Black represented to Mr. Stover that the land was unencumbered except the right of Martin and Barlow Hall to cut lumber on a portion of the lands under a permit previously given with only one year to run; and that the

contract for the purchase and deed was made, relying upon this representation; that after making this arrangement with Mr. Black they bought the other half interest in the lands of the heirs of the late Addison Dodge, (who had bought and owned it jointly with Mr. Black,) for the same sum which they were to pay Black; and received from said heirs a warranty deed of their half, free from all incumbrance; which deed was drawn in the respondent's office and under his direction; that it was part of the agreement between the parties, that before the delivery of the deeds, the complainants might go on and cut upon the land, appropriating the proceeds to the liquidation of their notes; and they did so. This agreement was not part of the written contract.

The note payable on demand was paid May 18, 1865, when the written memorandum of their contract was signed, and the amount of the other note was tendered to Mr. Black, December 20, 1865, and refused by him; he then saying that he never should comply with their demand, then made, for a deed according to the tenor of the contract in writing, but would give one containing a reservation of the rights of Messrs. Hall to cut under their permit which was, in fact, dated November 22, 1863, and ran for three years from that date. Such a deed the complainants declined to accept and brought this bill, to compel a conveyance according to the tenor of the writing aforesaid, and an account of the lumber cut by the Halls under their permit during the season of 1865–6; not claiming anything for timber cut by those gentlemen in 1864–5.

The answer admitted all of the complainant's allegations except those relating to the permit to the Halls, which Mr. Black said was truly stated to Mr. Stover, according to its actual tenor; that the omission to reserve or except it in his obligation and in the Dodge deed (which, though drawn in his office, by his clerk, was never seen by him) was accidental; but that the facts were well known to both parties. August 8, 1871, Eugene Hale, Esq., acting for Mr. Black, demanded of Mr. Chamberlain the amount of the note due; but that gentleman refused to pay, except upon condition of receiving such a deed as he claimed.

This cause has been once before considered by this court, and is reported in 55 Maine, 87.

J. S. Rowe for the complainants.

The rule, as to varying a written contract by parol, is as well settled in equity as at law. *Eveleth* v. *Wilson*, 15 Maine, 109.

The permit to the Halls has been altered. It bore date originally in 1864, as appears by inspection; and the "November 22" is an alteration. The twenty-second of November, 1863, was Sunday. The almanac was not consulted when that date was altered.

Nobody testifies when that permit was actually first delivered to the Halls.

F. A. Wilson for the respondent.

CUTTING, J. The plaintiffs seek in this suit the specific performance of a written contract duly executed by the defendant, dated May 18, 1865, wherein he covenanted to convey to them a certain tract or parcel of land in township number twenty-seven, middle division in the county of Hancock, provided they pay to the defendant their two notes dated December 20, 1864, for $907.50 each, the first on demand and the second in one year.

It appears that the first note was paid and that December 20, 1865, they tendered to the defendant the principal and interest due on the other note and demanded of him a deed according to the terms of his obligation which he refused to execute and deliver. 55 Maine, 87.

If the case terminated here there could be no question but that the prayer of the bill should be granted. But the answer and the evidence introduced by both parties disclose certain facts which demand consideration.

It appears that the terms of the defendant's obligation were to convey by a deed in fee with warranty against the lawful claims and demands of all persons claiming by, through or under him.

Now at this time the evidence discloses there was in existence a written permit from defendant to Martin and Barlow Hall to cut and haul pine and spruce timber from the land covenanted to be

conveyed for a period of three years from December 1863. This, therefore, was an incumbrance which the defendant was unwilling to warrant against in the demanded deed, and in his answer and deposition asserts that at the time his obligation was executed and delivered that fact was distinctly disclosed to the obligees and by them or one of them understood as an incumbrance not to be embraced in his covenants.

It would have been questionable whether this testimony was admissible to vary the written obligation if it had been seasonably objected to. But the objection of plaintiff's counsel in his argument comes too late, especially since by their own showing they admit that the incumbrance was to be excepted, and the parties only disagree as to the period it was to continue. The one contended for two and the other for three years, and here arises a conflict in the testimony. But we think that on the part of the defendant preponderates, so that at the time the contract to convey was made it was understood by the parties, that the incumbrance created by Hall's permit should be excepted in the covenants of warranty but was omitted to be inserted by mistake. Even the plaintiffs admit such to have been the fact as to a period of two years and claim damages for the third year. The defendant therefore was justified in refusing to deed without guarding against the incumbrance.

The defendant claims damages for lumber cut on the land before the date of the written contract, but only it seems by way of offset, which he is willing to relinquish provided the plaintiffs' claim for damages, as we have found, should not prevail.

The bill is sustained and a decree must be entered that the defendant perform his contract with the incumbrance excepted upon payment of the second note according to its tenor, which would have been without interest since the tender had the same been kept good, but the subsequent demand by Mr. Hale and refusal operated otherwise. Neither party to recover costs.

Decree accordingly.

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

PETERS, J., having been of counsel did not sit.

JERRY F. GRINDLE *vs.* SCHOOL DISTRICT NO. 1 IN BROOKSVILLE.

School district alterations—how made. R. S., c. 11, § 1.

It is not necessary that the recommendation of the municipal officers, required by R. S., c. 11, § 1, as a condition precedent to any vote of the town to alter or discontinue school districts, should indicate the precise changes to be made; but it may be in general terms.

A vote of a town to discontinue one district, and to annex its territory to others, is not void because of an omission to make any provision about the disposition of the school house on the territory of the district discontinued.

The town of Brooksville voted, "to divide school district No. 2, and annex Mark H. Grindle and all northwest to school district No. 3, and the remainder of No. 2 district to district No. 1." It appeared that Mark H. Grindle lived upon the homestead in district No. 2, owned by him, and so situated with reference to the boundaries of that district that it practically divided all the land in the district, northwest of his farm, from the rest of the district: *held*, that the reference to Mark H. Grindle, in the vote aforesaid, should be understood to mean the homestead owned and occupied by him.

ON REPORT.

ASSUMPSIT, on a count for money had and received, to recover the amount assessed upon the plaintiff by the assessors of Brooksville, in 1872, in behalf of school district No. 1, in that town, and paid by him under protest, January 27, 1873. The writ was dated March 6, 1873, and the money was actually paid over by the collector to the town treasurer on that day, some hours after the writ was filled.

At their annual meeting in March, 1872, the inhabitants of Brooksville passed the vote mentioned in the syllabus and in the opinion, basing this action upon the following "statement of facts in regard to school district No. 2 in the town of Brooksville," which was signed by the school committee and a majority of the selectmen: "Having been requested to approve a request to divide and discontinue school district No. 2, and annex it to districts Nos. 1 and 3; we do hereby approve, and give the following statement of facts. The school house has become entirely unfit to keep a school in, and the number of scholars in the district at present, and the

prospect for the future do not seem to warrant the building of a new house, or repairing the old one." The article in the warrant calling the meeting having reference to this subject was couched in the same phraseology as the vote upon it. This cause was submitted upon the facts to the disposition of the court.

Mark H. Grindle also brought suit against Mr. Hawes, the collector, for proceedings to enforce payment of the tax assessed upon him in the district to which he was attached by this vote; in which action a nonsuit was ordered upon the ground that the warrant under which the defendant acted was his protection, he having acted in strict conformity to it; according to *Nowell* v. *Tripp*, 61 Maine, 426. Other objections made by Jerry F. Grindle to the action of the town, in assuming to divide up the old school district No. 2, are noticed in the opinion.

Hale & Emery for the plaintiff.

I. The statute contemplates that the municipal officers and school committee shall mature some particular mode of division and submit it to the action of the town, for approval or rejection; not that merely a division shall be recommended, the details of which are to be determined in a tumultuous annual town meeting. The town cannot adopt a division differing from the one proposed. It cannot be seen here whether the town made such a division as the proper authorities approved, or not.

II. There were no conditions, proper or otherwise, annexed to this division. Nothing done about the school house.

III. The vote was ineffectual. *Worthington* v. *Eveleth*, 7 Pick., 106; *Nye* v. *Marion*, 7 Gray, 244.

IV. The money was in the hands of the town's agent, whether it was collector or treasurer.

C. J. Abbott for the defendants.

When this suit was brought, the defendants had none of the plaintiff's money. *Smith* v. *Readfield*, 27 Maine, 145; *Haynes* v. *School District*, 41 Maine, 246; *Starbird* v. *School District*, 51 Maine, 101; *Look* v. *Industry*, Id., 375.

PETERS, J. We think that none of the objections, urged against the validity of the proceedings of the town in this case, should be sustained.

The first objection taken is, that the recommendation of the town officers, in favor of a discontinuance of one district and the annexation of its territory to others, was insufficient, because it did not contain a description of the particular portions to be respectively annexed. The statute provides that school districts shall not be altered, discontinued, or annexed to others, except upon a recommendation of the municipal authorities. It does not require the definite and exact results of a contemplated change to be given. The recommendation may be in general terms. The town may then settle the details as it pleases. The question does not arise here whether the town could make an alteration in one way when it had been recommended in another. In this case the action of the town was not in any respect in conflict with the recommendation of its municipal officers.

The next objection is, that it does not appear by the vote of the town that the requirement of the statute was observed, which provided that a discontinuance of a district may be made "on conditions proper to preserve the rights and obligations of its inhabitants." But it does not appear to the contrary. No action relative to the school house was necessary as a condition of discontinuance. Sufficient provision for the disposition of that property is found in R. S., c. 11, § 3. And by the same section, the corporate powers and liabilities of a district remain after discontinuance, so far as may be necessary for the enforcement of its rights and duties.

Another objection, much relied upon by the plaintiff, is, that the vote of the town is ineffectual to create an alteration of the districts, because, as he contends, it does not describe by geographical boundaries the alterations designed to be made. The vote was, "to divide school district No. 2, and annex Mark H. Grindle and all northwest to district No. 3, and the remainder of said No. 2 district to district No. 1." From the statement of facts it is

clear that this description would be definite enough and well understood, if the reference to "Mark H. Grindle" could be regarded as identifying the homestead owned and occupied by him, and not as a personal description merely. The plaintiff relies upon cases in this State and Massachusetts, where it has been decided that a school district should be established or divided by geographical bounds, and that setting off individuals by name merely would not be sufficient; but that setting off individuals with their estates would be a sufficient compliance with the law. *Deane* v. *Washburn*, 17 Maine, 100; *Perry* v. *Dover*, 12 Pick., 206; *Alden* v. *Rounseville*, 7 Metc., 218; *Nye* v. *Marion*, 7 Gray, 244. But we think that a fair and practical construction of the vote in this case, under the facts stated, is, that the district was really divided by geographical bounds within the meaning of the decided cases; and that the homestead of Grindle and all the district northwest of him went one way, and the rest of the district another. The vote was to "divide school district No. 2;" of course it was to be some territorial division; and what it was to be is indicated only by the reference to Grindle. The words used were undoubtedly intended to comprehend the territory by him owned and occupied. The words "all northwest" include all the estates in the district situated northwest of that of Grindle, with the inhabitants thereon. The plaintiff's person and property fell into district No. 1. Any other construction than this would require the vote to be rejected as entirely senseless. *Plaintiff nonsuit.*

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

SILAS N. MITCHELL *vs.* WILLIAM H. BLACK.

Trespass lies for the entry of a mortgagee of improvements.

The owner of the fee in possession can recover in trespass for grass and trees cut by the assignee of a mortgage of the possession and improvements made by the party from whom the plaintiff derives his title before such party acquired the title to the land.

Such mortgage, purporting only to convey the right which the mortgagor then had by possession and improvement, passes to the mortgagee no interest in the land itself, but only (at best) a right to the improvements placed thereon by the mortgagor, or the equitable right to compensation for those improvements when dispossessed by the owner; nor will the subsequently acquired title of the mortgagor enure to the benefit of the mortgagee.

And the conveyance from such mortgagor, after he has acquired the title, will give to his grantee a superior title to the soil and its products, as against the assignee of the mortgagee. A recovery by the defendant in such trespass suit in a real action for the *locus*, against a party through whom the plaintiff derives his title, will not avail the defendant, if his suit is not commenced until after such third party has parted with the title and possession. Nor will the fact that the defendant was formally put in possession of the *locus* by an officer, upon a writ of possession in his favor, against the plaintiff's grantor, prevent the plaintiff from maintaining his action of trespass, if he was not put out of the possession, and had no knowledge of the suit or its result.

ON REPORT.

All the facts necessary for an understanding of the legal questions determined, are to be found in the opinion.

Hale & Emery for the plaintiff.

George S. Peters for the defendant.

BARROWS, J. The case shows that the plaintiff since 1862, and his grantors previously, have had possession of the land upon which the grass and trees were cut by the defendant in 1869, which is the trespass complained of. Without being in the constant occupation of the premises, they have cut the grass and standing growth thereon from year to year and paid the taxes assessed on it, claiming title under a warranty mortgage deed of

the premises from James Moseley to J. A. Deane, given in May, 1849, and a sheriff's sale of the equity of redemption, made in September, 1851. This title was regularly transmitted to the plaintiff and has been held by him since 1862.

The defendant claims under a mortgage of a possession and improvements upon the *locus* made by the same Moseley to John Black in 1832, to secure a debt which has never been paid, duly recorded, assigned to the defendant, and regularly foreclosed by publication in 1859. In 1868, possession of the *locus* was given to the defendant by an officer having a *habere facias* in defendant's favor against J. A. Deane, no one at the time of the service of said writ being in the actual occupation of the premises. But as we understand the report, Deane's title and interest in and to the premises and the possession thereof, had passed from him to third parties before the commencement of defendant's suit against him.

There was an improvement on the place in 1832, at the time Moseley made his mortgage to Black and its condition has not changed much since that time. Upon these facts the plaintiff is entitled to his damages for the grass and timber cut by the defendant, as having the better title to the soil on which they grew, and sufficient possession to enable him to maintain this action.

The acts of the plaintiff, and of his grantors for a series of years prior to 1869, show a possession in him which would enable him to maintain this suit against a stranger; and he must be deemed a stranger who can show no better or elder title or possession.

Both parties claiming under Moseley—the character, force and effect of the respective grants under which they claim must be examined.

The defendant's mortgage, made in 1832, purports to convey only such rights by possession and improvement as Moseley then had. That was not a right or interest in the land itself, but only a right to the improvements placed there by the party in possession, or an equitable right to compensation for those improve-

ments in case the owner of the soil should come and dispossess him. It could be assigned and conveyed by parol and delivery, like any chattel interest or chose in action. *Lombard* v. *Ruggles*, 9 Maine, 62.

But he who owns the soil itself may, at any time, enter and dispossess the owner of the improvements, who has only the equitable right to compensation therefor which is recognized by statute. In other words, the owner of the fee has the superior title, and the owner of the possession and improvements must resort, in suitable cases, to his remedy by bill in equity, or action of assumpsit, to secure his compensation. *Chapman* v. *Butler*, 22 Maine, 191.

Moseley, in 1832, in mortgaging to Black, pledged only this right. Apparently he had no other at that time. He undertook to convey no other at all events. But the defendant, claiming under his mortgage then made, is in no position to question the fact that, at that time, Moseley had been in possession of the land claiming adversely for six years or more. For aught that appears, he continued this possession during the seventeen years next following and up to the time when he mortgaged the fee to Deane in 1849. Even if he had acquired in the interim no title to the land by deed, in 1849 he had apparently got an indefeasible interest therein, by adverse possession for a continuous period of at least twenty-three years. If so, he could and did at that time convey an interest in the land itself to Deane, which the case finds had vested in the plaintiff accompanied by possession.

If Moseley had assumed to convey any interest in the land by his mortgage to Black in 1832, his after acquired title might have been held to enure to the benefit of Black and his assigns. But he did not.

The question here is not whether the assignee of the mortgage to Black has any remedy to enforce his claim to that which was the subject of his mortgage; but whether the grass and trees produced upon this land belong to the defendant or plaintiff.

The defendant's judgment against Deane, and his formal induc-

tion into possession of the *locus* by the officer upon the *hab. fac.* issued thereupon, are fruitless as against the plaintiff. His suit was not commenced until after Deane had parted with the title and the possession. Deane's submission to a default under such circumstances could not prejudice his grantees, and it does not appear that the plaintiff was dispossessed by the officer, or even that he had knowledge of the service of the writ of possession.

Defendant defaulted. Damage to be assessed by judge at nisi prius.

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

GEORGE A. PAGE *vs.* BUCKSPORT.

Proximate cause—what is.

The plaintiff was driving over a defective bridge in the defendant town, when without his fault the horse broke through the bridge and fell. The plaintiff in trying to extricate the horse received a blow from the horse's head and was injured by it. He was at the time exercising ordinary care. *Held*, that the defect in the way was the proximate cause of such injury.

ON EXCEPTIONS.

This was an action for damages from an injury alleged to have been caused by a defect in a highway in Bucksport.

There was evidence tending to show that the plaintiff was riding over a bridge in that town, when his horse broke through the bridge and fell; that the plaintiff being uninjured by such fall, jumped from his gig and immediately proceeded to extricate the horse; and that while so doing he was struck by the horse's head, (in the animal's struggle to free himself) and was injured.

The only instruction objected to was as to the rule of damages, which was given, *pro forma*, as follows:

"That if the horse fell into the bridge, as contended by the plaintiff, and the plaintiff had good reason to believe that by his

own exertions he could extricate the horse, and thereby lessen the injury likely to ensue to him, and he immediately attempted to do so, acting with what, under the circumstances of the situation would amount to common care and prudence upon his part, while endeavoring to accomplish it; and while thus engaged was struck by the horse's head so as to inflict an injury upon his person, in such case the town would be liable for such injury, providing the plaintiff is entitled to recover upon the other instructions given."

To which instruction the defendants excepted, a verdict having been given against them.

T. C. Woodman and *Hale & Emery* for the defendants, contended that the defect in the bridge was not "the proximate cause" of the injury, citing the definition of that term from various cases, especially from those relating to marine insurance, said by Shaw, C. J., to be analogous to road cases in that there were loss and injury without moral turpitude. *Marble* v. *Worcester*, 4 Gray, 395. Broome's Leg. Max., 166, 167, and cases cited. *Livie* v. *Janson*, 12 East, 648; *Carrington* v. *Roberts*, 2 Bos. & Pul., 378; *Dyer* v. *Piscataqua Ins. Co.*, 53 Maine, 118 and cases cited.

As the injuries happened without their being intended by the defendants, such cases must be brought within the letter of the statute. *Moulton* v. *Sanford*, 51 Maine, 127; 4 Gray, 395; *Jenks* v. *Wilbraham*, 11 Gray, 143; *McDonald* v. *Snelling*, 14 Allen, 290; *Davis* v. *Dudley*, 4 Allen, 560.

Arno Wiswell for the plaintiff, cited *Willey* v. *Belfast*, 61 Maine, 574; *Verrill* v. *Minot*, 31 Maine, 299; *Stover* v. *Bluehill*, 51 Maine, 439; *Eastman* v. *Sanborn*, 3 Allen, 594; *Tuttle* v. *Holyoke*, 6 Gray, 447; *Lund* v. *Tyngsboro*, 11 Cush., 563; *Stickney* v. *Maidstone*, 30 Vt., 738. It was the plaintiff's duty to try and extricate the horse, and he can recover for injury sustained in the effort. *Douglass* v. *Stephens*, 18 Misso., 362; *Illinois Cent. R. R. Co.* v. *Finnegan*, 21 Ill., 646.

PETERS, J. The plaintiff was driving with a horse and gig over a defective bridge in the defendant town when the horse broke

through the bridge and fell. The plaintiff immediately jumped from his gig and undertook to extricate the horse from the hole in the bridge. In doing so, in the struggle of the horse to free himself, he was struck by the horse's head and personally injured thereby. He was at the time of the injury in the use of common care.

The question is, whether the defect in the way can be considered as the direct and proximate cause of the injury complained of. The defendants contend that it was not. Their counsel attempt to fortify this position by many plausible and interesting illustrations. There may be a good deal of subtlety and refinement of argument upon questions of this kind. There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must therefore, as is often said, depend upon the circumstances of each particular case.

Upon the facts of this case, we think that the defect in the way was the proximate cause of the injury, and that the defendants are liable for the damages sustained. The foundation of this liability, is the services rendered or attempted to be rendered by the plaintiff for the benefit of the town, when the injury was received. The law required such services of the plaintiff. It was his duty to save the horse if possible. He would have been guilty of negligence towards the town if he had failed to make all reasonable attempts to do so. It is a general rule of law, that, where a person may sustain an injury by the fault of another, common care should be used upon his part to render the injury for which the party in fault is responsible as light as possible. He may be compensated for an injury received when in the exercise of such care and prudence, although a mistake may be made. In *Lund* v. *Tyngsboro*, 11 Cush., 563, it was held that a town was liable to a traveller who in the exercise of common care and prudence, leaps from his carriage because of its near approach to a dangerous defect in the highway and thereby sustains an injury, although he would have sustained no injury if he had remained in the carriage. The same principle was established in *Ingalls* v. *Bills*, 9 Metc., 1; and the same doctrine was applied to the facts in the

case of *Stover* v. *Bluehill*, 51 Maine, 439. The defendants however seek to distinguish those cases from this. They admit that such a doctrine would be applicable if the injury had happened here to the horse instead of to the driver. But we do not perceive that there would be any difference upon principle, whether the injury was to the plaintiff's person or his property. The accident to the horse was an injury sustained by the owner of the horse. The plaintiff was attempting to relieve himself of an injury to his horse and thereby of an injury to himself, when the horse in his struggles struck him with his head. This view of the facts is supported by the case of *Stickney* v. *Town of Maidstone*, 30 Vt., 738, cited upon the plaintiff's brief, which is as near a copy of the facts in this case as two cases could well be alike. We think that all which took place at the time of the accident was, as between these parties, but a single happening or event. It was but one accident. *Exceptions overruled.*

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

DRUSILLA G. PARKER *vs.* LLEWELLYN F. MURCH.

Amendment. Deed—construction of trust declared by R. S., c. 104, §§ 3, 8 *and* 10.

The whole of an instrument declaring a trust must be considered in determining the nature and terms of the trust; and where in the granting part of a deed, a trust unlimited in time is declared, but there is a qualification inserted at the close of the description of the premises limiting the duration of the trust, the latter clause must be construed as a limitation of the general words first employed.

By the deed under which the demandant claims title, she was to hold the whole estate in trust during the life of John L. Murch, and only her thirds after his decease. In this action instituted after his death, she claims the whole estate, and is held not entitled to recover it under said deed, nor to recover her undivided third of it, under R. S., c. 104, § 10, because she has not "set out the estate claimed," as required by §§ 3 and 8 of that chapter, having demanded the fee, while entitled only for life; but she is permitted on terms, to so amend her declaration as to demand that only to which she is entitled.

Parker *v.* Murch.

On exceptions.

Writ of entry to recover land the title to which was formerly in William Murch, who conveyed it on the fourth day of May, 1863, to the demandant, then Drusilla G. Sadler, by deed of that date, in which he gives, grants, bargains, sells and conveys the same to her "during her natural life and to hold in trust for her son, Charles A. Sadler," and for the ten children of John L. Murch, who are mentioned by name, "any other children that may be born to her and said Murch, and for the support of said Murch, the heirs and assigns forever." Then follows the description at the close of which is this clause: "meaning and intending hereby to convey to the said Drusilla, for her own and the support of John L. Murch during their natural lives, the two first parcels of land conveyed to me by the said John L. Murch, November 1, 1856, and to descend in equal shares to all the children said Drusilla and said Murch shall leave at their decease of the said John, and in such case said Drusilla is to have her thirds only. To have and to hold the aforementioned premises," &c. . . . "to the said Drusilla G. Sadler, for herself, and in trust as aforesaid, and to her heirs and assigns, their use and behoof forever."

There was no issue of the marriage between the demandant and John L. Murch, who died two years before the commencement of this action. The tenant claimed possession as guardian of some of the children mentioned in the deed. The cause was referred to the presiding justice, who ordered judgment for the demandant, to which the tenant excepted, the right to except having been reserved.

George S. Peters for the tenant.

Hale & Emery for the demandant.

Danforth, J. The question involved in this case is the right to the possession of two lots of land conveyed to the plaintiff by William Murch by deed dated May 4, 1863, and depends upon the construction to be given to the language used in that deed. The plaintiff claims as grantee, and the defendant is guardian of

one or more of the children named therein. The grant is thus stated: "have given, granted, bargained, sold and conveyed, and do hereby give, grant, bargain, sell and convey unto the said Drusilla G. Sadler during her natural life, and to hold in trust for," . . . "and for the support of said Murch." At the close of the description we find these words, "meaning and intending hereby to convey to the said Drusilla for her own and the support of John L. Murch during their natural lives . . . and to descend in equal shares to all the children said Drusilla and said Murch shall have at (their?) decease of the said John, and in such case said Drusilla is to have her thirds only," and in the habendum the words, "to have and to hold the aforementioned premises with all the privileges and appurtenances thereunto belonging to the said Drusilla G. Sadler for herself and in trust as aforesaid and to her heirs and assigns to their use and behoof forever." This is all the language in the deed bearing upon the question at issue, and for the purpose of ascertaining the meaning of the grantor, must all be taken together.

Thus construed it will appear that the premises are conveyed to the grantee during her life, coupled with a trust for certain children and the support of the father. In this connection the duration of the trust estate is not limited. Subsequently this trust is limited. At the decease of the said Murch the land is to descend in equal shares to the children, for whose benefit the trust was in part created, and the said Drusilla was then to have "her thirds only." The trust then must necessarily cease at the death of the father, for subsequent to that event the land must go to the children with the exception of the one-third interest which was reserved to "the said Drusilla." No other construction can be given to the deed unless we strike these words from it, while with it that which goes before as well as that which comes after may have its proper meaning. In the first and last clause quoted the grant is coupled with the trust and when the trust ceases, the grant must cease also. Both the grant to her during life and to her and her heirs and assigns must cease with the trust, for she could hold only her thirds in no other way than in trust. There

is no language which necessarily shows that the plaintiff was to hold beyond the life of "said Murch." The result is that by the deed the plaintiff would hold the premises for her own and said Murch's support during their joint lives, and at his decease her interest except her third, and the trust must cease, and the land descend to the children. Murch has deceased. The plaintiff therefore has no such interest in the land as will enable her to maintain this action in its present form. Still under the deed she has an interest which she, no other facts appearing than are now before us, would be entitled to recover, with the necessary amendments to her writ.

When the land descended to the children, in the language of the deed she is to have "her thirds only." This must be understood as an estate in the nature of dower. It cannot be dower because the husband was not seized in fee during coverture. She then so far as now appears has a life estate in an undivided third part of the demanded premises. In her writ she demands a fee, and though by R. S., c. 104, § 10, a demandant may recover an undivided portion of that which is claimed, yet by §§ 3 and 8 of the same chapter the estate claimed must be set out and the recovery if any, must be according to the allegations. It is however competent for the court upon motion, and upon such terms as may be reasonable to allow the necessary amendment to the plaintiff's writ. *Howe* v. *Wildes*, 34 Maine, 566; *Hamilton* v. *Wentworth*, 58 Maine, 101. *Exceptions sustained.*

APPLETON, C. J., VIRGIN, PETERS and LIBBEY, JJ., concurred.

ALVIN B. WILLEY *vs.* CITY OF ELLSWORTH.

Defective way—town's liability for.

The liability of a town for a defective way is commensurate with its right and obligation to repair it.

The statute gives no right to and imposes no liability upon towns as to anything outside the limits of the road.

But where a railing is necessary for the safety of travellers, the want of such railing is a defect in the way for which the town will be liable.

On exceptions.

Case for personal injury from an alleged defect in the highway. There was evidence tending to show that the injury was caused from an upsetting of plaintiff's sleigh by hitting a snow heap while driving in the night time from State street into Main street, in the defendant city; that the two streets as anciently located formed a sharp angle around which the travel from the one street to the other would have to pass, in order to keep within the limits of such located ways; that for many years the travel had been over a portion of the triangle formed by the intersection of such streets which was not railed, and was apparently used as a part of the streets; and one of the questions submitted was, whether or not such portion had not become a part of the highway by user. There was evidence in the case tending to show the other facts upon which the following instruction complained of was hypothetically based.

"If you do not find that there were any repairs actually put upon that place within the six years, nor that there was a way there by user, then another point still is presented by the evidence and involved in the following instruction, which I give you for the purpose of this trial as applicable to some of the evidence in the case, and applicable to the state of facts: If you find that the highway existed only according to the located limits as described to you by witnesses; that if it is not established that there was any legal road outside of the located limits, taking it for granted that there was no road, only such as the defendants now contend for and taking for granted that the alleged incumbrance (viz., the snow-bank) was outside of such limits, but immediately adjoining them, and if you find such incumbrance was situated, where, for some time prior to the accident, travellers had been accustomed to pass generally, in summer and winter, as a part of the actual way, and where but for such incumbrance it would have been safe and convenient for passing at the time of the accident; and if you further find that the limits of the highway were not indicated by any visible objects, and that the plain-

tiff in turning from Main into State street and driving with common and ordinary care pursued the general course and direction of travel; and that his sleigh was upset by one runner striking the snow-bank outside of the located limits, while the horse and other runner of the sleigh were within such limits, in such case the defendants may still be liable; if you find that the incumbrance outside of the way was so near it as to render travelling within the way dangerous, and that the defendants knew it to be so, and that there was nothing to give the plaintiff notice of the defect until too late to avoid it, providing you find all the other elements which are necessary to make out a case as given in this suit, and to be given you."

"The learned counsel for the defendants contends that the town cannot be liable for any defect which is outside of the limits of a highway. But the idea involved in this instruction, if I have succeeded in making it plain to you, is this: There may be such a thing as that it would be a defect *in* a road to allow a dangerous incumbrance to exist immediately *outside* of the road, upon which the general course and direction of the way might lead a traveller, if there was nothing to guide or warn him against it, under the circumstances and with the qualifications before given you."

To which instruction the defendants excepted, a verdict for eleven hundred dollars having been rendered against the city.

Hale & Emery for the defendants.

The point of the exceptions is that a town is not liable for an incumbrance outside of the located limits of the road. The statute says, "defect *in* a highway;" not "*near*" it. Being penal, cases must be brought within the letter of the law. *Moulton* v. *Sanford*, 51 Maine, 127.

Towns have no right to do anything except to take gravel for repairs, outside location of way; its duty and liability can extend no further than its power.

Arno Wiswell for the plaintiff.

The town is liable for leaving the road so constructed and un-

guarded as to lead travellers into peril, whether the danger was actually outside of its undefined limits or not. *Coggswell* v. *Lexington*, 4 Cush., 307; *Hayden* v. *Attleborough*, 7 Gray, 338.

APPLETON, C. J. By R. S., c. 18, § 40, "highways, townways, and streets, legally established, are to be opened and kept in repair, so that they are safe and convenient for travellers with horses, teams and carriages." The obligation is imposed upon towns to keep in repair ways "legally established" and none other.

Ways may be established by proof of public user or by a laying out by the constituted authorities. The limits of the way are determined by user or by location. However a way is shown to exist, it is one with limits defined by user or location.

Where repairs have been made upon a way or bridge within six years before the injury, the town making the repairs is estopped to deny the location, by § 66.

By § 65 "if any person receive any bodily injury or suffer any damage in his property through any defect or want of repair or sufficient railing in any highway, town way cause way or bridge, he may recover for the same in a special action on the case, &c.

The defect or want of repair must be in the way in controversy, not outside of the same. The statute imposes no liability for defects which the town is under no obligation to repair.

This action was for an injury arising from a defect in a highway which the defendants were bound to keep in repair. The defect was a snow-drift in the same as alleged in the plaintiff's writ. The jury were allowed to give damages for the consequences resulting from one without the defendant's highway and to give proof of its existence. The proof of one without the highway in no way proved or tended to prove the allegations in the plaintiff's writ. The verdict was obviously for a defect not mentioned in it, for that was a drift in the highway in question.

The jury were told that if the plaintiff's sleigh was upset by one runner striking the snow-bank outside of the located limits,

while the horse and other runner were within the limits, the defendants might be liable. It was not alleged that there was not ample room and a safe path within the limits of the located way. The verdict was not for defects therein but for a snow-drift outside, which could only be dangerous to those who were in whole or in part outside of the public way where they should be. The ruling of the judge excludes a way by user and that repairs had been made within six years upon the place where the accident happened. The liability of a town for damages depends upon the same proof as would render it liable for indictment. *Davis* v. *Bangor*, 42 Maine, 522. Now the defendants could not be liable to indictment for not removing a snow-drift outside the limits of the highway, which alone they were bound to keep in repair. The officers of the town are authorized to make repairs or remove defects within the limits of the way. They are trespassers when acting without such limits.

But reliance is placed upon *Hayden* v. *Attleborough*, 7 Gray, 338, to sustain the ruling of the justice presiding. In that case the injury arose from being precipitated into a cellar either within the limits of the highway or so near as to endanger travellers. The defect was the want of railing, the court holding that where a railing is necessary to the security and safety of travellers the want of such railing is a defect. But the defect in such case is the want of railing, which the town were bound to have, not the cellar without the limits of the highway with which they had nothing to do.

So in *Coggswell* v. *Lexington*, 4 Cush., 307, the injury was occasioned by a post outside the way as located. Metcalf, J., says: "Towns are bound to keep the roads within their bounds, safe for travellers. . . Whether the defendants had a right as against the owner of the land where the post stood to enter and remove it, is not now before us. But they clearly had the right and it was their duty if they could not lawfully remove the post, to place such a fence or other barrier between it and the road, as would have rendered the road safe." That is, the defect is in not having

the fence a barrier which the public safety required. The injnry results from such defect for that is the defect for which alone the town is liable.

The only possible defect in the present case was for not having some barrier or fence to prevent the traveller from not going out of the road; but that is not the defect alleged. Besides, towns are under no obligation to maintain fences to prevent travellers from straying from the highway. *Sparhawk* v. *Salem*, 1 Allen, 30; *Murphy* v. *Gloucester*, 105 Mass., 470; *Macomber* v. *Taunton*, 100 Mass., 255. "It is the highway as located and laid out by the county commissioners," observes Morton, J., in *Smith* v. *Wakefield*, 100 Mass, 437, "which the town is obliged to keep in repair. It has no right to go outside of the limits defined by the location in order to make the highway more safe and convenient for travel." The occasional user of a road not located legally does not impose on the town the obligation to pay damages occasioned by its neglect to keep the road in repair. *Rowell* v. *Montville*, 4 Maine, 270.

Where an injury is caused by a snow-drift outside the public highway and which the town cannot rightfully remove, they are not responsible for an injury occasioned thereby. Their liability for non-repair is only commensurate with their right and duty to repair. The town is liable for injuries occasioned by defects in the road and for those alone. *Exceptions sustained.*

CUTTING, WALTON, DANFORTH and VIRGIN, JJ., concurred.
BARROWS, J., did not concur.

MARY T. RICHARDSON *vs.* JOHN RICHARDSON.

Treble damages—tenants in common cannot recover of each other.

A tenant in common of a life estate cannot recover treble damages under R. S., c. 95, § 5, for an injury to the common property.

ON REPORT.

This is an action brought by the widow of the late Richard

Richardson to recover treble damages for injuries said to have been done to a quarry owned by the decedent and the defendant in common at the time of the former's death. The heirs of Richard conveyed to his widow by deed all the rents, profits and income arising or accruing from the estate of her late husband, "including the due proportion of the stone quarry," during her natural life. The question was whether this gave her such title as to enable her to maintain this suit under R. S., c. 95, § 5; the disposition of the cause to be according to the construction given this statute.

Wiswell & Wiswell and *A. Merrill* for the plaintiff.

Hale & Emery for the defendant.

DANFORTH, J. The only question presented in this case is whether the plaintiff has such a tenancy in the premises described in her writ, as will enable her to maintain an action for treble damages under the provisions of R. S., c. 95, § 5.

As evidence of her title to the land she puts in two deeds, each conveying substantially the same interest, by which the grantors therein convey to her "during her natural life, any and all rents, profits and income that may arise or accrue" from the property in question, "including the due proportion of the rent of the stone quarry."

It may be assumed that these deeds give her a tenancy for life, they certainly can give her no greater.

The statute provides that, in certain enumerated cases of injury to the common property, "any joint tenant, coparcener, or tenant in common of undivided lands" causing the injury "shall forfeit three times the amount of damages." Such damages are to be recovered by a co-tenant.

It is thus seen that this statute is not only in derogation of the common law but is highly penal. It must therefore receive a strict construction; nothing can be implied that is not expressed. The meaning of the terms used can neither be extended nor diminished to express any supposed intention of the legislature in passing the act.

Upon reading the statute the first and most prominent idea received, and that which is the most natural meaning of the language used, is the mutual liability of the tenants. The one seeking a remedy apparently has an interest as extensive as the one committing the injury. All the tenants are contemplated as having similar interests or estates of the same nature in the land.

This being so, what must the nature or extent of that interest be to bring it within the statute? The words describing it are "tenants in common of undivided lands." This would seem almost necessarily to mean an ownership of the whole property. The word "lands" in this connection, unlimited and unqualified as it is, cannot without a too liberal construction be held to include a less estate than one of inheritance. If the legislature in a statute like this had intended to have included a less estate or a different one we should expect the use of such language as would have expressed such an intention. But we find no words referring to a life estate, or indicating that such, or any less estate was contemplated.

This construction is confirmed by the fact that in the previous sections of the same chapter a remedy is provided for similar injuries when done by the tenant for life.

But whatever of doubt as to the construction of this section may remain, it is removed by a provision in the latter part of it. The co-tenants suing can recover only their proportion of such damages; that is, such damages as may have arisen from the injuries previously enumerated. A tenant for life has an interest in the usual annual rents and profits only, while the statute refers only to such as accrue to the inheritance. Every injury enumerated may have been done to this land, and yet the life estate in no respect have suffered. As the damages are consequent upon the injury, where there is no injury there can be no damages.

If therefore the plaintiff has suffered no such injury as the statute contemplates, it is quite certain she can have no such remedy as is therein provided. *Plaintiff nonsuit.*

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

ALONZO B. COMINS *et als.*, *vs.* INHABITANTS OF EDDINGTON.

Town not liable for commutation advanced by its officers.

Selectmen by obtaining on their own personal credit the money necessary to pay sums voted by the town for commutation to drafted men, and for the reimbursement of drafted or enrolled men who have procured substitutes, and paying the same directly to such persons, (the same not having passed through the town treasury) can acquire no right of action against the town to recover the same.

They stand in no better position than the original beneficiaries under such void votes before such payment was made.

ON REPORT.

ASSUMPSIT to recover moneys advanced to pay commutations, under the circumstances stated in the opinion.

A. Sanborn for the plaintiffs.

Wilson & Woodard for the defendants.

BARROWS, J. Under an article in the warrant which ran thus: "to see if the town will raise money to pay the fines of drafted men," the defendant town at a meeting held August 20, 1863, "voted that the selectmen be instructed to raise money to pay all the men that are drafted and are not exempt from any cause, to those who will procure a substitute the sum of $250, and those who do not procure a substitute the sum of $200." The plaintiffs who were selectmen of Eddington in 1863, raised $2650 on their personal responsibility, and paid to all who were drafted, in sums of $250 each to five men who had procured substitutes, and to one who went personally, and $200 each to five men who neither procured a substitute nor went—one of whom (Oakes) had an additional $100 from the fund thus raised. The selectmen gave their note at the bank for the money which they thus disposed of, and when it fell due August 12, 1864, the town paid on it $1484. When they went out of office they settled their account with the town. The claim here sued was not in it, and the town books do

not indicate that any part of it was ever received into or paid out of the town treasury.

At the March meeting in 1870, under Art. 9: "To see if the town will authorize the selectmen to settle with the men that hold a demand against the town for money paid for commutation which had been legalized by the State"—the town voted to give them such authority.

These are the undisputed facts in the case.

Whether a portion of the sum which these drafted men had was paid in town orders, and whether the town paid another sum of about $950 upon a note given at the same bank where the selectmen procured this loan, on account of the sum thus obtained by the selectmen, and thus in fact paid more than the amount which went to reimburse those who procured substitutes, leaving unpaid only a part of that which was given to commuters are matters left in doubt.

For reasons now to be stated we do not feel called upon to settle these controverted questions of fact.

No legislation or reiteration of the vote by the town could make valid the raising of money to pay commutation, or to reimburse those who had advanced it. *Thompson* v. *Pittston*, 59 Maine, 545.

This disposes of the greater part of the claim.

As we have seen in the statement of the case, eleven hundred dollars of the sum raised upon the note of the selectmen were paid by them to four drafted men who were neither mustered into the military service of the United States nor procured substitutes.

It remains to be determined whether under and by virtue of the act of 1866, chap. 59, the plaintiffs can recover the small balance of moneys paid to those who furnished substitutes, which upon their showing remains unpaid by the town.

It is suggested that the attempted ratification of votes to reimburse those who had furnished substitutes was recognized by this court as binding and efficacious in *Barbour* v. *Camden*, 51 Maine, 608.

But no such doctrine can be deduced from that case.

That part of the vote of the town which was there held to be binding and obligatory when ratified by the legislature was "to pay to each citizen so drafted the sum of three hundred dollars when mustered into the service of the United States, or to his substitute when so mustered." The plaintiff held an order from a substitute who was actually mustered into the service. Payments and promises to pay to those who actually went into the service whether as volunteers, drafted men or substitutes have been held capable of legislative ratification, for reasons adverted to in *Barber* v. *Dixmont*, 53 Maine, 575; *Winchester* v. *Corinna*, 55 Maine, 9, and *Hart* v. *Holden*, 55 Maine, 572.

Thus far and no farther has the court recognized the validity of the ratification acts. *Barbour* v. *Camden* goes no farther; for the plaintiff there was enforcing, under a regular assignment, the rights and claim of the substitute who went to the field.

The whole subject of donations by towns to individuals whose acts, business or outlays of money for their own private purposes may be deemed to be incidentally a benefit to the public also, has been so recently and so fully discussed in the opinion of the judges, 58 Maine, 591, *Allen* v. *Inhabitants of Jay*, 60 Maine, 124, and *Brewer Brick Company* v. *Inhabitants of Brewer*, 62 Maine, 62, that it is superfluous to go into any argument here to demonstrate the lack of power in a town to make a valid donation to one who has preferred to pay money to another, rather than to go into the military service of the country and in the legislature to delegate any such power to the town. A reference to the cases above mentioned in our own State, and to *Freeland et. al.* v. *Hastings*, 10 Allen, 570, will suffice.

In the ingenious argument of the plaintiffs' counsel it is claimed that this was a loan to the town by these plaintiffs and that they are not responsible for the illegal disposition of the money. But the facts do not sustain his hypotheses. This money never went into the treasury of the town—was not drawn from thence by the order of the selectmen—never was put into the town accounts by these plaintiffs—made no part of their claim against the town when they settled the account of their official doings.

It is plain that they were in some way induced to take upon their own shoulders the responsibility of furnishing and paying out this money, with the knowledge that the vote of the town gave them no legal authority to do it. Moreover they did not pursue the authority given by the town which seems to contemplate the raising of the money upon the credit of the town. They saw fit to undertake to make themselves creditors of the town by paying what they wrongly assumed might some day be recognized as valid claims against it.

They can stand in no better position than the original beneficiaries under the town votes. *Judgment for the defendants.*

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

THOMAS N. EGERY *et als.*, appellants,

vs.

GEORGE W. HOWARD, administrator.

Probate law, as to insolvent partnerships.

Prior to the statute of 1870, c. 113, § 16, copartnership creditors proving their claims against the estate of an insolvent deceased copartner were entitled to a dividend upon the full amount due them, in the same manner as the creditors of the insolvent individual.

If the estate was thereby obliged to pay more than its share of the partnership debts, its representative might look to the surviving partners.

Where administration had been commenced prior to the passage of that statute, and the estate of the individual copartner had been represented insolvent, and commissioners had been appointed upon it, whose term of service was not completed until after the passage of the statute, but the surviving partner, who was also the administrator, made no representation of insolvency as to the copartnership and no change was made in the commission, it was held that copartnership creditors who had proved their claims before such commissioners were entitled to dividends from the individual estate; and that they were not precluded therefrom, and that their demands were not to be considered as allowed against the partnership estate, only because it appeared by the report of the commissioners of insolvency that they were

debits of the firm. The report of the commissioners follows the power conferred upon them, and no proceedings in conformity with the new statute having been had, in cases which arose prior to its passage, although not completed when it passed, the distribution must be made in conformity with the proceedings and the previously existing laws.

ON REPORT.

APPEAL by Egery and others from the below stated decree of the judge of probate of Penobscot county. Upon the death of the senior partner of the firm of William Howard & Son, the junior partner, George W. Howard, at the August term 1869, of the probate court, was appointed administrator of his father's estate and also gave the requisite bond as surviving partner. At the November term 1869, of that court, commissioners of insolvency were appointed upon the individual estate of Wm. Howard, whose report was accepted at the June term 1872. No commissioners were appointed upon the partnership estate, though that also was insolvent.

The statement of the case to this court says: "The commissioners returned as allowed certain claims against the individual estate and certain other claims as allowed against the partnership estate, no claims being proved" [by the same creditors ?] "against both estates, nor were any balances" [between the estates ?] "proved;" but the commissioners' report, made part of and put into the case, showed that they had merely scheduled the claims presented to and allowed by them under three different heads, putting about a dozen under that of "estate of William Howard," three under the names of "William Howard and George W. Howard," and by far the larger number and amount, including those of Mr. Egery and of the Egery & Hinckley Iron Company, the appellants, under the heading of "Wm. Howard & Son."

At the June term 1872, after accepting the report the judge of probate made the order and decree appealed from in these words: "Distribution of partnership assets among partnership creditors. Distribution of deceased's assets ordered among the creditors who have proved their claims and balances, and been allowed them against the deceased's estate."

The reasons assigned for the appeal were:

"I. Because said order is irregular and not according to the law and statutes relating to distributions.

II. Because the proof and allowance of claims against William Howard & Son under a warrant to commissioners upon the estate of William Howard, after acceptance by the court, would admit the appellants to a participation in the assets of said William Howard.

III. Because the appellants are entitled to be allowed a dividend from the estate of William Howard, not allowed under the order of the court."

Wilson & Woodard for the appellants.

The act of 1870, c. 113, § 16, incorporated into R. S., c. 69, § 6, cannot apply to this case. The statute in existence when proceedings are commenced must be adhered to throughout where the new enactment would affect legal rights. *Given* v. *Marr*, 27 Maine, 212.

During the life time of William and George W. Howard, the appellants could have attached the several estates of either or both, and also their partnership property upon the claims proved. This right remained till taken away by the act of 1870, c. 113.

The last clause of this statute did not save the present case because no "such proceedings" as therein specified, had then been had, nor could they have been instituted. See the case cited by the defendant from 17 Pick., 383.

W. C. Crosby for the appellee.

Two questions arise in this case: First, are probate proceedings in cases like the present to be governed by legal or equitable rules? Second, if equity and its rules are to be disregarded, what does the law require to be done?

I. Equity marshals the assets giving to joint creditors the joint estate, and to the individual's creditors the separate estate. 3 Kent's Com., 65, and cases cited; *Jarvis* v. *Brooks*, 23 N. H., 136; *Crockett* v. *Cram*, 33 N. H., 542; *Weaver* v. *Weaver*, 46

N. H., 188; *Holton* v. *Holton*, 40 N. H., 77; *Merrill* v. *Neill*, 8 Howard, 414. Probate proceedings are governed by equitable rules. 17 Pick., 383.

II. The decree made is correct in law. The act of 1870, c. 113, § 16, was specially designed to meet the exigencies of the present case, and its passage was procured for that purpose. The final clause of the section evinces the purpose to give it retrospective effect.

BARROWS, J. Section sixteen of chapter one hundred and thirteen of the Laws of 1870, authorizes a surviving partner who has given the bond required by statute to represent the partnership estate insolvent if it appears to be insufficient to pay the partnership debts, whereupon commissioners are to be appointed by the judge of probate, claims proved and allowed, and the partnership assets distributed to pay such as are allowed, and in general like proceedings are to be had as might before that time have been had for the distribution of the estates of individuals deceased insolvent, under previously existing statute provisions. But this is not to invalidate the right of partnership creditors to recover from the surviving partner or the estate of the deceased partner any balances due them after the partnership property is exhausted.

In addition to these prospective provisions we have the following: "When in cases heretofore arising such proceedings have been had, they shall be held valid." But this respondent who was both administrator of William Howard and surviving partner of the firm of William Howard & Son, and had given bond in each capacity, in this case which arose before the passage of the statute of 1870, made no such representation in relation to the partnership estate and no such proceedings as are contemplated by the statute were ever had. Yet the respondent claims that the course of distribution should be the same as if they had been had, and were therefore to be held valid under the provision above quoted, because the commissioners who had been appointed upon the individual estate of William Howard in November 1869,

and who had their term of service lengthened from time to time, reporting finally in June 1872, distinguished in their report of the claims allowed by them between the claims of the creditors of the copartnership and the creditors of William Howard as an individual, showing that certain claims which were presented to and allowed by them (that of these appellants among the number) were due from William Howard & Son.

But they were none the less due from the estate of William Howard. The appellants presented and proved them against the estate of William Howard and the commissioners reported them as allowed in full. The commissioners had no authority to act as commissioners of insolvency upon the copartnership estate. They were not appointed nor commissioned for that purpose. It had not been represented insolvent by the surviving partner. Their commission authorized them to receive, examine and report the claims against the estate of William Howard, and they return that they did it. Their report will not bear the construction contended for and upon which the decree of the judge of probate seems to have been based, that these claims against William Howard & Son were not allowed against the individual estate of William Howard. These commissioners could allow them only against the individual estate upon which they were appointed commissioners, and they reported them as allowed and their report was accepted.

They designate in their report certain other claims allowed as being claims against William Howard and George W. Howard besides those specified as claims against the firm of William Howard & Son, but there is nothing in the report to indicate that they assumed to go beyond their commission or designed to do more than to describe accurately the claims which they allowed against the estate of William Howard. The statement that they returned as allowed certain claims against the individual estate, and certain other claims as allowed against the partnership estate, and that the claims of the appellants were proved and allowed against the estate of William Howard & Son is not sustained when we come to examine the commissioners' report which is made part of the

case. It might as well be concluded that they allowed claims against an imaginary third estate (neither the individual nor the partnership estate, but still an estate somehow belonging to William Howard and George W. Howard in common) because some of the demands are particularized as due from both, and yet are not included with the co-partnership debts. In point of fact, the commissioners pursued the course which had always been pursued prior to the statute of 1870—the only course authorized by previously existing statutes. They allowed the claims against the estate of William Howard, carefully describing the demands that were allowed, and thus it appears that in some cases the deceased was indebted as a partner and in others as a co-promisor with George W. Howard.

At law, the private property of each co-partner, in an unlimited partnership, is liable for the whole debt to the partnership creditor, who thus has that advantage over the creditors of the individuals composing the co-partnership which accrues from the personal liability of more than one debtor. Hence, when by reason of the death of one of the co-partners, the claim became several as well as joint, under our statutes as they existed before 1870, a partnership debt was provable for the full amount against the estate of a deceased partner which had been represented insolvent, and the co-partnership creditor had an equal right with the individual creditors to obtain full satisfaction of his claim from the estate of the deceased. If thereby the estate of the deceased was obliged to pay more than its share of the partnership debts, its representative had his remedy over against the surviving partners to compel an adjustment.

It was under such statutory provisions that the proceedings in this case were had.

It is sufficient to say that if a different course might have been pursued in this case, and would have been valid under the statute of 1870, it was not adopted. As the case arose before the passage of the statute, the decree should have followed the proceedings which were had.

The reasons of appeal are valid and well assigned and the

Decree is reversed.

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

APPLETON, C. J., being interested as a creditor, and PETERS, J., having been of counsel did not sit in this case.

JOHN FARRAR *vs.* AUGUSTUS J. SMITH.

Parol evidence. Delivery—what is necessary to constitute.

Where a grantor has conveyed a farm, reserving in the deed the use of the buildings thereon for a period of time afterwards, the grantee is not estopped by the deed to show that there was an oral agreement, at the time, that he was to have what manure should be made by the grantor's cattle on the place in the meantime, for the use of the premises.

The grantor could legally sell the manure to be made by his cattle during that time; but, to complete a sale as against a second purchaser, a delivery was necessary.

ON EXCEPTIONS.

TRESPASS *de bonis asportatis*, for taking and carrying away a quantity of manure. Plea, the general issue with brief statement of title in the defendant. January 9, 1869, Elijah Smith conveyed to Mr. Farrar by deed of warranty the homestead farm in Corinth upon which said Elijah was then living, the use of the buildings upon which he reserved to himself in said deed till the twenty-fifth day of March, 1869, and remained in occupation of them until that day arrived. Upon the twelfth day of March, 1869, Elijah Smith sold the manure in dispute, which was then in the barn upon said farm, to the defendant, who hauled it off the next day, for which act this action was commenced March 15, 1869. Farrar mortgaged back the land to secure part of the purchase money, and his notes and mortgage remained unpaid in Elijah Smith's hands at the time of the trial. These conveyances were

executed at the office of H. P. Haynes, several miles distant from the farm, and the plaintiff was permitted to testify, against the seasonable objection of the defendant, that it was then and there agreed between the parties that, in consideration of said Elijah's having the use of the buildings on the place till March 25, 1869, the plaintiff was to have all the manure made by said Elijah's cattle upon the farm during that time, and other witnesses were allowed to state facts tending to prove the same thing. It was admitted that the defendant knew nothing of this arrangement when he bought and removed the manure.

Elijah Smith, called by the defence, denied that such agreement was ever made, and testified that at the date of the deed he had fifty tons of hay in the barns on this place, half of which was not cut upon the farm but cut elsewhere and hauled there; that he traded in cattle; bought, fatted and sold them; that after Jan. 9, 1869, he bought oxen and stall-fed them with grain bought for the purpose after that date; that immediately after that day he cleared out the wide space behind the "tie-up" in his barn, laid a new flooring, and constructed a large box into which he threw all manure thereafterwards made, considering it his property, having thrown that previously made into the yard and left it there when he quit the premises.

March 12, 1869, he sold this manure in the box to the defendant, who then paid him, and hauled it away the next day. Mr. Farrar was not at the farm from some day before his purchase till after the removal of the manure. Mr. Haynes, the scrivener, heard nothing said about manure while the parties were at his office, the plaintiff admitting that no other conversation was ever had on the subject, except at that time and place. To the admission of parol evidence to vary the effect of the deeds the defendant objected, and further contended that there was no delivery of the manure which was not in existence January 9, 1869, to vest title to it as against him, an innocent purchaser for value without notice; but the presiding justice ruled *pro forma* that the delivery was sufficient, that the testimony was admissible, and if believed entitled the plaintiff to a verdict, which he obtained, and the defendant excepted.

Brown & Simpson for the defendant.

Lewis Barker for the plaintiff.

PETERS, J. In January, 1869, Elijah Smith conveyed a farm to the plaintiff by a deed containing these words: "Reserving, however, possession of the buildings for my own use till the twenty-fifth day of March, 1869." The verdict in the case establishes the fact that, at the time the deed was given, it was orally agreed by the parties to the deed that, as a compensation for the use of the buildings, as reserved to the grantor, the grantee should have all the manure made on the farm by the grantor's cattle during that time. The manure created during this period was collected into heaps in the barns where it was made, and then sold and delivered to the defendant by the grantor, and by the defendant paid for and removed from the premises before the twenty-fifth day of March, 1869, without any notice of a prior agreement or sale. The plaintiff was not upon the farm at the time the deed was given to him, nor at any time afterwards before the manure was removed. No other delivery of the manure was made to the plaintiff than is inferable from the situation of the parties and the facts thus stated. Several questions are raised by the defendant's exceptions to the rulings, which were made *pro forma*.

I. It is contended that oral evidence to prove the bargain between the parties to the deed, about the manure, was improperly admitted, because it was contradictory to the terms of the deed. But we think that the admission of this evidence amounts only to allowing the plaintiff to show that he was to give less for the land than the amount of the consideration expressed in the deed. That is, that he was to have the manure, in addition to the farm, for the sum paid by him. This affects the consideration only. In this view the evidence was admissible. In *Goodspeed* v. *Fuller*, 46 Maine, 148, where the decisions bearing on this subject are extensively collected, the court say: "The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation, in every direction."

II. The next objection is, that manure not in existence at the time of an attempted sale cannot legally be sold. According to most of the authorities, a thing may be sold which has only a potential existence. Among the illustrations given by legal writers, it is said that a valid sale may be made of the wine that a vineyard is expected to produce, or the grain a field may grow in a given time, or the milk a cow may yield during a coming year, or the wool that shall thereafter grow upon sheep, or what may be taken as the next cast of a fisherman's net, or fruits to grow, or young animals not yet in existence, or the good will of a trade, and the like. The thing sold, however, must be specific and identified. It must be, for instance, the products of a particular vineyard or field, or the wool from particular sheep. These must also be owned at the time by the vendor. A person cannot sell the products of a field which he does not own at the time of sale. Nor can he sell the wool to grow upon sheep which he does not own at the time of sale, but which he expects or agrees to buy thereafter. *Pratt* v. *Chase*, 40 Maine, 272; *Morrill* v. *Noyes*, 56 Maine, 458. We think the ruling upon this point was correct. It may well be supposed that the jury understood the sale to be applicable to such products of the stable as should be made by the particular animals then owned and possessed by the vendor.

III. Upon the remaining point, we think the ruling was not correct. The presiding justice substantially instructed the jury that, upon the facts found, there was a sufficient delivery to overcome the rights of the defendant as a *bona fide* purchaser. Had the manure remained upon the premises at the time the grantor left them, that act would have amounted to a delivery. *Nichols* v. *Patten*, 18 Maine, 231. But the manure was all removed before the seller's tenancy had terminated, and before the grantee had any possession of the buildings where it was. Up to the twenty-fifth day of March, 1869, the plaintiff had no more right to control or occupy the buildings than any stranger had. The manure could not pass as a part of the realty. It was

not upon the land when the deed was given, nor was it then in existence. The ordinary relation of landlord and tenant did not exist between the parties; nor was the manure made in the course of husbandry on the farm, if such a relation did exist. We do not see that there is any evidence of delivery whatever. Although the rule which requires a delivery to a *bona fide* purchaser, who has paid the price for personal property, as against a second purchaser, has been very liberally construed in many of the later decisions in this country; still, the rule has not been abrogated. Some evidence of delivery is required, though it may be slight. But here there is none. *Fuller* v. *Ludwig*, 17 Maine, 162; *Garland* v. *Hilborn*, 23 Maine, 442; *McKee* v. *Garcelon*, 60 Maine, 165; *Ingalls* v. *Herrick*, 108 Mass., 351.

Exceptions sustained.

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

BURLINGTON *vs.* SWANVILLE.

Husband and wife. Pauper residence—how acquired and lost.

Abandonment of a home or residence, followed by five years consecutive residence in another place, without receiving pauper supplies, will effect a settlement; but the abandonment of a husband or wife will have no such effect. No abandonment of either party by the other will, *per se*, affect the husband's settlement.

Though a wife cannot have a pauper settlement different from that of her husband, she can so establish her residence in a town other than that in which he resides as to have her home separate from his, so that in law as well as in fact her home will not be his home.

A man's settlement may be in a town though his wife and children have resided for the five preceding years consecutively in another town, without he or they receiving pauper supplies during that period.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT upon an account annexed, for the support of William Hurd from December 7, 1871, to May 1, 1872. It was not de-

nied that all proper statute notices and replies were given. The pauper was married in Swanville in 1839, lived there over twelve years, then went to Waldo for about three years, and returned to Swanville in 1855, where he remained till 1859, when he came to Burlington, staid there six months, then to Lowell for eighteen months, then to Lincoln for about the same length of time, and then to Enfield. His wife bore him five children, all born in Swanville. In March, 1864, Mr. Hurd left his family in Enfield, to go to work for a few weeks at Mattawamkeag Point. During his absence, and without his knowledge or consent, his wife and children moved to Lincoln, where his wife has ever since resided, the children staying with her till they married, two living with her at the time of trial. Returning from Mattawamkeag, Mr. Hurd ascertained where his family was, went there, had some talk with his wife, in which (as she testified) it was agreed that she would take care of herself and children, and he might take his money and support himself, which conversation he denied, but from that time it was admitted that he never lived with his wife nor spoke to her again, and was in Lincoln only once or twice, calling upon the children, one of whom was married and living in the other part of the house occupied by Mrs. Hurd, and contributed nothing toward the support of his family beyond giving a dollar or two to the children at the time of making these calls. Testifying in behalf of the defence, Mr. Hurd said that he always calculated that his home was where his family was, where his children were, calling them his family; that he had lived for short periods in various towns; in Lincoln a year or so, on a place for which he bargained with one Nute, where he kept house for himself; at Benj. Davis', in Burlington, in 1867–8. Being asked upon cross-examination if he made it his home at Davis' he replied: "Yes sir, had my clothes, valise and trunk there," which he afterwards explained to mean that he called it his home wherever he happened to be at work. After 1864 he voted once in Enfield, and voted in Lincoln in 1868, the year he lived on the Nute place. From 1863 to 1869 inclusive he was taxed in Lincoln, except in 1865, but paid his tax only for

1866. When one of the other taxes was demanded, he said he should not pay it there, because he had been living in Burlington, and if he paid anywhere it would be in Burlington. He was on the voting list of Lincoln from 1863 to 1871 inclusive, (except 1865,) but voted there only in 1868. The plaintiffs notified Lincoln as well as Swanville. The verdict was for the plaintiffs, which the defendants moved to set aside as against law and evidence.

The counsel for the defendants requested the following instructions:

I. If the pauper once established his residence in Lincoln, and has never since abandoned his wife or family, and no pauper supplies have been furnished, their continued residence in that town for more than five years consecutively, gave him a settlement in that town.

II. No abandonment by the wife of the husband, or refusal to cohabit with him, will affect the settlement of the husband, unless he abandoned her.

The first requested instruction the presiding justice refused to give. With reference to the second he remarked that "as matter of law the proposition is correct as it is worded, but requires careful consideration to understand its meaning. A wife can abandon her husband and divorces are often granted for that cause. She can abandon him as completely as he can abandon her. The point of inquiry is whether or not a separation has taken place, so as to create separate homes." "If they do separate, then they may have separate homes, and it is of no consequence which left the other. If she took up a separate residence it would become her dwelling-place or home to all intents and purposes, as much as if she were unmarried; but the wife's home is not necessarily the husband's home. Under our laws, a married woman may hire a tenement, take her property into it and establish a home for herself alone, separate from her husband, just as well as if she were an unmarried woman. He has no right to control her property against her will; she can control it herself, and manage it as she pleases."

Alluding to a point urged by the defendants' counsel, that a

man may have a home in a town without having any particular place in the town where he has a right to stay or call his home, the judge ruled or remarked to the jury: "Can a man be said to have a home in a town without having some roof to shelter him, some door which will be willingly opened to him, some place where he can lie down at night, some table at which he may be permitted to eat? Such a thing is possible. There is no legal impediment in the way. Whether such a condition of things is probable, the jury will judge. It is not impossible for a man to retain his home in a town though there is no particular spot that he has a right to go to. If, having established his residence in a town, he leaves with an intention not to return, or if he leaves without any intention one way or the other, taking all his earthly possessions with him, his residence is thereby interrupted. If he goes from town to town not having any intention one way or the other never thinking whether he will or will not go back to the town which he has left taking with him his trunk and clothing, and whatever else of earthly things he possesses, having no intention as to whether he will return or not; that will constitute an interruption. That was the precise point decided in *North Yarmouth* v. *West Gardiner*, 58 Maine, 207.

The defendants' counsel suggesting that the fact of the pauper having a wife and family in town which he had not abandoned would distinguish this case from that of *North Yarmouth* v. *West Gardiner*, the judge remarked that that fact might be important as a piece of evidence to be weighed in connection with the other evidence in the case, in determining what the pauper's intention was, but the ultimate fact to be determined after all was as to the intent with which the pauper left town.

The defendants excepted to the instructions and refusals to instruct. The foregoing are only extracts from the charge, which was full, covering all the points raised in the case.

A. W. Paine for the defendants.

The facts upon which our requests were based are these. The pauper Hurd having his residence and settlement in the defendant

town in 1859, being then a married man with five children, abandoned his residence in that town, moved away, and has never since returned to reside there as his home. He first went to Burlington, and from thence to other towns in that neighborhood, gaining no settlement, but living in several places, until 1863 or 1864, when, during his absence in the woods for a few weeks, his family moved into Lincoln. On his return soon after from the woods, he sought out their new place of residence, went to it and spent a portion of the day there, partook of a meal prepared there by his daughter, and ever after sought there to renew or continue his relation of husband and father to the family. From time to time, during the years which succeeded, he sought in various ways to win back his family to their former state of unity, by making advances to that end in various ways, assisting by occasional gifts in their support, sending them tokens of affection, and at one time actually bargaining for a house and farm within the town, into which to remove them, and actually taking possession of it and keeping such possession for two or three years. During all this time, however, after the removal to Lincoln, the wife of the pauper refused to cohabit with her husband, or to permit him to reside in the house, he living around in various places in Lincoln and neighboring towns, with no settled place of residence anywhere, other than that which his wife occupied, generally spending his time wherever he could get employment and a living. During all this time too, from 1863 to 1869 inclusive, he was taxed in Lincoln, and until 1871 his name was continued on the voting lists of the town, except only in 1865, he being on the first day of April of that year absent from town on what now appears to be a temporary visit to Swanville among his old friends. And what is important is the fact that he testifies that "he never abandoned his wife," "was always glad to see them," &c., a sentiment which was confirmed at the trial by very much testimony of his acts on both sides.

These are what may be called the undisputed facts of the case so far as questions of law arise, and they are the facts upon which were based the two requested instructions.

Our first proposition is so simple as to be tautological, an axiom, a truth that is self evident, and can hardly be made more so. If a person, having a wife and family, once established his home in a town and never abandons it, he continues it. Such in truth is the exact proposition submitted and refused.

If a man once establishes his home with his family in a given town, and then abandons that family, he may gain a settlement or have a home independent of them, but in order for him to gain such new home independent of them he must first give them up, or in other words abandon them, otherwise his home is with them. Such is the common sense of the proposition, and such is the uniform current of authority. These authorities when thoroughly examined will be found to concur in this, and every where in case of wandering paupers they base their whole argument upon this supposition. The other view of the case, viz., that of the man who has not abandoned his family, has never before been up for argument or decision. The doctrine now broached is *de novo*.

Thus, in that last of all cases in our state, so elaborately argued by the learned judge at all points, that of *Ripley* v. *Hebron*, 69 Maine, 379, the question of difficulty, the vexed question in all cases of the kind, is forcibly put as follows: "When a man leaves town . . . . . and is no longer personally residing there, and leaves no family nor property, &c., can he retain a home?" and in his answer he says, "if he did not intend to abandon it as his home, but did intend to retain his connection," &c., "then the inference and conclusion is not a questionable one." See also *North Yarmouth* v. *West Gardiner*, 58 Maine, 207.

The question is whether or not a wife who, in the absence of her husband, has located a home in a given place, afterwards adopted and approved of by him, can by her own conduct and without his concurrence so act toward him as to affect his residence or settlement. Can she as the jury were told "abandon him as completely as he can her"—"as if she were unmarried?" He can gain a settlement without her; can she do the same?

It is his intention that controls a settlement. If he intends

that his home shall be where hers is, can she control that intention because physically able to exclude him from the house? Her right to control her own property has nothing to do with this question. There is no such thing as a wife abandoning her husband within the meaning of the pauper act which is the connection in which this question arises, nor can she control his will as to his domicile. *Richmond* v. *Vassalboro*, 5 Maine, 396; *Pittston* v. *Wiscasset*, 4 Maine, 293; *Waterboro* v. *Newfield*, 8 Maine, 203; *Augusta* v. *Kingfield*, 36 Maine, 235; *Warren* v. *Thomaston*, 43 Maine, 606; *Howland* v. *Burlington*, 53 Maine, 54. As our proposition of law which was given was declared to be correct "as worded," we except to comments which virtually reversed it.

The facts do not sustain the verdict upon correct legal principles.

Wilson & Woodard for the plaintiffs.

The residence and acts of the wife have nothing to do with establishing the residence of the husband. *Hallowell* v. *Saco*, 5 Maine, 143; *Raymond* v. *Harrison*, 11 Maine, 190; *Greene* v. *Windham*, 13 Maine, 225; *Parsons* v. *Bangor*, 61 Maine, 457.

WALTON, J. In our judgment there was no ruling or instruction of the presiding judge of which the defendant can justly complain.

The first requested instruction, namely, that "if the pauper once established his residence in Lincoln, and has never since abandoned his wife or family, and no pauper supplies have been furnished, their continued residence in that town for more than five years consecutively gave him a settlement in that town"—was rightfully withheld, because it fails to discriminate between the abandonment of one's wife or family and a change of residence from one town to another. One may change his residence without abandoning his wife or family, or he may abandon his wife and family without taking up his residence in another town. Strike out the words "wife or family" and insert "residence," and strike out "their" and insert "his" and the proposition would be correct. As it is, it is clearly erroneous. *Parsons* v. *Bangor*, 61 Maine, 457.

The second requested instruction, namely, that "no abandonment by the wife of the husband, or refusal to cohabit with him, will affect the settlement of the husband unless he abandoned her," was given. But the defendants complain of the remarks of the judge which followed. They contend that they destroyed or neutralized the instruction and were therefore improper. We think not. It may be doubted whether the requested instruction is itself strictly accurate, whether the judge would not have been justified in withholding it altogether. It will be noticed that if it does not directly assert it very clearly implies, that abandonment by the wife will affect the settlement of the husband if he also abandons her. Strictly speaking no abandonment of either will, *per se*, affect the husband's settlement. Abandonment of a home or residence may affect the settlement, but the abandonment of a husband or wife will have no such effect. As remarked by the presiding judge, the real point of inquiry is whether an actual separation has taken place so as to give the husband and wife separate homes, so that while the wife actually resides in one town, the husband may have a home in another town. As worded, the requested instruction was well calculated to confuse if not to mislead the jury, and the remarks of the presiding judge were intended to guard against such a result. We think they were pertinent and proper.

But the chief ground of complaint is the instruction that a wife may abandon her husband and establish for herself a home separate from his. The question is not whether she can gain a pauper settlement separate from his. Of course she cannot. But whether she can establish for herself a separate home, so that in law as well as in fact her home will not be his home.

The defendants insist that while it is true that the husband may abandon his wife and establish for himself a separate home, she cannot abandon him and establish for herself a separate home.

We think she can. This precise argument was urged in a case recently decided in the supreme court at Washington and overruled. It was there claimed that the domicile of the husband is the domi-

cile of the wife, "that she could not have a different one from his." But the court held that she could, that this "was so well settled that it would be idle to discuss the proposition, that the rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so; that the right springs from the necessity for its exercise, and endures as long as the necessity continues." *Cheever* v. *Wilson*, 9 Wallace, 108.

And in an early case in this state where the same argument was urged, the court held that although the residence of the wife is evidence of the domicile of the husband, yet it is not conclusive that "if he has abandoned her, or she has abandoned him, he may establish his domicile elsewhere." *Greene* v. *Windham*, 13 Maine, 225.

Of course husbands and wives are expected to live together. The marriage relation contemplates that they will do so, and that they will have but one home. But if for any cause the home of the husband becomes an unfit place for the wife to live in, or he becomes an unfit person for her to live with, the law gives her a right to leave, and to establish for herself a home elsewhere. We cannot doubt that the ruling of the presiding judge upon this point was correct.

We think the verdict is not contrary to the weight of evidence.

Motion and exceptions overruled.

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

DANIEL M. HOWARD *et als.*, receivers, &c.

vs.

JOAB W. PALMER and another.

Promissory notes as capital stock—what is sufficient consideration.

The charter of a Mutual Insurance Company, having no capital stock, authorized the company "for the better security of those concerned," to receive notes for premiums in advance of persons intending to receive its policies, and to negotiate such notes, "for the purpose of paying claims, or otherwise in the course of its business," and a compensation was to be allowed and paid the signers at a rate to be determined by the trustees; *held:*

I. That such notes were on sufficient consideration.

II. That the authority given by statute, the security thus held out to dealers, and the compensation afforded signers for the credit thus acquired, and the association and agreement of the parties giving such notes, furnished a valid legal consideration for such notes.

III. That such notes were to be regarded as the capital stock of the company, or a substitute therefor.

IV. That if the security of the dealers with the company required their enforcement, they were valid and could be enforced in the hands of receivers, the company being insolvent, to pay its losses.

A note payable to the order of A. B. is equivalent to one payable to A. B. or order.

It is not a defence that no insurance has been effected under the open policies for which the notes in question were given—nor that the company has become insolvent.

ON REPORT.

ASSUMPSIT upon this note:

"BANGOR, April 26, 1870."

"$1,001. Eight months after date we promise to pay to the order of the Maine Mutual Marine Insurance Company one thousand and one dollars, payable at Bangor, Maine. Value received.

PALMER & JOHNSON."

This insurance company was incorporated by Special Laws of 1870, c. 470, and became insolvent, was enjoined, and the present plaintiffs appointed receivers under the statute in May, 1873.

There were four actions brought by the receivers, upon notes of like tenor to the above, (but signed by other parties,) three in their own names and one in that of the company, the reports of which immediately follow this. The same statement of facts as to the form, origin and purpose of the notes, the incorporation, proceedings and insolvency of the company, and the line of defence there to is applicable to all these cases, and is to be found in the opinion. Some additional facts were supposed to affect the other cases as will appear in the report of them. In one of the four, no extended opinion was given, the cause being determined by those hereinafter reported.

A. W. Paine, *C. P. Stetson* and *A. A. Strout* for the plaintiffs.

The plaintiffs claim to recover by virtue of the special provisions of the charter. The sixth section provides that the maximum liability of each member shall be the amount of premiums he has paid, or for which he has given his note. Every man knew that he gave his note, not merely for premiums, but to give the company credit and to secure its liabilities. The seventh section provides that each member before he receives his policy, shall pay the rates fixed and determined, &c., either in money or note, and that no such premium shall be withdrawn, but shall be liable for all losses and expenses of the company during its charter. The counsel in extended arguments referred to the various other provisions of the charter and by-laws, and cited numerous cases in support of the positions taken, the nature of which is apparent from the opinion.

J. S. Rowe and *Wilson & Woodard* for the defendants.

The whole contract, if any exists between these parties, is in writing, and we object to any attempt to vary it by parol. The agreement of the subscribers shows the consideration of the note; i. e., premiums in advance of persons intending to receive policies. If no policy was received before the company was enjoined, then the consideration failed. The obligation was mutual. The company were bound to insure to an amount equivalent to the premium; and if this was not done, there was no liability upon the note. Every person who read the charter (and everybody was legally bound to know its contents) could see that these notes were to secure claims only by being negotiated; not by being held as a trust fund in the hands of the company.

Appleton, C. J. The Maine Mutual Marine Insurance Company, of which these plaintiffs were appointed receivers, was incorporated by an act approved March 16, 1870, c. 470, with full power "by instrument under seal or otherwise, to make insurance on vessels, freights, money, goods, wares, merchandise, bottomry, respondentia interest, and other insurances appertaining to or connected with marine or internal navigation risks," &c. The

corporate powers of the company were to be exercised by a board of trustees and such officers and agents as they might appoint. Every person insured was a member of the corporation during the period of his insurance and no longer; and every person holding the certificates provided for by § 12 of the act of incorporation. The members were not to be liable beyond the amount of premiums or of the notes given therefor; which however are made liable for all losses and expenses incurred by the company during its charter.

By § 9, the company for the better security of those concerned may receive notes for premiums in advance of persons intending to receive policies and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business and a compensation to the signers thereof may be allowed and paid at a rate to be determined by the trustees, but not exceeding six per cent. per annum."

By § 7 of the by-laws it was provided that "the company for the better security of its dealers may receive approved notes in advance and allow a compensation to the signers thereof; and the trustees shall have authority at all times to surrender to the signers thereof any notes thus given and for which a compensation is allowed, whenever they conceive the interest of the company requires them to do so and the safety of the company allows it."

By a vote of the trustees of January 26, 1872, three per cent. per annum was to be paid on each note advanced the company under § 7 of its by-laws, in all cases where those furnishing them have done no business with the company, and that the same be allowed on all notes on which business has been done; that is, on all amounts over and above the business done.

Before the company went into operation the defendants and others signed the following agreement: "We, the undersigned, agree to advance our notes for premiums in advance to the Maine Mutual Marine Insurance Company, to the amount set against our names, respectively, in accordance with the charter and by-laws of the company."

By the tenth section of the charter it was provided that no policy should be issued until application should be made for insurance to the amount of fifty thousand dollars.

The defendant, Palmer, was one of the directors. At the time he gave the note in suit he received an open policy, but has had no insurance under it. Notes given by the defendants and by the other signers of the above agreement under similar circumstances, constituted forty two thousand dollars of the capital of the company. All those giving such notes were regarded as applicants for insurance under § 10. The notes of the above description with premiums for insurance constituted all the assets and made up the sum of fifty thousand dollars which the statute required before any policies could be issued.

The company having by premiums and these notes given in pursuance of § 9 of the charter and § 7 of the by-laws, obtained applications for insurance to the amount required by statute, commenced business, but becoming insolvent it was enjoined from further proceeding, and the plaintiffs were appointed receivers and gave the bonds required by law.

This action is brought upon the defendants' note. The defence is that it was given for premiums in advance; that the defendants had no insurance under it; that it was never negotiated; and that it is void for want of consideration.

The notes in controversy were given by the authority of the statute under which the company was organized. "I look upon this note," remarks Gray, J., in *Deraismes* v. *The Merchants Mutual Insurance Company*, 1 Comst., 375, where a similar question was presented for decision, "as a statutory note, the validity of which may be rested entirely upon the statute authorizing it to be taken, and does not at all depend upon any question of consideration." Further, these notes were given "for the better security of those concerned." If void, where would be the better security? They were given to be negotiated to pay claims or otherwise in the course of the business of the company and "for the better security of its dealers." A compensation was allowed

the signers for this use of their names. These notes constituted and were represented to the public as constituting a part of its assets; indeed almost the whole of its assets. The credit of the company was based upon their existence and their validity. These considerations amply suffice to render the notes valid. Further, the agreement signed by the defendants with others interested as associates in the company, to give their notes respectively, and to share the liabilities and enjoy the advantages secured by its charter constitute a consideration amply sufficient to uphold the notes in suit. *Brouwer* v. *Appleby*, 1 Sandf., 158; *House* v. *Allen*, Ib., 171; *Brouwer* v. *Hill*, Ib., 629; *Howland* v. *Myers*, 3 Comst., 290. It is to be observed that the charters referred to in the cases cited are almost identical in language with the one under consideration.

Premium notes for risks are to be paid. Premium notes are the notes of applicants for insurance. The note in suit is the note of an applicant for insurance. Both classes of securities make up the amount required before policies can be issued. So far as relates to the public, the dealers with the company, notes upon open policies where there have been no insurances and notes for risks taken are to be regarded alike as for the security of policy holders. The company is estopped to assert that they have falsely and fraudulently misstated them as assets in their advertisements to the public. The signers of notes like the one in suit are not to be permitted to say that they have uttered notes without consideration and valueless, for the purpose of misleading or defrauding those who have trusted in their integrity. The object of these notes was "for the better security of the dealers" with the company. That too was the design of the legislature. It would be in direct violation of the legislative intention and a gross fraud upon the dealers, creditors of the company, to hold that the notes and securities upon the basis of which the public were induced to give it credit and transact business with it, were utterly void or available only to the extent of the actual insurances indorsed on the open policies of the company.

These notes are made negotiable by statute. It can hardly be questioned that if negotiated, their payment could be enforced by an indorsee for value. But if not negotiated the purposes for which they were given may equally require their enforcement. They were given "for the better security of those concerned." They were received by the company "for the better security of its dealers." Who are those concerned? Who are the dealers of the company for whose "better security" these notes were given? The holders of unpaid policies where the contemplated risks have been incurred. The purpose for which they were given is equally promoted by enforcing their collection for the "better security" of the dealers with the company as for the benefit of its endorsees.

The notes by the seventh by-law are not to be given up, unless the interest of the company requires it and the safety of the company allows it. The interest of the company requires integrity. The safety of the company consists in its solvency. The surrender of its assets is alike at variance with its integrity and its solvency. If by its misfortunes it has ceased to be solvent, it can still remain honest.

It was the duty of the company to collect these notes "for the better security of its dealers." Having become insolvent the law has devolved that duty upon its officers.

The case of *Pendergast* v. *Commercial Mutual Marine Company*, 15 Gray, 257, has been cited and relied upon by the defence; but we think it does not apply. In an open policy it is generally understood that the insured is only liable upon his note to the extent of the insurance obtained. But in the present case the notes were given for more than the policy. They were given "for the better security of the dealers" with the company. They were held out to the world as a portion of its assets. The signers were paid for signing them.

It is objected that the note is payable to the order of the Maine Mutual Marine Insurance Company and has not been indorsed. It may have been once doubted whether a note payable to the order of A. B. was equivalent to one payable to A. B. or order, but

it has long been settled that a note payable to a man and his order, or to his order only, is one and the same thing. The note was enforceable in the name of the payee. The law vests the title in the receivers and the action is properly maintainable in their names. *Defendants defaulted.*

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

PETERS, J., having been of counsel did not sit in these cases.

DANIEL M. HOWARD, *et al.*, receivers, &c.
vs.
THE HINCKLEY AND EGERY IRON COMPANY.

Premium note—renewal of and liability upon.

When a premium note in advance for the security of dealers was given to a mutual insurance company, in accordance with the provisions of its charter, at its commencement in business and it was renewed, the makers are equally liable in case of insolvency to the receivers, as if the occasion for its use had arisen during the existence of the first note.

If premiums have been paid for risks at the time of insurance, they cannot be deducted from the note.

ON REPORT.

ASSUMPSIT upon defendants' note for $1,001, dated January 2, 1871, payable in twelve months from date to the order of the Maine Mutual Marine Insurance Company. A note of like amount was given by the defendants to the insurance company April 26, 1870, when they received an open policy for it. During 1870, defendants insured to amount of $21,150, the premiums on which were $142; which sum they paid in cash in January 1871, took up the old note, gave the one in suit and took a new open policy on which they insured $15,575, the premiums amounting to $103.17, paid in cash; and in January 1872 they took another policy on which they insured $3,240, and paid $18.36 premium.

The other facts are same as stated in preceding case.

A. W. Paine, *C. P. Stetson* and *A. A. Strout* for the plaintiffs.

J. S. Rowe and *Wilson & Woodard* for the defendants.

APPLETON, C. J. The facts admitted and the testimony in the case of these plaintiffs against Palmer and another are to be considered so far as they are legally admissible in this case.

The defendant company gave a new note in renewal of the first one and at the same time took an open policy of even date. The note so given is the one in suit. They had had insurance under the first policy which they paid, renewing their note for the original amount. Since the present note was given they have effected insurances, the premiums for which they have paid.

When a premium note in advance for the security of dealers was given to a mutual insurance company at its outset in business, and was renewed at maturity, the makers were held liable to the receivers of the company in the same manner as if the occasion for its use had arisen during the existence of the original note. *Howe* v. *Folger*, 1 Sandf., 177.

The defendants had an undoubted right to have allowed them all premiums due if any there were when this note was given, but they did not. So they might have had the premiums since paid allowed on the note in suit had they so chosen. Instead of doing that, they paid the premium, preferring thereto the anticipated benefits of the three per cent. allowed by the vote of the company in accordance with the ninth section of the charter and the vote passed under it. *Defendants defaulted.*

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

PETERS, J., did not sit.

MAINE MUTUAL MARINE INSURANCE COMPANY
vs.
EBEN BLUNT *et al.*

Renewed premium note—liability upon.

When a firm gives a premium note in advance for the security of dealers, under the charter of a Mutual Insurance Company, and a new firm is formed which succeeds to its business and which gives a note in renewal of the one first given, the signers of such note are liable therefor.

Where premiums have been earned against such firm by the company while the note is running, the firm are not liable for such premiums in addition to such note.

ON REPORT.

ASSUMPSIT upon note given by the defendants to the plaintiffs dated January 1, 1872, for $637.35, and payable to the plaintiffs' order in twelve months from date. There was also a count upon an account annexed for $212.24, being amount of premiums for insurance effected by Blunt & Co. between January 1, 1872, and May 1873, when the company was declared insolvent, and not indorsed on any note. Blunt, Hinman & Co. gave note for $1,001, dated April 26, 1870, for open policy No. 10, and were parties to the agreement mentioned in previous cases of *Howard* v. *Palmer*, and *Same* v. *Hinckley*, *ante*. In January 1871, that firm took up that note, paid the premiums of the year in cash, and took a new open policy. In January 1872, the present defendants who had succeeded to the business of Blunt, Hinman & Co. took up the note then maturing, and gave this note in suit which was for the sum remaining after deducting the premiums of the year from the $1,001 note. The defendants offered to pay the $212.24, and the plaintiffs claimed that sum in addition to the note, because not indorsed thereon. The other facts appear in the preceding cases and in the opinion.

A. W. Paine, *C. P. Stetson* and *A. A. Strout* for the plaintiffs.

J. S. Rowe and *Wilson & Woodard* for the defendants.

APPLETON, C. J. This is on a note given in renewal of a note given by Blunt, Hinman & Co. for an open policy issued by the plaintiff corporation. Eben Blunt was by the act of incorporation one of the trustees of the company and signed the subscription paper referred to in *Howard* v. *Palmer*, *ante*. He was likewise a vice president.

The note originally given by Blunt, Hinman & Co. was settled by deducting the amount due for premiums and giving the present note signed by Blunt & Co. who were the successors in business of the first named firm, having purchased their business and property. The new firm when it gave the note in suit, took a new open policy under which they have effected insurance to the amount of $212.34; for which sum they are willing to be defaulted. "But," as was remarked by Gray, J., in *Deraismes* v. *The Merchants' Mutual Insurance Company*, 1 Comst., 375, "the concession that the note is so far valid, it seems to me, virtually admits that it is good for the whole amount." That case was like the present in the charter of the insurance company and in the fact that there were risks taken under the open policy.

That the note in suit was given under § 9 to form part of the fund for the security of dealers we cannot doubt. *The Merchants' Mutual Insurance Company* v. *Rey*, 1 Sandf., 184.

The defendants are liable only for the amount of the note, and not for the premiums in addition to the note. *The Merchants' Mutual Insurance Company* v. *Leeds*, 1 Sandf., 183.

Defendants defaulted.

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

PETERS, J., did not sit.

EMMA A. JENKS *vs.* MASON A. WALTON.

Deed. Entry for condition broken. Practice.

A grantor in a conditional deed went upon the locus for condition broken with two witnesses; and there notified the grantee that she should take possession of the land because he had broken the condition in the deed: *held*, that those acts were a sufficient entry to revest the estate in her.

A court at law will not upon motion stay proceedings in a suit (where a forfeiture is sought to be exacted), in order to let in an alleged equitable defence when there is nothing before the court to show whether the motion is a meritorious one or not.

ON EXCEPTIONS.

PETITION FOR PARTITION. The petitioner asks to have set off to her one-half of lot number ten on the west side of the Bennock road in the town of Alton, particularly described in her petition owned by her, and previously undivided and occupied in common with the proprietor of the other half, but which she now desired to possess in severalty. The respondent claimed to be sole seized of the whole lot.

To sustain her title the petitioner introduced a deed of said lot, given May 9, 1868, to herself and the respondent from Sarah Walton and testified that she had occupied the premises under that conveyance. The respondent introduced a deed from the petitioner to him of an undivided half of the lot dated December 5, 1868, containing a condition that he should support and maintain Sarah Walton in a suitable manner during her life, &c., and "reserving to said Emma A. Jenks the right to enter on said premises if the foregoing condition is broken." Mrs. Jenks claimed that there had been a breach of this condition, in that there was a neglect and refusal to support Mrs. Walton from May 1872, till after the commencement of these proceedings and that she (the petitioner) had entered to regain the estate for condition broken by going upon the premises with two witnesses December 14, 1873, and there notifying Mr. Walton that she should take possession of the land because he had broken the condition of the

deed. She did not profess to recollect the exact language used by her on that occasion and the respondent testified that she came with two persons to his door one night and told him she had come to notify him that she was going to have the farm divided; that he asked her, "on what grounds?" and she replied that it was on the ground that he had neglected to support their mother (Mrs. Sarah Walton) according to the contract, that he then said he had not forfeited the contract, was then and always had been willing to support their mother and that she (Mrs. Sarah Walton) could come to his house at any time. His counsel thereupon requested the presiding judge to instruct the jury that these acts and declarations of Mrs. Jenks were not sufficient in law to revest the estate in her, so as to enable her to maintain this process, which instruction was refused, and the jury were told that if they found the condition had then in fact been broken, what was done by the petitioner was sufficient to revest the estate in her so that she could maintain this proceeding.

The respondent offered to prove that he paid a valuable consideration, beside the obligation to support, for Mrs. Jenks's deed to him; but upon her objection this testimony was excluded.

A motion was made to dismiss this petition on the ground that a writ of entry was the proper resort in such cases but it was overruled. The petitioner had a verdict, subsequently to which the respondent filed a motion that an auditor might be appointed to determine what sum ought to be paid for the support of Sarah A. Walton, and that upon payment of the same with costs, these proceedings be stayed. This motion was also overruled.

To these several rulings the respondent excepted.

J. H. Hilliard for the respondent.

The entry was insufficient to revest the estate. Mrs. Jenks said she was going to have the farm divided. This was *alio intuitu*. *Robison* v. *Swett*, 3 Maine, 316. Partition not the suitable method of ascertaining whether or not there has been a forfeiture. *Lincoln Bank* v. *Drummond*, 5 Mass., 321.

Mr. Walton should have been permitted to redeem. *Stone* v.

Ellis, 9 Cush., 95; *Atkins* v. *Chilson*, 11 Metc., 112; *Sanders* v. *Pope*, 12 Vesey, Jr., 293; *Baxter* v. *Lansing*, 7 Paige, 353; *Steel* v. *Steel*, 4 Allen, 417; *Gibson* v. *Taylor*, 6 Gray, 310.

F. M. Laughton for the petitioner.

No entry necessary to entitle one to the right to a division. R. S., c. 88, §§ 1 and 2. *Wells* v. *Prince*, 9 Mass., 508; *Barnard* v. *Pope*, 14 Mass., 434; *Baylies* v. *Bussey*, 5 Maine, 157. But if necessary the one made was sufficient. Co. Lit., 49, b., and 255, b. *Richards* v. *Folsom*, 11 Maine, 70.

Being again a tenant in common (after the entry) Mrs. Jenks was entitled to have the land divided. *Leadbetter* v. *Gash*, 8 Iredell, 462; *Wood* v. *Little*, 35 Maine, 107. Writ of entry not proper in such a case as this. *Cutts* v. *King*, 5 Maine, 482; *Colburn* v. *Mason*, 25 Maine, 434. The motion after verdict though appropriate (if seasonably made) in a suit upon a mortgage, has no propriety in these proceedings. *Frost* v. *Butler*, 7 Maine, 231.

PETERS, J. The petitioner claims that the premises are forfeited to her for the non-performance of a condition subsequent, contained in a deed from her to the respondent. A question arises whether she made a sufficient entry upon the land to entitle her to the benefit of the forfeiture.

Her counsel contends that this inquiry is not necessary, because the right of partition is conferred upon any petitioner who has only "a right of entry" into lands. R. S., c. 88, §§ 1 and 2. But this provision refers to one having the title and not the possession of land, and not to one whose title is conditional upon the fact of entry. Without an entry to recover the locus, the petitioner has neither possession or title.

What constitutes an entry for condition broken? It is deducible from the authorities that it must be an act. An intention to make an entry is not enough. The right to make it, so long as it is postponed, is considered for the time being as waived. A mere entry upon the land is not enough. The entry must be for the

purpose of taking the land back. The *factum* and the *animus* must concur in order to make the entry available. A mere casual or accidental presence upon the land would not operate to do it. The intention must be sufficiently shown either by the act itself or by words accompanying the act. Therefore it has been customary to take witnesses upon the land and personally express the intention in their presence. It is not necessary to turn the grantee off the premises. Nor to take possession in his presence. Nor to give an actual notice to him. Still the act itself must be of such a character as would serve to indicate to the person in possession that his right to the locus was regarded as terminated. It is not necessary that the grantor should make an entry even, if being in possession he remains in with the intent to hold the property for forfeiture, but in such case there must be some clear manifestation of such intent. *Robison* v. *Swett*, 3 Maine, 316; *Peabody* v. *Hewett*, 52 Maine, 33; *Brickett* v. *Spofford*, 14 Gray, 514; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass., 80. See Washburn on Real Property, Titles, Estates on Condition and Possession.

Applying the evidence to these rules, and the testimony of the petitioner must be regarded as showing a sufficient entry to revest the title of the estate in her. She says that she made an entry upon the locus for condition broken with witnesses and notified the respondent on the premises that she should take possession of the land, because he had broken the condition in the deed.

After verdict the respondent moved that an auditor be appointed by the court to ascertain what sum of money would be sufficient to relieve the forfeiture, in order that, upon the payment of such sum, further proceedings in the suit might be stayed. This request was denied and an exception taken thereto. Most of the cases cited in support of this motion would be applicable if this was a real action to foreclose a mortgage given by the respondent, instead of his being the grantee in a conditional deed. Probably a common law court has the power to grant such a motion if deemed proper to do so. *Atkins* v. *Chilson*, 11 Metc., 112.

A sufficient answer in the present case, is that there is no evidence of any kind before us which would show whether the motion is a meritorious one or not. There is nothing to indicate but that the breaches of condition were of a gross, wilful or inequitable character. The respondent can best judge whether the circumstances were such as would warrant his attempt to obtain a relief from the forfeiture by future proceedings in equity. No remedy is open to him here. *Exceptions overruled.*

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

ROYAL E. MATHEWS *vs.* HIRAM H. FISK.

Conversion. Demand. R. S., c. 91, § 3. Trover.

Fisk sold Mathews a horse taking his note for a hundred dollars payable in seven months, and a mortgage of the animal conditioned for the payment of twenty-five dollars upon the note in one month, and "the balance to be paid in labor driving logs the present season, if said Mathews' labor shall be sufficient; otherwise in cash according to the tenor of said note;" with a proviso that the horse was to remain in Mathews' possession until default made. At the expiration of thirty days from the date of these papers Fisk demanded payment of the $25 which was refused upon the ground that it was not due, and Fisk took possession of the beast. Mathews testified that he was not aware that the condition of the mortgage changed the tenor of the note and that he did not consent to any such change, and claimed that this taking was a conversion. After taking the horse Fisk disposed of him, and also negotiated the note which the maker paid in full to the indorsee. Fisk having repurchased the horse, the plaintiff after payment of his note demanded the beast of him, to which the defendant replied that it was at the stable of a third person a few rods off and that the plaintiff might take him; but Fisk admitted upon the stand that he had not at the time of demand seen the horse for more than a week and did not know whether or not he was then actually at the stable mentioned or not: *held*, that it was the defendant's duty to know whether or not the horse was at the designated place of delivery, and that a verdict against him should be sustained.

A sale by the mortgagee of personal property mortgaged, before foreclosure, is a conversion of the same for which the mortgagor can maintain an action.

ON EXCEPTIONS.

TROVER for the conversion of plaintiff's horse by the defendant.

April 23, 1873, Mathews bought of Fisk a horse for $125 paying twenty-five dollars in cash and giving his note on seven months for the hundred dollars. At the same time he secured payment of this note by a mortgage which stipulated that it was "to be paid as follows: twenty-five dollars to be paid in one month from date in cash, the balance to be paid in labor driving logs this present season, if said Mathews' labor shall be sufficient; otherwise in cash according to the tenor of said note," with an additional proviso, that the grantor was to continue in possession of the property, &c., "until the conditions of this sale are broken." There was testimony introduced that the parties made an agreement as to the mode and times of payment, according with those stated in the condition of the mortgage; and the defendant adduced testimony to the contrary, and swore that he did not know that the tenor of the note was at all varied by the mortgage and that he never consented to any change, that clause being fraudulently inserted.

Upon the twenty-fourth day of May 1872, the defendant requested the plaintiff to pay the twenty-five dollars then due. The plaintiff refused, denying that anything was due. The defendant thereupon took possession of the horse, and about two weeks after let one Clark have him for forty-five dollars. He introduced testimony tending to show that this sale to Clark was with the understanding and agreement that in case the plaintiff should wish to redeem the horse, Clark should let the defendant have him back for the price paid $45, and there was testimony to the contrary. Clark soon afterwards traded this horse unconditionally for another, getting some boot, to one Hatch. In about five months after the defendant took possession of the horse, he sold the note and bought the horse back of Hatch for $62.50. The defendant introduced testimony tending to prove that after he bought back the horse and before the plaintiff demanded him, the defendant requested the plaintiff to appoint a place where he would receive said horse and the plaintiff refused, whereupon the defendant left the horse with one Joseph Hatch, to work for his board in said Lincoln, and afterwards notified him that said horse was there for

him and there was testimony to the contrary. April 15, 1873, the plaintiff paid the note to the defendant's indorsee.

There was testimony tending to show that on the twenty-third day of April 1873, two demands were made for the horse; first in the morning about eight o'clock at defendant's stable; and next at Lincoln in the street some hours later in the day; and that the defendant immediately replied that the plaintiff could have him, that he was ready for him at Mr. Hatch's stable; and there was testimony to the contrary. Hatch's stable was within eight or ten rods of the place of demand. The plaintiff did not go to get said horse or see if he was at Hatch's stable; and the defendant testified that he had not seen him for a week or a month previous and did not know whether he was then in that stable or not.

This action was commenced in a few hours after demand. The plaintiff made no objection to the place of delivery, and there was no proof by the defendant that the horse was at the stable at the time of the demand.

The defendant's counsel requested the judge to instruct the jury that if at any time after the defendant took the horse and before the plaintiff's demand on the twenty-third day of April, 1873, and before the commencement of this suit, the defendant requested the plaintiff to appoint a place where he would receive said horse, and the plaintiff refused, the defendant had a right to deliver said horse for the plaintiff at a convenient place where the plaintiff could get him, and that the delivery at Mr. Hatch's for the plaintiff, if it was a convenient place was sufficient, and that the defendant is not bound to prove that the horse was in Hatch's stable on the twenty-third day of April, 1873, at the time of plaintiff's demand.

He also requested the judge to instruct the jury that if they find that said horse was taken on account of the conditions of said mortgage having been broken, the plaintiff cannot maintain an action of trover for the value of said horse; that in such a case the action should be replevin, or an action of the case for damages for withholding the property as by law provided; which instruc-

tions said presiding judge declined to give and the defendant excepted.

After stating the facts as claimed by each party the judge instructed the jury upon the law substantially as follows: "That is to say they made this arrangement, if you believe Fisk, that while the note was to be on seven months there was a provision in the mortgage for a payment of twenty-five dollars in money in one month and the balance in labor or money. If that was the bargain, and if you believe the paper was fairly and truly read to the plaintiff so that he knew the contents, the legal effect it was not necessary for him to know if the bargain was fairly reduced to writing, and fairly read and signed by him, it was binding upon him. He cannot say because he did not know what would be the effect of it, it was no bargain.

The plaintiff to sustain an action of trover must prove title in himself and right of possession at the time of the demand and refusal by the defendant, and a conversion by the defendant to his own use.

The first act of conversion which they allege, is that the property was taken somewhere about the twenty-first of May, that is in the next month of May, the precise date I do not know whether it is ascertained, that is for you to judge.

Now if the horse was then taken and this $25 remained unpaid, the month being complete and the plaintiff not paying the $25, as by the mortgage he was to, why Fisk had a right to take him. If the month had not expired then he had no right to take him. Now supposing the taking was rightful, was there any act of the defendant which tends to show a conversion? It seems by strange or absurd conduct, the defendant sold his note for nothing and got his horse back again. Nobody wants the horse. They want to see how much money can be got out of it. Now was there a conversion? It seems that in April 1872, the defendant took a mortgage of the horse; that he took him from plaintiff in May, and afterwards sold it to Mr. Clark, and Mr. Clark let Mr. Hatch have it. There was a demand made for the horse on the twenty-

third day of April 1873. The plaintiff alleges a demand in the morning and another demand subsequently on the same day. The defendant says that the horse was at Hatch's stable, and that he said to the plaintiff 'go and take it.' But is there any proof that the horse was there or that by going there he could get the horse? He might not be there, or he might. If you find there was a demand made, if there was no evidence that the horse was there that was a conversion. If there was a conversion what was the fair cash value of the horse then?"

To which instructions the defendant excepted.

It will be noticed that the charge indicates that there was some uncertainty about the time when Fisk took the horse away from Mathews, but the evidence as reported mentions only the twenty-fourth day of May 1872, as the time, and this date is assumed to be correct in the argument of counsel for both parties; it is therefore the one adopted in the statement of the case.

Wilson & Woodard for the defendant.

Lewis Barker for the plaintiff.

APPLETON, C. J. This was an action of trover for a horse.

It appeared in evidence that the defendant on the twenty-third day of April 1872, sold the horse in controversy to the plaintiff, taking back from him a note on seven months and a mortgage conditioned to be void if the mortgagor should pay the defendant "a certain note of even date herewith, payable to said Fisk or order and signed by said Mathews, of one hundred dollars, said payments to be made as follows: twenty-five dollars to be paid in one month from date in cash, the balance to be paid in labor in driving logs this present season if said Mathews' labor shall be sufficient, otherwise in cash according to the tenor of the note. Provided also, that it shall and may be lawful for said grantor to continue in possession of the afore-described property without denial or interruption by said grantee until the conditions of this sale are broken."

The defendant in the following May took the horse from the

possession of the plaintiff. The question arose whether the taking was before or after the expiration of the month in which the payment of the twenty-five dollars according to the terms of the mortgage was to be made. As to this the instruction of the court was that if this sum of twenty-five dollars remained unpaid at the expiration of the month, the defendant had a right to take possession of the mortgaged horse, otherwise not. This iustruction was sufficiently favorable to the defendant.

The defendant in the next fall transferred the note to one Francis by way of exchange for another note. Francis commenced a suit upon it and obtained judgment, which was satisfied and discharged April 15th, 1873.

The mortgage given by the defendant was never foreclosed. The defendant after taking possession of the horse sold the same to Joseph A. Clark, who in November 1872 sold the same to Joseph Hatch. In the following December the defendant purchased the horse from Hatch and left him with Hatch to work for his board.

There was testimony tending to show that on April 23, 1873, two demands were made for the horse; the first in the morning about eight o'clock at the defendant's stable, and the next at Lincoln in the street some hours later in the day. There was testimony tending to show that the defendant immediately replied that the plaintiff could have him, that he was ready for him at Mr. Hatch's stable, and testimony to the contrary. Hatch's stable was within eight or ten rods of the place of demand. There was no proof that the horse was at the place of delivery at the time of the demand. The plaintiff made no objection to the place of delivery. He did not go for his horse but during the day brought his action.

The counsel for the defendant requested the court to instruct the jury "that the defendant was not bound to prove that the horse was in said Hatch's stable on the twenty-third day of April 1873, at the time of the plaintiff's demand. This instruction the presiding justice declined to give but instructed the jury if there was a demand and the horse was not there, that would amount to a conversion.

The requested instruction was properly withheld. The defendant had no title to the horse whatever. His note had been paid. The plaintiff was entitled to the horse. No objection was made to the place or time of demand. The defendant had control of the horse. If he would make a tender of the horse or deliver him on demand, it was for him to see that the horse was at the place of delivery. The responsibility was on him that the horse should be there. The requested instruction was properly withheld.

If the horse was not at the place where it was stated to be, (and the defendant testified that he did not know whether it was or not) then there was a demand by the owner upon one having possession and control of his property and a misrepresentation as to where that property was. There was no surrender of possession but a direction to go where the property was not and get it. This was evidence tending to show a conversion. It would have been more correct to have stated to the jury that it was evidence from which a conversion might be inferred.

But by the defendant's own showing the mortgage note had been paid previously to the demand. After payment the horse was in the possession of a bailee of the defendant to be used at the will and pleasure of such bailee. The defendant, his note being paid, ceased to have any interest in or rightful control over the property of the plaintiff. That the horse was then at work for his board with Hatch by the authority of the defendant and under a contract with him was of itself a conversion of the plaintiff's property, for which the defendant was liable. So a sale by the mortgagee before foreclosure would be a conversion for which the mortgagor could maintain an action. *Spaulding* v. *Barnes*, 4 Gray, 330.

An objection is taken to the form of the action. By R. S., c. 91, § 3, after payment of the mortgage debt "the property if not immediately restored may be replevied or damages for withholding it recovered in an action on the case." The plaintiff therefore had his election to bring trover or replevin.

Upon the facts which are undisputed the defence fails. It does

not therefore become necessary to determine whether or not all the rulings under which the verdict was rendered are strictly correct. *Kimball* v. *Hildreth*, 8 Allen, 167.

Exceptions overruled.

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

AMOS M. ROBERTS *vs.* JOHN LANE.

Promissory note—who is bona fide holder.

The defendant made and indorsed in blank a note, on six months, payable to his own order, which within a week was cashed by the bank of which the plaintiff was president, under his direction without further indorsement. Hearing afterward that the maker alleged fraud in the origin of the paper, and deeming himself negligent in not requiring a second indorser, the plaintiff took the note (long after its maturity) paying his bank the amount of it; *held*, that he was a *bona fide* holder for value and entitled to recover without regard to any fraud in the inception of the paper, or any failure of consideration between the original parties.

The person who puts in suit a note shown to have been obtained from the maker by fraud, assumes the burden of establishing his own good faith. This he may do by showing that he or any prior holder to whose rights he succeeds, has taken the note fairly for value before maturity in the due course of business, and without knowledge of the fraud, or notice of any circumstances of suspicion connected with the paper. It is immaterial what the plaintiff's knowledge may be, if any prior owner whose rights he has, was a *bona fide* holder of the note as above explained.

It does not affect the principles of law above stated, that the note was made to the maker's order and bore only his indorsement, so that it passed by delivery, and the title was apparently derived directly from him, if it is shown that in fact it was purchased by the plaintiff's predecessor in title, in good faith and for value of him to whom the maker first gave it.

It is no defence to a note made and indorsed only by one and the same person, that the plaintiff bought it of a bank which is prohibited by the R. S., c. 47, § 14, from discounting paper without having at least two names to it. This provision is for the security of the stockholders, and does not concern him who obtains the loan upon it.

ON REPORT.

ASSUMPSIT upon a note dated February 15, 1871, for a thousand

dollars, signed by the defendant and payable to his order in six months from its date and indorsed by him in blank. No other name was upon it.

The defendant alleged that the note was obtained from him by the fraud of Smith and of Leavitt, so that neither of them could recover the amount if suit had been brought in the name of either of them.

The plaintiff asserts that he is a *bona fide* holder of the note, while the defendant denies it, and upon the determination of this issue the cause was to be decided upon the facts which are sufficiently stated in the opinion, as well as the legal positions taken.

Wilson & Woodard for the plaintiff.

A. W. Paine for the defendant.

Barrows, J. The defendant made a promissory note February 15, 1871, payable to his own order in six months from date, indorsed it in blank and passed it as we infer from the report of the evidence in payment of his subscription for some worthless stock, and he claims that it was procured from him by fraud in which Leavitt and Smith, the first known holders, were so far involved as to prevent them from sustaining an action upon it. But the plaintiff claims to be a *bona fide* holder; and if he is, judgment is to be rendered in his favor.

The evidence shows that within five days after the note was made, it was offered with others of like character, amounting in all to something over $9,500, for discount at the Eastern Bank, Bangor. The plaintiff is president of that bank and also of the Penobscot Savings Bank, which is a large depositor at the Eastern Bank. The cashier of the Eastern Bank, who was also treasurer of the Savings Bank, testifies that the Eastern Bank bought the note and paid Smith the amount of it, less the reasonable discount agreed upon, by a check on the Eliot National Bank of Boston, which was credited with the amount of the check February 20, 1871; that there was no private agreement or understand-

ing with Smith, and no entry of the note upon the books of the Eastern Bank; that neither Smith nor Leavitt gave any reason for not indorsing the notes, nor were they asked to indorse them; that the cashier knew the law required two names, and it was not customary to discount without two; but that the bank had a surplus of money, the president liked the paper and the cashier took it and placed it in the drawer as cash; that they took that course frequently to get interest for the Penobscot Savings Bank when it had a large amount on deposit in the Eastern Bank.

The defendant being called upon to pay the note to the Eastern Bank, refused on the ground that it was obtained from him by fraud. The note lay in the bank drawer for a year, when the plaintiff as he testifies having heard what the talk was about the paper, but regarding it as the duty of the officers to see the bank harmless, and as there was negligence on his own part in not having the notes indorsed, gave his check for the amount paid by the bank and took the note as his own.

As before stated the question for determination is whether he is to be regarded as a *bona fide* holder under the circumstances here proved. The labored argument of the defendant's diligent counsel fails to induce us to indulge even a suspicion that at the time these officers of the Eastern Bank paid out the bank's money for this paper, they were aware of the taint in the inception of the notes, or even that there were any circumstances justly calculated to awaken suspicion in the facts attending the disposition of them by Leavitt and Smith. Nor does the evidence reported warrant the conclusion which the counsel seeks to draw from it, that this suit is prosecuted for the benefit of any party connected with the fraud. Unless we are to discredit the testimony given by the president and cashier, the only fair inference is that the notes were bought outright with the money of the Eastern Bank, where they were openly offered for discount, so soon after they were made that it seems improbable that any suspicion as to their validity could have been excited in any quarter, and that at that time at all events, the officers of the bank who conducted the transac-

tion had no such suspicion, nor any cause for such suspicion, but relied with entire confidence upon the names of the makers for their payment at maturity without question or cavil.

It is equally certain that at the time when the plaintiff took the note in suit from the bank and paid his own money for it, it was overdue and dishonored and he had knowledge that the payment would be contested on the ground of alleged fraud.

Upon this view of the facts, what are the legal rights and liabilities of the parties respectively?

The defendant's allegation of fraud in the inception of the note does not seem to be traversed, and the result is that the burden of proof is on the plaintiff to show that he has the rights of a *bona fide* indorsee. *Perrin* v. *Noyes*, 39 Maine, 384; *Aldrich* v. *Warren*, 16 Maine, 465; *Munroe* v. *Cooper*, 5 Pick., 412; *Peacock* v. *Rhodes*, Doug., 633; *Heath* v. *Sansom, et al.*, 2 B. & Adol., 291, 22 E. C. L. R., 78.

A plaintiff may do this by showing that he himself or any prior holder whose rights he has, came by the note fairly for value before maturity without knowledge of the fraud in the due course of business, unattended with any circumstances justly calculated to awaken suspicion. In the class of cases above cited, and in others where similar language is used, the facts were such that it was obligatory upon the plaintiff to show such a transfer to himself, no previous holder having acquired the paper in that manner.

But it is equally well settled that if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right even though he may have purchased when the note was overdue or with a knowledge of its infirmity as between the original parties.

In *Hascall et al.* v. *Whitmore*, 19 Maine, 102, the payee had put the note in circulation in fraud of his agreement not to part with it, and it appeared that it was utterly without consideration, and that one of the plaintiffs was informed of these facts before he purchased, but it was held that the plaintiffs could nevertheless

recover, because a prior holder having a perfect title could transfer one. Shepley, J., says: "If the relations between himself and the maker only were to be considered he could not recover. But purchasing of one who had no notice he must be considered to be in the same situation, and is entitled to the same protection."

See also *Smith* v. *Hiscock*, 14 Maine, 449; *Woodman* v. *Churchill*, 52 Maine, 58.

It follows that the fact that Roberts took the note from the bank when it was overdue, and with knowledge that its validity would be contested is of no importance if it had once been in the hands of an innocent holder for value without notice.

The defendant, Lane, made this note payable to his own order and indorsed it in blank, thus making it payable to bearer and transferable like a bank bill by mere delivery. *Peacock* v. *Rhodes*, Doug., 633. In this condition he placed it in the hands of those who have abused his confidence; but if thereby he enabled them to get the money on it from those who, ignorant of the equities between him and the holders of the note, relied on his written promise as equivalent to cash, it would be in accordance with fundamental law and justice as well as with the custom of merchants that he, and not the innocent purchaser, should bear the loss. When Leavitt and Smith directly after the inception sold the note and got the money, they parted with their property in it and Lane became liable to pay it to the party who might lawfully be the bearer. Nor do we perceive that it makes any difference under the facts here developed whether that party was the bank or the plaintiff, its financial agent having control of its funds. If by reason of any incapacity in the bank to take on account of the prohibition in the statute the property in the note did not pass to the bank, then the plaintiff who directed the purchase must be deemed from that time the bearer of the note, and responsible to the bank for the use of its funds to make the purchase, and it is not for the promisor to object that the purchase was made with money wrongfully obtained. That was a matter which concerned only the bank, whose trustee and financial agent the plaintiff was.

But we think the bank did become the owner of the note and rightfully entitled to collect or transfer it, when it was delivered by Leavitt and Smith to the officers of the bank in exchange for the money of the bank.

We do not think that any of the directions and restrictions contained in R. S., c. 47, § 14, relative to banks and banking designed for the protection of their stock and bill holders and depositors, should be so construed as to operate adversely to their interests, and to relieve their debtors from the performance of contracts not expressly made void by the statute, and especially contracts which include no illegal element in their essence or obligation.

We find no authority for such a construction. It is true there is a *dictum* to that effect in *Richmond Bank* v. *Robinson*, 42 Maine, 589. But it seems to us that the *dictum* is opposed to the decision. Robinson claimed to be relieved in a suit brought by the bank upon a note signed by him payable to Foster and Spaulding, and indorsed by the firm to the bank because Foster who was a director in the bank was at the time of the transaction liable to the bank to an amount exceeding eight per cent. of its capital stock.

This is prohibited in the same section, almost in the same breath with the discounting of paper, without at least two responsible names; but Robinson's claim to resist the suit of the bank because its title to the note accrued by the violation of one of these restrictions was overruled, we think rightly, upon the ground that while such violation might make the directors individually responsible to the bank in case of loss, or might make the bank liable to injunction at the instance of the State, still "the defendant cannot avail himself of this failure on their part to observe these requirements of the statute; as to him that violation was entirely collateral; it did not enter into or affect his contract."

The *dictum* seems to be based upon *Springfield Bank* v. *Merrick*, 14 Mass., 322, without noticing the important distinction that in that case the promise and undertaking in the contract it-

self was to do an act which was prohibited by law, i. e., to pay in a forbidden currency.

Of course we agree that the law will not lend its aid to compel a man to do that which is forbidden by statute. But there is no law against a man's paying the promissory note which he has made payable to bearer in lawful money, and the violation of law by the plaintiff's agents is entirely collateral.

So in *Western Bank* v. *Mills*, 7 Cush., 539, the contract itself in its stipulations was illegal, usurious, and specially declared void by statute.

In short we think the decision in *Richmond Bank* v. *Robinson*, overrules the *dictum* in the opinion, and is in substance and effect adverse to the position assumed by the defendant. The principles involved and the suggestions made in *Little* v. *O'Brien*, 9 Mass., 423, are applicable to the present case in more than one particular.

There, a corporation in direct violation of a duty imposed by its charter had received the note sued indorsed in blank by the payee, and the officers of the corporation without any legal corporate action thereon had transferred it to the plaintiff by delivery merely. Yet the plaintiff was held entitled to recover.

The defendant here objects that there was no vote of the directors of the bank authorizing the transfer of the note in suit to the plaintiff.

But we think that is a matter between the bank and its officers, of which the defendant cannot avail himself. After such action as here appears by the agents of the bank intrusted with the care and management of its property and notes, it is clear that the bank could not be heard to assert a claim upon this note against the defendant, and it is in the power of the plaintiff to give him a good and legal discharge.

The defendant incurred his loss when he permitted his note payable to the bearer thereof to go into the market and be sold to those who took it in good faith for a full consideration without notice of the equities between him and the first holders,

or reasonable grounds to suspect that it had been procured by fraud. *Judgment for plaintiff.*

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

PETERS, J., did not sit in this case.

MELVIN PREBLE *vs.* CITY OF BANGOR.

Construction of ordinance.

The city physician of Bangor is entitled to an annual salary the amount of which is determined by the city council. By the eighth ordinance of the city he is entitled in cases of infectious disease, to such additional compensation as the city council may deem just: *held*, that this did not apply simply to services rendered to paupers, but that the compensation for attendance upon all cases of such diseases for the city was to be fixed by the city council.

ON EXCEPTIONS.

ASSUMPSIT to recover for professional services rendered in attendance as a physician upon small-pox patients in Bangor during the winter of 1872–3. Being called by the plaintiff, Hon. J. S. Wheelwright testified that as mayor he took general charge of the cases of infectious diseases in 1872–3, and employed nurses, physicians and assistants to attend. The plaintiff testifying in his own behalf said Mr. Wheelwright employed him, that he (witness) told Mr. W. when the application was first made that he was lame and wished to go to Boston, that after his return from Massachusetts the health officer reported a case to him and he again saw Mr. Wheelwright and asked if he (plaintiff) was expected to attend these cases as city physician and the mayor told him "no," but that it was customary first to offer them to the person holding that position. Mr. Wheelwright was recalled by the defence and stated that he went to Dr. Preble only because of his being city physician and applied to him to act in that capacity.

The defendants put in the city charter and the ordinance relat-

ing to the election and duties of city physician containing eight sections, the first of which was this: "SEC. 1. There shall annually be elected on the fourth Monday of March, a city physician, whose duty it shall be to attend under the direction of the overseers of the poor upon all paupers of the city, when in need of medical aid including all the inmates of the alms-house, workhouse and house of correction."

The seventh section requires the city physician to furnish at his own expense "all necessary medicines for the paupers of the city, other than inmates of" the institutions above-mentioned and provides that "he shall receive from the city treasury for his services including medicines to be furnished as aforesaid, such sum as the city council shall annually determine."

The eighth section quoted in the opinion provides for additional compensation for attendance in case of infectious diseases to be also determined by the city council. Upon the sixth day of March 1873, that body ordered the mayor to draw his warrant in favor of Dr. Preble for eight hundred dollars, upon the doctor's giving his receipt in full for extra services in small-pox cases.

The plaintiff declined to accept that sum upon these terms and on the eighth day of August 1873, brought this action upon an account annexed amounting to $1981, and obtained a verdict for $1701.

The defendants requested the presiding judge to instruct the jury that the plaintiff must be presumed to know the provisions of the ordinance under which he was elected prescribing the duties of city physician, and in accepting the office he became bound to perform all the duties of the office including attendance upon cases of small-pox and other infectious diseases, and to accept therefor such compensation as the city council should deem just and proper, and in order to maintain a suit therefor he must allege in his writ and prove that said council have voted to allow said sum and that the city have refused to pay it.

"That if the jury are satisfied that the plaintiff was city physician at the time he attended to the cases of small-pox charged in his

writ and was called upon by the mayor to attend the cases and did attend them, or if he did attend them without being called upon by the mayor he was bound by the provisions of the ordinance under which he was elected regulating the compensation of the city physician and the mode of payment for his attending upon small-pox cases, and that in order to be able to maintain an action therefor he must allege in his writ and prove that he has complied with the provisions of said ordinance, and that as one of the provisions of said ordinance is that 'In cases of small-pox or other infectious diseases, the city physician shall receive such compensation in addition to his annual salary, as the city council may deem just and proper;' he is not entitled to any other or greater compensation for his services in attending upon these cases than were allowed by the city council, and in order to maintain his action he must allege in his writ and prove that the city council have voted the sum claimed and that the city has refused to pay it."

"That if the jury are satisfied that plaintiff was city physician at the time he performed the alleged services and that the city council passed an order on the sixth day of March 1873, to allow him eight hundred dollars in full for said services, he is not entitled to any greater sum for said services, and as he has not alleged in his writ that said council have passed said order or that the city have refused to pay it, he cannot maintain this action."

"That the city charter makes it the duty of the mayor to exercise a general supervision over the conduct of all subordinate officers including the city physician, and that the only authority of the mayor over his conduct is limited to the supervision of his duties as prescribed by the ordinance on that subject and that he cannot as mayor excuse him from the performance of the duties of his office, and that the municipal officers alone cannot excuse him from the duties required of him by said ordinance."

"That the mayor had no authority to employ the plaintiff to attend to the small-pox cases alleged in his writ, and to make the city of Bangor liable to pay for the services alleged in plaintiff's writ; that it is the duty of the municipal officers of the city to

provide nurses, physicians and whatever is necessary in cases of small-pox, that in the discharge of these duties the mayor had not authority to make contracts binding the city or to employ physicians and nurses at the expense of the city, without the consent or confirmation of the board of aldermen or some members of the board, and if the mayor had such authority and employed the plaintiff or if the mayor and aldermen had employed him whether as city physician in his official capacity or in his private professional capacity simply; if he was city physician at the time he performed the alleged services, he is bound by the provisions of the city ordinance regulating and limiting the compensation of the city physician for such services, and that any agreement of the mayor or of the municipal officers if any was made to pay him for his services other than is provided by said ordinance, would not bind the city."

"That if the jury are satisfied that plaintiff was city physician at the time he attended the small-pox cases alleged in his writ and was not bound by the provisions of the ordinance under which he was elected to attend to them, yet if he did attend to them he would be governed and bound by the provisions of said ordinance on that subject in the amount and mode of compensation therefor, and as the ordinance provides that he shall receive such compensation for such services in addition to his annual salary as the city council should deem just and proper, he is not entitled to recover any greater compensation for his services than said council should allow whether he was employed by the mayor or the municipal officers of the city."

The judge declined to give any of the requested instructions, but for the purposes of this trial instructed the jury that the city physician was not bound to attend the small-pox cases sued for; that if he did attend to them his compensation therefor was not regulated and limited by the city ordinance on that subject; that the mayor had authority to employ him at the expense of the city, and that he was not limited to receive for said services such compensation as the council under the provisions of said ordinance

should deem just and proper, but was entitled to receive such sum as his services were reasonably worth and that was a question of fact for their determination upon the evidence and the instructions given them.

The defendants excepted.

A. G. Wakefield for the defendants.

L. Barker and *T. W. Vose* for the plaintiff.

WALTON, J. The right to maintain this suit depends upon the construction of the eighth section of the ordinance of the city of Bangor relating to the election, duties and compensation of the city physician. The seventh section provides for an annual salary to be determined by the city council. Then follows this section:

"Section 8. In cases of small-pox or other infectious disease, the city physician shall receive such compensation in addition to his annual salary as the city council may deem just and proper."

The plaintiff claims that this section refers only to cases of small-pox and other infectious diseases among the paupers of the city; that for attendance upon other cases he is not bound to accept such compensation as the city council may choose to vote him.

We think the fair construction of the section is that in all cases of small-pox or other infectious disease attended to for the city, the city physician shall receive such compensation in addition to his annual salary, as the city council may deem just and proper.

Such is the fair import of the language used, and no reason is perceived why it should receive a different construction.

It does not seem to us probable that the city would retain and exercise the right of fixing the compensation for attendance upon one class of persons and leave the city physician to fix his own price for attendance upon another class, both classes being alike chargeable to the city and both afflicted with the same disease.

The duty of the city to take charge of a person sick with the small-pox or other infectious disease, is the same whether such person is a pauper or not; the object being to guard against the spread of the disease. It may not be obligatory upon the city

physician to attend such person, but if he does attend we think he must accept such compensation as the city council chooses to vote him. Such, we think, is the true construction of the city ordinance under consideration. *Exceptions sustained.*

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

BARROWS and DANFORTH, JJ., did not concur.

CALVIN SEAVEY *vs.* MELVIN PREBLE.

Care—when highest degree of demanded. Justification.

The law requires the use of all possible care to prevent the spread of small-pox or other contagious disease; and while the medical profession is divided as to the necessity of using any particular precautionary measures a physician or other person having the care of small-pox patients will be justified in adopting it; and within the operation of this rule paper may be removed from the walls of rooms in which small-pox patients have been sick, if in the opinion of the attending physician it has become so soiled and besmeared with small-pox virus as to make its removal necessary; and an action of trespass will not lie by the owner of the building against the physician for advising or directing such removal.

ON MOTION FOR A NEW TRIAL, because the verdict for the plaintiff for $35 was against law and evidence. There were exceptions filed to the ruling that the action (trespass *quare clausum*) could be maintained although the *locus in quo* was in the occupation of a tenant at will by whose license the defendant entered; but as the court declares the law well settled on this point no further statement of it is necessary. The facts all appear by the opinion.

T. W. Vose for the defendant.

Lewis Barker for the plaintiff.

WALTON, J. We perceive no objection to the form of the action in this case. It is well settled that trespass *quare clausum*

fregit, may be maintained by the owner of real estate for an injury to the freehold, notwithstanding it was in the possession of a tenant at will at the time of the alleged injury. *Davis* v. *Nash*, 32 Maine, 411.

But we think the verdict is clearly against evidence.

When the small-pox or any other contagious disease exists in any town or city the law demands the utmost vigilance to prevent its spread. "All possible care" are the words of the statute. R. S., c. 14, § 30.

To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration. *Salus populi suprema lex*—the safety of the people is the supreme law—is the governing principle in such cases.

Where the public health and human life are concerned the law requires the highest degree of care. It will not allow of experiments to see if a less degree of care will not answer. The keeper of a furious dog or a mad bull is not allowed to let them go at large to see whether they will bite or gore the neighbor's children. Nor is the dealer in nitro-glycerine allowed in the presence of his customers to see how hard a kick a can of it will bear without exploding. Nor is the dealer in gunpowder allowed to see how near his magazine may be located to a blacksmith's forge without being blown up. Nor is one using a steam engine to see how much steam he can possibly put on without bursting the boiler. No more are those in charge of small-pox patients allowed to experiment to see how little cleansing will answer; how much paper spit upon and bedaubed with small-pox virus, it will do to leave upon the walls of the rooms where the patients have been confined. The law will not tolerate such experiments. It demands the exercise of all pos-

sible care. In all cases of doubt the safest course should be pursued remembering that it is infinitely better to do too much than run the risk of doing too little.

Unfortunately medical science has not yet arrived at that degree of perfection which will enable its practitioners to agree. There is scarcely a case tried where medical testimony is used, in which the doctors do not disagree. The swearing is sometimes so bitterly antagonistic as to make it painful to listen to it.

There is the usual conflict of medical testimony in this case. The defendant and other physicians called by him as witnesses express the opinion that it is necessary in order to cleanse a room in which small-pox patients have been confined to remove the paper from the walls. The plaintiff, (himself a physician) and the other physicians called by him as witnesses express the opinion that it is not necessary. Several of them however admit that if the paper is loose or the small-pox virus has actually come in contact with it, it should be removed.

Mrs. Liscomb the nurse employed by the city to take care of this family testifies that the paper needed to be taken off; that it was dirty around where the diseased folks were; that it was all dirty; that the spittle from the mouths of the patients flew upon it. Doctor Blaisdell who attended the family some two or three weeks before it came under the care of the defendant testifies that he noticed the paper particularly about the bed and that it was a good deal soiled; that he supposed the patient must have spit a good deal and was not particular where he spit; that in such cases it is difficult to expectorate; that the more violent the disease the more adhesive the saliva; that there is usually a great deal of saliva in all cases; that in this case the patient lay against the wall some of the time and that when the patent is against the wall and soils the paper by saliva and by putting his hands upon it the best medical advice is to remove it and whitewash the wall with quicklime; that in this case he should have stripped off all the paper. Other physicians called by the defendant express substantially the same opinion.

Under these circumstances what was it the duty of the defendant to do? The small-pox seems to have been unusually prevalent. The defendant testifies that he had a hundred and seven cases during the winter. He was city physician. Upon his efforts in a large degree depended the safety of the city. He could not go to his medical brethren for direction for they as usual were divided in opinion. The mandate of the law to him was "use all possible care." Under these circumstances we think he was justified in advising the removal of the paper from the walls of the rooms in which the small-pox patients had been confined, and that the law protected him in so doing. *Motion sustained.*

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

UNION INSURANCE COMPANY *vs.* ARNOLD GREENLEAF.

Premium note—negotiability of.

When the president of an insurance company is authorized to settle or compromise all claims against the company and to sign and indorse notes, his indorsement of a premium note in liquidation of a debt which to such amount is discharged, and the amount is passed to the credit of the company and no dissent is shown, transfers the title.

A note given for the premium of a policy of insurance is not a deposit note within R. S., c. 49, § 26.

It is no defence to such note when negotiated in good faith before maturity, that the company issuing the policy has failed.

A promissory note given to an insurance company is negotiable, notwithstanding it bears on its face the number of the policy for which it was given.

ON REPORT.

ASSUMPSIT upon a promissory note dated October 17, 1872, for three hundred and twenty-six dollars, signed by Arnold Greenleaf, and payable to the order of the National Insurance Company of Bangor in twelve months after date, a copy of which is given in the opinion.

The note was given for the premium on a policy of marine insurance issued by the National Insurance Company for one year from October 17, 1872. The risk was taken at Wiscasset by the company's agent there, and the note was by him sent to the branch office of the company in Boston. Upon the fifth day of November 1872, the marine secretary of the National Company in Boston passed over to the secretary of the Union Insurance Company in Boston the note in suit together with other notes, to be credited to the National Insurance Company, on account of indebtedness then existing from the National Company to the Union Company to an amount larger than the amount of the notes so passed over, and these notes were on the same day credited to the National Company on the books of the Union Company in Boston as so much money.

There had been similar transactions on two or three previous occasions as to which no question ever arose. The notes were at once forwarded to the home office of the Union Company in Bangor, and as soon as practicable, but not until after the Boston fire, though before the proceedings in insolvency hereinafter mentioned were begun, the president of the Union Company took these notes to the president of the National Company who indorsed them, this one among the others, in the manner which appears in the opinion.

At the time of the indorsement of the notes, there were rumors that the National Company had met with losses in the Boston fire to the extent of sixty thousand dollars, which rumors had come to the ears of the president of the Union Company, who had also heard that the officers of the National Company had declared its ability and intention of continuing its business.

The losses suffered by the National Company in the Boston fire of November 8 and 9, 1872, did cause a suspension of its business, and upon the fifteenth day of November 1872, on the application of the insurance commissioner, proceedings in insolvency were commenced against the company, and an injunction issued from the supreme judicial court, which proceedings are still pend-

ing. Receivers have been appointed and other proceedings had according to the statute regulating the subject.

The policy of insurance for the premium on which the note in suit was given, was surrendered and cancelled on the fourteenth day of November 1872.

The charter and by-laws of the National Insurance Company were made a part of this case.

The plaintiffs knew that the note was given for a premium on insurance policy.

Upon these facts judgment was to be rendered according to the legal rights of the parties.

Wilson & Woodard for the plaintiffs.

Three questions are raised in defence. First. Had the president authority to indorse this note as he did? Second. Were there any equities between the original parties binding upon the plaintiffs? Third. Was the note anything but ordinary negotiable paper, so as to affect the plaintiffs by any subsequently arising equities between the original parties?

The counsel argued in support of the proposition that the eighth by-law of the National Insurance Company authorizing the president to assign its securities when the directors so voted, did not limit his general power to indorse its negotiable notes so as to transfer title when necessary to settle losses and pay debts, citing Flanders on Fire Ins., 178; *Baker* v *Cotter*, 45 Maine, 236, and other cases. The plaintiffs' answers to the questions arising in this cause, and their reasons for giving them sufficiently appear in the opinion of the court.

Albert W. Paine for the defendant.

The company to which this note was given became insolvent within a month of its date. At common law the payee could recover but one-twelfth at most of the amount, the consideration failing in that proportion. *Leary* v. *Blanchard*, 48 Maine, 269. Can the indorsee recover more at common law? Though a subordinate in one company passed it to the clerk of the other in

Boston, yet it was not indorsed till after the great fire had rendered the payee insolvent, and just before that insolvency was declared, and after the parties both knew the facts which led to this result, and therefore not *bona fide;* or at least the burden is on the plaintiffs of showing good faith under these circumstances. 2 Greenl. on Ev., 172; *Munroe* v. *Cooper*, 5 Pick., 412; *Sistermans* v. *Field*, 9 Gray, 332; *Estabrook* v. *Boyle*, 1 Allen, 412; *Tucker* v. *Morrill*, Ib., 528; *Smith* v. *Edgeworth*, 3 Allen, 233; *Aldrich* v. *Warren*, 16 Maine, 465; *Perrin* v. *Noyes*, 39 Maine, 384. By the by-laws, the assent of the directors to a transfer is essential to its validity. This was a deposit note and void under R. S., c. 49, § 26, because the corporation became insolvent within sixty days of its date. A careful examination of the statutes which have been condensed in the last revision into § 26, shows that notes like the one in suit were intended to be embraced within its provisions.

Appleton, C. J. The defendant is sued as the maker of a promissory note payable to the order of the National Insurance Company and indorsed "National Ins. Company by Hiram Ruggles, president."

By the tenth by-law of the National Insurance Company it is provided that "the promissory notes given by the company, and indorsements or assignments of the notes or securities of the company shall be made by the president."

By the eighth by-law he has "full power to settle and adjust all losses and return premiums and other claims of the company, as he shall deem to be just and expedient for the company; to refer compromise or contest in law any demand which he may think it improper to allow." The indorsement was to pay a pre-existing debt which was thereby extinguished *pro tanto.* The National Insurance Company have had the benefit of it by a discharge of indebtedness. It does not appear that they have made any objections to this act of their president. The transfer was to adjust or settle an indebtedness which is not denied, and as this settlement has never been impeached, we think, notwithstanding the clause

in the same article, which authorizes him to assign or indorse notes when authorized by the directors, that having transferred the note in part payment of a debt due, and having general authority to settle adjust and compromise claims against the company, that the plaintiffs have at any rate made out a *prima facie* case, and are to be regarded as indorsees. *Cabot* v. *Given*, 45 Maine, 144; *Baker* v. *Cotter*, 45 Maine, 236; *Brown* v. *Donnell*, 49 Maine, 421.

The note reads as follows:

"BOSTON, Oct. 17, 1872.

$326. Twelve months after date, I promise to pay to the order of the National Insurance Co., of Bangor, for value received, three hundred and twenty-six dollars, payable in Boston. No. 2207.

ARNOLD GREENLEAF."

The following memorandum is printed across the face of the note in red ink: "This note must be paid at maturity without regard to the termination of the risk."

The note was negotiable. In *Taylor* v. *Curry*, 109 Mass., 36, it was held that a promissory note given to an insurance company is not rendered unnegotiable by bearing on its face the words, "on policy No. 33,386;" although the policy contains a provision for the set-off of notes due the company, in case of a loss.

The note was indorsed before maturity. The plaintiff company had met with losses. The National Insurance Company had met with losses to less than a third of its capital. But knowledge that a loss has been made by an insurance company is not evidence of the insolvency of the company so losing. Whether the National Insurance Company transferred notes to the plaintiffs or the plaintiffs to the National Company, there was no more notice of insolvency in the one case than in the other. Either company might for aught that appears have been the indorsee of the other, and that without any impeachment of its good faith.

Shortly after the transfer of the note in suit the National Insurance Company suspended its business, an injunction issued against its further proceeding, and receivers were appointed.

Upon the fourteenth day of November, 1872, the policy for the premium on which the note in suit was given was surrendered and cancelled. But this was done after the note had been indorsed to the plaintiffs.

The defendant claims that he is within the provision of R. S., c. 49, § 26, which provides that "a policy of insurance issued by a life, fire or marine insurance company domestic or foreign, and a deposit note given therefor shall be deemed one contract; and a loss under such policy or other equitable claims may be proved in defence of a suit upon said note, though it were indorsed or assigned before it was due; and when a company becomes insolvent the maker of the note shall only be liable for the equitable proportion thereof which accrued during the solvency of the company, and if the insolvency occurs within sixty days of the date of the note it shall be void except for the amount of the maker's claim, if any, on the company," &c.

The main question for determination is whether the note in suit is a deposit note within the true meaning of this statute.

By § 25 we learn what are to be regarded as deposit notes. They are to be given for a policy and for such sum as the directors may determine. Such part as the by-laws require is to be immediately paid towards incidental expenses, and is to be indorsed thereon. The remainder is payable in such instalments as the directors from time to time require for the payment of losses and other expenses to be assessed on all who are members when such losses or expenses happen, in proportion to the amount of their notes. It is therefore uncertain what if any part of the deposit may be required to be paid. The same doubt exists as to the time when payment will be demanded.

The deposit note as described in § 25 must be the one to which reference is had in § 26. But the note in suit was no such note. It was payable at a definite time. It was to be paid irrespective of the termination of the risk for which it was given. Its payment did not depend upon assessments to be made by directors contingent in amount upon the losses of the company. It was

given for the premium instead of making a payment in cash. It matters not whether the premium is paid in money or in a note on time, which is indorsed in good faith before maturity. In either case the insured risks the solvency of the insurer. He who so gives negotiable paper must abide the legal consequences of its negotiation.

The meaning of a statute is to be ascertained from its language. Undoubtedly much aid may be had by recurring to preceding legislation on the same subject. When there is a material change of language we must suppose there was a change of legislative intention. Words are to be understood as used in their customary signification, unless from the context a different meaning is apparent. If in a revision there are omissions, it is not for us to say whether those omissions are by accident or design. Still less are we to assume an omission to be accidental and then insert by construction what may have been omitted by design. Here is nothing doubtful or obscure. The note in suit cannot within the meaning of §§ 25 and 26 be regarded as a deposit note.

It is no defence to the note that the National Insurance Company has failed, it being in the hands of a *bona fide* holder. Nor can the cancellation of the policy subsequently to its indorsement lessen or destroy the rights of the holder. The note was given for a good consideration, was indorsed before its maturity in good faith, and must be paid. *Alliance Mutual Insurance Co.* v. *Swift*, 10 Cush., 433; *Cabot* v. *Given*, 45 Maine, 144.

Defendant defaulted.

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

PETERS, J., did not sit in this case.

CALEB H. H. BURR'S heirs, petitioners,
vs.
BUCKSPORT AND BANGOR RAILROAD COMPANY.

Practice in land-damage cases.

A motion to set aside the verdict of a jury assessing damages for land taken for a railroad must be addressed to and adjudicated upon by the court to which the verdict is returned.

Exceptions do not lie to the adjudication of such court in matters of discretion or of facts, but only in matters of law as in other cases.

To the judgment of the court overruling a motion to set aside such a verdict because it is against the testimony, no exceptions will lie.

But if they would lie the motion in this case was properly overruled.

ON EXCEPTIONS.

This was a motion to set aside the verdict of a sheriff's jury rendered upon the hearing of an appeal from an award of the county commissioners of Penobscot county of the damages done to the petitioners' land in Brewer in the construction of the respondents' railroad. The motion alleged the verdict to be contrary to law and evidence, that the damages were excessive and that new and important testimony had been discovered.

The presiding justice after hearing the evidence given at the trial as well as that claimed to be newly discovered, overruled the motion and the respondents excepted.

Wilson & Woodard for the respondents.

Charles P. Stetson for the petitioners.

DANFORTH, J. This case is not properly in this court. It is before us under the provision of R. S., c. 18, § 13. We there find that "either party may file a written motion to set aside said verdict for the same cause that a verdict rendered in court may be set aside. The court shall hear any competent evidence relating to the same, adjudicate thereon and confirm the verdict, or set it aside for good cause reserving the right to except as in other cases." The adjudication upon the testimony offered must present

questions of fact as well as questions of law. The "right to except" in other cases is reserved only in matters of law and not in matters of fact or discretion. It is only then in matters of law in cases of this kind that this right is reserved to the parties.

The case at bar comes before us upon exceptions to the adjudication of the presiding justice, upon the motion to set aside the verdict because it was against the evidence and upon newly discovered evidence.

The exceptions are general, simply to the overruling of the motion and present no question of law upon which the presiding judge ruled or refused to rule. So far as appears, his action was or might have been entirely based upon the weight given to the testimony.

The error into which counsel were led probably arose from the common practice of carrying such motions when made in relation to verdicts rendered in court directly to this court. But the statute upon which that practice rests is unlike that which authorizes the proceedings in cases of this kind. The former does not require an adjudication by the presiding justice, but does provide that the motion shall be presented to the law court not upon exceptions, but upon a report of the testimony while the latter does require an adjudication and provides for exceptions only. In *Bryant* v. *K. & L. R. R. Co.*, 61 Maine, 300, it was held that such cases as this can be carried to the law court only upon exceptions, and although not so stated in that case, it must be understood that such exceptions can only be founded upon some opinion or judgment of the court in matters of law "as in other cases."

The question now presented is similar to that settled in *Averill* v. *Rooney*, 59 Maine, 580. It is true that the decision there made was upon the construction of the act of 1872, c. 83; an act which is not applicable here. But the principle involved is the same and the only difference in the two cases is that by the statute in the one the single judge is authorized to act, while in the other he is required to.

In the motion now under consideration one of the causes alleged

for setting aside the verdict is that it is against law. But the exceptions present no principle of law passed upon by the court or violated by the verdict.

But as the overruling the motion was *pro forma* with a view undoubtedly to a more careful examination both by counsel and court, we have thought proper to give the matter that attention which the importance attached to it by the arguments of counsel, demands.

The first allegation that the verdict is against law as already seen presents no question of law for the court to act upon.

The second and third alike depend upon the testimony, and the only testimony to be considered as bearing upon these allegations is that which was produced at the hearing before the jury. An examination of this satisfies us that the verdict is in accordance with rather than against the testimony. It is true the jury had a view which we cannot have. Of the bearing of that we cannot form any opinion, but we are not to presume they neglected to act upon the light thus obtained.

The newly discovered testimony can have no bearing upon the question of damages in this case, if in any, for the reason that the case fails entirely to show that it might not have been discovered by the exercise of due diligence, while on the other hand it bears internal evidence that even slight diligence would have brought it to light. *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Maine, 290.

For the same reason the fourth alleged cause, based upon the newly-discovered testimony was properly overruled.

Exceptions dismissed.

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

JOHN L. JACKMAN *et. ux. vs.* INHABITANTS OF GARLAND.

Construction of R. S., c. 1, § 3, and Acts of 1874, c. 215, relating to notice of injury.

Public Laws of 1874, c. 215, approved March 3, 1874, requiring notice to the selectmen of the nature and attendant circumstances of an injury caused by a defective way within sixty days of the occurrence of the accident, (excepting in cases of injuries "already sustained") took effect at the expiration of thirty days after the adjournment of the legislature that enacted it and consequently has no application to the case of an injury received March 7, 1874.

The words "already sustained," in the Act of 1874, c. 215, must be referred to the time when the act took effect and not to its date. In legal contemplation the words are spoken when it becomes the law.

R. S., c. 1, § 3, fixing the time when enactments become laws is a general law of the state affecting all subsequent legislation unless there be some indication of a contrary purpose. Though no legislature is bound by its provisions acquiescence will be presumed unless dissent be shown.

ON REPORT.

ACTION ON THE CASE in which the plaintiffs offer to prove that Julia A. Jackman the female plaintiff then and now the wife of John L. Jackman, on the seventh day of March 1874, received severe and permanent bodily injury through defects and want of necessary repair of a certain highway or town road in Garland, which road or way that town was then and for a long time before had been by law bound to keep in repair; that the town at the time of the injury aforesaid had such reasonable notice of the defects and want of repair that the road or way ought to have been repaired and mended; that female plaintiff and her father who was driving the horse attached to the sleigh were on said seventh day of March thrown from their sleigh and by being so thrown the injury aforesaid was received; that the horse, sleigh, harness and all the accompaniments of said team were safe, sound and proper and that she and her father were then and there in the exercise of due and proper care; that the injury arose wholly from the fault of the town in not having repaired and mended the way; that within a very few days and not exceeding a week after the in-

jury the selectmen of Garland heard of the accident and injury but not the particulars of it and by reason thereof caused said road or way to be repaired at the place where the injury was received. The plaintiffs however admit that they gave no notice directly to the town or its officers of the defect or want of repair, nor of the injury aforesaid nor of claim for damages until after the expiration of sixty days from the time of said injury, not being then aware that Public Laws of 1874, c. 215, had been enacted.

If upon so much of the foregoing testimony as offered being produced the suit can be maintained, the action is to stand for trial otherwise plaintiffs to be non-suited.

A. G. Lebroke for the plaintiffs.

Josiah Crosby for the defendants.

DANFORTH, J. This is an action against the defendant town to recover damages for an injury caused by an alleged defect in a way which they were required to keep in repair. In 1874 the legislature passed an act, c. 215, amending R. S., c. 18, § 65, and providing that such an action cannot be sustained unless notice of the injury was given to the selectmen within sixty days of the time when it occurred. In the same act it is provided that it shall not have any application to injuries which have already happened. The injury in this case is alleged to have happened on the seventh day of March 1874. The act referred to was approved March 3, 1874. The only question now before the court is whether this act took effect from its approval or not until thirty days after the adjournment of the legislature. In the former case it was before the injury and as no notice as required was given the action cannot be sustained. In the latter case it would be after the injury and would not affect the action.

There is no provision in the act fixing the time it shall take effect. It would therefore become a law upon its approval unless in this respect it is controlled by R. S., c. 1, § 3. This is a general law and provides that all acts shall take effect thirty days after

the adjournment of the legislature passing them unless otherwise provided.

But it is said that this law is unconstitutional because one legislature cannot bind another except in cases involving a contract. The reason is founded upon a sound principle and would be entirely valid and conclusive if applicable. But it does not apply. The law does not nor does it purport to bind any subsequent legislature. It is simply a general law of the land, a rule for the government of the people regulating and controlling their rights and obligations so long as it shall remain in force, liable at any time to be modified or repealed and recognizing this liability in terms.

It is further said that if thus liable to be changed, it has been modified or suspended by the terms of this act of 1874, c. 215. We are unable to discover any terms in the latter act which do or purport to control or modify the former in this respect. There is nothing whatever in it tending to fix the time when it shall take effect and the simple fact that in the absence of any such provision the law takes effect upon its passage, cannot by any known rules of construction be considered as abrogating an existing law already passed for that very purpose. It is rather a recognition of that law. If the legislature knowing the existence of that law had desired to take the later one from its effect we must presume that they would have said so in some form of words. This they have not done. They have not even put into the later any provision inconsistent with the earlier. On the other hand both may stand together and have the force intended without any conflict whatever. In such cases it is understood that the later law is passed with express reference to the earlier and both are to be construed together. It is only the adoption of the familiar principle that a law is not repealed unless by some subsequent statute inconsistent with it. It may be true as suggested by counsel that the laws requiring notices on petitions are frequently disregarded by subsequent legislatures. But when they intend to do this that intention is made known by acts the purpose of which cannot be

misunderstood, and this only proves that each legislature acts for itself. In this case any legislature may entirely disregard or abrogate the law fixing the time when statutes shall take effect. But surely this intention is not to be inferred from entire silence or the absence of any acts in relation to it. A familiar application of this principle is in the case of corporations recognized by courts and the legislature, where general laws become a part of the charter granted by later a legislature unless expressly exempted therefrom. The result is simply this: there is a general law fixing the time in which all acts shall take effect at thirty days after the adjournment of the legislature. There is nothing in the law of 1874, c. 215, indicating any intention on the part of the legislature that it is to be excepted from the general rule. It cannot therefore be excepted.

The objection that the words "already sustained" must be construed as referring to the date of the act cannot prevail. An act is of no force until it becomes a law. The words must be construed as if spoken when the act takes effect; in legal contemplation that is the time when they are spoken. *Gorham* v. *Springfield*, 21 Maine, 58. *Action to stand for trial.*

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

DONALD MCAULEY *vs.* GEORGE H. REYNOLDS.

Amendment allowed.

A new count declaring upon an account annexed may be allowed in a suit upon a note given on Sunday in settlement of a prior account, since the note is void.

ON REPORT.

ASSUMPSIT on a promissory note, executed and delivered on the Lord's day, given in settlement of a book account which the plaintiff had against the defendant.

When the action came on for trial the plaintiff's counsel asked leave to amend his writ, by inserting a count upon an account annexed in the usual form, to recover for the items on his books for which this note was given.

To this proposed amendment the defendant's counsel objected, but the presiding justice allowed it to be made. If the amendment was properly allowed and the plaintiff cannot recover upon the note, the defendant was to be defaulted upon the account annexed; but if the amendment was not properly allowed and the plaintiff cannot recover upon the note he was to become non-suit.

P. G. White for the plaintiff, cited *Strang* v. *Hirst*, 61 Maine, 9.

B. Kimball for the defendant.

APPLETON, C. J. The note in suit was given on the Sabbath and is therefore void. The plaintiff was allowed to amend by inserting a new count based upon the account in settlement of which this note was given.

The amendment was properly allowed. In an action on a note given in the name of a partnership after its dissolution, the plaintiff was allowed to amend by adding a count upon the account for which the note in suit had been given. *Perrin* v. *Keen*, 19 Maine, 355. So when an action of debt was brought upon a judgment recovered in a state where the courts had no jurisdiction of the person of the defendant, the declaration was amended by striking out the original counts and inserting a count for work and labor, which was the basis of the original claim. *Mc Vicker* v. *Beede*, 31 Maine, 314. The account for which the note was given was in full force and the plaintiff is entitled to judgment.

Defendant defaulted.

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

GEORGE S. O. DOW *vs.* CATHARINE MCKENNEY.

Adverse possession—what is not.

Possession of the land under a deed for more than twenty years will not give a title to such portion as lies beyond the lines therein described, if this was occupied by mistake supposing it to be covered by the deed.

Worcester v. *Lord*, 56 Maine, 265, affirmed.

ON EXCEPTIONS.

REAL ACTION submitted to the court with the right to except. The title involved, after the filing of a disclaimer as to the residue, was a strip of land in Bangor a yard wide and about thirty-five feet long. The demandant owned a lot on French street and the tenant one on Broadway situated so that the line in question was the boundary between them. The distance across these lots from one street to the other was greater than the deeds called for. The presiding justice allotted to each its proportionate share of the surplus according to the depths of the respective lots, and then adjudged the demandant entitled to all he claimed. Each lot had buildings upon it; not standing at all however upon the strip in controversy. The tenant claimed this strip by adverse possession. With reference to this claim the presiding justice found and reported the following facts: "That the predecessor in title and in occupancy of the demandant's premises built a fence in the fall of 1844, substantially on the line as now claimed by the respondent, although making some slight variations from it in one place on account of a surface drain that was in the way of it; that this fence was kept up and supported by the demandant's predecessors for more than twenty years continuously (and until removed by demandant a short time before this suit,) to separate their occupation from the occupation of the respondent, and that the opposite parties exclusively occupied their respective lots accordingly during that time. But I find that the fence was placed and maintained upon a wrong divisional line by mistake; that the parties erroneously supposed

that it was substantially upon the true line, and that the respondent during all the time supposed and believed that the fence was on the true line, and that it was her land up to said fence, and that none of the parties had any idea of maintaining any line but the true divisional line, and that they occupied according to the fence only because they supposed it was on the true divisional line between them. Upon these facts my decision as a matter of law, is that the demandant is entitled to recover and judgment is ordered accordingly." To this ruling the tenant excepted.

A. Sanborn for the tenant.

Wilson & Woodard for the demandant.

DANFORTH, J. From the facts reported in this case it is a necessary inference that the parties and those under whom they severally claim were the owners of adjoining lots conveyed to them by deeds with sufficiently described lines, and that neither claimed title to any land beyond the lines thus described until the mistake in the location of the fence was discovered a short time and much less than twenty years before the commencement of this action.

The case is thus brought clearly within the principle settled in *Worcester* v. *Lord*, 56 Maine, 265, and cases there cited. Upon a re-examination of that decision we believe it to be sound and decisive of this. The ruling of the presiding justice was in accordance with this doctrine and there must be judgment for the plaintiff as ordered by him. *Exceptions overruled.*

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

ABRAM SANBORN, petitioner for the Penobscot County Bar,
vs.
BENJAMIN KIMBALL.

Attorney—for what causes and how disbarred.

An attorney at law is an officer of the court, and may be removed from office for misconduct, ascertained and determined by the court after an opportunity to be heard has been afforded.

The statute makes "a good moral character" a pre-requisite of admission to the bar and when an attorney at law has forfeited his claim to such character by such misconduct, professional or non-professional, in or out of court, as renders him unworthy to associate with gentlemen and unfit and unsafe to be entrusted with the powers, duties and responsibilities of the legal profession, the court may deprive him of the power and opportunity to do further injury under the color of his profession by removing him from the bar.

The evidence in this case conclusively establishes the allegation in the motion that "the respondent does not possess a good moral character," in that it shows that he has committed a fraud upon the court, violated his professional oath and duty, conducted dishonestly in his private dealings and disregarded the proprieties and civilities due to other members of the profession.

By admitting the respondent to the bar the court held him out to the public as worthy of confidence and patronage in the line of his profession. In view of the power of removal vested in the court, to allow the respondent to continue to exercise his profession after he has been thus proved to be unworthy of his office, would be indirectly to involve the court in the responsibility of his acts. And further, after the disclosures in this case, the court cannot forbear to pronounce the judgment of removal from office against the respondent without abdicating the high trust which the law confides to it in this behalf, and rendering that a nullity.

The respondent has been pardoned for the forgery of which he was convicted and for which he was confined in the state prison; but the instrument forged was a deposition used in a cause before this court; and though the pardon purged him of the offence of which he was convicted it did not affect the crime of the violation of his professional oath and duty, nor relieve him from the penalty of removal from the bar for this misconduct.

ON REPORT.

This was a motion presented by Hon. A. Sanborn in behalf of the bar of Penobscot county, for the removal of Benjamin Kimball from the office of an attorney and counsellor at law. It

prayed for a rule upon Mr. Kimball to show cause why he should not be removed, assigning as causes that he did not "possess a good moral character," in this that at the February term 1860, of this court for this county, he was convicted of forgery for which he was at the following criminal term sentenced to two years imprisonment at hard labor in the state prison; also, in that he had been guilty of repeated dishonest if not criminal acts, and on one occasion if not more, of obtaining money by false pretences; and in that he had been guilty of unprofessional conduct in wittingly promoting and suing false and groundless suits and otherwise violated his oath and the duties of his said office.

The motion was made and the rule to show cause granted at chambers in term time, but while the court was not actually in session, returnable to the court in session. At the return day of the rule the respondent moved that the complaint be dismissed or quashed and the rule discharged, because it did not appear by it that he was convicted of a forgery committed when acting as an attorney and counsellor of this court or in a matter in which he acted as such attorney, that it did not appear but that he had been restored to all his rights by an executive pardon, nor were the persons of whom he obtained money nor the dishonest acts so specified as to enable him to prepare any defence, nor was there any statement of instances of unprofessional conduct, neither was the complaint sworn to nor had the judge in chambers authority to take any action or make any order thereon, because the notice was defective and insufficient, requiring him to appear before some judge without designating whom, nor that it should be before the court in session and also because the court could only pass upon his moral character as affected by some act done by him in the capacity of an attorney and counsellor, and had nothing to do with his conduct as an individual or in other relations.

The court then appointed Joseph Carr, Esq., a commissioner to take the testimony relating to this matter, who entered upon and completed the discharge of this duty without taking any qualifying oath. For this reason the respondent objected to the

acceptance of Mr. Carr's report when it was offered; also, because (as he said) a commissioner should only state the testimony and had no right to find facts, or his conclusions from what he deemed to be facts, because he received the proceedings of the Penobscot bar (had before the motion or complaint presented in its behalf was made or any rule served on the respondent) as a specification of the charges upon which these proceedings were based and sent them up to the court with his report, although the same had never been authenticated by the secretary of the bar association, because after the respondent had commenced to take his depositions the complainants were allowed to take the deposition of William P. Tenney, and because testimony was taken of the acts of the respondent as an individual in no wise connected with his professional conduct. Subsequently he filed a motion to strike out all but the charges of a conviction of forgery and of wittingly promoting groundless suits upon the ground that the other charges were too indefinite to afford any basis of action, and afterwards asked to have this last charge stricken out for the same reason. The minutes of the meeting of the Penobscot bar annexed to the commissioner's report and referred to in the respondent's motion, set out the report of a committee previously appointed, made to that meeting in which they reported substantially the conviction of Mr. Kimball of forgery, his sentence and imprisonment, that several years after his release (to wit, in 1873) he returned to Bangor and resumed the practice of his profession there, that he had in the several instances specified obtained money upon false pretences and had unsuccessfully attempted to do so of various persons mentioned, that he had instituted groundless suits; one against the gentleman who had him arrested to compel repayment of a loan fraudulently obtained, and another against Ezra C. Brett, Esq., for writing to the governor a letter remonstrating against the appointment of Mr. Kimball to be a justice of the peace upon the ground of his unfitness. In the former of these suits Mr. Kimball obtained a verdict for nominal damages upon the technical ground that the writ upon which he was arrested

was in form a summons and attachment containing no order for an arrest, the attorney neglecting to strike out and insert the few words necessary to change it into a capias; the latter suit is still pending. The report also stated the instances of discourteous and improper language and conduct towards other members of the bar which are referred to in the opinion, where will be found a statement of the particular circumstances of his various fraudulent operations that were fully proved.

Mr. Kimball was married in 1853, in Sutton, N. H., and within the year following his wife left him and they never lived together afterwards. In 1859 he applied to this court for a divorce and to procure it produced what purported to be the deposition of Joseph Greeley of Sutton, taken before J. H. Allen, Esq., with a regular certificate of that magistrate attached, in which the deponent was represented as testifying that he saw the parties married, knew that Mrs. Kimball returned to New Hampshire in less than a year and had been there ever since and had told the witness that she should never return because Mr. Kimball was too literary for her, kept himself in his study, cared nothing for balls, &c., of which she was fond and that, though she had seen the published notice of his libel, she should not appear nor trouble him, but allow him to have his divorce. The deponent was also represented as answering that he had heard a rumor of her commission of adultery with a person named but knew of no improper relations between them. This deposition and caption were forged by Kimball. He presented and read them at the hearing upon his libel and obtained a decree of divorce. At the succeeding February term 1860, of this court he was indicted for the forgery, tried and convicted; and at the next criminal term in August 1860, was sentenced to two years imprisonment in the state prison. He was committed in execution of his sentence upon the twenty-second day of October 1860. He introduced in his defence to the present proceedings a certified copy of the petition of A. Sanborn and other members of the Penobscot bar, dated February 9, 1861 (probably it should be 1862), and petitions signed by about

four hundred citizens of Bangor, Veazie and vicinity, praying for his pardon upon the ground that he had been in the county jail thirteen months before being taken to Thomaston, and no party was actually injured by his forgery because his wife desired a divorce and had a libel pending in New Hampshire when he made his application and therefore "whatever of wrong attaches is, in effect, only technical." Upon these representations the executive council on the twenty-first day of February 1862 advised his pardon, and he was pardoned by Gov. Washburn on that day; the document reciting in the usual form, that "we do hereby grant unto him, the said Benjamin Kimball, a full and free pardon, and restore him to citizenship, of which all our judges, magistrates, officers, &c., are to take notice." This pardon Mr. Kimball now pleaded in bar of any attempt to remove him from his office of attorney on account of the conviction aforesaid. After his release from the state prison Mr. Kimball went to Philadelphia and did not return to Maine till 1873, when he re-opened an office in Bangor. The respondent moved and earnestly urged that the whole case with the voluminous testimony, papers, motions, &c., be reported to the full court for its determination thereon, which was assented to by the petitioners and it was reported accordingly, together with the findings of the commissioner.

A. Sanborn in behalf of the Penobscot county bar.

This court has power to disbar the respondent. *Ex parte Bradley*, 7 Wallace, 364; *Bradley* v. *Fisher*, 13 Wallace, 335.

His motions were properly overruled. *Randall*, petitioner, 11 Allen, 473; *In re Percy*, 36 N. Y., 651; *Randall* v. *Brigham*, 7 Wallace, 523.

No necessity for the commissioner to be sworn.

If the court has the power of removal argument is unnecessary to show that upon the facts presented, an occasion has arisen which demands its exercise. Cases cited *supra*; R. S. c. 79, § 18. *Ex parte Garland*, 4 Wallace, 378; *Ex parte Robinson*, 19 Wallace, 512.

Benjamin Kimball, in his own behalf.

Courts will only remove attorneys for contempt or for fraudulent and corrupt practices in his capacity and employment as an attorney and counsellor at law. Over this class of cases they will exercise their summary jurisdiction, but will leave the party complaining to his civil and criminal prosecution for all irregular or dishonest acts committed in a private capacity or employment, where a jury can be empannelled to pass upon the facts. *Bryant's case*, 24 N. H., 154; *Short* v. *Pratt*, Bing., 102; *In re Knight*, Ib., 142; *In re Morris*, 2 Ad. & El., 582: *Ex parte Boderlour*, 8 Ad. & El., 359.

The pardon disposes of the charge of forgery and all its consequences. *Ex parte Garland*, 4 Wallace, 378.

Dickerson, J. This is a complaint for the removal of the respondent from his office as attorney and counsellor at law. The complaint which is in the form of a motion signed by A. Sanborn, Esq., of and for the Penobscot bar, prays for a rule upon the respondent to show cause why he should not be removed from the office of attorney and counsellor at law of this court upon and for the following charges, to wit: "that he does not possess a good moral character, in that at the February term of said court, A. D. 1860, he was convicted of the crime of forgery, and at the next August term of said court he was sentenced to confinement to hard labor in the state prison for the term of three years; and in this that he has been guilty of repeated dishonest if not criminal acts; and in one instance if not more, of obtaining, money by false pretences; and of unprofessional practice in this, that he has wittingly promoted and sued false and groundless suits, and otherwise violated his oath, and the duties of his said office."

An attorney at law is an officer of the court as appears from the terms of his oath of office, to wit: "you will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients." The order of his admission to the bar is the judgment of the court that he possesses the

requisite legal qualifications and good moral character to entitle him to practice the profession of an attorney at law. From the moment of his entrance upon the duties of his office, he becomes responsible to the court for his official misconduct. The tenure of his office is during good behavior, and he can only be deprived of it for misconduct ascertained and determined by the court after opportunity to be heard has been afforded. In the absence of specific provision to the contrary the power of removal is commensurate with the power of appointment. *Ex parte Garland*, 4 Wall., 378; case of *Austin et als.*, 5 Rawle, 203.

When we consider the duties and powers devolved upon an attorney at law in virtue of his office and the temptations to abuse his professional franchise, the importance and necessity of the power of the court to remove him from the bar can scarcely be over-stated. An attorney at law in general may waive objections to evidence, make admissions in pleading or by parol, enter nonsuits and defaults, and make any admission of facts and any disposition of suits that his clients could make. Upon his advice and conduct in the management of causes the protection of the property, reputation and even the life of his client in a great degree is not unfrequently made to depend. In order to fit him for this trust the possession of a character fortified by high moral principle is indispensable. The statute makes "a good moral character" a condition precedent to his admission to the bar. By his admission the court hold him out to the public as worthy of public confidence and patronage. Upon this indorsement by the court the public have a right to rely, and to presume that his moral character continues to stand approved by the court. If "a good moral character" is indispensable to entitle one to admission to the bar, it is obvious that the necessity for its continuance becomes enhanced by the conflicts, excitements and temptations to which the practitioner is daily liable. For his official misconduct there is no power of removal but in the court. This power therefore is at once necessary to protect the court, preserve the purity of the administration of justice, and maintain the integrity of the

bar. "The power of removal," says Bigelow, C. J., in *Randall's case*, cited *post*, "was given not as a mode of inflicting a punishment for an offence, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice."

The power of removal however is a judicial power, to be exercised by a sound judicial discretion, and in accordance with well-established principles of law where the evidence is of a conclusive character. But while its use calls for judicial discretion, it also invokes judicial firmness.

The proceedings for the removal of an attorney at law do not partake of the nature of a criminal procedure in which a party has a right to insist upon a full, formal and technical description of the matter with which he is charged. They are usually commenced by motion to the court, setting forth the misconduct of the attorney in terms that may be readily comprehended by him, and praying for a rule on him to show cause why he should not be removed from the bar for the causes assigned. This course was pursued in the case at bar. The motion contains the general charge that "the respondent does not possess a good moral character," and then states in general terms the acts by which he has forfeited his claim to such character. We think the motion is sufficiently specific to advise the respondent of the charges he is required to meet, and if sustained by the evidence affords sufficient ground for his removal from his office as attorney at law. *Randall*, petr. for mandamus, 11 Allen, 470.

The causes for which an attorney at law may be removed from the bar from the nature of the case are diverse and numerous. He may be removed for violating his official oath ; for conviction of perjury or other felony ; for attempting to get an opposing attorney drunk in order to obtain advantage of him in the trial of a cause ; for obtaining money of his client by false pretences ;

for advocating the admission in evidence of a forged copy of a letter, knowing it to be forged when offered by his associate counsel; for ceasing to possess "a good moral character;" and for any ill practice attended with fraud and corruption, and committed against the principles of justice and common honesty. *Ex parte Bramhall*, Coop., 829; *Austin's case*, cited *ante*; *Dickens' case*, 67 Penn. St. R., 169; *People* v. *Ford*, 54 Ill., 520; *Rice* v. *Commonwealth*, B. Monroe, 484; *Mills' case*, 1 Mann, 393; *In re Percy*, 36 N. Y., 651; *Bryant's case*, 24 N. H., 155; *Burr's case*, 1 Wheeler's Crim. L., 503; *Leigh's case*, 1 Munf. ,481.

It is a mistaken view of this subject as the foregoing authorities show, to conclude that an attorney at law can only be disbarred for acts done "in his office as attorney," or "within the courts," in the terms of his oath of office. On the contrary an attorney may be guilty of disreputable practices and gross immoralities in his private capacity and without the pale of the court, which render him unfit to associate with gentlemen, disqualify him for the faithful discharge of his professional duties in or out of court, and render him unworthy to minister in the forum of justice. When such a case arises from whatever acts or causes, the cardinal condition of the attorney's admission to the bar, the possession of "a good moral character," is forfeited, and it will become the solemn duty of the court upon a due presentment of the case to revoke the authority it gave the offending member as a symbol of legal fitness and moral uprightness, lest it should be exercised for evil or tarnished with shame.

In *Leigh's case*, cited *ante*, Judge Roane says: "None are permitted to act as attorneys at law but those who are allowed by the judges to be skilled in law, and certified by the court to be persons of honesty, probity and good demeanor. Having obtained the sanction of the court touching these two particulars, an attorney is licensed or allowed to practice, and the court have also a continuing control over him, with power to revoke his license for unworthy practices or behavior."

In *Percy's case*, cited *ante*, the court say: "It is insisted by

the appellant that the misconduct justifying the removal is some deceit, malpractice, or misdemeanor practiced or committed in the exercise of the profession only and that general bad character or misconduct will not sustain the proceedings. We cannot concur in this position. It has been seen that the right of admission to practice is made by the statute to depend upon the possession of a good moral character joined with the requisite learning and ability. It is equally important that this character be preserved after admission while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision is made in case such character is wholly lost."

In *Mills' case*, cited *ante*, the court held that a bad moral character is good cause for disbarring an attorney. In that case Whipple, C. J., remarks as follows: "Should this court after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would in my opinion fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar and the public, to see that a power which may be wielded for good or for evil is not entrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption."

Upon passing from the law to the facts in the case before us, we find that the first specification relied on to establish the general charge that "the respondent does not possess a good moral character" is proved. He was "sentenced to confinement and hard labor in the state prison for the term of two years," as charged in the motion. The crime for which he was convicted and sentenced was the forgery of a deposition and caption thereto

annexed which were offered in evidence by him, and admitted by the court on the trial of a libel for. divorce brought by him against his wife, Marilla Kimball.

But we further find that he has been pardoned by the executive for that offence. The effect of that pardon is not only to release the respondent from the punishment prescribed for that offence and to prevent the penalties and disabilities consequent upon his conviction thereof, but also to blot out the guilt thus incurred, so that in the eye of the law he is as innocent of that offence as if he had never committed it. The pardon as it were makes him a new man in respect to that particular offence, and gives him a new credit and capacity. To exclude him from the office he held when he committed the offence is to enforce a punishment for it notwithstanding the pardon. *Ex parte Garland*, 4 Wallace, 380.

But the respondent in his capacity as attorney offered the deposition and caption forged by him as evidence in court, and they were admitted. This act was a palpable violation of his official oath which bound him "to do no falsehood nor consent to the doing of any in court." It was also an indignity offered to and a fraud upon the court and the law. By that act the respondent not only struck a fearful blow at the administration of justice but he betrayed confidence, practiced deceit, degraded himself and turned recreant to virtue. It is obvious that an attorney at law who is guilty of such an act does not possess that "good moral character" which the statute makes a prerequisite for admission to the bar and which is indispensable in the practice of the profession. *Rice* v. *Commonwealth*, 18 B. Monroe, Ky., 475.

The executive pardon affords the respondent no protection from the consequences which the law attaches to this offence. Pardon for one crime does not release a party from the penalties and disabilities consequent upon the commission of another. A pardon for forgery does not prevent a party from suffering the consequences attached to a conviction for adultery or larceny, nor blot out the guilt inseparable from such crimes and give their perpe-

trator a new character for chastity and honesty. The indictment upon which the respondent was convicted contains no count for a violation of his official oath or for a fraud upon the court. The respondent's pardon for forgery can no more obliterate the stain of guilt for those offences than the judgment in that case would be a bar to an indictment for their commission.

Nor has that act been condoned by lapse of time. Though the respondent's conviction and sentence took place in 1860, the delay has not been very considerable if we take into account the term of his imprisonment and his absence from the state. The offended husband or wife not unfrequently consents to continue or resume the relations of wedlock in the hope of an improved state of things without intending to condone previous causes of grievance, should such hope prove delusive. For the same reason also the court sometimes suspends sentence or even forbears to pronounce it. The forbearance in this case was doubtless prompted by the hope of an improvement. However this may be, the respondent has no legal or moral ground to complain that he has been suddenly or summarily dealt with or that he has been allowed an opportunity for repentance and reformation. How he has improved the interval granted him the sequel shows.

We also find the respondent guilty of dishonesty and bad faith toward his client, Thomas Frost. The evidence shows that Frost gave the respondent a retainer of $10 to defend him from an indictment for an assault with an intent to commit murder, and $20 more when the court was in session; that the respondent examined Frost's witnesses and told him to discharge them, and "to leave the case with him to fix up;" that "he had seen the parties and if Frost would let him have the money he would fix it up right away."

The respondent wanted $200 for that purpose which Frost let him have, and then went home. Upon being advised by his bondsman to return to court and look after his bond, Frost returned, found that nothing had been done, but was again assured by the respondent "that something would be done in a day or two." Nothing however was done and Frost demanded the $200 of the

respondent but recovered only $55, the balance being claimed by him for his services in the case.

The crime charged was one that the law does not allow to be compromised by the parties. The respondent was poor and Frost was in good credit. Neither the injured party nor the county attorney was introduced to show what efforts if any the respondent made to adjust the matter. Nor did the respondent offer his own testimony to remove the cloud that rests upon his professional conduct in this transaction. The evidence forces upon us the conviction that the respondent dealt falsely and dishonestly with his client and in a manner utterly inconsistent with that "good moral character" which he should have possessed. The pretence that the respondent had a right to retain the money for his services is too transparent to mislead any discerning mind. The evidence shows that the money retained by him was not and could not have been obtained for that purpose and that not a tithe of it was earned by him in the cause.

The specification of dishonest practices in obtaining money is established in several instances. The evidence shows that he went to Etna and obtained thirty dollars of Samuel R. Dennett, a farmer of that town whose acquaintance he had made the February previous while Dennett was attending court as a juror, upon the false statement that John C. Friend of Etna owed him sixty dollars. The respondent has never refunded the money though he promised to do so on the next day. He also obtained fifteen dollars of Seth Emery of Bangor, at an early hour in the morning upon the representation that he had a check on which he expected to get the money and would pay the money as soon as the bank was opened. He never paid the money and in the absence of any explanatory or exculpatory evidence to the contrary which it was in the power of the respondent to offer if any such existed, the inference is irresistible that he had no such check as he pretended to have. In another instance he obtained twelve dollars from a gentleman in Waterville upon representing that he had lost his pocket-book, was doing an extensive business in Philadelphia and had no money

to pay for his team and hotel bills, and upon his promise to remit the amount the next day from Bangor. As he neither sent the money nor would answer the gentleman's letters, the latter caused him to be arrested at the hotel in Waterville and thus collected his debt. His largest operation in the same direction that has been disclosed in this proceeding is in the case of William P. Tenney, who let him have some fourteen hundred dollars at different times, solely upon his express representation that it was intended to be used, and his agreement that it should be used, to purchase soldier's scrip or bounty, and that Tenney should have one half of the profits. After the earnest efforts of Tenney to obtain satisfaction, the result was his recovery of $400, the confession of Kimball that he had invested the balance in real estate in Sidney, and the tender of his worthless note for that amount. Other instances there are of successes and failures in obtaining money by means scarcely less disreputable though not so palpably dishonest.

As instances of unprofessional conduct and a disregard of the amenities of the profession may be mentioned his calling E. C. Brett, Esq., a member of the Penobscot bar and clerk of this court, a liar; in causing the name of Henry L. Mitchell, Esq., also a member of that bar to be erased under an action without authority and in having his own name inserted instead, and in putting his own name under an action defended by James W. Donigan, Esq., another member of said bar without authority and threatening "to flog him in the street if it was stricken off."

The specification of wittingly promoting and suing groundless suits is not sustained. In the one instance adduced the verdict of the jury was in favor of the respondent, then plaintiff, for nominal damages, and in the other the declaration seems to set forth good cause of action, whatever the proof may turn out to be, and as a jury may be called upon to try it, the court will not presume be forehand to pronounce it false and groundless.

Our conclusion is that independently of the act of the respondent in offering the forged deposition and caption as evidence in court, the allegation in the motion that "the respondent does not

possess a good moral character" is clearly established. With the evidence of that fact the case does not admit of a scintilla of doubt. The evidence discloses not merely a single instance of moral delinquency, disreputable practice and professional misconduct, but a series of them, showing the respondent to be unfit and unsafe to be intrusted with the powers, duties and responsibilities of the legal profession. No court would for a moment consider the claims of an applicant for admission to the bar who should be shown to possess such a moral character. If the violation of his oath of office, fraud upon the court, bad faith toward clients, dishonesty in his dealings as an individual and disregard of the courtesies and proprieties due to the other members of the profession should operate a forfeiture of the office of an attorney, the respondent has no longer any claim or right to enjoy that office.

Unpleasant as is the duty, grave as is the responsibility devolved upon us, and serious as must be the consequences to the respondent, we cannot forbear to pronounce the extreme judgment of removal without failing to discharge the high trust which the law reposes in us and which is indispensable to the maintenance of the dignity of the bench, the integrity of the bar and the purity of the administration of justice. Indeed to refuse to do so in this case would be virtually to abdicate this trust and render the law creating it a nullity. The guaranty which the law in this behalf provides for the security of the public must be maintained inviolate.

We have carefully examined all the respondent's objections to the proceedings before the court at *nisi prius* including his motions to dismiss, strike out and quash, and also to reject and amend the report of the commissioner, but we find nothing in them for which he has any legal ground of complaint. The objection that the commissioner to take the testimony was not sworn is not well taken. Assessors, auditors and referees appointed by the court are not required to be sworn nor is a commissioner to take evidence. So also was it competent for the judge to receive the complaint and grant the rule to show cause at chambers returnable to the court in session. As we have before seen the same strictness,

formality and technicality are not required in this proceeding as are requisite in other cases.

The judgment must be *The respondent to be removed from his office as attorney at law in all the courts of this state.*

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

LIBBEY, J., having been consulted did not sit.

HENRY M. PRENTISS *et al. vs.* DANIEL W. GARLAND *et al.*

Guarantor liable without suit against principal.

A guarantor, upon failure to perform his contract by the person whose action he guarantees, is liable to a suit by the holder of the guaranty, without any previous judgment or suit against the defaulting contractor.

ON MOTION FOR NEW TRIAL.

ASSUMPSIT upon the following agreement. No action has been commenced by the plaintiffs against Eben Thissell on the contract therein mentioned, which is also below stated.

A demand upon the defendants and upon Eben Thissell for payment, was duly made before this action was brought. The only question presented to the court for decision was whether or not this suit can be maintained by the plaintiffs against the defendants without any previous action brought by the plaintiffs against Eben Thissell. It is admitted that this question was not raised at the trial of the case.

The writings referred to were these:

"BANGOR, June 14, 1872.

Prentiss Brothers hereby agree with Eben Thissell to drive his logs from the head of 2d Lake, taking them as he left them about a week ago, to the Penobscot boom, and to drive all above, for which said Thissell agrees to pay them one dollar twenty-five cents per

thousand feet stumpage, scale as soon as the logs arrive at the Penobscot boom; said Thissell also agrees to pay them two dollars a thousand feet for driving the twenty-seven thousand feet, E. Clements' scale, landed on Telos Lake, to the Penobscot boom, mark JET, mark of other logs mentioned above, TET JET.

PRENTISS BROTHERS.
EBEN THISSELL.

We hereby agree that the said Eben Thissell shall make the payment as per the above contract, promptly, when the logs are driven as above specified, to the Penobscot boom.

D. W. GARLAND & Co."

Wilson & Woodard for the plaintiffs.

W. H. McCrillis for the defendants.

APPLETON, C. J. The plaintiffs on the fourteenth day of June, 1872, entered into a contract with Eben Thissell to drive his logs at specified prices.

The defendants at the same time signed the following agreement: "We hereby agree that said Eben Thissell shall make the payment as per the above contract, promptly, when the logs are driven as above specified, to the Penobscot boom.

D. W. GARLAND & Co."

The objection taken is that no suit has been brought against Thissell for the amount due, and that therefore this action cannot be maintained. The logs arrived at their destination. The principal, Thissell, was called upon to make payment but neglected. The defendants agreed that he should make payment according to the terms of the contract and "promptly." It has not been done. The agreement of the defendants has not been performed. It was for the defendants to see that it was performed. Not having kept their promise, they must be held liable for its non-performance.

The bringing a suit against Thissell is not made a condition precedent to the enforcement of the defendants' liability.

Motion overruled.

DICKERSON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

STATE OF MAINE *vs.* ADONIRAM STANLEY.

Indictment lies for fraud in exchanging horses.

When one has knowingly, designedly and falsely asserted a horse to be sound, which he well knew was unsound, with the intent to deceive and defraud, and thereby induced the party aggrieved to exchange horses relying upon such false representations, and that party was thereby deceived and defrauded, an indictment for cheating by false pretences will be sustained against the person making such false representations.

ON EXCEPTIONS.

INDICTMENT for falsely representing an unsound horse to be sound, whereby the purchaser was defrauded.

The defendant demurred generally to the indictment and excepted to the overruling of his demurrer.

A. Sanborn for the respondent.

This was a mere warranty of soundness, for the breach of which an action lies; but it is not an indictable offence under R. S., c. 126, § 1.

Jasper Hutchings, county attorney, for the state.

It was a false representation as to the quality of the article sold; hence indictable. 2 Bishop Cr. Law, §§ 367, 369; *People* v. *Haynes*, 14 Wend., 546; *People* v. *Crissie*, 4 Denio, 525; *Reg.* v. *Heighley*, Dean & B., 145; 26 Eng. L. & Eq., 631; *Reg.* v. *Abbott*, 2 Carr. & Kir, 629; *Reg.* v. *Remick*, 48 Eng. Com. L., 48; *Com.* v. *Stone*, 4 Metc., 43.

APPLETON, C. J. This is an indictment for cheating one Sullivan by means of certain false pretences.

The allegations in the indictment are that the defendant, in an exchange of horses with one Sullivan, knowingly, designedly and falsely pretended that his (the respondent's) horse was a sound horse when in fact it was not; that said Sullivan believed said false pretence, and was thereby deceived and induced to exchange and deliver his horse to the respondent, and was thus defrauded.

The question is, whether or not the indictment sets forth a false pretence within R. S., c. 126, § 1.

The assertion of the soundness of his horse by the defendant is the assertion of a material fact. It is false. It was made to deceive and defraud. It accomplished its purpose. Thus much the demurrer admits. It is not readily perceived why this falsehood is not within the spirit, as well as the letter, of the statute.

In *State* v. *Mills*, 17 Maine, 211, the owner of a horse represented to another, that his horse, which he offered in exchange for the property of the other, was a horse known as "The Charley," when he knew that it was not the horse called by that name and by such representation obtained the property of the other person in exchange, it was held that the indictment was sustained, although the horse said to be the Charley was equal in value to the property received in exchange, and as good as the Charley. So the statement that the property is unencumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretences notwithstanding there may have been a warranty, if the false pretence and not the warranty was the inducement which operated upon the party to make the exchange. *State* v. *Dorr*, 33 Maine, 498. In the *People* v. *Crissie*, 4 Denio, 525, an indictment alleging that the defendants falsely pretended to a third person that a drove of sheep which they offered to sell him were free of disease and foot-ail, and that a certain lameness, apparent in some of them, was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words and an averment negativing the facts represented, was held good under the statute against cheating by false pretences. In *Rex* v. *Jackson*, 3 Camp., 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. So the representation that a bank check was a good and genuine check and would be paid on presentation, when the drawer had no funds in the bank on which it is drawn, is a false pretence. *Smith* v. *People*, 47 N. Y., 303. So false representations as to

quantity may constitute a false pretence for which the person so falsely representing may be indicted, *Reg.* v. *Sherwood*, 40 E. C. L., 585. So by giving false samples, *Reg.* v. *Abbott*, 1 Den. C. C., 379. In *Reg.* v. *Kenrick*, 48 E. C. L., 49, the false pretence was that the horses were the property of a private person and not of a horse dealer, and that they were quiet and tractable, and Lord Denman, C. J., says, "The pretences were false, and the money was obtained by their means," and the indictment was sustained. In that case the purchaser wanted a quiet and tractable horse, in the one at bar a sound one was wanted. In that case as in the one at bar, the false representation was effective to defraud.

A false pretence may relate to quality, quantity, nature or other incident of the article offered for sale, whereby the purchaser relying on such false representation is defrauded. *Reg.* v. *Abbott*, 61 E. C. L., 629. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact with knowledge of its falsity. *Bishop* v. *Small*, 63 Maine 12; *Rex* v. *Reed*, 32 E. C. L., 904. No harm can happen to any one from abstinence in the making of false representations. When made, and material and effective for deception, no sufficient reason is perceived why the guilty party should escape punishment. *Exceptions overruled.*

Indictment adjudged good.

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

MATILDA J. DAVIS, in equity,

vs.

THOMAS B. RODGERS, administrator.

Mode of entry to foreclose under R. S. of 1857, *c.* 90, § 3.

A mortgagee in actual occupation of the mortgaged estate, after default of performance of the condition, has the right to enter peaceably in the presence of two witnesses, under R. S. of 1857, c. 90, § 3, to foreclose the mortgage for condition broken, without notifying the debtor of the intention to do so or of the fact that it has been done.

Davis *v.* Rodgers.

The mortgagor is bound to know whether or not he has performed the condition of his deed; and, if he has not, he must know that the law gives the right of such entry to foreclose the mortgage on account of the breach; and that the registry of deeds of the county where the land lies will inform him whether or not the creditor has exercised this right; therefore he cannot claim to be notified by the mortgagee that he has proceeded in the manner provided by law, R. S. of 1857, c. 90, § 3.

BILL IN EQUITY, to redeem from a mortgage, claimed in defence to have been legally foreclosed agreeably to the provisions of the R. S. of 1857, c. 90, § 3, as appears by the opinion, which fully states all the facts essential to an understanding of the legal questions determined.

John F. Godfrey for the complainant.

A. W. Paine for the respondent.

APPLETON, C. J. This is a bill in equity brought to redeem a mortgage, and is dated July 24, 1871.

The bill alleges that on the twelfth day of July, 1856, one George B. Rodgers mortgaged the premises sought to be redeemed to his mother, Polly B. Rodgers, the defendant's intestate, to secure the performance of a contract of that date entered into between them by which the said George agreed to pay his mother fifty dollars annually during her life; to finish the west room in the house except papering, and to do and perform the various matters set forth in that contract; that said George fully performed his part of the contract until his decease on the eighth day of August, 1860; that this complainant then his widow, was appointed administratrix upon his estate; that having obtained a license, she sold the equity of redemption of said mortgage to Peleg T. Jones who conveyed the same to Franklin A. Wilson, from whom the title passed to this complainant; that on the thirteenth day of November, 1860, Polly B. Rodgers entered upon the mortgaged premises to foreclose the same, being then in possession and occupation of the same, and then taking the rents and profits; that the conditions of the mortgage were not broken at the time of this entry; that she remained in possession taking the

rents and profits to an amount greater than was due by virtue of the contract referred to in the mortgage and so continued to the time of her death upon the twenty-sixth day of September, 1870; that the complainant was out of possession; that the entry so made was fraudulent and in secrecy; that a demand was made July 12, 1862, by F. A. Wilson on Polly B. Rodgers to state an account of rents and profits as required by the statute; and an offer made to pay what might be found due, if anything; that to this the respondent answered the same day, denying the receipt of rents and profits and claiming $348 as then due, and denying that there had been any payments of the fifty dollars to be paid annually.

The defendant in his answer admits the mortgage as set forth; the death of George B. Rodgers; the appointment of the plaintiff as his administratrix; the sale of the equity of redemption to Jones; that the title of Jones passed to F. A. Wilson and from him to the complainant; that the mortgagee resided on the place; but denies that she should account for such occupation; and asserts that the sum of fifty dollars to be paid annually has not been paid nor any portion of the same; that the west room has not been finished; that none of the conditions of the contract secured by the mortgage in question have been performed, except that his intestate had been permitted to remain in possession; that she upon the thirteenth day of November, 1860, entered for condition broken peaceably and in the presence of two witnesses, as prescribed by the statute; continued in possession of the premises until the mortgage was fully foreclosed by lapse of time, at which time there were due $350; and that since the foreclosure his intestate claimed to hold the estate in fee.

By R. S. of 1857, c. 90, § 3, a mortgagee "may enter peaceably and openly, if not opposed, in the presence of two witnesses and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace" . . and the certificate is to be recorded "in the registry of deeds in which the mortgage is,

or by law ought to be, recorded within thirty days next after the entry made."

By § 4, possession obtained "in this mode shall forever foreclose the right of redemption."

It is not denied that the certificate is full and complete, containing every fact required by the statute; nor that the entry was peaceable; nor that the certificate was recorded within the time required by law.

The objection is taken that the entry was secret and fraudulent, and consequently that the attempted foreclosure was null and void.

The mortgagor, or his assignee, knew, or was bound to know whether or not there was then or had been a forfeiture of the conditions of the mortgage. He knew, or was bound to know, that the mortgagee, if there was a forfeiture, had a right to enter for condition broken; that if in possession of the mortgaged premises after such forfeiture that he might be in for the purposes of foreclosure; and that the county registry of deeds would disclose whether he had entered under the statute to foreclose or not. It, therefore, was for the mortgagor to examine the registry after forfeiture, not for the mortgagee to serve him with notice of what he had done, or of the certificate on record. In *Hobbs* v. *Fuller*, 9 Gray, 98, the facts were like those in the case at bar. "The possession taken by the defendant," observes Thomas, J., "was in conformity with the provisions of the statutes, and there is no evidence from which a waiver of his possession could have been inferred." It was there held that an entry for foreclosure of a mortgage, under a statute similar to ours duly certified and recorded was sufficient without notice to the mortgagor or to a subsequent mortgagee in possession under a previous entry for foreclosure. In *Ellis* v. *Drake*, 8 Allen, 161, an entry by a mortgagee upon mortgaged premises, made, certified and recorded as provided by the Massachusetts R. S., c. 107, § 2, has the effect of foreclosing the mortgage, after the expiration of three years, though the entry was purposely made in secret. "The rule of law, as now held," observes Dewey, J., "seems to be that the

entry by the mortgagee for condition broken, in the presence of two witnesses, and a certificate thereof duly sworn to before a justice of the peace and duly recorded, are all that is necessary to effect a foreclosure." It is to be observed, however, in the present case that there is an entire absence of evidence tending to show that the entry was purposely made in secret. Indeed, it is fairly inferable that those holding the equity of redemption were fully aware of the commencement of the proceedings to foreclose, inasmuch as a demand on the mortgagee to account was made and a reply to such demand given long before the foreclosure became perfected.

It is next objected that there was no forfeiture of the conditions of the mortgage at the time when the mortgagee entered. But such is not the fact. The west room was never finished as stipulated in the contract between the parties. Neither is there the slightest evidence that any annual payment of fifty dollars was ever made by the mortgagor between the date of the mortgage, July 12, 1856, and August 8, 1860, when the mortgagor deceased. There was then ample ground for the mortgagee to enter for condition broken.

Upon the evidence introduced the complainant fails to show that the mortgage has been paid, or that she is, on any grounds entitled to redeem. *Bill dismissed with costs.*

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

GEORGE W. WASHBURN *vs.* REUBEN D. GILMAN.

Nuisance—maintained for injury by drift-stuff.

The plaintiff brought this action to recover for injury to his interval land by the drifting upon it, by a freshet, of the refuse cast out of the defendant's mill: *held*, that the defendant, in operating his mill, should have guarded against freshets, always liable to occur in our rivers.

These deposits by the waters of a navigable stream were such a nuisance as to entitle the plaintiff suffering special damage, to maintain an action for the injury caused thereby.

On exceptions.

Case for a nuisance occasioned by casting out of the defendant's saw-mill and into the Piscataquis river refuse stuff, which was floated by a freshet in the spring of 1871, upon the interval land, of the plaintiff, situated below the mill, upon the same stream, so that great injury was thereby caused and considerable expense in removing the same.

The defendant pleaded the general issue, with a brief statement of a lawful right to cast his refuse stuff into the river, by a prescription in himself and those under whom he claimed by forty years uninterrupted user; also, by the custom of the country for all the mill-owners so to do for fifty years uninterruptedly; and he denied that this stuff was thrown into the river by his authority or that it came to the plaintiff's land from his mills, but claimed that it was from other mills.

The case as made up, stated substantially these facts: "Upon the thirteenth day of March, 1871, the defendant owned and used for manufacturing lumber a saw mill and shingle mill, situated on the Piscataquis river in Foxcroft village. He so used the saw mill through the previous winter, and the shingle mill from January 18, 1871. He had recently built the shingle mill, and also a clapboard mill, which was not so used until sometime after March 13, 1871. He had for several years previous so owned and used the saw mill and a shingle mill and clapboard mill, so situated, but the shingle mill and clapboard mill had become dilapidated and were replaced by new mills built as above stated.

The plaintiff owned on March 13, 1871, and had for many years previously owned, a farm situated on said river below the mills of the defendant, in the town of Dover.

It was in proof that, on March 13, 1871, there was a very high freshet in the river which broke up the ice below the dam just above said mills, and carried it down to an island in the river; that the ice jammed on this island and flowed back on plaintiff's farm, covering some seven acres of his interval land adjoining the river with ice, and a great quantity of drift wood, edgings,

bark, waste stuff, saw dust, hearts, butts, shingle stuff, and some logs; that this stuff appeared as new or recently cut out.

The plaintiff proved that there was a large pile of shingle-edgings and a large pile of saw dust at defendant's mills, which had been thrown out on the ice during the preceding winter. And further plaintiff introduced evidence tending to show that defendant had, in the course of the winter, thrown out from his mill upon the ice some slabs, butts, hearts, clippings, and other waste stuff from his mills, which were carried off in the freshet.

The plaintiff introduced testimony tending to show that these piles and other things were mainly carried off by the freshet on that day, and that previous freshets had left nothing but earth upon his farm.

It was testified to that during the forty-five years next before the bringing of this action a saw mill had been upon this same spot and for most of the time for thirty years clapboard and shingle mills had been operated where the defendant had his; and that the owners or occupants had always thrown their waste stuff into the river, till it had become valuable for wood, and this had been the custom at the mills upon the river above those of the defendant.

The plaintiff said he and his men worked half a month and used his horse and cart eleven days removing the stuff deposited upon his land by this freshet; that he lost a ton and a half of hay that year and two tons the next in consequence of it, and that it ruined three acres of his interval."

Upon these facts the judge instructed the jury, that "if the defendant threw, or cast into the Piscataquis river, or deposited upon the ice, edgings, saw dust, slabs, butts, hearts, clippings or other waste stuff from his mills, leaving them to be floated away by the water of the river without any care or oversight, and if any of such stuff was carried by the action of the water of the river on the plaintiff's land, and there deposited and left, and the plaintiff was thereby injured, he might recover damages of defendant."

He further instructed the jury that "the defendant is liable only

for the damages occasioned by the stuff which came from his mills to and upon the plaintiff's land, and there remained. If it was mixed with like waste and stuff from other mills or places, and these together caused the injury, they must apportion the actual damage and charge the defendant only with the amount of damage they are satisfied was caused by the stuff from his mills. They must not charge him for injury not found to have been occasioned by defendant's stuff.

The defendant requested the court to instruct the jury,

I. That defendant has the right to cast into the Piscataquis river the slabs, butts, hearts, sawdust, edgings and other waste stuff made by his mills, and if by the great freshet of March 13, 1871, and the jamming of the ice on the island below plaintiff's farm, the same or any part of it was carried on the plaintiff's farm, and injured it, the defendant is not liable for the injury.

This instruction the court declined to give except as given in the first above instructions.

II. That if the jury find that two causes concurred to produce the injury to the plaintiff's farm, and that one cause was the waste stuff which defendant cast from his mills into the river, and the other cause was the great freshet of March 13, 1871, then the defendant is not liable for the injury.

The court refused to give this instruction, and further instructed the jury that, "if the great freshet carried the stuff on plaintiff's land and the defendant is otherwise liable, the fact that it was thus carried on by the freshet would not exonerate him."

III. That if the jury find that defendant cast such waste stuff into the river, and the water carried it, mixed up with other similar waste stuff cast into the river by other persons from mills on the river above defendant's mills on the plaintiff's farm, thereby injuring it, still, if the jury were unable from the testimony to estimate and determine the amount of damages done thereto by the waste stuff of defendant's alone, the law does not authorize the jury to render a verdict against him for more than nominal damages. This the court refused to give except as given in the instructions above.

The verdict was for the plaintiff for his damages, and the defendant excepted.

A Sanborn and *Lebroke & Pratt* for the defendant.

The defendant has all the rights of mill owners upon public rivers, including the use of it for the purpose of operating his mills, in the usual and reasonable manner. *Brown* v. *Chadbourne*, 31 Maine, 26; *Pitts* v. *Lancaster*, 13 Metc., 157; *Thurber* v. *Martin*, 2 Gray, 394; *Chandler* v. *Howland*, 7 Gray, 350.

Reasonable use is that adopted by men of ordinary prudence in that business. *Shrewsbury* v. *Smith*, 12 Cush., 181; *Sullivan* v. *Scripture*, 3 Allen, 564; *Snow* v. *Parsons*, 28 Vermont, 464.

Therefore the defendant had the right to do as all mill owners did in this respect. 28 Vermont, 464; *Jacobs* v. *Allard*, 42 Vermont, 303.

Such right as the defendant claimed may be acquired by prescription; one of the most common instances being that of obstructing a stream and flowing back its waters. *Bolivar Co.* v. *Neponset Co.*, 16 Pick., 241; *Stein* v. *Burden*, 24 Ala., 130; *Watkins* v. *Peck*, 13 N. H., 360; *Stackpole* v. *Curtis*, 32 Maine, 383; *Harrison* v. *Young*, 9 Ga., 359; Washb. on Easements, 243, 287 and cases there cited; *Moore* v. *Webb*, 1 C. B. (N. S.), 673; *Jones* v. *Crow*, 32 Penn. St. R., 398; *Bear River Co.* v. *York*, 8 Cal., 327; *Hill* v. *King*, Id., 336. And the mill need not stand upon the same spot all the time. *Shumway* v. *Simons*, 1 Vermont, 53.

The defence could rely upon the custom of the country. *Carlyon* v. *Lovering*, 40 Eng. Law & Eq., 448.

Josiah Crosby and *Henry Hudson* for the plaintiff.

The defendant had no right to obstruct a public highway with his drift stuff, nor can that right be acquired by prescription. Angell on Highways, §§ 225–229; 31 Maine, 9; *Knox* v. *Chaloner*, 42 Maine, 150; *Cole* v. *Sprowl*, 35 Maine, 161; *Veazie* v. *Dwinel*, 50 Maine, 490; *Dwinel* v. *Veazie*, 44 Maine, 167; *Davis* v. *Winslow*, 51 Maine, 264; *Gerrish* v. *Brown*, Id., 256.

APPLETON, C. J. The defendant is a mill owner on the Piscataquis river. The plaintiff brings this action to recover damages by reason of the butts, edgings, saw dust, &c., thrown by the defendant into this river, which stuff floating upon his land injured the grass upon his meadows and was removed therefrom at great expense.

The defendant requested the court to instruct the jury "that the defendant has the right to cast into the Piscataquis river the slabs, hearts, edgings, saw dust and other waste stuff made by his mills, and if by the great freshet of March 13, 1871, and the jamming of the ice on the island below the plaintiff's land, the same or any of it was carried on the plaintiff's farm and injured it, the defendant is not liable for the injury."

This instruction the court declined to give, but instructed the jury that, "if the defendant threw or cast into the Piscataquis river, or deposited upon the ice, edgings, saw dust, slabs, butts, hearts, clippings or other waste stuff from his mills, leaving the same to be floated away without any care or oversight; and if any such stuff was carried by the action of the water of the river to and upon the plaintiff's land and there deposited and left, and the plaintiff was thereby injured, he may recover his damages of the defendant." When there is a dam built on a stream subject to great freshets, it is not enough that it is sufficient to resist ordinary floods, but great freshets should also be guarded against. *The Mayor, &c., of New York*, v. *Bailey*, 2 Denio, 433. The instruction given was in accordance with law, and gave the defendant all to which he was entitled.

Freshets and ice periodically occur in the ordinary course of nature in our rivers. Their existence is no excuse for exposing refuse materials to their action, when the consequences of so exposing them are well known to all. Indeed, that they were so exposed "without care or oversight" the jury must have found, and the fact so found is the very basis of the plaintiff's complaint.

From the decision in *Simpson* v. *Seavey*, 8 Maine, 138, to the present time, it has been held that mill owners are responsible for

damages arising from throwing drift and waste stuff in the streams, (if navigable) upon which their mills are erected. In *Gerrish* v. *Brown*, 51 Maine, 256, it was held that if a person obstruct a stream, which is by law a public highway, by casting therein waste materials, filth or trash, or by depositing materials of any description, except as connected with the reasonable use of said stream or highway, or by direct authority of law, he does it at his peril, and is guilty of causing a public nuisance. The defendant was not in the reasonable use of the river, if "without care or oversight" he left the drift stuff from his mill so that by the ordinary forces of nature it would be carried on the land of the riparian proprietors below him to their injury. If without care, there could not be reasonable care. If the counsel had desired a more explicit ruling and that the question of reasonable use should have been distinctly submitted to the jury, he should have so requested the court.

The ground of complaint in the present case is not the interference with the navigation of the river but damage done to the plaintiff's land by the drift stuff floated by the rise of waters upon it. It is a private and special nuisance, for the consequences of which he seeks compensation. "It is a principle of the common law," observes Huston, J., in *Howell* v. *McCoy*, 3 Rawle, 256, "that the erection of anything in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. And this principle not only stands with reason but is supported by unquestionable authority, ancient and modern. . . The erection of a tan-yard comes within the operation of the same principles provided it has the effect of which the plaintiffs complain, corrupting and rendering unwholesome the water in the stream below, used for distillation or for culinary or domestic purposes. The general rule of law is that every man has a right to have the advantage of a flow of water, on his own land, without diminution or alteration in quantity or quality. Nor are we to be understood as saying, that there can be no diminution or alteration whatever, as that would be denying a valuable use of the water. The use of it must be such as not to be injurious to

the other proprietors." In *Crosby* v. *Bessey*, 49 Maine, 539, which was an action on the case for injury to the plaintiff's land by reason of the deposit thereon of bark from the defendant's tannery, by the natural flow of water, the court instructed the jury, that unless the defendant had acquired by grant or prescription the right so to deposit, that by the natural action of the water, it would be carried upon the plaintiff's land below, to his damage; and that if he did thus deposit it without having acquired such right, and it was carried on to the plaintiff's land to his damage, the plaintiff was entitled to recover, and the correctness of this ruling was affirmed. The same principle applies, whether the injury is by fouling the water or diminishing the productive powers of the soil. "I take the law to be," observes Blackburn, J., in *Hodgkinson* v. *Enna*, 116 E. C. L., 229, "as stated in *Tenant* v. *Goldwin*, 2 Ld. Raym., 1089; Salk., 21, 360; 6 Mod., 311; Holt, 500; that you must not injure the property of your neighbor, and consequently, if filth is created on any man's land, then in the quaint language of the report in Salk., 361, "he whose dirt it is, must keep it that it may not trespass." In *Hay* v. *The Cohoes Co.*, 2 Comst., 162, Gardner, J., states the law as follows: "In this case, the plaintiff was in the lawful possession and use of his property. The land was his, and as against the defendant, by an absolute right from the centre *usque ad cœlum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, (*Morley* v. *Pragnell*, Cro. Car., 510,); nor abstract any portion of the soil; (Rol. Abr., 565, note; 12 Mass., 221); nor cast anything upon the land, (*Lambert* v. *Bessy*, Sir T. Raymond, 421), by any act of their agents, neglect or otherwise. For this would violate the right of eminent domain. Subject to this qualification, the defendants were at liberty to use their land in a reasonable manner according to their pleasure."

The second requested instruction was properly refused. The defendant is not to be held responsible for the freshet, but as freshets are of frequent occurrence, he is bound to know that fact

equally as any other fact occurring in the course of nature, and he is liable for negligently leaving his drift stuff so that the lands of the riparian proprietors below are injured whenever they do occur.

The defendant is liable for damages arising from his own wrongful or negligent acts;—not for those arising from the negligent acts of others. Such was the instruction given. The difficulty may be great of accurately proportioning and assessing the damages done by the defendant, but that difficulty the defendant would have avoided had he taken due care that no occasion should arise requiring such assessment of damages.

The question of prescriptive right does not arise. There is no full report of the evidence, so that we cannot say whether the prescription was established or not. There was no ruling in relation to the law of prescription either given or requested. There were no erroneous instructions on this subject, for there were none whatever given. If the defendant wished to present that question, he should have asked for such rulings as he deemed applicable.

Exceptions overruled.

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

WALTON, J., did not concur.

NELSON T. PHILLIPS *vs.* HORACE G. SHERMAN.

Right to use of water. Sic tuo, &c.

A mill owner has no right to unnecessarily and unreasonably detain water from those who have a right to use it subsequent to his own; and he will be liable in damages for doing so.

What is a reasonable use, and what an unreasonable detention, are questions of fact for the jury.

ON REPORT.

CASE for unreasonably detaining by the defendant's dam, water which should have been allowed to flow in its natural channel, (after a reasonable use of it by the defendants) to, and to operate

the plaintiff's mill, lower down the same stream than that of the defendant's, but which was either kept back till it evaporated or else let out at night and other unseasonable times in such large quantities as to run to waste, so that the plaintiff (as he alleged) wholly lost the use of his mill for the four years preceding the bringing of this action, which was commenced February 4, 1870. There was considerable controversy over the facts, but those found by the court, upon the evidence reported for a decision conformably to law thereon, are recited in the opinion. If judgment were rendered for the plaintiff it was agreed that the damages should be assessed at twenty-five dollars. The defendant claimed the absolute ownership of the water, to employ or dissipate it as he pleased; and a prescriptive right to detain and control it by his dam, and to its use; and it was in evidence that he proposed to sell it to the plaintiff (after using what he wished) for fifty cents a day.

Henry Hudson and *J. Crosby* for the plaintiff.

The upper riparian owner has the right to check the natural flow of the stream, and withhold it from an owner lower down for a reasonable time, even though the mill of the latter was an ancient mill, accustomed to an uninterrupted flow for more than fifty years. Washb. on Easements, 340; *Thurber* v. *Martin*, 2 Gray, 394. But it cannot be uselessly nor unreasonably detained. Each must yield something to the other. Ibid. And any improvements in the flow enure to the benefit of all riparian proprietors below the place where they are made. Washb. on Easements, 346; *Tourtellot* v. *Phelps*, 4 Gray, 370.

Chapin formerly owned both mills. When he conveyed the lower one to the plaintiff's grantor—retaining then the upper one subsequently conveyed to the defendant—he conveyed all incidental rights including that of flowing his land above, and the flow of the stream. *Hathorn* v. *Stinson*, 10 Maine, 224; *Barrett* v. *Parsons*, 10 Cush., 371, 376.

A. M. Robinson and *P. S. Merrill* for the defendant.

The defendant owns the dominant, and the plaintiff the servient

estate. The former had a right to detain the water for use, and for a probable use likely to arise at any moment by grain being brought to his mill; and to sell it, if only kept back by a dam of the height which he had acquired a prescriptive right to maintain. *Pillsbury* v. *Moore*, 44 Maine, 154; *Munroe* v. *Stickney*, 48 Maine, 462.

Nor was the unity of possession by Chapin such as to destroy the right. *Bliss* v. *Rice*, 17 Pick., 23; *Gould* v. *Boston Duck Company*, 13 Gray, 442.

APPLETON, C. J. The defendant is the owner of a grist mill and privilege situate on a stream issuing from Hebron Pond in Monson. The evidence shows that in 1820, a dam and grist mill were erected at the outlet of said pond. In 1841, the then owner of the privilege rebuilt and enlarged the grist mill and deepened the channel thereto. Formerly fifty bushels of wheat or corn were daily ground at this mill. More recently the number has been reduced to a daily average of about twenty bushels. The consequence is, that a much less quantity of water is now vented than formerly.

The plaintiff's mill and dam situated some distance below on the same stream, was built in 1844. The defendant's privilege and dam have been occupied and enjoyed by him and those under whom he derives his title for a much longer period than is necessary to acquire an adverse title by prescription. Without detailing the evidence, we think it is satisfactorily proved that the defendant has all the rights which prior occupancy can give as well as those which can be acquired by prescription, so far as regards the height of his dam.

The defendant then has a right to keep and maintain his dam at its present height with all the water necessary to propel his machinery. But of this the plaintiff makes no complaint. The defendant claims the right to retain water not needed in any way for the use of his mill nor necessary for its full enjoyment, and to the loss and injury of those whose mills are below him on the same stream.

The defendant, owning the privilege above, and being the first occupant upon the stream, has a prior right to all the water necessary to propel his machinery. But while this right is sustained and protected, he must use the water in a reasonable and proper manner, having regard to the like reasonable use by all the proprietors above and below. He cannot unnecessarily and at his own will and pleasure, detain the water an unreasonable length of time, nor discharge it in such excessive quantity that it would endanger those below. Every owner of mills above is required so to use the water, that every riparian proprietor below shall have the enjoyment of it substantially, according to its natural flow, but subject to the necessary and unavoidable interruption arising from its reasonable and proper use by the privilege above. It cannot be unnecessarily and wantonly detained. Each riparian proprie tor on a running stream, whether above or below, has a right to the reasonable use and enjoyment of the water, and to the natural flow of the stream, subject to such disturbance and the consequent inconvenience and annoyance as might result to him from a reasonable use of the waters by others. The owner of a mill and dam has a right to the reasonable use of the water, but he must detain it no longer than is necessary for its profitable enjoyment, and then return it to its natural channel. A wanton or vexatious or unnecessary detention would render the mill owner so detaining liable in damages to those injured by such unlawful detention. *Hetrich* v. *Deachler*, 6 Barr, 32; *Davis* v. *Winslow*, 51 Maine, 264; *Davis* v. *Getchell*, 50 Maine, 602. In all these cases, the question is whether or not the use has been reasonable. *Thurber* v. *Martin*, 2 Gray, 396; *Pool* v. *Lewis*, 5 American Rep., (41 Ga., 162) 526; *Holden* v. *Lake Co.*, 53 N. H., 654; Washb. on Easements, 268; *Springfield* v. *Harris*, 4 Allen, 496.

So far as the defendant or those under whom he derives his title have by artificial means improved the stream, those improvements enure to the benefit of those below. The result is that the defendant has a right to use the water in his pond for the running of all the machinery upon his dam. He has a right to detain it

when required for the reasonable use of his mill. His rights are prior and superior to those of the plaintiff. But he cannot be permitted, in mere wantonness, to detain water not to be used, and of which there is no need whatever in the running of his mill.

The question of reasonable use of the water is one of fact, to be determined by the jury. The parties have referred that question to the court. Upon the whole evidence we are of opinion that the defendant has unreasonably withheld water, neither necessary nor required for the use of his mill.

Accordingly, there must be *Judgment for the plaintiff for* $25 *damages.*

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

ALBERT ALLEN *vs.* WILLIAM LAWRENCE.

Exceptions. Practice.

Bill of exceptions must contain a sufficient statement of the case to show wherein the excepting party was aggrieved. They cannot be added to, or supplemented by the statements of counsel made at the argument in the law court. They must contain enough within themselves to show error, or they will be overruled.

ON EXCEPTIONS.

ASSUMPSIT for breach of warranty of a pair of steers. The defence was that the sale was made by defendant's minor son, Herbert, to whom they belonged. The whole exceptions were in these words:

"VIRGIN, J., charged the jury, in part, as follows:

Young Ward's testimony has been alluded to by counsel, that when Lawrence was called to the door, after Herbert and the plaintiff had been down in the field, seen the cattle and come back, that Lawrence, the defendant and father of Herbert, made some remarks. Now what did he say? It is for you, a question of

fact—no law about it. Ward and the plaintiff, if I remember rightly, testified (but it is for you to say) that William Lawrence made a remark something like this: 'You trade with Herbert and whatever the trade is, it is all right.' It is for you to say what he meant by it, if he did say that.

On the one side it is said he meant to say, 'I will make good whatever my boy does about this matter;' upon the other side, that he simply meant 'these are Herbert's cattle, whatever trade he makes I will never call upon you for any money, or anything of the kind.' Now, what did he mean? That is the question for you.

I instruct you as matter of law, that if you should find that he made such a remark, and that he meant to assure Mr. Allen that whatever trade Herbert made he would be responsible for, for all contracts of warranty or otherwise that he made, he had a right to do so, and that a sufficient consideration for such a contract would be found in the subsequent sale of the cattle by Herbert to Allen.

One of the questions which is raised here (and it is a question of fact for you) is, was Herbert Lawrence under twenty-one years of age when these cattle were sold to this plaintiff. I do not understand the plaintiff to dispute that, and perhaps you might take that as a fixed fact."

To which rulings and instructions the defendant excepted, the verdict being against him.

C. A. Everett for the defendant.

A. M. Robinson for the plaintiff.

WALTON, J. All unnecessary prolixity should be avoided in bills of exceptions; but they must contain enough to show wherein the excepting party is aggrieved, or they cannot be sustained. They cannot be added to, or supplemented, by the statements of counsel made at the argument before the law court. They must contain enough within themselves to show error, or they will be overruled. No error is apparent in this case. The bill of excep-

tions contains absolutely nothing but an extract from the judge's charge. It is claimed in argument that this portion of the charge was inapplicable to the issues of fact actually litigated. This may be true. But as the bill of exceptions does not state what those issues were, it is impossible for the court to determine whether the complaint is well founded or not. No such error is apparent upon the face of the record. The exceptions must therefore be overruled; for error must be made to appear, it cannot be presumed. *Exceptions overruled.*

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

GEORGE BLAKE *vs.* EMELINE BLAKE.

Divorce. Husband and wife. R. S., c. 61.

A man who has made valuable improvements upon the real estate of his wife, paid taxes assessed thereon, and removed incumbrances, &c., at her request and upon her promise to pay for the same, was held entitled under R. S., c. 61, after the dissolution of the marriage by divorce, to recover for such improvements and moneys paid, &c., &c.

ON REPORT.

ASSUMPSIT upon an account annexed and the money counts, based upon the following facts, as stated to the court for the sole purpose of determining whether or not the action could be maintained upon proof of them.

"The plaintiff and defendant intermarried July 20, 1869, and lived together as man and wife up to October 30, 1871, and then parted.

The defendant made application for divorce, by libel dated November 9, 1871, entered at the February term, 1872, of this court. A divorce from the bonds of matrimony was decreed at the September term, 1872.

Previous to the marriage the defendant owed a note to Gilman

Lyford secured by mortgage on her real estate in Atkinson. Subsequently, but previous to the marriage, she with her son Lewis Cook, gave a joint note of herself and Lewis to Mr. Lyford in payment of the first mentioned note. Previous to the marriage, the plaintiff at the defendant's request, promised the defendant that he would pay the note signed by her and Cook. A few weeks subsequently to their marriage he did pay the full amount of the note to Lyford; took up the note and put it into a small unlocked trunk which was in a closet, of which his wife held the key, and she then destroyed the note without his consent.

Before the marriage the defendant promised that if the plaintiff would pay this note, she would secure him upon her real estate in Atkinson and pay the same; but she never secured nor paid the note.

When they parted October 30, 1871, the plaintiff looked for the note in the trunk but did not find it. The amount paid to Lyford was one hundred and twenty-eight dollars.

During the time of the marriage the plaintiff and defendant resided and kept house in her house in Atkinson and he made certain improvements on the premises, by making an addition to the stable on the same, and repairing the house to the extent of $200; put in a fire-frame costing $11; set out fruit trees on her land costing $8; labored on her land two hundred days, worth $200; boarded her daughter by her former husband, Cook, seventy-five weeks, worth $2 per week; paid taxes on the property assessed previous to the marriage, $10.

No promise of any kind has been made by the defendant to the plaintiff since the date of the libel of divorce. Repairs, taxes, improvements on her property, and board of her daughter were done with the defendant's consent, and with her promise to repay the same to the plaintiff.

The defendant, for the purpose of trying the question whether the action is maintainable upon the foregoing statement, admits the facts to be as stated, not however to be in any way prejudiced thereby in any subsequent trial. If the action is maintainable on

this statement, it is to stand for trial; otherwise the plaintiff is to be nonsuited."

Henry Hudson for the plaintiff.

The promise to repay the note was before they were married. Marriage is a good consideration for a promise. *Vance* v. *Vance*, 21 Maine, 364, and cases there cited.

Nor did the marriage relation prevent their making valid contracts with each other. *Motley* v. *Sawyer*, 34 Maine, 540, and 38 Maine, 68.

They can hold by conveyance from each other. *Davis* v. *Herrick*, 37 Maine, 397; *Randall* v. *Lunt*, 51 Maine, 246; *Mayo* v. *Hutchinson*, 57 Maine, 546; *Tunks* v. *Grover*, Id., 586; R. S., c. 61, § 4.

Josiah Crosby for the defendant.

As the divorce was on her libel, for his fault, he can not now recover unless he could have done so during coverture; because, if they could not then contract, no contract has since been made. But suit by one against the other could not have been maintained; nor could they contract with each other. *Smith* v. *Gorman*, 41 Maine, 405; *Crowther* v. *Crowther*, 55 Maine, 358; *Jackson* v. *Parks*, 10 Cush., 550; *Lord* v. *Parker*, 3 Allen, 129; *Edwards* v. *Stevens*, Id., 315; *Ingham* v. *White*, 4 Allen, 412; *Gay* v. *Kingsley*, 11 Allen, 345; *Robbins* v. *Pattee*, Id., 588; *Chapman* v. *Kellogg*, 102 Mass., 246; *Abbott* v. *Winchester*, 105 Mass., 115; *Sweat* v. *Hall*, 8 Vermont, 187.

Appleton, C. J. The plaintiff and defendant intermarried on the twentieth day of July, 1869, and have since been divorced. While the marital relations continued, they lived in a house and occupied a farm owned by the defendant. The plaintiff offered to show that during the continuance of the marriage, he was employed by the defendant to make valuable improvements upon her real estate and to pay the taxes assessed thereon—and that at her request, prior to their intermarriage, he advanced money after their marriage to pay an outstanding mortgage upon the same.

Were these several contracts such as the wife was authorized to make? Were they binding upon her in law or in equity? The parties to these contracts having ceased to be man and wife, can the husband maintain an action upon the promise of his wife to repay money advanced at her request to relieve her estate from incumbrance, or for labor and improvements made upon her house and lands.

Similar statutes varying in detail but all materially enlarging the rights and duties as well as the corresponding obligations and liabilities of married women have been enacted in most of the states.

The power is given to the wife to enter into contracts in reference to her own estate as if unmarried. In fact, in relation to her separate estate she is as if sole. She may give notes for land conveyed to her for her own use and she will be liable therefor. *Stewart* v. *Jenkins*, 6 Allen, 300. She may bid at an auction for the sale of real estate and if the highest bidder will be held to complete her purchase. *Faucett* v. *Currier*, 109 Mass., 79. Her contracts for buildings to be erected or improvements to be made upon her own land are binding upon her. *Pierce* v. *Kittridge*, 115 Mass., 374. Indeed she has full and entire power over her own estate—to convey it, which is the exercise of the highest power—or to charge it with incumbrances to any extent. Her powers over it are unlimited, so far as regards her dealings with persons other than her husband.

The wife may convey her real estate to her husband or receive from him a conveyance of his. *Johnson* v. *Stillings*, 35 Maine, 427; *Allen* v. *Hooper*, 50 Maine, 371; *Randall* v. *Lunt*, 51 Maine 247. So she may lease her estate to her husband. *Allen* v. *Lord*, 39 N. H., 196. She may enter into a reference in relation to it. *Duran* v. *Getchell*, 55 Maine, 241.

The right to make such contracts implies that they have obligatory force. They would be of no avail, if not binding. If effectual for one purpose, they are so for all. If the wife can convey to her husband, she may be bound by the covenants of her deed. If the husband is liable for the rent of his wife's estate to her,

she is none the less bound to the faithful performance of the covenants contained in such lease.

The rights of married women—the legal relations between husband and wife—their several and respective rights as to the public and as between each other have been repeatedly and materially changed by legislative action. To determine what they may be at any given time, recourse must be had to the then existent legislation. At the same time, past legislative action as well as the rules of the common law must not be forgotten.

By R. S., c. 61, § 1, a married woman of any age, may own in her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will, without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance; except real estate conveyed to her as security or in payment of a *bona fide* debt actually due to her from her husband."

By § 2 a married woman may release to her husband the right to control her property or any part of it . . . . and may in writing revoke the same.

By § 3 she may receive the wages of her personal labor, not performed for her own family, maintain an action therefor and hold them in her own right against her husband or any other person.

By § 1 the wife can convey real estate "conveyed to her as security or in payment of a *bona fide* debt actually due to her from her husband." The wife then may contract with her husband. Without the right to contract there could be no debt "actually due." Without this she could not contract for its payment or security. A deed from either to the other is a contract between them. If the real estate is held as security, the discharge of such security is a contract. The section implies separate estates, separate interests in regard to such estates and the mutual and reciprocal right of contract in regard to the same.

By § 4, which is a condensation of prior statutes, the wife is

made liable for debts contracted "for any lawful purpose." She may be a surety and she will be bound by the obligation of suretyship. *Mayo* v. *Hutchinson*, 57 Maine, 546. The wife can contract with any person as to her real estate, and under that general right she can lease or convey to her husband. She can contract "for any lawful purpose." No limitation is imposed upon her general right to contract, save that the purpose be lawful. No restrictions are intimated as to the person or persons with whom contracts for lawful purposes may be made. The contract to improve her real estate, to pay taxes, and to remove incumbrances upon it, are all for a "lawful purpose." If made with any one but the husband, their binding obligation would not be questioned. But their lawful purpose is the same with whomsoever made. They are just as binding as the deed or the lease which she may give to or take from her husband.

The result is that the wife having the general and unrestricted power of making any and all contracts in relation to her estate, its sale, lease, improvement, with the further right to make contracts for any lawful purpose may contract with whomsoever she may choose. She may contract with her husband equally as with any one else. True, the courts would carefully scrutinize the contracts made between husband and wife, but when fairly and honestly made, no reason can exist why they should not be enforced. "Courts of equity, for many purposes, treat the husband and wife as the civil law treats them, as distinct persons, capable (in a limited sense) of contracting with each other, and of having separate estates, debts and interests. A wife may, in a court of equity, sue her husband, and be sued by him." 2 Story's Eq., § 1368, The husband and the wife have separate property, and each may bind their respective estates.

It is not necessary to consider the question whether the plaintiff can recover for the board of his step-daughter, as it has not been discussed by the counsel on either side.

The objection to the maintenance of an action at common law arising from the marital relation no longer exists. The binding

obligation to pay for services rendered remains in full force. The disability to sue has ceased. There is no occasion to resort to equity. The action may be maintained at common law. *Webster* v. *Webster*, 58 Maine, 139; *Tunks* v. *Grover*, 57 Maine, 586.

Case to stand for trial.

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

DOVER *vs.* MARTIN L. ROBINSON *et als.*

Effect of altering a bond.

The plea of sureties upon a collector's bond that it is not their deed is well maintained by proof that subsequently to its delivery and approval, and without their knowledge or consent, but with the knowledge and consent of the selectmen of the town having custody of the bond, the penal sum was changed by the principal from twenty-five hundred to twenty-five thousand dollars.

Such an alteration, so made, avoids the bond as to the sureties. It cannot be deemed a spoliation by a stranger. The inhabitants of the town cannot maintain suit against the sureties upon a bond thus vitiated. The deliberate intentional permission of such an alteration, by their general financial agents, defeats their right to recover upon such bond against those not cognizant of the alteration nor taking any part therein, nor ratifying the same.

The town itself ratifies such permission by inserting in their writ a count upon the bond in its altered condition. They cannot take the chance of reaping a benefit therefrom without incurring at the same time a risk of loss.

ON REPORT.

DEBT upon the bond of Martin L. Robinson and his sureties, for the faithful performance by him of the duties of collector of taxes. The defence was that the penal sum was altered after delivery by erasing the word "hundred" and inserting "thousand," without the knowledge or consent of the sureties. If the action could be maintained against them the defendants were to be defaulted; otherwise, it was to be discontinued as to the sureties and judgment taken against Robinson alone. The

bonds given by the same parties for previous years had been for $25,000, and it was thought by the selectmen, when they approved it, that this was for the same sum. The selectmen testified that they did not assent to the change of the penalty, which was made by Robinson, when it was handed him, merely to call his attention to the mistake, and that the chairman of the board said it could not charge the sureties for more than the original amount; while Robinson swore that the chairman told him (as he was about to scratch out the word "hundred" with his knife) to write the "thousand" over the top, if he wrote it anywhere. He did so, simply making ink marks across the "hundred." There were two counts in the declaration, the first upon a bond for twenty-five thousand dollars and the second upon one of like date and obligation in the penal sum of twenty-five hundred.

The justice drawing the opinion accompanied it with the following memorandum, which is recited here as showing the precise state of facts upon which the decision is based.

"My opinion in this case is predicated upon the following view of the facts which I believe is the only one that we can reasonably take upon the testimony as reported.

I state it in advance, because I think, if any difference of opinion arises among members of the court, it will be upon the facts and not upon the law, and therefore I think they had better be discussed separately.

The bond in suit as originally executed, delivered and approved, was in the penal sum of twenty-five hundred dollars instead of twenty-five thousand, which was the sum usually inserted in the collector's bond. In the fall of 1872, more than two years after the bond was given, the selectmen discovered this fact, and thereupon agreed to call the attention of the principal to it.

This was done by one of them in the presence of the other two, and the bond was handed to the principal, who in the presence of all the selectmen, remarked that he could fix that, and forthwith with a pen struck out the word hundred, and wrote the word thousand over it. There was but little conversation. The

testimony taken together seems to establish the fact, that one of the selectmen expressed the opinion that the change could not be made so as to hold the sureties beyond the sum first inserted without their consent, and that he directed the principal to write the word 'thousand' over the word 'hundred,' and that neither of the other selectmen said anything, expressing neither assent nor dissent. The bond was replaced upon the town files, and the alteration did not come to the knowledge of the sureties until the next spring. After it did come to their knowledge two of them took mortgages of the principal's property, conditioned to be void if the principal saved them harmless 'from all legal liability' on this and two other bonds which they had signed as his sureties, 'it being however expressly understood that this mortgage imposes no additional liabilities on said sureties.'

The sureties have paid to the town upon the other bonds more than the estimated value of the mortgaged property. Under these circumstances, the only reasonable inference seems to be that the alteration was made with the knowledge and consent of the selectmen, and that there is no evidence of any knowledge of, or consent to, such alteration on the part of the sureties at the time it was made, or of any subsequent ratification thereof by them."

C. A. Everett for the plaintiffs, contended that the only power given to the selectmen was to approve a sufficient bond. When they had done this they were *functus officio* in this respect, and could not authorize an alteration of one already taken and approved. The bond run to the inhabitants of the town, and the selectmen were strangers to it, so that an alteration made by them would not vitiate it; *a fortiori*, one made by the principal without consent of the obligees, would not have that effect.

J. Crosby and *A. M. Robinson* for the defendants.

Barrows, J. Upon the testimony here reported the question seems to be whether the inhabitants of a town can maintain an

action against the sureties upon a collector's bond originally given in the penal sum of twenty-five hundred dollars when said penal sum has been altered by the principal in the bond, since its delivery, with the knowledge and consent of the selectmen of the town, from twenty-five hundred to twenty-five thousand dollars, without the knowledge of the sureties, and in the absence of all proof of a subsequent ratification by them. The proposition that these facts are sufficient to sustain the sureties' plea that such altered bond is not their deed, would seem to admit of little doubt. It is not a case of spoliation by a stranger. The cases which hold, as in *Small* v. *Danville*, 51 Maine, 359; and *Mitchell* v. *Rockland*, 52 Maine, 118, that towns are not responsible for the wrongful acts of their officers in the performance of a public duty imposed upon them by statute, have no proper application to a case like this.

It is no legitimate consequence of the doctrine of these and similar decisions, to subject the debtors of a town to the increased liabilities which might ensue from an undetected alteration of the instruments which form the evidence of their indebtment, when such alteration is made with the permission of the financial agents of the town, and to hold that such tampering with written obligations entails no risk of loss when unsuccessfully attempted. The town seeks here to enforce a right by virtue of a sealed instrument which was never executed in its present condition by those against whom they claim to recover on the strength of it. The change, which would avoid it beyond controversy or question if made with the consent of an individual obligee, was made by the consent of those whom the town had made its custodians. The plaintiffs claim to maintain their suit upon the bond notwithstanding its avoidance, upon the ground that the alteration was an act unauthorized by them, and one which their selectmen were not empowered by law or vote of the town to permit.

To be relieved from a liability incurred through the unauthorized and unlawful act of a public officer is one thing—to enforce as a valid subsisting claim a bond which has been vitiated with

the consent of those who rightfully had it in keeping on behalf of the town, is quite another. There seems to be no good reason why the principles which are laid down in *Chadwick* v. *Eastman*, 53 Maine, 12; and *Lee* v. *Starbird*, 55 Maine, 491, touching the alteration of written instruments offered in evidence should not be held to apply to a case like the present. It is not a case of misappropriation of payments like that of *Porter* v. *Stanley*, 47 Maine, 515, nor of negligence and mistake on the part of the selectmen like that of *Farmington* v. *Stanley*, 60 Maine, 472, where the defendants were rightly held chargeable for the default of their principal although they might have been relieved if the mistakes made by the town officers could have been allowed to pass uncorrected.

A careful examination will show that there is little analogy between those cases and the one now before us.

To sustain the present suit against the sureties we have a written obligation which has been vitiated as an instrument of evidence by the deliberate intentional act of the plaintiffs' agents, an act done apparently to secure themselves from the blame which might attach to them for their carelessness in accepting an inadequate security, but an act which as effectually deprived the town for which they acted of any right of action against these sureties upon this bond, as if they had never executed any bond at all. It is not their deed. But there is another view which is equally fatal to the plaintiffs' case. The plaintiff town presents itself here in this very suit in the attitude of ratifying this act of their selectmen.

Whatever might have been thought of the elaborate and ingenious effort of counsel to establish the position, that the inhabitants of the town ought not to be affected by what he claims to have been the unauthorized act of their agents, if they had brought suit on the bond as originally given, it can hardly avail when we find that the first count in the writ asserts the giving of a bond by the defendants in the sum of twenty-five thousand dollars. The plaintiff corporation seems to have been ready to avail itself of

the alteration if it passed unnoticed. They can do so only at the hazard of losing the benefit of their bond altogether. Asserting a claim here upon the bond in its altered condition, they must be held to have ratified the act of their selectmen in permitting the alteration and to stand in the same position as a private corporation or an individual does, in bringing suit upon an altered instrument.

That position is not improved by any acts or omissions on the part of the sureties. They gave no implied authority to the principal and to the town officers to insert such sum as they might agree upon, by executing the collector's bond in blank, as was done in the case of *South Berwick* v. *Huntress*, 53 Maine, 89.

The condition of the mortgage of the principal's property received by two of the sureties to secure them against all "legal liabilities" upon this and two other bonds, is so framed as to exclude the idea that they intended to ratify the alteration.

Even if they had not already paid upon the other bonds a sum larger than the estimated value of the mortgaged property, the reception of this mortgage could not be construed as a ratification.

As to them the plea that this is not their deed is well maintained.

Such a defence cannot avail the principal who made the alteration.

Plaintiffs have leave to discontinue as to the sureties.

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

URIAH T. PEARSON *vs.* JAMES S. CANNEY.

Distress warrant for taxes—when issuable.

A town treasurer is authorized to issue a warrant of distress only against a collector of taxes who is delinquent in collecting and paying over taxes legally committed to him for collection.

A legal commitment requires a warrant in due form of law and a list of taxes under the hands of the assessors.

ON REPORT.

TRESPASS *de bonis* for taking and carrying away a quantity of

cedar and other shingle timber. The defendant pleaded the general issue and a brief statement that the plaintiff was tax-collector of Orneville for 1869, and gave bond for that year and also for the collection of the uncollected balance of the taxes of 1868, but failed to collect and pay these taxes to the defendant, who was treasurer of the town, and the defendant thereupon issued his warrant of distress to the proper officer, upon which the property mentioned in the writ was taken and sold; and this was the trespass complained of.

Among other objections to the sufficiency of the proceedings, the defendant suggested that the warrant issued to him was not such as to enable him to collect the taxes, because it directed him to seize only such property as was not exempt from attachment, as appears by the report of the case of *Orneville* v. *Pearson*, 61 Maine, 552; and also that the list of taxes committed to him was not under the hands of the assessors.

The cause was submitted to the court *in banc* to enter such judgment, and for such damages as the law and facts might seem to require.

Lebroke & Pratt for the plaintiff, argued that Mr. Canney issued the distress warrant for too large a sum; and cited cases to show that this rendered it void; that no such commitment as it alleged was ever made; and that the warrant given Mr. Pearson was not such that he could enforce payment of taxes under it.

C. A. Everett and *W. P. Young* for the defendant.

The distress warrant was good as to such sums as Pearson had actually received as collector, *Trescott* v. *Moan*, 50 Maine, 347; *Johnson* v. *Goodridge*, 15 Maine, 29.

Danforth, J. This is an action of trespass for certain lumber alleged to have been taken from the plaintiff by the direction of the defendant. The taking is admitted, but attempted to be justified on the ground that the only direction given, was by virtue of a warrant of distress issued by the defendant as treasurer of the town of Orneville, against the plaintiff as collector of taxes for

the same town, for neglect in collecting and paying over taxes assessed in 1868.

Several objections are made to the form and substance of the warrant, of the validity of which we are unable to judge as no copy is found among the papers furnished us. But assuming it to be sufficient to answer the requirements of the law, it cannot avail as a defence to this action, as it was illegally issued. By the law under which the tax in question was assessed,—R. S., of 1857, c. 6, § 113, re-enacted in the revision of 1871, same chapter § 130,—before a warrant can be issued against a collector, he must have been delinquent in respect to taxes committed to him for collection. This commitment must have been such as the law requires; such as would authorize the collector to compel payment; for without authority, there can be no corresponding duty, and consequently no neglect. *Tremont* v. *Clark*, 33 Maine, 482; *Waldron* v. *Lee*, 5 Pick., 328–9.

To give the collector this required authority, he must have a legal warrant and a "perfect list" of the taxes under the hands of the assessors as required by R. S., c. 6, § 70, being § 56 of that chapter in R. S. of 1857. In this case neither of these conditions seems to have been complied with. The warrant is the same as that held to be defective in *Orneville* v. *Pearson*, 61 Maine, 552, and the list of taxes committed to the collector, the original of which is in the case, does not appear to have been authenticated by the signatures of the assessors, or any of them. *Foxcroft* v. *Nevens*, 4 Maine, 72; *Lowe* v. *Weld*, 52 Maine, 588.

It is, however, contended that the collector is liable for whatever amount of money has been voluntarily paid to him. This is unquestionably true, but this liability can only be enforced in the proper form of action. The statute nowhere constitutes the treasurer, a tribunal to hear evidence and determine the amount which may have been paid to the collector. The tax committed is the only basis for fixing the amount due, and if none has been committed, it is clear there can be no foundation upon which the warrant can rest. As no such foundation appears in this case the

warrant was unauthorized, and though it may be a sufficient protection to the officer serving it, it is none to the treasurer.

The only other question is that of damages. It appears that the lumber sued for was sold at public auction for one hundred and fifty-one dollars. There is no tesitmony tending to show that this sale was not entirely fair and after proper notice given. The sum paid for it at such a sale is *prima facie* proof of its value, and we find no testimony in this case sufficient to overcome it.

Judgment for the plaintiff for one hundred and fifty-one dollars and interest from the time the lumber was taken as shown by the officer's return upon the warrant.

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

SUSAN RAND *vs.* ADONIJAH WEBBER.

Amendment. Assumpsit—when not maintainable.

A grantor verbally bargained certain land for a specified consideration, and, either by mistake or fraud, the premises conveyed did not include a parcel of ten acres embraced in the verbal agreement; whereupon, without rescinding the contract, the plaintiff brought assumpsit to recover the value of the lot thus omitted, or a proportional part of the consideration paid: *held* that the action would not lie.

The plaintiff had her election to have the deed reformed in equity, if the omission was by mutual mistake; or to bring an action of deceit for damages, if the lot was fraudulently omitted; or seasonably to rescind the whole contract and recover the entire consideration, if fully paid; or could defend against the notes given for the purchase (if any were outstanding) by way of recoupment, to the extent of the injury sustained; but could not retain that portion of the land covered by the deed and sue for the value of the portion omitted. The rescission must be total to maintain assumpsit, in which the whole consideration (if anything) would be recoverable.

The plaintiff originally declared in a special count setting out the bargain and alleging the breach to be the omission of ten acres mentioned; she afterwards added the money counts. She is now permitted, upon terms, to further amend so as to change the action into one for deceit, in order to save her claim from being barred by the statute of limitations.

On report.

Assumpsit, alleging that, on the twenty-second day of February, A. D., 1867, in consideration that the plaintiff would buy "the Samuel Bean farm" in Hudson for five hundred dollars, the defendant promised to sell her the farm for that sum, and promised that it "included a certain piece of good, cleared land containing about ten acres and lying on the side of the road opposite to the main body of the farm, of the value of two hundred dollars;" in consideration whereof the plaintiff promised to buy said farm; but the defendant "subtly intending to deceive and defraud the plaintiff," &c., conveyed to her a described parcel of land, which did not embrace the ten acre lot aforesaid, which he had promised her, and which she had paid for, &c., &c.

Substantially the same facts were set forth in several special counts; and, when the cause came on for trial, the plaintiff was allowed, against the defendant's objection, to add the count for money had and received. The general issue was pleaded in defence, with a brief statement setting up the statute of frauds, and that assumpsit would not lie if the facts alleged were all proved. The case was reported for the entry of a nonsuit or default as the court should consider the law upon the facts required.

C. A. Everett for the plaintiff, relied upon *Goodspeed* v. *Fuller*, 46 Maine, 141.

Lebroke & Pratt for the defendant.

Peters, J. The defendant deeded to the plaintiff a piece of land. It appears that the deed does not include a parcel of about ten acres, which the defendant represented he was conveying, and which the plaintiff supposed she was getting, when the deed was made. The omission was occasioned, either by the mutual mistake of the parties, or by fraud on the part of the defendant. The plaintiff does not rescind the contract on this account. She relies upon a special count in assumpsit and a count for money

had and received, to recover back so much of the purchase money, as said omitted parcel was actually worth. Whether this action can be maintained, is the question for our determination.

We are satisfied that the form of remedy is misconceived. It is clear that the count declaring on a special oral promise to convey the ten acres cannot be maintained, because such a contract is within the statute of frauds. The statute of frauds is duly pleaded and relied on.

And it is just as certain that the action cannot be upheld upon the common counts. This form of declaring is predicated upon a repudiation of what has been done. It cannot be allowed, unless based upon a rescission of the contract. This cannot be partial, but must be entire. Both parties must be restored to the condition in which they were before the contract was made. No new contract can be made for them without the consent of both. The plaintiff must tender a release of the premises conveyed, before she can sue to recover back any part of the consideration paid. She might have resorted to equity, if there was a mutual mistake; or she might have an action of deceit to recover the damages actually sustained, if the defendant committed a fraud upon her, and she might defend against any notes given for the land, to the extent of the damages sustained by the defendant's fraud, if they should be sued by the defendant, or any one having no superior rights to the defendant. These propositions are familiar doctrine, and abundantly sustained by the following, and numerous other, authorities. *Herbert* v. *Ford*, 29 Maine, 546; *Garland* v. *Spencer*, 46 Maine, 528; *Percival* v. *Hichborn*, 56 Maine, 575. And see cases cited hereafter.

But the plaintiff contends, that this case can be rescued from an application of these technical principles, upon the strength of the precedent in *Goodspeed* v. *Fuller*, 46 Maine, 141. It was there decided "that upon the money counts parol evidence was admissible to prove that the defendant, for the amount expressed as the consideration in a deed, agreed to sell and convey to the plaintiff two lots of land, each for a specified price; that the plain-

tiff paid the defendant the full sum for both lots, and that by mistake or fraud of the grantor, only one of the lots was conveyed by the deed, and the defendant having upon request, refused to convey the other lot, that the plaintiff could recover back the consideration paid for it with interest." That case was not like this. In that case there was a bargain for two lots at separate prices. Two bargains were there described in one transaction. The consideration was divisible. But in the case at bar there is but one contract, and one gross sum to be paid for the whole. All the land was bargained for as an entirety. It must be borne in mind, that it is not the actual value of the omitted lot that the plaintiff should recover, (if at all) but the exact amount of the consideration paid therefor. How can this be ascertained? How can it be known how much the purchase price of the "ten acres" was in comparison with the price of any other portion or of the whole? How can it be known that the defendant would sell one parcel without the other? Or how much the value of one parcel may be reduced by its separation in ownership or occupation from the whole?

The distinction between the case cited and this case is very forcibly illustrated in *Miner* v. *Bradley*, 22 Pick., 457, to which we refer as directly supporting our conclusions here. The same question afterwards arose, and was elaborately examined, both by counsel and court, in *Clark* v. *Baker*, 5 Metc., 452. The same principle was affirmed in the later cases of *Morse* v. *Brackett*, 98 Mass., 205; and *Bartlett* v. *Drake*, 100 Mass., 174. The case of *Johnson* v. *Johnson*, 3 Bos. & Pul., 162, much relied on in the Massachusetts cases, is also a very forcible case directly in point. The opinion of the court in *Cushing* v. *Rice*, 46 Maine, 303, is not inconsistent with our views as expressed here, although it may be regarded as to some extent conflicting with one of the Massachusetts cases above cited. In that case the plaintiff was allowed to recover back money paid for logs which he had not got, there being no difficulty in making an apportionment of the consideration, as no point was made that there was any difference

in the value per thousand feet between the logs that were and those that were not received. The court say in that case that it does not appear upon what ground the verdict was rendered; and that the exceptions disclosed no objection to the form of the action or to the instructions of the presiding judge. It appears that no point was taken at the trial of that case, that the remedy was misconceived.

It appears that the cause of action in this case arose more than six years before another suit could now be commenced. As the special count stood, it could easily be amended so as to have been an action of deceit. The plaintiff elected otherwise by adding a money count, and joining pleadings in assumpsit. The plaintiff may at *nisi prius* have leave to have the writ amended and the pleadings reformed, conformably to an action of tort, by paying costs and receiving none up to the date of the amendment; otherwise *A nonsuit to be entered.*

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

WEALTHY G. STUBBS *vs.* LYMAN LEE.

An office-holder, by accepting another office incompatible with the one held by him, thereby resigns the one first held.

Thus, one who accepts a commission as a deputy-sheriff thereby vacates that of trial justice previously held by him; the two offices being incompatible.

ON REPORT.

TRESPASS *vi et armis*, for an assault upon the plaintiff by the defendant and for an imprisonment by causing her to be committed to and detained in the county jail at Bangor for six months.

Upon the eighth day of May, 1866, the governor and council commissioned Lyman Lee as a trial justice of Piscataquis county,

and he qualified himself by taking the requisite oaths, on the twenty-ninth day of the same month. Edward Jewett, sheriff of that county, appointed Mr. Lee as one of his deputies December 22, 1868, and he was sworn in on the thirtieth day of that month; and on the fourth day of February, 1871, he was re-appointed and took the qualifying oaths February 28, 1871.

Upon the twenty-second day of May, 1872, Leonard Howard made a complaint against Wealthy G. Stubbs to Lyman Lee, who took it in the capacity of trial justice of said county and issued his warrant thereon, upon which she was arrested and brought before him upon that day; the cause was continued for three days, when she was tried by the defendant who ordered her to recognize to keep the peace for twelve months and to pay the costs of prosecution, which she failed to do, and he issued a mittimus upon which she was committed to the jail in Bangor (there being none in Piscataquis county) May 25, 1872, by Isaac Phillips, another deputy of the sheriff aforesaid, and remained in prison till discharged at the September term, 1872, of the supreme court for this county. A formal judgment was rendered, upon which the mittimus issued. The defendant pleaded the general issue and justified as trial justice, acting in that capacity. Being called in his own behalf, he testified that he was appointed crier to this court for Piscataquis county in 1866, and his commission was renewed every two years; that he never served any precepts or acted as a deputy sheriff, beyond serving as crier while the court was in session; that he never gave any bond; and that there was an agreement, at the time of each appointment, between him and the sheriff that he was to serve no precept, and only to act as crier. He once took charge of a jury being sworn in the usual way for that purpose. He had frequently acted as trial justice between the date of his commission as such officer and the trial of the plaintiff.

To recover for the imprisonment aforesaid Mrs. Stubbs commenced this action August 22, 1873. If, upon the foregoing

facts, it could be maintained, it was to stand for trial; otherwise, she was to become nonsuit.

C. A. Everett for the plaintiff.

Lebroke & Pratt for the defendant, cited *Com.* v. *Kirby*, 2 Cush., 477, and argued that Mr. Lee never assumed the functions of deputy-sheriff, or attempted to perform the duties of both positions at the same time, or with reference to the same transaction.

APPLETON, C. J. The defendant, being a trial justice, was subsequently appointed and sworn as a deputy-sheriff. The question presented for determination is whether the acceptance of the last is a resignation of the first office.

The offices in question must be regarded as incompatible. "I think," remarks Bailey, J., in *The King* v. *Tizzard*, 9 B. & C., 418, "that the two offices are incompatible when the holder cannot in every instance discharge the duties of each. . . The acceptance of the second office therefore vacates the first." . . . "So a man shall lose his office, if he accepts another office incompatible; as if one be under the control of the other; as, if the remembrancer of the exchequer be made a baron of the exchequer." 5 Com. Dig., Tit, "Officer," (K., 5.) The appointment of a person to a second office, incompatible with the first, is not absolutely void; but on his subsequently accepting the appointment and qualifying, the first office is *ipso facto* vacated. *The People* v. *Carrique*, 2 Hill, 93. A vacancy may arise in an office from an implied resignation; as by the incumbent's accepting an incompatible office. *Van Orsdale* v. *Hazard*, 3 Hill, 243. The acceptance of the office of constable of a town by a person holding at the time the office of justice of the peace, is of itself a surrender of the latter office. *Magie* v. *Stoddard*, 25 Conn., 565. In 3 Maine, 486, this court, in their answer to the senate say, "that the office of justice of the peace is incompatible with that of sheriff, deputy-sheriff or coroner."

Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable as well as one indispensable for the protection of the public.

The defendant having been appointed and sworn as a deputy-sheriff must be regarded as having accepted that office. By that acceptance he surrendered the office of trial justice, a judicial office incompatible with that of a deputy-sheriff. His judicial authority, therefore, as a trial justice was at an end.

The case to stand for trial.

DICKERSON, VIRGIN, PETERS and LIBBEY, JJ., concurred.

PULASKI MCCRILLIS *vs.* STACY T. MANSFIELD.

One taxed not estopped to deny inhabitancy.

In an action by a collector of taxes, to recover a poll tax assessed upon a person in a town where he was not an inhabitant at the time the tax was assessed, the defendant is not estopped from showing his non-residence in defence, although all the proceedings of the town including the warrant to the officer, are upon their face formal and regular.

ON REPORT.

DEBT to recover a poll tax assessed in due form against the defendant in Dexter for the year 1871; submitted to the presiding judge who found that, though working in Dexter (where he had resided in former years) upon an engagement for a year's work, on the first day of April, 1871, the defendant was then a resident of Foxcroft. The plaintiff objected to evidence of this last fact, contending that the defendant was estopped to assert it in this action and that the plaintiff was entitled to recover, irrespective of the actual inhabitancy of the defendant, if the tax assessment,

commitment and warrant to the plaintiff were regular, but the judge ruled the law otherwise, and that the plaintiff could not recover upon the facts found.

V. A. & M. Sprague for the plaintiff.

The collector's justification is his warrant, which protects him against all illegalities but his own; and he is not responsible for the errors of the assessors, whether in assessing one not liable or otherwise erroneous. *Nowell* v. *Tripp*, 61 Maine, 426; *Carville* v. *Additon*, 62 Maine, 459.

The plaintiff is bound to account to Dexter for this tax committed to him; if he cannot recover it here he is remediless; but if illegally assessed, and payment enforced, Mr. Mansfield can recover it of Dexter. *Briggs* v. *Lewiston*, 29 Maine, 472.

E. Flint for the defendant.

PETERS, J. This is an action by the collector of the town of Dexter, to recover a poll tax assessed upon the defendant as an inhabitant of that town. The facts show that the defendant was not an inhabitant of that town at the time that the tax was assessed. But the plaintiff contends that, as his warrant authorized him to collect the tax, the defendant cannot, in this suit, go behind the warrant and show the tax to be illegal. In support of this position, the case of *Nowell* v. *Tripp*, 61 Maine, 426, is relied upon.

But that case falls short of sustaining such a proposition. Nor does the reason for the rule established in that case exist in this. Here, the officer was not compelled to institute a suit for the collection of the tax, although he might do so. If the plaintiff can prevail here, then the defendant is remitted to a subsequent suit against the town to recover back the tax; in that way requiring two suits, instead of one, to settle the litigation.

We do not think the doctrine enunciated in the case cited needs to be thus extended. *Plaintiff nonsuit.*

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

OTIS STINCHFIELD *vs.* JOHN C. GERRY.

Deed—construction of.

The plaintiff took conveyance of a parcel of land described as "being the most northerly fifty acres of lot number forty-two, according to Norcross' survey." A county road previously constructed, was laid along the east line of lot No. 42, one-half of its width being upon said lot, and the other on the lot next easterly of it. The court held that, to obtain his fifty acres, the plaintiff must go to the east line of lot No. 42, which was the centre of the road aforesaid; and that resort could not be had to the covenants of the deed (especially to that warranting the land to be free from incumbrances) in order to change his line, so as to run it along the westerly side of the road.

ON REPORT.

TRESPASS *quare clausum*, for breaking and entering certain premises conveyed by Samuel Mitchell to Otis Stinchfield, by deed containing the usual covenants of warranty, dated April 28, 1845, the description in which is quoted in the opinion, where will be found a statement of the single question submitted and of the facts necessary for its determination; and the line of argument pursued by the respective counsel can be readily perceived from the language of the court.

Lebroke & Pratt for the plaintiff, cited *Bradley* v. *Rice*, 13 Maine, 198; *Cottle* v. *Young*, 59 Maine, 105; *Tyler* v. *Hammond*, 11 Pick., 193; *Van O'Linda* v. *Lothrop*, 21 Pick, 292; *Peck* v. *Smith*, 1 Conn., 103; *Jackson* v. *Hathaway*, 15 Johnson, 447; and 2 Washb. on Real Prop., 623.

To the point that recourse might be had to the *habendum* and covenants of the deed they cited *Deering* v. *Long Wharf*, 25 Maine, 51.

C. A. Everett for the defendant.

LIBBEY, J. Plaintiff claims that defendant committed trespass on premises conveyed to him by deed of warranty containing the following description: "a certain piece or parcel of land situated

in said Dover and being the most northerly fifty acres of lot number forty-two according to Norcross' survey." The parties agree "that a county road is duly laid out in the east line of No. 42, and one-half of said road is on said lot No. 42, and one-half on the lot next east" and "that, if plaintiff, in order to get his fifty acres of said lot, is entitled to be bounded by the west line of said road defendant is a trespasser; but if plaintiff's fifty acres must be bounded on the east by the east line of lot No. 42, which is the centre of said road, defendant is not a trespasser." It is admitted that the road was a highway at the time the plaintiff took his title.

It is contended on the part of the plaintiff that in cases of ambiguity in the description, the covenants in the deed may be taken into consideration in ascertaining the meaning of the parties, that by his deed he is entitled to fifty acres free from incumbrances; and to get it he must be bounded by the west line of the highway. But in this case there is no ambiguity in the description. The covenants in a deed cannot enlarge the grant, but only apply to the thing granted.

By the deed under which the plaintiff claims he is bounded on the east by the east line of the lot, and not by the west line of the highway. *Plaintiff nonsuit.*

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

AMOS TRACY *vs.* INHABITANTS OF ROME.

Where petition under R. S., c. 24, § 13, must be brought.

One of the kindred of a pauper, assessed and apportioned a certain sum for the support of the pauper, desiring to be released from that obligation, upon the ground that he is not of sufficient ability to pay it, must file his petition under R. S., c. 24, § 13, for a modification of the decree in the county where the same was originally entered.

ON REPORT.

This was a petition by Amos Tracy of Abbott, in this county,

under R. S., c. 24, § 13, for an alteration of the assessment made upon him to relieve his mother under a judgment of this court made upon complaint of the defendants under said chapter, at its December term, 1871, in Somerset county. There was no motion filed to dismiss the petition. At the hearing, the presiding justice was of the opinion that Mr. Tracy was not of sufficient ability to be required to aid further in his mother's support, and decided that nothing more should be exacted of him under said decree of this court and that the same be annulled. The defendants objected to this, contending there was not jurisdiction to vacate the whole decree, and that the petitioner should have made his application to the court sitting in Somerset county; but the presiding justice ruled otherwise. If these rulings were correct, the prayer of the petitioner was to be granted; but if this petition should have been brought in Somerset county, the petitioner was to become nonsuit.

Henry Hudson for the petitioner.

Mr. Tracy had a right to seek this relief in his own county; but if not, the objection is waived because not pleaded in abatement. *Sewall* v. *Ridlon*, 5 Maine, 458; *Webb* v. *Goddard*, 46 Maine, 505.

H. & W. J. Knowlton for the respondents.

APPLETON, C. J. This is a petition to alter or change the assessment made upon the petitioner to relieve Sally Tracy, his mother, by virtue of a judgment of this court for the county of Somerset, recovered at its December term, 1871. The petitioner is an inhabitant of this county and no motion was made to dismiss the petition.

Upon a hearing of the petition and evidence, the court was of opinion that the petitioner was not of sufficient ability to be required further to aid in the support of his mother under R. S., c. 24, and decreed that he should be entirely absolved from furnishing further aid.

The presiding judge likewise ruled that this process might be

brought in the county of Piscataquis notwithstanding the judgment sought to be altered had been recovered in the county of Somerset.

By R. S., c. 24, § 9, the kindred of those chargeable as paupers within certain specified degrees, if "of sufficient ability" are made liable to support persons so chargeable "in proportion to their respective ability."

By § 10 of the same chapter the process to enforce this liability is by complaint to the supreme judicial court in the county, where any of such kindred reside,—and the court may cause such kindred to be summoned and upon a hearing "may assess and apportion a reasonable sum upon such kindred as are found to be of sufficient ability, for the support of the pauper at the time of such assessment and may enforce payment thereof by warrant of distress." By § 12, the court may "assess and apportion upon such kindred a sum for the future support of such pauper to be paid quarterly, until further order."

By § 13 the court may, from time to time, make any further order on complaint of a party interested and after notice given, alter such assessment or apportionment."

The process in this case was to procure an alteration of a previous assessment or apportionment. Under this section the previous assessment or apportionment may be modified as justice may require. The obligation to render aid depends upon the sufficient ability of the party liable. When that ceases, the obligation ceases. The moment the party charged is not of sufficient ability and that fact is made to appear, the kindred so situated should be relieved from all liability, for the basis of judicial action in the premises no longer exists.

The process by complaint under § 13 is for the purpose of making such alteration in the existing record as justice may demand. The language of the section assumes that this complaint must be before the court having jurisdiction of the original complaint. The court may "make any further order." A further order implies a previous order to be modified. The record of the original

decree and of the new decree altering it must be in one and the same county. Such are all the analogies of the law. The petition for review must be heard in the county where the judgment to be reviewed was rendered, and the trial, if a review is granted, must be there had. The writ of error is returnable and is to be tried in the county, where the judgment alleged to be erroneous, was rendered. So here, the judgment or decree to be altered, and the judgment or decree altering the same, must be on the records of the same court and in the same county. There may be numerous kindred and they may each file complaints for the purpose of having alterations of their respective assessments or apportionments. If they could do this in different counties, there might be as many alterations as there are counties, while the original judgment would appear to be in full force in the county where the first complaint was filed. This cannot be. This complaint is not maintainable here. *Petitioner nonsuit with costs for defendants.*

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

ANNA BRADSTREET, appellant, *vs.* EDWARD L. BRADSTREET.

Practice. Probate appeal.

To justify setting aside the findings of a jury empanelled to determine issues framed in a probate appeal, and the decree of the justice at *nisi prius* affirming that of the judge of probate, there must be a very decided preponderance of the evidence against the verdict and decrees.

Upon a probate appeal, neither party can claim a trial by jury, as matter of right.

It is discretionary with the court whether or not to frame issues—and, if any, what—to be determined by a jury; and the verdict is to inform the conscience of the court, but need not control its action, unless approved; nor can either party except because issues prepared by him were not submitted.

In this case, the following questions were left to the jury:

I. "Did the guardian support said ward, while she lived in his house, as an act of charity till her former guardian was appointed?"

II. "Did the services of the ward, rendered for her guardian, compensate him for her support, after the appointment of the first guardian?"

III. "How much, if anything, was the guardian entitled to receive from the ward, by virtue of his guardianship and of the account filed by him, at the date of its settlement at the probate office?" To the first inquiry an affirmative, and to the second a negative, answer was returned; the third was answered, "One hundred and forty-one dollars and ten cents." The appellant objected that these inquiries presented issues of law, as well as of fact; this objection is untenable, because all verdicts involve law, as given by the court, and facts found by the jury, the result being the law applied to the facts.

The practice of reporting the whole charge in the exceptions is reprehensible. Only the points of law to be raised and such facts as are essential to enable the court to perceive the applicability of the instructions given or refused, should be stated.

Should the judge inadvertently mis-state any fact in his charge, his attention should be called to the error that it may be then and there corrected; otherwise, it will be treated as waived.

One item of the appellee's account was for personal services, which it was contended could not be allowed because he had not settled any account of his guardianship of the appellant for more than three years after his appointment, the account in controversy being the first and final one; this objection was properly overruled because not stated in the reasons of appeal.

On exceptions and motion for a new trial.

Appeal from the decree of the judge of probate of Waldo county, allowing the account of Edward L. Bradstreet, the appellee, as guardian of the appellant, while Anna Morrison, the wardship being terminated in February, 1870, by her marriage to Charles L. Bradstreet. It seemed by the report that a different account was first filed, but allowed to be withdrawn on the return day and the one under consideration in this case substituted therefor. This proceeding was stated as one of the reasons of appeal, and that thus there had been no notice upon the account actually settled before the judge of probate.

By the account in controversy the appellee charged himself as guardian with the amount of the inventory ($173.87) and eighteen dollars interest, making $191.87, and prayed to be allowed for an error of $16.49 in the inventory, five term fees at probate court, of seven dollars each, five per cent. commission on $157.38 (the true amount of the original inventory, as corrected), various

items of clothing, &c., fifteen dollars for going to Madrid to settle with James Morrison, Anna's former guardian, and fifty dollars for "board and clothing of minor for seven years, viz.: from 1862 to 1869," which was the item chiefly in dispute. These several credits amounted to $141.10, and were all allowed by the judge of probate, this substituted account being prepared so as to meet his approbation, the amount of the credit for board being submitted to his discretion and filled in by him.

From this allowance the ward appealed, assigning as reasons, the substitution of this account for the one first filed, and on which notice was had; that the claim for board was allowed, although there was an express agreement made with the former guardian that nothing should be charged; and because of the allowance of sundry minor sums specified, with the reasons for their rejection.

At the hearing before the supreme court of probate, at *nisi prius*, the three issues mentioned in the syllabus and opinion were framed by the direction of the presiding justice and submitted to the jury, who returned the answers there indicated.

The appellee claimed the right to open and close, upon the ground that he had the burden of the affirmative upon him, but it was refused him.

All the evidence in the case and the whole charge were reported, and made (with the exceptions) a hundred and twenty-one pages of manuscript, and all of the instructions given were excepted to, as well as certain rulings made during the trial and several refusals to instruct. The charge filled twenty-five pages.

The father of the appellant was a soldier in the service of the United States, and died after his discharge, leaving three orphan children, Anna being then about ten years old, wholly destitute. She was taken into the family of Edward L. Bradstreet where she remained (with the exception of a few absences of a few weeks at a time) until her marriage, when she was eighteen or nineteen years old. After the death of her father a pension, &c., was obtained, and James Morrison was appointed her guardian in 1864,

and so continued till her arrival at the age of fourteen, when she chose the appellee as her guardian, and he was appointed in January, 1868. He went to Madrid Franklin county, and settled with the former guardian, giving a receipt for the funds transferred to him and one for a hundred dollars in full of her support to that date; but he testified that the hundred dollars was embraced in the sum for which he gave the other receipt and was included in the inventory returned by him; that, upon objection to the account, as first presented, he made out the one now before the court, charging himself with the whole amount, and leaving a blank for the judge of probate to fill such credit for board, &c., as he thought just, and that he inserted the sum of fifty dollars, and settled the account as presented, at the April term, 1871. The appellee denied that he ever agreed to make no charge for his ward's support. Her counsel contended, as their exceptions state that all the expense of supporting, boarding, clothing and schooling her, before the appointment of her former guardian, was an act of charity; that, subsequently to that appointment and until her marriage, she was supported, &c., under a contract between her first and second guardians, that her labor should be considered an equivalent, and full compensation for her support till she was eighteen years old; and that she was always capable of and did earn her support from the time of that contract until her marriage; that the claim was adjusted with the former guardian up to the time of the change of guardians; and that Mr. Bradstreeet settled no account till more than three years had elapsed from the date of his appointment. The presiding justice was asked to present the several issues above indicated to the jury, which he declined to do, but formed those already mentioned, and ordered the appellant's attorneys to join this issue; "and now the said appellant comes, when, &c., and for plea says, that she is not indebted to the said Edward L. Bradstreet, in manner and form as alleged by him in this appeal, and of this she puts herself upon the country;" which they accordingly joined under protest.

The jury returned a verdict, as before stated, upon the issues presented, after which the appellant's counsel objected to the allowance of the account for the reasons already urged by them to the jury; but the presiding justice overruled these objections, and affirmed the decree of the judge of probate, and the appellant excepted.

H. & W. J. Knowlton and *N. B. Turner* for the appellant.

The purport of the counsel's elaborate argument can be easily inferred from the opinion. It contained strong criticism upon the charge to the jury, and claimed that a comparison of the language of the charge upon some points mentioned, when compared with the evidence reported upon the motion for a new trial, would show a misstatement of the facts and evidence by the judge.

W. H. McLellan for the appellee.

Appleton, C. J. This is an appeal from the decree of the judge of probate of Waldo county, allowing the account of the appellee as guardian of the appellant.

The case comes before us upon a motion for a new trial and upon exceptions to the rulings of the justice presiding.

It is urged that the verdict should be set aside as against evidence. But after the account of the guardian has been passed upon with approval by the judge of probate, after a verdict of the jury in favor of the appellee upon the issues presented for their determination, and after the affirmance of the decree from which the appeal was taken by the justice presiding, it would require a greater preponderance of evidence to justify this court, which has neither seen nor heard the witnesses, to overrule the judgment of those who have, than is disclosed by the evidence before us.

By R. S., c. 63, § 26, an appeal may be taken from the decree of the judge of probate to the supreme judicial court, as the supreme court of probate, and "said court may reverse or affirm in whole or in part the sentence or act appealed from, pass such decree thereon as the judge of probate ought to have passed, re-

mit the case to the probate court for further proceedings, or take any order therein that law and justice require; and if, upon such hearing, any question of fact occurs proper for a trial by jury, an issue may be formed under the direction of the court, and so tried."

Courts of probate are of special and limited jurisdiction. Their proceedings are not according to the course of the common law. They have no juries. Neither party, upon appeal, can claim as a matter of right, a trial by jury. The judge of the appellate court may form an issue when, in his judgment, any question of fact occurs proper for a trial by jury, and not otherwise. The issue is to be formed and tried at law, but as in equity, to inform the conscience of the court, and under its direction. *Higbee* v. *Bacon*, 11 Pick., 423; *Wood* v. *Stone*, 39 N. H., 575; *Patrick* v. *Cowles*, 45 N. H., 553.

The counsel for the appellant complain that certain issues presented by them were not submitted to the jury. But it was for the judge to determine what issues should be so presented, not the counsel. Nor does it appear that the appellant has in any way suffered by the action of the court in this respect.

The presiding justice, however, in virtue of the authority given by statute, did form the following issues for the decision of the jury.

I. Did the guardian support said ward while she lived in his house as an act of charity till her former guardian was appointed?

To this interrogatory, the jury returned:—"Yes."

II. Did the services of the ward rendered for her guardian compensate him for her support after the appointment of the first guardian?

To the second interrogatory, the jury returned: "No."

III. How much, if anything, was the guardian entitled to receive from the ward by virtue of his guardianship and the account filed by him at the date of its settlement at the probate office?

To the third interrogatory, the jury returned:—"One hundred and forty-one dollars and ten cents."

It is objected that these issues involved issues of law as well as of fact, and should not have been thus submitted to the jury. But the facts were submitted to the jury under instructions, pertinent and applicable. In all cases, the verdict is the determination of issuable facts subject to the rulings of the court as to the law applicable to such facts. The appellant has, therefore, no cause of complaint, if the law as given to the jury was correctly given. All verdicts involve both fact and law; the law to be given to the jury by the court; the facts to be found by the jury, and the verdict is, as should be, the result of the law as properly applied to the facts.

The whole charge is reported. The practice of reporting exceptions to the whole of a charge cannot be too strongly discountenanced, as inconvenient and irregular. The points of law should be clearly and distinctly presented, and the facts should be stated as fully as is necessary to enable the court to appreciate the applicability of the instructions and determine their correctness. A full report of the evidence and of the charge, embracing the material and immaterial, the relevant and the irrelevant, should be avoided as unnecessarily expensive to the parties and uselessly burdensome to the court. *Burt* v. *Merchant's Ins. Co.*, 115 Mass., 1; *Evans* v. *Eaton*, 7 Wheaton, 426.

It is objected, that the presiding justice erred in some statement of fact to the jury. But if the judge inadvertently misstates the facts, the counsel should, at the time, call his attention to the fact, that it may then and there receive correction. *Nolton* v. *Moses*, 3 Barb.. 34; *Varnum* v. *Taylor*, 10 Bosworth, 148.

A portion of the appellant's account is for personal services. It is insisted that, the account not having been settled within three years, this part of the account is forfeited under the provisions of R. S., c. 67, § 19, which requires that, "every guardian shall settle his account with the judge at least once in three years, and as much oftener as the judge cites him for that purpose;" and shall "forfeit all allowance for his personal services, unless it appears to the judge that such neglect arose from sickness or other unavoidable accident."

The account for personal services was allowed by the judge of probate. Its allowance is not among the reasons of appeal. In an appeal from a decree of the judge of probate allowing a guardian's account, the appellant is confined to the matters specified in his reasons for appeal. *Patrick* v. *Cowles*, 45 N. H., 553. The reasons of appeal are to be filed in the probate office, and the party appealing is restricted to the reasons assigned by him. *Gilman* v. *Gilman*, 53 Maine, 184. The amount of the charge was not the matter of objection, but the charge itself. The ob- objection now first taken was not open to the appellant.

It was urged that the appellee had made a special agreement with a former guardian to support his ward until she should arrive at the age of eighteen years, and that her labor in his (the appellee's) family was a sufficient compensation for her board and clothing. All this was denied.

The amount claimed for board was small. These matters were first presented to the judge of probate for his consideration, and the account of the appellee was allowed. After a full and patient hearing of the evidence and a verdict of the jury, negativing the claims of the appellant, and affirming the correctness of the account of the appellee, the justice presiding confirmed the decree of the judge of probate, in all which we perceive no error.

Motion and exceptions overruled.

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

HARRIET GREELEY *vs.* RUFUS MANSUR.

Evidence of juror to affect verdict.

Upon a motion to set aside a verdict, on account of the sickness of one of the jury rendering it, his testimony cannot be received to show that, through indisposition, he was not able to attend to and understand all the testimony given at the trial.

ON MOTION FOR A NEW TRIAL.

ASSUMPSIT. Upon the tenth day of December, 1872, Mrs.

Greeley held a note for $1,121.30, dated August 27, 1866, payable on demand with interest, to her order, signed by James White, and having indorsed upon it one payment of four hundred dollars, made September 24, 1868. Prior to December 10, 1872, the maker had died; and on that day, his son, Russell H. White, and Rufus Mansur were at Belfast to settle up the business relating to the decedent's estate. The plaintiff's agent presented this note, having computed the amount at $1,014.50; some question arose about it, but the testimony at the trial was conflicting as to what it was; the plaintiff's agent testifying that Mr. Mansur said the amount should be less; and that gentleman and Mr. White swearing that they claimed that a smaller sum should be taken as a compromise because the maker's estate had been represented insolvent. The other party admitted that a proposition for a compromise was made, but said Mr. Mansur also denied that the interest was correctly cast.

At all events it resulted in the plaintiff's agent writing a note for the amount of his computation, $1,014.50, dated December 10, 1872, payable to Mrs. Harriet Greeley or bearer in six months after date, with interest at eight per cent, which was signed by Russell H. White, and by Rufus Mansur as surety, though the capacity in which Mr. Mansur signed did not appear upon the note. Mrs. Greeley's agent testified that he told them he did not feel sure that his figures were right, but Mr. Mansur was in a hurry to start for his home in Houlton, and it was then near sundown, and so Mr. Mansur promised if an error were found he would rectify it, and pay any difference; and thereupon the James White note was surrendered, the words "errors excepted" having been written across it, and the note of Mansur and R. H. White, of the tenor aforesaid, taken in exchange. Messrs. Mansur and White denied that any such conversation was had, or any such promise made by Mr. Mansur. Their note was paid at or after maturity. This action was to recover the alleged error or difference between it and the true amount of the James White note (on the tenth of December, 1872), stated in the declaration to be

$66.77. Writ dated December 8, 1873. The verdict was for the defendant which the plaintiff moved to set aside as against law and evidence; also because, during the trial, "Stephen Tilton, one of the jurors, was disabled by sickness from a proper performance of his duty as a juror." In support of this last ground of the motion, Mr. Tilton's testimony was taken to the effect that he was suffering from severe headache, pain all over him, and sickness at the stomach, all day; that he heard but little of the discussion in the jury-room, took no part in it, and some parts of the testimony of the plaintiff's witness he did not understand, being unable to comprehend it by reason of this sickness.

J. Williamson for the plaintiff.

W. H. McLellan for the defendant.

WALTON, J. The court is of opinion that the verdict in this case is not against law, nor against evidence, nor manifestly against the weight of evidence. It cannot therefore be set aside on either of these grounds.

Nor can it be set aside on account of the alleged inability of the juror, Tilton, by reason of a severe headache, and other illness, fully to understand the evidence. There is no legal evidence in support of this allegation. The practical inconvenience would be so great, to allow parties, or their counsel, to interrogate jurors as to the grounds of their verdict, or their understanding of the evidence, or the charge of the judge, and then to make a supposed error in any of these particulars the ground of a motion for a new trial, that, upon these subjects, the law has wisely closed the mouths of jurors, by declaring them incompetent to be witnesses to impeach their own verdict. "The modern practice," says Shaw, C. J., "has been uniform, not to entertain a motion to set aside a verdict on the ground of error, mistake, irregularity or misconduct of the jury, or any of them, on the testimony of one or more jurors; that this practice rests on sound considerations of public policy." *Chadbourn* v. *Franklin*, 5 Gray, 312.

It is therefore useless for parties, or their counsel, to interrogate jurors with respect to their verdicts, in the hope thereby to obtain evidence on which to ground a motion for a new trial. Such efforts will not avail. *Motion overruled.*

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

STILLMAN W. ERSKINE *vs.* ABIAL W. ERSKINE.

Practice.

Cumulative evidence offered by the plaintiff, after the defendant has closed his evidence, should not be excluded unless the plaintiff has been seasonably notified by the court that this course will be adopted.

Notice by the adverse party that he will claim to have this rule enforced will be ineffectual.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed for a balance of $2,802.95, brought by a son against the father to recover for services rendered for the fifteen years next after minority had ceased, and for some other items. There were exceptions taken to the rulings of the court upon the subject, but the only one that need be noticed was to the exclusion by the court, upon defendant's objection, of cumulative testimony which the plaintiff proposed to put in after the defendant had closed his evidence. The jury rendered a verdict for only $62.35, and the plaintiff excepted.

H. & W. J. Knowlton for the plaintiff.

N. B. Turner for the defendant.

WALTON, J. The exceptions state that the plaintiff's counsel offered cumulative testimony after the defendant had closed his testimony, which, on objection of the defendant, was excluded.

The exclusion was erroneous. If the presiding judge had sea-

sonably notified the plaintiff that he would be required to put in the whole of his evidence before stopping, and that cumulative evidence would not be received afterwards, the exclusion would have beeen correct. But the enforcement of the rule without such notice is erroneous. And the notice must come from the court. It is not competent for one of the parties to give the notice, and then insist upon the enforcement of the rule. So held in *Moore* v. *Holland*, 36 Maine, 14; and in *Dane* v. *Treat*, 35 Maine, 198.

It is unnecessary to consider the other points raised by the bill of exceptions. *Exceptions sustained.*

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

CATHERINE BURNS *vs.* ALBERT C. COLLINS and trustee.

Mortgagee's lien on insurance—how made effectual, or lost.

A mortgagee of real estate has no lien upon a policy of insurance procured thereon by the mortgagor, which has been settled in good faith by the insurers before the expiration of sixty days after loss of the property by fire, and before any notice of the lien required by statute to be filed with the secretary, although such notice may be filed within the sixty days but after such settlement.

ON EXCEPTIONS.

ASSUMPSIT. The defendant owned and occupied real estate in Liberty, which he mortgaged to one Peavey, who assigned the mortgage and the notes thereby secured to the plaintiff. Mr. Collins, upon the twenty-fifth day of June, 1870, insured the buildings upon said land, and their contents, with the Connecticut Fire Insurance Company, for eleven hundred dollars. Upon the nineteenth day of February, 1874, during the life of the policy, the property covered by it was damaged by fire. Upon the twenty-eighth day of February, 1874, the company, through its

agent, made a settlement of the loss with the assured, paying him seven hundred dollars in full, by a draft drawn by their agent upon them to the order of Mr. Collins and by him taken and negotiated for value, and he surrendered the policy and directed its cancellation, which was done, receipting in full of all demands under it.

Mr. Collins sold the draft March 4, 1874, and on the following day Mrs. Burns served upon the company's agent at Liberty a notice of her mortgage and that she claimed a lien upon the amount insured upon said property, under R. S., c. 49, §§ 32 and 33; and, on the seventh day of March, 1874, the secretary received at Hartford, Connecticut, a similar notice from her attorney. The corporation settled in good faith, without any purpose of injuring the mortgagee, or knowledge of her claim.

As the company declined to acknowledge any lien, under these circumstances, the mortgagee brought this suit upon the unpaid mortgage notes and summoned the corporation as the trustee of the debtor, in order to effectuate the alleged lien. The policy contained the customary provision that the loss (if any) would be payable in sixty days after notice and proof of loss, made by the assured, and received at the home office. Upon a disclosure of these facts the presiding justice ordered that the trustee be discharged, and the plaintiff excepted.

H. & W. J. Knowlton for the plaintiff.

The mortgagee has a lien upon the amount insured.

This lien exists before notice, but takes effect so as to fix the time from which the sixty days begin to run, within which suit must be brought, until after notice to the company.

The assignee of a mortgage has the same rights as the original mortgagee. *Haskell* v. *Monmouth Fire Insurance Co.*, 52 Maine, 128.

In case the mortgagor does not consent that the whole or a part of the sum secured by the policy shall be paid to the mortgagee in discharge of said mortgage, then said lien may be enforced by trustee process. R. S., c. 49, § 33.

This being a lien claim, the common principles applicable to trustees in other cases do not apply to this case.

Payment by trustees, or any other agreement or arrangement, made to or with the principal creditor or person holding the policy, before the expiration of the sixty days, did not and could not defeat the lien claim of the plaintiff, because by R. S., c. 49, § 33, he has sixty days in which to enforce his lien. *Atwood* v. *Williams*, 40 Maine, 409; *Spofford* v. *True*, 33 Maine, 283; *Doe* v. *Monson*, 33 Maine, 430; *Haskell* v. *Monmouth Fire Insurance Co.*, 52 Maine, 128.

A. G. Jewett, for the insurance company, trustee, said this was the first time he ever knew of such a corporation being sued because it adjusted a claim against it too promptly, and he did not conceive that the statute meant to compel delay between the insurer and insured, but thought they would be permitted to settle as speedily as they could come to an agreement, provided the rights of third persons had not intervened by notice being given of them, and provided there was no attempt or intent to defraud.

PETERS, J. The court are of the opinion that the exception to the discharge of the trustee must be overruled. The loss under the policy was settled before any notice was received by the company of any lien or claim thereon. And it does not appear that it was done to avoid notice, or with any improper motive whatever. The mortgagee could have secured his right, by filing the notice prescribed by statute at any time before the settlement took place; but failed to do so. Be sure, by R. S., c. 49, § 33, the mortgagee had sixty days after a loss to enforce his lien by suit. But that implies that he has a lien. By § 32, same chapter, his lien takes effect from the time he filed his notice with the company. Till that is done he can have no lien. When that was done in this case, there was no subsisting policy to take effect upon. It had been settled, and was *functus officio*. Any other construction would impose unreasonable burdens on insurers and the insured, without any corresponding advantages to other parties.

The position taken by the plaintiff would logically lead to the conclusion, that parties to a policy could not cancel or withdraw it, even before loss, without consulting all mortgagees of the property insured. The case of *Haskell* v. *Monmouth Fire Insurance Co.*, 52 Maine, 128, cited by the plaintiff, is not in point.

Exceptions overruled.

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

ELKANAH MOULTON *vs.* IRA TRAFTON.

Construction of a deed.

The tenant, assignee of Clark Trafton, claimed to hold premises thus described in a deed from another party to the demandant: "Excepting by this conveyance a saw mill and a shingle machine, and land enough around said mill to carry on the lumbering business at said mills, and a right of way from said mill to the road leading from Thorndike to Unity Village, conveyed to Clark Trafton, as long as said Trafton occupies said privilege with mills:"—*held*, that these words created an exception, and not a reservation merely; and that the land under the mills was included in the exception; and that the exception constituted a determinable or qualified fee, which could be assigned; and that the duration of the excepted estate was limited by the existence of mills upon the premises, and not by the personal occupancy of Clark Trafton.

ON REPORT.

REAL ACTION, commenced September 14, 1871, "wherein the said Moulton demands against the said Trafton one messuage in Unity, in said county, bounded and described as follows, to wit:—a saw mill and shingle machine, known as the Trafton mills, and the land upon which they stand, and the land around said mill and used in operating the same in the manufacture of lumber, together with the water privilege used in operating said mills, and the road or private way leading from said mill to the county road leading by said Moulton's, from Belfast to Unity village; being the same land and mills and water privilege and road thereto as formerly occupied and used by Clark Trafton."

The general issue was pleaded, and the sole question involved was the construction of a deed of warranty given by Adeline and Chandler B. Shirley to Elkanah Moulton, dated April 1, 1858, and recorded July 13, 1858, embracing within its boundaries a large tract, of which the demanded premises are part, but containing at the close of the description this sentence:—" Excepting from this conveyance a saw mill and shingle machine, and land enough around said mill for to carry on the lumbering business at said mills, and a right of way from said mill to the road leading from Thorndike to Unity village, conveyed to Clark Trafton, as long as said Trafton occupies said privilege with mills." The demandant contended that this was a personal privilege granted to Clark Trafton, to be enjoyed only by him, and not by his heirs or assigns; and that he could make no valid assignment of it.

The whole tract embraced in the demandant's above-mentioned deed was formerly the property of the late James Shirley; and the grantors therein were his widow and son, who derived title to it under his last will, of which she was executrix. In that capacity, on the seventeenth day of November, 1857, by a written instrument, witnessed by her son, she "bargained and sold to Clark Trafton of Thorndike the saw mill and shingle mill standing on the land of the said James Shirley; and said Trafton is to have all the rights of said mill privilege as long as he wishes to occupy it with mills, and land enough for said mills for all necessary purposes for said mills, and a right of way from the road passing through said Shirley's farm to said mills" for $1323.50 and certain other considerations, "and said Adeline is to give said Trafton a deed of said mills as soon as she can get a permit from the probate court to sell said mills." Accordingly, Mrs. Shirley and her son, by deed of warranty, in usual form, dated the first day of May, 1858, conveyed to Clark Trafton "a saw-mill and shingle-machine situated on the farm formerly owned by the late James Shirley, situated in said Unity, on the Sandy stream, and also a right of way from the mills to the road passing from Abraham Cookson's to Unity village, as it is now fenced out; to have

and to hold the above granted mills, with all privileges and appurtenances thereto belonging, to the said Clark Trafton, his heirs and assigns forever:" then follow the customary covenants of warranty. But this deed was not recorded till July 13, 1866, just eight years after that to the demandant; so the tenant was compelled to rely upon the exception or reservation in the last named deed.

Accordingly as that was construed by this court, judgment was to be entered.

It appeared in evidence that Mrs. Shirley and her son first prepared for Clark Trafton a deed which he refused to accept because the *habendum* clause did not contain the words "and to his heirs and assigns;" and the one above-mentioned was substituted. Upon the eighteenth day of February, 1860, Clark Trafton conveyed by deed of warranty to Julia Trafton, wife of Ira Trafton, the tenant, "the land, with the saw-mill and shingle-machine thereon" conveyed to him by said deed of May 1, 1858, to which reference was made; this deed to Mrs. Trafton was recorded July 13, 1866. It was admitted that the tenant was living upon and in occupation of the premises under his wife.

W. H. McLellan for the demandant.

The language of the Shirleys' deed to the demandant is to be taken as a reservation, which must be to the grantor, and not to a stranger. If to a stranger, it is void. 3 Washb. on Real Prop., 370; *Borst* v. *Empie*, 1 Seld., 38; *School District* v. *Lynch* 33 Conn., 335; *Hill* v. *Lord*, 48 Maine, 83.

In this case the right of way and use of the land were only easements; therefore, the clause relating to them must be a reservation; since an exception is a part of the thing granted, while a reservation is of a thing not in being till created by the deed. *State* v. *Wilson*, 42 Maine, 9.

But even if the tenant has an easement, this action is maintainable, as he has pleaded only the general issue, which tries the title to the fee. *Blake* v. *Clark*, 6 Maine, 436; *Blake* v. *Ham*, 50 Maine, 311.

No land was conveyed to Clark Trafton. The word "premises" was erased from the deed to him, and "mills" substituted. *Derby* v. *Jones*, 27 Maine, 357.

A. G. Jewett for the tenant.

The right acquired by Clark Trafton under the deed to him was not a mere personal privilege, but was assignable. *Farnum* v. *Platt*, 8 Pick., 339; *Munn* v. *Stone*, 4 Cush., 146; *Gay* v. *Walker*, 36 Maine, 54; *Moulton* v. *Faught*, 41 Maine, 298; *Winthrop* v. *Fairbanks*, Id., 307; *State* v. *Wilson*, 42 Maine, 9.

The exception in the deed to Moulton excluded from that conveyance all Trafton's rights. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Smith* v. *Ladd*, Id., 314.

The conveyance of land carries a right of way appurtenant thereto. *Kent* v. *Waite*, 10 Pick., 138; *Underwood* v. *Carney*, 1 Cush., 285; *Brown* v. *Thissell*, 6 Cush. 254.

PETERS, J. The demandant received from Adeline and Chandler B. Shirley a deed of a farm, which contained the following provision: "Excepting by this conveyance a saw-mill and shingle-machine, and land enough around said mill to carry on the lumbering business at said mills, and a right of way from said mill to the road leading from Thorndike to Unity village, conveyed to Clark Trafton, as long as said Trafton occupies said privilege with mills." At the date of this deed, and for some years afterwards, the excepted premises were occupied by Clark Trafton for milling purposes. His title is subject to the demandant's deed. When Clark Trafton sold out his interest to Ira Trafton, and ceased to occupy the excepted premises personally, the demandant commenced this action for the premises, claiming them as his own. And the question here depends upon the construction to be given to the above clause in his deed.

In the first place, he claims that the language above quoted amounts only to a reservation and not an exception, and that it is void, because not made to the grantor himself. But this construction is not a reasonable or just one, so long as the words are fair-

ly susceptible of any other, by which the agreement of the parties can be upheld.

Then the position is taken that if not a reservation, that an exception of "a saw-mill and shingle-machine," would not include the land under the same. But the authorities settle this point the other way. It would be an awkward conveyance indeed that carried land "around" a mill, but none under it. By the grant of a mill, the land under it, indispensable to its use, unless there is in the conveyance language indicating a different intention, passes by implication. The same rule applies to exceptions in a grant. Among the cases applicable to this view, are *Forbush* v. *Lombard*, 13 Metc., 109; *Esty* v. *Currier*, 98 Mass., 500; *Clark* v. *Blake*, 6 Maine, 436; *Farrar* v. *Cooper*, 34 Maine, 397. The case of *Derby* v. *Jones*, 27 Maine, 357, relied on by the demandant, is not at all opposed to these cases, but clearly distinguishable from them. The judge who delivered that opinion makes the distinction very apparent in the judgment in the case of *Sanborn* v. *Hoyt*, 24 Maine, upon page 119.

But the more important inquiry suggested in this case is, whether the subject matter of the exception in the demandant's deed continues longer than the personal occupation of the premises by Clark Trafton. This question may not be free of all difficulty and doubt; still we think that the most satisfactory interpretation which can be put upon the words of the exception is, that a fee in the land under and about the mills and an easement in the way to the mills, were to be and remain excluded from the grant to the demandant, so long as "said privilege" was occupied "with mills" by Clark Trafton or his heirs or assignees. In other words, that the exception was not personal merely, but assignable. Our opinion is that the estate excepted is what is called in the technical law a qualified, base, or determinable fee; an estate which passes subject to a reverter; and will continue until the qualification annexed to it is at an end. The test of the limitation in this case, is rather as to the purposes for which the estate may be occupied than as to the persons occupying it. When the

estate ceases to be used for mills, then it reverts to the grantor. Such an estate is both descendible and assignable. There is much to indicate that such was the intention of the parties. The value of the excepted property was undoubtedly deducted from what would have been a greater price paid for the farm by the demandant. A valuable mill has been kept upon the privilege from that day to this. It can hardly be supposed that a license was to be extended to Trafton to make extensive investments, which would not be worth anything in anybody's hands but his. Nor is it easy to perceive what difference it could be to the owner of the farm, whether the mills were to be owned by Trafton or some one else. At the same time there is every reason to believe that the demandant's farm was not to be encumbered with any outside ownership of the privilege and easements, after the mills and all demand for mills at that place had passed away. We think this view is well supported by the authorities, and is also in accordance with the justice and equities of the case. In *Esty* v. *Currier*, before cited, it was decided, that a grant or a reservation of the whole of a cider-mill, so long as the cider-mill shall stand on certain land and no longer, gave a freehold in the land under the building so long as it stood thereon, even after it ceased to be used as a cider-mill. That case has a similarity, in the principle involved, to this case. The case of *Jamaica Pond Aqueduct Co.* v. *Chandler*, 9 Allen, 159, is a relevant authority. See also *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass., and cases there cited on page 322. The private way alluded to in the deed to this demandant, was one already constructed at the date of his deed. Such a way may be the subject of an exception in a grant. *State* v. *Wilson*, 42 Maine, 9; *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Smith* v. *Ladd*, Id., 314; *Munn* v. *Stone*, 4 Cush., 146.

The demandant claims that, at all events, he can recover the way or road, notwithstanding the tenant has an easement in it, because the tenant has pleaded the general issue, which tries the question of a fee, and not an easement, in it. But the language of the declaration is, "together with the water privilege used in operat-

ing said mills, and the road or private way leading from said mills to the county road." No other or more particular description is given, and we are led to believe that the purpose of the averment was rather to describe the easement than the fee, in order to put in issue a claim to recover what was described in the exception in the deed, and no more. *Demandant nonsuit.*

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

RALPH H. SEAVEY *vs.* ISAAC C. COFFIN.

Statute of limitations—bars suit against indorser of witnessed note.

An action against the indorser of a promissory note is not within the exception of witnessed notes; and the general limitation of six years, duly pleaded, will defeat such action.

ON FACTS AGREED.

This case, as made by the parties, was submitted to the whole court, under the provisions of R. S., c. 77, § 14.

The writ is dated August 12, 1874. The plaintiff declares against the defendant as indorser of a certain promissory note dated April 12, 1859, payable to the order of the defendant, in six months, and by him indorsed to the plaintiff. To the signature of the maker, there was an attesting witness. The note was indorsed by the defendant "waiving demand and notice."

If the plaintiff's action is barred by the statute of limitations, he is to become nonsuit; if it is within the exception of the statute, the note sued on being a witnessed note, the defendant is to be defaulted.

R. A. Treat for the plaintiff.

Wales Hubbard for the defendant.

APPLETON, C. J. The limitation of six years when duly pleaded, is a bar to any action on a promissory note, unless it is one "signed

in the presence of an attesting witness." R. S., 1857, c. 81, § 97, re-enacted by R. S., 1871, c. 81, § 83.

The giving of a note is one thing. Its indorsement is another, and very different thing. The attestation of a note is all to which the statute refers. The indorsement pre-supposes a perfected instrument—that is, a promissory note. It always takes place subsequent to the existence of the note. It is a new and different contract from that of the note, which it transfers. An unattested indorsement is neither within the language nor the spirit of the statute, which excepts attested promissory notes from the general limitation of six years as applicable to personal contracts.

Plaintiff nonsuit.

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

GEORGE E. WALLACE *et als. vs.* ALFRED W. STEVENS *et als.*

Proceedings in equity to redeem a mortgage.

When a mortgagor sells portions of the mortgaged premises in different parcels and at different times, that, which he retains, will, in equity, be held primarily liable for the whole debt.

When a bill to redeem is brought by five complainants, claiming to redeem two several mortgages, a demand by one of the co-complainants made long before the title of the others accrued, will not enure to their benefit.

BILL IN EQUITY, inserted in a writ, dated March 28, 1873, brought to redeem, from a mortgage thereon, certain described premises.

The bill, brought by five complainants, Wallace, Sanborn, Wyman, Kimball and Fogler, against Alfred W. Stevens, Harrison Stevens, Gould and Chapman, alleged that Harrison Stevens was seized in fee or otherwise of about one hundred and twenty-six acres of land in Jackson on the twenty-ninth day of July, 1867, and on that day mortgaged it to Alfred W. Stevens, and on the

twenty-eighth day of October, 1869, conveyed twenty-five acres of it by deed of warranty, to Gould and Chapman; and on the second day of November, 1871, mortgaged about seventy-five acres of it (lying in two lots) to David Lincoln; that on the twenty-second day of December, 1871, all the right which said Harrison had, on the tenth day of November, 1871, (when the same was seized upon a warrant of distress) to redeem this last named parcel of seventy-five acres was sold to George E. Wallace; that Alfred W. Stevens, on the twenty-sixth day of December, 1871, took possession of the premises to foreclose his mortgage of July 29, 1867, and has since continued in possession; that on the twenty-eighth day of December, 1872, the said Harrison's right to redeem above twenty-five acres of the original tract, not conveyed by him except in mortgage to said Alfred (as aforesaid) was sold to the four complainants, Sanborn, Wyman, Kimball and Fogler, at sheriff's sale; that on the twenty-sixth day of December, 1871, the complainant, Wallace, demanded an account of the sum due of said Alfred, who refused to give it, claiming his whole note and interest, which the bill alleges is more than was then really due; but it appeared by evidence that this demand and refusal were some hours before the Lincoln mortgage was assigned to said Alfred. The bill further averred that Gould and Chapman pretended that Alfred W. Stevens conveyed to them, for $200, all his interest in the parcel of twenty-five acres bought by them of said Harrison, but that no such deed was ever recorded.

The complainants prayed for an account and to be admitted to redeem.

George E. Wallace and *William H. Fogler* for the complainants.

We are entitled, not only to relief but to costs against Alfred W. Stevens for his refusal to account on demand. *Roby* v. *Skinner*, 34 Maine, 270; *Pease* v. *Benson*, 28 Maine, 336.

Harrison Stevens, Gould and Chapman are rightfully made parties. *Lovell* v. *Farrington*, 50 Maine, 239; *Stone* v. *Bartlett*, 46 Maine, 438.

Gould and Chapman should contribute proportionally, to the cost of redemption. *Bailey* v. *Myrick*, 50 Maine, 171.

Joseph Williamson for the defendants.

Wallace's demand, a year before the others had any interest, cannot avail to support this bill, even had it been made at a proper time and place, which it was not, having been made at a store, two miles from the mortgagee's residence. *Brown* v. *Snell*, 46 Maine, 490; *Roby* v. *Skinner*, 34 Maine, 270; *Putnam* v *Putnam*, 13 Pick., 129; *Willard* v. *Fiske*, 2 Pick., 540.

Complainants cannot have costs in this case, where the debt exceeds the value of the land held by Alfred W. Stevens. They should be deducted from the debt. *Battle* v. *Griffin*, 5 Pick., 167.

APPLETON, C. J. This is a bill brought to redeem two mortgages given by Harrison Stevens, one to the defendant, Alfred W. Stevens, and the other to David Lincoln.

It seems that Harrison Stevens, one of the defendants, upon the twenty-ninth day of July, 1867, being seized in fee of a tract of land in Jackson containing about one hundred and twenty-six acres, mortgaged the same to Alfred W. Stevens; and that upon the twenty-eighth day of October, 1869, he conveyed by deed of warranty twenty-five acres of the mortgaged premises to Gilman Gould and William B. Chapman. The effect of this conveyance was to impose the whole of the mortgaged debt upon the remaining portion of the mortgaged premises, if of sufficient value, as against all but the mortgagee. In such event, Gould and Chapman would not be required to contribute. *Cushing* v. *Ayer*, 25 Maine, 383; *Holden* v. *Pike*, 24 Maine, 427. Where a mortgagor sells a portion of the land mortgaged, in different parcels, that, which he retains, will be held primarily liable in equity for the whole debt. *Brown* v. *Simons*, 44 N. H., 475.

It further appears that upon the second day of November, 1871, said Harrison Stevens conveyed in mortgage to David Lincoln two other portions of the mortgaged premises, containing seventy-five acres.

Upon the twenty-second day of December, 1871, the complainant, Wallace, at a sheriff's sale, became the purchaser of the equity of redemption of the mortgage last-mentioned.

Upon the twenty-sixth day of December, 1871, said Wallace made a demand upon Alfred W. Stevens to render a true account of the sum due him on the mortgage from Harrison Stevens, dated July 29, 1867, and of the rents and profits, which he declined doing.

On the same day, December 26, 1871, but after the demand to account, David Lincoln assigned his mortgage before described to Alfred W. Stevens, who on the twenty-ninth day of December, 1871, took possession of the premises described in the mortgage to him of July 29, 1867, for the purpose of foreclosing the same.

The bill then alleges that the other four complainants, upon the twenty-eighth day of December, 1872, became the purchasers of all the right in equity that said Stevens had on the seventeenth day of December, 1871, to redeem the remainder of the original mortgage to Alfred W. Stevens, and being the residue of the first mortgaged premises, after deducting what had been previously sold or mortgaged, and containing twenty-five acres.

It thus appears that the demand made by Wallace upon the twenty-sixth day of December, 1871, was nearly a year before the other complainants had acquired any title whatever to redeem the premises, or any portion of the same; nor was it certain that they ever would acquire such title. They have never made any demand upon the defendant, Alfred W. Stevens, to render a true account of the sum due on his mortgage and of the rents and profits. They cannot take advantage of a demand made before their title accrued. A bill in equity cannot be maintained against an assignee of a mortgage by virtue of a tender to a previous assignee who has since parted with all his interest. *Williams* v. *Smith*, 49 Maine, 564. So, here, a demand made before the title of four out of five of the complainants accrued cannot enure to their benefit. The defendant has never been required by them to render an account of the amount due on the mortgage they

seek to redeem, nor of its rents and profits, &c. He has, therefore, neither neglected nor refused to render such account, for he has never been asked.

It is sought to redeem the mortgage to Lincoln of November 2, 1871; but the evidence shows that the assignment of that mortgage to A. W. Stevens was not made until after the demand of Wallace, who had the equity of its redemption, was made. There has, therefore, been no demand on any one, so far as relates to this mortgage. The bill therefore must fail.

Bill dismissed, without prejudice.

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

THOMAS W. VOSE *vs.* INHABITANTS OF FRANKFORT.

Effect of division of town, and commissioner's report. Tax.

Under the provisions of the act of 1867, c. 291, setting off a part of Frankfort, the inhabitants set off, for the purpose of paying the debts of the town as therein specified, remain subject to taxation with its incidents and liabilities, the same as if the act had not passed.

The report of the commissioner appointed to determine the indebtedness of the town is conclusive upon the parties as to all things upon this subject contained in it.

The orders reported by him as contingent claims, though void, so far as they represent existing indebtedness, may be substituted by that indebtedness;— and that being valid, its proportional part may be assessed upon the territory set off.

Those orders, so far as they represented bounties payable under the vote of January 28, 1865, may be changed for these bounties, these being valid claims.

The expense of collecting and the necessary abatements, are incidents of a tax and proper to be taken into consideration in fixing the amount to be raised for a given purpose.

A town or its officers duly authorized may settle a disputed claim against it, and doing so in the exercise of good faith, and sound discretion, may enforce a tax duly assessed upon its citizens to raise money for its payment.

ON REPORT.

ASSUMPSIT, to recover a tax assessed by the town of Frankfort upon property situated in that part of Winterport which was set off to it from Frankfort, under act of 1867, c. 291; paid under protest to avoid a distraint of property. The grounds upon which the tax was claimed to be illegal are stated in the opinion.

T. W. Vose in his own behalf.

The act of division provides that the indebtedness of Frankfort shall be determined, and Mr. Woodman was appointed to determine it.

The legislature have a right to make such an apportionment of the existing indebtedness between the old and new towns as to it appears equitable; but if it makes none, the old town must pay all the debt. *Frankfort* v. *Winterport*, 54 Maine, 250; *Windham* v. *Portland*, 4 Mass., 384; *North Yarmouth* v. *Skillings*, 45 Maine, 133; *Granly* v. *Thurston*, 23 Conn., 406.

It was only those liabilities that were "determined" by the finding of the commissioner that the territory set off was to bear any part of; not that, or any portion of it, which he was unable to determine, because doubtful if it ever accrued. The disputed items are:

I. The percentage which the territory is to pay. Mr. Woodman fixed it at .38,982, but the assessment makes it .3954,—a difference of $51.02 against those living upon the territory.

II. The costs paid to Belfast upon an execution issued in its favor against Frankfort, not included in the commissioner's report, nor proved to be an existing liability when the division of towns was made. The execution is for eighteen dollars, of which $7.02 is assessed upon this territory.

III. The principal item is the soldiers' bounties, $3,345.17; of which $1,304.01 is demanded from the tax-payers of the set-off. Though the town meeting of January 28, 1865, was legal, and those of February 8, and March 6, 1865, illegal, yet it was only the orders issued under the votes passed at these latter meetings that are included in Mr. Woodman's report; the payment of

which was perpetually enjoined in *Clark* v. *Wardwell*, 55 Maine, 61. Any certain or uncertain liability under the votes to pay bounties passed at the meeting of January 28, 1865, was not included in the commissioner's report, because none was then supposed to exist, the meeting of February 8, 1865, at which the votes of January 28, 1865, were rescinded not having then been ascertained to be illegal. The liability mentioned was solely upon these void orders.

N. H. Hubbard for the defendants.

DANFORTH, J. This is an action to recover all or a part of a tax assessed upon the plaintiff's property and collected of him by the defendant town. The only question raised is whether the tax, or any portion of it, was for "money not raised for a legal object."

By a special act of the legislature of 1867, c. 291, a part of Frankfort was set off and annexed to the town of Winterport. By § 3 of said act, "the territory thus set off and the inhabitants thereon, with estates, shall pay their just proportion of the present indebtedness of Frankfort over its assets, . . and shall also pay five thousand dollars additional." These sums were to be assessed by the assessors and collected by the collector of Frankfort from time to time "the same as if this act had not passed."

The plaintiff owned property upon the territory, and upon that property this tax was assessed in 1874. It will thus be seen that this plaintiff with the other tax-payers upon this territory, so far as regards the assessment of taxes for the payment of this debt, retained the same relation to the town of Frankfort after the set-off as before.

In pursuance of the authority in this act, Frankfort made annual assessments upon this territory up to and including the year 1874. The plaintiff claims that the whole debt, and more, was paid by the assessment of 1873, and hence the tax of 1874, now in question, was not for a legal object. On the other hand, the defendants claim that the tax of 1874 is no more than sufficient to pay the amount due; and to show this, have produced an ac-

count with said territory which, if correct, substantiates their position.

Without stopping to inquire whether the plaintiff has selected his proper remedy, we shall examine the issue thus presented by the parties upon its merits.

By § 4 of the act referred to, Theodore C. Woodman was appointed a commissioner to determine the liabilities and assets of the town of Frankfort, and to make a written report to each town of the certain liabilities and assets, also the number and nature of the liabilities and assets, "the precise amount of which cannot be determined, and the proportion which the territory and inhabitants hereby set off, shall pay when determined, as provided in the preceding section."

Under this authority, Mr. Woodman heard the parties, and made his report. To this report, so far as appears, no objection has been heretofore, or is now made. It is therefore conclusive upon the parties as to all things contained in it. It is the judgment of a tribunal to whose jurisdiction the parties voluntarily submitted, and from which they make no appeal.

The account upon which the defendants have made their several assessments, including that of 1874, is made up on the debit side, mainly from this report. Several of the items contained in it are objected to, and if the objections are well founded, the tax in question, to that extent was improperly assessed. The principal item in this class is found under date of April 8, 1871, and is for $3345.17 paid for bounty claims. The proportional part of this, assessed upon the territory, is $1304,01, and it is conceded that this sum is correct if the whole amount is allowable as a debt of Frankfort under the act of separation. It appears that this sum was paid under a vote of Frankfort passed March 6, 1871, which vote was predicated upon an alleged liability of the town, by virtue of a vote passed January 28, 1865. 'It was decided in *Cushing* v. *Frankfort*, 57 Maine, 541, that the bounties voted at the last named date were legal claims against the town. Therefore this amount, with perhaps an exception to be hereafter noticed,

was properly paid and was a debt due from the town at the date of the act of separation. Still, it is claimed that the part set off is not liable, because it is not found in the report of Mr. Woodman. In terms it is not there; but in the report we find, among the contingent claims, or, in other words, those "the precise amount of which could not then be determined," certain specified orders for bounties issued under a vote of the town, passed March 6, 1865. It is true, as contended by counsel, that these orders were void by reason of the illegality of the meeting at which the vote authorizing them was passed, and were so held in *Clark* v. *Wardwell*, 55 Maine, 61. It is also true that the same persons to whom they were issued, had claims for the same amount and for the same services, under the vote of January 28, 1865, and these orders were, in fact, only the evidence of such claims and intended as such.

While, then, the orders were of no binding force, the debt represented by them was valid. The orders were merely the form, the claims upon which they were founded the substance. Therefore the report of the commissioner does show this debt, not the amount indeed, but an amount which has since been "determined" and no wrong is done, no principle of law is violated in holding the territory set off liable for its share of this item. On the other hand, it is in strict accordance with well settled principles of law that a void security given for an existing debt does not discharge it, but in such cases a claim under the void security may be substituted by the valid debt. *Perrin* v. *Keene*, 19 Maine, 355; *Mc Vicker* v. *Beedy*, 31 Maine, 314.

But it is contended that two of these claims, those of Wheelden and of Colson, are exceptions to this rule, and should not be allowed, because the original claims were invalid. It is said they were drafted men and in the service at the time of the vote of January 28, 1865. This may all be true and yet their claims be valid. The vote was sufficiently comprehensive to include them under the decision in *Hart* v. *Holden*, 55 Maine, 574; and under the authority of *Railroad Co.*, v. *Brooks*, 60 Maine, 568, the

article in the warrant was sufficient. So far as the facts show, no illegality in these claims appears. The payment may, for ought shown by the testimony, have been for future services. If the plaintiff would avail himself of any illegality, the burden is upon him to show it.

But admitting this item, or any part of it, to be somewhat questionable as to its binding force as a debt, we must still come to the conclusion, under the facts shown by the case, that the territory is bound to pay its share.

The debt, as already seen, was reported by the commissioner as one the amount of which was subsequently to be "determined." By § 4 of the act, the territory and inhabitants were to pay their proportional part when determined. By whom was this amount to be ascertained? No tribunal is named. Any legal determination then must be sufficient. Here was a debt disputable, perhaps, but returned as a debt by the legally appointed commissioner, part of which, and a part which was supposed to represent the whole, had been judicially held valid. Under these circumstances shall the town, liable to pay the largest portion, be compelled, at a large expense, to litigate and obtain a judgment of court upon each item before it can enforce a tax upon its inhabitants for its payment? We think not. They would clearly have the right to settle this as any other disputed claim against them, thus saving the cost, vexation and uncertainty necessarily attendant upon litigation; provided, of course, that it is done in good faith and in the exercise of sound discretion. This they have done, so far as appears, and it should be final.

It would hardly be contended that any citizen of Frankfort could recover of the town a tax assessed for the payment of this debt as a sum "not raised for a legal object;" and, as already seen, by the provisions of the act, the tax payers set off remain a part of the town for the assessment of taxes with the same rights and liabilities as the remaining citizens, in relation to these debts.

Another item assessed and objected to, is the expense of collection. In this respect the collector was allowed for collecting

this tax the same as for collecting that part assessed upon the town. If these assessments were to continue till the debts were paid, we can see no well-founded objection to this allowance. This, with the necessary abatements, are unavoidable incidents to this method of paying any particular sum and are to be taken into consideration when the amount to be assessed is fixed. Otherwise, the tax would not pay the sum required. Though these incidents are not especially provided for in the act, it must be understood that the legislature, in providing this method of paying the amount to be raised, intended to include the usual and proper means for accomplishing the object. Had those set off remained in the town, they would have been liable to this expense. There is nothing in the act tending to show that the legislature intended to lighten these burdens in this respect, but rather the contrary; for as already seen, for this purpose they remained a part of the town.

The remaining two items objected to, viz: the percentage charged to the territory and its proportion of the Belfast execution making about fifty-eight dollars are admitted to be erroneous. But to offset these, the case finds that there have been expenses and abatements, not charged in the account, amounting to about one hundred and seventy dollars. Allowing these last items, as they should be, we find the tax is no more than the legal liability, and no part of it assessed for an object not legal.

Judgment for the defendants.

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

BENJAMIN B. WHITTAKER *vs.* PHEBE C. BERRY *et als.*

In review, interest is only cast on the original judgment.

A bond given on review, under R. S. of 1857, c. 89, § 4, is discharged upon payment of the original judgment, (including debts and costs) and interest at twelve per cent. from the date of the bond to that of final judgment in review, and taxable costs.

Interest is not to be allowed on the costs of the review.

ON REPORT.

DEBT upon a bond for $316.32, given to obtain a review of a real action originally brought against one Benjamin Brown, now deceased, whose estate Mrs. Berry, the defendant, represents, and in which a judgment was obtained October 26, 1866, against him for $158.16; of which $21.24 were the damages or mesne profits, and $136.92 were costs, and twenty-five cents more for a writ of possession. Mr. Brown sought to obtain a review of that action, and in order to do so, gave the bond in suit, dated January 10, 1867, under R. S. of 1857, then in force, c. 89, § 4. The review was granted, but he died during its pendency, and Mrs. Berry assumed to prosecute it, as administratrix of his estate, which this court in *Berry* v. *Whittaker*, 58 Maine, 422, decided she had no right to do; on the ground that a real action could not be prosecuted by the personal representative of a demandant. In this last named action (of review) judgment was entered up for $237.36, debt or damage, and $96.66, costs. The debt or damage was ascertained by computing upon the whole amount of the original judgment, ($158.41, as above) the interest at six per cent. from the date of its rendition (October 26, 1866) to January 10, 1867, the date of the bond, (1.95) and interest upon that amount ($160.36) from January 10, 1867, to January 12, 1871, when the judgment in review was entered, the clerk calling this $77. as it came within a few cents of those figures. The costs of this review were composed of the usual items of travel, attendance, witnesses, fees, &c., without reference to costs of the former

suit, which (as already observed) were included in the judgment for damages upon the review. The plaintiff was paid the amount of damages included in this last judgment, as computed by the clerk, ($237.36), but claimed interest at twelve per cent., upon the amount of the second, instead of upon the first judgment. The question of the justice of this claim was submitted to the court in this suit upon the bond, brought to enforce it.

W. H. McLellan for the plaintiff.

We claim interest at twelve per cent. on the costs included in the last judgment because it is so "nominated in the bond." The penalty of failure upon the review is the payment of that rate upon "the final judgment." This is the exact language of the instrument.

J. Williamson for the defendants.

Appleton, C. J. The plaintiff in this suit brought a writ of entry against one Benjamin Brown, in which he obtained judgment. The defendant, Brown, then petitioned for a review of the judgment against him and for a writ of *supersedeas*, which was granted upon his filing a bond "in double the amount of the damages and costs conditioned to pay said amount if the petition is denied, or the amount of the final judgment on review, if it is granted, with interest thereon at the rate of twelve per cent., from the date of the bond to the time of final judgment," under R. S. of 1857, c. 89, § 4.

The review was granted and the writ of review issued. The plaintiff in review having deceased, the writ was prosecuted by his administratrix, who became nonsuit and judgment was rendered against her, as reported in *Berry*, adm'x, v. *Whittaker*, 58 Maine, 422.

The judgment as rendered was for the debt or damage in the original action and the costs therein with interest from the date of the bond to the time of the rendition of judgment on the nonsuit, at the rate of twelve per cent. This amount has been paid by Mrs. Berry, as administratrix, together with the costs recovered by the defendant in review.

The question presented is whether the plaintiff is entitled to any further or additional sum.

When a writ of review has been granted, the judgment sought to be reviewed is neither reversed nor annulled, but remains in full force. *Dyer* v. *Wilbur*, 48 Maine, 287; *Curtis* v. *Curtis*, 47 Maine, 525.

Now the judgment in review may be for the same amount as the judgment to be reviewed or for more or less. Provision is made for each of these contingencies by statute.

By the ninth section of the statute, "when the original plaintiff recovers a greater sum than he did by the first judgment, as debt or damage, he shall have judgment therefor, or for so much thereof as remains unsatisfied, and for costs on review."

The original judgment, it has been seen, remains in full force. The plaintiff is not to have two judgments for one debt. His judgment will be for the "greater sum" that is the excess over and above the first judgment. Such was the judgment in *Crehore* v. *Pike*, 47 Maine, 435, where it was rendered only for the interest accruing subsequently to the first judgment.

By the tenth section of the same chapter, "when the sum first recovered is reduced, the original defendant shall have judgment for the difference with costs, on the review; and if the former judgment has not been satisfied, one judgment may be set off against the other and execution be issued for the balance." Both judgments, it will be perceived, are recognized as valid, and are to be so treated.

By the same section, "when the original judgment is wholly reversed, judgment shall be entered in review for the amount of the former judgment and costs and interest thereon, and for such further sum as the prevailing party would have been entitled to recover in costs in the original action, if in the opinion of the court justice requires it. In such case, if the original judgment remains unpaid, it shall be cancelled by a set-off entered of record, in the judgment in review and execution shall issue for the balance only, otherwise for the amount of the latter judgment." In the last

case, the court regard the first judgment, if it had not been paid, as cancelled or nullified. *Dunlap* v. *Burnham*, 38 Maine, 112.

The statute bond, by § 4, is "in double the amount of the damages and costs." That amount may be increased or diminished on review. The judgment for the excess, under § 12, is not the final judgment to which the condition of the bond refers, for the "greater amount" may be only the accruing interest as in *Crehore* v. *Pike*, and the plaintiff would be without security for the judgment reviewed, which alone the bond was given to secure. The final judgment therein contemplated and thereby protected is the amount of damages and costs first recovered, unless reduced by § 10.

The costs which are given by §§ 9 and 10 are to be treated as costs only. The party entitled thereto is to recover only the taxable fees without any addition thereto of twelve per cent. interest. They exist only upon and by the rendition of judgment.

The plaintiff has the amount of damages and costs of the original judgment and interest thereon at twelve per cent., as given by the statute, and the costs of review and he is not entitled to recover any more. *Plaintiff nonsuit.*

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

AMOS GRANT *vs.* DANIEL WARD.

Fraud not to be presumed.

Fraud is not to be presumed, even in the case of a conveyance made by a debtor to his wife, where he testifies that it was for a valuable consideration, and there is no evidence adduced to impeach his character or contradict his statement.

ON REPORT.

REAL ACTION to recover possession of certain premises in Winterport, conveyed by William Mugridge to Daniel Ward, December 8, 1866, for $1200, and mortgaged back the same day to secure

one-half of the purchase money; which mortgage was discharged November 30, 1869. Upon the twenty-third day of June, 1868, Mr. Ward conveyed the premises, by deed of warranty, to his wife Martella Ward; and upon the fifteenth day of December, 1869, joined in her conveyance of them to her father, Lyman Littlefield. Mr. Ward called in his own behalf, testified that his wife, whom he married June 28, 1866, paid him a thousand dollars, for his deed of the place, partly in money and partly in her father's notes, one hundred before the giving of the deed to her, four hundred at the date of delivery, and her father's notes (still outstanding) for the other five hundred. The demandant introduced no rebutting testimony, relying upon the inherent improbability of the tenant's story, as detailed upon the examination and cross-examination, and upon this title of a judgment creditor, by a purchase of the tenant's equity of redemption at a sheriff's sale.

N. H. Hubbard for the demandant.

N. Abbott for the tenant.

WALTON, J. Real action before the law court on report. The only evidence of title in the plaintiff is a sheriff's deed of an equity of redemption. There had been no previous attachment on the writ; and more than a year before the seizure and sale on execution the debtor had conveyed the premises to his wife by a warranty deed duly acknowledged and recorded. If effect be given to this deed it of course defeats the plaintiff's title. No evidence is offered to impeach it, and no reason is assigned why it should not be held to be a valid deed. It may have been made to defraud creditors; but there is no evidence of any such fraudulent purpose. On the contrary, the debtor swears that it was made in good faith, and for a full and valuable consideration. Fraud cannot be presumed. In the absence of proof to the contrary, the presumption is that fraud does not exist. We must, therefore, assume that this deed was not made for a fraudulent

purpose. Giving effect to it, it entirely defeats the plaintiff's title; and judgment must go against him.

Judgment for the defendant.

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

SARAH HUNT *vs.* RUSSELL HOTCHKISS *et als.*

Dower—what is sufficient demand, of agent.

A claimant of dower, being in possession of the land, occupying it for her own benefit under a contract made with the owners by a third person, the owners being out of the state and having within the state a general agent to care for and protect their interests in said land, may make a demand upon said agent sufficient to enable her to maintain her action for dower and for damages.

ON REPORT.

ACTION OF DOWER, in which, by agreement, the question of damages only was submitted to the jury, the facts upon which a legal issue was made being reported for the action of the court.

The verdict was for $55.60, damages for the detention. The only question was as to the sufficiency of the demand of dower. Hotchkiss Brothers & Company, the tenants, reside and do business in New Haven, Connecticut. In January, 1862, they recovered judgment against the firm of W. R. and W. H. Hunt, doing business in Maine, the senior member of which resided in Liberty in this county, and was the demandant's husband. An execution for $2679.34, issued upon this judgment, was levied upon the premises in question then in the possession of W. R. Hunt, and a writ of entry was brought to recover the same of him, by the judgment creditors, in which they prevailed, in 1869. William R. Hunt died June 20, 1872, upon the estate, having paid rent therefor to Joseph Williamson, Esq., who was the attorney of Hotchkiss Brothers & Company in the litigation aforesaid and their agent to take care of the property, and collect the rents,—

from the date of the levy. After her husband's death, Mrs. Hunt, his widow, continued to reside in the same place, paying rent to Mr. Williamson as before, till May 17th, 1873, when he notified her to vacate the premises.

The demand of dower was served upon Mr. Williamson a seasonable time before this suit was commenced, the writ in which was also served upon him. The demand was made some time in September, 1872, while Mrs. Hunt was still in occupation of the property, and the writ dated September 4, 1873.

H. & W. J. Knowlton for the demandant.

Joseph Williamson for the tenants.

DANFORTH, J. This is an action of dower, and the only question raised is as to the sufficiency of the demand. No objection is made as to its form or substance, but it is claimed that it was not made upon the right person. The defendants are conceded to be the owners of the land in which dower is claimed, and to be residents out of the state.

It is, however, contended that, at the time of the demand, one William H. Hunt was a tenant in possession within the meaning of the statute, and upon him the demand should have been made. But an examination of the testimony reported, satisfies us that, though he paid the rent from time to time, and though the defendants might have had a legal claim upon him therefor, by virture of a contract with him, he was not in possession of the premises, but whatever he did in this respect, was done for and in behalf of this demandant, who was in fact in possession and occupying the premises for her own benefit. This possession she had continued from the death of her husband, who had occupied them in the same way for some years previous to his decease.

This would seem to present a case not contemplated by the statute, which provides that the demand shall be made, "of the person who is, at the time, seized of the freehold, if in the state; otherwise, of the tenant in possession." The claimant being in possession could not with propriety make the demand upon her-

self. No principle of law would allow the same person, at the same time, to act in two opposing capacities. The statute evidently contemplates a demand made by one person upon another occupying a somewhat antagonistic position, with interests really inconsistent. If the case stopped here, it might be that the plaintiff would be compelled to resort to her common law remedy, in which no demand would be necessary, and perhaps no damages recoverable. But the case does not stop here. It shows that the demand was made upon Joseph Williamson, who in respect to this land was the agent and representative of the owners, to collect the rents, look after the tenants, and in general to care for and protect their interests in relation to it. The defendants, though not residing within the state, as respects this land, were here by their representative. It will be noticed that the statute does not require a residence but simply a presence. No valid reason has been, or (as we think) can be given, why this presence may not be by an agent, as well as personal. Ordinarily, what a man can do by himself, he can do by another. This is only the converse of the proposition, that what he does by another, he does by himself. It cannot be doubted that if the defendants, residing out of the state, had been found within it, a sufficient demand could have been made upon them. If under such circumstances they could have been the recipients of a valid demand, there would seem to be no good reason why they might not confer that power upon another; or why a general agency would not be sufficient for that purpose, at least in the absence of any other person upon whom the necessary demand could be made. In respect to this land the agent is the representative of his principals. They do not reside in the state, nor so far as appears are they here personally, but they are here by their representative.

This view is analagous to the principle adopted in *Russell, et als.* v. *Hook*, 4 Maine, 372, which was a case involving the validity of a levy and an execution upon real estate. The debtor was absent from the county and an appraiser was chosen by an agent upon notice given by the officer. This was treated as sufficient,

though perhaps not necessary to the decision of the case. In the case of levies notices are required very much as demands in dower, and in each case the statute is alike silent as to the authority of agents. If the agency is valid in one case it must be in the other; and we think it may be in either.

As provided in the report, there must be judgment for the demandant for her dower, with damages as found by the jury, $55.60, and interest from the finding of the verdict.

Judgment for the demandant.

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

INHABITANTS OF EASTPORT *vs.* INHABITANTS OF LUBEC.

Pauper supplies—what are.

Needed supplies furnished by the town to a minor child, not emancipated nor abandoned, when furnished with the knowledge of the father, and by reason of his failure to furnish necessary support to the child, will be deemed supplies furnished indirectly to the father, and will interrupt the gaining of a settlement by him. His consent to the furnishing is not necessary.

It is competent for a jury to infer such knowledge on the part of the father in a case where the supplies are furnished to his daughter by the authorities of the town where he lives, she having left his house by reason of a quarrel with her step-mother and gone to an uncle's in the same town, and there fallen into distress.

ON MOTIONS FOR A NEW TRIAL.

ASSUMPSIT, to recover for supplies furnished under the pauper act to George and Martha, minor children of Reuben Lyons, whose legal settlement was the only question for the jury, the defendants denying that it was in their town and claiming it to be in Pembroke. Reuben Lyons was born in 1817 in Lubec, where his father and grandfather resided before him. November 27, 1837, Reuben Lyons was married to Martha Leighton who died in December, 1852, having borne him seven children of whom the

oldest was named Frances. Within a year after his said marriage he moved from Lubec to Pembroke, where he remained but a few months, and then moved from one place to another, returning occasionally to reside in Pembroke, Lubec, and neighboring towns. Upon the twenty-fourth day of April, 1853, he was again married, at Lubec, where he was then living, to Martha A. Case. In the July following they moved to Eastport, where they staid till the next October, when they went to Pembroke. From this time, October 18, 1853, till some time in the last of August, 1859, the defendants claimed, and Mr. Lyons testified, (upon their motion for a new trial on account of newly discovered evidence,) that his residence was in Pembroke, though it was admitted that he was actually living with his family in Perry, a few rods from the line dividing those towns, from April to September of the year 1854, during which season he worked in Pembroke, and built himself a house upon the land there for which he had bargained, and moved into this house in September, 1854. His second wife bore him six children, of whom the youngest two were Martha and George, to whom the supplies were furnished for which a recovery was sought in this action. Late in the fall of 1854, after his second marriage, his oldest child, Frances, then fourteen years of age, left the house (in Pembroke) and went to her maternal grandfather's, George Leighton, in Pembroke, where she resided most of the time after that, except that she was for some weeks at her uncle's, Robinson Leighton's, in Pembroke. The plaintiffs sought to defeat the alleged settlement of Reuben Lyons in Pembroke, by claiming that the removal to Perry was an interruption of his residence, and was of like character with his other removals; and also by testimony that while his daughter was at her grandfather's she was sick, and again while at her uncle's, and that, on each occasion, she was upon the application of those relatives, supplied by the town of Pembroke with medical services and necessaries, the bill for which was subsequently paid by Lubec. It was also asserted that the whole family was twice aided in the absence of Mr. Lyons. There was much conflict upon the fact of assistance

being rendered, which was recognized and paid for by Lubec; and it became an important issue whether or not Frances was helped as stated. The jury gave their verdict in favor of the plaintiffs and the defendants moved to set it aside as against the law and the weight of evidence; and subsequently filed another motion for a new trial upon the ground of newly discovered evidence, consisting mainly of the denial by the gentleman who was said, while an overseer of Lubec, to have paid for the aid afforded Frances by Pembroke, and of Frances' deposition that she never asked for nor received such aid, and of her father that it was not rendered with his knowledge or consent. Upon cross-examination these witnesses all admitted that an overseer from each of these towns did visit Frances while sick at her grandfather's and uncle's, and that they did tell Reuben that application for relief had been made; to which he replied that he would take care of her if she would stay at home, but that he could not afford to board her out. And he made no attempt to take her home.

J. C. Talbot and *A. McNichol* for the defendants.

Joseph Granger and *W. Bates* for the plaintiffs.

Barrows, J. It is doubtless true that the furnishing of supplies to a minor child (who is not a member of her father's family, but is away from his care and protection either through her own fault or his neglect, without the knowledge or consent of the father,) by a distant town where she may happen to fall into distress, he being of sufficient ability and willing to support her at his own home, would not be considered a furnishing of supplies to him as a pauper, so as to prevent his acquiring a settlement to which he would otherwise be entitled. This was settled in *Bangor* v. *Readfield*, 32 Maine, 60; *Greene* v. *Buckfield*, 3 Maine, 136; *Dixmont* v. *Biddeford*, 3 Maine, 205.

Again it seems to have been held in cases where the father has deliberately abandoned his family and taken up his residence in another town, emancipating them from all duty to him, and

renouncing all obligation to them, that supplies furnished, even under such circumstances as imply a knowledge of the fact upon his part, will not be considered as supplies furnished to him, so as to prevent his gaining a settlement in his new place of residence. *Raymond* v. *Harrison*, 11 Maine, 190; *Hallowell* v. *Saco*, 5 Maine, 143.

But when the parental and filial relation continues to subsist, and there has been no emancipation or abandonment, and the circumstances are such as make it evident that the father has knowledge of the necessities of the child, and he fails to supply those necessities, and they are supplied by the town officers, acting in good faith to relieve a case of actual want and distress, the supplies thus furnished will be deemed supplies furnished indirectly to the father, and will operate to prevent his gaining a settlement.

This is abundantly established in the cases of *Garland* v. *Dover*, 19 Maine, 441; *Sanford* v. *Lebanon*, 31 Maine, 124; *Clinton* v. *York*, 26 Maine, 167.

In *Garland* v. *Dover* it was settled that minor children might be still under the care and protection of the father, so that supplies to them would interrupt the gaining of a settlement by him, though they were not in his family at the time, and in each of the cases above cited the question what will constitute an abandonment or an emancipation is more or less discussed.

In *Clinton* v. *York* the relations subsisting between the father and daughter greatly resembled in essential particulars those in the case at bar. The court to whom the case was reported for decision upon the law and fact appear to have held that such a condition of things showed neither emancipation nor abandonment, and to have inferred the father's knowledge of the furnishing of supplies by the town from the fact that the daughter was living in the same town with him.

It is well settled that if the necessity for supplies exist, it is not essential to show that the recipient called for them, or that the party whose settlement is thereby affected should have assented to the furnishing of them by the town. If the supplies were actu-

ally needed and were furnished, received and consumed, it suffices. *Corinna* v. *Exeter*, 13 Maine, 328; *Hampden* v. *Levant*, 59 Maine, 560. The anger, indifference or false pride of a father cannot be permitted to prevent the supply by the town authorities of such aid as the pressing necessities of any member of his family, or of any child not emancipated who is under his care, may require. If he knows of the existing need, and fails to furnish it himself, so long as the parental and filial relations are not dissolved, the furnishing and reception of aid from the town must have its legitimate effect upon his settlement. *Corinna* v. *Exeter*, *ubi supra*; *Tremont* v. *Mount Desert*, 36 Maine, 390.

Such a case belongs to a totally different class from *Bangor* v. *Readfield*, where the child had left her father's home without his knowledge or consent, and the supplies were furnished by a distant town, there being no evidence of any knowledge on his part that she had fallen into distress.

There was evidence at the trial from which the jury might well find that, late in the fall of 1854, while Reuben Lyons lived in Pembroke, his daughter Fanny, then aged 15, left home on account of a quarrel with her step-mother, and went to her uncle Robinson Leighton's in the same town; that while there, the attention of the overseers of the poor was called to her as a person needing relief; that she actually was in such need; that the overseers agreed with and paid Robinson Leighton for her board; that they notified the defendant town, and that James Leighton, one of the overseers of Lubec, came to attend to the case; that a conference with Reuben Lyons, the father, failed to secure his intervention in the matter. It is hardly supposable that Reuben Lyons, living in the same town, could have been ignorant of this condition of things before this conference with the overseers of the two towns. There is nothing to show abandonment or emancipation up to that time. The supplies must be considered as having been indirectly furnished to him.

The statements made by Reuben Lyons and James Leighton upon cross-examination in their depositions taken by the defend-

ants in support of the motion for a new trial on the ground of newly discovered evidence, tend rather to corroborate the testimony of Adna Leighton upon these points.

Motions overruled.

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

CITY OF CALAIS *vs.* CHARLES R. WHIDDEN.

Money had and received. Authority and duty of city officials.

When one has money of a plaintiff, which in equity and good conscience he ought to pay or refund, the law raises a promise on his part that he will do so. Being under a moral obligation to pay, and the law implying a promise to pay, a demand is unnecessary.

The representative of a town or city in the legistature is under no official obligation to attend to the prosecution or aid in the adjustment of its claims against the state for reimbursement. Neither is the city solicitor. For such services the representative or the city solicitor is entitled to a reasonable compensation.

The city treasurer, as such, has no authority to contract with either as to the rule of compensation for extra official services to be rendered by a representative or solicitor of such city.

ON REPORT.

ASSUMPSIT, by writ dated August 17, 1871, declaring upon a count for money had and received, with a specification of the demand to be proved under it, as $1304.03, received of the State of Maine, as found due from the state to the city of Calais, less $15.58, leaving a balance of $1288.45 and interest thereon from its reception by the defendant due from him to said city.

The defendant pleaded the general issue with a brief statement denying that the action was instituted by competent authority; alleging also that there was no demand made upon him for the money before the suit was brought, and setting up a settlement of the claim, before suit, between the defendant and the city treasurer, and a ratification of that settlement by the plaintiffs who have

never rescinded the same, nor returned the sum by them received of the defendant thereon.

The plaintiffs proved that they had a claim against the state, for military supplies furnished during the war, amounting to thirteen hundred and four dollars and three cents, which was audited by the governor and council of 1870, agreeably to a legislative resolve, passed February 26, 1869, and that sum allowed; and that it was paid by the state treasurer's draft to the order of Mr. Whidden, who cashed the same at the Calais National Bank, upon which it was drawn. The defendant introduced a bill for services rendered to the city by him, consisting of two items, one for collecting this $1304. of the state, for which he charged $652, under an agreement with the treasurer to collect it "at the halves;" and the other for services and expenses in making up rolls and lists of soldiers for allowance by the state commissioners upon the assumption of municipal war-debts, and collecting $25,458.33, at two and a half per cent., $636.45, making the total of his account $1288.45. In 1870 Mr. Whidden represented Calais in the legislature till February 25, 1870, when he resigned. He was city solicitor during the municipal year of 1869–70. When Mr. Whidden returned from Augusta he took with him the state treasurer's check for this $1304.03, and mentioned it to the city treasurer, and said he offered it to that official. The mayor and four of the five aldermen were soon after called together at Mr. Whidden's office and there his bill was presented and allowed, the treasurer being present, and subsequently the mayor drew an order upon the treasurer for the sum total of Mr. Whidden's account and he passed that order for $1288.45 and his own check for $15.58 to the treasurer in full for the $1304.03 received of the state as aforesaid. At the close of the fiscal year the finance committee examined and approved the treasurer's account, including this item. The treasurer testified that when he told Mr. Whidden to charge half what was to be procured from the state for his services he (the witness) thought the claim did not exceed two hundred dollars; he had retained

no recollection that it was for so large a sum as it was, though the original disbursements for the soldiers were made through him, as treasurer, he having held that office over twenty years.

He also said that Mr. Duren, the only alderman absent when the bill was presented at Mr. Whidden's office, was the only member of the finance committee who examined the treasurer's account at the close of the year.

The city government elected in the spring of 1870, repudiated the agreement and adjustment aforesaid with Mr. Whidden, and the city solicitor of that year told him a suit would be commenced unless the sum, he obtained in Augusta, was paid into the treasury. Efforts to refer the dispute failing, the present proceedings were instituted. Upon the evidence adduced, the question was submitted to this court whether or not, upon the facts disclosed, the action could be maintained; if so, it was to stand for trial; otherwise, the plaintiffs were to be nonsuit.

The plaintiffs contended that there was a fixed salary attached to the office of solicitor, which covered all the legal services rendered by Mr. Whidden to the city while he held that position; and that his going before the executive council was simply as the representative of Calais at Augusta.

By the ordinances, no warrant upon the treasurer should be drawn by the mayor unless the bill which it is to pay is approved by the joint committee of accounts. No member of the common council was present at the meeting of the aldermen at Mr. Whidden's office; nor did any of the members of the common council approve the bill; nor did the city clerk, who is *ex officio*, the clerk of the board of aldermen attend, nor keep any record of the meeting at Mr. Whidden's office.

F. A. Pike and *J. & G. F. Granger* for the plaintiffs.

So soon as the defendant received the plaintiff's money, in the shape of a check payable to his own order, an action of assumpsit would lie against him for not paying into the treasury as required by the city charter and ordinances. He was liable so soon as he took the check in that form. *Floyd* v. *Day*, 3 Mass., 403; *Cof-*

fin v. *Coffin*, 7 Maine, 298; *Bliss* v. *Thompson*, 4 Mass., 488; *Mason* v. *Waite*, 17 Mass., 560; *Hall* v. *Marston*, Id., 575; *Concord* v. *Delaney*, 58 Maine, 309.

George Walker and *Charles R. Whidden* for the defendant.

The demand made by the city solicitor upon Mr. Whidden was an unauthorized and therefore, ineffectual one, and did not justify the institution of this suit.

If the city determined to rescind, or attempted to do so, the settlement with Mr. Whidden, his checks and the city order should have been returned to him.

A previous demand should have been made, by competent authority. *Emerson* v. *McNamara*, 41 Maine, 565; *Bisbee* v. *Ham*, 47 Maine, 543; *Jones* v. *Hoar*, 5 Pick., 285; 2 Greenl. on Ev., § 117.

The city treasurer, being the custodian of the public funds, to whom all other persons receiving the city's money are, by the charter and ordinances to pay them, it follows that his receipt is a good discharge of the liability, and that he is the proper person with whom to settle.

Mr. Whidden did not receive this money from the state by virtue of any official relations between him and the city, but merely as an attorney employed by the treasurer (in behalf of the city) to collect the funds and account for them to him, which was done, to the satisfaction of all concerned. If the treasurer has wronged the city his bond is ample security that the wrong shall be rectified.

Appleton, C. J. The question presented for our determination is whether upon the evidence offered by the plaintiffs irrespective of that in the defence, they are entitled to recover.

The plaintiff town having claims against the state for reimbursement, the legislature by resolve authorized the same to be audited by the governor and council and an order to be drawn for the amount found due. The defendant, who was then the city solicitor of the plaintiff's and their representative in the legisla-

ture, appeared before the auditing board to procure the allowance of the plaintiff's claims. They were allowed to the amount of $1304.03, for which sum the state treasurer drew an order on the Calais National Bank in favor of the defendant, who indorsed the same and received the amount.

The defendant, then, had the funds of the plaintiff city in his hands, for which he was bound to account. He received the order as their agent to pay to them. The money received upon the order was the plaintiff's, and this action is brought to recover the same.

I. It is objected, that the action cannot be maintained, because there was no previous demand. But where one is proved to have money of the plaintiffs in his hands, which, *ex æquo et bono*, he ought to refund or pay over, the law will presume he promised so to do and the jury are bound to find accordingly. Being under legal and moral obligation to pay, the law implies a promise so to do. No demand therefore was necessary. *Stetson* v. *Howe*, 31 Maine, 353; *Hall* v. *Marston*, 17 Mass., 575.

If a demand was necessary, there is evidence tending to show that a demand was made on the defendant and that he was notified that a suit would be commenced in case of a failure to pay.

II. The authority to commence the suit is denied. But the appearance of the plaintiffs' attorney has not been called for seasonably. If it had been, it appears by record evidence, that the plaintiffs directed by vote the institution of this suit, and nothing indicates on their part any desire that its prosecution should cease.

The plaintiffs, therefore, have made out a *prima facie* case. But certain questions have been raised which it is expedient now to determine.

The defendant, whether as the representative of the plaintiff city, or as their solicitor, was under no official obligation to attend to the prosecution or to aid in the adjustment of their claims against the state for reimbursement. For his services in this behalf he is entitled to a just and reasonable compensation.

The city treasurer, as such, had no authority to agree upon the

rate of compensation for extra official service, and nothing is shown from the records of the plaintiff corporation that he was in any way authorized to make any agreement such as is alleged. Its validity would be established only by subsequent ratification, if that can be shown. *Action to stand for trial.*

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

WILLIAM DEMING *vs.* INHABITANTS OF HOULTON.

Coupons in hands of innocent holder for value—when held valid.

By a special act of the legislature the town of Houlton was authorized to aid in the construction of the Houlton Branch Railroad, by issuing scrip with annual interest coupons. The town voted to raise thirty thousand dollars, payable in this manner as the work progressed: In an action to recover interest upon these coupons it was *held*, that it was a matter within the province of the selectmen and treasurer to ascertain and decide whether or not the party contracting to build the railroad had complied with all the conditions and pre-requisites to entitle them to the bonds and coupons; and that their action was conclusive as between the defendants and innocent holders of the bonds and coupons.

ON REPORT.

ASSUMPSIT, upon an account annexed, for money had and received, and special counts to recover $122.54, the amount of twenty interest coupons of six dollars each attached to bonds issued by the defendants under the legislation, votes and acts referred to in the opinion, with the interest upon them after maturity.

The general issue was pleaded, together with a brief statement that the Houlton Branch Railroad Company was never legally organized, for several reasons mentioned; that the contractors for its construction did not carry out their contract according to its terms, either as to the place where, or the time within which it was to be built; that the bonds were received from the town officers by one of the contractors in fraud of the town and by collusion between these persons; that the terms of the act of the legislature

and of the contract, intended to secure the town from loss, were never complied with; that only two selectmen signed the bonds; that the legislature had no power to authorize the giving of the money of the citizens of Houlton to persons residing in New Brunswick to build a road only partly in said town and partly in said foreign province.

The chief grievance of which the defendants complain, and which led to their refusal to pay these coupons, was the location and erection of the depot by the contractor who built the road; and is thus stated in the fourth item of the specifications of defence:

IV. "That said Osburn was duly and seasonably notified by the selectmen of said town who signed said contract in behalf of the town, that said railroad must be built, and the depot located at or near the business centre of the town and village, as required by his contract; and that if not so built, it would be of little or no value or benefit to the town, and that the town would not pay him a dollar, if not built according to his contract. That said Osburn replied in substance that he should not so build it, but should build it as he pleased, and should locate the depot nearly or quite three quarters of a mile from the business centre of said village and town, and he did so build it, and he declared that he would rather build said depot where he did build it even if he received no part of the sum voted by the town. All of which was well known to the persons who signed said bonds and coupons here offered in evidence by the plaintiff."

To give progress to the cause and settle the law, the presiding justice ruled *pro forma* that the defence set up in the defendants' brief statement is not open to them in this action; that the facts offered by defendants to be proved are inadmissible, and excluded them on the ground that it was a matter within the province of the selectmen and treasurer of the town of Houlton for the time being to ascertain and decide whether or not the party contracting to build the said railroad had complied with all the conditions and pre-requisites to entitle them to the bonds and coupons as stipulated

in the contract, and that their action in the matter was final and conclusive as between the defendants and innocent holders of the bonds and coupons.

Whereupon the action was taken from the jury to be submitted to the full court upon the report of the presiding justice, and it is agreed by the parties to this action that the full court may enter such judgment of nonsuit or default, or grant a new trial as in their opinion the principles of law and justice may require.

D. D. Stewart and *C. M. Herrin* for the defendants.

A town, like a county, having no inherent right of legislation, is strictly confined to the powers delegated to it in subscribing to aid public improvements. *Thompson* v. *Lee County*, 3 Wallace, 330; *Emery* v. *Mariaville*, 56 Maine, 315; *Starin* v. *Genoa*, 23 N. Y., 449; *People* v. *Smith*, 45 N. Y., 773, 781; 1 Dillon's Mun. Corps., § 106.

The acts required by the legislature to be done are conditions precedent to the issuing of the bonds; and without their performance the bonds are void. 23 N. Y., 450.

Everybody is chargeable with knowledge of the action required by public legislation. *Knox County* v. *Aspinwall*, 21 Howard, 543, 544.

These bonds upon their face expressly refer to the acts and vote by force of which they are issued and with which compliance must be had. These terms and conditions precedent were that the corporation should give bond to the town for the payment of principal and interest of this scrip as each fell due, depositing an equal amount of its own scrip with the town, and securing it by a mortgage of the road. These things were not done, as the defendants offered to prove; though, really, the plaintiff, to entitle him to recover, should have first proved that they were done. 23 N. Y., 440; *People* v. *Mead*, 24 N. Y., 125; 1 Dillon's Mun. Corps., § 423.

Certainly, the evidence offered was admissible in defence, even if the plaintiff was an innocent holder for value, because it affects

the power of the town to make the contract at all. *Marsh* v. *Fulton County*, 10 Wallace, 683.

The act required, as a condition precedent, the exercise of "the best judgment and discretion" of the town officers. The defence offered was that it was not had, but that they acted collusively and fraudulently. This was such a non-compliance as to avoid the bonds. *Powell* v. *Tuttle*, 3 Comst., 396; *Sherwood* v. *Reede*, 7 Hill, 431; *Olmstead* v. *Elder*, 1 Selden, 144; *Jackson* v. *Hampden*, 16 Maine, 184, and 20 Maine, 37; *Anderson* v. *Farnham*, 34 Maine, 161.

Proof of fraud in their inception should have been admitted, as it would have thrown upon the plaintiff the burden of showing that he was an innocent purchaser for value, before maturity—which we deny. *Smith* v. *Sac County*, 11 Wallace, 139; *Aldrich* v. *Warren*, 16 Maine, 465; *Perrin* v. *Noyes*, 39 Maine, 384; *Gallagher* v. *Black*, 44 Maine, 99.

R. S., c. 1, § 4, item third, authorizing a majority of a board of public officers to act, refers to their ordinary official duties under general legislation, and not to the execution of a particular trust under a special act.

The act authorized the issuing of bonds; i. e., instruments under seal; not of this scrip. *Knight* v. *Barber*, 16 M. & W., 66. The plaintiff should have shown, affirmatively, that the road was built, as nearly as practicable and advisable, according to Hartley's survey, and not to the advice of Mr. Molyneux.

The declaration avers, in so many words, that these coupons fell due upon the twentieth day of July, 1872, and that the plaintiff became the lawful bearer of them on the twelfth day of the succeeding August; that is, he bought them a month after maturity.

F. A. Pike and *J. & G. F. Granger* for the plaintiff.

This court was persuaded by counsel now arguing the reverse that under authority to issue bonds a municipality could issue scrip; and so decided in *Augusta Bank* v. *Augusta*, 49 Maine, 507.

The allegation as to the time that the plaintiff became the holder of this scrip is alleged under a *videlicet*; and it was admitted that

they were sold to him; and, virtually, that he was an innocent purchaser; so no equities could be set up against him. *Moran* v. *Miami County*, 2 Black, 722; *Zabriskie* v. *Cleaveland Railroad Company*, 23 Howard, 400, and very many other more recent cases decided by the same court.

The only condition precedent to the issue of the scrip was the acceptance of the act by the railroad company, and by the town of Houlton, of which no question is made. All the rest were conditions subsequent. The very issuing of the instrument is evidence of the existence of the circumstances justifying it, as is the case with all negotiable paper. *Lexington* v. *Butler*, 14 Wallace, 282, citing earlier cases determined in the same court. *Commercial Bank* v. *St. Croix Manufacturing Company*, 23 Maine, 280.

The action of the town of Houlton, subsequently ratified by the special act of 1869, c. 95, became the law of this contract. The scrip issued under it matured, payment was demanded and refused, and that sustains this action. *Augusta Bank* v. *Augusta*, 49 Maine, 507; *Railroad Company* v. *County of Otoe*, 16 Wallace, 667.

Counsel also cited in support of this action many other cases the tendency of which is apparent from the opinion in this case.

Appleton, C. J. By an act approved February 6, 1867, c. 216, the Houlton Branch Railroad Company was incorporated with authority to built a railroad "from some point in the town of Houlton to some point on the east line of the state."

By an act approved February 18, 1867, c. 287, the town of Houlton was authorized to aid in the construction of the Houlton Branch Railroad. By § 1 the town was empowered to loan its credit to said company to the extent of fifty thousand dollars, if sanctioned by a two-thirds vote of the legal voters at a public town meeting called within a limited time and specifying the objects of such meeting.

By § 2 it is provided that, "upon the acceptance of this act as aforesaid, the selectmen of the town shall certify the same to the town treasurer, and he shall issue to the directors of said company

to be expended in the construction and furnishing of said road, and the purchase of the right of way, the scrip of said town, payable to the holder thereof, at the expiration of twenty years from date, with coupons for interest attached, payable annually, to the amount of ten thousand dollars, in sums of one hundred dollars each, said scrip to be countersigned by the selectmen before issue. And as the road shall progress towards completion, and in accordance with the judgment of the selectmen of said town, for the time being, the town treasurer may make further issue of said town scrip, countersigned by the selectmen, to the directors of said company, in suitable and convenient forms to the amount the town shall have decided to loan, payable in like manner as the first amount of issue."

By subsequent sections, provision is made for security to be given the town for the scrip issued, and its eventual repayment by the railroad company. It is made the duty of the municipal officers to see that proper indemnity against loss is given simultaneously with the issue of the scrip.

At a town meeting duly called on the twenty-third day of November, 1868, it was voted unanimously to accept the act approved February 18, 1867, entitled "an act to authorize the town of Houlton to aid the construction of the Houlton Branch Railroad, and that the town loan its credit to the amount of thirty thousand dollars in aid of the Houlton Branch Railroad; ten thousand dollars to be paid when the road is one-third built; ten thousand dollars when the road is two-thirds built; and ten thousand dollars when the road is completed, equipped and in running order."

It was further voted unanimously, "to authorize the directors of said Houlton Branch Railroad Company and the selectmen of the town, to contract with some party or parties, company or compa nies, for the construction, equipment and running of said road, at a cost to the town not to exceed thirty thousand dollars; and to transfer and assign the charter of said company, and to lease said road and all interest of the town and of the company therein, to such party or parties, company or companies, in such way and

manner and for such time as to insure the construction, equipment and continuous running of said road."

By an act approved February 17, 1869, the doings of the town at the meeting of the twenty-third of November, 1868, were made valid, and it was authorized to loan its credit to the extent of thirty thousand dollars, and to make the contracts referred to in the votes of the town.

In pursuance of the authority thus conferred, the directors of the railroad company and the selectmen of Houlton entered into a contract on the thirtieth day of September, 1869, with Henry Osburn and William Todd "to construct the Houlton Branch Railroad in accordance with the survey of James R. Hartley, late of Woodstock, deceased, as nearly as practicable and advisable, to be commenced forthwith, and to be completed and equipped in running order, with proper and necessary and sufficient rolling stock on or before the first day of January, A. D., 1871."

Bonds were issued for $10,000 as the first instalment under the contract, and the coupons in suit were originally attached to the bonds so issued.

It is admitted that the railroad has been constructed in accordance with the advice and opinion of Charles Molyneux, a competent civil engineer; that the necessary rolling stock has been provided; and that the railroad has since been running in connection with the New Brunswick and Canada Railway, and furnishes direct communication with the European and North American Railroad and the St. Stephen and Woodstock Branch Railroads.

The case finds the bonds were sold to the plaintiff. The fact of a sale implies a consideration, and in the absence of proof of fraud or deception, an adequate one. There is no denial in the specifications of defence that the plaintiff is a *bona fide* holder before the maturity of the coupons, and for a valuable consideration. In the ordinary course of business the holder of a note or bill is presumed *prima facie* to be a holder for value. "The owner of a bill," remarks Lord Denman, in *Arbouin* v. *Anderson*, 1 Ad. & Ellis., New Rep., 498, "is entitled to recover upon it, if he came by it

honestly. That fact is implied *prima facie*, by possession; and, to meet the inference so raised, fraud, felony, or some such matter must be proved."

As was remarked by Clifford, J., in *City of Lexington* v. *Butler*, 14 Wallace, 295: "Issued by authority of law, as the bonds purport to have been, and being by the regular indorsement thereof made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the number in the market overt, became the lawful indorsee and holder of the same, together with the coupons annexed, and the interest secured by the coupons being unpaid, he instituted the present suit to recover the amount. Evidently the *prima facie* presumption in such a case is that the holder acquired the bonds before they were due; that he paid a valuable consideration for the same; and that he took them without notice of any defect which would render the instruments invalid."

The presiding judge ruled *pro forma* "that the defence set up in the defendants' brief statement is not open to them in this action; that the facts offered to be proved are inadmissible, and excluded them upon the ground that, it was a matter within the province of the selectmen and treasurer of the town of Houlton, for the time being, to ascertain and decide whether or not the party contracting to build the railroad had complied with all the conditions and pre-requisites to entitle them to the bonds and coupons as stipulated in the contract; and that their action in this matter is final and conclusive as between the defendants and innocent holders of the bonds and coupons."

It is apparent that the case comes before us upon the question whether the various matters offered in the specifications of defence would be available against *bona fide* or innocent holders of coupons; that the plaintiff is to be regarded as such, and that the justice presiding must have understood that this was the question to be submitted for our determination.

The possession of coupons is *prima facie* evidence that the holder of them is the holder of the bonds from which they were

cut off. *McCoy* v. *Washington County*, 3 Wall., Jr., C. C., 381. It is not necessary to produce the bonds from which they are detached to entitle the holder to maintain an action upon them. *Aurora City* v. *West*, 7 Wallace, 82.

The bonds were issued by the proper authorities of the town. It was their duty to determine whether the preliminaries necessary to give validity to the bonds had been complied with, before issuing them; and their determination is conclusive. *Augusta Bank* v. *Augusta*, 49 Maine, 507. The same principle has been fully affirmed by the supreme court of the United States. *Lynde* v. *The County*, 16 Wallace, 6. In a suit against a town by a *bona fide* holder of its bonds whose title accrued before maturity, the corporation cannot show, by way of defence, where the corporation has authority to issue such bonds, any want of compliance with formalities required by the statute authorizing their issue, or that there has been fraud in their agents issuing them. *Woods* v. *Lawrence County*, 1 Black, 386; *Mercer County* v. *Hackett*, 1 Wallace, 83; *Gelpcke* v. *Dubuque*, Id., 175; *Grand Chute* v. *Winegar*, 15 Wallace, 356.

The bonds were signed by but two of the selectmen. This is sufficient. By R. S., c. 1, § 4, item 3, it is enacted that "words giving authority to three or more persons authorize a majority to act, when the enactment does not otherwise determine." The enactments under which the coupons were issued do not "otherwise determine."

The limits of the Houlton Branch Railroad are within this state by the express language of its charter. The question as to the right of the legislature to authorize the raising of money, or of loaning credit to aid in the building of a railroad on foreign soil, does not arise.

The bonds given to meet the first instalment may be valid, though the subsequent ones were improvidently issued. By the terms of the vote of the town, which received the sanction of the legislature, they were to be issued before the completion of the contract. The risk of its ultimate completion was upon the par-

ty so issuing them, not the innocent purchaser. Besides, if once rightly issued and binding, they cannot be defeated in the hands of honest holders by the subsequent neglect of the officers of the town in enforcing the contract for the construction of the road, or of the contractors in negligently completing their contract.

Besides, by c. 286, § 2, the selectmen were specially authorized, as the road should progress, to issue scrip in accordance with their judgment. Nothing is shown or offered to be shown that these bonds and coupons were improperly issued. If issued in accordance with their judgment, in the absence of fraud, they are binding upon the town; and in case of fraud, the loss must fall on the town rather than on a *bona fide* holder, ignorant of such fraud.

The specifications of defence cannot apply to the bonds issued to meet the first instalment. There is no allegation that these were issued in fraud of the town. The most that is said is that the defendants shall so contend.

By the terms of the contract under which the railroad was built, it was to be constructed in accordance with the survey of James R. Hartley, "as nearly as practicable and advisable." There is no offer to show it was not so done. Besides, we must assume that the selectmen and treasurer so regarded it—else they would not have issued these bonds. *Defendants defaulted.*

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

STATE OF MAINE *vs.* FAYETTE SHAW *et als.*

Organization of plantation—how effected.

The county commissioner, to whom application is made for the organization of a plantation under acts of 1870, c. 121, is alone authorized to fix the place of meeting for that purpose.

He cannot delegate this power to the person to whom his warrant is addressed.

The officer's return must show that the notices of the meeting were posted in two conspicuous (as well as public) places.

On report.

Trespass *quare clausum*, for cutting timber upon the lots reserved for public uses in Vanceboro plantation, between the twenty-eighth day of January, 1871, and the date of the writ. It was conceded that Mr. Shaw had the right so to cut prior to January 28, 1871, by virtue of a deed from the state, and had not lost it, unless the proceedings had upon that day, for an organization of the township into a plantation, under acts of 1870, c. 121, the provisions of which are recited in the opinion, were legally sufficient for that purpose. This was the only question submitted; and a nonsuit or default, without costs in either event, was to be entered as its determination might require.

Albert W. Paine for the state.

The effect to be given to the defendant's deed is stated in *Bragg* v. *Burleigh*, 61 Maine, 444.

The notice of the meeting of January 28, 1871, was given, as the return states, "according to law." This is sufficient. *Tuttle* v. *Cary*, 7 Maine, 426; *Ford* v. *Clough*, 8 Maine, 334; *Bucksport* v. *Spofford*, 12 Maine, 487; *Saxton* v. *Nimms*, 14 Mass., 315; *Thayer* v. *Stearns*, 1 Pick., 109; *Houghton* v. *Davenport*, 23 Pick., 235, and cases there cited; *Rand* v. *Wilder*, 11 Cush., 294.

The cases of *State* v. *Williams*, 25 Maine, 561, and others of later date, are governed by positive requirements of the statute as to the return of the warning officer, and therefore do not conflict with those above cited.

E. B. Harvey for the defendant, cited *State* v. *Williams*, 25 Maine, 561, and other similar cases, and raised the various objections to the proceedings had for the purpose of effecting an organization that are noticed in the opinion.

Appleton, C. J. This is an action of trespass *quare clausum fregit* against the defendants for cutting timber on No. 1, R. 4, of Titcomb's survey, called Vanceboro.

The defendants justify under a deed from the state dated November 8, 1850, which confers the right to cut timber and grass on the public lot in question, the right "to continue until the tract or township shall be incorporated, or organized for plantation purposes."

The organization upon which reliance is placed was under and by virtue of the provisions of an act approved March 10, 1870, c. 121, §§ 2 and 3.

By § 1, the county commissioners were to return to the secretary of state every five years a description of townships containing more than two hundred and fifty inhabitants.

By § 2, "immediately after making such return said commissioners shall issue their warrant to one of the principal inhabitants of each of such unincorporated townships, commanding him to notify the inhabitants thereof, qualified to vote for governor, to assemble on a day and at a place named in the warrant, to choose a moderator, clerk, three assessors, treasurer, collector of taxes, constable, superintending school committee, and other necessary plantation officers. Notice of such meeting is to be given by posting an attested copy of the warrant therefor, in two public and conspicuous places in the township, fourteen days before the day of meeting. The warrant with such inhabitant's return thereon is to be returned to the meeting and the above named officers shall be chosen and sworn."

By § 3, provision is made for the organization of townships containing "any number of inhabitants." It was under this section that the alleged organization took place.

By this section, "any one or more of the county commissioners, on written application signed by three or more persons qualified as the constitution requires to be voters, &c., may issue a warrant to one of them requiring him to warn a meeting of the qualified voters of such place residing within the limits described in the warrant . . the warrant, notice of meeting and proceedings therein to be the same as in the preceding section."

The warrant issued by the county commissioner to whom ap-

plication was made, was to notify the inhabitants of Vanceboro proper "to meet at some central place in said Vanceboro, on Saturday, the twenty-eighth day of January, 1871, at two o'clock in the afternoon, by posting notices in two or more public places in said Vanceboro, fourteen days before the time of said meeting to give in their votes for the choice of the following officers: first, to choose a moderator to govern said meeting; second, to choose a clerk; third, to choose three assessors for said plantation."

It will be perceived that the warrant fails to comply with the requirements of § 2, in not naming the place of meeting; in omitting most of the officers to be chosen; and in not requiring that an attested copy of the warrant shall be posted in two public and conspicuous places in said township.

The notice as given, notifies and warns the inhabitants to assemble at the school house in said Vanceboro at the time designated in the warrant. The place of meeting, it seems, was fixed and determined, not by the county commissioner issuing the warrant as required by § 2, but by the person to whom it was directed for service and who was in no way authorized to name it.

The return to the warrant of the county commissioner is in these words:

"Pursuant to the within warrant, I have notified the inhabitants of Vanceboro, qualified as therein expressed, to meet at the school house in Vanceboro, for the purposes therein expressed, by posting up notices according to law. GEO. M. B. SPRAGUE."

The return is not dated. It cannot be known that the required notice was given. It does not appear that notice was posted up in two or more public places, nor, if so posted, that the places were conspicuous, as the statute requires. It is certain that the notice was not to choose the officers required by statute to be chosen.

The warrant as issued by the county commissioner was not in accordance with § 3. The return of Sprague fails to show that the inhabitants were seasonably or legally notified, as required by the same section. The notice was not posted up in two public

and conspicuous places as the statute directs. *State* v. *Williams*, 25 Maine, 561; *Fossett* v. *Bearce*, 29 Maine, 523; *Bearce* v. *Fossett*, 34 Maine, 575; *Brown* v. *Witham*, 51 Maine, 29.

It not being shown that there has been an organization, such as the statute requires, the plaintiff, by the agreement of parties, must become nonsuit. *Plaintiff nonsuit.*

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

STATE OF MAINE *vs.* AMOS C. BENNER.

Evidence. Practice.

It is in the discretion of the court to permit the counsel calling a witness to propose to him leading questions, and to cross-examine him, when he is an unwilling witness and adverse to the party by whom he is called.

The occasion for this permission is to be determined by the presiding justice, and the granting of it is not subject to exception.

The limit of cross-examination as to collateral matters, allowable by a judge at *nisi prius*, is matter of discretion.

When a witness, on whose evidence in part an indictment has been found, but who is called by the prisoner, testifies at *nisi prius*, differently from what he had done before the grand jury, a member of that panel is a competent witness to prove what he stated before that body for the purpose of contradicting and impeaching his testimony.

A witness cannot be cross-examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony in relation to such collateral subjects.

If the irresponsive answer of a witness is objectionable, the objection must be taken at the time, and the court should be requested to have it stricken out.

The statements of a witness, not under oath, are hearsay and receivable only to contradict what he may have said under oath, and to impeach his testimony, and not as evidence of the facts stated.

It is not error to say to the jury that their verdict is not final and irreversible, and that the evidence is to be reported to the governor and council for their consideration and examination, and that after revising the evidence they may order the execution of the sentence, or commute it, or pardon the offender.

When it is perceived that the court has misapprehended testimony, it is the duty of the counsel at the time to call its attention to the subject, that the correction may at once be made.

It is no ground of complaint that the judge states to the jury the positions of fact as respectively assumed, or claimed to exist, by the counsel on the one side or the other, that they may more distinctly perceive the precise issues presented for their decision. Indeed, it may be his duty so to do.

The utterance of falsehoods by the prisoner, by way of exculpation, the falsehoods being established by satisfactory proof, is universally recognized as circumstantial evidence tending to establish his guilt, the inculpatory force of which is to be determined by the jury.

A hypothetical statement, which pre-supposes as its basis that the issue has already been determined, is not an expression of an opinion "upon issues of fact arising in the case," within the act of 1874, c. 212.

The opinion for the expression of which a new trial is to be granted, must be a distinct and positive one, "upon issues of fact arising in the case."

On exceptions.

Indictment, charging that Benner, in the night time of the eighteenth of September, 1873, set fire to and consumed the dwelling house, owned and then occupied by Charles P. Holland, in Pembroke, in said county. The family then being in the house, this was a capital offence, under our statutes. The respondent was convicted. Numerous exceptions to the rulings at the trial, and to the charge to the jury, were taken. Fully to understand the first two it is necessary to transcribe a large portion of the direct examination of Henry J. Motz, called as a witness by the government. It must first be premised, however, that the respondent's wife left him and took refuge at Holland's, within a week of the fire; and that, when Benner went after her, Mrs. Holland remonstrated against Mrs. Benner returning with Mr. Benner, who became very much excited and enraged, and so conducted himself that a warrant was issued against him and one of two men who accompanied him and they were tried before Mr. Bailey, a trial justice, on the seventeenth day of September, 1873, and the prisoner's comrade (Bela Anthony,) was sentenced to pay a fine, but it was paid by Benner, who immediately signed a complaint against Holland for an illegal sale of intoxicating liquors; but after the warrant against Holland had been put into a constable's hands, and before it was served, Benner came to Mr. Bailey, paid for it and procured its recall, saying: "Perhaps you may want to

know why I wish to withdraw the warrant. I wish to punish him more than this." He inquired what the punishment would be, and on being told a fine of thirty dollars and costs, said, "it will not be enough," and asked "if he could not punish him more by getting him indicted." Being told he might, if he could get Holland convicted as a common seller or for keeping a tippling shop, but that it was doubtful if the facts would sustain either of those charges, he exclaimed: "Damn him, I want to punish him more!" The magistrate expostulated with him, telling him that Holland was a simple sort of a man, of no great information, an innocent fellow, and that he had better let it drop; but Benner said: "By God, I will have revenge for what he has done to me." Finding remonstrance useless, Mr. Bailey said no more, and Mr. Benner (and a man with him whom Bailey did not recognize) left Mr. Bailey's house, distant two or three miles from Holland's, at just fifteen minutes before nine o'clock as that gentleman (Bailey) noticed when he passed through his dining-room after closing the door behind them. Mr. Holland's house was discovered to be on fire between ten and eleven o'clock of that same night. Among the last articles carried out by Mr. Holland was his pendulum clock, which he laid down upon the grass, and it was stopped at five minutes of eleven. The precise moment of Benner's leaving Mr. Bailey's was impressed upon that gentleman's mind when he heard of the fire the next day. Mrs. Holland and a Mrs. Carter who was visiting her at the time of the fire swore to seeing Benner looking into the window of Mr. Holland's house about ten o'clock, just before they retired. Mrs. Carter first saw him and called Mrs. Holland's attention to him. Directly after this Mrs. Holland went up stairs to bed and told her husband that Benner was round the house, to which he replied she was always surmising something. Her last act before going up stairs was to wind the clock, and she noticed it was ten o'clock.

While Mr. Motz, the witness before mentioned, was under examination by the state attorney he was asked if he was at the trial of Benner before Mr. Bailey on the seventeenth of September,

1873, and if he saw the prisoner there. He replied affirmatively, and that he had a conversation with Benner, because he (witness) always talked with everybody he met. He was then interrogated as to whether or not the conversation was respecting Holland's wife, and responded that something was said by Benner; that she swore to a lie; should not come upon his premises; and if she came into his house he would kick her out of doors, "or something like that." He then testified to meeting the prisoner at a Mr. Anthony's in the evening after the trial, and to the conversation had there, in which Benner told about his going to Holland's after his (Benner's) wife and child, and having borrowed a revolver of Jim Robinson to carry with him there. The following colloquy then ensued:

Q. "Do you remember anything that he said about Mr. Holland, there at Anthony's?" *Ans.* "Yes. He said he thought Charles Holland told the truth as near as he (Benner) could tell it himself. He said he found no fault with him, and he never paid any money with so good a heart as he paid that fine."

Q. "What did he say about Mrs. Holland?" *Ans.* "I don't remember what he did say; but he did not like her so well as he did Charley, I can tell you that."

Q. "Did he make any threats against the Hollands?" *Ans.* "He made none against Charley Holland. He said Mrs. Holland should not come into his house."

Q. "Did he say anything about their buildings at Anthony's?" *Ans.* "I don't think he did say anything about his buildings."

Q. "Don't you remember anything he said about Mrs. Holland at that place?" *Ans.* "I don't remember the words, but he didn't like her very well. It has been so long I can't remember the words."

Q. "Tell it as near as you can, Mr. Motz." *Ans.* "About as much as I heard him say was that she swore to a lie, and she should not come to his house again; if she did, he would kick her out."

Q. "Did he say anything about burning?" *Ans.* "Well"—

[Objection interposed by Mr. McNichol, who said to the court: "Does your honor admit that?" and the judge replied: "Yes, to this witness. He is an unwilling witness."] The question was then repeated, in the same words. *Ans.* "Well, my memory is so poor I don't want to say anything about it. We talked there a good deal, one way and another. I don't know"—

Q. "What did he say, if anything, about burning? Give the substance." *Ans.* "I think he did not say nothing about burning the house."

Q. "Well, about burning Mrs. Holland then?" [Objection interposed.] *Ans.* "I don't think he said anything about that."

Q. "Did he say anything about burning anything connected with the Hollands?" *Ans.* "Well, not really; I don't think he did. He kind o' laughed and said, 'Bela, if they did take $15 out of us, we will live on roast beef the rest of the winter;' or something like that."

Q. "Can you recollect anything that was said about burning?" *Ans.* "I don't think I can. I don't seem to recollect."

Q. "Was nothing said about burning there by him that night?" [Objected to.] *Ans.* "I don't know but he might have said it was no matter if the damned old coop was burned up, but I did not hear him say that he would burn it up. I guess that was about all that was said."

Q. [By the court.] "Do you know that he did say that about the old coop?" *Ans.* "Well, I should say that he did. I guess he did."

Q. "Now, what else did he say about the coop, or burning Mrs. Holland?" *Ans.* "I did not hear him say anything about burning Mrs. Holland."

Q. "Did he say, 'damn her, he wished she was burned up?'" *Ans.* "Well, it was said there, but I don't remember of him saying it. There was something of that kind said there. That comes pretty nigh to it. The prisoner did not say it. The prisoner was present."

Q. "Did he say it would be better for her, or the world, if she was burned up?" *Ans.* "No, sir."

Q. "Did he say what he would do if his wife went there again?" *Ans.* "He said she should not go there. I don't know as I can tell you what was said. There was a good deal said."

Q. "I am only asking what he said upon that point?" *Ans.* "He said she should not go there again."

Q. "Did he say what he would do, if she did?" [Objection made.] *Ans.* "I want to think—I have nothing against anybody. I think there was something said about burning the damned old coop up, but I don't know who said it. I don't think I heard him say so."

Q. "Did he say, 'Susie, if you go there again, I will burn the damned old coop up?'" [Objection noted.] *Ans.* "Well, I think he did."

The direct examination was pursued till it was drawn out that the witness went straight from the trial at Bailey's to Eben Anthony's, where Bela Anthony and his wife lived, and was there two hours, during which the talk he heard was had; and that the next morning he went half a mile, to the place where he supposed Holland would be at work, and failing to find him went again in the evening and staid till nine o'clock, but he did not come. The following questions were then put to the witness:

Q. "What did you go to see him for?" *Ans.* "I wanted to have a little talk with him."

Q. "For what purpose?" [Objected to and excluded, unless connected with the case.]

Q. "Did you go to see Charles Holland in consequence of what you heard Benner say the night before at Eben Anthony's?" *Ans.* "Yes, I did."

Q. "Did you go to see him in consequence of what you heard the prisoner say about burning?" [Objected.] *Ans.* "No, sir, I did not hear him say anything but—Did you want me to tell you what I went for? I went up the next morning, and he was not there; and I went the next night, the night the house was burned, to tell him that if I was him, I would get my hay and barn insured."

Q. "And was that what you went in the morning for?" *Ans.* "Yes; and I went at night for that purpose."

To the overruling of their objections to the foregoing interrogatories the respondent's counsel excepted.

From the testimony of John H. Benner, brother to the defendant, and summoned by him, it appeared that it was he who called with the respondent at Mr. Bailey's upon the night of the fire; and he swore that he took Cris. (the defendant) to Pembroke and carried him nearly home; and that, from his statement, they must have been several miles distant when the fire was set, and that they did not pass Holland's house that night, returning home (as they came) by a shorter road. In the course of his testimony he volunteered a remark as to what it was before the grand jury; and at a later stage of the trial, Charles Cary, foreman of the grand jury which found the indictment, was called to prove that John H. Benner and Bela Anthony made statements before the grand jury very materially different from, and entirely irreconcilable with, those made when testifying for the defence upon the trial. To the admission of the testimony of Mr. Cary, as to what transpired before the grand jury, the defendant's counsel strenuously objected, but it was received.

It came out in evidence that a civil action had been commenced by Charles P. Holland against Amos C. Benner, to recover the value of the property destroyed by this fire. On cross-examination, Holland was asked if he did not tell Mr. Lincoln that he did not direct these proceedings, and that he was going down to stop them. His reply was that he did not say so; and the defendant while putting in his testimony on his part, called Mr. Lincoln, and proposed to show by him that Holland did say this to Lincoln; but the court excluded it; saying to counsel that the inquiry was collateral, and the answer obtained binding.

Emilus W. Carter, a neighbor of Holland's, called in defence, testified to being at the fire till the house burned down. He was asked if anything was said there that night about seeing Benner there; but the state attorney objecting, he was not permitted to

answer. He was then asked if he heard anything said about seeing anybody there; and no objection being interposed, replied that he did not. The defence excepted to the exclusion of the former question.

Jacob R. Sinclair, called in rebuttal by the government, testified to fishing at a designated bridge on the night of September 18, 1873, with other persons, so that he could have seen Benner had he passed that way, as claimed by him and his brother John. One of the two persons who were with Mr. Sinclair testified to seeing and talking with Benner upon that bridge about ten o'clock that night, but Mr. Sinclair and his other comrade denied it. The defence, to show Sinclair might have been mistaken as to the night, asked him if he did not go to his home, some distance off, after the mill in which he worked was closed in August, and he said that he went home on Saturdays and returned to work in the mill on Monday. The question was then put: "Didn't you come back and go into that mill Tuesday?" *Ans.* "If they sent word for me to come I did."

Q. "You didn't come till they sent for you?" *Ans.* "If I was fishing"—Here the court interposed with the remark that it was no matter where he was at any other time if he was there on the night of the eighteenth of September; to which exclusion and remark the defendant excepted.

Exceptions were also taken to the following passages of the charge to the jury: "Now, gentlemen, it is contended here that if the prisoner is convicted he goes to the gallows. Well, it is only one step in that direction, and that step may be retraced. It does not follow that he will be hung if your verdict should be against him, therefore your responsibility is not so great as contended. Other tribunals have responsibilities. The court, yourselves, and the chief executive of the state, all share the responsibilities; because if your verdict should be guilty, this may come before the court, and the whole of the evidence be reviewed, and if they are satisfied your verdict is wrong they will set it aside. But if not so satisfied, then the sentence prescribed by law is pro-

nounced, and that is that he shall be hung. But the responsibility does not stop there. The whole of the evidence, according to the law of Maine, has to be reported to the governor and council. Every particle of the evidence must be reported and examined, and if the governor is satisfied that the verdict is not right, or not clearly right, he is authorized—and the statute says after the person has been imprisoned for one year—that he shall, after revising the evidence, then either pardon, or commute, or execute the sentence. One of these three things it is his imperative duty to do. He may pardon, if he thinks the testimony not sufficient to warrant a verdict; or may commute to imprisonment for life; or issue his warrant for execution, as prescribed for this offence. Now, gentlemen, we know, notwithstanding that imperative declaration of the statute, that statute has been disregarded for a series of years. Why it has been so, it is not for me to say. There are a number of individuals in the state prison, who have been there for years, under the sentence of death, and there has been no pardon, no commutation, and no execution. . . . . So, gentlemen, you see you are only one of the co-ordinate tribunals, sitting in the administration of justice. Now, gentlemen, these remarks are general, and have no particular application to this case, only to show that your jurisdiction is in aid of the other tribunals of the state, and that if you make a mistake it can be remedied; and that the individual, if convicted, does not go directly to the gallows; it is a step in that direction which may be retraced."....

"It seems that on the evening of the eighteenth of September last he (the prisoner) was seen at Mr. Bailey's, the magistrate's, and you recollect the circumstances why he was there. Now, at the time he started from that place, Mr. Bailey says it was fifteen minutes before nine in the evening. Where did he go? Did he take the route passing by Holland's and fire the house, and then go in a direct course home, or did he take another route? Now, the theory of the government is, and they have introduced testimony tending to show it, that he took the route passing by Hol-

land's house, fired the building, and arrived home after the building was in flames. On the other hand, it is contended in the defence, that he took another route, which did not pass that house, and was seen at various places, at particular times, and arrived home about ten o'clock, before the house was seen to be on fire. There is the question: and after all, it depends principally upon the question of time. If he arrived home at ten o'clock, and before this house was consumed, or in flames, of course it is not contended that he can be the guilty party. On the other hand, if he has falsified, and it follows from the testimony that he arrived home long after the house was consumed, it is a circumstance and strong evidence of his guilt, because it is a fact that if a man undertakes to prove that he was in a different place, and the testimony shows to the contrary, it is a circumstance, though not conclusive of his guilt. Then, gentlemen, consider the testimony in relation to those two theories, that on the part of the government and on the part of the defence. Look at all of the testimony, and scrutinize it carefully. It is conflicting. Witnesses upon the stand make certain statements, and other witnesses are called to swear that they made other statements at other times, which goes to discredit their statements. The prisoner and his brother John are introduced. If the prisoner is guilty, you must come to the conclusion that his brother John was a confederate. You see, therefore, how they are situated, and the motive to falsify, if he is guilty. The prisoner is a competent witness, made so by the law; still, the force and effect of his testimony is wholly for your consideration. You may disregard it entirely, or you may give it full weight. It is altogether a subject for your own consideration.

Then, gentlemen, there is another question, and that is whether the fire was accidental. If it was an accident, why then the prisoner could not have set it. . . . . Then, it is contended that there were two individuals who saw Benner there before the fire on this evening, and you have heard the testimony and the arguments in relation to that. If you believe that he was there, then perhaps you would not hesitate to believe that he was the perpe-

trator of this crime. Then, it is said that he made threats to burn the building. When he was at Bailey's, he swore, by God, that he would have revenge, on the same night that the building was burned, and it is contended that he carried the threat into execution. You have heard the testimony and the arguments, and judge you whether that threat was executed or not. The defence then introduced the prisoner's good character. You have heard that, and there was no controversy about it," &c., &c. . . . . .

Joseph Granger and *A. McNichol* for the respondent.

The counsel argued in support of their exceptions to the leading questions asked Motz by the state attorney, and the inquiry as to the purpose for which that witness tried to find Holland; to the introduction of Cary's testimony as to what was stated before the grand jury, citing 1 Greenl. on Ev., § 252; Roscoe's Crim. Ev., 150; 2 Starkie on Ev., 232; Bishop's Crim. Proc., § 738; *McLellan* v. *Richardson*, 13 Maine, 82, and *State* v. *Knight*, 43 Maine, 11 and 128; to the exclusion of Lincoln's statement of what Holland told him about seeing Benner, and of Hobart and Gardner's testimony as to what Holland said about suspecting anybody of being the incendiary—(which the judge excluded with the remark, "That is not material");—and of Carter's statement whether or not anything was said at Holland's at or after the fire (on that night) about seeing Benner there; to the exclusion of and comment upon question proposed to Sinclair; to so much of the charge as tended to diminish the juror's sense of responsibility; to the reference to the statement of the time, as fixed by Bailey; to the assumption by the court that the government had a theory which the testimony tended to prove; to the statement that, after all, it was principally a question of time; (as it was claimed these last two matters were questions of fact to be submitted to the jury without comment, under the act of 1874, c. 212); to the instruction as to the effect of its being satisfactorily proved that Benner lied about his whereabouts and the time of his arrival home; to that saying that if the prisoner was guilty, his brother John must have been his confederate, &c.; to that

stating that a belief that Benner was seen at Holland's that night might lead to a conclusion of his guilt; and to the assumption, as an undisputed fact, that the prisoner did say at Bailey's that by God, he would have revenge, &c.

H. M. Plaisted, attorney general, for the state.

The attorney general argued ably and elaborately in support of the rulings and instructions of the court; citing in support of his method of examining the government witness, Motz; 1 Starkie on Ev., 132; 1 Philips on Ev., 205; 2 Graham & Waterman on New Trials, 694; *Stratford* v. *Sanford*, 9 Conn., 275.

As to the right to introduce Cary's testimony as to the evidence before the grand jury he cited; *Commonwealth* v. *Hill*, 11 Cush., 137; *Commonwealth* v. *Mead*, 12 Gray, 167, and cases there cited; *Burnham* v. *Hatfield*, 5 Blackf., (Ind.,) 21; *State* v. *Broughton*, 7 Iredell, (No. Car.,) 96; *Sands* v. *Robinson*, 12 Smedes & Marshall, (Miss.,) 704; Low's case, 4 Maine, 440; 1 Bishop's Crim. Proc., § 859, 729; 1 Archbold's Crim. Prac. & Plead., 488, and note.

To the propriety of the exclusion of testimony to contradict upon collateral matters, elicited by cross-examination; *Ware* v. *Ware*, 8 Maine, 42; *Page* v. *Homans*, 14 Maine, 478; *People* v. *McGinnis*, 1 Parker's Crim. Rep. 387; *Seavey* v. *Washburn*, 19 N. H., 351; *State* v. *Theban*, 30 Vt., 100.

The respondent was not injured by the exclusion of the question put to Carter about Benner being seen at Holland's upon the night of the fire, since it was embraced in the next question asked and answered without objection. *Fogg* v. *Babcock*, 41 Maine, 347; *Pope* v. *Machias Water Power Co.*, 52 Maine, 535.

The remarks of the judge in his charge, as to the divided responsibility of the jury were of same purport as those of Judge Bigelow, in the Hersey trial, and of Judge Walton in the Lowell case, and no stronger in expression.

Appleton, C. J. Numerous exceptions have been alleged to the rulings and instructions of the justice presiding at the trial of

the respondent. Those exceptions we propose to consider and discuss in the order of their presentation.

I. Henry J. Motz was called as a witness by the state. The objection is taken that he was cross-examined by the attorney general, and that leading questions were proposed to him.

The answers of a witness, honest and favorable to the party calling him, will obviously depend on the questions proposed. But the party calling will only propose those favorable to his interests. His interrogation will naturally be one sided and the answers partial and incomplete—the inevitable result of incomplete and partial inquiry. Interrogation *ex adverso*, then, is indispensable—that thereby the errors of indistinctness, incompleteness, or incorrectness may be removed and the material facts developed fully, distinctly and correctly.

The witness called, being favorable to the party calling him and dishonest, the necessity of interrogation as a means of extracting the truth is at once perceived, and its value indefinitely increased. Is the witness indistinct, the needed inquiries remove all indistinctness. Is he incomplete, interrogation is the natural and obvious mode of obtaining the desired fullness and completeness. Is he incorrect, inquiry is the only way of detecting and rectifying incorrectness. Important as is the whole truth to correct decision, its attainment will be endangered unless the right of interrogation and cross-interrogation be conceded to the parties litigant to enable them to elicit such facts as from inadvertence, want of memory, inattention, sinister bias, or intentional mendacity may have been omitted.

But it may happen that the witness may be adverse in sympathy and interest to the party by whom he is called. Cross-examination of an opponent's witness is allowable. Why? Because, being called by him, it has been imagined that there was some tie of sympathy or interest, which would induce partiality on the part of the witness in favor of the party, who called him. If the witness is from any cause adverse to the party calling him, the same reasoning which authorizes and sanctions cross-examination, more or less rig-

orous, equally requires it when the party finds that the witness, whom the necessities of his case has compelled him to call, is adverse in feeling, is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be, if the witness is friendly, to remove uncertainty and indistinctness, and to give fullness and clearness, doubly important is it, if the witness be dishonest and adverse, to extract from reluctant lips, facts concealed from sympathy, secreted from interest, or withheld from dishonesty. Cross-examination may be as necessary to elicit the truth from one's own, as from one's opponent's witness. When the necessity exists, equal latitude should be allowed in the one case as in the other. The occasion for the exercise of this right must be determined by the justice presiding. It can be by no one else. Its allowance is a matter of discretion, and not the subject of exception.

The presiding justice, finding Motz to be an unwilling witness for the state, allowed leading questions to be proposed; and permitted him to be cross-examined by the counsel calling him. This was in manifest furtherance of justice and in entire accordance with judicial decisions. *Moody* v. *Rowell*, 17 Pick., 490; *York* v. *Pease*, 2 Gray, 282; *Green* v. *Gould*, 3 Allen, 465.

II. Where a witness, called by a party, appears adverse in interest to the party calling him, the presiding justice may, in his discretion, permit the party so calling him to ask leading questions. This permission is discretionary on his part, and not subject to exception. The presiding judge seeing and hearing the witness, and observing his manner, is best able to determine whether he is hostile to the party calling him. In the present case, the presiding justice did determine that Motz was an unwilling witness, and one to whom leading questions might properly be proposed and his conclusion is not open to revision.

The answers of Motz being objected to, it may not be amiss to note what preceded the remark of the witness which is alleged as a ground for setting aside the verdict. The witness stated without objection that he went to see Holland and have a little talk

with him. He was then asked: "For what purpose," he wanted to have a talk with him? This was objected to, and the objection sustained, "unless connected with the case." The witness was then permitted to say that he saw Holland in consequence of what he heard the night before. But this was harmless and immaterial. The court admitted these immaterial inquiries to ascertain if the former question had "any connection with the case," that being the purpose for which they were proposed. The witness had said previously that he thought the prisoner had said he would "burn the damned old coop up."

The witness was then asked: "Did you go to see him in consequence of what you heard the prisoner say about burning?" To this question an objection was noted. The answer was: "No, sir: I did not hear him say anything." This constituted a full and complete answer to the question and furnishes no ground whatever of complaint.

The witness then, of his own motion, says: "But did you want me to tell you what I went for? I went up the next morning to see him, and he was not there, and I went the next night, the night the house was burned, to tell him that if I was him I would get my hay and barn insured." The question proposed by the government had been answered. The question proposed by the witness was not objected to nor was his answer thereto. The counsel for the prisoner should at once have objected to the inquiry, and moved to have it stricken out.

The court was not in fault. The counsel for the prisoner might have objected to the irresponsive remarks of the witness. He neither objected to them, nor moved to have them stricken out. There is rarely a trial in which witnesses do not make remarks which, upon strict law, are inadmissible. The proper course is to act at once, and object.

But if counsel allow irresponsive answers to be made without moving to have them stricken out, and without objection, and still can have exceptions, no verdict can be safe. The judge is not notified that the counsel will except to the testimony and has

a right to assume that no objection is relied upon, as none is made. If it had been, we must assume the ruling would have been correct. To permit this sort of practice would be to defeat the very ends of justice, and to encourage trickery and fraud. "Not having disclosed the character and ground of his objection," as Barrows, J., remarks, in 61 Maine, 175, "at the time, when, if it had any substance, he should have done, he cannot be permitted to wait with it as a cause for a new trial. Honest dealing with the court and the opposite party in a case, civil and criminal, requires that where an objection is made to a piece of testimony, apparently relevant and competent, . . the objection should be specifically set forth." But here no objection was even made. No action of the court was asked for; nor was the judge's attention called to the matter as it should have been.

III. John H. Benner, a brother of the defendant, was summoned as a witness and testified before the grand jury by whom the indictment was found. On the trial at *nisi prius* he was called as witness by and testified in favor of the prisoner. His testimony was material and exculpatory. The government called the foreman of the grand jury, by whom it was proved that the witness, in his examination before that body, had made statements under oath adverse to, and materially different from those to which he testified before the traverse jury. To this testimony the counsel for the prisoner objected.

Truth is desirable, from whatever source obtained. It is the very basis of justice. The exclusion of evidence is the exclusion of the very means of arriving at just conclusions. Exclude all evidence and the sacred lot alone remains as the foundation of judicial decision.

It is a rule of the common law, that the testimony of a witness may be contradicted by different and varying statements made at other and different times, either under oath or not. The evidence to the introduction of which exception is taken, is of that character. The truth from the lips of a grand juror is as important as from those of any other person. When his testimony is required in

the administration of the law, why should not his testimony be received?

A witness testifies to one set of facts before the grand jury. Before the traverse jury he testifies to another statement, differing from, and contradictory to his former statement in every essential particular. He has committed perjury in the one case or the other.

Truth is as desirable before the grand jury as before any judicial tribunal. The whole criminal jurisdiction of the state rests primarily with them. Indictments are found and trials had in consequence of their proceedings. Is perjury no offence in their presence? Can it be committed before them alone without infamy, and without fear of punishment? Is the grand inquest of the county, whose duty it is to "diligently inquire and true presentment make of all matters and things given" them "in charge," to be prohibited from the investigation of crimes committed in its presence?

The witness, it may be, told the truth before the grand jury. On the trial, suborned, seduced by sympathy, or swerved by prejudice, his statements false, perjurious, tending to the exculpation of the guilty prisoner, are offered in evidence. Are they to pass without contradiction or refutation, when the means of contradiction and refutation are at hand? Is the guilty prisoner to escape? The witness may be impeached by other and opposing statements made elsewhere. Is a grand juror any the less reliable, or any the less competent as a witness, than any other citizen, who may not have been a member of that body? Is a guilty and perjured witness to triumph in his crime? Or shall all the facts necessary to a just decision be disclosed, and the right prevail? The witness may be false against the prisoner. Is innocence to suffer the penalty of guilt when the testimony necessary for its proof is so readily accessible?

It is an axiom in the law of evidence that no testimony should be rejected unless greater evil is seen as likely to arise from its admission than from its rejection. What possible evils can arise from this evidence? Wherein does the testimonial trustworthiness of a grand

juror differ from that of any other citizen? What matters it whether he heard the contradictory and impeaching story of the witness in the street, or under oath and in the deliberations of the grand jury room—save that in the latter case it would be uttered under the highest sanctions for testimonial veracity. Let this evidence be excluded, and to the precise extent of the exclusion, the means for arriving at correct conclusions are withheld from the consideration of the jury. Injustice is done. The guilty escape. The innocent are punished. Such are, or may be, the results from the exclusion of relevant and material testimony.

It would be a strange and anomalous principle of public policy, which should specially clothe with impunity crime committed in the presence of a body impannelled to inquire into its existence, and when found to exist, to present it for punishment. It would be a discreditable denial of justice, which should exclude material and relevant testimony, whether needed for the conviction of the criminal, or required for the exculpation of the innocent. Where would be the policy of licensing mendacity without the fear of contradiction or of punishment?

It is apparent, therefore, that so far as the great end of judicial administration—justice—is concerned, there can be no principle of public policy requiring the exclusion of the evidence by a grand juror of the testimony of a witness before his body whenever it may become necessary for the ascertainment of the truth.

But it is urged that the secrets of the grand jury must be protected—that the oath of the grand juror prohibits their utterance. The juror is sworn the state's counsel, his fellows', and his own, to keep secret. But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights. *Burnham* v. *Hatfield*, 5 Blackf., 21. "It seems to us," observes Ruffin, C. J., in the *State* v. *Broughton*, 7 Iredell, 96, "that the witness (who testifies before the grand jury) has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as depos-

ing under all the obligations of an oath in judicial proceedings and, therefore, that the oath of the grand juror is no legal or moral impediment to his solemn examination under the direction of a court, as to evidence before him, whenever it becomes material to the administration of justice." To the same effect was the decision of the supreme court of Indiana in *Perkins* v. *The State*, 4 Ind., 222. In *Com.* v. *Hill*, 11 Cush., 137, a member of the grand jury which found an indictment was held to be a competent witness on trial to prove that a certain person did not testify before the grand jury. In *Com.* v. *Mead*, 12 Gray, 167, it was held that the defendant for the purpose of impeaching a witness for the commonwealth, on the trial of an indictment, might prove that he testified differently before the grand jury. So, if to impeach a witness, evidence is offered of statements made by him before the grand jury, he may testify in rebuttal what those statements were. *Way* v. *Butterworth*, 106 Mass., 75. When a witness testifies differently in the trial before the petit jury from what he did before the grand jury, the grand jurors may be called to contradict him whether his testimony is favorable or adverse to the prisoner. So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses. Such seems the result of the most carefully considered decisions in this country.

In *Low's case*, 4 Maine, 440, it was held that grand jurors might be examined as witnesses in court to the question whether twelve of the panel concurred or not in the finding of a bill of indictment. If the counsel of the grand jurors is to be kept secret at all events, the votes of the grand jurors are certainly as much a matter of secrecy as anything done or testified to before them. The action of a grand juror is more especially a matter of his own counsel than any statement of any one else before his body. The assertion that less than twelve concurred in an indictment involves necessarily the assertion of who did and of who did not so concur.

The opinion of the court demonstrates the propriety of the reception of the evidence offered. But, logically, it was admissible

only because otherwise injustice would ensue; because the requirement of secrecy is to be subordinated to the higher demands of justice. In *McLellan* v. *Richardson*, 13 Maine, 82, it appears that one of the grand jurors was a witness, and it would seem testified to facts occurring before the grand jury. "With regard to the course pursued in the examination of the grand jurors," remarks Weston, C. J., in delivering his opinion, "it must be understood to have been assented to by the counsel for the defendant, and therefore furnishes no ground of exception on his part." On the hearing of the case before the full court the defendants' counsel offered to prove that Robert Dunning, one of the panel before whom the case was tried, had been a member of the grand jury by whom the trespass in issue had been investigated; and to prove by the county attorney that the subject-matter of the present matter had been investigated by the grand jury. But the court refused to set aside the verdict for such cause. "Whatever examination was gone into before the grand jury," remarks Weston, C. J., "no bill was preferred against the defendant. It is not then to be presumed, that any one of them was satisfied of his guilt. It is further stated and not denied, that the jurors generally before the trial commenced, were inquired of, whether they had formed any opinion or were sensible of any bias upon their minds, in relation to the case. Upon such inquiry every juror conscious that he did not stand indifferent, should, and it may be presumed would, disclose the fact." The conclusion of the court, it will be perceived, is based upon the conduct of the juror under the circumstances. "Proof that the subject-matter of the present action had been investigated by the grand jury" would have been hearsay—and would have been ineffectual to disturb the verdict and therefore was properly excluded. In *State* v. *Knight*, 43 Maine, 128, one Rice, a witness for the state, on direct examination, testified "that on the afternoon of the day succeeding the death of the deceased he saw something on the sleeve of the shirt of the prisoner, which he thought was blood; and on cross-examination, that he was a witness before the magistrate and before the coroner's inquest. In

answer to the prisoner's inquiry whether he had testified before, that he saw blood on the prisoner's wrist, he answered in the affirmative; and then the question was proposed in behalf of the prisoner, if this was the first time he had so testified except before the grand jury. This question being objected to, was excluded. It is not controverted by the prisoner's counsel that a witness is not permitted to disclose evidence before the grand jury. It will be observed that no authorities were cited in reference to the question now under consideration; that no discussion was had of the principles involved, but that the counsel for the prisoner assented to the principle that, witness is not permitted to disclose evidence before the grand jury and the court without consideration or investigation accepted the surrender. But it is to be observed, that, irrespective of the consideration already discussed, the question was properly excluded on the "established rule, that a witness cannot be called upon to state his testimony given on a former occasion in a trial where the same question is relevant."

The question we have been considering was neither argued, discussed or decided in any case in this state. The decision in *Low's case* can only be sustained upon principles, which sanction the ruling on this point in the case at bar. The two other cases to which we have referred were decided upon satisfactory principles. They cannot be considered as adverse to the conclusion to which we have arrived. Indeed the question here raised has never been authoritively decided before in Maine.

IV. The counsel for the prisoner asked Holland when he was on the stand, whether or not he ever told the witness Lincoln that he did not authorize the commencement of an action against Benner. He then proposed to Lincoln this question; "what did he (Holland) say about commencing an action against Mr. Benner?" An objection being interposed, the court remarked "that was collateral, and you must abide by it. I exclude it."

This ruling was correct. The inquiry of Holland was in relation to a collateral matter—what he said to a witness. The rule is well settled that a witness cannot be cross-examined on collat-

eral matters in order to contradict and impeach his testimony. What Holland said to another witness about a suit was clearly collateral. *Bell* v. *Woodman*, 60 Maine, 465; *Coombs* v. *Winchester*, 39 N. H., 13; *Page* v. *Homans*, 14 Maine, 478.

V. The answers to the questions proposed to a witness as to whether Holland said he mistrusted any one—or had suspicion of any one—were properly excluded. Holland was a witness. What he said to any one was hearsay. His answers were not sought for the purpose of contradicting any previous statements he may have made. They were but hearsay and inadmissible.

VI. This question was proposed to Emilus W. Carter: "Was there anything said there that night about seeing Benner there?" and the answer was excluded. The question seeks for hearsay. Nothing indicates that the answer would be proper. But if proper, it would be immaterial; for to the next question he answered that he heard nothing said.

VII. Before an exception that a question is not answered can be sustained, it must appear that the inquiry was pertinent. It does not appear that the question to Jacob R. Sinclair—"you did not come till they sent for you?" was either pertinent or material. It was cross-examination. The limits to collateral cross-examination are determinable by the presiding justice.

VIII. The presiding justice after calling the attention of the jury to their duties and responsibilities, briefly alluded to those of the executive, calling their attention to the duty of the governor and council to revise the evidence, and after revision, their power to pardon, commute or carry into execution the sentence of the law.

The object of the presiding justice was to show that the verdict of the jury was not final and irreversible, that it does not take away life. There was no misstatement of the law—nothing of which the prisoner can justly complain.

The allusion to the fact that in times past there had been repeated omissions to inflict the penalty of the law was by way of suggestion to the executive that the law had been disregarded, not by way of intimation that such would be the case in the future.

IX. Complaint is made that the testimony of the witness Bailey is inaccurately stated. It is denied that such is the case. But suppose it to be so, the counsel for the defence must have perceived it, and it was his duty to call the attention of the court to the fact, if in any instance from misapprehension the testimony of a witness had been erroneously stated. If there was a stenographic reporter, his minutes were forthcoming for the correction of any mistakes in addition to those of the counsel. But on examining the evidence as reported, no error is perceived.

X. It is a part of the duty of a presiding justice to call the attention of the jury to the several positions respectively assumed by the counsel on the one side and the other, so that thereby the jury may the more distinctly perceive the precise question submitted to them for their determination. In doing so, no opinion was given as to the facts on the one side or the other. No preponderance is given to either the theory of the counsel for the prisoner or for the state.

XI. The remark that the question depended principally upon that of time, was no expression as to the guilt or innocence of the prisoner. The remark that the question depended on space would have been equally true and unobjectionable. If the crime of arson was committed it was essential that the incendiary should be at the place at the time of its commission. The time and place where the accused was when the fire was set, if it was set, were elements material to the establishment of guilt.

XII. The remark that if the prisoner falsified as to time, it was a circumstance strongly evidentiary of guilt, was not merely unobjectionable, but strictly and accurately correct. Crime is ordinarily proved by circumstantial evidence. Truth is the reliance of innocence. Falsehood is the resort of crime. All true facts are consistent with each other. If the prisoner was innocent, there was no reason for the withholding a true fact. Still less was there for uttering a falsehood. Falsehood is evidence of crime. Every falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force. A

false *alibi* disproved is a circumstance indicative of guilt, though as the presiding justice very justly remarked, not conclusive.

XIII. The court instructed the jury that the prisoner was a competent witness, but that the force and effect of his testimony was wholly for their consideration; and remarked that "if the prisoner is guilty, you must come to the conclusion that his brother John was a confederate." The justice of the remark is abundantly manifest from the testimony of the brothers. The remark was hypothetical, not positive. It was based hypothetically upon their finding the prisoner guilty, as to which no opinion whatever was expressed. The issue before the jury was as to the guilt or innocence of the prisoner. The guilty confederacy of the brother was not a fact for the determination of the jury. If the jury found the prisoner innocent or guilty they had fully discharged their duty. Nothing more remained for them to do. Whether the brother was or was not a confederate was not the subject of inquiry on their part.

XIV. In the course of the charge, the presiding justice observed as follows:—"Then it is contended that there were two individuals who saw Benner there before the fire on this evening, and you have heard the testimony and arguments in relation to that. If you believe he was there perhaps you would not hesitate to believe that he was the perpetrator of this crime. Then it is said that he made threats to burn the building, &c., and it is contended that he carried that threat into execution." The prisoner denied his presence at the house of Holland at or near the time of the fire. Two witnesses on the part of the state testified that he was there. If the accused was there, then in denying the fact he was guilty of exonerative and perjurious falsehood. But falsehood—exonerative and perjurious falsehood is evidentiary of guilt. Such is the rule of law. No opinion as to the fact of guilt was given. No assertion as to its existence was made. "Perhaps the jury would not hesitate," implies that perhaps they might hesitate. Whether they would or would not "hesitate to believe that he (the respondent) was the perpetrator of the crime," was the question

submitted to the jury and not withdrawn from their consideration by any assertion of fact, or expression of opinion.

The statute of 1874, c. 212, requires that "the presiding justice shall rule and charge the jury, orally or in writing upon all matters of law arising in such cases (jury trials) but shall not during the progress of the trial, including the charge to the jury, express an opinion upon issues of fact arising in the case." As the court are to rule upon matters of law arising in the case, it will be their duty to state the principles of law applicable to the different phases it may present. As they are to charge, it is incumbent upon the court to call the attention of the jury to the evidence on the one side and the other. Indeed, in a long and complicated case, the jury taking no minutes of the evidence, the result would be somewhat a matter of chance, or dependent on the skill and eloquence of counsel rather than the merits of the cause, unless their attention was directed to the issues of fact respectively raised and to the evidence bearing upon those issues. The statute contemplates that the judge shall charge the jury subject only to the prohibition that he shall not "express an opinion upon issues of fact arising in the case." With the exception of this limitation, there is no restriction whatever upon the rights, duties or powers of the court in the trial of a cause. That the presiding judge may state the grounds respectively taken by counsel—that he may rule the law as applicable to the hypothesis assumed by the one and the other is assumed in the idea of a charge. The authoritative expression of opinion "as to the issues of fact arising in the case" is the extent and limit of the prohibition.

The correctness of the charge is not to be determined by mere isolated remarks without reference to their connection with what precedes and follows. It must be regarded as a whole. Upon a careful examination, no error is perceived in the legal principles therein stated. There is no judicial expression of opinion "upon issues of fact arising in the case." No fact was withdrawn from the consideration of the jury. The force and effect of the testimony—the guilt or innocence of the prisoner—were explicitly and

fully submitted to the judgment of the jury, and upon them must rest the responsibility of their conclusions.

Exceptions overruled.

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

JOSEPH GRANGER *vs.* PETER AVERY.

Construction of grants from Massachusetts.

The title of the government is superior to that of the aborigines.

A township bounded "easterly and northerly on Schoodiac river" carries the grant to the middle thread of the river above tide waters.

The owner of land on both sides of a river, above tide waters, owns the islands therein, to the extent of the length of his lands opposite to them.

ON REPORT.

Trespass quare clausum, commenced by writ dated December 16, 1854, for breaking and entering the plaintiff's close in Baileyville, in said county, "being an island in the St. Croix river called and known as Grass Island, part of lot number fourteen in Baileyville, according to the survey of B. R. Jones," and cutting and carrying off the grass, &c. The trespass was alleged to have been committed on the sixteenth day of December, 1848, and on divers days between that day and the date of the writ. The defendant pleads the general issue, and by brief statement justified the taking as agent of the state for the Passamaquoddy tribe of Indians, not only under their original title (which he claimed had never been extinguished) but also by a treaty with and conveyance from the commonwealth of Massachusetts, made September 29, 1794, by which their title was confirmed; that they have ever been in the actual possession and occupancy of the same, and that the plaintiff never was possessed of said island. Mr. Granger filed a counter brief statement, containing a general denial of the facts set up in defence and averring that he and his

predecessors in the same right had had open, notorious, exclusive, peaceable and adverse possession of the island for more than sixty years before the bringing of this action. He introduced a copy of a deed of the commonwealth of Massachusetts to William Bingham, dated January 28, 1793, and recorded September 12, 1794; and proved that township No. 7, now called Baileyville, was included in this deed; that a survey, called Benjamin R. Jones' survey, was subsequently made of the river lands and embraced lot No. 14; that the proprietors of Baileyville conveyed this lot (No. 14) to William Vance, by deed of July 13, 1834; Vance to Robinson and Granger, by deed of November 27, 1835; and that Robinson conveyed his interest to Granger, October 11, 1837. It was admitted that by virtue of these deeds, Mr. Granger owns the whole of lot No. 14, and is the riparian proprietor on the other (or New Brunswick) side of the river, opposite this island, having purchased what was known as "the Bailey rips' mills" in 1835 and 1837, (by the deeds aforesaid) and the possessory rights of Joseph and William Thornton, then in occupation of the island, claiming to own it. The sole question was whether or not Mr. Granger owned the island by virtue of his ownership of the river's banks upon both sides of it. Mr. Granger testified that nobody ever disputed his title to Grass Island, except persons claiming under the Indian agent; and the first he knew of that was when the grass was cut, under this claim, by two young men named Daggett in 1842; that he sued them for the trespass and obtained judgment and execution by default; that one other year, prior to 1848, the grass was cut by one Dewey but not removed by him, but by the witness; that from 1848 to 1854 (the time embraced in the declaration) one Michael Casey cut the grass under a claim of title derived from the defendant as Indian agent; and that in 1854 the plaintiff made a formal entry to purge this disseisin (if it amounted to one) and then brought this action, which is now submitted upon a report of the evidence to the determination of the full court.

The island is about sixteen rods wide and about sixty-five rods long, while lot 14 is only fifty rods long; so there are fifteen rods

not covered by the deed of No. 14; but Mr. Granger claimed the island by possession, as well as under these conveyances. He conceded that the deepest channel, and most current, were on the New Brunswick side, but that it was wider between the island and the western bank than from the island to the eastern bank, except at extremely low stages of the water, when the eastern channel is the wider, the American side being nearly, but not quite, dry during a severe summer drouth.

The defence put in the deed from Massachusetts to the Passamaquoddy Indians, dated September 29, 1794; not recorded till June 9, 1842. Grass island was expressly mentioned in this conveyance. The defendant also introduced copies of the land-office (in Massachusetts) plans of part of township number six, and of part of township number seven, including lot No. 14; but the decision of the cause does not render necessary any description or delineation of these plans. He also called several Indians and other witnesses to prove the Indian occupation of this island.

J. & G. F. Granger for the plaintiff.

If the line dividing the United States from the British provinces passes to the west of this island, the plaintiff claims it by possession and by his purchase of the Thorntons; and of course the defendant's title fails, because Massachusetts would then have nothing to convey. But if the national boundary line passes east of the island, or divides it longitudinally in the centre, then the plaintiff claims under his deeds conveying the Bingham title, as well as by the Thornton purchase and possession, as being the riparian proprietor upon each side. *Morrison* v. *Keene*, 3 Maine, 474; *Handly* v. *Anthony*, 5 Wheaton, 374; *King* v. *King*, 7 Mass., 496; *Lunt* v. *Holland*, 14 Mass., 149; *Ingraham* v. *Wilkinson*, 4 Pick., 268; *Hopkins Academy* v. *Dickinson*, 9 Cush., 545; Angell on Watercourses (sixth ed.,) §§ 44–48, *a.*; *Storer* v. *Freeman*, 6 Mass., 435; *Bradford* v. *Cressey*, 45 Maine, 9; *Canal Com.* v. *People*, 5 Wend., 423.

C. R. Whidden for the defendant.

The Passamaquoddy tribe of Indians, as lords of the soil, have

been for centuries the rightful occupants of the lands lying upon the St. Croix and its tributaries, including the island in controversy; and the sovereignty of the state over it was subject to this legal right of occupancy. 1 Kent's Com., (seventh ed.,) 257, 259, 276; 3 Kent's Com., 461, 468, and note.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*, for breaking and entering the plaintiff's close, called "Grass Island" situated in St. Croix river, and cutting and carrying away the grass growing thereon. There is another count *de bonis asportatis* for taking and carrying away the hay cut upon the island. The writ is dated December 16, 1854. The case has just been submitted to the court for its decision.

The river St. Croix at Baileyville divides Maine from New Brunswick. The middle thread of the river is the boundary between them, dividing Grass Island about equally. The island is above tide waters. The plaintiff is the admitted riparian proprietor on both sides of the river, including the island. The plaintiff owning the lands on both sides of the river, he owns the island to the extent of the length of his lands upon it. *Prima facie*, therefore, he makes out a case.

The defendant, as the agent of the Passamaquoddy tribe of Indians, justifies under their alleged title.

The defence rests upon an agreement, or treaty, by which the commonwealth of Massachusetts, on the twenty-ninth day of September, 1794, for a valuable consideration, assigned to the Passamaquoddy tribe of Indians, and other Indians connected with them, certain islands in the St. Croix river, among which is found Grass Island. This agreement or treaty was recorded in the registry of deeds for Washington county on the ninth day of June, 1842.

But prior to the twenty-ninth day of September, 1794, the commonwealth of Massachusetts had by deed dated January 28, 1793, and recorded September 12, 1794, conveyed No. 7 (now Baileyville) to William Bingham, describing it as bounding westerly on

townships numbered sixteen and seventeen in the East division, easterly and northerly on Schoodiac river, &c. The Schoodiac river is called likewise the St. Croix. By this deed the grantee acquired title to the middle thread of the river. *Starr* v. *Child*, 20 Wend., 149.

It is apparent therefore that the title to Grass Island did not pass to the Indians of the Passamaquoddy tribe by the agreement made with the commonwealth of Massachusetts, because that commonwealth had already parted with its title to the same, and its deed had been duly put upon record.

The case finds that the plaintiff had the title of William Bingham to river lot No. 14, in Baileyville which is opposite Grass Island, and that he had acquired the title of William Bingham before the agreement under which the defendant justifies was even placed on record. In addition to this the plaintiff has the possessory rights of Joseph and William Thornton, who claimed to own the island, and who were in possession. His title is perfect.

It was determined in *Penobscot Tribe* v. *Veazie*, 58 Maine, 402, that the title of the government was superior to that of the aborigines. The Passamaquoddy Indians had no title originally to this island in controversy. They acquired none by the conveyance from Massachusetts, nor have they since acquired any by adverse possession. The occasional occupation of the island by different Indians for temporary purposes cannot constitute a title by disseisin. *Defendant defaulted.*

Cutting, Walton, Barrows, Danforth and Peters, JJ., concurred.

ORRIN EMERSON, JR., executor, *vs.* CHARLES HEWINS.

Construction of a will.

A testatrix gave her property in trust to her son, whom she made executor of her will, for the benefit of her husband and children; declaring it to be her wish that her husband should have the management and control of it while he lived—the title in the meantime to be in the son, to whom she gave authority to sell any or all of it at such times and prices as his father should deem best, "the proceeds to go to my said husband for the benefit of himself and my children to be used by him for their benefit." The son gave bond as executor, but never did as trustee. But in pursuance of the power given him in the will, he exchanged some of the property for a stock of goods, of which he took a bill of sale running to him as executor, and made his father his agent to sell them in connection with a stock belonging to the father in an adjoining store. The goods were attached for the father's debt. The son brought suit against the attaching officer, describing himself as executor; the defendant justified his attachment, claiming that the goods were the property of the father:

Held, that under the issue thus raised, the defendant could not object that the plaintiff described himself in his writ as executor instead of trustee; that goods thus acquired by the executor in exchange for the property of the estate, though placed by him in the hands of the father for sale, were not liable to attachment for the debts of the father; that by "the proceeds" the testatrix meant the avails of the property when converted into cash; that proof that the father had represented the goods as his own, and had assumed to mortgage them with his own to a third party was not conclusive against his testimony in the case that the title remained in his son in trust; that evidence that the testatrix in her lifetime and by her will had intrusted the management of her property to her husband, would not, by itself, warrant the jury in coming to the conclusion that she held the property in fraud of her husband's creditors; that the value of certain articles for which the plaintiff claimed to recover, but which were not proved to have been conveyed to the executor in exchange for the property of the estate (amounting to $87.) must be deducted from the amount of the verdict, as of the date of its rendition.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

TRESPASS *de bonis* against the sheriff of Kennebec county for the tort of his deputy in attaching and selling as the property of Orrin Emerson, senior, a stock of fancy goods, claimed to belong to the plaintiff in his capacity as executor of the will of his deceased mother, Louisa Emerson.

The terms of this will, so far as they affect this case, the nature of the plaintiff's title, and the questions of law and fact upon which the exceptions and motion proceed, sufficiently appear by the opinion.

When the plaintiff rested his case the defendant moved for a nonsuit because the action is brought in the capacity of an executor, while the proof showed that if it belonged to the plaintiff at all, it was as a trustee under the will aforesaid. The judge overruled the motion, saying that the action was sustained by the evidence, and would be, had the plaintiff merely shown title as an individual.

After the evidence had been introduced by both parties, the defendant's counsel, in their closing argument to the jury contended, among other things, that the action could not be maintained by the plaintiff, because he has no title in his capacity as executor; and also, because under the will of Louisa Emerson, the goods having been purchased by a conveyance of real estate belonging to her estate, and delivered to Orrin Emerson, senior, the title at once vested in him by virtue of the will, and the executor no longer had any title or right to possession as against him, and the officer having attached the goods as the property of Orrin Emerson, had all the rights as against the plaintiff, which Orrin Emerson, senior, had, and requested the court so to instruct the jury; but the presiding judge instructed the jury to the contrary on both points, and that if Orrin Emerson, senior, received and held the goods as agent for the plaintiff, the title and right of possession would be in the plaintiff, and he might maintain the suit; that the title would not pass to Orrin Emerson, senior, under the will, though the goods were received for the land sold, unless delivered by the plaintiff to him to be his under the will.

The defendant's counsel also contended to the jury, that the title to the land for which the goods were received, was held by Louisa Emerson in fraud of the creditors of Orrin Emerson, senior, and was subject to attachment and levy as the property of said Emerson, and that the goods received therefor by his execu-

tor would be subject to attachment by the creditors of said Emerson as his property. Upon this point, the presiding judge charged the jury that they need have no trouble, but would lay it out of the case, as he saw no evidence of fraud in the title of Mrs. Emerson.

The plaintiff had a verdict for $531.27, which the defendant alleged to be not only against law and evidence, but clearly excessive upon the plaintiff's own testimony. They therefore moved to set it aside and filed exceptions to the rulings made and refused.

A. Libbey and *Joseph Baker* for the defendant.

I. The plaintiff has no title to the goods as executor of Louisa Emerson's estate. He could sell the land in Pittston as trustee only. If he had any title to the goods it was as trustee or in his own right. Such title will not support the action as executor.

II. Under the will of Louisa Emerson, the plaintiff was a dry, naked or passive trustee. Orrin Emerson the husband and the *cestui que use*, was to have the management and control of the property. The trustee was "to sell any or all of said property at such times and prices as his father may deem best." "The proceeds to go to my said husband for the benefit of himself and my children, to be used by him for their benefit." The children were to be educated by the father. Under the statute of uses the title passed directly to Orrin Emerson, and he had full power to dispose of the property. *Sawyer* v. *Skowhegan*, 57 Maine, 500.

The evidence of Orrin Emerson, senior, proves that he did dispose of the Pittston property, made the bargain, took the goods received for it, and proceeded to sell them keeping no account. On this state of facts could the plaintiff maintain a suit against Orrin Emerson, senior, to recover from him the goods? The will declares that the proceeds of such a sale shall go to Orrin Emerson, senior. The goods were his and attachable as his.

III. The question whether the title of Mrs. Emerson was not fraudulent as against her husband's creditors should have been submitted to the jury. There was some evidence from Mr. Whit-

more, from the acts of the parties, and the peculiar provisions of the will, tending to show that the wife held the title for the husband, he being insolvent. Especially as there was no attempt to show that she had any property in her own right, and the plaintiff's witness, Orrin Emerson, senior, was not asked to explain, though the action is really his.

IV. The verdict is against the evidence on two points.

1. The Chase goods were so intermingled with the goods of Orrin Emerson, senior, by the plaintiff or his agent, that they could not be separated.

2. The goods were delivered to Orrin Emerson by the plaintiff as his goods under the will, and not to hold as the agent of the plaintiff.

On the first point we call the attention of the court to the evidence, and to the fact that at least forty-one items, amounting to $421.50, on the schedule made by Emerson and his daughter, which Emerson swears contains nothing but the Chase goods, are not to be found on the bill of sale of the Chase goods. Emerson is the only witness who claims to know the Chase goods, and when we compare the two bills with each other we find he could not tell which were the Chase goods, or is wilfully false.

Upon the second point, Emerson is the only witness to prove that he held the goods for his son. He is contradicted by proof of his representations that they were his, and by his acts and all the surrounding facts and circumstances. He says he knew all the plaintiff received from sales of the property was his, under the will of his wife; that he had received most all the proceeds of sales prior to that sale; that the plaintiff was insolvent; that he had guaranteed the payment of his debts taking mortgages of every article of property he had as security; that he received the goods in suit, as a stock in part to go into trade with, in Augusta; that he purchased other goods of like kind and put into his store with them and sold from them indiscriminately keeping no account of the sales of the Chase goods; that he had a paper from the plaintiff showing how much money the plaintiff had received and

kept belonging to the estate, and that was the only account between them. He admits that his son had left the state; that he did not know where he was and had not seen him for some three years prior to March, 1871, the time when he testified; and that the plaintiff had given him a power of attorney to transact all the business pertaining to his wife's (Louisa Emerson, deceased) estate.

Orrin Emerson, senior, took a retailer's license in his own name and mortgaged these very goods to Whitmore.

Clarence C. Frost for the plaintiff.

Barrows, J. Orrin Emerson, junior, the plaintiff, describing himself in his writ as executor of the last will of Louisa Emerson, deceased, brings this action to recover the value of a stock of goods seized and sold by the defendant's deputy on process against Orrin Emerson, senior, the plaintiff's father; under which process the defendant claims to justify on the ground that the goods were in truth and fact the property of the father. The plaintiff produces a bill of sale from Maria C. Chase of a similar stock of somewhat greater value dated a few months previous to the attachment, and running to "Orrin Emerson, junior, executor of will of Louisa Emerson," and puts in testimony which may be regarded as proving that the Chase stock was conveyed to him in exchange for real estate formerly belonging to Louisa Emerson and deeded by the plaintiff as her executor to Mrs. Chase.

The stock so purchased seems to have been placed by the plaintiff in the hands of his father who undertook to act in the disposition of the same as the plaintiff's agent, this course of proceeding being supposed to be in accordance with certain provisions in the will of Louisa Emerson, whereby she gave her property, real and personal, to the plaintiff, in trust for his father during life with remainder to her children in equal proportions and declared her wish that her husband should have the management and control of the property while he lived—the title in the meantime to be in the plaintiff as trustee. The will proceeds: "I also give power and authority to said trustee to sell any or all of said property at

such times and prices as his father may deem best, and to give good and sufficient conveyances, the proceeds to go to my said husband for the benefit of himself and my children, to be used by him for their benefit. It is also my wish that my children should be well brought up and educated as thoroughly as may be deemed expedient by them and their father."

The manifest design of Louisa Emerson in this will was to appropriate the property which she left to the personal benefit and support of her husband and children, free from liability to be taken by her husband's creditors. To effect this, she created a trust for their joint benefit, placing the title to the property in this plaintiff, whom she also made executor of the will in such a manner as must prevent the property or any portion of it, (or property obtained in exchange for it, so long as the origin can be traced and the title continues in the plaintiff,) from being taken for the debts of Orrin Emerson, senior.

She directs her executor and trustee to permit Orrin Emerson, senior, to have the management and control of things, but not in such a way as to pass the property to him, because that would defeat her intentions so far as the children were concerned. Hence the title to the property was to be and remain in the plaintiff in trust, and however its form might change, so long as it could be traced, and until it was finally disposed of and converted into cash, and "the proceeds" were turned over to Orrin Emerson, senior, to be used for the support of himself and the children, it was competent for the plaintiff to pursue it and protect his title, and the design of the testatrix. Her desire to insure to her insolvent husband the management of the property resulted naturally enough in just such a complication as this case exhibits. The creditors of Orrin Emerson, senior, finding the property in his possession and apparently under his control, with other property confessedly his own, have attached it as his, and the plaintiff is compelled to vindicate his title by suit. The verdict being in his favor three questions are raised by exceptions to the ruling of the presiding judge.

I. Is it fatal to the maintenance of the suit that the plaintiff

has described himself in the writ as executor, instead of suing as trustee under the will, or in his individual capacity?

Doubtless in the regular course of probate business the plaintiff ought before this time to have settled all his accounts as executor and to have given bond as trustee. But he has not done so. Yet this irregularity cannot relieve any one who shall be found to have wrongfully intermeddled with the property of the testatrix in his hands. The bill of sale from Mrs. Chase describes him as executor of the last will of Louisa Emerson. His title thus obtained he may vindicate in a suit so brought that the person and case may be rightly understood by the court. The defendant cannot object that he is described in the writ as he is in the bill of sale which is the evidence of his title. Either as executor or trustee he would be holding the goods in trust for the estate, and it is not perceived that it can be material to the issue here presented how he is designated. The defendant undertakes to justify on the ground that the goods were the goods of the father. He must stand or fall with his justification.

II. The defendant insists that the plaintiff had but a dry and passive trust and that under the statute of uses and the provisions of this will before recited, the title to Louisa Emerson's property passed to her husband as the *cestui qui use* and became liable to be taken for his debts.

But this would be a plain contravention of the terms and purpose of the will as we have already seen, and would defeat the object which she seems to have had in view which was the ultimate appropriation of "the proceeds" of her estate to the personal comfort and support of the husband and children. We cannot hold that a mere exchange of a piece of the property held in trust by the plaintiff for other property real or personal, not money—creates the condition of things under which Louisa Emerson contemplated the transfer of "the proceeds" to her husband for the support of himself and her children. It was competent for Louisa Emerson to guard the interest of her children in her property by placing the title to it in the plaintiff even while she directed him

to be governed in the management and disposal of it by his father, nor would this make the property liable, while he thus held the title, to be taken for the debts of the father, even though it might be in the father's possession for the purpose of being converted into money and appropriated to the use of the beneficiaries under the will by him. Not the property but "the proceeds" of it, in the language of the will, were "to go to" Orrin Emerson, "for the benefit of himself and my children, to be used by him for their benefit." There is room for a further question whether the proceeds were not thereby given to the husband subject to a trust which could be enforced for the benefit of the children; but none at all, that the title to the Chase goods was in the plaintiff free from all liability to be taken for the debts of the father.

III. The judge instructed the jury that they need not trouble themselves with the inquiry whether Louisa Emerson held the title in fraud of her husband's creditors, for he saw no evidence of such a proposition. In so instructing them we think he was clearly right. The conversation with Mr. Whitmore and the provisions of the will showed nothing except that Mrs. Emerson had confidence in the capacity of her husband to manage her property provided it were so held as not to be subject to seizure for his debts, but had no tendency to show that her title accrued in fraud of his creditors. The burden of proof is upon the creditor alleging such fraud. *Winslow* v. *Gilbreth*, 50 Maine, 90.

The defendant has no just cause of complaint in the instructions to the jury. Under the motion for a new trial the defendant contends that the evidence demonstrates the fact that the plaintiff did in fact put the goods into the possession of his father as his goods under the will and not to be held by him as plaintiff's agent; and that they were so intermingled with the goods of the father that they could not be separated.

But upon both these propositions the evidence was conflicting and we find nothing of a character sufficiently decisive to warrant us in setting aside the verdict. Doubtless Orrin Emerson, senior, said and did much to convey the idea to others that the goods be-

longed to him absolutely; but the Chase goods were not his nevertheless, but belonged to the estate of Louisa Emerson, to be disposed of as she had directed. The defendant further contends that the verdict is excessive as including damages for other goods not belonging to the Chase stock, but carelessly or falsely represented by Orrin Emerson, senior, in his testimony, as part thereof. Our attention is called to many items which do not appear in the schedule of the Chase goods. That the items in the two schedules should be identical is not to be expected, especially in view of the fact that the Chase schedule embraces items of the following description—"2 show cases and contents $225;" "dry goods $30," besides various "lots" which may fairly be supposed to have been more specifically described when the goods were attached.

But there is nothing in the Chase stock that corresponds with the items of the sewing machine and ladies' cloth boots charged in the plaintiff's schedule at $60 and $27 respectively. Evidently they were no part of the Chase goods. For aught that appears however they went to make up the amount for which the plaintiff had a verdict. The verdict must be set aside unless the plaintiff remits $87 thereof as of the date of its rendition. If he does so the entry will be *Motion and exceptions overruled.*

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

JOHN H. BALLOU *vs.* EPAPHRAS K. PRESCOTT.

Physician's duty to patient. Burden of proof.

Though the language used and the effect of it are questions of fact for the jury, in controversies relating to a contract by parol, yet it is also true that in many cases the law will infer a definite, though perhaps implied contract from certain admitted facts. At least it will infer certain elements as belonging to particular contracts, or impose specific duties in connection with, and growing out of special undertakings, although these are entered into by parol.

Especially is this true of contracts growing out of an employment *quasi* public in its nature, like that of a professional man.

Thus, the care and skill which a professional man guarantees to his employer are elements of the contract into which he enters by accepting a proffered engagement. So, continued attention to the undertaking, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law.

While it is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit, if they please; and while, if there be no such limitation, the physician can discontinue his attendance at his election, after giving reasonable notice of his intention to do so; yet, if he be sent for at the time of an injury by one whose family physician he has been for years, the effect of his responding to the call will be an engagement to attend to the case, so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance but in determining when it may be safely and properly discontinued.

If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies upon an alleged discharge by the patient as a defence to a suit brought for the abandonment; this being a new substantive matter of defence, the burden of proving it is upon the defendant.

On exceptions.

Case, against a physician, or surgeon, for malpractice in treating the plaintiff for an injury to his left leg, received May 20, 1870.

The plaintiff testified that Dr. Prescott had been the family physician for many years, and that he was sent for and arrived within an hour of the time when the injury was received; made an examination of the limb, said nothing about calling again, and never did call afterward, nor was he ever sent for again. Dr. Prescott stated, on the contrary, that as he was about leaving he said: "Ballou, shall I call and visit you any more?" that the reply was: "I will leave it to you;" and the doctor testified, "I guess my answer was, 'oh, no.' Then I think some words passed, and to wind up I said something like this: 'then I shall not visit,' or, 'I shall not visit you any more unless you call for me,' and left him immediately." Mary E. Trask, summoned by the defendant, was present when the wound was dressed, and "heard the doctor say, when he left, that if he was needed again, to send for him."

She did not hear Mr. Ballou say anything. *Per contra*, Charles A. Sanderson, also present all the time, did not hear aught said about coming again, or being sent for; and did not think anything was said about it.

This was the substance of all the testimony upon this particular branch of the case to which the exceptions apply. The jury gave the plaintiff a verdict for four hundred and fifty dollars. The defendant moved to set it aside as against law and evidence, which motion was overruled. He also excepted to the charge of the judge in the following particulars:

The defendant's counsel requested the court to instruct the jury as follows: "That if defendant was to attend plaintiff during his illness or lameness and did not attend, and that was known to plaintiff; and ordinary care on his part required him to send for defendant again, or employ another surgeon to treat him, it was his duty to do so, and for such damages as resulted from such neglect defendant would not be liable." This instruction was given qualifiedly, thus:

"I believe I have given that. I have already stated to you, as you understand, if he was misled by any directions, or any want of directions, which it was his duty to give, why, it is not for the defendant to complain of that. But if he did not go to him, not exercising the ordinary care, such as I have described, without being misled by the defendant's directions, and he neglected to do what he ought to have done in the way of sending for this man, or another surgeon, why, of course whatever damage happened from that want of ordinary care, or from that neglect on the part of the plaintiff, he could not recover for."

Before this request was made and answered as aforesaid, the judge had instructed the jury, in a manner not excepted to, as to the necessity for reasonable professional skill in the physician and the exercise of it and of ordinary care in the actual treatment of that particular case; and that if such skill was possessed and such care exercised, then in those respects the defendant would be exonerated from liability. He then further remarked:

"If he did not, why then he would be liable for that dereliction of duty. But there is one other question presented in connection with this, to which it is necessary that I should call your attention. It is said, on the one hand, that his duty ended with that first visit, and that he is not in fault for what happened subsequently to that. On the other hand, it is claimed that his duties continued. Here is a question of fact as well as of law. In regard to the law upon this matter, I apprehend there is no doubt about it. When a physician or surgeon is called upon to attend a patient, it is perfectly competent for the parties to make just such a contract as they see fit, and in accordance with this view, I understand it is sometimes a practice among certain physicians and surgeons, to make a contract to attend upon certain families of persons, and specifying a time or by the year, whatever may be their sickness, longer or shorter, to do whatever duties may be required of them during the year. So it is competent for them to make a contract regulating their attendance for a single sickness, longer or shorter, and it is competent after they have made a contract, if one is made at all, for the parties to rescind it. Here, I understand the surgeon was called in the usual way, and nothing said about the time during which he was to attend, and he went in obedience to that call. If nothing more was said, and nothing more was done, the law would require him to give such attention as the case or the patient required. If this injury required that degree of treatment which it was proper to be rendered him, be it longer or shorter, and if nothing was said about the time, it was competent for either party to rescind that contract any time they saw fit. It was perfectly competent for the patient to discharge his physician or surgeon, and it was just as competent for the physician or surgeon to discharge his patient. The privileges are mutual; their rights are mutual; the same rights, each have. But supposing the patient was in a condition that required longer treatment. It would not be proper—it would not be legal—the defendant would not have a right to say nothing to that patient, and go off and abandon him in that condition, when he required

further treatment, when he had not been discharged, and when he himself had not discharged his patient. In order to do that, it would be necessary for him either to continue his treatment until he is discharged, or to give his patient notice, and sufficient notice to enable him to procure other proper medical attendance. There are many cases where it would be exceedingly critical and dangerous, for a physician at once to leave a patient. The law does not authorize him to do that, his patient being in that critical and dangerous condition. But so long as his attendance and treatment are required, so long he must do it, unless he himself chooses to discharge his patient by giving him the proper notice that he will not attend further."

The judge then presented the issue of fact to the jury as to the manner of Dr. Prescott's leaving Mr. Ballou, and whether or not anything was said about his coming again or being sent for; remarking that it was perfectly competent for the parties to make any such arrangements of these matters as pleased them; and submitting to the jury what, if any, were made in this instance; and then proceeded to instruct thus, in case nothing was found to have been said by Dr. Prescott when leaving:

"I understand it to be the duty of a surgeon, when he is called upon to attend, to exercise his own judgment, in the absence of any agreement, or discharge on the part of the patient, or with the patient—that he should exercise his own judgment as to the propriety of coming again, and in exercising that judgment, he is to exercise the same degree of skill or knowledge of the accident or disease which he is attending, and the same degree of care which he should exercise in its treatment.

Now if he informed this plaintiff, that from the nature of the injury it was unnecessary for him to come again, unless some new developments took place, why then a question arises whether in the formation of that judgment, he exercised this ordinary care and skill to which I have called your attention, upon the main question. If he did, why then, although he might have been mistaken, he would not be liable for any bad results which might fol-

low from it, any more than from any mistake in judgment, which he might exercise in the treatment of the injury itself; the same rule, precisely, would apply. And if that was the true state of things, why then you will inquire, and see whether it was so, or not, and inquire of course, whether he did exercise that degree of skill and care in forming that judgment which is required in the treatment of the disease.

And this also, would have a bearing upon his duty, as to further attendance. If he did form that judgment, and so notified the plaintiff, why then he would have no occasion for attending further; that is, if in this exercising of all due care and skill, he had come to that conclusion, and so informed the plaintiff, why then his duties would cease at that time.

These, gentlemen, I believe, so far as they occur to me, are all the principles of law which are applicable to the duties. In regard to this discharge to which I am requested to call your attention, it should be proved, and you will perceive from the instructions, I think, that I have already given you, that if there was nothing said about that, the burden of proof would be upon the defendant, to show that his duties had ceased then, unless you are satisfied, that in the exercise of a sound judgment, that degree of judgment which is required, he gave notice that his attendance (or substantially to that effect) would not be longer needed, with the request that he should be notified if he was required, if any further development should take place. So far as the discharge alone is concerned the burden of proof would be upon the defendant, to show that he was discharged; because he assumes the affirmative there, and says that he was discharged."

The judge then gave unexceptionable instructions upon the question of damages, and concluded the charge by reading Mr. Libbey's above mentioned request and then modifying it, as hereinbefore shown.

A. Libbey for the defendant.

The contract between the parties was proved by parol, and it was a question of fact for the jury to determine what the contract

was. This proposition is so well settled it is unnecessary to cite authority. The court could not, as a matter of law, determine what the contract was from this evidence. It was for the jury to find whether the contract was for one visit only or for taking charge of the plaintiff so long as he needed surgical or medical treatment. To constitute a contract between the parties they must have understood it alike, and assented to its terms and conditions. In determining the question, the jury should consider all the circumstances of the case, as well as the evidence given by the witnesses. They should consider the nature of the plaintiff's injury; what it was understood to be at the time by the plaintiff and by defendant. The skill and place of residence of the defendant as understood by the plaintiff, and whether either or both of the parties understood that one visit only was required by the plaintiff's condition.

It might be that the person called to attend in such a case was understood as not possessing sufficient skill as a surgeon to treat the case, and was merely called in the emergency, to care for the person injured till competent aid could be procured. It might be that the family physician was away from home, and another was called to attend till the family physician returned, and that from a knowledge of the circumstances both parties so understood it, though nothing was said. It might be that a very skilful surgeon was called from a great distance at large expense, and from the circumstances both parties understood it was for one visit only though nothing was said about it.

These illustrations are used to show that the court cannot assume, as matter of law, from the fact that a surgeon or physician is called to a person injured or sick, that the contract between the parties is for one visit or more than one.

The substance of the instruction to the jury was that the defendant was called in the usual way, and was bound to attend the plaintiff so long as he needed treatment, unless the contract was terminated in the manner specified in the charge; and that the burden of proof was on the defendant to show that the contract

was thus terminated. The jury should have been instructed that the defendant undertook to treat him so long as his injuries required treatment; and on this point they should consider the fact that the defendant was called, and all that took place between the parties, if anything, in regard to it, at the first visit, and the surrounding circumstances.

The rule given to the jury required the defendant to prove affirmatively that he was discharged by the plaintiff, or discharged his patient by giving him reasonable notice that he should cease to attend him; or that, in the exercise of due skill and discretion he determined that the plaintiff needed no further attendance and notified the plaintiff of the fact. This I submit is error.

The action is case for want of skill or negligence on the part of the defendant, in treating and taking care of the plaintiff. The burden of proof is on the plaintiff throughout the whole case to show want of skill or negligence. If he relies on the fact that the defendant made one visit only, and was guilty of negligence in not continuing his treatment, the burden is on the plaintiff to show that the defendant undertook to treat him as long as he needed treatment, and that he needed further treatment; that in the exercise of due skill and care the defendant would have known he required further treatment, and did not continue it, by reason of which the plaintiff was damaged. In an action of tort for negligence the burden of proof is on the plaintiff to show negligence throughout the whole case on every point involving due care.

Joseph and *Orville D. Baker* for the plaintiff.

Danforth, J. This is an action against the defendant as a surgeon for alleged malpractice, and one of the causes of complaint set out in the writ is that he abandoned his patient while still needing medical attention. The exceptions raise the question as to the nature of the contract between the surgeon and his patient.

Upon this point the jury were instructed as follows: "Here I understand the surgeon was called in the usual way, nothing said about the time during which he was to attend, and he went in obe-

dience to that call. If nothing more were said or done, the law would require him to give such attention as the case or patient required." It is suggested that, by this ruling, that which was really a question of fact for the jury, was decided as a question of law; or in other words, whatever contract existed between the parties, being verbal, it was the province of the jury to settle its terms. As a general proposition this is undoubtedly true; but it is equally true that in many cases from certain admitted facts, the law will infer a definite contract, implied perhaps but none the less distinct and certain. Much more will it infer certain elements as belonging to particular contracts, or impose specific duties in connection with and growing out of special undertakings. Especially is this true of all that class of cases in which the contract grows out of an employment, in a greater or less degree public in its nature. All professional business partakes somewhat of this character. The care and skill which a professional man guarantees to his employer are elements of the contract to which he becomes a party on accepting a proffered engagement. They are implied by the law as resulting from that engagement, though it be but verbal, and nothing said in relation to such elements. So continued attention to the undertaking so long as attention is required in the absence of any stipulation to the contrary, is equally an inference of the law. If a counsellor at law undertakes the management of a cause, nothing more being said or done than simply an offer and acceptance of a retainer for that purpose, it will hardly be denied that an abandonment of the cause before its close would be as much a violation of the contract with the client as a neglect to use the requisite care and skill in its prosecution, and the duty of continued attention is equally an implication of the law as that of exercising the required care and skill.

That the same principles apply to the employment of a physician or surgeon there can be no doubt. If he is called to attend in the usual manner, and undertakes to do so by word or act, nothing being said or done to modify this undertaking, it is quite clear as a legal proposition that not only reasonable care and skill should

be exercised, but also continued attention so long as the condition of the patient might require it, in the exercise of an honest and properly educated judgment, and certainly any culpable negligence in this respect would render him liable in an action. *Barbour* v. *Martin*, 62 Maine, 536; Shearman & Redfield on Negligence, § 441.

In this case it is hardly possible that the jury could have been misled by the instruction complained of, for in its terms it was not only legally correct but it was guarded by other instructions not excepted to, in regard to the competency of the parties to make for themselves such a contract as they might see fit, to limit the attendance for a longer or shorter period, or for a single visit; and that, without any limitation the defendant might at any time discontinue his visits upon reasonable notice.

These instructions would seem to be all, if not more than all under the testimony the defendant was entitled to. It appears that he was at the time, and had been the plaintiff's family physician; that he was sent for and responded in the usual manner, while there is nothing to show that he was not expected to attend so long as necessary, or that he did not so understand it. On the other hand it appears affirmatively that he alone was relied upon as the attending surgeon, and so understood it.

Another objection is raised to the instruction as to the burden of proof. It is undoubtedly true that in an action of tort the burden is upon the plaintiff all through to give the jury reasonable satisfaction of the alleged wrong on the part of the defendant. But when the defendant takes the ground that the act or want of action was not a wrong because by the terms of the contract or its rescision he was justified, he assumes an affirmative and so far the burden of proof.

The defendant is charged with negligence in abandoning his patient while in need of medical care; admitting the fact of non-attendance, he attempts to justify, not only on the ground that no further attention was necessary but also on the ground of notice that he should not attend further unless sent for; and that the contract was thus rescinded and he discharged.

As to the first ground, the burden would continue upon the plaintiff, for there would be no delinquency unless the defendant had failed to exercise the required judgment or carelessly neglected his duty. But upon the latter ground the defendant sets up a new fact in avoidance, and that he must prove before it can avail him. To this and this alone the instruction applied. The first part of it may perhaps be a little uncertain in its meaning, and the presiding justice, apparently so fearing, to prevent any misunderstanding adds these words: "So far as the discharge alone is concerned the burden of proof is upon the defendant to show that he was discharged." In this we see no error. *Exceptions overruled.*

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

ELIAS MARSON *vs.* JAMES PLUMMER.

Replevin defeated for want of title.

The plaintiff owning the wagon replevied, swapped it with one Cunningham for another wagon and fifty dollars. The wagon he received was taken from him upon a replevin writ by one who claimed a superior title to Cunningham's and the fifty dollars boot money not having been repaid, was trusteed in the plaintiff's hands by professed creditors of Cunningham; but neither of these suits was shown ever to have been entered in court: *held*, that the title to the wagon now replevied by the plaintiff had passed from him to Cunningham, and that nothing in the facts proved as above stated justified the maintenance of this action.

ON EXCEPTIONS.

REPLEVIN of a wagon. The defendant pleaded the general issue with a brief statement, denying the plaintiff's title, possession, or right of possession, at the time the writ was brought, June 3, 1872, and alleging the same then to be in Jason M. Carleton. It seemed by the plaintiff's testimony that he once owned the new wagon this writ was brought to recover, and in May, 1872, swapped it with Weston Cunningham for another wagon and fifty dollars in money. The wagon was not then delivered because it was

at the paint shop, but delivery was to be made within two weeks. This was not done, because the old wagon, received by Marson from Cunningham in exchange for the one now in suit, was taken from Marson's possession upon a replevin writ, of which fact he informed Cunningham and also that he (Marson) had been summoned as Cunningham's trustee on account of the fifty dollars received by Marson as aforesaid. Finding the wagon now in controversy in the defendant's trimming shop, the plaintiff brought this action to recover it. The old wagon was taken from the plaintiff upon a writ in favor of one Savage, who, being called by the plaintiff, swore that he traded with one Austin Cunningham for this old wagon in exchange for a horse; that Weston Cunningham subsequently came to Savage's stable and said the wagon was stolen from him and took it away, unharnessing it from the horse to which it was attached. A warrant issued against Austin Cunningham and after a trial upon it in the police court, the witness, Savage, sued out his replevin writ to regain possession of the wagon which had then passed into Marson's hands by virtue of his trade with Weston Cunningham. It was admitted that his writ was never entered in court, and there was no evidence that the writ by which Marson was trusteed was ever returned anywhere. The cross-examination was evidently conducted upon the theory that these suits were fictitious and collusive. The presiding justice directed a nonsuit, and the plaintiff excepted.

A. C. Stilphen for the plaintiff.

Joseph Baker, *J. M. Carleton* and *H. K. Choate* for the defendant.

Dickerson, J. The plaintiff was the owner of the wagon replevied in this suit, and exchanged it with one Cunningham for another wagon and fifty dollars. He received both the wagon and the money when the trade was made, and agreed to deliver his wagon to Cunningham in two weeks. Before the expiration of that time the wagon the plaintiff received in exchange for his, was replevied, and the plaintiff was trusteed. The case does not

show that the plaintiff defended either of those suits, or that either of them was ever entered, and prosecuted to final judgment. When the plaintiff brought this action the wagon had been removed from the shop where it was when the exchange was effected, to the defendant's shop. Upon this state of facts the presiding justice, on motion of the defendant, ordered a nonsuit to which order the plaintiff excepted. The plea is the general issue, with a brief statement of property in another, and denying the plaintiff's possession.

The title to the wagon in suit and the right of possession passed from the plaintiff to Cunningham before this action was brought, and therefore this action cannot be maintained.

Exceptions overruled.

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

HARRIET E. SMART *vs.* ALFRED SMART.

Defence by subsequent plaintiff, under R. S., c. 82, § 39.

Leave will not be granted under c. 82, § 39, to a plaintiff in a subsequent suit to defend a prior suit, the same property being attached in both, unless both suits are pending.

The statute does not apply to a subsequently attaching creditor, who has obtained a judgment, which has been satisfied.

ON REPORT.

ASSUMPSIT upon two promissory notes, admitted to have been given for a lawful consideration by the defendant to his wife, who is the plaintiff. This action was brought March 21, 1868, entered at the next August term, and allowed to be defaulted at the following October term, and thence continued for judgment till the August term, 1872, when Gideon S. Palmer filed a petition and bond, purporting to be drawn under R. S., c. 82, § 39, praying to be allowed to come in and defend this suit, which prayer was granted. His petition, after setting out his residence and that of these parties, and the coverture of the plaintiff and specifying the date and

cause of the present action, and the attachment of the defendant's property upon the plaintiff's writ, stated "that prior thereto said Alfred Smart was justly indebted to your petitioner in the sum of more than fifty dollars, and your petitioner believes this action was brought and attachment made to hinder and prevent him from recovering from the said Alfred Smart his said indebtedness," because the action had not been defended, but was defaulted and continued for judgment as aforesaid. The petition further showed that the petitioner, subsequent to said attachment, to wit, on the twelfth day of October, 1868, commenced an action against said Alfred Smart to recover the said indebtedness and then caused the same property of the defendant to be attached therein; that he recovered judgment for $94.89 debt and $12.08 costs; put the execution for those sums, issued November 29, 1869, into the hands of an officer who seized said Smart's equity of redemption of certain mortgaged real estate in Pittston and sold the same to the petitioner for $118, being the amount of the execution and fees, and delivered a deed of it to the purchaser who had it recorded within three months thereafter; the property mentioned being the only real estate in that county owned by Alfred Smart at the time of its attachment. Being thus allowed to appear, Mr. Palmer pleaded the general issue with a brief statement that the defendant and promisor was the plaintiff's husband, and therefore that this action could not be maintained. At this stage of the case it was agreed to report the proceedings to the full court for their determination as to their propriety.

L. Clay for the plaintiff.

A. C. Stilphen for Mr. Palmer.

Appleton, C. J. The writ in this suit is dated March 21, 1868. It was entered at the return day and at the October term, 1868, the defendant submitted to a default and the action was continued for judgment from term to term until the August term, 1872, when Gideon S. Palmer filed a petition for leave to defend this suit as a

subsequent attaching creditor. In his petition he alleges that on the twelfth day of October, 1868, he sued out a writ against this defendant, on which the same property was attached as in this plaintiff's suit; that at the October term, 1869, of this court, he recovered judgment against the defendant for ninety-four dollars and eighty-nine cents debt, and twelve dollars and eight cents costs of suit; that execution was issued thereon bearing date November 29, 1869, which was seasonably placed in the hands of a deputy sheriff by whom the defendant's equity of redemption of certain mortgaged real estate was sold and the execution recovered by him fully satisfied.

The question presented is whether Palmer under the admitted facts can be regarded as a subsequent attaching plaintiff, and as such be permitted to defend this suit under the provisions of R. S., c. 82, § 39.

By § 39, "when property has been attached, a plaintiff, who has caused it to be attached in a subsequent suit, may by himself or attorney petition the court for leave to defend the *prior* suit and set forth the facts as he believes them to be, under oath; and the court may grant or refuse such leave."

The section assumes a prior and a subsequent attachment as subsisting and permits the plaintiff in the subsequent to defend against the prior suit. Palmer, when he claimed to intervene at the August term, 1872, was not a plaintiff, for he had no suit pending. He was not a subsequent attaching creditor, for he had long since ceased to be a creditor. He had levied upon the estate of the debtor, and his execution had been fully satisfied. Whether he would ever be a plaintiff or an attaching creditor was a matter entirely problematical. If he should be, he will not be a plaintiff by virtue of the process under which he now claims to defend against this plaintiff. New process is required that Palmer may become a plaintiff and an attaching creditor, which he was not when he petitioned to defend, and which he can only be by the institution of a new process.

The right to defend against a prior attachment was first confer-

red on a subsequent attaching creditor by act approved March 25, 1831, c. 508, § 2. By this act it was required that both suits must be pending when the subsequent attaching creditor intervenes. This section was incorporated into the revision of 1841, c. 115, § 113, but the petition was to be in "the court in which such suits are pending." In the subsequent revision, in the process of condensation, the language was changed, but without any alteration of the meaning. Both suits must be pending, when the plaintiff in the subsequent suit claims to intervene. There was no subsequent suit pending, there was no existing plaintiff at the August term, 1872.

If the pending suit is fraudulent, or a collusive judgment is fraudulently obtained and a levy is made upon the real estate claimed by Palmer, the law will afford him ample means of defence. But it is conceded that the plaintiff in the suit sought to be defended, has a just and honest claim. There is nothing to show that the "prior attachment was made with intent to delay or defraud creditors, or that there was collusion between the present plaintiff and defendant for that purpose" to render the same void by § 44. It is only for the prevention of fraud and collusion that intervention by strangers to a process is permissible. The agreed facts exclude the possibility of their existence.

The appearance of Palmer to defend, he not being a plaintiff having a subsequent attachment, is to be withdrawn. It will then remain for the parties to the suit to advise as to its disposition, Palmer not being authorized to interpose a defence.

The validity of a judgment recovered by a wife against her husband is not a matter presented for our consideration.

The appearance of Palmer to be withdrawn and the case to stand for trial.

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

INHABITANTS OF WATERVILLE *vs.* ASHER H. BARTON *et als.*

Proper mode of procedure under R. S., c. 18, § 28.

This case involves an application of the well-settled rules that inferior courts of limited jurisdiction are responsible in trespass to those whom their acts in excess of their jurisdiction injuriously affect; and that an officer executing their process, when the want of jurisdiction is apparent upon its face (but not otherwise) is equally liable.

County commissioners who have appointed an agent to contract for the building of a bridge, part of a way, under R. S., c. 18, § 28, have no right to issue a warrant of distress to collect of the delinquent town the cost of its construction upon the day following that designated in their order appointing such agent and in the contract for the completion of the work, although it is actually done and the accounts of disbursements therefor allowed, upon notice, more than thirty days before the warrant issued. For the seizure of property upon a warrant so issued, the county commissioners, will be liable in trespass, as would the officer making the seizure, if such defect appeared upon its face.

As the section referred to (R. S., c. 18, § 28) provides that a certificate shall be sent to the town, forthwith after the making of the contract stating the time agreed upon for the completion of the work, and contemplates the allowance of the accounts to be made, and the liability of the town to accrue, after such completion, the contractor, agent, and commissioners cannot hasten the day of payment by hurrying up the work.

No warrant of distress should issue till the expiration of thirty days, at least, after the day designated in the contract for the completion of the work; nor (by R. S., c. 78, § 15) till twenty days after notice of their judgment certified by the clerk of the county commissioners to the assessors of the town.

A warrant of distress returnable (as executions are) in ninety days, instead of three months, as required by law, is fatally defective, no protection to the officer serving it, and renders those issuing it liable as trespassers for directing its enforcement.

There is no authority for the county commissioners to render judgment in favor of themselves for expenditures thus incurred; nor for costs *eo nomine*, in such a case. It is the agent's account which is allowed, and for his benefit that the warrant of distress issues.

The warrant should issue for the sum allowed by the county commissioners, after notice, upon the agent's account, and for his expenses of superintending the work, &c.

The computation of interest from the time the account was actually allowed (March 29, 1871,) instead of from the day named for the completion of the work, (May 1, 1871,) was erroneous and exacted from the plaintiffs more

than they were liable to pay. The warrant therefore issued for too large a sum; which defect is fatal. Interest should have been computed from May 1, 1871, under R. S., c. 78, § 15.

If the county commissioners erred in assessing the expense of the agent's superintendency upon only one of the two towns connected by the bridge, this was a judicial error, for which they would not be liable as trespassers.

On report.

Trespass, for breaking and entering the plaintiff's close in Waterville, being their town poor farm, and taking and carrying away certain animals. The third count was *de bonis*, for taking and carrying off the beasts.

This litigation resulted from the controversy relative to the rebuilding of a bridge across the Kennebec, between Waterville and Winslow, swept away by a freshet in October, 1869, and which a majority of the inhabitants of the former town did not wish to rebuild. See *Waterville* v. *Co. Com'rs*, 59 Maine, 86. By an act approved January 21, 1870, c. 282, the county commissioners were authorized to locate a way and free bridge between these towns, the one destroyed having been subject to toll.

A very large number of the citizens of the county petitioned the county commissioners to lay out such a way, which they did, after notice and hearing; and, under the authority to apportion the expense, conferred by said act, they directed the cost of construction and maintenance of the bridge to be borne by Waterville and Winslow in proportion to their respective state valuations; and it was "further ordered, that the said towns of Waterville and Winslow shall have until the sixteenth day of May, 1870, to contract for the erection of said bridge, and until the first day of May, 1871, to complete the same;" notice of the commissioners' report and orders to be served upon the towns eighteen days before May 16, 1870.

Neither of the towns acting in the matter, several of their citizens, original petitioners for the bridge, applied to the commissioners, on the seventeenth day of May, 1870, for the appointment of an agent to contract for and supervise its construction under the special act aforesaid. The prayer of this petition, after

notice and hearing thereon, was granted and George A. Phillips was appointed such agent on the twenty-sixth day of May, 1870, and "required to complete the same, and make the same passable on or before the first day of May next, the expense of which shall not exceed $30,000." Upon the sixteenth day of June, 1870, the contract was made accordingly. It was approved by the commissioners and the towns ordered to be notified of their respective proportions of the expense (viz: Waterville, $24,060.68, and Winslow, $5,939,32,) on the same day; which notice was served June 25, 1870. The agent reported to the county commissioners March 6, 1871, that the bridge was completed and accepted; and, upon the following day, the board ordered notice to the towns that the agent had filed his account and that the same would be settled March 29, 1871, which notice was served upon the towns March 20, 1871.

March 29, 1871, the agent was allowed one hundred and sixty dollars for his services and expenses; a claim for extra expendi tures by the contractors was rejected; and the contract price allowed; and the account thus settled, and the report accepted and recorded.

Upon the second day of May, 1871, the county commissioners issued this warrant of distress:—

"STATE OF MAINE.

KENNEBEC, ss.

[L. S.] To the sheriff of our county of Kennebec, or either of his deputies, GREETING.

Whereas, by the consideration of our county commissioners, holden at Augusta, within and for our county of Kennebec, on
24,060.68 the 29th day of March, A. D., 1871, we recovered judgment
193.80 against the town of Waterville, in said county of Kennebec, for the
24,254.48 sum of twenty-four thousand and sixty dollars and sixty-eight cents
.25 debt, and one hundred ninety-three dollars and eighty cents for costs in the same suit expended, as to us appears of record, whereof execution remains to be done:

We command you therefore, that by distress and sale of the

money, goods or estate of the said town of Waterville within your precinct, you cause to be levied and paid unto our treasurer of our county of Kennebec, the aforesaid sums, amounting in the whole to the sum of twenty-four thousand two hundred and fifty-four dollars and forty-eight cents, and interest thereon from said 29th day of March, 1871, together with twenty-five cents more for this writ, and thereof also to satisfy yourself for your own fees.

Hereof fail not, and make return of this writ, with your doings therein, into the clerk's office of our said county commissioners in our county of Kennebec aforesaid, within three months from the date hereof.

Witness, Mark Rollins, junior, Asbury Young, and Nathaniel Gray, county commissioners, at Augusta, this second day of May, in the year of our Lord one thousand eight hundred and seventy-one. WM. M. STRATTON, clerk."

(Endorsed.) "Mem.—February 12th, 1872. The county treasurer received of the town of Waterville the sum of $24,254.48, leaving due at that date the interest, $1,281.55. Alias issued, June 10, 1872."

At an adjourned meeting of the board of county commissioners held March 26, 1872, they directed their clerk to notify Waterville that the accrued interest, amounting to $1,281.55 was still due upon the judgment above described, and that a warrant of distress would issue in twenty days unless this sum was before then paid. This notice was given the next day after the order passed. The town failing to respond a distress warrant similar to the above, *mutatis mutandis*, (as to amount, &c.,) issued June 10, 1872. This precept was put into the hands of Asher H. Barton sheriff of the county, who executed it August 5, 1872, by seizing certain live stock on the plaintiffs' poor farm and selling the same August 12, 1872. For this he and the county commissioners were sued in this action, which was reported to the full court for its determination. The damages, if any, are to be assessed at *nisi prius* by the justice there presiding.

D. D. Stewart for the plaintiffs.

He who seizes another's property, and he who directs the seizure, must show legal authority, strictly sufficient, or they will alike be held liable as trespassers. *Coffin* v. *Field*, 7 Cush., 358; *Woodbridge* v. *Conner*, 49 Maine, 353; *Emerson* v. *Washington Co.*, 9 Maine, 98; *Sumner* v. *Co. Com'rs*, 37 Maine, 115.

The defects pointed out by counsel, and held fatal by the court, appear in the opinion, which indicates the line of argument pursued.

A. Libbey for the defendants.

The writ contains three counts. The first and second are trespass *quare clausum*, and the third is for taking plaintiffs' personal property described therein. I suppose it will not be contended that the county commissioners can he held under the first or second count, nor that the sheriff can if the warrant is a protection to him. The action cannot be maintained under the third count.

I. The county commissioners had jurisdiction over the subject matter out of which the warrant of distress grew. *Waterville, pet'rs*, v. *Co. Com'rs*, 59 Maine, 86.

The warrant of distress was regular on its face, disclosed no want of jurisdiction in the county commissioners, and is a protection to the sheriff, Mr. Barton. *Whipple* v. *Kent*, 2 Gray, 410; *Thurston* v. *Adams*, 41 Maine, 419; *Gray* v. *Kimball*, 42 Maine, 299.

II. The other defendants, the county commissioners, are not liable. The amount of the liability of Waterville became fixed by the commissioners March 29, 1871. It remained unpaid for more than thirty days. A warrant of distress was duly issued May 2, 1871, R. S., c. 18, § 28.

On this warrant the plaintiffs paid $24,254.48, February 12, 1872; all but the interest and twenty-five cents for the warrant. They had full notice of the amount due. This was not a satisfaction of the judgment. The judgment against the plaintiffs for their part of their expense of opening the way, bore interest from the time the amount was fixed, March 29, 1871. R. S., c. 78, § 15.

The second warrant was properly issued for the collection of the balance due.

III. If not authorized by the statute, the determination that the judgment bore interest was a judicial question over which the commissioners had jurisdiction, and if they erred they are not liable in this suit. *Tyler* v. *Alford*, 38 Maine, 530; *Noxon* v. *Hill*, 2 Allen, 215; *Pratt* v. *Gardner*, 2 Cush., 63; *Piper* v. *Pearson*, 2 Gray, 120.

If the warrant in this case should be found irregular, then it is important to the parties that the court decide the main question, whether interest can be recovered. When this question is settled, the parties will have no difficulty in making a settlement.

Barrows, J. This is an action of trespass *quare clausum* brought by the town of Waterville against the sheriff and county commissioners of Kennebec county for going upon plaintiffs' town farm and seizing and selling certain stock and swine belonging to the plaintiffs.

The defendants set up in justification a warrant of distress issued by said commissioners June 10, 1872, and served by said sheriff August 5, 1872, which is the trespass complained of.

We start with the well settled rules that inferior courts of limited jurisdiction are responsible in trespass to those whom their acts affect, when they act without, or in excess of their jurisdiction, and not otherwise. *Pratt* v. *Gardner*, 2 Cush., 63; *Piper* v. *Pearson*, 2 Gray, 120; and that the officer who executes their process does not subject himself to an action unless the want or excess of jurisdiction appears upon the face of the process. *Whipple* v. *Kent*, 2 Gray, 410; *Thurston* v. *Adams*, 41 Maine, 419; *Gray* v. *Kimball*, 42 Maine, 299.

We are to inquire whether any, and if any which, of the numerous objections urged by the learned and diligent counsel of the plaintiffs against the sufficiency of the record and process relied on by the defendants as a justification, can prevail. In addition to their general jurisdiction the commissioners of Kennebec county were specially empowered by Special Laws of 1870, c. 282, § 1,

to lay out the highway, out of the construction of which this controversy has arisen. By the same act in § 2, it is provided that "the existing laws in relation to the laying out of highways shall govern them in their proceedings, except that there shall be no appeal from their decision in laying out or refusing to lay out such highway;" and that the return of the commissioners may be made at any adjourned session and entered of record at once; in § 3, that if the commissioners shall determine to lay it out they shall also determine the proportion of the expense of erecting and maintaining the bridge, to be borne by each of the towns of Waterville and Winslow which is to be in proportion to their respective state valuations; in § 4, authority is given to the selectmen of the two towns to contract for the erection of the bridge jointly, each town to be liable for its proportion of the expense and no more.

Section 5 provides as follows: "If the selectmen of said towns fail to contract for the erection of the bridge within such time as the commissioners shall fix, the commissioners shall proceed in the manner provided in section twenty-seven of chap. eighteen of the Revised Statutes."

The records show a regular laying out of the highway upon proceedings in conformity with existing laws entered of record at the April session, 1870; an adjudication by the commissioners in accordance with the special act, of the proportions which each town should bear of the expense of the erection of the bridge, and an order under § 5, that the towns should have until the sixteenth day of May, 1870, to contract for the erection of the bridge; and a further order that they should have until the first day of May, 1871, to complete it. The records further show that at a session of the commissioners held May 17, 1870, a petition for the appointment of an agent to build the bridge, alleging the failure of the towns to contract for its erection within the time fixed by the commissioners as above, was presented, of the pendency of which petition the plaintiffs were duly notified and on the twenty-sixth day of May, 1870, upon proof of the facts therein alleged, the commissioners appointed an agent to contract for

the building of the bridge, requiring him to complete and open it on or before May 1, 1871, at an expense not exceeding thirty thousand dollars, the plans and specifications to be filed with the clerk of the courts together with the contract, and the contract not to be binding unless approved by the commissioners, and thereafterwards the agent to be paid for his services, and the contractor for building the bridge, in the manner prescribed by "the statutes in such cases made and provided."

In pursuance of this authority on the sixteenth day of June, 1870, the agent contracted with certain parties for the erection of the bridge for $30,000, according to plans and specifications which were duly filed, and with the contract approved by the commissioners. On the same day the commissioners issued a notice to the assessors of the two towns of the appointment of the agent—of the terms of the contract into which he had entered—of the time when it was to be completed, and of the amount which each town would be required to pay therefor (Waterville's part being $24,060.68) which was duly served a few days later. On the twenty-ninth day of March, 1871, after the completion and acceptance of the work, and due notice to the towns of the presentment of the agent's account for allowance, the commissioners allowed the contract price and $160 for the services and expenses of the agent, and rejected a claim of $2,336.34 for extra work and materials, and ordered their adjudication to be recorded. On the second day of May, 1871, they issued a warrant of distress against the plaintiffs addressed to the sheriff and his deputies, the preamble of which runs thus: "Whereas by the consideration of our county commissioners holden at Augusta within and for our county of Kennebec on the twenty-ninth day of March, A. D. 1871, we recovered judgment against the town of Waterville in said county of Kennebec for the sum of twenty-four thousand and sixty dollars and sixty-eight cents debt, and one hundred and ninety-three dollars and eighty cents for costs, in the same suit expended, as to us appears of record, whereof execution remains to be done."

To this preamble they appended a command to the sheriff to

"cause to be levied and paid unto our treasurer of our county of Kennebec the aforesaid sums, amounting, &c., and interest thereon from said twenty-ninth day of March, 1871, together with twenty-five cents more for this writ, and thereof also to satisfy yourself for your own fees" and to make return within three months from the date.

By a memorandum indorsed upon this warrant it appears that the plaintiffs paid to the county treasurer February 12, 1872, the sum of $24,254.48.

At a session of the commissioners March 26, 1872, the clerk was ordered to notify the assessors of Waterville that the sum of $1,281.55 was still due as accrued interest on this judgment and to issue a warrant of distress for the collection of the same if not paid in twenty days after such notice. He gave such notice by mail the following day and on June 10, 1872, issued a second warrant of distress running against the inhabitants of Waterville and setting forth the recovery of the judgment March 29, 1871, for debt and costs as in the preamble to the previous warrant, except that the original sum is stated to have been "expended by said county in erecting the bridge from Waterville to Winslow," and that "execution remains to be done in part namely for $1,281.55 and interest thereon from February 12, 1872;" which sum and interest the sheriff is commanded by distress and sale of the money, goods, or estate of said inhabitants to cause to be paid to the county treasurer together with fifty cents for the two warrants.

It was in the service of this warrant that the sheriff did the acts here complained of.

The proposition with which the plaintiffs start, that the commissioners had no authority to appoint an agent to build the bridge until the full time had elapsed which they had assigned to the towns as the term within which it was to be completed, while according to the general course of proceeding in such cases it would be correct, is not, we think, maintainable here.

Special powers were conferred by the act of January 21, 1870, c. 282, and, to determine their extent, the whole of the act is to be

construed so as to give effect to all its provisions. *Holbrook* v. *Holbrook*, 1 Pick., 250, 258.

To do this it is plain that the direction in § 2, that "the existing laws in relation to the laying out of highways shall govern them in their proceedings" is not to be so construed as to preclude them from acting under the special power conferred. That direction was doubtless designed to warn the commissioners that in the exercise of the power conferred on them by the special act, they were not at liberty to dispense with the petition, notices, hearing, and allowance of damages which were required by existing laws. This court had so held in the case of the *City of Belfast, appellants*, 53 Maine, 436, 437.

But the clear and explicit language of the legislature in §§ 3 and 5, of chap. 282, laws of 1870, forbids the conclusion that the proceedings of the commissioners throughout and in all contingencies were to be governed by the existing general laws. The general laws authorize no such apportionment of the expense and give no such power to the commissioners to fix a time within which the towns shall contract for the erection of the bridge, or to proceed in the manner provided in § 27, c. 18, R. S. of 1857, if the towns fail to contract, as is here distinctly conferred.

The obvious design and effect of § 5, is to empower the commissioners to appoint an agent and secure the prompt construction of the bridge in case the towns should fail to contract for its erection within such time as the commissioners might fix, instead of waiting as plaintiffs' counsel now contend they should have done until the further time fixed for its completion by the towns should elapse.

The mandate of § 5, is not, as plaintiffs' counsel assumes, to proceed at such time as is prescribed in § 27, but "in the manner" therein provided. The commissioners were justified in proceeding when, and as they did after notice to the town, upon petition of those interested, to cause the work to be done by an agent not one of themselves. That agent made his written contract for the work and filed a copy of it in the clerk's office and the commis-

sioners certified to the assessors of Waterville the time when the contract was to be completed and the amount to be paid therefor.

So far the proceedings of the commissioners were warranted by the authority which the act confers upon them, and if they had continued throughout to proceed in the manner provided in § 27, c. 18, R. S. of 1857, which is identical with § 28, c. 18, R. S. of 1871, the plaintiffs would have had no just cause of complaint.

But our attention has been called to some irregularities in these proceedings which we deem fatal to the defendants' justification. The commissioners did not proceed in the manner prescribed in said § 27, when they issued the first warrant of distress May 2, 1871, the next day after the one fixed for the completion of the contract.

It is not in the power of the agent appointed or the party with whom he contracts, by finishing his work and procuring the allowance of his accounts within the time fixed for the completion of the contract, to hasten the day of payment. The town is to be notified when the contract is made, of the time fixed for its completion. We think the true construction of the statute is that the liability of the town to pay accrues only at the expiration of the time so fixed, although the sum due under the contract and for the expenses of the agent may have been previously ascertained, and that no warrant of distress can lawfully issue unless the town neglects to pay for thirty days thereafterwards. Moreover in R. S. of 1857, c. 78, § 19, (re-enacted in R. S., of 1871, c. 78, § 15,) it is provided that "no warrant of distress shall be originally issued against a town until twenty days after a certificate of the rendition of the judgment is transmitted by their clerk to the assessors of such town." So far as appears this provision was disregarded when the original warrant was issued.

The time when process to enforce a judgment shall issue is not a matter of judicial discretion, and a magistrate issuing it prematurely is liable in trespass. *Briggs* v. *Wardwell*, 10 Mass., 356.

There were other irregularities. The warrant was made returnable in three months instead of ninety days as the statute re-

quires. The periods are not identical. The word month means a calendar month. R. S., c. 1, § 1, clause XI. It is not for us to assume that the legislature had no substantial reason for making such warrants returnable within a different period from that assigned for the return of executions. *Stet lex pro ratione;* and as long as it stands it must be heedfully regarded.

The warrant of distress refers to a judgment which "we" have recovered for a certain sum of money "expended by said county in erecting the bridge from Waterville to Winslow" and requires that sum with additional sums called "costs" to be levied and "paid unto our treasurer of our county of Kennebec."

There is no statute giving the commissioners authority to render judgment in favor of themselves for expenditures thus incurred, or for costs, *eo nomine*, in such a case.

The county of Kennebec was never liable for the contract price of the work or for the agent's services and expenses. *Emerson* v. *Washington Co.*, 9 Maine, 98.

It was the town whose delinquency made the expenditure of money under the direction of an agent necessary, alone, that was liable for the costs of the work and the expenses and services of the agent. It was the agent's accounts which were allowed. It was for his use and benefit that the warrant of distress was to issue.

And it was to issue for such amount as the commissioners might allow on the settlement of his accounts, after notice to the town, for sums expended on the work, and "expenses of the agent for superintendence and for procuring the allowance of his account."

The commissioners had no authority to render any judgment except for the sums which they might so allow, and it should run in favor of the agent and not in favor of themselves or the county which they represent, and the order in the warrant to levy for debt and costs (how made up does not appear) was irregular and void. If the omission to enter upon the record a formal and proper judgment against the town for the amount thus expended to build the bridge, might be attributed to the clerk, as in *Sumner* v. *Co. Com'rs*, 37 Maine, 123, still the issuing of a war-

rant of distress for costs as well as debt, was illegal a nd affords no protection to the tribunal issuing or the officer serving it. Most of these defects and errors attach also to the alias warrant under which the defendants claim to justify, appear upon its face, and must be deemed fatal to the defence. And they are not all mere matters of form. The plaintiffs were thereby ordered to pay in interest and costs more than they were legally liable to pay.

It was suggested at the argument that should the proceedings be found irregular, it was still desirable that the court should determine whether interest was recoverable, with a view to settle all questions between the parties without further litigation.

We have therefore examined the question and see no reason to doubt that under the last clause of c. 78, § 15, R. S., of 1871, which is a transcript of R. S., of 1857, c. 78, § 19, interest would be recoverable on such sum as the commissioners allowed upon the accounts of Mr. Phillips for the amount expended in the construction of the bridge, and for his services in superintending the same and his expenses in procuring the allowance of the accounts, from and after the first day of May, 1871. At that date the time for the completion of the contract had expired. The contract had been in fact completed, and the accounts had been allowed, after notice to the town. The sum thus allowed was payable at that time and the thirty days neglect of the town to pay under their legal liability then commenced.

The fact that the original warrant was wrongfully issued before the expiration of the thirty days, and without the twenty days notice from the clerk, can make no difference in the obligation of the town to pay interest from the time when they were in default.

Nor do we see any force in the plaintiffs' objection that nothing could be allowed to the agent for the construction of the bridge, because he had in fact paid out nothing, and by the terms of the contract with those who did the work, was not to be responsible personally to them, they assuming the risk and delay incident to collecting of the reluctant town through legal process. The expenditure had been made and under the direction of the agent law-

fully appointed by the commissioners, because the town neglected its duty in the premises. And the payment of the expense thus incurred could properly be enforced by warrant of distress for the benefit of whom it might concern in the name of the agent. The allowance of the agent's accounts by the commissioners after due notice to the town, was tantamount to a judgment against the town the record of which may be extended if deficient.

But the commissioners had no authority to render judgment for costs or for interest for a time prior to the term fixed for the completion of the contract.

The complaint of the plaintiffs that the commissioners laid upon them the burden of all the expenses of the agent for superintendence if well founded in fact, could not avail the plaintiffs in this suit; for that, even if it were erroneous and unjust, would be but an error in the exercise of a judicial function. It may be that the commissioners were satisfied that the necessity for the appointment of an agent arose wholly out of the recusancy of Waterville, and therefore the whole expense would be but their due proportion.

But whether they were right or wrong, it is only for ministerial acts not warranted by their general jurisdiction nor the special act, that we hold the commissioners responsible here. As some of those errors appear upon the face of the process which they gave the sheriff to serve, he must be held responsible with them. According to the agreement in the report, the damages are to be assessed by the judge at *nisi prius.* *Defendants defaulted.*

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

ENSIGN L. WORTHING *vs.* HIRAM WORTHING.

When both parties to a real action claim under deeds from the same grantor, the demandant's being many (thirteen) years prior to that of the tenant, the latter cannot introduce in evidence a deed from their common grantor to a third person subsequent to both titles, to disprove the delivery of the first deed, and to show the purpose and the intention of the grantor at the time of its delivery.

Where a witness testified that a deed was delivered to her by her husband for his minor son, the fact that many years after she joined with her husband in a warranty deed in which she released to a third person dower in part of the land included in the deed to her son, he being then a minor, and his deed (for aught appearing) being in her possession, may be regarded as inconsistent with her testimony and is admissible for the purpose of contradicting it.

When the evidence is admissible for a special purpose, the jury should be instructed to limit its use to that purpose only, and a general instruction permitting its use for all purposes whatsoever would be erroneous.

ON EXCEPTIONS.

REAL ACTION to determine the title to certain land in China. It was formerly owned by Samuel H. Worthing who died in 1869, leaving a widow, Sally Worthing, and one son, Ensign L. Worthing, the demandant. To maintain his action the demandant introduced a deed of the premises in question to him from his father, dated November 27, 1827. The tenant put in a deed from his brother, the late Samuel H. Worthing, to him, of the same property, dated October 23, 1838. Each of these deeds was recorded upon the day of its respective date. The tenant also introduced, subject to the demandant's objection, a deed of the same land from said Samuel H. Worthing to Hillman Worthing, (another brother) dated December 24, 1839, and recorded March 24, 1840, in which Sally Worthing joined to bar her dower. The demandant was but six years old when the deed to him was made. The tenant denied that the deed was ever delivered and the demandant claimed to have proved by his mother, Sally Worthing, that Samuel H. Worthing delivered it to her for him. Several exceptions were taken during the trial and to the charge, but the opinion of

the court indicates those upon which the verdict, which was for the tenant, is set aside.

Joseph and *Orville D. Baker* for the demandant.

The deed to Hillman Worthing, made twelve years after that to Ensign, and nine years after the delivery of the latter to his mother for him, was improperly admitted, because it was simply a subsequent declaration of the grantor. *Baker* v. *Haskell*, 47 N. H., 479; *Bartlett* v. *Delprat*, 4 Mass., 702; *Aldrich* v. *Earle*, 13 Gray, 578; *Gates* v. *Mowry*, 15 Gray, 564; *Taylor* v. *Robinson*, 2 Allen, 562; *Lynde* v. *McGregor*, 13 Allen, 175; *Rivard* v. *Walker*, 39 Ill., 413; 1 Greenl. on Ev., § 180 and cases there cited. The reason is that the later acts or declarations are no evidence of the intention that existed when the deed was delivered.

The deed was admitted generally, and not for any special purpose, as plainly appears from the language of the charge.

A. Libbey for the tenant.

The deed to Hillman Worthing was one of warranty signed by Sally Worthing with her husband, and was admissible to contradict her. Being properly admitted, the demandant should have asked specifically to have its effect limited, had he desired this. He did not do so, nor does he base his exceptions upon the failure thus to limit it.

Appleton, C. J. This is a writ of entry, in which both parties derive their title from Samuel H. Worthing;—the demandant by deed dated November 27, 1827; and the tenant by deed dated October 29, 1838. Both deeds were recorded the day of their date.

The issue presented to the jury was whether there had been a delivery and acceptance of the deed under which the demandant claims title, prior to the deed from the same grantor to the tenant.

The demandant, to support the issue on his part, offered the deposition of Sally Worthing, the wife of the late Samuel H. Wor-

thing and the mother of the demandant, who testifies that her husband delivered the deed, under which the demandant claims, to her to keep for him and that he was then about six years old.

The tenant offered in evidence a warranty deed from Samuel H. Worthing to Hillman Worthing dated December 24, 1839, of a part of the premises included in the conveyance from Samuel H. Worthing to the demandant, in which Sally Worthing had released her dower. To the admission of this deed the demandant objected, but notwithstanding the objection it was received.

The deed was offered for various purposes;—to negative the alleged fact of a delivery of the deed from Samuel H. Worthing to the demandant or to his wife for his use; and to disprove any intention on his part to convey the title to the premises described in his deed to his minor son; and to contradict the statements of Sally Worthing in her deposition.

So far as the deed was offered for the purpose of defeating the title the demandant acquired, if any, by the deed of November 27, 1827, it was inadmissible. It was subsequent in time to the conveyances under which the demandant and tenant respectively derive their titles. It is *res inter alios*, and on that account inadmissible.

The issue was whether there had been a delivery of the deed under which the demandant claims title, either to him or to any one for his use. The deed offered bore date twelve years later than the date of the deed to the demandant. It did not, and it could not, show the state of facts, or the intention of the grantor, years before its execution. The declarations of a grantor subsequent to his deed are not admissible to defeat such deeds. But a deed is but the declaration of a grantor reduced to writing. In *Gates* v. *Mowry*, 15 Gray, 565, an offer of similar testimony was made and rejected, and the ruling sustained. A grantee's title cannot be impeached by declarations of the grantor made subsequently to his grant. In *Baker* v. *Haskell*, 47 N. H., 479, Smith, J., says: "By a conveyance, a grantee succeeds to the title as qualified by the admissions of his grantor, made before the

conveyance; but his title is not subject to be impaired or defeated by any subsequent declarations of the grantor." On the trial of a writ of entry against husband and wife to establish the title of a creditor of the husband to property alleged to have been fraudulently conveyed to the wife, declarations of the husband, after the conveyance are inadmissible as against the wife, to prove such fraud. *Aldrich* v. *Earle*, 13 Gray, 578. The same principle has been affirmed in numerous decisions. *Taylor* v. *Robinson*, 2 Allen, 562; *Sullivan* v. *Lowder*, 11 Maine, 427.

But the deed contains acts and declarations of Sally Worthing. If her testimony is true, her husband had parted with all his title to the premises in controversy many years before. Joining with him in a deed of warranty of this land, and releasing dower therein is, to a certain extent, inconsistent with that fact, that her husband had no title, and that his deed conveying the land to a minor son was left in her possession for him, he not being of age when the deed in question was given. It has a tendency to show that she understood the title to remain in her husband notwithstanding what had been done, and impliedly to negative the fact of an unconditional delivery to her of his deed to his son. The effect of this testimony was for the jury.

Had the justice presiding limited the testimony to its bearing upon the credibility of Mrs. Worthing's statements there would have been no just ground of exception; but, instead of that, in referring to the deeds introduced, he says: "they are evidence in the case, and whatever weight is to be given to them upon this point or any other, you have a right to consider." In other words, the deed in question was admitted and no restriction or limitation was made upon the use to be made of it as an article of evidence. In this there was error. *Exceptions sustained.*

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

Hiram Hall *vs.* Henry Barker *et al.*

Demurrage—when recoverable.

Where a bill of lading is silent as to demurrage, and the vessel is unreasonably detained at the port of delivery, before being unloaded, the shipper will be liable to the master, sailing the vessel on shares and having control of her employment, (and therefore the owner *pro hac vice*) in an action of assumpsit upon the implied contract that his vessel should be discharged in a reasonable time after arrival, for the damages incurred, in the nature of demurrage, even though the bill of lading states that the cargo is to be discharged by the consignee with the assistance of the crew.

On report.

Assumpsit. The declaration contained a special count as follows: "In a plea of the case for that the plaintiff, on the fourteenth day of June, A. D. 1867, was the master and had the sole possession, management and control of the schooner Mabel Hall, of 240 tons capacity, and on said day the defendants, in consideration that the plaintiff, at the special request of the defendants, undertook and promised to carry in said schooner from Vinalhaven, in Maine, to the Delaware Breakwater, so called, in the state of Delaware, a cargo of granite, and then and there to deliver the same to Maj. Charles S. Stuart, Brevet Lieutenant Col. Engineers, or his successor, at the port of Delaware Breakwater, for a freight of one dollar and sixty cents a ton, to be paid by the defendants, then and there undertook and promised that said consignee should be ready to receive and discharge said cargo immediately, and without any unreasonable delay, or to pay a reasonable compensation to the plaintiff as demurrage for all the time that the plaintiff, his crew and schooner were delayed beyond that time. And the plaintiff avers that in pursuance of said promise and undertaking on the part of the defendants, he did take said cargo and carry the same to Delaware Breakwater, in Delaware, where he arrived and was ready to discharge the same on the fourth day of July, 1867, then and there gave due notice thereof to said con

signee; but that the defendants, regardless of their said promise and undertaking, did not have said consignee or any other authorized person in readiness to receive and discharge said cargo on that day, or on any other day between that day and the twenty-second day of July, 1867; whereby the plaintiff, with his crew and schooner, was unreasonably delayed for the space of nineteen days from said fourth day of July to said twenty-second day of July, and lost their time, expenses and earnings of themselves and schooner; and the plaintiff avers that a reasonable compensation therefor, with interest to the date hereof, is one thousand dollars. Yet the defendants, notwithstanding their promise and undertaking as aforesaid, have not paid said sum, but though often thereto requested, neglect and refuse so to do."

There was this second count: "Also for that the defendants, at Augusta, on the day of the date hereof, being indebted to the plaintiff in the sum of one thousand dollars for the demurrage of a certain schooner called the 'Mabel Hall,' belonging to the plaintiff, before that time detained and kept at the Delaware Breakwater, in the state of Delaware, with a cargo of granite on board thereof, on demurrage for the space of nineteen days, in consideration thereof, then and there promised the plaintiff to pay him the same on demand; but though often thereto requested, have not paid the same, but neglect and refuse so to do. To the damage of the said plaintiff (as he says) the sum of two thousand dollars."

The bill of lading, in the ordinary form used in the coasting trade, stipulated that the stone was to be discharged by the consignee with the assistance of the crew, and made no mention of demurrage, nor of any particular number of days after arrival within which the schooner was to be discharged.

The master testified that he run the vessel "on the square halves," receiving one-half of the gross earnings and paying running expenses. He was also half owner, and had the whole control of the employment of the vessel, acting as her husband, or agent. It was admitted that his vessel was unreasonably delayed

for sixteen days, and that twenty-six dollars a day would be a fair compensation for the detention; but the defendants contended that it should be paid by the consignee (the United States) and not by them. If found liable, they were to be defaulted and damage assessed upon the foregoing basis of computation, and legal interest.

Joseph and *Orville D. Baker* for the plaintiff.

Capt. Hall was, *pro hac vice*, the owner, and as such, entitled to maintain this action. *Worden* v. *Bemis*, 32 Conn., 268; *Clendanil* v. *Tuckerman*, 17 Barb., 184; *Sproat* v. *Donnell*, 26 Maine, 185; *Bonzey* v. *Hodgkins*, 55 Maine, 98.

The liability for demurrage, like that for freight, is implied against the shipper by the mere fact of carriage. 3 Kent's Com.,* 203; Redfield on Carriers, § 326; 32 Conn., 268; *Cross* v. *Beard*, 26 N. Y., 85; *Sprague* v. *West*, 1 Abb. Adm., 548; *Morse* v. *Pesant*, 3 Abb. N. Y., Ap. Dec., 321; *Fisher* v. *Abeel*, 44 How'd. Prac., 432.

If the bill of lading says the consignee shall pay freight, that does not relieve the shipper of liability for it. *Moore* v. *Wilson*, 1 T. R., 659; *Domett* v. *Beckford*, 5 Barn. & Ad., 521; *Randall* v. *Lynch*, 2 Campb., 355; *Blanchard* v. *Page*, 8 Gray, 292; *Gage* v. *Morse*, 12 Allen, 410.

Demurrage stands on the same footing.

The freighter is bound not to detain the ship beyond the stipulated or usual time to load or deliver the cargo, and is responsible for all the various vicissitudes that may prevent a restoration of her within a reasonable time. 2 Kent's Com.,* 203; 2 Camp., 355, 356.

We are entitled to interest from demand, July 25, 1867. *Hall* v. *Huckins*, 41 Maine, 580; *Chadbourne* v. *Hanscom*, 56 Maine, 554; *Piscataquis R. R. Co.* v. *McComb*, 60 Maine, 290; *Bartlett* v. *Western Union Telegraph Co.*, 62 Maine, 209; *Ford* v. *Tirrell*, 9 Gray, 401; *Harrison* v. *Conlan*, 10 Allen, 85 and 87.

A. P. Gould and *J. E. Moore* for the defendants.

If any action is maintainable, it should be case for negligence, and not assumpsit upon a promise, when there was none. 1 Pars. Mar. Law, 262, and note 3; *Kell* v. *Anderson*, 10 M. & W., 498; *Robertson* v. *Bethune*, 3 Johns., 342; 17 Barb., 184.

The bill of lading shows that the master was to look to the consignee for his discharge, and should have sued him. *Ham* v. *Bensusan*, 9 Car. & P. 709; *Atty* v. *Parish*, 4 Bos. & Pul., 404; 3 Johns., 348. The freight the shippers have paid.

The master is not entitled to sue. 1 Pars. Mar. Law, *ubi sup.*; *Brouncker* v. *Scott*, 4 Taunton, 1; *Jesson* v. *Solly*, Id., 52; *Evans* v. *Forrester*, 1 B. & Ad., 118, and 20 Eng. Com. Law, 420.

Appleton, C. J. The defendants shipped on board the schooner Mabel Hall, of which the plaintiff was master, a quantity of rough stone, weighing 338,090 pounds, from Vinalhaven, to be delivered in good order and condition at (Port) Delaware Breakwater, unto Maj. Charles S. Stuart, Brevet Lt. Col. Engineers, or his successor at a specified freight per ton without primage and average accustomed, the stone to be discharged by the consignee with the assistance of the crew. It was admitted that the vessel containing the stone arrived at the Breakwater in due time, but that no one being ready to receive the cargo, the plaintiff was detained there twenty-eight days beyond a reasonable time for discharging.

The plaintiff for this delay claims compensation in the nature of demurrage. The bill of lading specifies no time within which the cargo was to be discharged, nor is there any written contract between the parties upon the subject.

The plaintiff was master of the Mabel Hall, and half owner;—sailed the vessel on shares, victualling and manning her, and receiving half her gross earnings, acted as agent at home and abroad, had full control of her, making all contracts for freight and signed the bill of lading. He is therefore, *pro hac vice*, to be regarded as between these parties, as the owner of the vessel and as such to

receive what may be due. *Bonzey* v. *Hodgkins*, 55 Maine, 98; *Clendanil* v. *Tuckerman*, 17 Barb., 185; *Worden* v. *Bemis*, 32 Conn., 268.

The shipper of goods is liable for freight to the ship owner. "Demurrage," as is remarked by Heath, J., in *Jesson* v. *Solly*, 4 Taunt., 53, "is only an extended freight," and the liability for freight and for demurrage stands upon the same grounds.

When there is a reservation for demurrage, either in the charter party or the bill of lading, that must control. When there is none it seems settled by all the authorities that an action for damages arising from delay on the part of the shipper in receiving goods, in the nature of demurrage, may be maintained.

The plaintiff has brought assumpsit upon the promise implied on the part of the shipper to receive the goods shipped within a reasonable time after their arrival at the port of destination. The ship-owner impliedly promises to carry the goods as speedily as may be consistent with safety, and is liable in damages for culpable neglect or unreasonable delay. It is the duty of the shipper to be ready to receive the goods at the port of discharge and to see that they are unloaded with reasonable dispatch. For the non-performance of these reciprocal obligations, the injured party has a remedy without any express stipulations to that effect. "Damages, in the nature of demurrage," observes Butler, J., in *Worden* v. *Bemis*, 32 Conn., 273, "are recoverable for detention beyond a reasonable time, in unloading only, and when there is no express stipulation to pay demurrage. They are in the nature of demurrage because they are for the detention of the vessel, and measured by the day like demurrage, and are damages because they are recovered for a breach of the implied contract of the shipper that he will receive the goods in a reasonable time. Assumpsit will lie for them because resulting from a breach of contract, but the count must be special, as for unliquidated damages in other cases of breach of an implied contract." In *Clendanil* v. *Tuckerman*, 17 Barb., 185, which was an action for freight and demurrage, it was held where there has been no special agreement

between a shipper of goods and the master of a vessel run on shares for demurrage, that if the vessel is detained an unreasonable time by the freighter or consignee the owner of the vessel may recover damages in the nature of demurrage for detention. In *Cross* v. *Beard*, 26 N. Y., 85, it was held in the absence of any express agreement as to demurrage, that a contract is implied that the owner and consignee of goods will provide for their discharge in a reasonable time, and that he is liable in damages in case of a breach of such implied contract.

The contract with the plaintiff under the bill of lading was with the shipper. *Blanchard* v. *Page*, 8 Gray, 281. As there was no provision for the payment of demurrage by the consignee, the shipper's liability for such demurrage remains equally as for freight. *Gage* v. *Morse*, 12 Allen, 410; *Chappel* v. *Comfort*, 10 C. B., (N. S.,) 802.

The defendants are liable in assumpsit upon their implied contract and are liable to pay interest from the date of the plaintiff's demand which was made upon the twenty-fifth day of July, 1867.

Defendants defaulted.

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

JOHN F. HUNT *vs.* HENRY BARKER *et al.*

When master is owner, pro hac vice.

When the master sails his vessel on shares, employing the crew, contracting for business, fixing the rate, signing the bill of lading, and having the entire management when away from home, he is the owner, *pro hac vice*, and as such is entitled to sue for damages for the detention of the vessel, even though there be an agent whom the master was accustomed to consult when at home and who had a right of direction, if he chose to exercise it, but who had no control of the vessel when the bill of lading for the voyage in question was signed, and nothing to do with contracts for freight.

ON REPORT.

ASSUMPSIT for damages for the detention of the schooner Leonessa,

in the nature of demurrage. The declaration, bill of lading and voyage in this case, were the same as in the preceding one of *Hall* v. *Barker*, names and dates only being changed. Both suits were commenced May 17, 1873, and the general issue was pleaded in defence to them. Capt. Hunt engaged his vessel to carry stone from Vinalhaven to Delaware Breakwater for Barker & Bodwell, who had a contract with the government to deliver fourteen thousand tons of stone there, and the bill of lading was signed by the plaintiff June 18, 1867. He arrived at the breakwater July 9, 1867, and it was admitted that he was unreasonably detained there twenty-eight days beyond the proper time for discharging, and that thirty-four dollars a day would be a fair compensation for the delay; for which sum and interest he was to have judgment, if entitled to recover in this action. His right of recovery was contested upon the same grounds that have been already stated in the next preceding case, and also because he had not (as it was alleged) such control of the Leonessa as to make him owner, *pro hac vice*, nor such as Capt. Hall had of the Mabel Hall.

Upon this point Capt. Hunt testified, substantially, that he was part owner and in command of the Leonessa in the summer of 1867, then sailing her for one-half the net earnings, employing and paying the crew, contracting for freights and fixing the rates. He said: "Away from home, I had wholly to do with the management of the vessel throughout. At home the agent did. They always allowed me to manage her. I had the victualing of the ship." He then stated his employment by Barker & Bodwell, as aforesaid, and that "the agent of whom I have spoken had no control over the vessel at the time this contract was made. They allowed me to do all such kind of business. . . . He had nothing at all to do with the making of contracts for freights. I made demand on the defendants August 15, 1867." Upon cross-examination he said: "I conferred with the agent upon the subject of freight. I don't know that I did at that time. He never interfered with it. He knew I was making this trade and didn't object. I was not generally accustomed to consult him about my business

when I was at home." This question was then put: "You say away from home you had the control, but at home the agent had the control?" and answered; "yes; he had a right to direct me if he chose. I saw him every day and he knew about it."

Mr. Bodwell testified to this: "We never supposed for a moment but that these parties would get demurrage; not from us, but from the government. Col. Stuart was of that opinion, and I didn't have any other."

Baker & Baker for the plaintiff.

Gould & Moore for the defendants.

In addition to the considerations urged in the case of Hall against these same defendants, their counsel said that "in order to make the master of a vessel owner, *pro hac vice*, under a contract for sailing her on shares, he must have the exclusive control of her for the time being. This principle runs through all the recent authorities." *Noyes* v. *Staples*, 61 Maine, 422; *Thompson* v. *Snow*, 4 Maine, 269; *Emery* v. *Hersey*, Id., 407; *Winsor* v. *Cutts*, 7 Maine, 261; *Lyman* v. *Redman*, 23 Maine, 289; *Bonzey* v. *Hodgkins*, 55 Maine, 98; *Sims* v. *Howard*, 40 Maine, 276.

APPLETON, C. J. This is an action of special assumpsit for demurrage of the schooner Leonessa.

The plaintiff was a part owner, sailing the vessel on shares, employing the crew, receiving half of the net earnings, contracting for freight, fixing the rate, signing bills of lading, and having the whole management when absent from home. There was an agent for the owners, but he had no control of the vessel when the bill of lading was signed, nor anything to do with contracts for freight.

True, the plaintiff says he was accustomed when at home to consult the agent about business, and he had a right to direct him if he chose. The plaintiff might undoubtedly consult with the owners for their common good, or with their agent. So the owners having the right to terminate the contract with the master not being limited in time, might so do, and so doing might direct the

master what to do, and they might authorize an agent to do the same. But it does not appear that they have done so; nor that they have in any way interfered with the action of the master in sailing the vessel on shares.

Upon the whole evidence, the plaintiff must be deemed as the owner, *pro hac vice*, as against these defendants, and as such he is entitled to recover upon the principles settled in *Hall* v. *Barker*. The mere advising with the owners or their agent was a matter of courtesy and nothing more. Taking all the declarations of the plaintiff together, we think he meant to be understood as asserting the fact that he sailed the vessel on shares, and had the entire control of its management.

He demanded payment of this claim on the fifteenth day of August, 1867, and must recover interest upon the sum agreed upon as damages from that date. *Defendants defaulted.*

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

CORDELIA LADD *vs.* JESSE JACOBS.

How judgment against a trustee is allowed against his principal.

The pendency of a trustee process is no bar to the commencement of a suit by the principal debtor against the trustee.

The judgment recovered in such trustee suit, when satisfied, is a bar to the suit subsequently commenced, to the amount paid and the costs of the trustee.

When in the suit by the principal debtor against the trustee the amount recovered is reduced to less than twenty dollars the plaintiff can recover but quarter costs.

ON REPORT.

The defendant was administrator of the estate of the late Stephen Ladd, against which the plaintiff had a claim for labor, which was submitted to referees, who awarded her five hundred and twenty-five dollars. December 9, 1871, the defendant paid her four hundred dollars in money and gave her his note for one hun-

dred and twenty-five dollars payable to her on demand with interest. It was not negotiable in form. No part of it has been paid directly to the holder by the maker. Upon the twenty-third day of March, 1872, Roderick McDonald brought a suit in this court for this county against Cordelia Ladd and Jesse Jacobs as her trustee, and recovered judgment therein at the October term, 1873, and the same was satisfied February 4, 1874, by the payment by Jacobs of $63.28. His costs were $9.43. April 18, 1872, A. N. Stetson summoned said Jacobs as trustee of said Ladd to appear on the twenty-seventh day of that month before a trial justice, who gave judgment for the plaintiff on the fourth day of May, 1872; and on the twenty-second day of said April, he was summoned to appear before the same justice at the suit of H. C. Arnold against said Ladd and him, as her trustee, on the fourth day of May, 1872, when judgment was rendered against them and in favor of said Arnold. Upon the twenty-fourth day of April, 1872, Edwin S. Chandler sued said Ladd and Jacobs as her trustee, by writ issued by the same justice, returnable May 4, 1872, when the plaintiff obtained judgment against them. The plaintiff disclosed in all four cases. His costs were ninety-nine cents in each of the justice suits. April 10, 1873, he paid $45.72 in full satisfaction of the executions issued in these justice actions, payment of them having been seasonably demanded of him.

Upon the foregoing statement the court was to render such judgment both as to damages and costs, as the law and facts require.

The suit in the present action was commenced upon the second day of May, 1872.

W. R. White for the plaintiff.

Emery O. Bean for the defendant.

Appleton, C. J. The writ in this action was sued out on May 2, 1872. Before that date four several trustee processes had been served on the plaintiff and this defendant as her trustee, in all which

judgments have been obtained against both principal and trustee. The executions, which issued in these several trustee processes have all been paid by the trustee, leaving a balance still due on the plaintiff's claim against him.

It is claimed that this action was prematurely commenced, the defendant having been previously summoned as a trustee of the plaintiff.

The plaintiff commenced a suit upon a claim which was due and unpaid. By the service of the trustee processes upon the defendant his indebtedness to the plaintiff was held to respond to the final judgments which might be recovered in the several actions, of which service had been duly made upon him. If the plaintiffs in those suits should fail, the defendant would be discharged as trustee. So, unless a demand is made within thirty days after judgment, the lien created by the attachment will expire. In case judgment is recovered against the principal debtor and trustee and the same is satisfied by the trustee, such judgment will discharge the trustee "from all demands by the principal defendant or his executors or administrators, for all goods, effects and credits, paid, delivered or accounted for by the trustee thereon." R. S., c. 86, § 74.

The suing out a trustee suit is not a bar to the commencement of a suit by the principal defendant against the trustee. If it were to be so held, the defendant might lose an opportunity of securing his debt against the trustee, or it might become barred by the statute of limitation, by reason of the pendency of the trustee process. In *Nathan* v. *Giles*, 5 Taunton, 558, it was held, that a foreign attachment pending is no bar to an action until judgment be recovered in the attachment suit. When judgment is recovered, it becomes a bar to the extent of the amount paid by the trustee and his costs.

It follows that the plaintiff is entitled to recover the balance remaining due after deducting the judgments paid by the defendant and his judgments for costs. Knowing the pendency of the trustee processes against her, the plaintiff voluntarily incurred the

risks of her suit. If the whole debt of the defendant was required to meet the claims against her, she would fail in this action. If they reduce the amount to be recovered by her to less than twenty dollars, as would seem to be the case, her costs must be limited to a quarter of the debt recovered.

Judgment for the plaintiff accordingly.

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

SUSAN PETTINGILL, appellant, *vs.* HOWARD PETTINGILL.

Probate appeal upon an account. Practice.

An executor's account rendered in the probate court for settlement is in the nature of a declaration in a writ; and unless amended by order of court, a greater sum than is charged cannot be allowed to the executor either in that court or upon appeal.

Where one of several obligors in a bond, each being bound for himself alone, overpays the amount due from him, such payment being made upon his liability alone, it does not enure to the benefit of either of the others.

ON REPORT.

This was a second hearing upon the appeal taken by Susan Pettingill, widow and devisee of the late Benjamin Pettingill, from the decree of the judge of probate of Kennebec county, allowing the account of Howard Pettingill, as executor of the will of his father, also named Howard Pettingill, deceased March 28, 1840. The reasons for the appeal, and the relations of the parties can be ascertained by reference to the report of the case *Pettingill*, appellant, v. *Pettingill*, 60 Maine, 411. By the terms of the will of which the appellee is executor the five children of the decedent by his wife, Amy Pettingill, were required to and did give bond for the support of their mother during her life, the expense to be borne equally according to the condition of the bond, though not precisely so expressed in the will, by the terms of which the lands devised to the testator's children were charged with the perform-

ance of the stipulations of the bond, which was not in fact executed till two months after the death of the father. See 60 Maine, 411, and *Pettingill* v. *Patterson*, executor, 32 Maine, 569.

The executor's account as originally filed, was "for the maintenance of Amy Pettingill, widow of Howard Pettingill, deceased," viz :—

From March 28, 1840, to March 28, 1861, at $110. per year,	$2,310
To interest on twenty instalments,	2,706
To continuing maintenance from March 28, 1861, to March 28, 1871, at $220 per year,	2,200
To interest on nine instalments,	594
	$7,810
Less one-fifth, [the executor's one proportion, he being a son,]	1,562
Balance,	$6,248

The judge of probate allowed this account, exclusive of interest, as is stated in 60 Maine, 414; but the supreme court of probate directed its allowance for the six years next preceding the filing of the account, and that credit should be given the several devisees for the sums paid by each for the mother's maintenance and for such sum (if any) as she earned by her labor in the accountant's family. 60 Maine, 424 and 425.

To ascertain these items, the cause was sent by the judge at *nisi prius* to an auditor, (Hon. James W. Bradbury,) who made this report at the March term, 1875:

"After a protracted hearing of the parties, their evidence and the arguments of their counsel, and a careful consideration of the same. I have come to the following conclusion, viz:—

That for a period of six years from November 20, 1852, to November 20, 1858, a fair and just compensation for the support and maintenance of Mrs. Amy Pettingill, according to the bond, was $110 per year, making for the six years,	$660.00
And for the period of six years from November 20, 1858, to November 20, 1864, $3.50 per week, or $182 per year making for the six years,	1,092.00
And for the period from November 20, 1864, to March 28, 1871, $6.50 per week, or $338 per year, making for the period of six years, eighteen weeks,	2,145.00
	$3,897.00

To which amount I add interest upon the six annual instalments next before filing the account,	304.00
	$4,201.00
Interest from the filing the account March 28, 1871, to March 28, 1875, is added,	1,008.00
Making,	$5,209.00
Of this one-fifth is to be borne by the executor,	1,041.80
	$4,168.20

And said Howard Pettingill is not in my judgment entitled upon the evidence to recover anything on this account for the maintenance of his mother prior to November 20, 1852. At that time, in a settlement of certain matters made between him and Benjamin, it was the understanding of both that all past liability of every kind from Benjamin to Howard was cancelled.

All the other parties liable for the support of the old lady having settled, I find that said Howard is not entitled to recover anything in this account for charges prior to November 20, 1852.

Mrs. Mary A. Kent, an obligor in the bond, testified to her care of the mother and attendance upon her since the fall of 1864; and that she has in addition, paid Howard $1200 on account of her liability to bear her fifth part of the expense incurred under the bond. This, in my judgment, is sufficient and more than sufficient to discharge her appropriate share of the liability.

But I have not felt at liberty to deduct the excess so as to reduce the amount due from Benjamin. All the other obligors have respectively discharged their share of the obligation under the bond, either by settlement or adequate service.

The services of the mother were of value to Howard prior to his marriage in the fall of 1848. Since her illness in 1858, her kindly efforts at labor have been of no substantial value.

I find, in conclusion, that there is due to Howard Pettingill from the estate of said Benjamin chargeable upon the land decreed to him by his father, including interest upon the last annual instalments up to March 28, 1875, the sum of ($1,041.80) ten hundred forty-one dollars eighty cents.

Exception was taken by the counsel for the appellant to my al-

lowance of a larger amount per annum for the maintenance of the mother than that charged in the original account filed in the probate office, and by the counsel of the appellee to my allowance of any payment to Howard in the transactions of November 20, 1852, as not being embraced in the 'reasons of appeal.'

J. W. BRADBURY."

The said Susan Pettingill, appellant, filed the following objections to the acceptance of the foregoing report of the commissioner in this case.

I. The executor claimed but two hundred and twenty dollars per year and interest thereon as appears in report of the case, from March 28, 1861, to March 28, 1871, in his account filed in the probate court, but the commissioner in his report allows him from November 20, 1864, to March 28, 1871, $6.50 per week, or $338 per year, and interest upon the last six instalments. His allowance of more than that claimed by the executor in his account and interest upon the same was unauthorized.

II. The commissioner finds that Mrs. Mary A. Kent, one of the obligors in the bond, paid more than her one-fifth for the support of Amy Pettingill to Howard Pettingill, the executor, but does not deduct the amount so overpaid from the executor's claim, but allows his claim for the same amount as if he had not received such over payment. The amount so over-paid by Mary A. Kent should have been deducted from the executor's claim.

The facts set forth in the report of this case in the sixtieth volume of Maine reports, page 411, were made a part of the case.

The presiding judge, *pro forma*, accepted the report and awarded costs to the appellee, to which acceptance and award of costs the appellant excepted.

E. F. Pillsbury for the appellant.

The commissioner allows $72 a year from November 20, 1858, to November 20, 1864, six years,—$432—more than was charged in the executor's account originally filed in the case. 60 Maine, 414.

Also $118 a year from November 20, 1864, to March 28, 1871, six years and eighteen weeks, more than was charged in the account; amounting to about $750, and interest upon this over-allowance for six years to the time of filing the account, March 28, 1871, equals $270. These over-allowances and interest on the same to March 28, 1871, equals $1450. Then he allows interest upon this over-allowance from the time of filing the account March 28, 1871, to March 28, 1875, four years, being about $350 more, making in all an over-allowance of about $1800, one-fifth of this is $360, allowed against the widow of Benjamin Pettingill more than charged in the executor's account.

It may be claimed that the amount allowed does not exceed the amount charged including interest, but the greater part of the over-allowance is upon that part of the account on which interest is allowed. The charge in the account is $220 per year with interest, and the allowance is $338 per year with interest.

If it is claimed that this extra allowance may stand because the whole amount allowed on all the items does not exceed the whole amount charged in all the items, including interest, the answer is that the court has expressly found that interest shall be allowed only on the last six instalments. 60 Maine, 425.

What propriety in cutting off the interest prior to the six years if the other items are to be increased to offset the interest cut off?

Can $338 and interest be allowed on a charge of $220 a year and interest?

Suppose this question of fact as to the worth of supporting the old lady had been submitted to a jury, as it might have been under R. S., c. 63, § 26, could the jury in that case, render a verdict for more than was charged in the account as first filed? No more than they could upon an account in a writ.

The amount overpaid by Mary A. Hunt, to the executor should have been deducted from his claim against the estate for supporting the old lady. The over-payment by Mrs. Kent may be and is in fact barred from being recovered back by her and in so far

as she has over-paid Howard will be twice paid if he can recover it again in this manner.

Suppose the other three obligors had supported their mother entirely. Could the executor compel Benjamin's estate to pay one-fifth of it to him? If one has contributed more than her share is it to be paid to Howard again?

The court say in this case, the acountant should charge himself with all that either of the legatees has paid, as well as his own fifth. 60 Maine, 424. This report only charges him with a part of what Mrs. Kent paid and leaves him to be paid twice.

If the account as originally filed was based on a judgment in the case of *Pettingill* v. *Patterson*, 32 Maine, 569, as claimed by appellee's attorney, it is an additional reason why it should not be increased.

S. Lancaster for the appellee.

In the original bill filed in the probate court, Howard Pettingill as executor, claimed to be allowed what the judgment in *Pettingill* v. *Patterson*, 32 Maine, 569, would give him, and made his bill for the first twenty years, upon the basis of that judgment; then for the next ten years, the yearly sum was doubled, to meet the increased cost of living, but interest was claimed and reckoned on the yearly instalments, in accordance with the judgment in that case, and just as much claimed as the yearly instalments themselves.

See the bill in 60 Maine, 414.

One-fifth part of it is	$1,562.00
Interest from March 28, 1871, to March 28, 1875,	374.88
Amounting March 28, 1875, to	$1,936.88

But the court in their decision in this case, reported in 60 Maine, 411, not having adopted the judgment in the case first cited as the method of making up the executor's account, and having decided, that he was "to be allowed the cost of maintenance," at the hearing before Mr. Bradbury, the executor was called upon by Mr. Bradbury, to make up his account according to the above directions, and he made it up as follows:

From March 28, 1840, to March 28, 1848, 416 weeks at $3 per week,	$1,248.00
From March 28, 1848, to March 28, 1857, 468 weeks at $5 per week,	2,340.00
From March 28, 1857, to March 28, 1871, 728 weeks at $8 per week,	5,824.00
Interest on six last annual instalments,	519,30
Amounting to	$9,931.30
One-fifth of which, being Benjamin's part is	$1,986.20

It is true that Mr. Bradbury divided the whole time into periods as the case seemed to require, and allowed according to the circumstances of each particular period, up to 1848 allowing nothing, and without saying what he allowed from 1848 to November 20, 1852, considering everything up to that time, embraced in a private settlement, then made, between Howard and Benjamin, after that allowing according to the circumstances of the case, amounting in the aggregate to the said sum of $1,041.80.

Now the executor says that the appellant is not aggrieved at this, but that he is the aggrieved party, because Mr. Bradbury allowed the appellant to go outside of the reasons of appeal, and offer proof of claims never thought of while Benjamin lived, nor at the time the reasons of appeal were made and filed. This the executor considers entirely illegal, and that whatever was allowed by Mr. Bradbury for the use of the place and for twelve acres of land, was wholly outside of the case and unauthorized, but having consented that Mr. Bradbury might make up the account he proposes to abide by Mr. Bradbury's decision.

Upon the whole the case stands thus, Mr. Bradbury has apportioned the sum he allowed, to the different periods, in a manner different from what the executor claimed, in some allowing nothing, in others more, but not so much as was charged on the bill used at the trial, nor in the aggregate, so much as the original account, by some eight or nine hundred dollars.

Danforth, J. The questions involved in this case grow out of an account presented by the appellee, in the probate court, in which he claims a certain amount alleged to have been expended for the support of his testator's widow. The case has once been before the law court and is reported in 60 Maine, 411. It was

then held that he was entitled to render such an account, and upon subsequent proceedings an auditor was appointed to ascertain and report the amount to be allowed.

That report and objections in writing to its acceptance have been filed. These objections present the only questions now before the court.

The first objection is, that the auditor has allowed more than was claimed in the original account. The truth of this is denied, and whether true or not depends upon the validity of several propositions contended for by counsel. The original account, as filed, is in the aggregate larger than the amount allowed. But that account is made up largely, of interest, portions of which have already been held not allowable and are therefore to be stricken from the account, and can no longer be considered a part of it. Nor, under any circumstances, can we hold the interest to be a part of the debt; it is rather an incident to it. It certainly is no part of the expense of supporting the widow and must be left out in considering the question now before us.

Again it is contended that the auditor reduced the account by the allowance of payments which were unauthorized by the reasons of appeal, and but for this reduction the account would still in the aggregate be larger than the amount reported. It is true that the auditor disallowed all the account prior to a certain date, and on the ground that up to that time it had been paid and settled by the parties. This was fully authorized by the sixth reason of appeal and by the directions of the court as to the manner in which the account is to be made up, as appears by the report of the case in 60 Maine, on page 424.

Besides, this disallowance reduces the report and the account in the same proportion and can therefore have no bearing upon this question.

It is further claimed that a new and amended account, one made up in accordance with the decision of the law court, was presented to the auditor and acted upon by him without objection. That such an account was made up and acted upon may be true.

But it nowhere appears in the case that it was done by the authority of any court; nor does it appear that it was acted upon without objection, but the contrary; for the auditor's report shows that exception was taken to his allowance of a larger amount "than that charged in the original account." It would undoubtedly be competent for the court at the proper time and place, and upon proper terms, on motion being made therefor, to allow such amendments as may be necessary to correct mistakes and supply omissions; but until such an amendment is made, we must take it as originally filed. It may be true that the new one was made in accordance with the decision of the court and so was the original one, except the interest, and the court did not and had no occasion to consider whether a new account should be filed, or the old one amended. The instructions given as to the manner of making up the account, related to the items of the old one which were to be allowed, and to that alone.

It may be proper to remark that we do not deem it material that the auditor divided the time covered into periods shorter than those in the original account. As originally rendered, the account, aside from the interest, consisted substantially of one item, a claim for the support of the testator's widow. For different periods, different prices are charged. In the auditor's report the periods are made shorter, and in one instance a sum less than that charged is allowed, while in others the sum allowed is greater than that charged. It is very obvious that for a long period a certain sum per week might properly be allowed, which might be too large for a portion of that period and too small for another portion.

The real question then, is, whether the auditor has, in the aggregate, allowed for the widow's support during the time covered by the executor's claim, more than is charged in the original account. He so reports, and on examination, in the light of the principles already discussed, we so find.

This we deem inadmissible. The account filed is in the nature of a declaration in a writ. It is a statement of the claim set up and the grounds upon which it rests. The opposing party has no-

tice of that claim and nothing beyond. In any proceeding at law or in equity, it would be somewhat of a novelty to allow a party to set up one claim and prove another, especially a larger one. He may indeed, in some instances, prove a smaller. But this is allowable only when the larger includes the smaller, and upon that ground. But the larger can never be included in the smaller. Stephen, in his work on Pleading, page 300, says "that a verdict cannot in general be obtained for a larger quantity or value than is alleged." Sedgwick on Damages, page 681, lays down the same rule saying: "it is adhered to with severity."

Upon this point, therefore, the exceptions must be sustained, and the report recommitted unless the excess in the amount allowed be remitted.

The other objection relied upon we think has no legal foundation. It alleges, and the auditor finds, that Mrs. Kent, one of the obligors in the bond given for the support of the widow, has paid more than her share toward such support, which excess is not deducted from the executor's claim in this case. The bond referred to is a several one holding each signer responsible for his share of the expense incurred for the widow's support. It was so held in the former decision of this case. The payments are to be credited to such of the legatees as make them for the purpose of "relieving his or her share of the estate." Accordingly, the auditor finds that the amount paid by Mrs. Kent was paid on her own share, and not for the benefit of this contestant. If, therefore, she has overpaid it is a matter to be settled between her and the executor, and not one which either of the other parties can legally inquire into. *Exceptions sustained.*

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

ELIAS PLIMPTON *vs.* ROBERT H. GARDINER *et al.*

Special damage must be alleged.

This was an action for an injury to the plaintiff's mill through the flowing back of water upon it by means of a dam raised by the defendants. The declaration was for the obstruction thus caused to the working of the mill and the consequent loss of profits: *held*, that a loss of rents, obliged to be relinquished by the plaintiff to his lessees, by agreement between them, in consequence of the overflow of the mill, could not be considered as an element of damage because not specially mentioned in the writ.

ON EXCEPTIONS.

CASE, to recover for damage done by the defendants to the plaintiff's mills. The plaintiff had his mills, known as the Hoe and Fork Factories, upon a little stream, known as Purgatory stream, running from Purgatory pond and emptying into the Cobbosseecontee. The defendants had mills and a dam upon the Cobbosseecontee, at Gardiner, fourteen miles from those of the plaintiff.

The declaration contained two counts, alleging substantially that the plaintiff and his predecessors in title had, from time whereof the memory of man runneth not to the contrary, and ought to have, the unobstructed use of Purgatory stream for the running of the mills mentioned; but that the defendants on and prior to, and ever since the first day of April, 1867, to the day of the suing out of the plaintiff's writ, July 2, 1872, did erect and maintain a dam across the Cobbosseecontee, "into which the said Purgatory flows and empties, thereby hindering and obstructing the free course and passage of the Cobbosseecontee stream and of said Purgatory to the Kennebec river, and thereby damming up and raising the waters of the Cobbosseecontee stream above its usual and due height, thus detaining the waters of the said stream, in the ponds and reservoirs adjacent thereto so as to cause said waters to flow back into said Purgatory stream, and into said mills, and upon the wheels and machinery thereto attached and belonging, thereby hindering and obstructing the use of said mills and

machinery, rendering the same of little or no value, and subjecting the plaintiff to great loss and expense by the interruption of the business of said mills, and depriving him of the profits thereof."

In the spring of 1867 the defendants had placed flush-boards upon their dam which raised it about fifteen inches, and it remained at that elevation for two years. In 1867 and 1868, at high stages of the water, the plaintiff's mill was flowed and he attributed it to this raising of the defendant's dam and brought this suit for the damage thereby caused.

There was much evidence to show that this was the cause of the overflow, and several experts and others to the contrary, holding that it could not so affect the streams for such a long distance. A prior action was brought for this injury but failed because the executors of the late R. H. Gardiner's estate were sued in that capacity. *Plimpton* v. *Richards*, 59 Maine, 115, where the court say that case for a tort does not lie against executors as such.

The second count in the declaration was this:

"Also, for that the said plaintiff on the said first day of April, A. D. 1867, and for a long time before, and from thence hitherto, was seized and possessed of certain mills, mill-dam and water privilege on Purgatory stream, so called, in Litchfield, in said county of Kennebec, and had a right to the free use and flow of the water in said Purgatory stream, and the right to maintain a dam across said stream for the raising of a head of water, and for the purpose of driving his said mills and machinery without any hindrance or molestation.

And the plaintiff avers that the defendants, on the said first day of April, A. D. 1867, and before that time, without any lawful right, authority or permission, had erected, built and maintained a certain structure called flush-boards upon and across a certain dam, called dam number one, or reservoir dam, situate in Gardider aforesaid, over and across the Cobbosseecontee stream, so called, into which the said Purgatory stream runs and empties, and had also filled up certain sluices, and stopped up the waste-ways in said dam, thereby raising the waters of the said Cobbos-

seecontee stream above their usual height and level, to wit, twenty-one inches higher than they were accustomed to be raised, and so much higher than said defendants, or any other person, had any right or authority to raise said stream, and thus maintained and continued said structure during all the time complained of in this writ; by means of which the said Cobbosseecontee stream became full and flowed back into said Purgatory stream, and into said mills of the plaintiff, thereby causing back water, and overflowing the wheels and machinery of said mill; whereby the same were hindered and obstructed so that the plaintiff for a long time, to wit, from said first day of April, A. D. 1867, to the date of this writ, was unable to use his said mills, mill-privilege and machinery to any advantage or profit, but wholly lost the same, and was otherwise greatly injured and damnified."

For several years before 1867 the plaintiff and his sons carried on the manufacturing business in partnership, though the mills and machinery were owned by him alone. In the fall of 1867, they dissolved that copartnership, and the sons hired the mills by a verbal agreement that they were to have it for five hundred dollars a year rent provided they were not flowed out during the next spring as they had been the previous one; in which event, no rent was to be paid. In 1868 the mills were again flowed, and therefore no rent was paid or demanded, since none was due under their arrangement.

Besides being flowed out by these freshets, the wheels were broken some, one corner of one of the two mills settled, and other damage was done. The plaintiff claimed to recover for this direct injury to the mill and for the loss of the rents of it. To settle all questions by one trial the presiding judge refused to give an instruction requested by the defence, to the effect that this last item was not recoverable in this action, and directed the jury, in addition to their general verdict, to find specially what sum would cover the direct injury to the realty itself, if any were found to be inflicted upon it by the defendants' acts, and what would be an equivalent for the lost rent of the mill, at a fair rent-

al. The jury returned a general verdict for $659.27; of which they apportioned, "For damage to mill, $93.24" and "for loss of rent, $566.03." The defendants excepted to the instructions as to rent and to other rulings, and filed a motion for a new trial; but only the question of the right to recover for rent lost is considered in the opinion.

Baker & Webster for the defendants.

The defendants' counsel argued elaborately upon their motion to set aside the verdict; and then, in support of their exceptions, contended that the court should have given the requested instruction, "that the plaintiff, under the counts in this writ is not entitled to recover for diminution of rents for his mill and machinery, as he has set out no such cause of action." 1 Chitty on Pleading, 441; Sedgwick on Damages, 575; *Baker* v. *Sanderson*, 3 Pick., 348; *Sumner* v. *Tileston*, 7 Pick., 203; *Parker* v. *Lowell*, 11 Gray, 353; *Baldwin* v. *R. R. Co.*, 4 Gray, 333; *Warner* v. *Bran*, 8 Gray, 400; *Adams* v. *Barry*, 10 Gray, 361; *Buttley* v. *Faulkner*, 3 B. & Ald., 294.

L. Clay for the plaintiff, in support of this action, cited R. S., c. 92, § 2; *Thomas* v. *Hill*, 31 Maine, 252; *Wentworth* v. *Poor*, 38 Maine, 243; *Lincoln* v. *Chadbourne*, 56 Maine, 197; *Munroe* v. *Gates*, 48 Maine, 463.

Loss of use, or rent, of the property is properly included. Sedgwick on Damages, 147, note; *Hammat* v. *Russ*, 18 Maine, 171; *White* v. *Moseley*, 8 Pick., 356; *Munroe* v. *Gates*, 48 Maine, 463; *Rockwood* v. *Allen*, 7 Mass., 254.

Dickerson, J. This is an action on the case to recover damages to the plaintiff's mills and for the interruption of his mill business, alleged to have been caused by the defendants placing flush boards upon their dam on the Cobbosseecontee stream in Gardiner, whereby the water was made to flow back in Purgatory stream in Litchfield, on which the plaintiff's mills and dam are situated. It comes before the court on motion and exceptions.

There are two counts in the writ. The particular injuries caused

by the defendants' erections, as set forth in the first count, are "hindering and obstructing the use of said mills and machinery and rendering the same of little or no value, and subjecting the plaintiff to great loss and expense by the interruption of the business of said mills, and depriving him of the profit thereof." The injuries complained of in the second count are that "the wheels of the mills were hindered and obstructed so that the plaintiff was unable to use his said mills, mill-privilege and machinery to any advantage or profit, but wholly lost the same, and was otherwise greatly injured and damnified."

As the plaintiff was a copartner with his sons during a portion of the time covered by the writ he did not claim, nor was he allowed to receive any damages in consequence of loss of profits or for preventing the use of the mills for that period of time, but was confined to such damages as resulted from direct injuries to the mills and machinery for which the jury returned a special verdict.

During the balance of the time specified in the writ it was in evidence that the sons of the plaintiff operated the mills under a verbal lease to pay a rental of $500, if the mills were not flowed out as they were the previous year; but if they were thus flowed out, they were not to pay any rent. The jury returned a verdict of $566.03 "for loss of rent."

There is no count in the writ alleging damages for loss of rent in express terms, nor for diminution of rent, and the counsel for the defendants requested the presiding justice to instruct the jury that "the plaintiff under the counts in his writ is not entitled to recover for diminution of rents for his mill and machinery, as he had set out no such cause of action therein." This request was denied, and the jury were instructed that the measure of damages would be the difference between the fair rent of the mills with the flush boards on, and the rent without the flush boards.

It is a well established rule in pleading that when special or peculiar damages are claimed, such as are not the usual or natural consequences of the act done, they should be specifically set forth in the declaration, by way of aggravation, that the defendant may

have due notice of the claim. Special damages are those which may be given in evidence to aggravate the damages sued for in an action already pending, or which may be themselves distinct causes of action. *Dickinson* v. *Boyle*, 17 Pick., 78 ; *Smith* v. *Sherman*, 4 Cush., 413.

It was held in *Parker* v. *City of Lowell*, 11 Gray, 358, which was an action of tort for the obstruction of a culvert, that the loss of rents is in the nature of special damages, and is not recoverable unless specifically set forth in the declaration. *Squier* v. *Gould*, 14 Wend., 159; *Adams* v. *Barry*, 10 Gray, 361; 1 Chitty on Pleading, 441. Sedgwick on Damages, (6th ed.,) 730, 731, 732, and notes.

The jury were instructed that the loss or diminution of rent occasioned by the wrongful acts of the defendants, would be the measure of damages. Our conclusion is that the instructions upon this point are erroneous, and that there is error in the refusal to give the requested instruction in respect to the necessity of a special count for loss or diminution of rent. There is, in truth, no count in the writ to sustain the verdict of the jury "for loss of rent."

Nor is this infirmity cured by the allegation of loss of profits in the first count in the writ. Profits are clearly distinguishable from rents. Both terms are technical in their nature, and neither necessarily includes the other ; there may be profits without rents, and *vice versa*. The other requested instructions were given, and the rulings in respect to the admission and exclusion of evidence appear to be unobjectionable.

There is nothing in the motion that calls upon us to set aside the verdict. The plaintiff is entitled to recover the damages done to the mill and machinery which the jury found to be $93.24. For that sum the plaintiff may have judgment, if he will remit from the verdict all but that amount and interest thereon from the date of the verdict. Otherwise the verdict must be set aside and a new trial granted. *Judgment accordingly.*

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

HIRAM QUINN *vs.* JONATHAN B. BESSE.

Complaint for flowage—when it may be referred under R. S., c. 108.

A statute complaint for flowage may be submitted to the determination of referees, under R. S., c. 108, unless it expressly appear that the title to real estate was necessarily involved, or that the referees attempted to pass upon such title.

ON EXCEPTIONS.

Mr. Quinn claimed that his land had been overflowed and damaged by means of a dam erected by Mr. Besse upon his own land. They agreed to refer the claim to three persons, agreeably to R. S., c. 108, and a submission in the form there indicated was entered into, signed and acknowledged by the parties, October 6, 1873.

The plaintiff's claim, as annexed to this submission, was in these words: "The said Quinn claims that the said Besse has erected or caused to be erected a dam across the stream, the outlet of Lovejoy's pond, in Albion, above said Besse's mill, and continues to support said dam for the purpose of raising a head of water to operate his mill erected on his own land, and that by reason of said dam the water is flowed back and kept upon the land of said Quinn, and has materially injured the same. Said Quinn claims damages for said flowage in the sum of $200 for the last three years."

The referees had hearings upon the thirtieth day of April and the seventh day of May, 1874, and awarded "that Hiram Quinn do recover of the said Jonathan B. Besse the sum of ninety dollars damages and costs of court," &c. The defendant moved that the report be rejected and the case dismissed upon the ground that the submission gave the referees no jurisdiction over the subject matter. The court at *nisi prius* denied the motion, ordered the acceptance of the report, and the defendant excepted.

W. P. Whitehouse for the plaintiff.

R. Foster for the defendant.

BARROWS, J. Quinn's claim for damages for three years flowage of his land by means of a mill-dam erected by the defendant upon his own land, was duly submitted by the parties to arbitrators in pursuance of the provisions of the 108th chapter of the Revised Statutes.

Upon the presentation of the report, the defendant objected to its acceptance upon the ground that the arbitrators had no jurisdiction of the subject matter. Chapter 108 authorizes the submission to arbitration in this mode of "all controversies which may be the subject of a personal action."

The defendant's objection to the jurisdiction is two-fold:

1. That a complaint for flowage is a proceeding *sui generis*, and therefore cannot be deemed a personal action within the meaning of chapter 108.

2. That the title to real estate on both sides is necessarily involved, and therefore it is not the subject of a personal action.

I. The appropriate remedy for such an injury at common law is unquestionably a personal action to recover the damages. R. S., c. 92, prescribes the form of the proceeding only. It is to be by complaint which may be inserted in a writ of attachment and served by summons and copy. § 6. It takes the place of the action at common law. §§ 12 and 23. It must be regarded simply as the statutory substitute for such action, and as being, within the meaning of chapter 108, itself a personal action, and a proper subject of arbitration unless matters which cannot be the subject of a personal action are necessarily involved.

II. There is neither proof nor suggestion that there was any actual controversy between these parties as to their respective titles to the several parcels of land referred to in the plaintiff's claim. For aught that appears, the only question was as to the amount of damage.

This brings the case directly within the reasoning of the court in the case of *Propr's of Fryeburg Canal* v. *Frye*, 5 Maine, 41.

In that case which was error to reverse a judgment rendered upon a statute submission, the court say: "It is objected that the subject matter in dispute between the parties, affecting the title to real estate, could not be adjudicated upon by referees appointed under a submission before a justice. If the title to real estate is necessarily involved in this controversy . . . this error is well assigned." But as it did not appear that any question arose as to the right of either party in real estate, the court liken it to an action of trespass *quare clausum* brought before a justice of the peace where the defendant does not contest the plaintiff's title, and say "it is a mere question of damage and not of title." That case is a decisive authority for the plaintiff in this upon both points; for one of the errors assigned there was that a special mode of ascertaining the damages of the land owners was prescribed by the statutes creating the canal corporation. *Held*, not to preclude the submission of a question of damages to arbitration under the statute.

That the plaintiff's demand is but a mere pecuniary claim, capable of being waived, satisfied or extinguished by parol, was well held in *Snow* v. *Moses*, 53 Maine, 547. See also *Hersey* v. *Packard*, 56 Maine, 395.

No question which could properly be determined in a real action only, seems to be necessarily involved in a reference of this description. As in an action of trespass *quare clausum*, it may be only a question of damage, and not of title. Unless the arbitrators undertook to pass upon a disputed question of title to real estate, the case was clearly within their jurisdiction. It does not appear that they did. *Exceptions overruled.*

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

STATE OF MAINE *vs.* ALBERT E. CLARY *et als.*

What allegations indictment under R. S., c. 126, § 17, must contain.

An indictment for conspiracy, under R. S., c. 126, § 17, is fatally defective if it does not contain any allegation of facts necessary to bring the defendant's acts within the purview of that section; as, for instance, if it omit to charge that the conspiracy was "to injure the person, character, business or property of another;" or an "illegal act injurious to the public trade, health, morals, police, or the administration of public justice;" or "to commit a crime punishable by imprisonment in the state prison."

The conspiracy must be to depreciate in value the article of property itself, and not merely to injure the owner by depriving him of the possession of it. A trespass in forcibly taking a horse from a person, even though accompanied by misstatements as to the authority for doing so, does not come within this statute.

ON EXCEPTIONS.

INDICTMENT charging that Albert E. Clary, Ford B. Curtis and George Elwell unlawfully conspired among themselves, at Gardiner, &c., with the fraudulent intent, &c., "by divers false pretences and subtle means and devices to obtain and acquire to themselves a certain horse, the property of one Erastus Littlefield, which the said Littlefield, by his agent, one George E. Spaulding, had previously received from the said Clary in exchange for a certain black horse . . . . . and to deprive said Littlefield of the possession of said horse by trespass and to divest him of his title to said horse without due process of law, &c., ... and thereby to commit an act injurious to the public morals and to the administration of public justice; and in pursuance of the said conspiracy, &c., the said defendants [naming them] on the twelfth day of October, 1874, at West Gardiner, &c., did falsely pretend, &c., to said Littlefield and his said agent, that said Curtis, an officer, was then and there possessed of certain papers, conferring upon said Curtis lawful authority to take said horse from the possession of said Littlefield; and did then and there forcibly, and against the wishes and commands of the

said Littlefield and Spaulding, take said horse from the possession of said Littlefield and convert said horse to their own use; whereas in truth and in fact said Curtis was not possessed of any such papers," &c., &c., &c.

Upon the trial at the October term, 1874, the respondents were convicted. Thereupon a motion was made to arrest the judgment upon the ground that the indictment was too defective to sustain a judgment and did not charge any offence known to the law. The motion was overruled, and the respondents excepted.

L. Clay for the respondents.

Wm. Penn Whitehouse, county attorney, for the state.

APPLETON, C. J. This is an indictment for conspiracy under R. S., c. 126, § 17. The jury found the defendants guilty, who thereupon filed a motion in arrest of judgment, which being overruled, exceptions to such over-ruling were duly taken.

The indictment sets forth a conspiracy to obtain a horse the property of one Littlefield; and that, in pursuance of such conspiracy, they alleged that Ford B. Curtis, one of the defendants and an officer, "was then and there possessed of certain papers conferring upon said Curtis lawful authority to take said horse from said Littlefield and did then and there forcibly and against the wishes and command of said Littlefield . . take said horse from the possession of said Littlefield, and convert said horse to their own use;" whereas said Curtis was not possessed of any papers authorizing him to take said horse.

The indictment entirely fails to allege any of the facts necessary to bring the defendants within § 17 of the chapter aforesaid.

There is no allegation that the conspiracy was "to injure the person, character, business, or property of another." A conspiracy to cheat and defraud, and thereby causing an injury or loss is not within the prohibition. The injury referred to is one whereby the value of the property injured is diminished or destroyed. *State* v. *Hewett*, 31 Maine, 396.

The indictment does not set forth the doing of "any illegal act injurious to the public trade, health, morals, police, or administration of public justice;" nor any conspiracy "to commit any crime punishable by imprisonment in the state prison."

The indictment is not for Curtis' falsely assuming to be an officer, under c. 122, § 20, for it is distinctly alleged that he was an officer.

The substance of the indictment is that the defendants committed a trespass upon one Littlefield by forcibly taking from him his horse and converting the same "to their own use." This does not show any violation of § 17. *Exceptions sustained.*
Judgment arrested.

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

HATTIE A. SIDELINGER *vs.* MOSES R. BUCKLIN.

Bastardy. Complainant's declarations inadmissible. Practice.

The declarations of a complainant in bastardy, whether made before or after her formal accusation upon oath, as to the paternity of her child, are inadmissible in evidence, when offered by her, either to show constancy or strengthen her credit; since they have no tendency to do either. They are no proof that entirely different statements may not have been made at other times; hence, are no evidence of constancy in the accusation; and if her sworn statements are of doubtful credibility, those made without the sanction of an oath, or its equivalent cannot corroborate them.

Upon the trial of a bastardy process, a copy of the complaint and warrant, certified by the magistrate who took bond for the respondent's appearance, even though the complaint was made before, and the warrant issued by another official, are properly received as evidence of the regularity of the original proceedings.

Proceedings before a trial justice are a sufficient compliance with the statute, which says they shall be before a justice of the peace.

Evidence that the complainant has had the reputation of being a prostitute for the three years preceding the accusation, was properly rejected.

ON EXCEPTIONS.

COMPLAINT in bastardy made June 15, 1872, before one E. G.

Webber, a trial justice of Knox county, who issued his warrant upon which the respondent was brought before Charles F. Blake, Esq., another trial justice of the county, who required him to give bond for his appearance at the next term of this court. At the trial copies of the complaint and warrant, certified by Mr. Blake, were permitted to be used as pleadings and as proof that the complainant had made the requisite accusation, &c., although the respondent objected to their use. The complainant testified that she signed such an accusation.

The complainant's mother, summoned by her, testified that the complainant told her who was the father of the child in May, 1872. The same witness was asked: "since the making of her accusation in writing, whom has she accused of being the father of the child?" and was allowed to answer: "Moses R. Bucklin." This witness then stated that her daughter had always accused the defendant of being the father of the child ever since that time, whenever she conversed with her on the subject.

Complainant's counsel argued to the jury that this was evidence of her truthfulness, as well as of her constancy.

The defendant offered to prove that the complainant had the general reputation of being a prostitute for the past three years, but the judge excluded it.

To these rulings, admitting the papers and testimony and excluding that offered by him, the respondent excepted, the verdict being against him.

Gould & Moore for the respondent.

Mortland & Bliss for the complainant.

Danforth, J. The complainant, under objection, was permitted to prove by a witness upon the stand, her own declarations, made both before and after her "accusation and examination," that the respondent was the father of her child. Such declarations are not admissible to prove that "she has continued constant in such accusation," as they have no tendency to do so. They are entirely consistent with any number of different accusations.

Nor are they competent to sustain her credibility as a witness, the purpose for which they seem to have been used; for if her statements under oath are of doubtful credit, they would be no less so without that sanction. Nor could they be strengthened by any number of repetitions. 1 Greenl. on Ev., § 469, and cases cited in the note to that section.

Nothing appears in the case to make them an exception to the general rule excluding declarations of parties in their own behalf, or of witnesses generally, made out of court.

In all the other matters excepted to, the rulings of the court were in accordance with the law and the usual practice in this state. *Exceptions sustained.*

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

BEDER FALES *vs.* LUTHER HEMENWAY *et als.*

Mortgage. Reference. Practice.

An unrestricted reference by rule of court of a suit pending upon a mortgage gives authority to the referee, if he finds the plaintiff entitled to recover, to determine the amount of the conditional judgment.

Where the mortgage is conditioned to be void upon the fulfilment by the mortgagors of their obligation to the mortgagee for a life maintenance and other things, the referee, if he finds a breach of the continuing condition, should make up the conditional judgment in such sum as in equity and good conscience is a present equivalent for full performance, including therein prospective, as well as past damages.

It is competent for the referee by permission of the presiding judge, to amend the form of his report so as to make its meaning plain, after it has been opened and filed in court, without a formal order of recommitment for that purpose.

ON EXCEPTIONS.

WRIT OF ENTRY, originally commenced by Joseph Tolman upon a mortgage conditioned for his support by the respondents, as is stated in the opinion.

This action was instituted June 20, 1867, upon said mortgage, dated March 28, 1866, given to secure the performance of an obligation of even date for the mortgagee's comfortable maintenance. It was entered at the September term, 1867, of this court for Knox county, and referred the ninth day to Isaac Tolman, but the rule did not issue till May 7, 1868, and at the September term of that year the referee presented his report, to the effect that, upon the defendants' failure to appear agreeably to the notice given he proceeded *ex parte* and found that the defendants did disseize, &c., and further determined and awarded "that the conditions of the obligation described in the mortgage declared upon have been broken by the defendants, and that the amount due to the said Tolman from the defendants on account of the breach of said obligation, in full satisfaction thereof, is seventeen hundred and thirty dollars, and that the plaintiff is entitled to a conditional judgment for that sum" and costs.

The defendants filed written objections to the acceptance of the report alleging various objections; that the reference was without the knowledge of the defendants or of their counsel; that the referee was the nephew of the plaintiff; because one of the defendants died before the hearing, and no administrator had been appointed before the hearing; that Luther Hemenway, upon the reception of the notice of hearing, wrote the referee that one of his co-defendants lay at the point of death (the one who soon after died) and another (said Luther's wife, a daughter of the original plaintiff) was confined to the house by sickness; because he had determined matters not submitted to him, and assumed to award both the mortgaged property and damages for non-performance to the plaintiff; and because the report was changed in material particulars after it was filed. The change was in striking out "fifteen hundred" and inserting "seventeen hundred and thirty" before "dollars," and striking out these words: "I also award that the plaintiff shall recover of the defendants the costs of his board and clothing from the time he was obliged to leave the premises up to September, 1868, as taxed by me at two hundred

and thirty dollars." The judge at *nisi prius* overruled the objections and ordered it to be entered of record as accepted, to which the defendants excepted.

The original plaintiff died, and Beder Fales came in to prosecute, as his administrator.

In allowing the exceptions the justice to whose rulings they were taken added this explanatory statement:

"As to the first objection, I find as matter of fact that the entry upon the docket of a reference to Isaac Tolman was known to the defendants and their counsel, at a term of court prior to the time when the rule of court was issued, and that no motion was made to strike off the reference or to correct the entry, but the cause was suffered to be continued.

"I decline under these circumstances to go into an inquiry as to the original agreement to refer.

"As to the second objection, I find that the relationship of the referee to the plaintiff is as alleged, and that he was cousin to the female defendants, who are the daughters of the plaintiff, and that the fact of such relationship was well known to both parties before the entry of the reference.

"III. I find the facts as alleged in the objection number three, as to the death of a party before the hearing, but the action was discontinued as to her, before the report was accepted.

"IV. I find in the evidence offered in support of this objection nothing to sustain any charge of unfairness or oppression on the part of the referee, and nothing addressing itself to my discretion in such a manner as to induce me to recommit the report.

"V. The fifth objection presents a naked question of law, and I overrule the objection without examination in order to present it to the full court.

"VI. The changes were made by the referee by my permission, subject to defendant's objection, in order to correct the form of the report.

"I overrule all the objections and order the acceptance of the report."

T. R. Simonton for the defendants.

A. P. Gould and *J. E. Moore* for the plaintiff.

BARROWS, J. This case comes before us on exceptions to the acceptance of the report of the referee filed therein and the overruling of the defendants' objections thereto. The suit was originally commenced by Joseph Tolman and is a writ of entry upon a mortgage given to him by the respondents, conditioned to be void if they fulfilled their obligation of same date to maintain him during the term of his natural life, furnish him with certain comforts and privileges, and do certain other acts in said obligation specified.

A hearing before a kinsman of both parties to whom the case was referred by rule of court, was had, and the questions now to be considered were raised upon the presentation of his report for acceptance during the life time of Tolman.

The objections relied on in argument here are that the referee had no authority to fix the amount for which the conditional judgment should be rendered; no power to include in such judgment any damages for the breach of the defendant's obligation, except such as had accrued prior to the commencement of the action, and especially none for the future support of the mortgagee; and that he was allowed by the presiding judge to amend his report after it was filed, so as to make its purport more certain, by adding together and returning in one sum the damages which he had assessed for the support of the mortgagee up to the time of the filing of his report, and those which he had fixed upon and at first returned separately as the prospective damages.

I. When a suit upon a mortgage is referred by rule of court, without any special limitation of the power of the referee, we think it very clear that it is as much the duty of the referee to ascertain the amount for which the conditional judgment shall be rendered, in case he finds the plaintiff entitled to recover, as it is to determine in whose favor judgment ought to be rendered.

It might as well be held that in an action of assumpsit he has

authority only to say that the defendant did promise but not to assess the damages, as that he may find in a writ of entry on a mortgage that the defendants did disseize the plaintiff but has no power to fix the amount of the conditional judgment.

II. Nor do we see any force in the objection to the referee's making, with the permission of the presiding judge, such an amendment of his report after it has been returned to court as will make it more succinct and intelligible, without a formal order to recommit for that purpose.

No change in the substance of the decision was sought or made.

Subject to the defendant's objection, the referee was allowed to make a specific amendment by adding together the two sums to which he had found the plaintiff entitled. All the substantial rights of the defendants were thus certainly as well preserved as they could possibly have been by a formal order to recommit, and a return from the referee in a new draft, which might have made it more difficult for the defendants to reach the remaining question, which is the only serious one presented by the exceptions. To all practical intents, moreover, the permission to amend was equivalent to a recommitment for that purpose.

III. The referee included in the sum for which the conditional judgment was to be awarded, besides the expense actually incurred for the support of the mortgagee up to the time of filing his report, general prospective damages for the breach of the defendant's obligation.

Ought the judgment so to be made up in a suit upon a mortgage conditioned to be void if the mortgagor fulfils an obligation to support the mortgagee during his natural life? When there is a breach of such an obligation and the mortgagee sues for possession of the mortgaged estate, shall his damages be assessed once for all, and the conditional judgment rendered for the amount, or is he entitled only to a conditional judgment for the cost of his support up to the time of the commencement of the action or the trial thereof in court?

It was held in *Sibley* v. *Rider*, 54 Maine, 463, following the

doctrine of *Philbrook* v. *Burgess*, 52 Maine, 271, that the true measure of damages, and the sum for which conditional judgment should be rendered in a suit upon such a mortgage, "is a present equivalent for full performance, and if the parties submit without exceptions to a less sum the judgment will nevertheless be conclusive." Satisfaction of it will operate as a complete satisfaction of the obligation and mortgage, so that no action can subsequently be maintained upon either. Hard as this may seem in a case where a party ignorant of his legal rights had had judgment in such a suit entered up for past damages only, we think a little reflection will make it clear that the contrary doctrine and practice would so completely deprive the mortgagee of any effectual remedy as to work still greater injustice.

There seems to have been at one time a doubt whether mortgages of this description were subject to redemption after breach of the condition; but this court held in *Bryant* v. *Erskine*, 55 Maine, 157, that they are so.

And this is doubtless right; but it is easy to see that the mortgagee who, as is usual in such cases, has conveyed his whole estate, relying upon prompt and punctual performance by the mortgagor for his daily bread, would be in a sorry plight if he were forced to depend for his means of subsistence upon such credit as the right to maintain a succession of small suits for the recovery of money actually advanced, would give him.

After paying the expenses of litigation, little would remain for the support of the obligee.

On the other hand, the party who receives a conveyance of property upon the strength of his agreement to furnish a life maintenance to the grantor, if required, when he fails to perform his contract, either to restore the possession of what he has received or to furnish the means of making his undertaking good, has no cause of complaint. He simply abides the natural and necessary consequences of his own delinquency.

A review of the question only confirms us in the conviction that an adherence to the doctrine of *Sibley* v. *Rider*, and *Phil-*

brook v. *Burgess*, *ubi supra*, will best subserve both law and justice. It was the duty of the referee standing as he did in the place of both judge and jury, to determine not only whether the continuing agreement of the defendants had been broken, but to ascertain what sum would be, in equity and good conscience, a present equivalent for full performance; and for such sum it would follow that a conditional judgment should be entered.

Exceptions overruled.

WALTON, DANFORTH and PETERS, JJ., concurred.

VIRGIN, J., concurred in the result.

HENRY POOR *et al. vs.* JONATHAN S. WILLOUGHBY.

Corporation—liability of stockholders.

Manufacturing corporations "incorporated by general law" under the provisions of R. S., c. 48, §§ 18, 19 and 20, stand on an equality with those "incorporated by a special act" as to the rights and powers conferred and as to the duties, obligations and liabilities imposed by R. S., c. 46 and c. 48.

The liability imposed on stockholders by R. S., c. 48, § 9, is repealed by the act of 1871, c. 205, by § 5 of which act their liability is restricted to "the amount or amounts withdrawn or not paid in" by such stockholders.

ON REPORT.

CASE, brought under the provisions of R. S., c. 48, by the plaintiffs as creditors of the Rockland Shoe Company against the defendant as one of its stockholders.

The company is a manufacturing corporation, organized in 1872, for the purpose of making boots and shoes at Rockland, under the provisions of the sections, from eighteen to twenty inclusive, of the chapter aforesaid, and acts additional thereto, and under written articles of agreement dated January 27, 1872.

The regularity of the proceedings for the organization of the company, and the filing of the requisite certificates, were admitted. The written articles of agreement declared that the capital stock of the company should not be less than forty thousand, nor more

than a hundred thousand dollars. The amount fixed by vote was fifty thousand, all of which was subscribed, but only $42,700 ever paid in, in shares of a hundred dollars each, one of which the defendant held, having paid for it in full, and no part of said capital stock so paid in has ever been withdrawn, and he has ever since its commencement been, and still is the holder of said share.

About the first day of December, A. D. 1874, the company stopped payment of their debts, being at that time in debt to an amount exceeding the amount of their capital invested within the state, in real estate and fixtures thereon, including machinery—and also exceeding one-half of their capital paid in, and remaining undivided, and of their other property and assets, a part of which indebtedness still remains. Upon suits commenced by creditors of the company upon debts thus contracted and existing on December 1, 1874, and upon executions issued thereon, all the property of the corporation had been taken, before the proceedings on the plaintiffs' execution took place.

The plaintiffs being creditors of the corporation on the first day of December, 1874, by a note dated July 17, 1874, sued their demand, and recovered judgment thereon for $1,957.30 debt and $11.32 costs, against the corporation, and execution on the judgment was at once placed in the sheriff's hands for collection. The officer made diligent search for property of the corporation wherewith to satisfy the execution, but could find none, and by direction of the plaintiff creditors, he demanded of the defendant, as such stockholder, to disclose and show attachable property of the corporation sufficient to satisfy said execution, which the defendant refused and neglected to do. The plaintiffs also demanded of the defendant so to disclose and show attachable property as aforesaid, for the purpose aforesaid, which also he refused to do, and on the return day of the execution the officer made due return of his said proceedings on said execution, and that the execution was returned in no part satisfied, and thereupon within six months after the rendition of the judgment aforesaid, this action was brought to recover the amount of their execution, debt and costs, of the defend-

ant individually, to the extent of the stock subscribed and held by him as aforesaid.

The case was submitted to the full court for decision, who are to render judgment therein according to the legal rights of the parties, by default or nonsuit.

Albert W. Paine for the plaintiffs.

The report makes out a case for the plaintiffs. R. S., c. 46, §§ 24, 25, 26, and c. 48, § 9; *Millikin* v. *Whitehouse*, 49 Maine, 527; *Lovegrove* v. *Hunt*, 58 Maine, 9; *Lovegrove* v. *Brown*, 60 Maine, 592. A casual reading might lead one to suppose these sections of the statute to be changed by the act of 1871, c. 205; but a careful examination will show that only those corporations created by special legislation, and not voluntary associations, are included in its operations. Counsel then entered into a critical discussion of that act, in elaboration of this position.

A. P. Gould and *J. E. Moore* for the defendant.

Appleton, C. J. This is an action on the case brought under the provisions of R. S., c. 48, in favor of the plaintiffs as creditors of the Rockland Shoe Company against the defendant, one of its stockholders.

The company is a manufacturing corporation, organized in 1872, for the purpose of manufacturing boots and shoes at Rockland, under the provisions of c. 48, §§ 18, 19 and 20, and acts additional thereto, and under written articles of agreement, dated January 27, 1872. The due organization of the corporation and the regularity of its subsequent proceedings are conceded.

Chapter 48 of Revised Statutes relates to "manufacturing, mining and quarrying corporations." The three last sections relate to "manufacturing, mining and quarrying companies incorporated by general law," and provide a mode by which such companies "may organize into a corporation, adopt a corporate name, define the purposes of the corporation, fix the amount of the capital stock, which shall not be less than two thousand dollars, nor more than

two hundred thousand, divide it into shares, and elect a president, not less than three directors, a secretary, treasurer, and other necessary officers, and adopt a code of by-laws."

After complying with the provisions of the statute those thus incorporated, by § 5, are declared to "be a corporation the same as if incorporated by a special act, with all the rights and powers, and subject to all the duties, obligations and liabilities provided by this chapter, (c. 48) and chapter forty-six."

No distinctions were to be made as to the origin of a corporation, whether it be by special act or it be "incorporated by general law." If any were to be made, then the latter kind would not be "the same as if incorporated by a special act." But both kinds of corporations are placed upon a perfect equality as to "rights and powers" as well as to "duties, obligations and liabilities."

The plaintiffs claim to have brought their case within R. S., c. 48, § 9, and within the case of *Lovegrove* v. *Hunt*, 58 Maine, 9, and we think they have, and are entitled to recover unless their right of action is defeated by subsequent legislation.

Upon the twenty-fourth day of February, 1871, "an act fixing the liability of stockholders in corporations," c. 205, was approved and became the law of the state.

By § 1, "The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription or agreement to or for the capital stock of any corporation, shall be deemed a payment within the purview of this act, unless *bona fide* made in cash, or in some other matter or thing at a *bona fide* and fair valuation thereof."

By § 2, the withdrawal of any portion of the capital stock of the corporation, directly or indirectly is declared void as against any person having thereafter a *bona fide* judgment against said corporation and as against receivers and trustees.

By § 3, the judgment creditors and the trustees or receivers of corporations are authorized to maintain a bill in equity against any person or persons "who have subscribed for or agreed to take stock in the said corporation, and have not paid for the same; or

who have received dividends declared from the capital stock, or in violation of any statute; or who has withdrawn any portion of the capital stock or cancelled or surrendered any of his stock, and received any valuable consideration therefor from the corporation, except its own stock or obligation for its own stock; or who has transferred any of his stock to the corporation as collateral security or otherwise, and received any valuable consideration therefor as aforesaid; and in such action may recover the amount of the capital stock so remaining unpaid or withdrawn, not exceeding the amounts of said judgments or the deficiencies of the assets of such insolvent corporation."

By § 5, "no stockholder in any corporation in this state, except in banks, shall hereafter be liable for the debts or claims against said corporation beyond any amount or amounts withdrawn or not paid in as aforesaid; but this act shall not affect the liability of any officer of any corporation."

The language of the act of 1871, c. 205, is clear and explicit. No room is left for any doubt as to its meaning. It was intended to have effect according to its terms. The past liability of stockholders had been fixed by previous legislation. This act was to fix their liability in the future. So far as it modifies, changes, restricts or limits the then existent liability of stockholders, it must be regarded as a repeal of any law, which is thus modified, changed, restricted or limited by it provisions.

The provisions of R. S., c. 48, § 9, under which this action is brought, are inconsistent with the act which we have just been considering and that section must be regarded as necessarily repealed by the subsequent legislation upon the same subject matter—the liability of stockholders.

To hold the defendant liable would be to disregard the spirit, as well as the letter, of the act of February 24, 1871. Indeed, the act would be unnecessary, and its passage a work of supererogation, if the more efficient and burdensome liabilities of R. S., c. 48, § 9 were to remain in full force and vigor.

Plaintiffs nonsuit.

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

ISRAEL SNOW *et al. vs.* JOSHUA A. BARTLETT.

Construction of R. S., c. 87, §§ 7 and 10.

Where one of several plaintiffs dies his administrator has until the second term after his death to determine whether or not he will come in to prosecute; consequently the other plaintiffs cannot be compelled to elect before then whether or not they will join the administrator in prosecuting the suit, as surviving partners, or will themselves prosecute it in that character, in case the administrator fails to appear.

ON EXCEPTIONS.

ASSUMPSIT, originally brought November 23, 1874, by Israel Snow, Joseph L. Farwell and Israel L. Snow, copartners. The senior member of the firm died and at the next term (March, 1875) his death was suggested on the docket, and the defendant moved that the plaintiffs be required to elect by the middle of the ensuing vacation whether they would prosecute as survivors, or summon in the administrator of the deceased partner to join with them.

An administrator of Israel Snow's estate had been appointed before the commencement of said March term, and the defendant asked leave to summon him in to prosecute.

The judge ruled as matter of law that by R. S., c. 87, § 7, the administrator could not be cited in until after the second term after the death of his intestate, and that the survivors could not be compelled to make their election whether or not to prosecute as survivors before that time; and, on this ground, denied both motions, to which the defendant excepted.

A. P. Gould and *J. E. Moore* for the defendant.

R. S., c. 87, § 7, applies only to the case where there is only one plaintiff or defendant and he dies. Then the administrator requires a full vacation to acquaint himself with the affairs of his intestate. Neither the rule nor the reason of it applies to cases like the present. Section 10 of that chapter gives the right to summon in the administrator, and refers to § 7 only to fix the mode.

Surviving partners should elect whether or not to join the administrator of their deceased associate with them at the first term after one is appointed.

D. N. Mortland for the plaintiffs.

DANFORTH, J. By the R. S., c. 87, § 10, "when either of several plaintiffs or defendants in an action that survives, dies, . . . the executor or administrator of the deceased may appear, or be cited to appear, as provided in section seven." On referring to the latter section, we find no provision regulating the manner in which the representative party shall be summoned in, but we do find one referring to, and fixing the time when it may be done. If therefore, we construe the words, "as provided in section seven" as referring to the manner of citing only, they would be without meaning, and mere surplusage;—a construction which, according to well settled principles, is not permissible. They must, therefore, refer to the provision regulating the time, which thus becomes a part of section ten, and applicable to cases where there are more than one plaintiff or defendant. The result is that the administrator has until "the second term after such death, or after his appointment," in which to make his election whether he will appear or not. If at such second term he neglects or refuses to enter an appearance, he may then be summoned in. This may, as suggested, in some cases cause serious inconvenience. But, if so, the remedy is with the legislature, and not with the court. *Exceptions overruled.*

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

STATE OF MAINE *vs.* JOHN N. AMES.

Indictment for obstructing justice.

It is an indictable offence, at common law, to endeavor to persuade one, recognized for his appearance as a witness in a criminal case, not to appear and testify; whether the persuasion is effective or not.

The use of the persuasive means, thus to obstruct the course of justice, is an overt act toward the consummation of a criminal purpose, that will subject the offender to punishment, whether he succeed or fail in his attempt.

It is not necessary, even if it be desirable or possible, to set out the nature of the particular means employed in any given case, in the indictment.

It is the nature of the offence charged, and not of the means employed in its commission, that the accused is entitled to be informed of by the indictment.

ON EXCEPTIONS.

INDICTMENT, presenting that the respondent, upon the sixth day of July, 1874, entered into a recognizance before Hiram Bass, a trial justice of Knox county, for his appearance at the then next ensuing term of this court, to answer to a complaint charging him with the offence of being a common seller of intoxicating liquors; that one William H. Trim was, at the same time, recognized to appear as a witness in that case for the state; "and the jurors aforesaid, upon their oaths aforesaid, do further present, that the said John N. Ames, at Camden aforesaid, on the sixth day of July, in the year aforesaid, not being ignorant of the premises, but well knowing the same, and contriving and intending the due course of justice to obstruct and impede, unlawfully, corruptly and wickedly did entice, solicit, and endeavor to persuade the said William H. Trim to absent himself from the said supreme judicial court, then next to be holden as aforesaid, on the third Tuesday of September, in the year aforesaid, and not to appear there before the said court, to give evidence in behalf of the state relative to the matters contained in the said complaint, to the evil example of all others in like case offending, and against the peace of the state."

The second count set out the facts as to the recognizances in the

same language as the first, and then presented that the respondent, on, &c., at, &c., well knowing the premises, "and contriving and intending the due course of justice to obstruct and impede, unlawfully, corruptly and wickedly, did endeavor to prevent the said William H. Trim from appearing before the supreme judicial court, then next to be holden at," &c., &c.

To this indictment the defendant demurred. His demurrer was overruled, and he excepted.

Mortland & Hicks for the respondent.

No crime is charged in the indictment, either by statute or common law. If any was committed, it is not sufficiently set out in the indictment. Const. of Maine, art. 1, § 6; *State* v. *Learned*, 47 Maine, 426.

"To entice, solicit, and endeavor to persuade" are not, *per se*, a crime. Nor is it cured by stating the end to be accomplished. It must also state what act was done. *State* v. *Bartlett*, 30 Maine, 132; *State* v. *Ripley*, 31 Maine, 386; *State* v. *Hewett*, Id., 396; *State* v. *Roberts*, 34 Maine, 320.

The indefinite and uncertain charge in the second count, that the defendant "did endeavor to prevent," is still more objectionable.

Trim was not lawfully bound, because his recognizance was for a hundred dollars. R. S., c. 27, § 44.

L. M. Staples, county attorney, for the state.

DANFORTH, J. This is an indictment which comes before us upon demurrer. It is objected that no crime is charged therein; or, if charged, that it is not sufficiently set out.

That it is a crime known to the common law, to induce a witness to absent himself from a court where he is legally bound to appear, to give testimony upon a criminal process there pending, is too clear for argument, and too well settled to require the citation of authorities.

It is perhaps equally well settled that an attempt to do the same thing, though it is not accomplished, will subject the offender

to an indictment. 1 Wharton's Am. Crim. Law., §§ 8 and 9; 1 Bishop on Crim. Law., § 365; *State* v. *Keyes*, 8 Vt., 57; *State* v. *Carpenter*, 20 Vt., 9.

Russell, in his work on Crimes, upon page 182, says: "All who endeavor to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading, or endeavoring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed."

It may be true that a mere purpose to commit a crime, so long as it rests in the intention alone, will not be indictable. But when that purpose results in some overt act; when something is done to accomplish the end designed; it then becomes liable to criminal punishment. It is also true that this purpose and the resulting act must be set out in the indictment so that the accused shall be fully informed of "the nature and cause of the accusation."

In this case, it appears from the indictment that some progress was made in the accomplishment of the unlawful intention. The respondent did "entice, solicit and endeavor to persuade" the witness to absent himself. The means used for this purpose are not set out, nor is it necessary, or perhaps possible, that they should be. The words, "entice, solicit and persuade" sufficiently indicate the nature of the act and cannot leave the defendant in any possible doubt as to the "nature and cause of the offence" with which he is charged. In this description, no element which is necessary to describe the crime intended to be set out, appears to be omitted. No objection to the indictment in other respects is made, nor do we perceive any. The fifth count substantially follows the form found in Wharton's Precedents of Indictments, 601, and is sufficient. The second count is more general, and is, perhaps, defective.

Exceptions overruled.

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

SAMUEL FOYE *vs.* SEWALL SOUTHARD.

Bailiff—what constitutes one.

The plaintiff agreed to sell the defendant, a mariner, a quantity of unbranded pressed hay, which agreement was in contravention of the statute then in force (R. S., c. 38, § 35) upon that subject. After part of it had been put on board Captain Southard's vessel, a dispute arose between the parties as to whether certain bales hauled to the wharf were of the stipulated quality. The plaintiff then told the defendant that he must take the lot as a whole, or none of it, and then assumed to sell all his pressed hay to one Greenleaf, who took all of it, except thirty-two bales already laden on board Captain Southard's schooner, which the captain was unwilling to land again. After some debate on this point, the plaintiff said to Southard: "You take what you have got, and go to hell with it." The defendant carried it to Boston, sold it, and after his return promised to pay Foye the proceeds less the freight, but afterward neglected and refused to do so. Foye brought an action of trover against Southard for the hay so carried to Boston, which was determined in favor of the defendant. He then brought the present action of assumpsit, declaring in his first count for so much hay sold and delivered at the rate named in the original contract, and in the second for money had and received for the net proceeds of the hay sold after deducting expenses. Upon the last count the plaintiff obtained a verdict, which the court decides is not against law, nor so clearly contrary to the evidence as to require that it be set aside upon that ground; as it was competent for the jury to find upon these facts that the defendant carried the hay to Boston and there sold it as bailiff and agent of the plaintiff.

If the substance of a requested instruction, so far as it is material, is given, there is no ground for exception that it is not given in the language of the request.

The defendant requested to have the jury instructed, substantially, that if Mr. Foye sold to Greenleaf all the hay including that then on board of Captain Southard's vessel, and delivered all the rest of it, he could not recover in this action;—which instruction was refused, the judge ruling that, as the hay was not hauled, the sale would be void, and that Greenleaf would obtain no rights under it, either as against Foye or Southard, and therefore that such sale could not be set up by the latter in defence to this claim: *held*, that this ruling was in accordance with law.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT, commenced the twenty-fifth day of October, 1862. A nonsuit had been ordered in this case at its first trial, in 1866,

which the full court decided to be improper; and that if his evidence was not rebutted, the plaintiff could recover upon the facts proved by him. *Foye* v. *Southard*, 54 Maine, 147.

The declaration contained two counts. The first was upon an account annexed "for 9759 lbs. of hay taken from Whaleship wharf in Wiscasset and carried to Boston and sold for twenty-three dollars a ton, $112.22,
and for interest thereon 17.73

$129.95"

with a credit of $9.75 for freight.

The bill was dated May 22, 1860, when the transaction took place.

The second count was for money had and received, with this specification: "For balance of money and interest thereon received for the hay sold in Boston."

In May, 1860, this hay was baled but not branded, and, in that condition, was in the plaintiff's barn, when the defendant,—who then had command of the coasting schooner Coquette, lying at Whaleship wharf in Wiscasset, and who desired to purchase enough pressed hay to finish out a deck-load for his vessel,—went up to see it. Terms of purchase were agreed upon, $17 for the superior and $14 for the inferior quality. The hay was to be delivered along side of the schooner. Several loads were hauled to the wharf, with the first four or five of which no fault was found; but with some of the later loads Captain Southard was dissatisfied, saying it was not such as he purchased and he would not take it. Mr. Foye told him he must take the whole lot or none. Finally, a Mr. Greenleaf, who was called to examine the hay, and pass upon its quality, declared it to be a good average lot, and that he would take it if Southard would not. Thereupon Foye said he sold the whole lot, including that already on board the Coquette, to Greenleaf. The defendant's version of this part of the transaction, and the conversation relative thereto was this: "The third time he came, there were five or six bales of the poor hay and I told him that would not do, and he said he would take

off what I wanted, and Greenleaf would take the rest. We put that on again, and when he came again he drove up to Mr. Greenleaf's store-house. I asked him what that meant. He said I should not have it in that way. I told him I did not buy damaged hay. He said I should not have any of it, unless I took the whole. I told him again I did not buy damaged hay. The reply he made was: 'You take what you have got, and go to hell with it.' I did not know the way to hell, and so I went to Boston with it." He was then asked whether he carried the hay to sell for Foye, or whether it was sold to him, and whether or not Foye ever demanded a re-delivery of it, and replied, "It was sold to me," and that no re-delivery was ever asked for, adding: "When I got back from Boston, I met Foye at Stacy's corner. I said if you will stop a few moments, I will pay you for that hay; and he said, 'what in hell did you go off, and not pay me for?' I said, Mr. Foye, I never saw you; you did not present any bill, but if you will stop here five minutes till I go to the house to get the money, I will settle with you.' I went to the house and got my papers and came right back. I was not gone over five minutes. I hunted all over town for him. I was in a hurry to go up the river. There was a fair wind. I went up to Mr. Elmes' shop, and left the money with him," &c., &c.

June 1, 1860, the plaintiff brought trover against the defendant for the conversion of the same hay that is mentioned in the account annexed to the writ in the present action. This trover suit was referred and the referees reported in favor of the defendant on the ground of the sale to him, which prevented the taking from being tortious, and judgment was entered upon the report, on the second Tuesday of January, 1862.

The defendant requested the judge to give these instructions to the jury:

"I. That if the hay was sold by the plaintiff to the defendant in the market, for shipping, without being branded with the first letter of the christian and the whole of the surname of the person putting up the same, with the name and state where such person

lives, the sale was in violation of law, and the plaintiff cannot recover the price agreed to be paid.

II. That if the hay was so sold by the plaintiff to the defendant, and delivered to the defendant the title passed to the defendant; and if the defendant sold the hay in Boston and afterwards promised the plaintiff to pay him without any new consideration, such promise is void, and no action can be maintained for the price of the hay.

III. That if the plaintiff rescinded the contract of sale to the defendant on the ground that he would not accept the whole of the hay, so that the title did not pass to the defendant, and thereupon sold the whole lot, including the portion hauled to the defendant, to Mr. Greenleaf, for a price agreed upon by the parties, and agreed to deliver the hay to him, and did deliver to said Greenleaf, on that day, a portion of the lot of hay under the contract, the title to the whole, including the portion hauled to the defendant would pass to Greenleaf, and the plaintiff cannot maintain this action for the hay or the money received by the defendant for it.

The first request was given. The other requests were not given, except as modified in the charge. The presiding judge instructed the jury as follows:

"By the statute of this state all hay pressed and put up for sale in this state is required to be branded upon the boards or bands which contain it, with the first letter of the christian name and the whole surname of the person who puts it up, together with the name of the state and the town where the party resides. And if any such hay, not thus branded, is offered for sale, or shipping, it is liable to forfeiture, and may be forfeited, one-half going to the party complaining and the other half to the benefit of the town where the transaction takes place. And if any shipmaster shall take on board any pressed hay not thus branded, he shall be liable to a penalty of two dollars for every such bundle taken on board his vessel for that purpose.

"The plaintiff brings this action for the purpose of recovering

compensation for a certain amount of hay which he delivered to the defendant, many years ago. His action contains two counts: the first is a count on an account annexed to the writ, and the next is a count for money had and received by the defendant for the benefit of the plaintiff. Although some suggestion was made at the opening of the plaintiff's case in regard to the first count in the writ, I understand that now upon looking the whole matter over, the plaintiff expects you to consider whether or not under the rule of law applicable to the case, he is entitled to recover upon that count in the writ; and whether entitled to recover under that count or not, he claims that he is entitled to recover upon the second count.

"There is no question between these parties but that the defendant did receive a quantity of hay from the plaintiff, whether there was a contract for sale or otherwise. And there is no question that the hay thus delivered was pressed hay and not branded. The question arises as to the effect of any contract for sale, the parties may have made: Is it one that can be enforced by the courts of this state? This sale is an illegal one, if such one was made, and being illegal in its character, will the courts in this state, established and ordained for the purpose of executing the laws, lend its aid in violation of those very laws? The simple inquiry suggests an answer in the negative. The courts will not aid parties in enforcing contracts when made in plain violation of the law of the land. This statute was passed, undoubtedly, from motives of public policy, for the protection of honest purchasers; to enable the purchaser of an article which did not prove to be what it appeared to be, to trace the hay back to the guilty party, and to enable him to punish such party.

"Now, I have to say to you gentlemen, that if these parties entered into a contract, the plaintiff to sell, and the defendant to buy this hay, unbranded, that that was a contract made in violation of the law and the law will not aid either party in enforcing it, and that the plaintiff, if such was the contract between the parties, cannot recover from the defendant for the price under the first count

in the writ. Can he recover under the second count? I propose principally to direct your attention to the principles of law, without recapitulating the testimony or any considerable portion of it before you. You will undoubtedly recollect all that is material in the case. There has been some testimony tending to show, or by which, it is claimed by one side, or perhaps both sides, that this pretended contract was rescinded by the plaintiff in consequence of a refusal by the defendant to receive certain objectionable bundles, as not conforming to the quality which he had agreed to deliver. It is claimed by the counsel for the defendant that if this was done by the plaintiff—that if he then and there stated that if he did not take the whole of the hay as it was, it being precisely the quality stipulated for, that he should not have any of it, that the contract was up, and that he did then and there negotiate with one Greenleaf and did sell all to him, delivering a portion to him, that then the plaintiff parted with the property to Greenleaf, and having parted with his interest in the property to Greenleaf, he cannot maintain this action against the defendant. Now, gentlemen, how was this, and what is the rule of law applicable to such cases? The original contract, if a contract was made, between the plaintiff and the defendant, was an illegal one and conferred no right of property in the hay not delivered, upon the defendant—no right that he could enforce at law. If, for instance, the parties had entered into this contract and a part was delivered to the defendant and a part remained in the plaintiff's possession, think you that if the plaintiff refused to deliver the balance, the law could compel him to deliver it? Certainly not. So that if the illegitimate contract was undertaken on the part of the plaintiff to be rescinded by him, the advantage that he undertook to confer upon Greenleaf would confer no greater rights than he had conferred upon the defendant. The contract with Greenleaf would be equally illegal, and therefore I do not give you the instruction requested by the defendant.

"Now it is claimed further, on the part of the counsel for the plaintiff, that this hay, whatever may have been the original contract or arrangements between these parties, actually went into

the possession of the defendant with the plaintiff's consent and knowledge, after the rescission of the contract and that it was taken to Boston by him, with the consent and knowledge of the plaintiff, and that having been thus taken, and having been sold by him in Boston, and having upon his return to Wiscasset promised the plaintiff that he would pay him the amount that he had received for the sale of the hay, deducting the freight; and therefore from this circumstance the plaintiff is entitled to recover upon the second count in the writ. In other words, that the defendant now has money in his possession which, in equity and good conscience belongs to the plaintiff, and that he is bound to pay over the money to the plaintiff. Now, gentlemen, how was that? I instruct you that if this hay did thus go into the possession of the defendant, with the consent of the plaintiff, and did leave Wiscasset in the defendant's vessel with the plaintiff's knowledge and consent, and the defendant did take it to Boston, and did sell it and come home, and promised to pay the proceeds to the plaintiff—deducting the freight, that the plaintiff is entitled to recover the amount of the sales of the hay, deducting the amount of the freight. So it will be important for you to consider the taking of the hay with respect to the knowledge and consent of this plaintiff, and whether upon his return he offered to pay the amount to the plaintiff, deducting the amount of the freight. For if he did, then I instruct you that the plaintiff is entitled to recover.

"But if the defendant took the hay without the consent of the plaintiff, if he took it tortiously, and took it to Boston, and there sold it, and then came home and offered to pay the plaintiff the amount of the proceeds, that he would not be entitled to maintain this action, for the reason the question of tortious taking has been once solemnly adjudicated between the parties, and it is not competent to have that matter adjudicated upon again.

"These are the principles of law, as I understand, which are involved in this case; and it is for you to apply the testimony upon these principles."

The verdict was for the plaintiff, and to the foregoing instructions and refusals to instruct, the defendant excepted.

A. Libbey for the defendant.

The plaintiff cannot recover on the contract of sale, because the hay was not branded; on this point the charge of the presiding judge is correct. *Foye* v. *Southard*, 54 Maine, 147; *Buxton* v. *Hamblen*, 32 Maine, 448.

The second and third requested instructions should have been given.

By the sale to Greenleaf of the whole of the plaintiff's hay, including what he had hauled to the defendant, and a delivery of part, the title to the whole, as between the parties, passed to Greenleaf. A sale by the owner of property in the hands of one wrongfully holding it, will pass the title to purchaser without delivery, and the purchaser may maintain trover for it. *Lanfear* v. *Sumner*, 17 Mass., 110; *Parsons* v. *Dickinson*, 11 Pick., 352.

The title to property sold on the Lord's day, passes to the purchaser. *Richardson* v. *Kimball*, 28 Maine, 463; *Myers* v. *Meinrath*, 101 Mass., 366.

The plaintiff never rescinded the contract of sale with Greenleaf, and if the defendant did not purchase the hay of Foye, he is liable in trover to Greenleaf.

The instruction "that if this hay did thus go into the possession of the defendant, with the consent of the plaintiff, and did leave Wiscasset in defendant's vessel with plaintiff's knowledge and consent, and the defendant did take it to Boston, and did sell it and come home, and promised to pay the proceeds to the plaintiff, deducting the freight, then the plaintiff is entitled to recover the amount of sales of the hay deducting the amount of freight," as applied to the evidence in the case, is erroneous. Though correct as an abstract proposition there was no evidence in the case to authorize it. *Hopkins* v. *Fowler*, 39 Maine, 568; *Wright* v. *Old Colony R. R. Co.*, 9 Gray, 413.

The verdict is clearly against the evidence. If it was a sale, the plaintiff cannot recover. If a conversion, he cannot recover, for he brought his suit for that cause, and defendant recovered judgment against him.

There is no evidence that the defendant took the hay of the plaintiff to carry to Boston and sell for him, on freight. The plaintiff's own evidence and that of his brother also, is against it. The plaintiff says he sold all the hay to Greenleaf.

The averment in the plaintiff's first writ that the defendant wrongfully took and converted the hay, is evidence he did not take it by plaintiff's request, to sell for him.

Having once elected to rely upon a tort, he cannot now waive it and bring assumpsit. *Ware* v. *Percival*, 61 Maine, 391.

A. P. Gould and *J. E. Moore* for the plaintiff.

VIRGIN, J. In the first count, the plaintiff seeks to recover the price of a certain quantity of hay, as for goods sold and delivered.

In the second count is set forth the claim of the plaintiff to recover, not the price agreed upon as part of a contract of sale, but the proceeds of the same hay received by the defendant and alleged rightfully to belong to the plaintiff, less certain charges for freight, but never accounted for or paid over to him by the defendant.

In the spring of 1860, (the date of the transactions to which the allegations refer,) the plaintiff, a farmer residing in Wiscasset, owned certain bales of pressed hay, not branded in conformity with the requirements of R. S. of 1857, c. 38, § 35. The defendant was master of a coasting vessel lying at one of the wharves in Wiscasset, and about to sail to Boston.

After an examination of the hay as it was stored in the plaintiff's barn, and some negotiations between the parties, a contract of sale was made, the price agreed upon and a day fixed for the delivery at the wharf.

When a portion had been delivered on board in pursuance of such contract of sale, a dispute arose as to the quality of the hay; the defendant refused to receive certain bales which he claimed were inferior in quality and value to those shown to him at the barn; and the plaintiff insisting that it was the same hay examined, declared that it should not be picked, that unless the defendant took the whole lot at the rates originally agreed upon, he should have none of it.

Thereupon the plaintiff ceased hauling hay to the defendant's vessel—made a new sale to one Greenleaf, to whom he delivered all that had not been put on board of the defendant's vessel, or deposited at the wharf ready for delivery on board. There is evidence tending to show that this new contract of sale to Greenleaf included in terms the entire lot—that already in possession of the defendant as well as the part which had never been delivered to him.

The report of the evidence discloses at length the conversation between the parties pertaining to this transaction. It need not be repeated, but will be important to be considered in its bearing upon the question whether, notwithstanding the alleged sale to Greenleaf, consent was finally given by the plaintiff to the defendant's retaining the hay delivered to him and proceeding with it to Boston.

The defendant sailed soon after for Boston, where he sold the hay, received the proceeds and on his return promised the plaintiff to pay him; but has never done so.

As to the amount of the verdict, if under the rules of law stated by the presiding justice, the jury should find for the plaintiff, they were directed that they might "return the amount received by the defendant for the sale of the hay, deducting for his freight and all reasonable charges, and add to that interest from the date of the writ."

The verdict was for the plaintiff, and the case comes before this court on exceptions and motion to set aside the verdict as against evidence.

The first requested instruction was given; and as it was conceded at the trial that the hay was not branded, that was equivalent to a ruling that the plaintiff was not entitled to recover under the first count. The charge also contained other definite instructions to the same effect.

The first exception, therefore, has reference to the refusal of the presiding judge to give the second instruction requested by the defendant. But upon review of the charge, we are satisfied that while the language of this request was not adopted, its substance,

so far as material to the issue was clearly embraced in the rulings given.

Upon facts not in dispute, the jury were instructed that the plaintiff could not recover under the first count; and his right to recover under the second count was made by the rulings given, to depend upon their finding that the original contract of sale was rescinded by the parties, prior to the defendant's sailing to Boston. If such rescission was not proved, then by the instructions contained in the charge, the plaintiff was not entitled to recover. If there was such rescission, the second request predecated as it is upon a subsisting sale became inapplicable.

The defendant secondly excepts to the refusal to give the third requested instruction and to those rulings which were given upon the matters embraced therein.

But we think it clear upon principle and authority that an agreement to sell to Greenleaf the unbranded hay which was in the possession of the defendant, being in direct violation of the statute, and it not having been executed on either side by payment or delivery, conferred no title upon Greenleaf which the law would protect. Whatever form of remedy he should elect, whatever process he should adopt to sustain such title—whether to enforce delivery according to the terms of the illegal contract, or to recover damages for breach thereof, the maxim—"*Potior est conditio defendentis*" would apply. The sole claim which Greenleaf could urge against the plaintiff, so far as the hay which remained in the possession of the defendant is concerned, would be based wholly upon an unexecuted contract, forbidden by statute. If the plaintiff delivered to him only a part of what he had agreed to deliver, Greenleaf could have accepted it or rejected it and refused to pay; and if he adopted the latter course, the failure to deliver the whole as well as the illegality of the contract would have afforded ample defence to Greenleaf in any proceeding by the plaintiff against him. But if he chose to accept a part of what had been illegally agreed to be sold and delivered to him, he thereby acquired no title to the portion not delivered and not paid for.

These considerations apply as well to any proceedings by Greenleaf against the defendant as against the plaintiff. For unless the verdict is against the evidence—which we shall consider later—the defendant can only be regarded as the bailee of the plaintiff with reference to the hay which forms the subject matter of this suit. Under the instructions given, the jury must have found that the defendant was not a vendee under an illegal sale; for they were told in effect that the plaintiff was not entitled to recover in such case.

The verdict also negatives the theory that the defendant was a trespasser or wrongdoer in his conduct relating to the hay. For it appearing that a previous action of trover for the same hay had been determined in favor of the defendant, the jury were instructed that—"If the defendant took the hay without the consent of the plaintiff, if he took it tortiously to Boston and there sold it, and then came home and offered to pay the plaintiff the amount of the proceeds, the plaintiff would not be entitled to maintain this action for the reason that the tortious taking has once been solemnly adjudicated between the parties," &c.

Under the verdict, then, the defendant was neither vendee nor trespasser. He was bailee of the plaintiff; and the same considerations which would forbid Greenleaf to assert title against the plaintiff or claim damage of him, would apply with equal force to any claim made by Greenleaf upon the defendant, in regard to this hay. No title in Greenleaf then intervenes to prevent the plaintiff from maintaining this suit; and the refusal to give the second request, as well as the instructions given on this subject were correct.

The remaining exception is to the following ruling: "If this hay did thus go into the possession of the defendant with the plaintiff's consent and did leave Wiscasset in the defendant's vessel with the plaintiff's knowledge and consent, and the defendant did take it to Boston and sell it, and came home and promised to pay the proceeds to the plaintiff, deducting the freight, the plaintiff is entitled to recover."

This is conceded to be correct as an abstract proposition, but it is claimed that there is no evidence on which to base it.

The consideration of this exception therefore is closely connected with that of the motion to set aside the verdict as being against evidence.

It is contended that the instruction assumes one fact which the jury were not authorized to find from the evidence—to wit—the plaintiff's consent to the defendant's act in taking and removing the hay to Boston.

Were the jury justified in finding such assent? Or is the verdict on this point so clearly opposed to the evidence as to require the interference of this court to correct an error of fact?

There is undoubtedly testimony strongly tending to show that the plaintiff did not assent to such action on the part of the defendant; but it can by no means be said upon the evidence reported to be a matter about which there is not a real controversy.

The plaintiff at one time said that unless the defendant took the whole of the hay, he should have none. But there is also testimony tending to show that the hay immediately upon its delivery at the wharf was put on board the vessel in the plaintiff's presence; and it appears that the plaintiff never demanded the possession of it again, nor forbade the defendant to sail with it; but on the contrary told the defendant—"you take what you have got and go to hell with it"—which the defendant might construe into a permission to take what hay was already on board and go wherever he pleased with it.

The plaintiff says he sold the whole lot to Greenleaf, including what had been delivered to the defendant; and the first action brought by the plaintiff was trover alleging conversion. Both of these facts are strongly opposed to any theory of consent on the part of the plaintiff to the taking of the hay by the defendant.

But in determining the question whether the taking by the defendant was tortious in such sense as that judgment in favor of the defendant in the action of trover should bar this action, regard should be had not so much to what were the real wish and intent of the plaintiff as to what was the manifestation of his will by word and act in his dealing with the defendant.

Were his language and conduct, or his silence and failure to act, such as reasonably to give the defendant to understand that he might retain and remove to Boston the hay which had been put on board his vessel, accounting therefor on his return? If so, the defendant was guilty of no tort, and the judgment in trover should not bar this action.

The interview between the parties on the return of the defendant from Boston, as detailed by both, tends strongly to show that the plaintiff did not complain of the defendant for proceeding to Boston with the hay, that he charged him with no wrong except the non-payment of the money. Whether the court might or might not arrive at a different result upon the same evidence, we are satisfied that no such manifest error in the action of the jury is shown as requires us to grant this motion and re-open this long pending controversy.

And if on this point the verdict is not unwarranted by the evidence, the last instruction to which exception is taken, admitted to be correct in the abstract, becomes pertinent to the facts in controversy.

A somewhat peculiar state of facts is developed by the testimony reported. It is not a question of the legal relation existing between parties to a contract made in violation of law. It was only upon proof of the rescission of the contract of sale, the taking of the hay by the plaintiff's consent, the receipt of the proceeds by the defendant upon sale thereof in another state, and a subsequent promise made on his return to pay, that under the rulings given the defendant became liable.

Without attempting to determine what would have been the legal rights of the parties had no rescission been proved, we regard the instructions to which exceptions have been taken as free from any error by which the defendant has been prejudiced.

Motion and exceptions overruled.

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

INHABITANTS OF BOOTHBAY *vs.* BENJAMIN P. GILES *et als.*

Collector's bond—liability thereon.

No action can be maintained upon a collector's bond by merely showing his failure to account and the commitment to him of the tax lists and warrant, if the latter directs an exemption from distress of property not exempt by statute. The plaintiffs must go further, in such case, and prove an actual reception of money for taxes by the collector, and not accounted for by him, or they will fail in their action.

ON REPORT.

DEBT, upon three bonds, given by Mr. Giles as collector of Boothbay for 1866, 1867, and 1868, and the other defendants as his sureties. A separate action was commenced upon each bond, but they were all submitted upon one report, as the legal questions raised in each case were identical. The plaintiffs put in the proof of the defendant's (Giles') election and qualification as collector, and of the commitment of the tax lists to him, with a warrant for their collection, in which the tax payer's "animals" and "other goods and chattels exempted from attachment for debt," were exempted from distress, in addition to the articles exempt by statute, as was the case in the warrant mentioned in *Orneville* v. *Pearson*, 61 Maine, 552. The decision of the case at bar is merely a re-affirmance of *Orneville* v. *Pearson*, but is published on account of the importance of the subject and the extensive use which this defective form of warrant has obtained throughout the towns all over the state.

A. Libbey for the plaintiffs.

A. P. Gould and *J. E. Moore* for the defendants.

DANFORTH, J. These actions are upon different bonds purporting to have been given by Giles as principal, and the other defendants as sureties, to secure his fidelity as collector of taxes for the plaintiff town for the several years of 1866, 1867 and 1868. For each of those years the assessors committed to said

Giles lists of taxes with warrants of the same tenor, and similar to that considered in the case of *Orneville* v. *Pearson*, 61 Maine, 552. These commitments for the reasons given in the opinion in that case (to which we refer)—on account of the defect in the warrants—conferred upon the collector no authority, and imposed upon him no official duty. It is therefore not sufficient for the plaintiffs to make out their case to show such a commitment. They must go further and show that he had received money for which he had not accounted. *Trescott* v. *Moan*, 50 Maine, 347; *Cheshire* v. *Howland*, 13 Gray, 321 to 324.

It appears from the auditor's report that, upon this point, no other proof than that of the commitments was offered before him, and all that appears in the report comes from the other side and tends to show that all the money received has been legally accounted for. Therefore there must be in each case

Judgment for the defendants.

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

JOHN BULFINCH, administrator, in review, *vs.* WILLIAM BENNER.

Preferred claims not to be proved before insolvency commissioners.

An action of debt, to recover taxes assessed against the person and estate of one who has since died insolvent, can be maintained against his administrator, without having laid the claim therefor before the commissioners of insolvency appointed upon said estate; since preferred claims are not required to be proved before such commissioners.

ON REPORT.

William Benner of Waldoboro, in this county, was chosen collector of taxes by that town, in 1861, and qualified for and entered upon the duties of that position. Among the taxes committed to him were those against Evarts Bulfinch, a resident of Waldoboro, amounting in all (state, county, town and school district)

to forty-nine dollars and fifty-seven cents. The regularity of the assessment, and the liability of the citizen to taxation there, were not denied. Before any portion of these taxes against Mr. Bulfinch were collected he died, and John Bulfinch, the plaintiff in review, became the administrator of his estate, which proved insolvent, was so represented, and commissioners of insolvency were appointed who met conformably to the requirements of their commission and reported upon such claims as were laid before them. By a certified copy of the administrator's first account—not referred to in the report, nor made part of the case, but accompanying the papers that came from the court into the hands of the reporter—it appeared that he charged himself with six thousand dollars, the whole amount at which the estate was inventoried, and was allowed $7,078.90, for what, by the account, purported to be "payments and charges entitled to preferences under the laws of the United States;" showing a balance of $1,078.90 due the administrator.

The claim for taxes hereinbefore mentioned was not presented before the commissioners of insolvency, but payment was demanded of the administrator and refused. Thereupon the inhabitants of Waldoboro, at the June term, 1862, of the probate court for Lincoln county, presented their petition, stating their claim and its non-payment; that the account as settled was fraudulent as to them, and that assets were actually in the hands of the administrator; and praying that he be cited to settle another account and, failing to do so, for leave to sue his administration bond. The administrator not appearing in response to the notice given him of this petition, leave was granted at the term holden July 7, 1862, to sue his bond; from which order he appealed, but was held by this court in 54 Maine, 150, not entitled to appeal because not aggrieved. While this appeal was pending, to wit, December 18, 1863, Mr. Benner sued Mr. John Bulfinch, as administrator, to recover these taxes.

There was an entry made in accordance with a written agreement of counsel, that this last suit should abide the determina-

tion of the appeal; and as that was dismissed, the plaintiff in review now claims that the action at law should have been dismissed with it; but it will be perceived by a reference to 54 Maine, 152, that this court thought otherwise; for, in the closing paragraph of the opinion, they say: "Inasmuch as we can give no opinion upon the main matters in controversy between the parties in this case, the stipulation with regard to the disposition of the suit *Benner* v. *Bulfinch*, adm'r, becomes inoperative."

The order for the dismissal of Mr. Bulfinch's appeal was received June 14, 1867, and entered as of the fifth day of the preceding May term. Upon the first day of the ensuing October term, 1867, the action of *Benner* v. *Bulfinch*, adm'r, was defaulted, and judgment was entered upon the default for $61.16 debt and $39.46 costs, and execution issued therefor November 25, 1867. This execution was fully paid by John Bulfinch to Henry Farrington, the plaintiff's attorney, August 3, 1868, and a receipt in full of that date, indorsed thereon. At the April term, 1869, of this court, Mr. Bulfinch presented a petition for a review of Mr. Benner's said suit against him, alleging as the principal reason, the agreement in writing between him and Mr. Farrington that the action should abide the decision of the appeal from the judge of probate; that the default was obtained without his knowledge and in violation of said agreement; and that he paid the execution only in consequence of Farrington's representation that he had a copy of the opinion in the appeal case from the reporter, and that the default was in accordance with the determination of the appeal; which the petitioner contended was not the fact. The petition for review was granted at the October term, 1869, and at the October term, 1873, the present report of this case brought August 6, 1872, was made up in which it was admitted that Mr. Bulfinch paid the execution in consequence of Mr. Farrington's statement to him that the default and judgment were according to agreement aforesaid signed by them. It is obvious that there was something to be said in support of this view of the effect of the dismissal of the appeal, since it was decided adversely to the ad-

ministrator, and left him liable to a suit upon his bond by license of the judge of probate.

If the foregoing facts furnished any defence to the plaintiff in review, the action was to stand for trial; otherwise judgment was to be entered for the defendant in review (who was the original plaintiff) for his costs—the former judgment having been satisfied, as aforesaid.

John Bulfinch pro se.

Henry Farrington for William Benner.

DANFORTH, J. The original action was to recover the amount of town and school district taxes assessed in the town of Waldoboro in 1861 to the defendant's intestate. No question is raised as to the legality of the assessments, or to the competency of the defendant in review to sue for them.

The only defence under the report is that the estate was duly rendered insolvent, and the claim was not presented to, or proved before the commissioners. This at the commencement of the action was, and still is, a preferred claim. R. S., c. 66, § 1, class 4. It was therefore unnecessary that it should be laid before the commissioners. R. S., c. 66, § 17; *Flitner* v. *Hanley*, 19 Maine, 261.

As a further defence it is claimed in argument that all the estate was required for the payment of prior preferred debts, and to show this, a copy of an account settled in the probate court by the administrator is offered in evidence. But this account, though showing a balance in favor of the administrator, is a first and not a final one, and no allusion is made to it in the report of the case. It is therefore inadmissible, even if it would show what is claimed for it.

As the report shows no defence to the original action, as therein provided, judgment must be entered for the defendant in review. *Judgment for the defendant in review.*

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

WILLIAM H. FORD, petitioner for increase of damages,

vs.

THE COUNTY COMMISSIONERS OF LINCOLN COUNTY.

Land damages for highway—how estimated.

Damages for the soil and a structure thereon, taken for a highway, cannot be separately estimated, under R. S., c. 18, § 14, but the value, as it is when taken, is the proper subject of assessment.

The costs of the removal of the structure from land so taken, and the diminished value of the erection by reason of its removal, are to be considered in the estimation of damages.

Taking for a way land already used for that purpose takes all things existing upon it and adapted to its use as a way, such as flagstones, gravel, bridges, culverts, &c.; so that the appraisal, in such case, should be of the land with all these incidents of its condition.

ON EXCEPTIONS.

APPEAL by Mr. Ford from an award of the county commissioners in estimating the damages sustained by him in having certain land of his taken in the alteration of the course of a highway in Whitefield. The committee appointed to hear his petition concluded their report thus: "we award as damage sustained by the laying out of the road or way described in the warrant hereto annexed over and across the land and bridge of said William H. Ford, as follows: for the land taken we award the sum of fifty dollars damage; and for the bridge we award the sum of three hundred dollars, damage or compensation."

This report was accepted against the respondents' objections and exception was taken thereto.

Gould & Moore and *Wm. H. Hilton*, county attorney, for the respondents.

J. M. Carleton for the petitioner.

APPLETON, C. J. The committee appointed by the court, after a full hearing of the parties interested, awarded as damages sus-

tained by the laying out of the road or way in controversy over and across the land and bridge of the petitioner, as follows:

"For the land taken we award the sum of fifty dollars, damage. For the bridge we award the sum of three hundred dollars, damage or compensation."

The committee, in their report, distinguish between the land taken and an erection thereon. But by R. S., c. 18, § 14, "the owners of lands taken are allowed one year after the proceedings are finally closed to take off timber, wood, or any erection thereon."

A bridge as such is not the subject of distinct appraisal. If it is to be regarded as an erection upon the land, as such it is removable. Its appraisal therefore could neither give title to it nor transfer the right to its use.

The land taken could alone be properly appraised. But the land as it then existed, at the time of its taking, should so be appraised as to give the land owner full compensation for all damages sustained by the sequestration of his property for public uses. The damages should be in proportion to the injury. If an erection is to be removed and its removal can only be made at a great diminution of its value, the expenses of removal and the consequent diminution of value are to be considered in estimating damages. *Hyde* v. *Middlesex*, 2 Gray, 267; *Brown* v. *Worcester*, 13 Gray, 31. If the erection is of such a character as to become so incorporated with the land taken as to be regarded as the land taken, whatever is taken should be so appraised.

But "taking land for a way already used as such," observes Shaw, C. J., in *Central Bridge Corporation* v. *Lowell*, 15 Gray, 110, "takes all things placed, fixed or existing upon it, adapted to its use as a public way, such as gravel, stone or wood paving, planking, flagstones, bridges, culverts, guard or lamp posts, and all works erected on or connected with it for use, or rendering its use more safe and beneficial as a way." Where a previously existing private way is taken, the commissioners may well take into consideration the value of the existing way, with reference to the

costs of construction and state of repair. *Reed's petition*, 13 N. H., 384.

The appraisal should be made of the land taken, upon the principles here stated. The bridge should not be appraised separately.

Exceptions sustained.

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

JAMES FULTON *vs.* JAMES NORTON.

What is such severance as creates title separate from the soil.

A sale of stones by the owner of a farm, accompanied by a payment for, and removal of the same by the vendee to another part of the premises, constitutes a severance, and vests the title in the purchaser.

A second sale of such stones by a grantee of the farm under a deed subsequent to the first sale by his predecessor in ownership of the farm vests no title; and if the second purchaser removes them from the place where they were deposited by the first vendee, he becomes liable in an action of trespass for the value of the stones thus removed.

ON EXCEPTIONS.

TRESPASS *de bonis asportatis*, for taking and carrying away thirty-five tons of ballast stones from the bank of the Cathance river, in Bowdoinham, in the summer of 1873.

The defendant admitted that he took and carried away in a lighter the quantity of ballast stones alleged, and justified the taking because he purchased them of John Hall, who was then the owner in possession of the soil, under title of a deed warranty from John Patten, dated May 11, 1872, conveying the farm upon which the stones originally were, as below stated.

The plaintiff made no question of the ownership or possession of the soil by Hall, or that the defendant acted under Hall's advice and direction in taking and carrying away the stones; but he claimed title to the stones by virtue of a purchase in the summer of 1870, of John Patten, Hall's grantor, who then owned the

farm. He testified that he paid for them and removed them from the walls and fields of the farm, and threw them in a pile over the banks, and by the shore of the Cathance river, on said Hall's farm.

The defendant contended that the stones were a part of the real estate, and became Hall's under his deed; also that if the plaintiff ever had any title to them, he had abandoned or forfeited it by allowing them to remain so long upon the bank without removal.

There was evidence tending to show that Hall had no knowledge of Fulton's trade with his grantor, Patten, at the time of taking his title deed.

The presiding justice instructed the jury for the purposes of this trial as follows: "if the stones had been sold and delivered by the then owner of the land to the plaintiff, and he had taken and removed them to another place in pursuance of that purchase by him, they were severed from the soil, and became his personal property, and he would be entitled to recover, if they were taken and carried away wrongfully (that is, without his consent) by the defendant."

The verdict was for the plaintiff for $15.75, and the defendant excepted to the foregoing ruling of the presiding justice.

W. T. Hall for the defendant.

W. Gilbert for the plaintiff.

Appleton, C. J. This is an action of trespass *de bonis asportatis*, for taking and carrying away thirty-five tons of ballast stones from the bank of Cathance river.

The plaintiff purchased the stones of John Patten, the then owner of the soil, paid him for the same, and removed them from the walls and fields of his farm and piled them by the shore of Cathance river, but on said farm.

The defendant claiming title under John Hall, the grantee of Patten, by a deed subsequent to the sale and removal of the stones

before described, by the advice of Hall, who was then the owner of the farm upon which they were lying, took and carried away the stones, for which this action is brought.

The presiding judge instructed the jury that "if the stones had been sold and delivered by the then owner of the land to the plaintiff, and he had taken and removed them to another place in pursuance of that purchase by him, they were severed from the soil and became his personal property, and he would be entitled to recover, if they were taken and carried away wrongfully (that is, without his consent) by the defendant."

The instruction given was correct. The plaintiff had purchased and paid for the stones and removed them. He had had delivery of them from the owner of the soil. It was the legal result of severance, sale and removal, that they became the personal property of the plaintiff. As such the defendant converted them to his own use, and is liable for such conversion. *Giles* v. *Simonds*, 15 Gray, 441; *Drake* v. *Wills*, 11 Allen, 141.

Exceptions overruled.

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

INHABITANTS OF SMITHFIELD *vs.* INHABITANTS OF WATERVILLE.

Pauper supplies—furnished by one overseer.

United action upon the part of overseers of the poor in furnishing supplies to one falling into distress in their town is not necessary to the interruption of the running of the time in which a settlement will be gained, provided a majority of the board, upon learning the facts, ratify the action of their colleague in affording the relief.

A verdict will not be set aside on account of the reception of testimony legally inadmissible, if it be immaterial and entirely harmless.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT, for supplies furnished one Daniel Rowe, in January and February, 1871. It became material to the plaintiff's case

to show that said Rowe received supplies in 1867, otherwise he would have acquired a settlement in Smithfield. The plaintiffs introduced evidence tending to show that said Rowe received supplies at that time, and that notice was given to the overseers of Waterville of the fact; and the plaintiffs contended that the overseers of the poor of Waterville took charge of said Rowe and furnished him with further supplies, although he continued to remain in Smithfield. To establish this claim they called one James Rowe, who testified that he was acquainted with one Hatch, who was, at that time, one of the overseers of the poor of Waterville and resided at West Waterville, but is now deceased, and that he saw said Hatch about the time of the alleged supplies, on the highway near the house of a Mr. Tibbetts in Smithfield, (when he was on his way up, but nearly a mile and a half from said Rowe's) in conversation with other persons. He was thereupon asked by plaintiffs' counsel to state what Hatch said about Rowe's having help. The defendants' counsel objected to such statements as inadmissible. The court overruled the objection, and the witness was allowed to state that he heard Hatch say that Waterville had been notified of Rowe's falling into distress, and he was going to Rowe's to see about it; that he did not see Hatch at Rowe's—had no conversation with Hatch himself upon the subject, but heard him make these statements to others, near the house of Mr. Tibbetts, and that he saw Hatch afterwards on his way back.

Jonas W. Gould testified that in 1867 he was an overseer of Smithfield; that he was informed about the last of April or first of May, 1867, that Rowe needed help, and that he took to his house a peck of corn meal, 10 pounds flour, and 3½ pounds pork; that he was elected to office the first or second Monday of the March previous, and these were the first supplies he had furnished to any person applying as a pauper, after his election; that he had had no previous talk with any of his associates as to furnishing these or any other supplies, and that he furnished them wholly on his own motion without the knowledge of any other overseer of the poor.

The defendants contended that supplies thus furnished were not to be regarded as furnished by the overseers of the poor within the provisions of the statute; and also that no subsequent ratification by another overseer would render them legal so as to affect the rights of the town of Waterville.

The defendants also contended that there was no legal evidence of any such subsequent ratification, and asked the court so to instruct the jury.

The court instructed the jury thus, upon this part of the case: "For the purposes of this trial, I instruct you that if Mr. Tuttle, the other overseer, afterwards had knowledge of this furnishing of supplies by Mr. Gould to Daniel Rowe, and approved of it and consented to it, and presented a bill for them, in the name of the town of Smithfield, to the overseers of Waterville, it would have the same effect as though there had been a previous consultation between them about it.

"Now you are to determine from the evidence whether there was such a ratification of that act by Mr. Tuttle. If you are satisfied that there was, then it becomes a vital question whether Daniel Rowe was really in distress and in need of relief when these supplies were furnished in 1867."

To the foregoing rulings and refusal to instruct the jury, the defendants excepted.

There was also a motion filed for a new trial, but it presented only a question of the effect of evidence.

D. D. Stewart for the defendants.

To prevent Daniel Rowe's five years' residence in Smithfield from giving him a settlement there, it was necessary to prove the furnishing of pauper supplies. It was attempted to show that he was so aided both by Smithfield and Waterville. It would be immaterial by which town they were provided. *Beetham* v. *Lincoln*, 16 Maine, 137; *East Sudbury* v. *Waltham*, 13 Mass., 460; *Taunton* v. *Middleborough*, 12 Metc., 35; *Choate* v. *Rochester*, 13 Gray, 92; *Oakham* v. *Warwick*, 13 Allen, 88. It was as to the aid by Waterville that James Rowe testified to Hatch's decla-

ration of notice, &c. This statement, if made by Hatch, was of a past transaction and not admissible. *Franklin Bank* v. *Cooper*, 39 Maine, 542; *Lime Rock Bank* v. *Hewett*, 52 Maine, 531; *Partridge* v. *White*, 59 Maine, 564; *Haynes* v. *Rutter*, 24 Pick., 242; *Coit* v. *Howd*, 1 Gray, 547. It was not admissible for any purpose. *Penn* v. *Turner*, 10 Maine, 185; *New Bedford* v. *Taunton*, 9 Allen, 207; *Dartmouth* v. *Lakeville*, 9 Allen, 211, note.

Inasmuch as it is impossible to tell upon which ground the jury rendered their verdict, it should be set aside if improper testimony was admitted as to aid by either town. *Leonard* v. *Smith*, 11 Metc., 330.

Less than a majority of an official board can do no binding act. *Boothbay* v. *Troy*, 48 Maine, 560.

The void act of a public agent is not susceptible of ratification. *Richmond* v. *Johnson*, 53 Maine, 437; *Argyle* v. *Dwinel*, 29 Maine, 29.

S. D. Lindsay and *H. & W. J. Knowlton* for the plaintiffs.

Appleton, C. J. This is an action of assumpsit for supplies furnished one Daniel Rowe.

The case comes before us upon exceptions to the rulings of the justice presiding, and upon a motion to set aside the verdict as against the evidence.

The settlement of the pauper is in either the plaintiff or defendant town. It seems to be conceded that the pauper had acquired a settlement in the plaintiff town by five years continuous residence, unless the jury were satisfied from the evidence that supplies had been furnished him in 1867. The rights of the parties mainly depended upon the validity of the supplies then alleged to have been furnished.

Jonas W. Gould, an overseer of the poor of the plaintiff town, testified that he was informed about the last of April or first of May, 1867, that Rowe needed help, and that he took to his house a small quantity of corn, flour and pork; that he had been elect-

ed to office the first or second Monday of the March previous, and those were the first supplies he had furnished to any person applying as a pauper after his election; that he had had no previous talk with his associates as to furnishing these or any other supplies, and that he furnished them wholly on his own motion without the knowledge of any other overseer. He further testified that it was the custom, when there was an urgent call, to furnish immediate relief, without consulting the different members of the board.

The defendants contended that supplies thus furnished were not to be regarded as furnished by the overseers within the provisions of the statute, and that no subsequent ratification by another overseer would render them legal so as to affect the rights of the town of Waterville; and that there was no legal evidence of any subsequent ratification, and requested the court so to instruct the jury.

The instruction given upon this part of the case was in these words: "For the purposes of this trial, I instruct you that if Mr. Tuttle, the other overseer, afterwards had knowledge of this furnishing of supplies by Mr. Gould to Daniel Rowe, and approved of and consented to it, and presented a bill for them, in the name of the town of Smithfield, to the overseers of Waterville, it would have the same effect as though there had been a previous consultation between them about it. Now you are to determine from the evidence whether there was such a ratification of the act by Mr. Tuttle. If you are satisfied there was, then it becomes a vital question whether Daniel Rowe was really in distress and in need of relief when these supplies were furnished in 1867."

These are the only instructions to which exceptions were taken. It may be affirmed, therefore, that all needed and proper instructions applicable to and required by the case, were given.

The inconvenience of requiring the united action of all the overseers in each case of distress and particularly when relief is urgently and immediately required, is sufficiently obvious. Accordingly, in *Windsor* v. *China*, 4 Maine, 298, it was held that sup-

plies furnished by order of one of a board of overseers acting under a parol agreement with the rest as to the general manner of executing their office, are supplies furnished by "some town," within the statutes of 1821, c. 122, § 2. In *Fayette* v. *Livermore*, 62 Maine, 229, it was held not necessary, that a majority of the overseers should make a personal examination as to the necessity for supplies. One may act upon information derived from one of his fellows, and if he ratify an order previously given for supplies by his associates, it is sufficient to constitute a furnishing by the town. In *Lee* v. *Deerfield*, 3 N. H., 291, the court say: "we are of opinion, that, when one of the selectmen of a town orders supplies to be furnished a person entitled to relief, the assent of the other selectmen is to be presumed, because it is their duty to assent. It would be extremely inconvenient, if no supplies could be furnished paupers, without the express consent of a majority of the selectmen, while no inconvenience can result from holding, that proper supplies, furnished on proper occasions by order of one of the selectmen, shall bind the town in the same manner as if furnished by the express order of all the selectmen." These views, more stringent than those of this court, received the sanction of the same court in subsequent cases where the same question arose. *Andover* v. *Grafton*, 7 N. H., 315; *Mason* v. *Bristol*, 10 N. H., 36; *Glidden* v. *Unity*, 33 N. H., 577. Our rule is, that one overseer may in a proper case furnish supplies to a distressed pauper by virtue of precedent authority, or his act, without such authority, may receive a subsequent ratification. *Boothbay* v. *Troy*, 48 Maine, 560.

When supplies have been furnished by one overseer, and the bill for such supplies is presented to the town where the residence of the pauper is claimed to be, by another overseer who had knowledge of the furnishing of these supplies, it was properly submitted to the jury to determine whether such overseer by presenting the bill for payment ratified the same, if special ratification is to be regarded as necessary, where needed supplies are furnished in good faith to relieve existing distress.

It appears that one Hatch since deceased was in 1867 one of the overseers of the poor of the defendant town. A witness called by the plaintiffs was permitted to state, notwithstanding the objection of the defendants, that he heard Hatch say that Waterville had been notified of Rowe's falling into distress and that he was going to see Rowe about it;—that he had no conversation with Hatch himself upon the subject, but heard him make these statements to others, and that he saw Hatch on his way back.

These statements were clearly inadmissible to prove notice to the defendant town. But the fact of notice was not denied nor even questioned.

It appears from the evidence offered by both parties that the defendant town was notified in 1867; that Hatch returned an answer to such notice; that he visited the pauper; that the bill for supplies then furnished was presented to the overseers of the poor of Waterville for payment, and that they paid the same. The fact of notice in 1867 was not in controversy. The statements of Hatch, though legally inadmissible, as they relate to a fact unquestioned, and indeed conceded, can afford no ground for a new trial. Whether received or excluded, they were alike immaterial and harmless. The defendants were in no conceivable way aggrieved by the admission of this testimony.

The exceptions are not sustainable.

The evidence offered was contradictory. Perhaps some of the evidence might not have been admissible if objection had been duly taken thereto. Having been received, the jury properly acted upon it as, had objection been made, the facts might have been offered in unexceptionable form. The case was submitted to the jury under instructions to which no valid exceptions have been taken. It is not enough, that the court might have come to a different conclusion. The infirmative and contradictory evidence offered by the defendants and enforced by the able argument of their learned counsel, failed to satisfy the jury of the falsity of the testimony introduced by the plaintiffs. Of its truth or its falsehood, the law has made them judges. A mere difference of opinion as

to the relative weight to be given to conflicting witnesses, will not justify our interference. *Exceptions and motion overruled.*

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

JENNIE HENDERSON *vs.* THOMAS S. HENDERSON.

When decree for alimony can be reviewed.

Where a husband obtained a divorce upon his own libel, which contained no mention of his wife's dower or alimony, and no decree was made on that subject, it was *held* that the wife could not review the proceedings so far as alimony and dower were concerned. If any decree can be made as to either while the decree obtained by the husband stands unreversed, it must be upon an independent libel praying for it, filed by the wife.

ON REPORT.

This is a petition for a review of a libel of divorce, so far as the questions of alimony, allowance and dower are concerned. The respondent at the March term, 1874, of this court in this county, entered a libel for divorce against the petitioner for the cause of desertion, and at the September term of the same court a divorce was decreed. Since then, and before this proceeding was commenced, the respondent was married to another person. The petitioner represented that she had no actual notice of the proceedings against her, and that the alleged cause of divorce was not true. She did not seek to overturn the entire decree of divorce, but only so far review the same that she might be able to obtain alimony and dower in the respondent's estate.

The judge reported these facts: "I find that the petitioner had no actual notice of the pendency of the libel against her seasonably for her to defend; although a service by actual notice on her could have been easily had. I find that the respondent then had and now has a certain dowable real estate in this state. I also find the other allegations of fact set forth in the petition to be sufficiently established to entitle her to a review as prayed for,

provided a review can be legally granted upon proof of the facts alleged."

But as a question arose whether or not such a petition is legally maintainable upon the facts alleged, the case was reported to the full court, for such direction, upon the foregoing facts and findings, as may be proper.

E. F. Pilsbury, for the petitioner, cited *Rowell* v. *Rowell*, 108 Mass., 314; *Graves* v. *Graves*, Id., 318; *Sheafe* v. *Sheafe*, 24 N. H., 564; *Sheafe* v. *Leighton*, 36 N. H., 240.

S. S. Chapman and *H. & W. J. Knowlton* for the respondent.

DANFORTH, J. The original petition is not made a part of the case, but the report shows that it asks "for a review of a libel of divorce, as far as the questions of alimony, allowance and dower are concerned." The divorce was granted upon the libel of the husband, and it appears that no decree whatever as to alimony or allowance was made. The only question submitted is "whether such a petition is legally maintainable upon the facts alleged."

All the power vested in the court for this purpose is found in the statutes. R. S., c. 60, § 9, as amended by the laws of 1874, c. 184, § 3, provides that in certain cases a "new trial may be granted as to alimony or specific sum decreed," &c. Under this provision it may well be doubted whether a new trial can be granted when no decree whatever in relation to the subject has been passed. In such case what is there to be reviewed? No complaint can well be made of that which has no existence. The statute provides for a review of that which does exist, and which was obtained "through fraud, accident, mistake or misfortune," and not that which never has been obtained by any means. In the absence of any such decree, how can the rights of the wife be affected? There was no process before the court for an adjudication upon the question of allowance, and none was made. If, then, she ever had any rights in this respect, they are still open to her. If she asks to be heard, no judgment of the court can be

produced in bar of her wishes. It is certainly a safe proposition that a party is not shut out from the courts until a final adjudication upon a proper process pending.

If it is said that the decree of divorce disposes of the petitioner's claim to alimony, even then a review does not help her. If such as she asks is granted the divorce still stands, and the rights of the parties must be settled accordingly. Whatever may have been the effect of that decree when passed, that effect must remain with it so long as it stands.

But the serious difficulty in the petitioner's case is, that under the original libel, she had no right to a hearing upon the question of allowance or dower.

The court, deriving its authority upon this subject solely from the statutes, must be governed by them. We there find no authority for granting alimony to the wife upon a libel in favor of the husband. On the other hand it is limited to a hearing upon a libel in her favor. In *Stilphen* v. *Houdlette*, 60 Maine, 447, it was held that a divorce to the husband was a bar to the wife's dower, though she subsequently obtained a divorce upon her own libel.

In *Stilphen* v. *Stilphen*, 58 Maine, 515, it is said, in reference to the second divorce, "it is still necessary to enable the court to make a decree, securing to her such portions of the common property as may be deemed reasonable and proper." Again on page 517, "the object of the second divorce is not to enable the delinquent party to marry again, but to enable the court to make such ancillary decrees as justice and humanity may require." The inference from this necessarily is, that the court can grant alimony only upon the divorce upon the wife's libel.

It is true that a different doctrine has prevailed in Massachusetts, and New Hampshire, as well as in some other states. But those decisions rest upon the provisions of their several statutes, which are different from ours, and which clearly provide for the exercise of such authority. The question before us is not whether it may not be expedient that the court should have such authority, but

whether existing statutes have conferred it. We find they have not, and the entry must be *Petition dismissed.*

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

AMORY PRESCOTT, administrator, *vs.* CHARLES MORSE, executor.

The duties and liabilities of an executor, upon his decease, devolve upon the administrator with the will annexed of the estate of the deceased, who represents the testator and not upon the executor of the executor.

ON REPORT.

ASSUMPSIT, for a legacy given the plaintiff's intestate by the will of Willoughby Prescott.

Upon the twenty-ninth day of March, 1854, this will was executed and the maker died in January, 1859, and it was admitted to probate March 1, 1859. The second bequest was the one under consideration, and read thus: "I give and bequeath to my son, George Prescott, the sum of two hundred dollars, placing it in the hands of the executor for his use and benefit as he may need it, and not receiving any more at any time than what is necessary for his benefit at the time." George Prescott survived his father, but died before being paid the legacy, and the plaintiff was appointed his administrator. Charles Morse was made executor of the will of Willoughby Prescott, and accepted that trust, but did not give any bond as trustee, as was understood to be the fact when this matter was previously before this court. See *Prescott* v. *Morse*, 62 Maine, 447, 450.

Charles Morse, executor of Willoughby Prescott, died in February, 1864. His son, of the same name, the present defendant, became executor of his will, and is sued here, in that capacity for said legacy.

John H. Webster for the plaintiff.

Stephen Coburn for the defendant.

APPLETON, C. J. Willoughby Prescott by his last will and testament devised two hundred dollars in trust for his son George, and appointed Charles Morse, who has since deceased, as his executor.

No trustee was appointed for George Prescott, and the executor of the will of Willoughby Prescott never gave bonds as such trustee.

But Charles Morse gave bond as executor and in his life time settled one account in the probate office. The duties of an executor devolved, upon his decease, upon the administrator *cum testamento annexo*, who represents the deceased executor. *Farewell* v. *Jacobs*, 4 Mass., 634. The executor of Charles Morse, whether executor by right or by wrong, does not represent the estate of Willoughby Prescott. That would properly be represented by an administrator *cum testamento annexo*, but none such has been appointed. As has been already decided, if the legacy remained in the hands of the executor of Willoughby Prescott, no action could be maintained against this defendant, as he is not authorized to settle or discharge the liabilities of that estate. *Prescott* v. *Morse*, 62 Maine, 447. *Plaintiff nonsuit.*

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

STATE OF MAINE *vs.* WILLIAM SMITH.

Pleading.

R. S., c. 27, § 20, gives one moiety of the penalty imposed upon the offence there specified to the complainant and the other to the county, where it was committed, and provides that the prosecution may be by complaint or by indictment. The respondent in this case was indicted and convicted; and the conviction sustained although the indictment named no person as complainant.

Where the proceeding is by indictment, no private prosecutor being named, the whole fine goes to the county.

ON EXCEPTIONS.

INDICTMENT, presenting that the respondent, "on the eighth day of May, A. D., 1873, at a plantation called Highland, &c., did

travel from place to place in said Highland, and did then and there represent himself to one Joshua R. Howard, of said Highland, to be the agent of James Patten & Company, of said Boston, for the purpose of procuring orders for the sale of intoxicating liquors, and did then and there obtain of the said Joshua R. Howard an order on said James Patten & Company for the sale of a quantity of intoxicating liquors, to wit: four and three-fourths gallons of Medford Rum, which said liquors were afterwards, to wit, on the tenth day of June, A. D., 1873, sent to said Joshua R. Howard on said order so obtained against the peace," &c., &c.

There was a second count, but at the suggestion of the court a *nol pros* was entered as to that before the case was submitted to the jury. A verdict of guilty was returned. The respondent moved in arrest of judgment, because the mode of travel or conveyance was not alleged; because more than one offence was charged in the same count (relying upon a former decision relative to an indictment against the prisoner. *State* v. *Smith*, 61 Maine, 386;) and especially because it did not appear by the indictment, nor otherwise, who the complainant is, no name of any complainant being inserted in the indictment, nor upon the record; nor was it stated to whose use or benefit the penalty, if recovered, belongs, nor how it is to be appropriated, the state, in whose name alone the indictment was drawn, not having any interest in, or claim to, the fine or any part thereof. This motion was overruled and the respondent excepted.

L. Clay for the respondent.

The provision of the statute in question, R. S., c. 27, § 20, is that one-half of the fine shall go to the complainant and the other half to the county in which the offence is committed.

There is no complainant named, and no person or corporation to whom the fine when imposed would go; and no other punishment or penalty is provided by the statute for the offence, except the payment of a fine; no fine can be imposed, and no judgment in favor of the state can be rendered upon this indictment.

Upon the decision in the case of the *State* v. *Grand Trunk Railway Company*, 60 Maine, 145, and the authorities there cited, judgment must be arrested.

S. J. Walton, county attorney, for the state.

APPLETON, C. J. This is an indictment under R. S., c. 27, § 20, which provides that "no person shall travel from town to town or from place to place in any city, town or plantation in this state, on foot or by any kind of land or water, public or private conveyance whatever, carrying for sale or offering for sale, or offering to obtain or obtaining orders for the sale or delivery of any spirituous, intoxicating or fermented liquors, in any quantity, under a penalty of not less than twenty nor more than a hundred dollars, for each offer to take an order, and for each order taken, and for each sale so made, to be collected on complaint or by indictment before any court competent to try the same; one-half of said fine to go to the complainant, and the other half to the county in which the offence is committed."

The indictment does not contain the name of any complainant, and for this cause the defendant after verdict has filed a motion in arrest of judgment.

The penalty provided by this section is to be recovered either by complaint or indictment. If by complaint, half goes to the complainant. If there be no complainant, the party violating the law is none the less guilty; none the less liable to its punishment. The defendant by the verdict has violated the law and is liable to its penalty. It is no concern of his how the penalty is appropriated. He is in no way responsible hereafter for the disposition to be made of it when collected. Indeed it is not necessary to set forth the penalty, or how it should be appropriated. *State* v. *Cottle*, 15 Maine, 473. Where the statute inflicts a penalty partly to the use of the state and partly to that of an informer, the government may sue for the whole. *Com.* v. *Howard*, 13 Mass., 221.

If there had been a complaint made upon which judgment had

been rendered against the defendant that would have been a good bar to these proceedings. Where a statute creates a penalty and says that one moiety shall be to the use of the king, he may sue for the whole, unless a common informer has commenced a *qui tam* suit for the penalty. *King* v. *Hymen*, 7 D. & E., 536. He who first commences a *qui tam* suit acquires a right in the penalty which cannot be divested by a subsequent suit, though judgment be first recovered in the second suit. *Pike* v. *Madbury*, 12 N. H., 263. But in this case it is neither alleged nor proved that there has been any previous complaint, or that there is any danger that the defendant will be compelled to pay a double penalty.

The case of *State* v. *Grand Trunk Railway*, 60 Maine, 145, is inapplicable. There the forfeiture was wholly to the use of the widow or children, or heirs, and no part of it accrued to the state. There could be no forfeiture, if there were no one for whose benefit it was intended. In the case before us there is a penalty, which may be recovered, whether there is a complainant seeking for his moiety or not. If no complainant, the whole goes to the county; but whatever becomes of it, the defendant has nothing to do with its disposition. *Exceptions overruled.*

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

DANFORTH, J. I concur in the result. The county in any event is to receive one-half of the fine; and, therefore, in the absence of a complainant, claiming the other half, may recover the whole. It is a corporation made certain by law, and requires no proof of identity, as matter of fact; therefore its right to the forfeiture need not be averred in the indictment.

JESSE DAVIS *vs.* JACOB ROBY.

Evidence. Practice.

Answers to collateral inquiries on cross-examination cannot be contradicted by the party inquiring, for the purpose of impeaching the witness.

But a witness may be impeached by proof that she has said that she knew nothing about the case, except what her husband had told her; and that her memory was so treacherous her husband had to keep telling her what to testify to;—even though, upon cross-examination, she has denied making the statements.

ON EXCEPTIONS.

TRESPASS *de bonis*, for taking three cows. The plaintiff claimed title to the property by virtue of a bill of sale signed by one Frances A. Sawyer, wife of Charles E. Sawyer, which bill of sale was executed at the plaintiff's house in Lisbon, April 11, 1871, and a delivery of the property to the plaintiff by Mrs. Sawyer, about two or three weeks afterwards, on the Getchell place in Webster, where Mr. and Mrs. Sawyer then lived. The defendant claimed title to the property by virtue of two bills of sale given to him by Mr. Sawyer. The first bill of sale was dated September 30, 1868, and included two of the cows in question; and the other bill was dated February 5, 1870, and included the third cow. Delivery of the cows to the defendant was made at the times when these bills of sale were given.

At the time the bills of sale were given to the defendant, Mr. and Mrs. Sawyer lived in Lewiston, on a farm owned by the plaintiff, for the conveyance of which the plaintiff had given Mrs. Sawyer a bond or other agreement; according to the terms of which bond or agreement there was a large amount due to the plaintiff. The Sawyers remained on the Davis place in Lewiston, till early in 1871, when they removed to Webster, where Mrs. Sawyer took a lease of a farm of one Getchell, and where they resided when Mrs. Sawyer gave the bill of sale to the plaintiff. The defendant introduced evidence tending to prove that Mrs. Sawyer had knowledge of, and gave her consent to the sales of the property to the defendant; and the plaintiff also introduced Mr. and Mrs. Sawyer,

to prove the want of such knowledge and consent on her part. Mr. Sawyer, among other things, testified on cross-examination that the money which he received from the defendant and for which he gave the bills of sale of the cows, was for a special purpose of his own, and that none of it was paid to the plaintiff towards the Davis place. The defendant introduced one H. B. Bartlett, and offered to prove by him that Mr. Sawyer, shortly after he gave the bills of sale to the defendant, told him (Bartlett) and others that he (Sawyer) had sold the cows in question to the defendant, and had paid the money so obtained from the defendant to the plaintiff towards the place which the plaintiff had given his obligation to convey to Mrs. Sawyer, as aforesaid.

The plaintiff objected to the introduction of the evidence so offered by the defendant, and the presiding judge excluded it, on the ground that it would only contradict Sawyer on a collateral matter. The defendant also introduced one Mrs. Smith, who testified thus on cross-examination: "I know Levi T. Coombs, by sight. I remember having some conversation with him."

"*Ques.* Did you tell him that your memory was very poor and that your husband had to tell you every day or two what you should testify to here?"

"*Ans.* No Sir, nothing of the kind."

The plaintiff thereupon called Levi T. Coombs, who testified against the objections of the defendant, "I am some acquainted with Mrs. Smith."

"*Ques.* What conversation, if any, did you have with Mrs. Smith in relation to this matter, what she should testify to?"

The defendant objected to the question as being both collateral and irrelevant. The presiding judge ruled it admissible, and the witness testified thus: "While I was out with the jury yesterday afternoon Mrs. Smith approached me and said, I suppose I am going on the stand in the next case. Said I, what case do you refer to? She said, Mr. Davis and Mr. Roby;" adding, "I do not remember anything about it any further than Mr. Smith has told me." She said her memory was so treacherous she could not

remember;—so Mr. Smith told her before me what to testify to, and said he, "you must tell the same story twice, if you are called on, if you don't it will spoil it all."

To the foregoing rulings in excluding and admitting testimony the defendant excepted, the verdict being against him.

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

If the testimony of Bartlett was properly excluded because tending to contradict Sawyer upon a collateral point, what can be said of the admission of Coombs' testimony to contradict Mrs. Smith's statement; especially when this witness was allowed to go on and tell what Mr. Smith said to his wife, in the absence of all parties to this litigation.

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

APPLETON, C. J. This was an action of trespass for three cows, the title to which was originally in Mrs. Sawyer, from whom the plaintiff derives his title. The defendant derives title from her (Mrs. Sawyer's) husband by a bill of sale prior in date and in delivery to that upon which the plaintiff relies.

Mr. and Mrs. Sawyer were both witnesses and testified that the bill of sale to the defendant was without the knowledge or assent of the latter. Mr. Sawyer upon cross-examination testified that the money which he received from the defendant was for a special purpose of his own, and that none was paid the plaintiff toward the Davis place of which the wife had a bond for its conveyance upon certain conditions which had not been performed. The defendant offered to show that Sawyer said, shortly after the sale to the defendant, that he had paid the money raised from the sale of the cows to Mr. Roby to the plaintiff toward the amount due on the bond for a deed given by him (Davis) to Mrs. Sawyer. This evidence the court refused to receive, as it would only contradict the witness upon a collateral matter.

It was immaterial what Sawyer did with the money received from the sale of the cows, if the sale was without the knowledge or consent of his wife. The offer was to show that he had given a

different account of the disposition of the money;—but that was entirely immaterial, unless such disposition was with her knowledge and consent;—but that was no part of his statement.

The inquiry was collateral to the main question and the defendant must abide the answer. The rule is uniform that answers to inquiries on cross-examination as to collateral matters cannot be contradicted. *State* v. *Benner*, *ante* page 267.

A witness may be impeached by showing a bias or prejudice or gross misconduct in reference to the cause in which his testimony is given. Mrs. Smith was a witness. She was impeached by proof from her own lips that she knew nothing about the case but what her husband had told her, and that he had told her the story she must tell, with a caution, that she must tell the same story twice alike or she would spoil all. The authorities all show that a witness may thus be impeached. *Chapman* v. *Coffin*, 14 Gray, 454; *Day* v. *Stickney*, 14 Allen, 255; *Swett* v. *Shumway*, 102 Mass., 365; *New Portland* v. *Kingfield*, 55 Maine, 172. Certainly a statement that she knew nothing about the case except what was told her is a contradiction of any statement as to her knowledge.

The exception taken was to the interrogatory proposed. If the answer was irresponsive, or in part contained inadmissible statements, the objection should have been made thereto, at the time, so that whatever was objectionable could be stricken out.

Exceptions overruled.

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

ARETUS B. PENNY *vs.* SUMNER B. WALKER.

Arrest—mail-carrier liable to, on criminal process.

A person who is at the time engaged in carrying the United States mail is liable to arrest, by an officer duly qualified and holding a warrant for his arrest for an offence against the law of the state, though the crime be not a felony, but a violation of the liquor law, R. S., c. 27.

The mail-carrier cannot justify, by virtue of his own public employment, an assault upon the officer who attempts to serve such warrant.

Penny *v.* Walker.

On exceptions.

Trespass *vi et armis*, for an alleged assault and battery. At the time of the alleged assault, the defendant was a mail-carrier, and was engaged in conveying the United States mail; and the plaintiff was a constable of the city of Auburn, duly authorized to serve criminal process, and had a complaint and warrant for the arrest of the defendant, wherein the defendant was charged with having intoxicating liquors, kept and deposited, with intent to sell the same in violation of law. The defendant contended that the plaintiff had no legal right to arrest him while he was in the discharge of his duty, in carrying the United States mail, and requested the presiding judge so to instruct the jury. But the presiding judge instructed the jury that the defendant was legally liable to arrest on a charge of any criminal offence, although he was engaged at the time, in carrying the United States mail. The verdict was for the plaintiff for $261.

To the foregoing instructions and refusal to instruct, the defendant excepted.

Record & Hutchinson for the defendant, cited the act of March 3, 1825, to be found in 4 U. S. Statutes at large, (Little and Brown's edition) c. 64, pages 102, 114, especially § 21, prohibiting a desertion of the mail by any person having it in charge.

Frye, Cotton & White for the plaintiff.

Barrows, J. The single question is whether a mail-carrier, who is at the time engaged in conveying the United States mail, is justified in using force to repel an officer duly qualified and having a legal warrant for his arrest to answer for an offence against a state law, when the charge (which was the keeping of spirituous liquors designed for unlawful sale) is neither treason, felony, nor a breach of the peace.

This defendant, in an action of trespass for an assault and battery committed upon such officer, requested the presiding judge to instruct the jury that the officer had no legal right to arrest him under these circumstances. The request was refused and the jury were instructed that "the defendant was legally liable to arrest on

a charge of any criminal offence, although he was engaged at the time in carrying the United States mail."

To support his request and his exceptions the defendant relies upon the provisions of the act of congress passed March 3, 1825, which is a consolidation of the various previous acts relating to the establishment and regulation of the post office department and prescribes among other things the oath or affirmation to be administered to every person employed in the care, custody, or conveyance of the mail, and imposes a fine not exceeding $500 upon any one, who being in charge of the mail shall quit or desert it before delivering it into the post office at the termination of the route, or to some known mail-carrier or post office agent authorized to receive it; and a fine not exceeding $100 upon any one who knowingly and wilfully obstructs or retards the passage of the mail or of any driver or carrier, or of any horse or carriage carrying the same.

It may be regarded as certain that it was no part of the design of congress in these provisions to afford to the employees of the post office department, or to mail contractors and their servants, immunity from arrest at any time for such offences as they might commit against the criminal law of the states in which their routes lie.

We find no case in which the precise question here presented has been raised.

But it was held in the case of the *U. S.* v. *Hart*, Peters C. C. R., 390, that the act was not to be so construed as to prevent the arrest of the driver of a carriage in which the mail is conveyed when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants, i. e., when he was proceeding at a greater rate of speed than the framers of a city ordinance deemed consistent with safety.

And it was the opinion of the attorney general (5 Opin. 554) that it could not be held to conflict with a municipal ordinance prohibiting the passage of railroad cars through the limits of a city at a greater speed than six miles an hour.

If the progress of the mail may be lawfully arrested or retarded in conformity with municipal ordinances of this description, it is not easy to see why such incidental interruption as may arise from the occasional arrest of a mail driver for the violation of other laws designed to restrain evils pernicious to the public welfare, should not also be tolerated.

The safe carriage and prompt delivery of the mails are matters which mainly concern the inhabitants of the communities among whom they are distributed.

No needless interference with them can be allowed; but the public interest is, to say the least, quite as great in the preservation of sobriety and good order.

We think it would be a greater evil to hold the carriers of the mail a class privileged to resist the criminal process of the state in the hands of officers duly qualified, than it would be to incur the risk of the brief and infrequent detention of the mail when its carriers are found liable to arrest for criminal offences. This defendant claims to intrench himself behind such supposed privilege in order to establish a defence to a suit, which of itself imports a breach of the peace on his part, although the charge upon which the plaintiff arrested him was not of that character. We think such a claim cannot be allowed.

It is not readily perceived how the mail carrier could be held liable to the penalty for quitting or deserting the mail in his charge, by yielding that implicit submission to legal process which the law requires of all citizens, unless it were because his own criminal misconduct had made him liable to such process. He must see to it that he places himself in no such dilemma.

The penalty imposed by the act upon those who knowingly and wilfully obstruct or retard the mail, must be ample protection if he were harassed with malicious prosecutions for trifling offences, such as the counsel suggests as likely to multiply if he is held liable to arrest for anything short of felony.

The few cases in which questions bearing any analogy to that now presented have been discussed, have been almost exclusively cases of indictments under the last named provision.

We know of none where the indictment has been sustained for an arrest on criminal process. In *U. S.* v. *Kirby*, 7 Wallace, 482, the right of the state officer to arrest upon a charge of felony is emphatically sustained. The line of reasoning in that opinion would apply equally well in all cases of criminal offences affecting the public welfare.

The only reasonable distinction which can be made seems to be between arrests upon civil and criminal process. To enforce merely private rights, the detention of the mail by an officer seems to have been held unwarrantable in *U. S.* v. *Harvey*, 8 Law Reporter, 77. Just here we think the line should be drawn.

The mail carrier must not be detained upon any civil suit or claim for debt or damage, while in the discharge of his duty to the public, but we think he is legally liable to arrest on a charge of any criminal offence; and this was precisely the ruling which is the subject of complaint. *Exceptions overruled.*

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

INHABITANTS OF WEBSTER, appellants,

vs.

THE COUNTY COMMISSIONERS OF ANDROSCOGGIN COUNTY.

Appeal—only taken when allowed by statute.

The act of 1873, c. 91, amendatory of R. S., c. 18, § 37, regulating the time of taking an appeal from the decision of county commissioners, and requiring it to be made at the term of this court next after their return is filed, had the effect to defeat all appeals in pending cases, not so taken.

ON EXCEPTIONS.

The facts in this case are substantially the same as those set forth in the case of *Webster* v. *County Commissioners*, 63 Maine, 27. The commissioners filed their return, locating a way, at their October term, 1870, and the case was thence continued from term

to term, till their October term, 1872. At this last term, but on the fifth day of March, 1873, their proceedings were closed and recorded. The plaintiffs then appealed therefrom, which they entered at the April term, 1873, of this court. The respondents moved to dismiss this appeal as not seasonably taken, because the Public Laws of 1873, c. 91, amendatory of R. S., c. 18, § 37, upon this subject, required the appeal to be taken at the term next after the filing of the return, instead of next after the record was closed, as the law was prior to this amendment. This motion was denied and the respondents excepted.

R. Dresser for the respondents.

Frye, Cotton & White for the appellants.

Dickerson, J. By R. S., c. 18, § 37, before it was amended by the Public Laws of 1873, c. 91, appeals from the decision of the county commissioners were required to be taken after it had been entered of record, and before the next term of the supreme judicial court in the county where the proceedings originated. By the amendatory act the words, "it has been entered of record," were stricken out and the words, "their return has been placed on file," were inserted instead thereof. The amendatory act took effect January 29, 1873.

The return of the county commissioners, in this case, was made and filed at their October term, 1870, but their proceedings were not closed and their decision was not filed, till the fifth day of March, 1873. The appeal was taken before the next term of the appellate court, in April, 1873, and duly entered in said court.

The attorney for the petitioners moved to dismiss the appeal, because it was not seasonably entered as required by the amended statute. Appeals from the decision of the county commissioners are exclusively regulated by statute. The provision of the statute in question is mandatory. It took effect before the appeal was made, and does not except cases then pending before the commissioners. Petitions pending before county commissioners are not actions within the purview of R. S., c. 1, § 3. There was no stat-

ute in force authorizing the entry of the appeal when it was made, and it should have been dismissed on the motion.

Exceptions sustained.

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

INHABITANTS OF WEBSTER, appellants,

vs.

THE COUNTY COMMISSIONERS OF ANDROSCOGGIN COUNTY.

Appeal—can only be taken conformably to statute.

Where the statute provides for an appeal to be taken before the next session of the appellate court, one taken upon the day such session commenced is unseasonable, and must be dismissed.

ON EXCEPTIONS.

This is an appeal from a decree of the county commissioners of Androscoggin county, on a petition of the inhabitants of Webster, asking the discontinuance of a certain road in Webster, the decision being against the petitioners; which petition was entered in the supreme judicial court for Androscoggin county, at the January term, 1873; being the next term of said court after the proceedings were closed and recorded by the county commissioners. The appellants entered notice of their appeal on the docket of the court of the county commissioners, upon the day of the sitting of the court, at its said January term, 1873, but after the session had commenced. The appeal was answered to by the county attorney, and also by the attorney for the original petitioners for laying out the road, at the entry term, upon the supreme court docket. Upon the seventeenth day of the April term of this court, the respondents' attorneys filed a motion to dismiss the appeal, and affirm the judgment of the county commissioners, upon the ground that the court had not jurisdiction of the appeal, because the appellants had not complied with the requirements of R. S., c. 18, § 37. The presiding judge thereupon ruled that the appeal be dismissed, to which ruling the said appellants excepted.

Frye, Cotton & White for the appellants.

R. Dresser for the respondents.

DICKERSON, J. The statute allows an appeal to be taken from the decision of county commissioners in certain specified cases, "after it has been entered of record and before the next term of the supreme judicial court in the county, where the proceedings originated." R. S., c. 18, § 37. An appeal thus taken "may be entered and prosecuted" in the appellate court.

Appeals from county commissioners are regulated exclusively by statute. No such appeals are allowable unless they are authorized by the statute. Hence, the statutes upon this subject should be strictly construed. Where the statute authorizes an appeal to be taken from the decision of the county commissioners "after it has been entered of record," it cannot be construed to allow an appeal to be taken before that is done. So, when it authorizes an appeal "before the next term of the supreme judicial court in the county," it cannot be construed to sanction an appeal after, or during such term. The statute is not a machine in the hands of the court, capable of being adjusted to suit the exigencies of the occasion, and thus enable parties to escape the legal consequences of their laches and mistakes. When the statute provides that a thing may be done, and prescribes the time and mode of doing it, these directions should be strictly followed.

In this case the statute then in force required that the particular acts necessary to constitute an appeal, should be performed before the next term of the appellate court at which the appeal might be prosecuted. The appellants did not do this, and for that cause the presiding justice very properly ordered the appeal to be dismissed. *Exceptions overruled.*

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

DAVID MESERVE *vs.* LEWISTON STEAM MILL COMPANY.

Application of the terms of a written contract to additional work.

September 28, 1871, the parties to this suit entered into two written agreements; one for the furnishing by the plaintiff to the defendants of two million feet of logs, and the other for the driving of them by the plaintiff at a dollar a thousand. In the following November, the plaintiff further agreed in writing to furnish another million feet of logs, but no stipulation as to the driving was inserted. These last logs were also driven by the plaintiff. There was testimony that, before entering upon this work, there was considerable discussion as to the rate at which it should be done; the defendants claiming that Mr. Meserve offered to do it for seventy-five cents a thousand, and that they were willing to give him but half a dollar; which proposition (they said) he finally acceded to; while Mr. Meserve testified that he always demanded a dollar a thousand, and would take no less, but admitted that the defendants wanted him to drive at half that rate, presenting a writing to that effect for his signature, which he refused to sign. Upon this state of facts, the defendants contended that if, after this discussion, no price was definitely fixed for driving the additional million, the plaintiff would be entitled to recover only a fair, reasonable price for the driving; but the court instructed the jury that, in such event, the contract for driving of September 28, 1871, would determine the price: *held*, that this instruction was correct.

ON EXCEPTIONS.

ASSUMPSIT, to recover a balance due the plaintiff for logs furnished the defendant company, and for the driving of the same down the Androscoggin river during the spring of 1872. To sustain his claim, the plaintiff offered in evidence a contract for two million feet of logs, dated September 28, 1871, and another contract of that date for driving the logs; also an additional contract for one million feet more of logs, dated the following November. The plaintiff claimed that by the driving contract made September 28, 1871, he was to receive one dollar a thousand for all the logs put into the river for the Steam Mill Company that spring, during the driving season, regardless entirely of the lumber contract of the same date; while the defendants contended that, by a fair construction of that contract, the dollar a thousand only pertained to the logs named in the contract for furnishing, made the same day. The

plaintiff and defendants both testified that at the time of the execution of this contract, (September 28, 1871) there was no intention of putting in any more logs than those named in the log contract. The presiding judge ruled that the driving contract would control and determine the price of driving all the logs put into the Androscoggin river by the defendant company above Rumford Falls, during the driving season of that spring. There was evidence tending to show that in November, when the second furnishing contract was made, the price to be paid for driving the additional million was discussed by the parties. The plaintiff admitted that it was, but denied that any contract was finally entered into; the agent of the defendant company and the clerk both testified that the plaintiff asked seventy-five cents a thousand and no more; that the agent told him that he would not give more than fifty cents, and the agent testified that fifty cents was finally the agreed price. The presiding judge instructed the jury that it was competent for the parties to make a new contract. If they found such to be the fact, then the new contract should control the price. If they did not, from the evidence, notwithstanding the discussion, find that a new and different contract had been entered into between these parties, then they would be bound by that of September 28, 1871. The defendants contended that if from this discussion of price for the driving of the additional million, no price was definitely fixed, then the plaintiff would be entitled to recover a fair, reasonable price for the services rendered in driving; but the court instructed the jury that in such event the contract of September 28, 1871, would determine the price.

The verdict was for the plaintiff in the sum of nineteen hundred and thirty-seven dollars and seven cents. To these rulings and instructions of the presiding judge, the counsel for the defendant company excepted.

There was also a motion for a new trial, upon the ground that the verdict was against law and evidence, and because the damages were excessive. This motion was supported in argument by a scrutiny of the items of the plaintiff's account annexed and a

computation to show the alleged errors, as appears by the opinion; but as no question of law is involved or decided, a full statement of the testimony is deemed unnecessary.

Frye, Cotton & White for the defendants.

D. Hammons and *Pulsifer & Bolster* for the plaintiff.

VIRGIN, J. We do not perceive any error in the ruling of the presiding justice. The furnishing contract of September 28, was expressly modified by the parties not only in relation to the persons who might furnish, but also as to the quantity of logs; and judging from the language used the new stipulations seem to have been indorsed upon the original. Not so with the contract for driving. At any rate there is no pretence that any new written contract was ever executed by the parties; and the jury must have found that, although the subject matter was more or less discussed, still no agreement was made. There being no other, the original stipulation for the driving of "all the logs put into the Androscoggin river," &c., must govern the parties.

The jury evidently scrutinized the plaintiff's account; for instead of finding $3,480.43 due as stated in the account annexed to the writ, they returned a verdict for $1,937.07. This amount must include the balance which they found to be actually due with interest thereon from the date of the writ—about thirteen months.

The defendants challenged but few of the items in the account. Sixty-two dollars are charged for tools turned over and for repairing boats. Coombs as referee fixed the sum at $12. The plaintiff charged for driving 3,149,800 feet when by his own testimony the scale bills show 3,036,000 feet and 100,000 turned in at Sunday river. On the credit side the plaintiff had not entered his accommodation note of $1,500 paid by the defendants, nor the $30 for the use of the boats, as found by Coombs. Making these deductions, the balance would be $1,887.43, without interest.

The defendants lay the most stress upon the quantity of logs left on Rumford Falls. The testimony is very conflicting—vary-

ing from 60,000 estimated by Mr. Knapp, who is a disinterested witness and has resided at Rumford Falls for many years, to 2 to 3,000,000 as estimated by Mr. Wood agent of the defendants. All agree that whatever the quantity of logs found on the falls, but a small portion of them belonged to the defendants. If the jury believed the testimony of the plaintiff and his witnesses, the verdict is not at most $100 too large; and that sum the plaintiffs have offered to remit.

The drive, by the contract, and in fact, was under the control of the defendants. The jury have virtually found the logs were well and seasonably driven, and we do not consider it our duty to disturb the verdict provided the plaintiffs remit $100.

Motion and exceptions overruled.

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

ANDROSCOGGIN WATER POWER COMPANY
vs.
BETHEL STEAM MILL COMPANY.

Debt—does not lie under R. S., c. 42, § 3, against a corporation.

An action of debt under R. S., c. 42, § 3,—which imposes a penalty upon the taking of the logs of another, with intent to claim the same,—is not maintainable against a corporation.

ON EXCEPTIONS.

DEBT, under R. S., c. 42, § 3, brought July 24, 1874, to recover twice the value of the plaintiffs' logs alleged to have been taken by the defendants.

The defence requested the presiding justice among other things, to rule that this action would not lie against a corporation, but he held otherwise, telling the jury that the defendants had capacity to subject themselves to liability under this section of the statutes by reason of the misconduct of their servants and agents in taking

the plaintiffs' logs, and that a verdict should be rendered for double the value of such logs (if any,) as they should find belonging to the plaintiffs were taken by the defendants. The verdict was for $1750, and the defendants filed exceptions.

A. A. Strout and *E. M. Rand* for the defendants.

This penal statute must be strictly construed. 1 Bishop Cr. Law, §§ 224 and 225; *Abbott* v. *Wood*, 22 Maine, 541.

"Not every act of misfeasance is indictable in a corporation that would be in an individual. The act must come within the scope of corporate duty." 1 Bishop Cr. Law, § 505. It is not every act of its agents that will make a corporation liable. *Mitchell* v. *Rockland*, 41 Maine, 363; *Bangor Boom Co.* v. *Whiting*, 29 Maine, 123; *State* v. *Great Works & Co.*, 20 Maine, 41.

C. W. Larrabee for the plaintiffs.

The defendant corporation had the benefit of the logs taken, and they were sawed by its machinery, under the supervision of its agents, in the prosecution of the business for which it was incorporated.

Being within the mischief of the act, they are subject to its penalties, by reason of the acts of its agents in the line of the corporate business. *Goddard* v. *Grand Trunk Railway Co.*, 57 Maine, 212.

Appleton, C. J. This is an action of debt, brought under R. S., c. 42, § 3.

The question for determination is, whether this action is maintainable against a corporation. Its solution must depend upon the ascertainment of legislative intention as derived from the language of § 3, and the two preceding sections.

By § 1, "If any person takes, carries away or otherwise converts to his own use, without the consent of the owner any log suitable to be sawed or cut into boards, clapboards, &c., or any mast or spar, the property of another, whether the owner thereof be known or unknown, lying and being in any river, pond, &c., within this

state, or cuts out, alters or destroys any mark made thereon, without the consent of the owner and with intent to claim the same, he shall forfeit for every such log, &c., twenty dollars, to be recovered on complaint before any justice of the peace of the county where the offence is committed: one-half to the use of the state, and the other to the use of the complainant."

By § 2, "Whoever fraudulently and wilfully takes and converts to his own use, either by himself or by another in his employment, any such log, &c., lying or being as aforesaid, for the purpose of being driven to a market or place of manufacture, shall be deemed guilty of larceny and punished accordingly."

It is obvious that the defendant corporation could not be indicted under this last section. The intent, with which the act prohibited is done, is individual, not corporate intent. Larceny cannot, by any existing law, be predicated of any corporate action of a corporation, nor is there any provision for its punishment for the crime, if it were one which it is capable of committing. It is manifest, therefore, that a corporation is not, and was not intended to be included within the word "whoever," but that the section applies only to personal criminality.

By § 3, under which this suit is brought, it is enacted as follows:—"In prosecutions under sections one and two, if such log, mast, &c., is found in the possession of the accused partly destroyed, partly sawed or manufactured, or with the marks cut out, or altered, not his property, it shall be presumptive evidence of his guilt, and the burden of proof shall then be on him and whoever is guilty of the offence described in either section shall also be liable to the owner in an action of debt, for double the value of the log, mast or spar so dealt with."

Now "whoever is guilty of the offence described in either section" is liable to this action of debt and to the payment of "double the value of the log, mast or spar so dealt with," not those who are not, and cannot be guilty of the offences so described. The "accused" in whose possession the property is found, must be one against whom the accusation of the crime of larceny could be

made. He must be one who could "be guilty of the offence described in either section," and could be punished for such guilt. Now a corporation could not be.

Further, section three applies to both of the preceding sections equally. If the second section is not within the meaning of section three, neither is the first section. The third section must be held to include one equally with the other. But § 2 cannot be within § 3, unless a corporation can be "deemed guilty of larceny" and be "punished accordingly."

The construction here given is in entire conformity with the language of the act which relates only to persons and personal offences. It is equally in accord with the decisions of the courts in analagous cases. In *Benson* v. *Monson & Brimfield Manufacturing Co.*, 9 Metc., 562, it was held that a corporation was not liable for the penalty imposed by statute on the owner, agent, or superintendent of a manufacturing corporation for employing children under the age of ten years, in laboring more than ten hours a day. "The provisions" observes Dewey, J., "of acts imposing penalties are not to be extended by construction beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not in terms included in the statute on which this action is brought." The construction of a somewhat similar statute came before the court in *Cumberland & Oxford Canal Co.* v. *Portland*, 56 Maine, 78, and it was there held, that malice and wilfulness could not be predicated of a corporation, though it might be of its members.

While undoubtedly "the word 'person' may include a body corporate," we do not think that it was the legislative intention that in the act under consideration, it should do so. The fair and natural construction to be given to the language used negatives any such idea. *Exceptions sustained.*

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

APOLLOS C. HOWARD *vs.* GEORGE E. HOUGHTON.

Practice in a real action by a mortgagee.

The mortgagee has the legal title to the mortgaged premises, and the right to possession as against the mortgagor, when not otherwise agreed, both before and after condition broken. In a writ of entry wherein he declares generally on his own seisin, upon proof of title, he may have judgment at common law, unless the defendant having the rights of the mortgagor, claims a conditional judgment according to the statute.

In such writ, originally brought for two parcels of land, he may, with leave of court, amend by striking out his claim for one of the parcels, and have judgment at common law for the other, if the defendant does not desire a conditional judgment.

In any such suit the court will render judgment as at common law when neither party claims the conditional judgment.

ON EXCEPTIONS.

REAL ACTION, originally brought upon a mortgage of two parcels of land, one lying in Auburn and the other in Poland. Having obtained possession of the parcel in Auburn by a peaceable entry in the presence of two witnesses and made record of the certificate of his having done so, the demandant suggested that fact to the court and asked leave to strike the claim for this lot from his writ, which was granted. The condition of the mortgage had been broken. Judgment was then ordered generally for the demandant, the privilege being offered the tenant to have it entered conditionally, if he desired; but he denied the right of the demandant to have any judgment for only a part of the mortgaged estate. Thereupon the presiding justice ordered judgment to be entered for the demandant at common law, to which the tenant excepted.

David Dunn for the tenant.

Frye, Cotton & White for the demandant.

BARROWS, J. The plaintiff sued in a real action, counting generally on his own seisin, for two parcels of land. In proof of title

he introduced a mortgage deed of both parcels. Having made an entry in the presence of two witnesses, and taken possession of one of the parcels, he was allowed by the court to strike from his writ the claim therefor, and did so. The condition of the mortgage had been broken, and the court ordered judgment for the plaintiff generally, giving the defendant the privilege of a conditional judgment if desired. But the defendant objected to a conditional judgment for a part of the real estate embraced in the mortgage, and the plaintiff does not seem to have moved for it; whereupon the court ordered judgment for the plaintiff at common law. And to this the defendant excepts.

His argument in support of the exceptions is based upon the erroneous idea that he has a right in this mode to compel the mortgagee to foreclose his mortgage. But this is not so. The debt is the principal thing. The mortgagee may waive his mortgage altogether, and collect his debt by levying upon a portion of the mortgaged premises. *Crooker* v. *Frazier*, 52 Maine, 405. Or he may use the legal title conveyed to him in any manner authorized by law to make the payment secure. As between the mortgagor and mortgagee, the mortgagee has the legal estate and the right of possession even before a breach of the condition, when there is no agreement to the contrary.

The mortgagor cannot complain that the mortgagee takes no legal steps to deprive him of his right of redemption.

We are not called upon now to determine what the effect of the proceedings above set forth may be so far as the right of redemption is concerned. If the plaintiff is willing to subject himself to a liability to account for rents and profits, and to equities that may remain in the defendant notwithstanding these proceedings, certainly no right of the defendant is thereby abridged.

It may be very true, as remarked in *Spring* v. *Haines*, 21 Maine, 129, that so long as a mortgagor has a right to redeem any part of the mortgaged premises he has a right to redeem the whole; and as further remarked in *Treat* v. *Pierce*, 53 Maine, 78, that when the demandant has judgment for possession on his own seisin at

common law, such possession does not affect the right of redemption.

Neither do these matters affect the right of the mortgagee to judgment for possession at common law, unless the defendant claims the conditional judgment which under the statute is to be rendered on motion of either party. That right of the mortgagee is distinctly declared in *Treat* v. *Pierce*, 53 Maine, 77 and 78, and cases there cited.

Neither in that case nor in this has the demandant asked for any judgment as on mortgage. When he does, the question whether a suit to obtain possession of one parcel only of the mortgaged premises can be maintained under the circumstances here disclosed may arise, if the defendant then objects to such judgment. Whether a judgment for possession at common law will effect the plaintiff's purpose, is for him to consider.

Exceptions overruled.

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

LEWIS P. CROCKETT *et al. vs.* BENJAMIN F. SCRIBNER.

Statute of frauds—what is not within.

A contract to manufacture staves out of a particular lot of timber, already cut for the purpose, is not within the statute of frauds and is valid although not in writing.

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

ASSUMPSIT upon a parol contract for the manufacture of staves. The case was tried by the justice of the superior court without the intervention of a jury, at the March term, 1873, subject to exceptions in matters of law.

The case shows that during the winter of 1871–1872 the defendant was employed by the plaintiffs, in cutting poplar timber;

that while the defendant was so engaged in cutting timber, negotiations were had between the defendant and the plaintiffs for the manufacture of said timber into syrup barrel staves by the plaintiffs for the defendant at a certain price per thousand; that finally a parol agreement was made between the parties, by which the plaintiffs undertook and agreed to manufacture the whole lot of timber into staves, for the defendant, and the defendant agreed to pay for said staves when manufactured, the sum of $12.50 per thousand, and to take and pay for (at said rate) all the staves that could be made from that particular lot of timber, the payments to be $50 cash, and two notes on three and six months with sureties.

It was claimed that the contract was within the statute of frauds, but the justice ruled as matter of law, that as said staves were not in existence at the time of said contract, and, by the terms of said agreement, were to be manufactured by the plaintiffs for the defendant, from a particular lot of timber, it is not a contract for the sale of goods, wares and merchandise, but for the manufacture and delivery of the staves, and therefore not within the statute of frauds.

The staves were manufactured by the plaintiffs, and offered to the defendant according to the contract, who refused to receive or to pay for them according to the parol agreement. The plaintiffs then sold them for the most they could get for them in the market, and the justice held the legal measure of damages to be the difference between the contract price and the amount so received by the plaintiffs for the staves. There were 41,400 staves so manufactured, deducting tare, and the damages by the above rule were seventy-five cents per thousand. The defendant excepted.

Cobb & Ray for the defendant.

As the staves and their price, and not the labor of manufacturing and its price, formed the consideration of the contract it was within the statute. *Buxton* v. *Bedal*, 3 East, 303; *Bird* v. *Muhlinbrink*, 1 Rich., 197; *Cason* v. *Cheeley*, 6 Ga., 554; *Clay* v.

Yates, 1 Hurl. & Nor., 73; *Gardner* v. *Joy*, 9 Metc., 177; *Robertson* v. *Vaughn*, 5 Sandf., 1; *Wilkes* v. *Atkinson*, 6 Taunt., 11; *Watts* v. *Friend*, 10 Barn. & Cres., 446.

H. J. Swasey & Son for the plaintiff.

DICKERSON, J. This case is presented on the defendant's exceptions to the rulings of the superior court for the county of Cumberland in matters of law.

That court ruled as matter of law, that, as the staves in controversy were not in existence when the contract was made, but were to be manufactured for the defendant from a particular lot of timber, it is not a contract for the sale of goods, wares and merchandise, but for the manufacture and delivery of the particular staves named, and is not therefore, within the statute of frauds.

The finding of the court, that as a matter of fact, the contract was for the manufacture and delivery of certain staves from a particular lot of timber, is conclusive upon the parties. The law is well settled that such a contract is not within the statute of frauds. *Hight* v. *Ripley*, 19 Maine, 137; *Abbott* v. *Gilchrist*, 38 Maine, 260; *Goddard* v. *Binney*, 115 Mass., 450.

The objection to the rule of damages laid down by the court is not well taken, and is waived in the argument.

Exceptions overruled.

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

DAVID BINGHAM *vs.* FRANCIS O. J. SMITH.

Levy of execution—waived at creditor's option. Tax.

Proceedings for making a levy upon his debtor's real estate are instituted by the creditor of his own motion, and for his own benefit; and he may accept or reject it when made without assigning any reason for making his election.

If seisin be not delivered to him, or he decline to accept it, the levy will be void, and another extent may be made by force of the same execution at any time before the return day, without any application to court.

If the debtor lives out of the state and has no attorney therein, and therefore is not entitled to choose an appraiser, the levying officer need not return that the debtor neglected to choose an appraiser as a reason for appointing two by the officer. It is enough to state the non-residence of the debtor, and that he has no attorney.

Premises described for the purposes of taxation and tax sale as "land, east corner of Congress and Exchange streets, extending through to Market," are not sufficiently identified to pass a valid title.

ON REPORT.

REAL ACTION in which the demandant demands two parcels of land situate upon Market, Exchange and Congress streets in Portland. The lot described in his first count he claims by virtue of a levy of an execution thereon in his favor against the defendant; that described in his second count he purchased at a sale thereof to satisfy a tax assessed upon it and against said Smith as its non-resident owner.

At the April term, 1871, of this court for Cumberland county, David Bingham recovered judgment against Francis O. J. Smith for $8,984.64 debt and $14.16 costs. Execution issued upon this judgment May 18, 1871, and upon the twenty-ninth day of the same month the officer to whom it was committed for collection extended it upon certain land in the vicinity of the demanded premises and made return of his doings, as did the appraisers, upon the execution. The creditor indorsed upon the execution a written refusal to accept seisin, and the officer made return of such refusal, and that the execution was in no part satisfied.

Mr. Smith, prior to this levy, had made this indorsement upon the execution:

"PORTLAND, May 29, 1871.

Neither myself, nor any attorney of mine residing in the county of Cumberland, but being myself at this time temporarily at Portland in said county, I hereby acknowledge to have been duly notified by the officer having this execution for service to choose an appraiser. I have accordingly done so—to wit: Ezra Carter.

F. O. J. SMITH."

Upon the first day of June, 1871, the creditor's attorney made this additional indorsement upon the execution:

"June 1, 1871. All proceedings on this execution prior to this date are waived, the creditor refusing to receive delivery of seisin of the property appraised.

DAVID BINGHAM, by J. & E. M. RAND, his attorneys."

On the fifth day of June, 1871, three appraisers were chosen, neither of whom had acted upon the twenty-ninth day of May, who appraised a different parcel of land from that taken May 29, 1871; of this the creditor accepted seizin in satisfaction of his execution, and it is the same demanded in the first count in his writ. In his return of this last levy the officer stated that one appraiser was chosen by the creditor, one by him, the officer holding said execution for service, and the third "appointed by me for Francis O. J. Smith, the within named debtor, for the reason that neither the said debtor nor his attorney reside in the county where the land lies."

The lot described in the second count was conveyed by John W. and Alvin Deering to Mr. Bingham by quitclaim deed dated August 9, 1872, and purporting to convey such titles as they had obtained upon sales of the land for non-payment of taxes assessed thereon. In the assessment and other books and returns the premises were described as "land, east corner of Congress and Exchange streets extending through to Market," and this description was referred to in the treasurer's deeds to the Messrs. Deering.

J. & E. M. Rand for the demandant.

F. O. J. Smith and *Bradbury & Bradbury* for the tenant.

The levy of June 5, 1871, was void because the execution by force of which it was made had become *functus officio* by the prior levy of May 29, 1871. *Darling* v. *Rollins*, 18 Maine, 405.

The creditor has no absolute right to refuse seisin, but can do so only for some one of the causes specified in the statute; R. S., c. 76, § 16; no one of which was assigned or existed, in this case. No waiver is effectual until judgment of the court thereon in an action of debt on the judgment or *scire facias* for a new execution. *Davis* v. *Richmond*, 14 Mass., 480; *Gorham* v. *Blazo*, 2 Maine, 237; *Kendrick* v. *Wentworth*, 14 Mass., 57.

It was void because of the officer's failure to notify the debtor to choose an appraiser, and to return that the debtor neglected to do so. *Nickerson* v. *Whittier*, 20 Maine, 227; *Wellington* v. *Fuller*, 38 Maine, 61; *Jewett* v. *Whitney*, 51 Maine, 233; *Boynton* v. *Grant*, 52 Maine, 229; *Whitman* v. *Tyler*, 8 Mass., 284; *Eddy* v. *Knap*, 2 Mass., 155; *Leonard* v. *Bryant*, 2 Cush., 37; *Shields* v. *Hastings*, 10 Cush., 247; which is decisive upon this point.

A fraud was practiced upon the debtor in concealing from him all knowledge that the creditor refused to accept seisin under the first levy, and all notice to choose an appraiser under the second. *Pullen* v. *Pemblecke*, 1 Raymd., 346, 718; *Hilton* v. *Hanson*, 18 Maine, 397; *Mansfield* v. *Jack*, 24 Maine, 103.

At least the appraiser already designated by the debtor, Mr. Carter, should have been called upon to act the second time. The appraisers of June 5, 1871, designedly so set off the property as to depreciate the value of the part taken and of the part left. This avoids the levy.

DICKERSON, J. The statute requires an officer making a levy of an execution on real estate to deliver seisin and possession thereof to the creditor or his attorney. This formality is a necessary pre-requisite to constitute a valid levy. When this is not done it is not necessary to apply to the court to have the execution superseded before a new levy can be made, but a new levy

may be made on the same execution, if in life, the previous proceedings being void *ab initio*. R. S., c. 76, § 5; *Darling* v. *Rollins*, 18 Maine, 407.

We think that a like result follows when, as in the case at bar, the officer's return on the execution shows that the creditor refused to receive seisin and possession of the land levied on when tendered to him, and the creditor himself certifies his refusal on the execution. The creditor is not obliged to take the land, and cases may not unfrequently arise where it would be unwise for him to do so. In the interval between the levy and the tender of delivery of seisin and possession he may have discovered a defect in the debtor's title, or found personal property with which to satisfy his execution, or there may have been an over-valuation. The creditor institutes the proceedings for making a levy of his own motion and for his own benefit, and may accept or reject it when made, with or without assigning any reason for his decision. When a creditor's rejection of the land levied upon is evidenced by the officer's return and his own certificate upon the execution, no title to the land passes to him by the levy, and the proceedings in making it become void, in the same manner as in the case where the officer's return shows that he did not deliver seisin and possession to the creditor. We see no substantial reason for requiring the creditor to sue out a writ of *scire facias* for an *alias* execution, or of debt for a new judgment before he can make another levy in the former case, and allowing him to make another levy on the same execution in the latter one. To make such distinction, on the contrary, is to subject a creditor, who thus exercises his legal right to reject a levy, to great expense, vexation and delay, as well as the risk of losing his debt altogether, for no legal purpose.

The levy of the twenty-ninth day of May failing because the creditor refused to receive delivery of seizin and possession of the land levied on, the officer had authority to make a new levy on the same execution, and proceeded to do so on the fifth day of June following. We do not perceive any defect in that levy. It con-

tains all the formalities of a valid levy. The officer's return shows that the debtor did not reside in the county where the land levied on was situated, and that he had no attorney residing there. In such cases the officer may appoint an appraiser for the debtor without notifying the debtor or his attorney to do so, as he did in this case. There can be no "neglect" of a debtor to choose an appraiser when he is not entitled to notice to choose one; nor can the officer be required by the statute "to allow the debtor a reasonable time therefor," when he is not bound to notify him at all. The "reasonable time," mentioned in the statute, is the time that elapses between giving notice and appointing an appraiser. It is impossible to determine whether "reasonable time to choose an appraiser" was "allowed," in a given case, when either of these data is wanting. The "neglect" of the debtor to choose an appraiser, in the meaning of the statute, commences at the expiration of the "reasonable time" "allowed therefor;" when that is indeterminate, there is no criterion for determining the question of neglect. To hold, therefore, that an officer's return is fatally defective because it does not show that the debtor "neglected to choose an appraiser" when he was neither bound by law, and did not undertake to notify him to do so, is to require such officer to commit a palpable absurdity. R. S., c. 76, § 1.

The case of *Nickerson* v. *Whittier*, 20 Maine, 227, is directly in point. In that case the creditor chose one of the appraisers, the officer another, and also one, as he certified in his return "for the within named debtor who having no residence or place of abode in this county,—Waldo—and after the most diligent search not being able to find him in my precinct, I could not notify him to choose an appraiser." The court held the levy valid.

In delivering the opinion of the court, Shepley, J., says: "When the officer is required to notify the debtor to appoint an appraiser, he must return that he has neglected or refused to appoint, to prove his authority to appoint one for him. But there are cases in which our statute does not require the debtor should have notice to appoint, and in these cases it is necessary that the officer

should return such facts as would prove his authority to appoint without notice to the debtor. The officer is required to notify, if the debtor be living in the county where such land lies. In this case the officer does return such facts as prove his authority to appoint for the debtor; and that is all that the statute requires." The officer did the same in the case at bar, and we have no doubt the levy is valid.

The authorities cited by the defendant's counsel do not sustain the position, that the levy is void because the officer appointed an appraiser for the debtor without returning that he "neglected" to appoint one. In *Wellington* v. *Fuller*, 38 Maine, 61, the officer appointed an appraiser for the debtor where his return showed that the debtor's family resided in the county where the land levied on was situated. The case of *Shields* v. *Hastings*, 10 Cush., 247, claimed by the counsel to be conclusive in support of his position, arose under a statute which does not authorize the officer, as our statute does, to choose an appraiser for the debtor when he resides out of the state, and has no attorney in it. So in *Leonard* v. *Bryant*, 2 Cush., 37.

We have not found, nor should we expect to find a single authority which requires the officer, as a pre-requisite of his authority to appoint an appraiser for the debtor, to return that the debtor "neglected" to appoint an appraiser, when the statute does not require the officer to give the debtor notice to appoint one.

The charges of collusion between the officer and the plaintiff's attorney, and the imputation upon the integrity of the appraisers in making the levy contained in the argument of the defendant are not warranted by the facts in the case, and should never have been made.

The plaintiff's claim of title, by a tax deed to land not covered by the levy is not very much relied upon in the argument, and is not sustained by the evidence. The description of the premises is uncertain and insufficient. *Judgment for the demandant on the first count in the writ.*

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

INHABITANTS OF CAPE ELIZABETH, petitioners for *certiorari*,
vs.
THE COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

Way—located under special act, must follow its provisions.

A way can be located across tide water only by authority of the legislature, which must be strictly pursued.

The Private and Special Law of 1869, c. 227, authorized the location of a way across Long Creek in Cape Elizabeth, and provided that it should be by a bridge over the tide waters of this creek, with a suitable draw, and subject to the approval of the harbor commissioners of Portland: *held*, that a location making no mention of bridge or draw, and not approved by the harbor commissioners, was unauthorized and void, and must be quashed upon *certiorari*.

ON AGREED FACTS.

PETITION for *certiorari* to bring up the proceedings of the county commissioners of Cumberland county in locating a certain way, and to quash the same.

Upon the seventeenth day of December, 1868, Mark Trickey and Nathaniel W. Lowe gave notice by publication in the Portland Daily Press that they, with other citizens of Cape Elizabeth and Westbrook, would petition the next legislature for an act authorizing the establishment and laying out of a new county road, the termini and general course of which were given, with the names of those whose lands it would traverse; and it was stated that it would cross Long Creek, "being a distance in all of about three miles, and crossing at one point tide water." In response to the application made, the legislature passed the act approved March 5, 1869, being c. 227 of the Private and Special Laws of that year, by the terms of which the county commissioners were authorized to locate a way over the tide waters of said Long Creek by means of a bridge with a suitable draw, subject to the approval of the harbor commissioners of the city of Portland.

At the June term, 1870, of the court of county commissioners, Mark Trickey and others petitioned for the location and construction of a way commencing at the place named in the published

notice aforesaid, but differing in its course and other terminus, and in the ownership of some of the lands taken, from those mentioned in that notice, and being of only half the length there stated; but it crossed Long Creek. After due notice and hearing, the county commissioners assumed to locate the way as prayed for in this petition, but in their return of it, as filed and recorded December 30, 1870, made no statement of the method of crossing the creek, whether by a fill or bridge, so (of course) said nothing of any draw. Their location was never approved by the harbor commissioners of Portland. The proceedings were closed and recorded at their June term, 1871. It was admitted that the tide ebbed and flowed in Long Creek and that it was navigated by boats and by vessels of large tonnage.

At the October term, 1873, of this court, the petitioners prayed for a writ of *certiorari* to quash these proceedings of the county commissioners for various reasons; among others, because the location was not in conformity with the act of 1869, c. 227, containing no provision for any draw, and not made subject to the approval of, nor approved by the harbor commissioners.

Upon the facts agreed and the record the matter was submitted.

Howard & Cleaves for the petitioners.

W. H. Vinton for the respondents.

It is in the construction and not in the location, that the bridge with a draw is to be provided. It need not be mentioned in the record. In the way as built there must be an opportunity for the passage of vessels; but the location is not the way (as this court expressed it in *Sproul* v. *Foye*, 55 Maine, 162) any more than a house-lot is a house. It is the construction of the way across Long Creek, and not its location, that is subject to the approval of the harbor commissioners of Portland.

WALTON, J. The county commissioners undertook to locate a county road across tide waters. Such a location could be made only by authority of the legislature. Such authority was obtain-

ed, but it was not pursued. The act granting it provided that the location across Long Creek should be by a bridge with a suitable draw therein. It also provided that "the same" should be subject to the approval of the harbor commissioners of the city of Portland. The words "the same," in our judgment refer to the entire location. The location made by the county commissioners does not provide for such a bridge or such a draw. And the case finds "that said supposed location was not made subject to or with the approval of the harbor commissioners." In the opinion of the court these omissions are fatal to the location.

Writ granted, as prayed for.

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

EZRA CARTER, in equity, *vs.* FREDERIC W. BAILEY, *et al.*

Copyright. Equity, jurisdiction.

An owner in common of a copyright, who has, at his own expense, printed, published, and sold the book copyrighted, is not liable, in the absence of any agreement *inter sese*, to account to his co-owner.

This court sitting in equity will not entertain jurisdiction of a bill between owners in common of stereotype plates, seeking for an account for the use and income of the common property, when no diseevery is sought, and the accounts are simple and can be properly and conveniently adjusted in an action at law.

BILL IN EQUITY.

The complainant set out that, for many years prior to the twenty-eighth day of June, 1860, he and one Oliver L. Sanborn were copartners in the book business, owning together the copyrights and stereotype plates of several books mentioned; that, upon that day, the copartnership was dissolved and it was agreed in writing that the property specified should belong to them "as individuals, co-owners, co-tenants and tenants in common until the same should be converted into cash, or otherwise, at their option,

and then should be equally divided between them;" that Bailey & Noyes well knew the premises, but that, some time between August 1, 1865, and August 1, 1867, said Sanborn fraudulently sold them all said stereotype plates, assuming to convey the whole title, whereas the complainant's interest therein was worth fifteen hundred dollars; that, on the second day of July, 1866, said Sanborn fraudulently demised and leased to Bailey & Noyes the whole of said copyrights; that, in 1867, said Sanborn was adjudicated a bankrupt, and on the fourteenth day of November, 1868, his assignee sold all said Sanborn's interest in these copyrights to these respondents; "whereby said Bailey & Noyes became the equal co-owners, co-tenants and tenants in common with your orator in all of said copyrights and publishing rights of all of said books, in the place of said Sanborn;" that "said Bailey & Noyes, since the first day of August, A. D., 1865, to the present time, have had the exclusive possession, use, benefit and profit of all said copyrights and all the publishing rights incident thereto, and by virtue thereof have printed, published and sold large quantities of all said books," giving an estimate of the sales; "that the royalty, rents and profits of said copyrights and publishing rights incident thereto, were ten per cent. of the retail price of each and all of said books," which is then stated; that there is due the complainant on account of the copyrights and plates, including interest, $5,544.31; that a settlement has been repeatedly requested by the complainant and refused by the respondents; wherefore he prayed that they be required to account and to pay him such sum as might be found due.

To this bill the defendants demurred, and the hearing was upon the demurrer.

A. Merrill for the complainant.

The parties were co-tenants and co-owners of the property mentioned in the bill. *Strickland* v. *Parker*, 54 Maine, 268. The respondents have had the sole benefit and income from the common property, without Mr. Carter's knowledge or consent, and he now wants a discovery of the profits or royalty. *Cutler* v. *Currier*, 54 Maine, 81.

This being a dispute between part owners of personal property is within the equity jurisdiction of this court. R. S., c. 77, § 5; Public Laws of 1873, c. 140; *McKim* v. *Odom*, 12 Maine, 105; *Mustard* v. *Robinson*, 52 Maine, 54.

S. C. Strout and *H. W. Gage* for the respondents.

There is no pretence of any publication by agreement, nor of any express promise to account, but it is assumed that this liability results from the joint ownership of the copyrights and plates, without any allegation that Bailey & Noyes have ever, in any way, prevented said Carter from exercising his right of publication.

A copyright is an exclusive right to the multiplication of copies. *Stephens* v. *Cady*, 14 Howard, 528. A joint interest in it does not make the co-owners partners. *Parkhurst* v. *Kinsman*, 1 Blatchf. C. C., 488; *Gould* v. *Banks*, 8 Wend., 568. Each part owner has the right to publish and sell. *Vose* v. *Singer*, 4 Allen, 226; *Whittemore* v. *Cutter*, 1 Gall, 429; *Clum* v. *Brewer*, 2 Curtis, 506.

But if the defendants received any benefit from Carter's interest, his remedy is at law. *Gowen* v. *Shaw*, 40 Maine, 56; *Dyer* v. *Wilbur*, 48 Maine, 287; *Stone* v. *Aldrich*, 43 N. H., 52.

This is not framed as a bill of discovery, nor sworn to as such.

For aught that appears, Carter may have exercised the right of publication to a far greater extent than the defendants.

Virgin, J. This case comes before us on demurrer to the bill.

The plaintiff alleges substantially that he and the defendants are tenants in common in the proportions stated of the copyrights of certain school books described by their respective titles; that since August, 1865, the defendants, without his consent, have printed, published and sold large specified numbers of the books, at a certain net profit; that he is equitably entitled to a share of the profits proportioned to the extent of his undivided interest; and he prays that the defendants be decreed to account to him for the same with equitable interest.

The question presented is whether one owner in common of a copyright, who, at his sole expense has printed, published and sold the book copyrighted, is liable in the absence of any agreement *inter sese*, to account to his co-owner.

We are not aware that this precise question has ever been decided.

The doctrine that an author has a right of property in his ideas and is entitled to demand for them the same perpetual protection which the law accords to the proprietor of personal property gen erally, finds no recognition either in the common law or in the statutes of any civilized country. When he has embodied his thoughts in manuscript, the latter is his exclusive property having the characteristics of transfer and succession common to personal property. Being his property, the author may exercise full dominion over it. He may publish it to the world or not, at his option. *Bartlett* v. *Crittenden*, 5 McLean, 36; *Little* v. *Hall*, 16 How., 170; *Palmer* v. *De Witt*, 47 N. Y., 532. If he publishes his book he ceases to have any exclusive claim to the ideas or sentiments thereon expressed, considered apart from the language or the outward semblance in which they are conveyed; for he can no longer exclusively appropriate the thoughts which have entered into the understandings of other persons through publication, or prevent the unlimited use of every advantage which the purchaser can reap from the doctrine or sentiments which the work contains. *Miller* v. *Taylor*, 4 Burr., 2362; *Stowe* v. *Thomas*, 5 Wall., Jr., 564; *Greene* v. *Bishop*, 1 Cliff., 198.

The public are interested in the development and promulgation of all new, wholesome ideas, and in new combinations and illustrations of old ones; and the most efficient mode of promulgating them is that afforded by the press. Without publication and some exclusive right thereto, the products of authors would prove comparatively profitless. The public, then, for the addition to its general stock of knowledge, and the author, in consideration of the pecuniary profit derivable therefrom, are jointly interested in the publication of new works. The framers of the U. S. Consti-

tution recognizing the importance of establishing a just policy in relation to this and its kindred subject, empowered congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. 1, Sect. VIII., cl. 8. Congress forthwith enacted statutes for carrying into execution this power. These statutes were not regarded as regulations of existing common law rights, (*Wheaton* v. *Peters*, 8 Pet., 591; *Jefferies* v. *Boosey*, 4 H. L. Cas., 815;) but the "exclusive right to their respective writings for limited times" was thereby created and conferred upon authors as a compensation for their contributions to the promotion of general knowledge. The impracticability of fixing any specific price for their respective contributions was avoided by leaving the sum to be graduated by the *ad valorem* favor which the public should mete out to the author by way of demand for his production.

The right created and granted to authors by the federal statutes "respecting copyrights," is *sui generis;* consisting as its name indicates, in the "sole right" of the "author or authors," "their executors, administrators or legal assigns" resident in the United States, to print, reprint, publish and vend their productions, for the term specified. 4 U. S. Stats., 436, c. 16, § 1, in force when the copyrights in question were secured. It is an incorporeal right, resting entirely in the reasonable interpretation of the terms of the grant; and so disconnected from, and independent of any material substance such as manuscript or plate, that a sale of either or both of these will not necessarily carry with it any right on the part of the purchaser thereof to make copies of the original work—the right to copy or the "copyright" still remaining in the author, his legal representative or assignee, a distinct, well defined, though intangible legal estate. *Stevenson* v. *Cady*, 14 How., 530; *Stevens* v. *Gladding*, 17 How., 447.

The statute evidently contemplates that the copyright may be secured in the name of the author; or, if he have legally assigned his right, the assignee may avail himself of the provisions of the

statute and secure the title in his name. In whosever name taken, whether in that of the author or of him whose title is derived from one sustaining that relation to the work, the legal proprietor may have his legal and equitable interests decided and protected in the appropriate tribunals. If there be more than one author or assignee, all of either class, as the case may be, may have the copyright.

So whenever the legal estate has once vested through a compliance with the statute, it is assignable. The assignment is not limited to one, but may be to more than one—nor to the whole interest, but any owner may sell and assign any aliquot part of his undivided interest. When the assignment is made to more than one, the ownership is not that of partners; although they may enter into any contract of partnership *inter sese*, or between themselves and publishers of their works. *Gould* v. *Banks*, 8 Wend., 568; *Pulte* v. *Derby*, 5 McLean, 328; *Stevens* v. *Rumney*, 6 De G. M. & G., 223. In the absence of any contract modifying their relations, they are simply owners in common, as the plaintiff has alleged, each owning a distinct but undivided part which or any part of which alone he can sell, as in the case of personal chattels.

The statute confers upon all the owners full power, without exacting any obligation in return to print, publish and sell. It gives no superior right to either—the only restriction being as to time. All others within that period, having no license from them or some one of them, are excluded. Each can exercise his own right alone without using, or receiving any aid or benefit whatever from the title or property of the others. But if none be allowed to enjoy his legal interest without the consent of all, then one, by withholding his consent, might practically destroy the value of the whole use. And a use only upon condition of accounting for profits, would compel a disuse, or a risk of skill, capital and time with no right to call for a sharing of possible losses. When one owner by exercising a right expressly conferred upon him, in nowise uses or molests the right, title, possession or estate of his coowners, or hinders them from a full enjoyment, or sale and transfer

of their whole property, we fail to perceive any principle of equity which would require him to account therefor. If owners of such property would have the result otherwise, they must bring it about by contract. Such seems to be the rule governing owners in common of patent rights; (*Clum* v. *Brewer*, 2 Curt. C. C., 507; *Vose* v. *Singer*, 4 Allen, 226; *Mathers* v. *Green*, 1 Ch. Ap. Cas. 30; *contra*, *Pits* v. *Hall*, 3 Blatchf. 201;) and we think the same principle applicable to the question involved in case of copyright. The bill cannot be sustained so far as it seeks for an account in respect to the copyrights.

The plaintiff also claims to recover the value of one undivided half of the stereotype plates owned in common by these parties; one allegation being that Sanborn "fraudulently sold, transferred and delivered to the defendants the entire property of all said stereotype plates for a valuable consideration." The sale of personal property by one owner in common does not as against his co-owner, vest the entire common property in the vendee; but the co-owner may assert his title to his own share; or he may have trover for its value against him who converted it by assuming to own and sell the whole; (*Wheeler* v. *Wheeler*, 33 Maine, 347;) but not against the vendee so long as he continues in possession and uses it in a manner not inconsistent with the co-owner's rights. *Dain* v. *Cowing*, 22 Maine, 347; *Kilgore* v. *Wood*, 56 Maine, 150. Or he may waive the the tort and recover in assumpsit for his share of the money received by the vendor. *Moses* v. *Ross*, 41 Maine, 360; *White* v. *Brooks*, 43 N. H., 402. And the remedy in trover is ample for the injury set forth in the further allegation that "said defendants used up and destroyed all of said stereotype plates." *Herrin* v. *Eaton*, 13 Maine, 193; *Strickland* v. *Parker*, 54 Maine, 263.

The foregoing remedies, however, do not enable the plaintiff to recover for "the use, rents, profits or income" of the plates, sought.

At common law each tenant in common of the realty may, at all times, reasonably enjoy every part of the common property, reasonable enjoyment being such as will not interfere with the like

rights of his co-tenants. *Knox* v. *Silloway*, 10 Maine, 201; *Hutchinson* v. *Chase*, 39 Maine, 513. In the case of saw-mills, the statute has reduced this abstract rule to a practical one, by apportioning the time of occupancy among the tenants according to their respective interests. R. S., c. 88, § 8. So owners in common of personal property hold by unity of possession—each having an equal right of occupancy. But there are numerous kinds of property, animate and inanimate, in their nature inseverable, which cannot be beneficially enjoyed in common, and which are not susceptible of a joint and equal possession. One owner in common, having no superior rights, cannot maintain replevin to recover possession from his co-owner; (*Witham* v. *Witham*, 57 Maine, 447;) nor trover for the value of his share—unless the treatment of the common property on the part of the owner in possession amount to conversion, the possession of one and its appropriate use not being regarded as inconsistent with the rights of the other. *Estey* v. *Boardman*, 61 Maine, 595. The common law, therefore, furnishes no specific remedy in respect to the possession of such kinds of property, but leaves each owner in common thereof to take possession "when he can see his time." Co. Litt., § 322; *Esty* v. *Boardman*, *supra*. Having possession and appropriating it to such uses only as it was designed for, the owner has only what the law gives him; and he may maintain such possession and prosecute such use without laying himself under obligation to pay or account therefor, unless he take more than his share of the rents and income, without the consent of his co-owners, and refuse, in a reasonable time after demand, to pay such co-tenants their share thereof; and then he will be liable to an action of special assumpsit. R. S., c. 95, § 16; *Moses* v. *Ross*, 41 Maine, 360; *Dyer* v *Wilbur*, 48 Maine, 287; *Cutler* v. *Currier*, 54 Maine, 81; *Blood* v. *Blood*, 110 Mass., 545.

This court as a court of equity has jurisdiction of matters of account between owners in common of personal property; and when such a case is presented, wherein is involved a variety of adjustments, limitations, cross-claims or other complications, it

will afford to parties the superior facilities of equity in effecting distributive justice among them, although as a court of law it also has jurisdiction of the subject matter. But when, as in the case at bar, the account (if any) is simple, and all upon one side, and can be fully and readily adjusted by a judgment in an action of assumpsit, and no discovery is sought, the necessity for entertaining equity jurisdiction of the case does not exist, and the court will decline it. *Gloninger* v. *Hazard*, 42 Penn. St. R., 401; *Blood* v. *Blood*, 110 Mass., 545.

Demurrer sustained.
Bill dismissed with costs.

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

CUMBERLAND BONE COMPANY *vs.* ANDES INSURANCE COMPANY.

Insurable interest—what is.

The bargainee of goods who has advanced the price thereof to the seller, when the seller has agreed to store them free of expense to him, and deliver them as wanted, and to procure insurance on them to protect his advances, and does so in good faith, in the name of the bargainee, making known to the agent of the insurance company the fact of the advances, and the object of the policy, has an insurable interest in the goods, so that a policy in his name may be valid and binding, so far as that point is concerned, notwithstanding the goods may not have been separated from other stock belonging to the seller, of the same kind, or weighed out, formally delivered, and accepted by the bargainee.

ON REPORT.

ASSUMPSIT, to recover for a loss by fire of a quantity of fish scrap alleged to be the property of the plaintiffs, stored in the building at Boothbay, Maine, known as the Atlantic Oil Company's Wofks, upon which the defendants issued a policy insuring it to the amount of two thousand dollars, from the eleventh day of March to the first day of June, 1872. The fire occurred April 13, 1872. The Atlantic Oil Company's Works were managed

and mostly owned by Luther Maddox of Boothbay, who had agreed early in 1872, to deliver a quantity of fish scrap there made to the plaintiffs, in consideration of which, money and machinery to the amount of two thousand dollars were advanced to him by the Cumberland Bone Company, and he was to ship the scrap as wanted, storing it and keeping it insured in the meantime for the benefit of, and free from expense to the plaintiffs. Accordingly he procured the policy upon which this suit is brought to be issued in the plaintiffs' name, stating the facts to the insurance agent at Bath, who delivered it to him, and he obtained another policy, in another company, upon his own interest at the same time. There never was any weighing or separation of any of the scrap destroyed, nor any formal delivery of it to the plaintiffs.

A default was entered for the full amount claimed, being two thousand dollars and interest from the time the loss was payable; to be taken off if, on all the testimony, this court should come to the conclusion that a jury would not be authorized to find that the plaintiffs had an insurable interest under the policy.

Strout & Holmes for the plaintiffs.

As between the parties, no delivery was necessary. 1 Parsons on Con., 529; *Waldron* v. *Chase*, 37 Maine, 414; *Vining* v. *Gilbreth*, 39 Maine, 496; *Whitehouse* v. *Frost*, 12 East., 613.

Nor does it make any difference that the stock was to be ground by Maddox before shipment. 37 Maine, 414; *Damon* v. *Osborne*, 1 Pick., 476; *Riddle* v. *Varnum*, 20 Pick., 280.

Any legal or equitable interest under an executory contract constitutes an insurable interest. *Columbian Insurance Co.*, v. *Lawrence*, 2 Peters, 26; *Oliver* v. *Greene*, 3 Mass., 133; *Bartlett* v. *Walter*, 13 Mass., 267. One has an insurable interest in any property by the existence of which he enjoys a benefit or advantage, and by the destruction of which he will suffer a loss, whether he has any title to or lien upon it or not. *Eastern Railroad Company* v. *Relief Fire Insurance Company*, 98 Mass., 420; *Insurance Company* v. *Chase*, 5 Wallace, 513; *Wilson* v. *Jones*, Law Rep., 3 Exch., 150; 3 Kent's Com.,* 376.

The interest need not be specified. 5 Wallace, 513; *Kenny* v. *Clarkson*, 1 Johns., 385; *Carruthers* v. *Sheddon*, 6 Taunton, 14.

Howard & Cleaves, and *C. W. Larrabee* for the defendants.

The case resolves itself into this: the plaintiffs have an account against Maddox for advances under a contract to furnish them a quantity of fish guano. The guano has not been furnished; but Maddox lost by fire a quantity of fish scrap that he intended to prepare for the plaintiffs under their agreement. The plaintiffs might accept or reject it, as only perfect fish were contracted for, and no agent of the Bone Company had ever inspected the scrap to see if it was suitable and would be received. The plaintiffs had no more interest in this scrap than if it had been "afloat in the shape of porgies."

No action upon a policy can be maintained unless the insured had an interest in the property at the time of its loss. *Folsom* v. *The Merchants' Insurance Company*, 38 Maine, 414; *Sawyer* v. *Mayhew*, 51 Maine, 399; *French* v. *Rogers*, 16 N. H., 177.

It must be a legally recognizable interest in the subject insured. May on Insurance, § 76; 1 Phillips on Insurance, § 172; *Mitchell* v. *The Home Insurance Company*, 31 Iowa, 465.

Barrows, J. The plaintiffs claim to recover a loss of $2,000 under a policy issued by the defendants upon a stock of fish scrap contained in the Atlantic Oil Company's Works in Boothbay.

After the testimony was out a default was entered, to be taken off if upon a full report of the testimony we conclude that the jury would not be authorized to find that the plaintiffs had an insurable interest in the property.

This stipulation differs, it will be seen, in more than one particular from the more common one which presents to this court the whole case, and all the questions both of law and fact with power to draw inferences as a jury might.

As the default is to stand if the jury would be authorized to find that the plaintiffs had an insurable interest, we must accept the stipulation as equivalent to an admission that no question is

made as to plaintiffs' right to recover, if they had an insurable interest, and that the testimony of plaintiffs' witnesses is to be accepted as true as to all matters respecting which there is any conflict.

In all cases of conflicting testimony the jury are authorized to find the facts in accordance with the statements of those witnesses whom they may deem most deserving of confidence and belief; and it cannot be said that they "would not be authorized to find" all the facts as plaintiffs' witnesses state them.

The jury "would be authorized to find," then, that Luther Maddox, a manufacturer of porgy oil and fish scrap, dry and crude, in pursuance of negotiations with the plaintiffs looking to his furnishing them with large quantities of dried fish scrap, had received advances from the plaintiffs before the taking out of this policy to the amount of $2,000, and had the dried fish scrap on hand to an amount in value considerably exceeding the sum advanced by the plaintiffs.

As the fish scrap or porgy chum was not wanted by plaintiffs until the following season, it remained at the Oil Company's Works, not separated from that belonging to Maddox, under Maddox's agreement to store it for plaintiff, free of expense and deliver it when wanted, and to get it insured in order to secure the plaintiffs' advances.

In pursuance of this agreement Maddox told the agent of the defendant company that plaintiffs had scrap at Boothbay, that they had made advances to him to the amount of $2,000, and he wanted a policy to protect their interest in case of loss. He procured a policy on his own interest at the same time for a like amount. The cash value of the whole stock of fish scrap at the time of the insurance and of the fire was $5,000, and it were very nearly a total loss. No part of it had ever been delivered to plaintiffs, but Maddox stated fully to the agent of the insurance company the situation and condition of the stock "and the risk the company was taking just as it was."

He testified in substance that the porgy chum burned was the same upon which the plaintiffs had made the advancements to him—that there were 150 tons in the whole, of which he owned

three-fifths and the Cumberland Bone Company two-fifths by virtue of the advances made him—that he held it for them to be delivered as wanted.

The Insurance company paid the amount of the policy running to Maddox but resist the claim of the plaintiffs on the ground that Maddox had made no delivery to them—that the property in no specific part of the porgy chum had ever passed from Maddox to the plaintiffs—was not at their risk, and so they had no insurable interest.

If it were essential to the existence of an insurable interest that the assured should have a legal title to the property upon which the insurance is effected, the case would present a different and perhaps more difficult question. But such is not the law. An equitable interest suffices. Chancellor Kent lays down the law thus: "The interest need not be a property in the subject." "It does not necessarily imply a right to or property in the subject insured. It may consist in having some relation, to or concern in the subject of the insurance which relation or concern may be so affected by the peril as to produce damage."

The result is that a person so circumstanced that he is interested in the safety of a thing, derives a benefit from its existence and suffers prejudice from its destruction, has an interest in that thing which is the lawful subject of insurance.

"An equitable as well as a legal interest, and an interest held under an executory contract are valid subjects of insurance." *Columbian Ins. Co.* v. *Lawrence*, 1 Peters Sup. C., 25. Mortgagor and mortgagee, pledgor and pledgee both have an insurable interest in the subject of the mortgage or pledge—the former to the full value of the property, the latter to the amount of his debt thereby secured.

For further illustrations of interests which are deemed insurable, so as to relieve the contract from the character of a wager, and prevent it from being deemed unavailable for want of insurable interest, see *Locke* v. *No. American Ins. Co.*, 13 Mass., 61; *Bartlett* v. *Walter*, Id., 267; *Oliver* v. *Greene*, 3 Mass., 133; *Rider* v. *Ocean Ins. Co.*, 20 Pick., 259; *Waters* v. *Monarch*

F. & L. Ass. Co., 5 El. & Bl., 870; *Godin* v. *London Ass. Co.*, 1 Burr. 489; *Wolff* v. *Horncastle*, 1 Bos. & Pul., 316; *Sutherland* v. *Pratt*, 12 Mees. & Wels., 16; *Wells* v. *Philadelphia Ins. Co.*, 9 Serg. & Rawle, 103; *Ins. Co.* v. *Chase*, 5 Wall., 513.

Mr. Arnold in his Treatise on Insurance, vol. 1., p. 229, premising that "it is very difficult to give any definition of an insurable interest," states it, "as the fair result of the cases, that, in order to have an insurable interest, it is not necessary to have an absolute vested ownership or property in that which is insured; it is sufficient to have a right in the thing insured, or a right derivable out of some contract about the thing insured of such a nature that the party insuring may have benefit from its preservation and prejudice from its destruction." We think that the plaintiffs under the facts here developed had such an interest in the subject of insurance. Maddox was holding it in good faith in trust for them. He recognized the interest they had acquired in it by their advances, held it subject to their order and procured the insurance in their name to protect their advances, refraining from insuring it in his own, and making known to Mr. Plummer, the defendants' agent, the situation and condition of the property and the fact that advancements had been made to him thereon by the plaintiffs and that the object of the policy was to protect those advances. It is true that so long as Maddox was solvent the plaintiffs might not lose by the destruction of the property. But the same is true of every mortgagee or pledgee. We fail to see how the insurers could be injuriously affected, suppose it true that the agent understood that the part belonging to the plaintiffs had been separated, weighed off, and formally delivered. It does not appear that the risk they assumed was changed or affected. As we settle the only question presented by the report in the plaintiffs favor, the entry must be

Default to stand. Judgment for the plaintiffs for $2000 *and interest from Sept.* 10, 1872.

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

ANN W. KIDDER *vs.* JOHN W. SAWYER.

Practice.

Where by consent or order of the court sitting *in banc*, an entry is made that copies or exceptions are to be filed within a time stated, the cause will be disposed of by a dismissal of the exceptions or motion, if the papers are not placed in the hands of the chief justice within the period specified.

ON EXCEPTIONS.

There is no occasion for any statement of the facts of this case, nor of the issues of law presented by the exceptions. It was agreed that the cause should be submitted in writing within a limited period after the adjournment of the July law term. The time elapsed without any arguments being forwarded to the chief justice.

WALTON, J. When, in any case pending upon the law docket upon motion or exceptions, there is an entry upon the district clerk's docket, made either by consent of parties or by order of the court, that copies or arguments are to be furnished within a certain time, or the motion or exceptions to be overruled, if the required copies or arguments are not placed in the hands of the chief justice within the time limited, the case will be disposed of under the direction of the chief justice in accordance with such entry without further examination or consultation.

Exceptions overruled.

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

ELIZA C. DURGIN *et als vs.* BENJAMIN W. BARTOL.

Promissory note.

A note payable to the order of A. B., is, in contemplation of law, a note payable to A. B., or order, and may be sued in the name of A. B. without indorsement.

ON EXCEPTIONS.

ASSUMPSIT, upon a promissory note of this tenor:—

$100.00. "April 13, 1871.

On demand, for value received, I promise to pay to the order of either Eliza C. Durgin, Almyra H. Durgin, or Eliza C. Durgin, 2d, one hundred dollars with interest.

BENJAMIN W. BARTOL."

The three persons named in the body of the note brought this suit jointly thereon, there being no indorsement upon the back of the note. The defendant contended that it could not be maintained and that there was no enforceable contract until one or more of the three plaintiffs had indorsed the note, but the justice of the superior court, where the action originated, ruled otherwise and the defendant excepted.

J. O'Donnell for the defendant.

A note or bill payable to the order of an individual is not a valid contract until indorsed by the party to whom it is made payable: It is not negotiable, and therefore is not a contract, till indorsed. "It is the indorsement alone that gives it efficacy." *Smalley* v. *Wight*, 44 Maine, 446.

E. S. Ridlon and *J. C. Woodman* for the plaintiff.

DICKERSON, J. The judge of the superior court ruled *pro forma*, that this action is maintainable in the name of the plaintiffs without indorsement, though the note is payable to their order, and the defendant excepted to this ruling.

It is familiar law that an action on a note payable to A. B., or

order, cannot be maintained in the name of C. D., unless it is indorsed by A. B. So, in general, an action cannot be maintained upon a note or bill payable to the order of the maker or drawer until it is indorsed. *Smalley* v. *Wright*, 44 Maine, 445; *Foster* v. *Shattuck*, 2 N. H., 446.

The reason for the rule in the latter case is that the contract is not complete until the note is indorsed by the maker; it can only become a complete contract by being negotiated. But no such reason obtains in the case at bar. The plaintiffs became the owners of the note upon its delivery, with the right to enforce payment thereof without negotiating it. The law does not require the meaningless formality of making such a note payable to the plaintiffs by their own indorsement thereon. In contemplation of law, the contract of the parties, as between themselves, means the same without as with such indorsement: a note payable to the order of A. B., is a note payable to A. B., or order. *Howard* v. *Palmer*, page 86, *ante*. *Huling* v. *Hogg*, 1 Watts & Serg., 418; Story on Promissory Notes, § 36. *Exceptions overruled.*

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

HENRY HARRINGTON *vs.* HIRAM B. TUTTLE.

Amendment. Pleading. Practice.

A count for a balance of account, or for the amount due, is amendable by adding a bill of particulars.

If the defendant neglects to demur and proceeds to trial without a bill of particulars, it is too late for him to object for the want of such bill.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed and tried before the presiding justice without the intervention of a jury, subject to exceptions in matters of law, upon the general issue. The only item in dispute was the first:—"Amount due on former account, $36."

The judge ruled as matter of law that the declaration contains no sufficient description of the debt sought to be recovered under this item. Besides the count upon the account annexed there was a second alleging that the defendant, at &c., "being indebted to the plaintiff in the sum of one hundred and thirty-five dollars and forty-nine cents for six and a half cords of wood, for ten bushels of oats, and for three thousand nine hundred and sixty-four feet of lumber, and also for an amount due on a former account amounting to thirty-six dollars, and all of said several items mentioned amounting to one hundred and thirty-five dollars and forty-nine cents, in consideration thereof then and there promised," &c. The judge held that there was no sufficient averment or statement of the nature of the indebtedness in either count of the declaration on which judgment could legally be rendered for the amount claimed to be recovered on the first item; and ordered judgment for the plaintiff for the rest of his account.

The plaintiff excepted.

W. H. Vinton for the plaintiff.

Howard & Cleaves for the defendant, cited *Bennett* v. *Davis*, 62 Maine, 544; *Babcock* v. *Thompson*, 3 Pick., 446; *Cross* v. *Robinson*, 21 Conn., 392.

In *Bennett* v. *Davis*, this court said: "A sufficient declaration must contain all the allegations necessary to make out the plaintiff's case, without reference to a paper not attached. An account annexed is part of the declaration. As each item is, or may be, a separate contract of itself, no proof is admissible, in regard to such contract, unless the contract relied upon is alleged in the declaration. The bill annexed in this case shows that different items are relied upon, but does not state what they are." In that case the account annexed consisted of this item: "To groceries as per bill of particulars rendered, $28.62." The charge, "amount due on former account" is equally indefinite, and clearly supposes the existence of certain items that can only be ascertained by reference to some paper *dehors* the record. The court there conclude that it is

clear the "plaintiff cannot sustain his action, nor can he have judgment upon a default without an amendment;" and such, we conceive must be the determination in the present instance.

APPLETON, C. J. This is an action of assumpsit on account annexed, the first item of which is as follows :—"1870. To amount due on former account, $36.00."

The plaintiff testified that he and the defendant looked over their accounts and found that he owed the defendant $46.40, and that the defendant owed him $36.00; but that no settlement or adjustment of their accounts was then had. This was denied by the defendant, but the presiding justice, to whom the case was referred, without determining the controverted question of fact raised by the testimony in regard to this item, ruled that there was no sufficient description of the debt thereby sought to be recovered and no averment or statement of the nature of the indebtedness on which judgment could legally be rendered, and gave judgment for the remainder of the plaintiff's claim.

The case was tried upon the general issue. The defendant is entitled in actions of assumpsit on the common counts, upon his motion, to a specification of the plaintiff's claim. Rule XI, 37 Maine, 571. No bill of particulars was called for.

A common count on account annexed will give jurisdiction, though no account is annexed, nor any bill of particulars filed with the writ when the action is entered; and is amendable by adding such bill. *Tarbell* v. *Dickinson*, 3 Cush., 345; *Burgess* v. *Bugbee*, 100 Mass., 152; *Butler* v. *Millett*, 47 Maine, 492.

By pleading the general issue and going to trial without objecting to the want of a bill of particulars, the defendant waived his right to object for the want of it. *Preston* v. *Neale*, 12 Gray, 222.

It was determined in *Saco* v. *Hopkinton*, 29 Maine, 268, that an attachment upon the money counts or on an account annexed was invalid without a further and more definite specification of the claims sought to be recovered. When the declaration shows that the suit is for different items, as for goods delivered, but fails to disclose what the goods were, the defendant may call

for a bill of particulars or demur because the declaration contains no such bill.

The distinction between proceeding to trial without calling for a bill of particulars and demurring to the declaration for the want of one is fully recognized. In *Preston* v. *Neale*, 12 Gray, 222, it was held that the want of a bill of particulars under the common counts could not be objected to after the trial had commenced. "The exception to the judge's refusal to strike out the first count," observes Metcalf, J., "for want of a bill of particulars, is overruled. The defendant's proper course was either to move the court to order such a bill to be filed or to demur to the count." In *Bennett v. Davis*, 62 Maine, 544, advantage of the want of a bill of particulars was taken by demurrer. Not so here.

In the present case, if the defendant had desired a bill of particulars, he had only to make the request. When no request is made on the trial, the presumption is that the defendant has no need of the information thus attainable. *Exceptions sustained.*

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

JAMES HOUGHTON *et als. vs.* JOHN B. NASH.

Contract—rescission of.

One desiring to rescind a contract for fraud in its inception must restore to the other party any valuable article received as its consideration. In order to make an attempted rescission effectual the parties must be placed in *statu quo ante.*

ON EXCEPTIONS.

REPLEVIN of about twelve hundred dollars' worth of goods, which were purchased originally by the defendant of the plaintiffs, who now claimed the right to replevy them because of the insolvency of the vendee and of fraudulent representations by him as to his solvency and business standing and prospects which induced them to make the sale. The goods were bought about the middle

of October, 1870, and the writ of replevin bore date the first day of November following.

In part payment for these goods the buyer gave Houghton, Woods & Co., the plaintiffs, a draft payable to their order for nine hundred dollars, dated October 14, 1870, drawn by W. S. Nash, for J. B. Nash, upon Whitten, Burdett & Young, conditionally accepted "to be paid from first funds" in the hands of that firm, and upon which there was paid $225.95 on the last day of October, 1870, the day before this suit was brought. Neither this draft nor its proceeds were returned to the defendant before this present action was instituted. On the fourteenth of October, 1870, the plaintiffs wrote from their place of business in Boston to that of the defendant in Yarmouth, inquiring about his means; on the twenty-eighth day of October, he replied that he was badly involved, and they had better come down. In February, 1871, he was adjudged a bankrupt upon his own petition.

After the plaintiffs had drawn out their testimony, the presiding justice ruled that the action could not be maintained, and the plaintiffs excepted.

T. B. Reed for the plaintiffs.

Cobb & Ray for the defendant.

Dickerson, J. The plaintiffs brought their action of replevin for the goods obtained of them through alleged fraudulent representations, in respect to the vendee's solvency without returning his order on a third party for money given for the goods when they were delivered. The law is too well settled to need the citation of authorities, that in order to rescind such a contract the vender must restore the vendee to his former condition by returning the consideration. The plaintiffs not having done this cannot maintain this action. *Exceptions overruled.*

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

ELIZA G. T. LIBBY *vs.* JOHN W. THORNTON *et als.*

Deed—construction of.

A deed executed four years before the grantor's death was expressed as conveying "all the estate I now own, or may own at the time of my decease," and that it was "to have full effect immediately before my (the grantor's) decease:" *held*, that it conveyed only such of the real estate owned by the grantor at the date of its execution as he continued to own when it took effect, and did not convey any realty acquired after its execution.

The grant of the real estate owned at his decease is void.

ON REPORT.

REAL ACTION to recover an undivided seventh of three parcels of land, each parcel being described in a separate count. The parties are children of the late James B. Thornton of Scarborough, deceased, who died February 13, 1873, leaving seven heirs. Upon the fourth day of February, 1869, said James B. Thornton wrote, executed and acknowledged a warrantee deed in ordinary form, bearing that date, by which "in consideration of the sum of one dollar and my natural affection, paid by my four sons, J. Wingate Thornton, James B. Thornton, Charles C. G. Thornton and Henry Thornton," he conveyed to "the said John, James, Charles and Henry, their heirs and assigns forever, equally and undivided all the real estate wherever situated, that I now own or may own at the time of my decease. . . . . A list of the several pieces or lots of land will be found with my papers. This deed to have full effect immediately before my decease." A few days before his death, and in contemplation of that event as impending, the grantor delivered this deed to one of the grantees and it was recorded February 28, 1873. By his will, made October 18, 1869, Mr. Thornton, in the third item of it, gave all his personal property to these four sons, adding these words, "having before given to them by deed all my real estate." They were directed to pay certain legacies out of the property.

The demandant introduced a deed from Ancyl A. Thurston to

said James B. Thornton, senior, dated and executed May 13, 1872, and recorded February 27, 1873, which, it was admitted, covered and conveyed the lots described in the first count in the demandant's declaration.

It will be perceived that this deed bears date (May 12, 1872,) subsequently to that from Mr. Thornton to his sons, executed February 4, 1869.

The demandant also introduced deeds dated, executed and recorded in 1851 and 1852, from Dorville Libby and from John Fogg to said late James B. Thornton, conveying the land demanded in the second count of her declaration; and a deed dated, executed and recorded in December, 1854, from John Libby to said late James B. Thornton, conveying the parcel described in her third count. She also put in a number of deeds from James B. Thornton, senior, and two deeds to him of later dates than February 4, 1869. The defendants were executors of their father's will and found among his papers and produced at the trial three lists or inventories of his estate real and personal, made by him, the first dated August 16, 1867, the second February 26, 1869, and the third July 31, 1871. The cause was reported to the court sitting *in banc* for determination.

Butler & Libby for the demandant.

The deed of February 4, 1869, from Mr. Thornton to his sons, is void for uncertainty. It was not the decedent's intention that it should take effect upon delivery, and the land upon which it would operate was indefinite and uncertain. It purports to convey "all the real estate wherever situated, that I now own, or may own at the time of my decease." This was a fluctuating quantity; liable to be diminished by subsequent sales, or increased by subsequent purchases. There might be nothing left upon which the covenants in the deed could operate. As a matter of fact, the lists show that, after the execution of this deed and before its delivery, his real estate was decreased in amount by sales, since the valuation affixed to the several lots remains unchanged.

In 1867, his realty was valued at $51,150; in 1869, at $48,550;

and in 1871, at but $34,100. Can such a description suffice in a deed? If so, wills are no longer necessary, and property can be disposed of without any of the formalities required by the statute of wills.

In any event, it cannot convey the first demanded lot, acquired subsequently to February 4, 1869, since the "now" in the deed must refer to the date of its execution. 2 Washburn on Real Property,* 622; *Gold* v. *Judson*, 21 Conn., 652; *Cole* v. *Scott*, 16 Sim., 259; *Joseph* v. *Bigelow*, 4 Cush., 82.

The lists cannot enlarge nor weaken the language of the deed. The first lot is not found in either of them, nor was it devised by the will, which did not purport to act upon any realty, but spoke of it as having been already given by deed.

Strout & Holmes for the tenants.

The description of all property owned by him immediately before his decease was sufficient to convey all that he is proved to have possessed when that instant of time arrived. *Marr* v. *Hobson*, 22 Maine, 321; *Bosworth* v. *Sturtevant*, 2 Cush., 392; *Bird* v. *Bird*, 40 Maine, 398; *Adams* v. *Cuddy*, 13 Pick., 460; *Chaffin* v. *Chaffin*, 4 Gray, 280; *Jamaica Pond Aqueduct Corporation* v. *Chandler*, 9 Allen, 159.

If the general description were insufficient, the lists by reference become a part of the deed and fully identify the parcels conveyed thereby. *Marr* v. *Hobson*, 22 Maine, 321; *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Maine, 219; *Allen* v. *Bates*, 6 Pick., 460; *Foss* v. *Crisp*, 20 Pick., 121.

The deed takes effect from delivery and conveys all estate then owned by the grantor. *Oatman* v. *Walker*, 33 Maine, 67; *Sweetser* v. *Lowell*, Id., 446; *Fairbanks* v. *Metcalf*, 8 Mass., 230; *Mayburry* v. *Brien*, 15 Peters, 21; *Parmelee* v. *Simpson*, 5 Wallace, 81.

Being duly executed, acknowledged and delivered, the fact that it conveyed an estate *in futuro*, upon the happening of a contingency, however fatal under the old law of England, is no objec-

tion in this state. *Wyman* v. *Brown*, 50 Maine, 139; *Drown* v. *Smith*, 52 Maine, 141.

DICKERSON, J. It is a cardinal rule that deeds are to be so construed as to give effect to the intention of the parties. The intention must be intelligible and consistent with the rules of law. If an instrument in writing upon its face purports to pass the title to land in such manner and form as by the rules of law can only be done by will, it cannot be sustained as a deed. A deed given to take effect *in futuro*, upon its subsequent delivery, or some future contingency, may not convey the same property that a deed having the same description conveys, when it takes effect at the time of its execution. Between the time of execution and the time of taking effect the grantor may have conveyed a part or the whole of the property intended to be conveyed to a *bona fide* purchaser, who holds it under a recorded deed; or it may have been taken on execution. In such cases, the grantee acquires title to such part of the land only as remains the property of the grantor when the deed takes effect. The intention to be regarded must be one existing in the minds of the parties when the deed is executed. When the question arises with respect to what particular land the deed conveys, the inquiry is what did the grantor intend to convey, and the grantee to receive. Their intention in this respect is to be ascertained from the description in the deed. If the subject of the grant cannot be identified from that, the grant becomes void for uncertainty. 2 Washburn on Real Property, 622.

The application of these principles to the case at bar, renders a solution of the question presented easy and satisfactory. As it does not appear that the grantor under whom the defendants claim, made or received any conveyances between the time of the delivery of the deed and his death, and does appear that the deed was delivered in his life time, it is not necessary to determine whether the deed took effect on delivery, or immediately before the grantor's death. Nor is it necessary to determine whether the description in the deed "all the real estate wherever situated, that I now

own," is alone sufficient to convey all the real estate the grantor owned when the deed was executed, inasmuch as this description is aided by being coupled with "a list of the several pieces or lots of land," found among the grantor's papers, and referred to in the deed. These clauses together clearly show that the grantor had a legal and intelligible intention to convey, and the grantees to receive by the deed title to "the several pieces or lots," described in the memoranda thus referred to. It follows from the principles before stated that, though the deed was intended to take effect *in futuro*, it operated to convey the grantor's title to such parts of "the several pieces or lots of land," referred to in the deed as he continued to own when the deed took effect.

Did it convey more? In other words, did the deed convey the grantor's title to real estate acquired by him after the deed was executed, and remaining his when it took effect? The language of the description in the deed is, "all the real estate, wherever situated, that I now own, or may own at the time of my decease." The latter clause in the description is not aided by the subsequent reference in the deed to "the several pieces or lots of land," as that relates to real estate owned by him when the deed was executed. Real estate acquired by the grantor subsequently to the execution of the deed was not *in esse* with respect to him when he signed the deed. Neither he nor his grantors could then have had any rational or intelligible intention with regard to the location, quantity, number of parcels, value and the like, of the real estate he might thus acquire. He might take conveyances of property that would increase the value of the estate he owned when the deed was executed, an hundred fold, and might dispose of it all before, or retain the whole or a part of it when the deed should take effect. Upon all these matters the deed is silent, though it is to the description in the deed that we are to look in order to ascertain what particular real estate was designed to be conveyed by this clause in the deed. The subject of the grant under this clause cannot be ascertained from the description, and the grant is necessarily void for uncertainty. Moreover, the deed

cannot be held to pass the grantor's title to real estate acquired by him subsequently to its execution, without abolishing the distinction between the formalities required by the statute of wills, and those necessary to convey real estate by deed.

Judgment for the demandant on the first count in the writ.

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

PETERS, J., concurred in the result. He thought the description "all the real estate, wherever situated, that I now own," a good and sufficient description, but did not perceive, if it was not good, how it was aided by a reference to "a list of the several lots of land to be found with my papers." The reference is too loose, indefinite and uncertain to be reliable. It is easy to find pieces of paper, and it is to be apprehended that it might be improved upon as a precedent.

CHARLES P. MILLER *et al. vs.* HENRY W. MILLER.

Alimony—does not cease at appellee's death.

A decree made in a divorce suit that the mother shall have the care and custody of her minor children, and that the father shall pay a certain sum quarterly towards their support, which by its terms is to continue in force till the further order of the court, is not discharged by his death; and a bond given to secure the performance of such a decree, is binding upon the surety notwithstanding the death of the principal obligor.

ON FACTS AGREED.

DEBT upon a bond signed by the defendant with one Nathaniel J. Miller, deceased. The plaintiffs are the minor children of said late Nathaniel J. Miller and of Sarah P. Miller who was divorced from him upon her libel, at the October term, 1871, of this court, and it then was ordered and decreed that instead of alimony the

specific sum of seven thousand dollars be forthwith paid by the said Nathaniel J. Miller to the said Sarah P. Miller, for which execution was to issue in the usual form; and it was further "ordered and decreed that the said Nathaniel J. Miller pay the further sum of one hundred and thirty dollars on the first Monday of the months of January, April, July and October of the year 1872, and the same amount upon each and every first Mondays of said months thereafter occurring until the further order of this court, for the use of the said Sarah in the care, support and education of Charles P. Milller and Mary Miller, minor children of the said Sarah and Nathaniel; that the care, custody, support and education of said minor children be committed to said Sarah, free from all restraint or interference by the said Nathaniel, his agents or servants, until further ordered by this court;" and the libellant was also required to present to some justice of this court a quarterly account of her expenditures for the children.

When this decree was made a bond similar in tenor to the one in suit was given, with one Daniel W. Miller as surety, for the performance of so much of the decree as required the quarterly payments of $130, and subsequently, upon the death of said Daniel, the bond in suit was substituted. The plaintiffs' counsel offered to prove, if admissible, that, at the time the decree of divorce was entered, the presiding justice stated that he should not require a bond for the performance of so much of the decree as related to the support of the children—although the libellee had been adjudged in contempt in not complying with a previous order passed during the pendency of the divorce proceedings—but suggested a mortgage of real estate; but subsequently said Nathaniel gave the first bond before mentioned, with the assent of the presiding justice. To this testimony the defendant objected, and it was to be considered or rejected as the principles of law might require. The said Nathaniel made the required payments regularly up to the one which fell due on the first Monday of April, 1873, which was not paid, and none were paid afterwards. At that time he was sick and unable to attend to business, and died

on the seventeenth day of April, 1873. The defendant offered to be defaulted for the instalment due in April, 1873, and interest after. No alteration has been made by the court in the decree. The estate of said Nathaniel was represented insolvent, but the commissioners had not reported.

The plaintiffs' mother, as their next friend, had made application to the judge of probate, under R. S., c. 65, § 25, for an allowance to them, which petition is still pending.

It was agreed to submit the case upon the foregoing facts to this court for such judgment as the rights of the parties required.

Strout & Holmes for the plaintiffs.

The contingency contemplated has not occurred. There has been no modification of the decree; N. J. Miller's liability was under the decree, and not the mere common law liability of a father.

Butler & Libby for the defendant.

No decree for alimony should extend beyond the life of both parties. *Burr* v. *Burr*, 7 Hill, 207. This must be construed with that limitation, since Nathaniel could not pay any longer than during his life, and the defendant's engagement, being measured by that of his principal, must terminate with it.

Had Nathaniel died solvent, his children would have been entitled to inherit his estate and to be supported out of it; but, being insolvent, they have no right to be supported by the creditors, as they would be if this amount is paid by Henry W. Miller and by him taken out of the assets of his brother's estate. *Stinson* v. *Prescott*, 15 Gray, 335.

This is one of that class of contracts where the continued existence of one of the parties is an implied condition. 2 Chitty on Contracts, 11th edition, 1411; *Dexter* v. *Norton*, 47 N. Y., 62.

The jurisdiction of the court as to a decree determining which parent shall have the custody of the children and what shall be done for their support must terminate with the death of the father.

Walton, J. The question is whether a decree of this court, made in a divorce suit, that the mother shall have the care and

custody of the minor children, and that the father shall pay a certain sum quarterly towards their support, which by its terms is to continue in force till the further order of court, is discharged by the father's death.

We think it is not. The statute conferring jurisdiction in such cases is very comprehensive. It authorizes the court to make such a decree as the circumstances require. If, from hostility to the mother, or other cause, there is danger that the father will disinherit his children, and thus leave them to be supported by their mother without any aid from his estate, a decree may very properly be made for their support that shall continue in force after his decease, or until they are of sufficient age to provide for themselves; or at least till the further order of court. And if there is danger that the father will squander his property, or convey it away, so that none will be left for the decree to operate upon, he may very properly be required to give security.

We do not controvert the position of the learned counsel for the defendant that, by the rules of the common law, a father is under no legal obligation to provide for the support of his children after his death. It may be that he can disinherit them and leave them to be supported by others. "I am surprised," said Lord Alvanley, "that this should be the law of any country, but I fear it is the law of England." 2 Kent's Com., 10th ed., 225.

But we think such can only be the law when the family relations remain intact, and when there is no great danger that such an arbitrary power will be exercised. We think that when, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate.

Certainly such ought to be the law. Take, for instance this very case. Here was a father, who, being possessed of a large estate by inheritance, was amply able to provide for the future support of his children. Through his own misconduct his family

was broken up. His wife had obtained a divorce from him, and it was in proof before the court that his habits were such that it was no longer fit for him to have the care and custody of his children. It was perfectly evident that he would do nothing for their support, if they should be taken from him, except upon compulsion. In fact he was already in contempt for disobeying the order of the court requiring him to furnish means for their support. His course of life was such that it must have been painfully evident to his friends, as well as the court, that insolvency, and an early death, were probable results. Under these circumstances, what ought to be done? What power should the court possess? To guard against the danger of a resentful disinheritance of his children, should not the court possess the power to make a decree that should be binding upon his estate? To guard against the danger of insolvency, should not the court possess the power of requiring security? We think no one will doubt that such ought to be the law. We think it is the law. As before remarked, the statute conferring jurisdiction in such cases is very broad. It declares that the court may make such decree concerning the care, custody, and support of the minor children of the parties, and alter it from time to time, "as circumstances require," and employ any compulsory process they deem proper. R. S., c. 60, § 19.

We are aware of no rule of law in conflict with this decision. Nothing was decided in *Stinson* v. *Prescott*, 15 Gray, 335, cited by defendant's counsel, except that the written promise of the husband to pay his wife's board and other expenses at a hospital imposed no obligatlon upon his administrator to pay for her board after the husband's death, the contract itself being silent as to the length of time for which the husband should be holden. The court did not decide that a husband could not make a contract for his wife's support that should be binding upon his administrator. We apprehend no court ever so decided. They simply decided that that particular contract imposed no such obligation. If, like the bond sued in this case, it had expressly declared that it should be binding upon his administrator, or executor, the court would

probably have come to a different conclusion. Nor did the court decide that a decree could not be made for the support of a wife which should be binding upon the husband's personal representatives. The contrary was held in *Burr* v. *Burr*, 10 Paige, 20, in the chancellor's court, and same case, 7 Hill, 207, in the court of errors. It was there held that alimony could be decreed to continue after the husband's death, during the entire life of the wife. Bishop on Marriage and Divorce, § 601, last clause. So, in *Carson* v. *Murray*, 3 Paige, 483, where the husband and wife agreed to separate, and the articles of separation contained a provision for the payment of an annuity of $175 per annum to the wife during her life, as alimony, it was held that the annuity did not cease at the death of the husband, although there was a provision in his will for her benefit, which, if accepted, was to be in lieu of dower.

Our conclusion, therefore, is that, a decree made in a divorce suit, that the mother shall have the care and custody of the minor children, and that the father shall pay a certain sum quarterly towards their support, which by its terms is to continue in force till the further order of court, is not discharged by his death; and that a bond given to secure the performance of such a decree, is binding upon the surety, notwithstanding the death of the principal obligor.

Judgment for plaintiffs for the penal sum named in the bond. Execution to issue for the full amount of the quarterly payments in arrear at the time of the rendition of judgment.

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

VIRGIN and PETERS, JJ., did not sit in this case.

WALTER B. NUTTER, executor, in equity,

vs.

GEORGE W. VICKERY, *et als.*

Isaiah Vickery gave in his will, among other bequests, to his wife, six hundred dollars a year in money during her natural life; to his sister Sally McKenney, (who was dead when the will was made, but whose ten children and three grand-children, the offspring of a deceased child, were her heirs and survived the testator) a legacy of twelve hundred dollars; and the residue of his estate "to the lawful heirs of" his sisters Sally McKenney, (aforesaid,) Mary Hanscom, (deceased, leaving as her heirs one child and one grand-child, whose parent was dead,) Louisa Bradman, (deceased, whose heirs were her six children,) and those of his brother George W. Vickery, (who was living and had seven children at the testator's death) "equally"—and appointed the plaintiff his executor:—*Held*, that by virtue of R. S., c. 74, § 10, the ten children of Sally McKenney, took each one-eleventh and her three grand-children the other eleventh of the $1200 bequeathed to her; that the residue of the estate should be divided into twenty-six equal parts, of which the ten children of Sally McKenney, the six children of Louisa Bradman, the seven children of George W. Vickery, and the child of Mary Hanscom, were entitled to one each, the three grand-children of Sally McKenney, to one, and the grand-child of Mary Hanscom, to one in the right of their deceased parents respectively.

Held, further, that the bequest of the life annuity to the widow created a duty in the nature of a trust, and the testator having appointed no trustee, nor made any provision for the appointment of one, it became the duty of the executor, as such, to fulfil it,—that for this purpose such portion of the interest bearing securities belonging to the estate as should seem to the judge of probate sufficient to pay the annuity and all incidental expenses including taxes on the fund, and probate charges and commissions, should be appropriated for that purpose, and the residue might be distributed as above. But as the testator had made no provision for such appropriation, the payment of the widow's annuity in full must be considered as charged on the residue, and the executor should take from each recipient of a share therein, security satisfactory to the judge of probate for the refunding of so much of said share as might ultimately be found necessary, by reason of unforeseen casualties, to make good the annuity to the widow.

BILL IN EQUITY.

This is an amicable bill brought under R. S., c. 77, § 5, by the executor of the will of Isaiah Vickery, late of Cape Elizabeth, deceased. The testator made his will on the twenty-third day of

October, 1873, and died the following day. Thirty-one persons, supposed to be immediately or contingently interested, were made parties defendant to the bill, the purpose of which was to obtain a construction of the second, third and seventh clauses of the will aforesaid, which are recited in the opinion. The second clause gave an annuity to the testator's wife, during her life. By the third, $1200 were given to his sister, Sally McKenney, who had died about six months before. The seventh was the residuary clause, giving the residue of the estate, after the payment of debts, legacies and annuity "to the lawful heirs of Sally McKenney, Mary Hanscom, George W. Vickery and Louisa Bradman, equally."

The complainant desired this court, sitting in equity, to inform him whether or not he was to be considered as trustee of the residuary estate for the purpose of raising and paying the annuity to the widow, no trustee being specifically designated by the will; and if the executor was to be held as trustee, what amount he should hold in trust for the purposes aforesaid; and if not trustee to whom should he turn over the property. As to the third clause he asked whether or not it reverted to the general estate, by reason of the death of the legatee before the will was executed, or if it should be paid to her heirs; and for instructions as to the mode of distributing the residuary estate under the seventh clause, and what persons were entitled thereto, and in what proportions.

Joseph A. Locke complainant's solicitor.

Upon the question whether or not the executor was trustee, Mr. Locke cited R. S., c. 77, § 5, item seventh; *Howard* v. *American Peace Society*, 49 Maine, 288; *Baldwin* v. *Bean*, 59 Maine, 481.

As to the amount to be retained, *Orr* v. *Moses*, 52 Maine, 287. Whether the devise to Sally McKenney lapsed or not, she having left lineal descendants, R. S., c. 74, § 10; *Snow* v. *Snow*, 49 Maine, 159. The court must determine the testator's intention in view of the fact that he then knew, when he executed the will, that Mrs. McKenney was dead.

Under the residuary clause, does the word heirs mean children or issue, said George W. Vickery being alive, and what proportion

does each child receive, and what do the three Jordan children take who are children of Susan D. Jordan, who was a daughter of Sally McKenney?

Butler & Libby solicitors for certain of the heirs of Sally McKenney. The question that concerns our clients is whether the twelve hundred dollars bequeathed by the third clause is to be treated as a lapsed legacy, or whether it descends to the children of the person named as legatee, under R. S., c. 74, § 10. This statute is substantially as first enacted February 6, 1784. 1 Laws of Mass., 111. Other states have similar statutes and such a one was passed in England in 1838. It is to be construed liberally. *Paine* v. *Prentice*, 5 Metc., 396. Ordinarily, the question arises as to the effect of the death of a person made a legatee, who dies after the execution of the will; but the principle is the same, and the sense of justice as strong, in the case of one dying before its execution. *Martin's Appeal*, 40 Penn., 111; *Winter* v. *Winter*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473. The gift of the residuum "to the legal heirs," &c., must be taken as a word of purchase—*designatio personarum*—and signifying children. Else the gift to the heirs of the living brother would be void, since no one is heir to the living. *Head* v. *Horton*, 1 Denio, 165; *Otis* v. *Prince*, 10 Gray, 581; *Morton* v. *Barrett*, 22 Maine, 257; *Mace* v. *Cushman*, 45 Maine, 250.

J. H. Drummond solicitor for the testator's widow, Mary W. Vickery. The executor cannot purchase an annuity. *Everett* v. *Carr*, 59 Maine, 325. The legacy to one already dead is void. 1 Jarman on Wills, 311, 312, and notes. And R. S., c. 74, § 10, does not reach such a case.

The residue is to be distributed "equally" among the children and grand-children of the persons named in the seventh item. *Wheeler* v. *Allen*, 54 Maine, 232.

Barrows, J. The plaintiff who is executor of the last will and testament of the late Isaiah Vickery, making said Vickery's numerous legal heirs devisees and legatees parties respondent, seeks in

this amicable bill, brought under the seventh item of R. S., c. 77, § 5, a construction of certain provisions of the will, and directions from the court as to the mode in which he shall execute the trust therein confided to him. The will was made and executed October 24, 1873, and duly admitted to probate November 18, 1873.

The questions arise under the second, third, and seventh items of the will, which are as follows:

"Second. I give and bequeath to my beloved wife, Mary M. Vickery, all my household furniture, beds and bedding, clothing, books and pictures, and all the provisions I may have on hand at the time of my decease, and six hundred dollars a year in money during her natural life.

"Third. I give and bequeath to Sally McKenney twelve hundred dollars.

"Seventh. The rest and residue of my estate, real and personal, I give and bequeath to the lawful heirs of Sally McKenney, Mary Hanscom, George W. Vickery and Louisa Bradman equally."

Prior to the making of the will, Sally McKenney a sister of the testator named in the third item had died, leaving ten children and three grand-children named as respondents in the bill, who were her legal heirs.

George W. Vickery, the testator's brother, whose heirs are mentioned among the residuary legatees in the seventh item, was and still is living and has a farm devised to him under the fourth item of the will. He had seven children alive at the time of the testator's death.

One child and one grand-child of Mary Hanscom named in the seventh item, a deceased sister of the testator, were the legal heirs of said Mary when the will was made, and at the death of the testator.

Six children of Louisa Bradman, a sister of the testator, deceased prior to the making of the will, were the legal heirs of said Louisa, and all living at the death of the testator.

Hereupon the following inquiries are addressed to us:

I. Is the executor trustee of so much of the property as shall suffice for the payment of the annuity to the widow during her life; and if so, how much should be reserved for that purpose?

II. Are Sally McKenney's heirs entitled to the sum bequeathed to her by the third item?

III. To whom and in what proportions is the remainder to be distributed under the residuary clause?

It seems to be conceded that the property is sufficient to meet all the bequests and provisions contained in the will and leave something to pass under the residuary clause, and what we have to say is predicated upon that hypothesis.

I. It must be regarded as the settled law of this state that whenever any interest in the nature of a trust, or any power or duty implying a trust is created by a will, and there is no special designation of the executor or any other person as trustee nor any provision in the will for the selection or appointment of a trustee, it is incumbent upon the executor, as such, to administer the estate according to the provisions of the will. *Pettingill* v. *Pettingill*, 60 Maine, 411, 423; and cases there cited. Hence it is incumbent upon the executor in the present case to provide out of the estate for the payment of the life annuity of six hundred dollars to the widow.

He has no power (none being given by the will) to purchase an annuity except by the consent of all parties beneficially interested in the provisions of the will or the estate of the deceased. *Everett* v. *Carr*, 59 Maine, 336, 337.

The interest of the residuary legatees is of course subject to the payment of all the previous bequests to individuals. But it does not necessarily follow that the entire remainder of the estate must be left in the hands of the executor during the life of the annuitant.

How much shall be retained? And under what conditions may there be a present distribution of the remainder among those who shall be found entitled under the residuary clause? No general answer, applicable in all cases to such questions as these, can be given. The decision must always depend upon the apparent intentions of the testator as they may be ascertained from the whole will carefully construed. In *Orr* v. *Moses*, 52 Maine, 287, where the testator gave a life annuity of $350 to his mother and sisters

and the survivor of them, and the residue of his estate to his wife and son "subject to the payment of the annual sum of three hundred and fifty dollars" aforesaid, he also in the same clause directed that his "executrix should retain in her hands and properly invest a sum sufficient to pay the annuities"—the sum so retained and invested to be paid over at the decease of the annuitants to the residuary legatees; and thereupon this court held, (we think rightly) that it was the duty of the executrix to invest a sum apparently sufficient and in the exercise of ordinary care and prudence likely to remain sufficient, to produce the sum required for the payment of the annuities, with commissions and contingent expenses (such as taxes and the like) due regard being had to the future as well as the present in determining the amount and mode of the investment, and thereafterwards the annuitants must abide the fate of the investment.

Should the same course be pursued and the same result follow where the testator gives no specific directions for the setting apart of a sum sufficient to meet the call for the annuity? The power of the court to direct that a certain part of the estate should be set apart for the payment of an annuity seems to be unquestioned. In *Slanning* v. *Style*, 3 Peere Williams, 336, where the testator had charged the residue of his estate with the payment of an annuity and the property consisted as in the case at bar largely of bonds and securities, the chancellor ordered that such part thereof as might be sufficient to preserve the annuity be brought before the master. See also *Foyer* v. *Butler*, 8 Sim., 441. But beyond this arises the question whether the legatee is to suffer the loss consequent upon a partial failure of the fund appropriated for its payment. Some of the English cases favor a rule more stringent for his protection against unforeseen contingencies than that which was adopted by this court in *Orr* v. *Moses*, above cited.

See *May* v. *Bennett*, 1 Russ. Chanc. Cas., 370, where a testator directed his executors to invest in what government securities they saw fit so much money as would produce a certain annual interest to be paid to his wife during life and widowhood, and the exec-

utors accordingly invested in the five per cents a sum which yielded the precise amount of the specified income; yet when the dividends were diminished by the conversion of the five per cents into four per cents, Gifford, master of the rolls, held the widow entitled to have the deficiency made good either by the sale from time to time of portions of the appropriated stock or out of any other part of the residue which could be reached.

And in *Davis* v. *Wattier*, 1 Sim. & Stu., 463, where a testator had directed an annuity to be paid out of his personal estate, and in the course of the proceedings a certain sum of five per cent. stock had been ordered to be set apart to meet it when the fund became insufficient by the conversion of the five per cents into four per cents, Leach, vice chancellor, directed the deficiency to be supplied out of another fund, to which other persons interested in the residue, had been declared to be entitled.

The English doctrine seems to be that in all cases where the annuity bequeathed is a charge upon the whole of the personalty, the legatee's right to the full amount of the annuity is not liable to be affected by any appropriation which the executor can make. *Gordon* v. *Bowden*, 6 Madd., 342; *Boyd* v. *Buckle*, 10 Sim., 595. If, however, the investment is made in a particular stock in conformity with the expressed or presumed intention or direction of the testator, the English court leaves the legatee to abide the result. So in *Kendall* v. *Russell*, 3 Sim., 424, a testator gave the yearly sum of £2000 to his wife for life, and after her decease, to his trustees upon the same trusts as thereinafter declared concerning another yearly sum of £3000, which he gave to his trustees, to issue out of a sufficient sum of stock in the five per cents to be invested in the name of his trustees for that purpose, for the benefit of his daughter and her children. Whereupon the trustees invested £100,000 in the five per cents to meet both the annuities. And when it was afterwards converted into four per cents and the dividends thereby became insufficient to pay the annuities, Shadwill, V. C., held the legatees of the annuities not entitled to have the deficiency supplied out of the residuary estate.

The object of inquiry in all the cases is the same. It is to ascertain and fulfil the wish and intention of the testator.

In view of the condition of parties and estates in this country we are satisfied that this is best done in cases like *Orr* v. *Moses*, 52 Maine, 287, where the testator has evidently contemplated the setting apart of a sum sufficient to provide for the annuity by following the rule laid down in that case, subjecting the estate once for all to the appropriation of a sum apparently sufficient to meet all, except remote and unforeseen contingencies, and holding the annuitant to abide the result. Faithfully and carefully administered there is no great danger of loss to the annuitant, and the distribution of the residue of the estate is not postponed until those entitled to it are so scattered by death and removal that the testator's kindness is altogether frustrated, or becomes so far as they are concerned of little worth.

But when as in the will under consideration there is nothing to indicate that the testator contemplates any such appropriation or segregation of a part of the property to provide for the annuity, and only a naked remainder is given to collateral kindred as residuary legatees, the right of the annuitant is clearly paramount and we think a present distribution among the residuary legatees can only be ordered where an appropriation is made with the consent and approbation of the annuitant, or upon condition that each residuary legatee shall give security satisfactory to the judge of probate, to refund so much of the share he receives as may hereafter be found necessary to made good the annual payments required from the estate.

This course is sometimes pursued when a legacy is given payable upon a contingency. The residue is paid over to the residuary legatee upon his giving substantial security to cover the contingency. *Webber* v. *Webber*, 1 Sim. & Stu., 311.

The executor is instructed to set apart with the approval of the judge of probate such and so much of the interest-bearing securities belonging to the estate as shall be deemed sufficient to meet the annual payments to the widow and cover taxes, com-

missions and probate charges, and thereafterwards upon receiving an order of distribution of so much of the residue as shall be found available at present, to take from each recipient of a share under the residuary clause, security as above.

II. We are satisfied, upon reason, principle and authority, that the lineal descendants of a relative of the testator having a bequest in the will are entitled to the legacy given to their ancestor by virtue of R. S., c. 74, § 10, though the original legatee was in fact dead at the date of the will. The statute is in furtherance of what may fairly be presumed to have been the intention of the testator, and in order to effect its object it should be construed liberally, as remarked by Hubbard, J., in *Paine* v. *Prentiss*, 5 Metc., 399. Any other interpretation of the statute which has been the law of this state for nearly a century we think would be liable to operate harshly and adversely to the intent of the testator almost universally.

The adverse argument is based upon the distinction between lapsed and void devises, and the assumption that the statute takes effect only in cases of lapse. But no such limitation of its effect is found in the statute, the intent of which obviously is to save to the lineal descendants of the person named as devisee in the will, the benefit of a devise which would at the common law fail of effect by reason of the death of the original devisee before the testator. The statute has regard rather to the class of individuals for whose relief it is interposed, than to any technical distinction in the manner of the failure against which it proposes to guard them. As to them the result at the common law would be the same whether their ancestor died before or after the date of the will, if he died before the testator. Against this result, in either case, the statute places a barrier.

Our conclusion is in unison with those authorities to which our attention has been called. Martin's Appeal, 40 Penn., 111; *Winter* v. *Winter*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473. The result is, that under the third item of the will, the ten surviving children of Sally McKenney will take each one-eleventh and her

three surviving grand-children the remaining eleventh of the $1,200 therein given to her.

III. It is plain that the word heirs construed with technical accuracy would not express the real intention of the testator in the residuary clause. George W. Vickery's seven children were doubtless included in the testator's mind among the recipients; but as George was in full life those children were not technically speaking his heirs. Yet it would be wrong to defeat the manifest intention of the testator by excluding them.

It is not quite so clear that he meant to include the three grand-children of Sally McKenney, or the grand-child of Mary Hanscom, although they unquestionably were heirs to his deceased sisters.

In the popular acceptation one's children are his heirs, if he has children. Yet the grand-children are perfectly within the description given of the residuary legatees. They are (speaking with legal exactness) heirs respectively of Sally McKenney and Mary Hanscom, and entitled to their parents' portion in those estates.

So situated they cannot be excluded when we admit the heirs presumptive of George W. Vickery to participate in the benefits of the residuary clause.

Upon the whole we think the intention of the testator will be best met by reading the word "heirs" in the residuary clause as if it were "children," and then following the statute rule before adverted to, which gives to the children of the deceased children the shares which their parents would respectively have taken, had they survived.

The result is that the residue of the estate is to be divided into twenty-six shares, one of which goes to each of the twenty-four living children of the testator's sisters and brother named in the seventh item of his will, one to the three Jordan children, and one to Madeline Hanscom—these last being respectively declared entitled to the shares which their parents would have received, had they survived.

Subtle, logical and technical refinements could hardly fail to be mischievous, if we should attempt to apply them to language

manifestly used without any comprehension of its technical import. *Decree to be entered in conformity herewith. Costs of all parties to be paid out of the estate.*

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

ALFRED PATTERSON *et al.*
vs.
TRIUMPH INSURANCE COMPANY.

Who may sue for loss. Waiver of proof. Award—what is an.

Mortgagors who have caused the mortgaged property to be insured in their own names by a policy making the amount insured payable to the mortgagee in case of loss may, with the assent of the mortgagee, sustain an action in their own names upon the policy.

Failure to notify the assured that the proofs of loss furnished by him to the company are insufficient will be deemed a waiver of defects, and the objection cannot be made at the trial.

The assured agreed with the adjuster of the defendant company to submit to a third person the question of the amount of damage done to the property insured by reason of a fire, upon a promise by the adjuster to pay the cash so soon as a letter could go to Cincinnati and return. The referee found the loss to be four thousand dollars, but this sum was never paid; nor did the parties expressly, mutually and concurrently agree to abide by his appraisal; *held*, that this transaction was not one that would preclude an action upon the policy and compel a resort to a suit upon the award.

ON REPORT.

ASSUMPSIT, upon a policy of insurance issued by the defendant company to Patterson & Haines of Saco, Me., upon a quantity of ice, estimated at seven thousand tons, stored in their ice houses upon the banks of the Saco river, in Saco. The policy was issued July 3, 1872, for thirty-five hundred dollars. It was expressed by it that the Triumph Insurance Company "doth insure Patterson & Haines" against loss or damage by fire, to the amount above stated for four months, on the before mentioned property, the situa-

tion of which is particularly described, "Patterson's interest payable in case of loss to Benjamin Patterson to the amount of his claim."

Upon the twenty-sixth day of September, 1872, the ice houses were burned, about a third of the ice melted and the rest so covered with smoke and left so unprotected as to be of no market value, as was shown by the testimony.

At the trial, in the superior court in this county, the defendants contended that an action upon the policy could not be maintained except by making Benjamin Patterson a party plaintiff; also that the proofs of loss were insufficient and that the controversy between these litigants had been submitted to an arbitrator upon whose award suit should have been brought, instead of upon the policy.

T. H. Hubbard, an attorney of York county, was called as a witness by the plaintiffs and testified that this claim against the defendants was left with him for collection by Patterson & Haines; and that this action was commenced with the consent of Benjamin Patterson.

Proofs of loss were seasonably made and no objection taken to their sufficiency until the cause came to trial, when several objections were raised, which, in the view taken by the court, it is unnecessary to state.

After notice of the loss the company sent one Whittaker, a professional insurance adjuster, to Saco to inquire into the loss, its extent, &c., and to make report to the home office.

Ferguson Haines, one of the plaintiffs, testifying in his own behalf, said upon cross-examination (among other things): "I never had any settlement with Whittaker. We had an adjustment which was referred to R. M. Chapman of the Biddeford National Bank. We were both present at the hearing. The report of the referee was that we should have four thousand dollars for the whole insurance." Further cross-examined, at a later stage of the trial, he said: "Whittaker and I were present and made statements before Mr. Chapman, and he made a decision. I communicated with the company after that—sent them the telegram

shown me," which was as follows, (omitting the date, address and signature,) "Our proofs of loss was made October eighth. By terms of reference it was to be cash January first. What means your delay?"

Mr. Haines continued his statement upon this branch of the case: "There was an agreement to refer it to Chapman. It was not in writing. Chapman's decision was in writing, I think, but it was not delivered to me. Whittaker agreed to give me the cash as soon as a letter could go to Cincinnati and return. I waited ten days and at the end of that time I sent this despatch. I received no answer, and then I wrote them and received no answer. After the reference Whittaker said he was not at liberty to pay cash. Whittaker said he regarded the decision of Chapman as in the nature of an appraisal. Afterwards he said he would not pay it."

After the evidence was all taken out, by the agreement of parties a verdict for the plaintiffs was taken for the full amount claimed, $3693.67, being the amount of the policy and interest, which was to stand if upon the evidence, or so much of it as was legally admissible in the opinion of the full court, the action could be maintained; if not, a nonsuit was to be entered, or such judgment as the legal rights of the parties required.

Edwin B. Smith for the plaintiffs.

The verdict is to stand if, upon any view of the evidence, it is tenable. *Irons* v. *Field*, 9 R. I., 216.

Suit is properly brought in the names of the assured, by consent of Benjamin Patterson. 2 Parsons on Mar. Ins., 448, note 1; 2 Phillips on Ins., § 1965; *Farrow* v. *Commonwealth Ins. Co.*, 18 Pick., 53; *Turner* v. *Quincy Ins. Co.*, 109 Mass., 568. It has been held that it can only be so brought. *Woodbury Savings Institution* v. *Charter Oak Ins. Co.*, 29 Conn., 374.

It is the ordinary case of a promise to one for the benefit of another, upon which either can sue. *Motley* v. *Manufacturers Ins. Co.*, 29 Maine, 337.

Objections (if any existed) to the proof of loss were waived. *Bartlett* v. *Union Mutual Ins. Co.*, 46 Maine, 500; *Lewis* v. *Mon. Fire Ins. Co.*, 52 Maine, 492; *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371; *Bailey* v. *Hope Ins. Co.*, Id., 474.

What passed before Mr. Chapman was not a binding reference. He merely estimated damages. Whittaker had no authority to refer and the company refused to recognize his action. Indeed, he repudiated himself after the amount was stated.

Howard & Cleaves for the defendants.

One-half of the money to be paid under this policy belonged to Benjamin Patterson; then he certainly must be a necessary party to a suit for its recovery. Otherwise, the company is liable to be sued again by him upon this contract.

The proofs of loss are fatally defective in that they are not signed nor sworn to by Alfred Patterson, or any one in his behalf; there is no proof of firm loss; nor is Benjamin Patterson's interest stated. There is no statement of the ownership of the realty, nor where the "other insurance" is placed.

Suit should have been upon Chapman's award, and not on the policy. It was a submission of the damages only, then he found a loss of but $4000 upon the insurance of $4500 on the ice, and the verdict against us should have been only in that proportion.

WALTON, J. This is an action upon a policy of insurance against fire. By consent a verdict was taken for the plaintiffs, which is to stand if upon the evidence, or so much of it as is legally admissible, the full court is of opinion that the action is maintainable.

I. It is objected that the action cannot be maintained in the names of these plaintiffs because the loss, if any, was made payable to a third party. No authority is cited in support of this proposition, and the contrary seems to be well settled. *Farrow* v. *Commonwealth Ins. Co.*, 18 Pick., 53.

II. It is objected that the proofs of loss furnished the defendants were defective. This objection comes too late. It is now well settled that when a defective notice of loss is received by an insur-

ance company, they must immediately inform the insured of the supposed defects, and insist upon more formal proofs, or the defects will be regarded as waived. No such information appears to have been given the insured in this case. The defects, if any, must therefore be regarded as waived. *Bartlett* v. *Union Mutual Ins. Co.*, 46 Maine, 500; *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371.

III. The third and last objection to the maintainance of the suit is that the claim was referred before action brought, and that the action should have been upon the award and not upon the policy. We fail to find the evidence of such a submission and award as would be binding upon the parties. It appears that there was an appraisal of the amount of the plaintiffs' loss, made by a Mr. Chapman, and that this was done by agreement of the plaintiffs and a Mr. Whittaker who was acting as an adjuster for the defendants. But there is no proof that the parties agreed to be bound by the reference; and it was settled in *Houghton* v. *Houghton*, 37 Maine, 72, that such proof is necessary to make the award a bar to an action on the original claim, when, as in this case, the submission is by parol. Nor is there any evidence that Whittaker was authorized by the defendants to submit the claim to arbitration. Nor is there any evidence that either Whittaker or the defendants were willing to be bound by the decision of the referee. On the contrary it appears that they declined to abide by it, or to pay the amount awarded. We think it is therefore clear that the supposed arbitration of the claim in suit is no bar to this action.

These are all the objections made by the learned counsel for the defendants to the maintenance of the suit. In the opinion of the court none of them are tenable. Upon the evidence legally admissible in the case, the court is of opinion that the action is maintainable. The verdict must therefore stand, and judgment be rendered upon it. *Judgment on the verdict.*

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

PORTLAND AND OGDENSBURG RAILROAD COMPANY, petitioners,
vs.
COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

Certiorari—denied.

The R. S. of 1857, c. 51, § 6, provided substantially that when a party failed to prosecute a petition for a revision of the land damages awarded by the county commissioners at the next regular term after the filing of the same, it should be dismissed, unless good cause for delay is shown. The determination of the county commissioners as to the sufficiency of the excuse offered for delay is not to be revised by this court by writ of *certiorari*, even though a warrant for a jury had issued before the order of dismissal was entered.

ON EXCEPTIONS.

PETITION for a writ of *certiorari* to bring up and quash the proceedings of the county commissioners relative to a petition of the Portland and Ogdensburg Railroad Company for a diminution of the damages awarded by the county commissioners to James Norton for his land taken for the use of said corporation, and in ordering the dismissal of such petition, as fully appears by the opinion.

The presiding justice refused *pro forma* to grant the writ of *certiorari*, and the petitioners therefor excepted.

John O. Winship for the petitioners.

After the railroad company had filed its petition for diminution, there was nothing more it could do until the commissioners issued their summons and had a jury empanelled—an act which the law devolved upon those officials, and which it was solely their duty to perform. Nine days after Mr. Norton's motion to dismiss our petition for a decrease was filed, a warrant for a jury was issued, which is evidence that the corporation was not in fault; yet the county commissioners assumed to recall that warrant, and to dismiss our petition.

H. J. Swasey & Son for the respondents.

VIRGIN, J. At the regular session of the county commissioners for this county, begun on the first Tuesday of June, 1870, and by adjournment thereof held on the first Tuesday of August following, one James Norton filed his petition under R. S. of 1857, c. 51, § 5, praying for an estimation of his damages for land taken by the Portland & Ogdensburg Railroad Company. The commissioners ordered notice thereon, returnable on September 22, following, when, after view and hearing, they awarded the said Norton seven hundred dollars, and made their report December 29, next succeeding.

At the next January term, the railroad company, in accordance with § 6, seasonably filed their petition for a decrease of damages, therein alleging that they were aggrieved by the commissioners' estimation, and praying that a jury be ordered. This petition was entered at an adjournment of the January term, held on March 3, 1871, and thence continued to an adjournment of the June term, 1871, held on November 7, 1871, when the company filed a request that Norton be notified to appear and answer. The petition was then continued from term to term to the June term, 1872, when notice to Norton was waived by his attorney; whereupon a warrant for a jury was ordered to issue, and C. A. Chaplin was appointed to preside, in accordance with c. 18, §§ 10 and 12.

On December 2, 1873, Norton filed a petition alleging that the railroad company had failed to prosecute their petition for decrease of damages, that there was no good cause for delay, and praying that their petition be dismissed. Notice thereon was ordered and served the next day; and it was continued until the March term, 1874, when the commissioners ordered the company's petition for decrease to be dismissed for non-prosecution.

Prior to the last date, however, to wit, on December 11, 1873, and nine days after Norton filed his last named petition, the warrant for a jury and the commission to Chaplin (ordered at the June term, 1872) were issued, and in May following revoked, and the company's petition for decrease was dismissed.

These petitioners contend that the dismissal of their petition, on which a jury had been ordered and a warrant issued, is irregular, and that they have been thereby deprived of a statute remedy, without fault on their part.

R. S. of 1857, c. 51, § 6, provide, substantially, that when no petition for increase or decrease is filed within thirty days after notice of the award by the commissioners, the proceedings are to be closed. When such petition is seasonably filed, but the petitioner fails to prosecute it before the regular term or session of the commissioners holden next after said petition is filed, it is to be dismissed, and the proceedings closed, unless good cause for delay is shown.

In the case at bar, the petition was entered at the March term, 1871. If they had prosecuted it before the June term following, which was the next "regular session," they would have secured their statute remedy. After that time their petition was liable to be dismissed for unwarrantable delay in prosecuting. For some cause no warrant was ordered until more than a year after petition was entered, and none issued until eighteen months after it was ordered. The cause for delay is a matter for the commissioners to pass judgment on. They have passed upon that question, and have pronounced it not "good." We see no irregularity which will warrant us to grant the writ prayed for.

Exceptions overruled. Writ denied.

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

STATE OF MAINE *vs.* ANTHONY BUNDY.

Assault and battery. Pleading.

In an indictment for an assault and battery the name of the person upon whom the assault is alleged to have been committed is used for the purpose of identification, and when such person is equally well known by two names, the use of either of them is sufficient.

State *v.* Bundy.

On exceptions.

Indictment for an assault with intent to murder. The respondent was convicted. The name of the person assaulted mentioned in the indictment was Annie Maria St. John, which she when called as a witness for the prosecution testified to be her name. Upon her cross-examination, it appeared that she had been married prior to the time named in the indictment, to a man named Penney, and had been known by the name of Penney and of St. John. The government introduced, subject to the objection of the respondent's counsel, the record of her divorce at the October term, 1867, of the supreme judicial court for this county, under the name of Annie M. Penney, first proving her identity. Some of the government witnesses testified she was as well known by the name of Annie Maria St. John, as by that of Penney, and some testified that they had known her as Anna Maria St. John, while the witnesses for the defence testified that she had been known to them only by the name of Maria St. John and of "Gus Penney's wife." Her maiden name was St. John. She had been but once married, and had obtained no authority from the legislature or probate court to resume her maiden name after her divorce.

The respondent's counsel requested to have the jury instructed that "in this state when a husband and wife are divorced, the latter retains the surname of the former, in the absence of legal authority to change it; that she cannot take a new name, of her own motion, which shall be a legal name; and that, as there was no evidence of legal authority to change her name, this witness after her divorce retained Penney as a part of her legal name." Upon this subject the judge instructed the jury substantially, that it was incumbent upon the government to satisfy the jury that the assault was committed upon Annie Maria St. John, as stated in the indictment; that upon a charge of an assault upon one person a man could not be convicted of an assault upon an entirely different person; so that they were brought to the inquiry what the true name of the witness was; that she stated it as Annie Maria St. John, and the question was whether or not she had

given it truly and correctly; had she any motive to falsify or misstate? that she had been married to a man named Penney, but it was competent for her—not forbidden by any law—after her divorce to resume her maiden name, if she pleases to do so; and if she did so her true name would be St. John and not Penney. No matter how she is known to these other witnesses, if her name is really St. John that is sufficient. "But if you should come to the conclusion that the true name has not been used, it does not follow that there is a variance between the proof offered and the allegation in the indictment. It does not follow in that event that the government is not entitled to prevail, because if the government have not set forth her real name, but have set forth a name by which she is also commonly known, it is sufficient."

To these instructions and the refusal to give those requested, the respondent excepted.

Mattocks & Fox for the respondent.

The name of the person injured should be truly stated in the indictment. 1 Chitty's Crim. Law, 172, 216; 1 Wharton's Crim. Law, § 250; Davis' Crim. Jus., 17; Archbold's Crim. Prac. & Plead.,* 79; 3 Greenl. on Ev., § 22; *People* v. *Walker*, 5 Parker's Crim. Rep., 661; *Commonwealth* v. *Morse*, 14 Mass., 217; *State* v. *Hand*, 1 Eng., 165; *Commonwealth* v. *Turner*, 1 Miss.,* 176; *Commonwealth* v. *McAvoy*, 16 Gray, 235.

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

The instructions were correct. *State* v. *Dresser*, 54 Maine, 569; *Commonwealth* v. *Desmarteau*, 16 Gray, 1; *People* v. *Freeland*, 6 Cal., 96.

DANFORTH, J. The exceptions cannot be sustained. In an indictment for an assault and battery, the name of the person alleged to have been assaulted is used only for the purpose of identification. When such person is known equally well by two names, the use of either of them is sufficient, since either identifies the particular individual assaulted and makes the crime certain, so that

the respondent can be in no danger of being twice put in jeopardy in relation to it. *Exceptions overruled.*

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

FRANCIS O. J. SMITH *vs.* ELBRIDGE G. HARLOW *et al.*

Certain circumstances held not sufficient evidence of a purchase in bad faith.

One Nash living in New York prior to and on the eighth day of December, 1869, had entrusted to him by the plaintiff a lot of railroad bonds for the purpose of effecting a loan by a pledge of them. Nash delivered several of them, on that day, to one Wood only to be carried across the hall-way for exhibition to a person whom Wood represented was in an office there and likely to make the loan. Wood promised to return them to Nash immediately, but instead of doing so absconded and though prompt efforts were made for his arrest and the recovery of the bonds,—the loss of which was at once advertised in the New York papers,—neither of these objects was ever accomplished. Two of these bonds, for $500 each, some time afterward, came into the hands of a New York banker who wrote to Gould, one of the defendants, cashier of the First National Bank of Portland, to see if a sale could be made of them. In the course of a conversation had between him and Harlow, the other defendant, in the month of January, 1872, Mr. Gould mentioned the receipt of this letter and asked Harlow what he would give for them, proposing to transmit any proposition he might make. After some hesitation and parley, Harlow said he would give a hundred dollars for them and no more; which offer being communicated to the New York holder of the bonds was accepted by him and a sale of the bonds to Harlow for this sum completed. In the spring of 1873, Mr. Smith, having learned of this purchase, took Mr. Gould's deposition in *perpetuam* by which it appeared that he did not know his New York correspondent, nor give his name to Harlow, who did not ask for it; and he declined to examine the books and files of his bank to see who that person was, he having forgotten the name at the time of deposing; giving as the reason for his refusal that it would require too much time. He also stated that, not being a broker, the transaction was not a frequent or ordinary one to him. Upon this state of facts the plaintiff brought trover contending that as the bonds were obtained and put into the market by fraud the burden of showing good faith in the purchase and want of notice was upon the defendants, and that they had not made out a defence to his action; but the court *held*, that,

admitting the doctrine as laid down in *Aldrich* v. *Warren*, 16 Maine, 465, and *Perrin* v. *Noyes*, 39 Maine, 384, to be correct,—the defendants had shown a purchase for value, in good faith, and without notice of any fraud,—(both defendants testifying to their entire ignorance of the loss and advertisement of the bonds, and to their belief that the New York banker was a *bona fide* holder, and that the bonds were not commonly sold at the stock board and had no definite market value to their knowledge, the interest not being paid when due)—and that the action could not be maintained.

On report.

Trover, brought September 13, 1873, to recover the value of two $500 bonds of the issue of May 20, 1863, by the Portland and Oxford Central Railroad Company, payable in ten years from date to the trustees therein named or bearer having three interest coupons attached to each bond. These coupons all fell due after the bonds were bought by Mr. Harlow, not being dishonored at the date of his purchase. The facts are indicated in the syllabus and are stated more fully in the opinion. Due demand before suit was admitted.

Upon so much of the evidence as was admissible, this cause was submitted to this court with jury powers. The bonds were placed in the hands of the court as evidence and in case of judgment for the plaintiff were to be delivered to him in satisfaction thereof; otherwise to be returned to Mr. Harlow; and no costs to be claimed in either event.

F. O. J. Smith pro se.

The case establishes that these bonds were fraudulently put into circulation, which throws the burden upon the defendants that they obtained possession of them fairly, without any knowledge of the fraud, in the ordinary course of business, unattended with any circumstances justly calculated to arouse suspicion. *Aldrich* v. *Warren*, 16 Maine, 465; *Perrin* v. *Noyes*, 39 Maine, 384; *Munroe* v. *Cooper*, 5 Pick., 412, and cases there collected.

Admitting that the defendants had no actual knowledge of the theft of these bonds, did they come into their hands in the ordinary course of business? Evidently not. Gould, the cashier of a leading bank, familiar with business, makes no inquiry how these

bonds, not often found in the market, came into the hands of a broker three hundred and fifty miles off, who is understood to be so solicitous to sell that Gould thinks (correctly as the result shows) he will take ten per cent. or less for them. Harlow does not even ask this New-Yorker's name, and Gould retains no recollection of it, and will not refresh his memory.

They had notice of these and other suspicious circumstances. "Notice or knowledge does not mean express notice, but the means of knowledge," which is "equivalent to notice." *May* v. *Chapman*, 16 Mees. & Wels., 360; *Goodman* v. *Simonds*, 20 Howard, 367; *Kimball* v. *Billings*, 55 Maine, 147; *Lawrence* v. *Norton*, 4 Esp., 56; *Murray* v. *Lardner*, 2 Wallace, 119; *Anderson* v. *Nicholas*, 28 N. Y., 604.

E. G. Harlow for the defendants.

The bonds were payable to bearer, not over-due, and nothing upon their face to excite suspicion. This case is to be decided then upon the facts after applying to them the mercantile law and usage relating to this class of paper. *Goodman* v. *Simonds*, 20 Howard, 367.

There was nothing unusual in the purchase; no suspicious circumstances, unless it be my payment of $100 in good money for the paper of that corporation! Mr. Gould is not liable in any event, the sale was by the New York broker directly to me. Mr. Gould being merely the medium of communication.

Barrows, J. The plaintiff sues in trover, for two $500 bonds of the Portland & Oxford Central Railroad Company dated May 20, 1863, and payable to trustees therein named or bearer, in ten years from date with three coupons attached to each, payable respectively in May and November, 1872, and May, 1873.

The case is before us upon an agreed statement of facts and evidence from which it appears that on the eighth day of December, 1869, these and other similar bonds belonged to the plaintiff and were placed by him in the hands of an agent, in the city of New York, with authority to pledge them as collateral for a loan.

The agent intrusted them to one Wood who was to carry them to another office in the same building to exhibit them to a party whom Wood represented as ready to make the loan, but instead of doing so Wood absconded with the bonds, and though a warrant for his arrest was procured forthwith and diligent search made, neither the plaintiff nor his agent got any trace of Wood or of the bonds, with the single exception of one which was pledged to a western railroad conductor for the fare of an unknown passenger, until the two in controversy had come into the hands of the defendants, of whom the plaintiff demanded them, and upon their refusal to surrender them he brings this suit.

The loss of the bonds was advertised in one or more papers in the city of New York. But the testimony reported satisfies us also that neither of these defendants (one of whom, (Gould,) is and long has been cashier of the First National Bank in Portland, and the other a respectable member of the bar in Oxford county) had ever been informed of any of these occurrences, or of any loss of any such bonds by any one until long after these bonds were bought by said Harlow in January, 1872, under the following circumstances. He went to the bank of which the other defendant, Gould, was cashier, to pay certain town bonds which had been issued in aid of this same railroad, and after transacting his business was informed by Gould that a New York banker wanted to find a purchaser for one thousand dollars of the bonds of the railroad and was asked whether he did not want to purchase. Rather declining the proposition at first, he inquired the probable price and Gould said, "I don't know, perhaps twenty or twenty-five per cent., which Harlow refused to give, declaring it was more than they were worth, that they never paid any interest. Gould suggested that perhaps his correspondent would take less, that he would communicate such offer as Harlow saw fit to make, and the result was that Harlow authorized Gould to offer one hundred dollars for the bonds, which offer was communicated by Gould to the New York banker, accepted, the bonds forwarded to Gould who turned them over to Harlow, received the pay, and

transmitted it to the New York party. It does not appear that Harlow inquired who Gould's correspondent was. At all events he had no personal acquaintance with him. He had been informed that the railroad never paid its interest, had talked frequently before this with a respectable Portland broker about their value, though he made no inquiries pending the negotiation. Neither he, nor Gould, had ever known of any public sale of the bonds or that they had any public market value. There is no testimony tending to show that they had any other than a mere speculative value, or that the sum paid by Harlow was not as much as they were worth. At the time of the transaction the bonds were not due and no over-due coupons were attached to them. Both defendants declare they believed they received the bonds from a *bona fide* holder.

The matters relied on by the plaintiff to impeach the good faith of their purchase are that neither of the defendants had any personal knowledge of the seller, nor did they make any inquiries as to his title to the bonds; that the price paid was but an insignificant per centage of the face of the bonds; that Gould, when called upon at the plaintiff's instance between one and two years after the purchase to give his deposition *in perpetuam* in relation to it, declared himself unable to recall the name of the banker with whom he corresponded, or to produce his letters, or to fix the date of the transaction or to give any of its details, and declined to examine the files of his bank for the months of January, February and March in the years 1871 and 1872, with a view to ascertain to whom the pay for the bonds was remitted, alleging that it would take too much of his time, and because, as the plaintiff interprets his answer, Gould admits that it was not according to the usual course of business to buy bonds in that way. The plaintiff claims as matter of law that inasmuch as he lost the bonds by an act amounting to larceny, the burden of proof rests upon the defendants to show that their possession was acquired "fairly, in the due course of business, without knowledge of the fraud or felony, and unattended with circumstances justly calcu-

lated to awaken suspicion." He relies upon the decision of this court in *Aldrich* v. *Warren*, 16 Maine, 465, and *Perrin* v. *Noyes*, 39 Maine, 384.

We see no occasion to question the correctness of those decisions. They were made before the passage of the law allowing parties to be witnesses, and yet we are not aware that they were ever found to impose any unreasonable restraint upon any honest transactions in negotiable paper or securities. Since parties may be witnesses there is still less reason to apprehend such a result. The purchaser whose title is questioned may himself testify to the mode of its acquisition, to the time, place, and manner in which he made his purchase, and to all such declarations of the parties with whom he dealt as constitute part of the *res gestae*. His title if obtained without notice of the taint in that of the previous holder, and in the due and regular course of business (which of itself implies that the transaction is unattended with circumstances justly calculated to excite suspicion) will be sustained.

It is only when "the circumstances attending the negotiation are justly calculated to excite suspicion," that he is put upon inquiry.

That phrase is rather one which is descriptive of the character of the evidence that bears in such cases upon the vital matters of good faith and the regular course of business, than one which constitutes a rule in and of itself.

The essential questions are, did the purchaser deal in good faith and in the due course of business? When the proffered trade is attended with circumstances justly calculated to excite suspicion that the seller has no legal right to dispose of the property which he proposes to sell, not only does the regular course of business require a reasonable attempt to ascertain the facts, but under such circumstances a neglect to use the means at hand to ascertain them could scarcely be distinguished from the gross negligence which is so often held to be equivalent to bad faith.

Perhaps it would be more exact to say that it is evidence from which one could not fail to draw the conclusion that the purchaser was acting *mala fide* and not in the due course of business.

But when we come to apply the law as maintained by the plaintiff to the facts here presented, we feel bound to say that we think the burden of proof here cast upon the defendants is sustained.

The plaintiff justly remarks that it is of little importance who has that burden in a case presented as this is, substantially, upon facts agreed.

He makes no specific objections to any of the testimony reported. Looking to the character of the issue perhaps there was none to make. But the matters which may seem suspicious to the loser, do not present themselves to our minds as amounting to proof, that there were in that negotiation any circumstances justly calculated to awaken suspicion that the party, with whom the defendants dealt, had not good right and lawful authority to dispose of the bonds.

That Harlow, to whom the proposition to purchase was made through the cashier of a leading bank in Portland, should have made no inquiries about the New York banker was not strange.

If the security had been unquestionably good or possessed a known market value, and the price offered and accepted had been grossly inadequate, it would be a suspicious circumstance, but the case seems to have been the reverse.

Addressing a letter of inquiry to a large moneyed institution in the vicinity of the railroad, the officers of which, if the owner had been thoroughly diligent in making known his loss, would be likely to be informed of it, seems hardly the way that a thief would take to dispose of his plunder unless he courted detection.

It is a course more likely to be taken by a broker rightfully in possession who wanted to find a purchaser at some rate for a doubtful security. Considering the time which had elapsed since the theft and the greater facility for disposing of stolen property safely in New York, we incline to believe with the defendants that the party with whom they dealt was a *bona fide* holder.

The position of Gould is totally different from that of the defendant in *Kimball* v. *Billings*, 55 Maine, 147. There the defendant acted directly as the agent of the wrongful holder, took the bonds

and made the sale himself, and moreover it appears there that the proceeds, (or an equivalent amount to secure him) were in his hands when the suit was commenced and had not gone back to his principal.

Here, Gould seems to have intervened merely in courtesy to Harlow, with whom he had frequent dealings, and was his agent and messenger in the purchase. Were we satisfied that the New York banker was a wrongful holder, still Gould would not under such circumstances be responsible. *Burditt* v. *Hunt*, 25 Maine, 419.

As Gould had no pecuniary interest whatever, and the transaction was trivial in amount compared with his regular daily routine, it does not seem strange that he should have made no memoranda, preserved no correspondence, and recollected none of the details of a matter of which he probably never expected to hear again.

The question and answer from which it is assumed that he admits his action was not in the due course of business are as follows: "Is it customary for you to receive and sell any description of bonds for a stranger without any inquiry or knowledge of his ownership or of his possession of them?" "I am not a broker—no, it is not." The answer implies that with brokers, unless there was something to excite suspicion in the offer, it would be customary. And as he did not make the sale, Harlow purchasing directly from the New York banker, there is nothing in this which has the force which the plaintiff seeks to give it. We find nothing in the case to overcome the testimony of the defendants that they acted in good faith; nothing to invalidate the purchase under the doctrines of *Aldrich* v. *Warren* and *Perrin* v. *Noyes*, *ubi sup.*

Judgment for the defendants.

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

DANIEL B. SOULE *vs.* SAMUEL WINSLOW.

Malicious prosecution. Pleading.

In a suit brought by Samuel Winslow, next friend to Harrison Joy, a minor, &c., Samuel Winslow is the plaintiff.

The plaintiff is not liable in such case for malicious prosecution, when the suit is thus erroneously brought, if done without his knowledge or consent.

The execution for costs in such case should run against the plaintiff of record, Samuel Winslow.

In a suit by a minor, he should be declared as plaintiff, "who sues by S. W., of—&c., the next friend of the said plaintiff," &c.

ON MOTION FOR A NEW TRIAL.

CASE, for a malicious prosecution, in instituting an action which purported to be brought by Samuel Winslow, as next friend of Harrison Joy, a minor, to recover from Mr. Soule the boy's wages for two months' labor performed under an agreement for a longer term of service which was not binding upon the boy on account of his minority. Mr. Soule tendered seventeen dollars and the amount recovered in that suit did not exceed this sum. The facts are more fully stated in the opinion.

The justice of the superior court, before whom the present cause was tried, gave appropriate instructions upon the necessity of satisfactory proof of the existence of malice and probable cause and upon all other legal questions arising at the trial. The jury gave a verdict for the plaintiff for one hundred and forty-one dollars and sixty-seven cents, which the defendant moved to have set aside as against law and evidence and the instructions given by the court.

Motley & Blethen for the defendant.

Mattocks & Fox for the plaintiff.

APPLETON, C. J. This is an action on the case against the defendant for a malicious prosecution.

It seems that one Harrison Joy, a minor, agreed to work for

the plaintiff a year. There was evidence tending to show that he was to receive one hundred and twenty-five dollars for his labor, likewise to show that the original bargain was for a year at one hundred and twenty-five dollars, or for six months at eighteen dollars per month. It appears that after working over two months Joy left, as the plaintiff testifies, of his own mere motion; but as Joy says, at the plaintiff's motion, he being dismissed by him. After Joy left, he called three times for his pay, but was unable to obtain it. He then sent his demand to an attorney for collection, claiming thirty-six dollars for his labor. The plaintiff tendered Joy's attorney seventeen dollars for the debt and one dollar for costs, which not being accepted, the suit which is the basis of the alleged malicious prosecution was commenced.

Harrison Joy being a minor, the agreement as to time and compensation, was not binding upon him. It is immaterial, therefore whether it was as claimed by him or as it was subsequently reduced to writing. Joy would be entitled to a reasonable compensation for his services during the time he labored for this plaintiff, and they would be more valuable for some portions of the year than at other portions. His compensation might therefore much exceed the average rate of wages he was entitled to receive if he labored for a year.

The suit, so far as the evidence disclosed, was commenced by Joy. The defendant, at the request of the attorney, permitted his name to be used as *prochein ami.*

If the suit is to be regarded as commenced by Joy by the defendant as his next friend, it is difficult to see how there is evidence of want of probable cause or of malice on his part. He had thrice demanded payment and it had thrice been refused. There was no binding contract for the price. The contract as testified to by him and the defendant was in the alternative, and by its terms he might have $18 per month for six months. As the labor was for $18 per month for a part of the alternative term, it is not evidence of want of probable cause and of malice that he should claim the rate of payment provided in case of six months' service.

The action for malicious prosecution "must be supported by want of probable cause and by malice conjoined, but the most vindictive and express malice in the prosecution, apart from the other constituent of the action will not do." *Marshall* v. *Maddox*, 6 Littell's Select Cases, 106. To sustain this action the want of probable cause should be clear and unsuspicious. *Rogers* v. *Haines*, 3 Maine, 362. But in the suit against the plaintiff, judgment was recovered against him, so that the record shows not merely probable but actual cause of action. It would be a novel doctrine to hold that the mere claim of more than is recovered on the money counts or on an account annexed were to be held as constituting such want of probable cause that malice was the necessary and legitimate inference.

When the case against the plaintiff came on for trial, reliance was placed upon the tender and its sufficiency was established. Judgment was rendered for the amount tendered without costs, and the defendant (now plaintiff) recovered costs against Joy. But the non-acceptance of a tender is not evidence of malice, while the tender is evidence of probable cause to the extent of the tender. It was for Joy to accept or reject the tender as he might deem most expedient.

It is manifest that upon the evidence, no action could have been maintained against Joy for malicious prosecution. The defendant as *prochein ami* was not a party liable for costs. *Leavitt* v. *Bangor*, 41 Maine, 458. The court may appoint a *prochein ami*, or revoke his appointment, whenever such course shall be deemed necessary for the protection of the minor. *Guild* v. *Cranston*, 8 Cush., 506

As Joy could not be held liable for malicious prosecution in commencing a suit, if it is to be regarded as his, neither can the next friend be held liable, for a suit lawfully commenced, nor would the using of language indicating ill will make him so liable.

Thus far, we have proceeded upon the assumption, that the suit claimed to be malicious was brought by Joy by the defendant, as his next friend. But such was not the fact. The plaintiff in that

suit was required to answer "to Samuel Winslow of Freeport, in the county of Cumberland, next friend of Harrison Joy of said Freeport." It thus appears by the record that Winslow was the plaintiff and not Joy. But there is no evidence that he ordered or expected the suit to be so commenced or knew that it had been done. But a plaintiff, in whose name an action has been brought without his authority, cannot be held liable for a malicious prosecution. The judgment of nonsuit should have been rendered in the case, and this plaintiff would then have recovered his costs as he claimed at the time. Had he filed exceptions to the ruling of the court denying them, they would have been sustained, and this plaintiff would have had judgment for all his costs legally taxable. But a neglect to file exceptions on the part of this plaintiff does not give him any new rights, or enlarge those before possessed by him.

Instead of resisting the claim sued, the plaintiff, without necessity, admitted its justice and submitted to a judgment against him to the amount of the tender, thus conceding a right of action, when none existed. *Motion sustained. New trial granted.*

WALTON, DICKERSON and PETERS, JJ., concurred.

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

STATE OF MAINE *vs.* MARY CORKREY, appellant.

Pleading. Only the issue raised in court below is tried on appeal.

One who pleads a misnomer in the municipal court and appeals from an adverse judgment there, upon that issue, cannot waive that plea in this court and have a trial upon the merits.

ON EXCEPTIONS to the rulings of the justice of the superior court.

COMPLAINT and search and seizure process made to and issued by the municipal court of the city of Portland, against the present respondent and her husband, William Corkrey. Mr. Corkrey was discharged by that court, but his wife was convicted and sen-

tenced to pay a fine of fifty dollars and costs, from which judgment she appealed to the superior court.

The record of this case in the municipal court recited that "Mary Ann Corkrey, who is complained of by the name of Mary Corkrey, comes and says that her name is Mary Ann Corkrey and not Mary Corkrey as by said complaint is supposed, and this she is ready to verify. Whereupon, Charles F. Libby, attorney for the state, &c., &c., comes and says that the said Mary Ann Corkrey long before, . . . was and still is known as well by the name of Mary Corkrey as of Mary Ann Corkrey," &c. . . . . "Whereupon, after a full hearing, the court decides that the said complaint ought not to be quashed by reason of anything above pleaded by the said Mary Ann Corkrey." Then follows a statement that the court decides that William Corkrey is not guilty, and the record concludes that it is considered and ordered that Mary Corkrey pay the fine, &c., (as aforesaid) from which sentence she appeals, &c.

There is no distinct statement that she is adjudged guilty of the offence charged.

The papers accompanying the record and filed in the appellate court showed a formal plea of misnomer, properly joined.

At the trial in the superior court the defendant contended that no judgment was rendered against her in the court below; that she had no trial there; and claimed one in the superior court by jury upon a plea of not guilty; but the presiding justice, ruled that no trial could now be had upon the merits, as by the record introduced it appeared that the only question pending was that of misnomer, and that the case could only be tried upon the issue the respondent had chosen to present in the lower court.

The appellant then moved that the appeal be dismissed because no legal judgment of conviction was awarded in the municipal court, but this motion was denied, the case sent to the jury upon the plea of misnomer, which was found against the respondent, and exceptions were taken to the rulings aforesaid.

J. O'Donnell for the respondent.

The judge in the municipal court if he found for the state upon

the respondent's plea of misnomer should have overruled that plea and adjudged her guilty. *Commonwealth* v. *Dow*, 11 Gray, 317. A conviction must precede sentence, and be alleged in the record. R. S., c. 27, §§ 45 to 55; *Kendall* v. *Powers*, 4 Metc., 553.

There being no judgment on the plea of misnomer, the respondent was entitled to a trial by jury upon the general issue. *Commonwealth* v. *Golding*, 14 Gray, 49.

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

DICKERSON, J. The record of the municipal court in this case shows that the respondent filed a plea of misnomer, and that the decision was against her upon that plea; and that, thereupon, judgment was rendered against her. By thus electing to go to trial solely upon the plea of misnomer in the municipal court, the respondent waived her right to plead anew in the appellate court and go to trial on the merits. *Exceptions overruled.*

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

STATE OF MAINE *vs.* JOSEPH E. BOARDMAN.

House of ill-fame—how proved to be so. Superior court.

On trial of an indictment for keeping a house of ill-fame under R. S., c. 17, §§ 1 and 2, testimony as to the reputation of the house is not admissible. It is sufficient if the evidence shows that the house was in fact used as a house of ill-fame, and evidence of its reputation has no legal tendency to establish that fact.

In such a case evidence of the reputation of the women frequenting the house and of the character of their conversation and acts in and about it is admissible.

It is no cause for avoiding a verdict that the January term of the superior court, designated for the trial of criminal cases, was adjourned from the second day of February to the seventeenth day of that month, and that the February term was held between these dates; and a plea setting out these facts was properly overruled.

State *v.* Boardman.

On exceptions.

Indictment found at the January term, 1874, of the superior court for this county, under R. S., c. 17, § 1, for maintaining a nuisance, charging that the respondent on the first day of January, 1873, at Deering, &c., and on divers other days and times between that day and the day of finding of the indictment "did keep a certain house of ill-fame, then and there resorted to for the purpose of prostitution and lewdness, by the consent and with the knowledge of the said Joseph E. Boardman, against the peace," &c.

Before proceeding to trial the respondent filed a "motion or plea" setting forth that he was "not bound by law to answer to said indictment, and proceed to the trial thereof, because he says that the adjournment of the January term of this [the superior] court from the second day of February instant to this day, as will appear by record thereof was not authorized by law, and that this court is now sitting illegally and without right. Wherefore he prays that he may not be required to plead to this indictment, but may be permitted to go thereof without day."

The presiding justice overruled the same, and the respondent excepted.

By the act of 1868, c. 151, establishing said court, jurors may be required to serve therein for one or two terms, and either one or two juries may be in attendance as the justice may determine, according as, in his view, public necessities and business may require. The January term is one of those designated in the act for the trial of criminal cases and at these terms precedence is given to these over civil causes. The terms of this court are holden upon the first Tuesday of each month for nine months of the year. The January term, 1874, commenced on the first Tuesday of that month, and the February term also on the first Tuesday of February. Before the time for commencing the latter term arrived, to wit, on the second day of February, 1874, the January term was adjourned to the seventeenth day of the same February, and the February civil term was held between these dates. Dur-

ing the earlier part of the January term two juries were in attendance, one of which had attended at the preceding December term. On the second day of February, just before the aforesaid adjournment of the January term, those jurors who had served in December were excused from further attendance by the presiding justice, and only those originally summoned for the January term —seventeen in number—were retained and were present when this trial began. The respondent's counsel objected to proceeding to trial, upon the ground that he would be restricted in his right to draw a jury for the hearing of the cause from the full number constituting the juries for said January term; but the court overruled the objection and he excepted.

The defendant was allowed his statute right of challenge, and the panel was obtained before the list of jurors in attendance was exhausted. The trial then proceeded upon a plea of not guilty. The first witness whose testimony is reported in the exceptions testified that he was a hackman and had several times within the preceding year carried men and women out to the Brewer house, that being the name of the place kept by Mr. Boardman; that he did not know the class of women, nor their names, but they were called a little fast; that sometimes the men who hired his hacks had their own women with them, and at others perhaps he would find them, finding that class that would like to go and have a good time and a good supper. Other testimony, of a more positive character, was introduced as to the character of the girls who visited the house, and the purpose for which they went there, their conduct about the house and in its vicinity, soliciting passers-by to go in with them, &c., &c. A witness, called by the prosecution, was then asked if he knew the general reputation of the house as to its being or not being, a house of ill-fame, resorted to for the purposes of lewdness and prostitution; to this inquiry the defendant objected, but the court ruled it admissible to establish the general reputation of the house as one of ill-fame, resorted to for the purposes of prostitution and lewdness; and the same question was put to and answered by several other

witnesses. After stating, in his charge, that the language of the indictment was not technical but easily understood, and that the only question was as to the truth or falsity of the charge it contained, he remarked that, in these cases, three classes of testimony were admissible; first, testimony tending to show specific or particular acts of lewdness and prostitution upon the premises referred to; second, testimony tending to show the general reputation for chastity of the men and women accustomed to frequent the house; third, testimony tending to show the general reputation of the house itself as to its being resorted to for the purposes of prostitution and lewdness; adding, "it is only incumbent upon the government to prove that this was a house of ill-fame resorted to for the purposes of prostitution and lewdness, and it is not necessary for the government to prove in addition the reputation of the house. That is to say, if the government has made out to your satisfaction, beyond a reasonable doubt, that this was a bawdy house, resorted to for purposes of lewdness and prostitution, the whole case is made out, without proof that it had the reputation of being so. The testimony as to its reputation is admissible only so far as it bears on the question whether or not it was in fact so; that is to say, it is only admissible as tending to prove that the house was in fact a house of ill-fame, resorted to for the purposes of lewdness and prostitution." The respondent was found guilty. To the ruling admitting the testimony aforesaid, the respondent excepted.

Bradbury & Bradbury for the respondent.

The act of 1868, establishing the superior court, c. 151, § 6, provides that terms shall be held upon the first Tuesday of every month except June, July and August; while c. 216 of the same year provides that its criminal business shall be transacted at its January, May and September terms. Can these terms be extended beyond the time and terms devoted by statute to civil business exclusively? If so, where is the limitation? How many terms can be made to overlap each other?

R. S., c. 82, § 71, provides that when a justice excuses jurors he

shall issue a venire for others to fill their places. So if twelve were excused, twelve new ones should have been summoned, and from such whole number the respondent had a right to have the jury drawn by which he was to be tried. R. S., c. 82, § 66.

Testimony of conduct and conversation in the vicinity of the house, out of the defendant's presence, was improperly admitted. *Commonwealth* v. *Harwood*, 4 Gray, 41.

General reputation is not admissible to prove the fact that the house is one of ill-fame; even in Connecticut where under a statute like ours it is held that the fact and the reputation must both be proved in order to convict—but evidence of the repute has no tendency to prove the fact. *Cadwell* v. *State*, 17 Conn., 467; *Commonwealth* v. *Stewart*, 1 S. & R., 342; 2 Bishop's Crim. Proc., §§ 91 and 92.

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

The determination as to the jury to try the cause and who shall be excused is discretionary with the justice. *Ware* v. *Ware*, 8 Maine, 42; Act of 1868, c. 151, § 6.

The term "house of ill-fame" is synonymous with "bawdy-house." *McAllister* v. *Clark*, 33 Conn., 92; 1 Bishop's Crim. Law, § 1083; 2 Archbold's Crim. Prac. and Plead., 1007.

It is so employed in our R. S., c. 17, § 1; "all places used as houses of ill-fame" are declared nuisances.

Evidence of the bad reputation of the house, as being a bawdy-house, is admissible. *State* v. *Main*, 31 Conn., 575. The defence rely upon *Cadwell* v. *State*, 17 Conn., 422; that was a decision in favor of the state in support of a ruling in the court below, and does not apply under our statute, as is clear from the language, "used as a house of ill-fame," &c. R. S., c. 17, § 1. See the later case in Connecticut. 31 Conn., 575. And in the last volume of Connecticut reports is the case of *State* v. *Morgan*, 40 Conn., 46, where that court, in speaking of one indicted under their statute, for keeping a place in which it was reputed that intoxicating liquors were sold without license, say, "The reputation here intended grows out of such indications as convince men

of ordinary sagacity that such liquors are in fact kept in these places for sale. It comes from persons passing and repassing, who see there the ordinary concomitants of drinking saloons. They see, perhaps, the intemperate loitering before them; or persons going in apparently sober and coming away intoxicated. They see casks, decanters, jugs, &c., labeled with the names of various kinds of intoxicating liquors; and, indeed, everything that usually attends drinking saloons. Such persons communicate their knowledge to others, and in a short time these places have the reputation of being establishments where such liquors are kept for sale. The reputation, therefore, is founded in fact; that is, it is based upon, or grows out of, the fact, that such liquors are kept for sale." The closing sentence of that opinion is, "for if it was the honest opinion of the neighborhood that the defendant kept such liquors in his establishment for sale, it must have had its origin in evidence that satisfied the minds of observers that such liquors were in fact kept for sale." The same reasoning is equally applicable to the ill-repute of a house arising from the external appearances surrounding it.

In very numerous cases in this state, Massachusetts, and elsewhere, it has been held that evidence of these external appearances about an establishment is admissible to show the intent with which liquors there found and seized were kept. It is equally admissible to show the lewd purpose for which a house is hept; so the evidence of the character and conduct of the females living at and visiting the Brewer House was properly received. *Commonwealth* v. *Kimball*, 7 Gray, 328.

The three classes of testimony enumerated by the judge are admissible. 2 Bishop's Crim. Proc., §§ 112 to 117; 3 Wharton's Crim. Law, § 2390; 2 Archbold's Crim. Prac. and Plead., (7th ed.,) 1008.

Dickerson, J. The defendant is indicted for keeping a house of ill-fame, resorted to for the purposes of prostitution and lewdness. The offence charged is that of a common nuisance. The language of the statute is as follows: "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." R. S., c. 17, § 1. Section 2 of the same chapter makes "any person keeping or maintaining such nuisance," liable to fine or imprisonment in the county jail.

The terms "house of ill-fame" and "bawdy house" are synonymous. "A bawdy house," says Bouvier, "is a house of ill-fame, kept for the resort and unlawful convenience of lewd people of both sexes." So Archbold defines a bawdy house to be a house kept for the resort and convenience of lewd people of both sexes. 1 Bouvier's Law Dic., h. t.; 2 Archbold's Crim. Prac. & Plead., 1667; 1 Bishop's Crim. Law, (5th ed.,) 1083; *McAllister* v. *Clarke*, 33 Conn., 92.

The common signification of the word corresponds with its technical meaning. "A bawdy house," says Worcester, "is a house used for lewdness and prostitution; a brothel." The idea conveyed by the term "house of ill-fame," or its synonym "bawdy house" is that of a house "resorted to for the purposes of lewdness and prostitution." A "house used as a house of ill-fame" is a house thus resorted to; it cannot be so used unless it is thus resorted to, and if it is resorted to for such purpose it is "a house used as a house of ill-fame," in the purview of the statute, though it may not have that reputation. The phrase "resorted to for lewdness," contained in the statute does not qualify, enlarge or change the meaning of the preceding clause in this case; the statute, in this case, has the same meaning and application without as with that phrase.

In order to make out the offence charged in the indictment under our statute, it is necessary to establish two things: first, that the house was used as a house of ill-fame; and, second, that the defendant kept it. The gist of the offence consists in the use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offence is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it

had any. The reputation of the house, under our statute, makes no part of the issue. Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill-fame, and is inadmissible as mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance. 2 Wharton's Crim. Law, § 2367; 3 Greenl. on Ev., (6th ed.,) 186; 2 Bishop's Crim. Proc., § 91. The judge in the court below erred in admitting such evidence.

We are aware that the court in Connecticut, in *Cadwell* v. *The State*, 17 Conn., 467, held that to support such an information, under the statute of that state, it is necessary to prove that the general reputation of the house was that of a bawdy house, and that it was such in fact. To establish the first proposition the court in that case admitted evidence of the reputation of the house, but distinctly say that such testimony would be clearly inadmissible to prove that the house was in fact a house of ill-fame. We have seen that under the phraseology of our statute it is not necessary to prove the reputation of the house; and the case of *Cadwell* v. *The State*, 17 Conn., 467, thus becomes authority for excluding evidence of reputation in this case. 2 Bishop's Crim. Proc., § 91.

Evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is competent in such cases, as the judge ruled. *Commonwealth* v. *Kimball*, 7 Gray, 328; *Commonwealth* v. *Gannett*, 1 Allen, 8.

The judge also properly overruled the defendant's plea. *Ware* v. *Ware*, 8 Maine, 42; Public Laws of 1868, c. 151, § 6.

Exceptions sustained.

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

The chief justice and concurring justices appear also to have assented to this note upon the case by

PETERS, J. The house must be proved to be a house of ill-fame by facts and not by fame.

STATE OF MAINE *vs.* SAMUEL NOWLAN.

Pleading. Practice.

A general verdict of guilty or not guilty, without any special findings, is all that is usual or necessary in prosecutions under R. S., c. 27, for keeping intoxicating liquors for illegal sale.

It is enough that the complainant alleges his belief that intoxicating liquors are so kept and deposited by the respondent, without averring that he has probable cause so to believe, or assigning any reason.

It is sufficient to follow the form given by the statute for use in such cases.

ON EXCEPTIONS to the rulings of the justice of the superior court.

COMPLAINT and process of search and seizure coming by appeal from the municipal court of Portland to the superior court.

The jury rendered a general verdict of guilty, and after verdict and before sentence, the defendant moved in arrest of judgment for the following reasons:

First. That the verdict should have been special under the direction of the court on all facts necessary to determine the adjudication of the court.

Second. Because the complaint does not allege that the complainant had probable cause to believe that intoxicating liquors were kept and deposited by the defendant and intended for sale by him.

Third. Because for lack of sufficient allegation in said complaint the whole proceedings are void.

This motion was overruled; to which ruling the defendant excepted.

The complaint and warrant were in the form given in the R. S., page 315.

J. H. Williams for the respondent.

R. S., c. 27, § 47, expressly requires that "the jury shall find specially, under the direction of the court, on all facts necessary to determine the adjudication of the court."

The fourth amendment to the constitution of the United States

requires that process for search shall only issue upon probable cause, supported by oath or affirmation.

Our state constitution is to the same effect. Art. 1, § 5. Therefore, the existence of probable cause should be stated or shown by the complaint.

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

WALTON, J. A special verdict is not necessary in a prosecution for keeping intoxicating liquors with intent to sell the same in violation of law. A general verdict of guilty or not guilty is all that is usual or necessary in such cases. Nor is it necessary that the complaint should contain an averment that the complainant "has probable cause to believe" that the defendant keeps liquors with intent to sell them in violation of law. Neither the statute nor the form enacted by the legislature requires such an averment. It is enough for the complainant to state that he does in fact believe that intoxicating liquors are thus kept by the defendant. It is not necessary for him to add that his belief is a reasonable one. R. S., c. 27, § 35, and form on page 315.

Exceptions overruled.

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

STATE OF MAINE *vs.* PARMENAS E. WHEELER.

One of the four days' notice for the draft of jurors may be Sunday.

A notice posted August 14, 1873, for the draft of jurors on the eighteenth day of the same month is legal, under R. S., c. 106, § 9, although one of the "four days" between those dates be Sunday.

ON EXCEPTIONS.

INDICTMENT under R. S., c. 27, for being a common seller of intoxicating liquors. The respondent filed a plea that the person who signed the bill as foreman of the grand jury was not legally oc-

cupying that position because voted for and elected by three men, assuming to act as members of the panel, who were not properly so, because the meeting at which they were drawn was notified August 14, 1873, and holden on the eighteenth day of the same month. The pleas were met finally by a demurrer. A motion to quash for the same cause was also filed and overruled. The demurrer was sustained, the plea adjudged bad, though the facts were found to be as therein stated. To this ruling the respondent excepted, and desired to except to the ruling denying the motion to quash, but the justice of the superior court, to which the indictment was returned, refused to allow them but exception was taken and allowed to this refusal.

William L. Putnam for the respondent.

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

VIRGIN, J. By R. S., c. 106, § 9, a meeting for the drafting of jurors is called by posting notices at the places designated, "at least four days before such meeting."

Does the last clause mean "four days" exclusive of Sunday? We think it does not. It is not so expressed. If the legislature so intended, they would have been likely to exclude Sunday in terms as in c. 84, § 3; c. 83, § 17, and in c. 107, § 8. Neither can we perceive any reason why the time covered by the notice may not properly include Sunday provided the day of the draft be not fixed on that day, for which there can be no necessity.

We need not decide the other question raised.

Exceptions overruled.

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

STATE OF MAINE *vs.* PATRICK PLUNKETT.

Evidence. Search and seizure process, under R. S., c. 27, § 35.

The statement of the complainant's belief contained in the affidavit which is made by R. S., c. 27, § 35, a condition precedent to the issuing of a warrant to search for intoxicating liquors illegally kept, is not a traversable fact.

The question to be tried is not whether the complainant was right or wrong in testifying to the facts which led to the search for, and the finding and seizure of the liquors; but whether or not they are liable to forfeiture and the keeper to the prescribed penalty.

If the liquors are found by the jury to have been intended for illegal sale in this state, and to have been kept here by the respondent with knowledge of the guilty purpose, it is no defence that they were seized upon an illegal warrant, or that the officer exceeded his authority under it.

A collateral issue will not be raised to determine whether or not proof, in itself competent, was lawfully or unlawfully obtained.

The offence is committed if the liquors are kept and deposited by the respondent for the purpose of illegal sale within this state, whether so kept and found in the building indicated in the warrant or in another; and though the warrant do not authorize the officer to search such other building, and though he may be liable for doing so, this will be no defence to a proceeding for the forfeiture of the liquor and the punishment of the offender.

When evidence of itself competent generally is objected to, the grounds upon which the objecting party relies must be stated when the objection is made.

The liquors which the respondent was here convicted of illegally keeping were seized September 25, 1873, upon process that day issued. At the trial the record of a conviction upon a plea of *nolo contendere*, of a similar offence, committed July 8, 1873, was properly admitted, upon the question of intent.

ON EXCEPTIONS.

SEARCH AND SEIZURE process, under R. S., c. 27, § 35, issued September 25, 1873, upon complaint of the sheriff, in the form prescribed by law, that he believed "that on the twenty-fourth day of that month, and on the day of the complaint, intoxicating liquors were kept in Portland by Patrick Plunkett in the dwelling-house and its appurtenances situated on the southerly side of Adams street, and numbered two on said street; a part of which said dwelling house is used for the purposes of traffic by the said Plunkett." Upon the warrant issued on this complaint liquors

were, the same day, found and seized in a room occupied by the family of Plunkett as a kitchen. This room was reached by passing through the front part of Plunkett's grocery, then through a rear room, connected by a door with this kitchen. At the trial the respondent testified and contended that the building in which he lived was entirely distinct from his store, and that no part of his dwelling house was used for purposes of traffic; and therefore claimed that, this allegation in the complaint being false, the search for, and seizure of the liquors was unauthorized; but the justice of the superior court before which he was tried, ruled that this was no defence to this process.

The record of a former conviction, upon a plea of *nolo contendere*, upon a charge of illegally keeping for sale in this state intoxicating liquors seized on the twenty-fifth day of September, 1873, upon a complaint and warrant of that date, was admitted against the defendant's objection, and he excepted thereto, as well as to the ruling aforesaid. He was convicted. Testifying in his own behalf, he said that he abandoned the sale of liquor in the last of July or the first of August, 1873.

J. O'Donnell for the respondent.

I. The court erred in admitting the record of a former conviction on the search and seizure process July 8, 1873.

First. Because it had no tendency to prove the respondent guilty at the time of trial in this case. The government, on cross-examination of the respondent, elicited the fact that he left off selling liquor in the latter part of July or first of August previous. It was a collateral inquiry made of him, and his answer was conclusive and could not be contradicted by the record of a former conviction. *Ware* v. *Ware*, 8 Maine, 42.

Second. Because no former conviction was alleged and it could not therefore be proved to affect his defence to the present complaint. R. S., c. 27, § 45–55, and 56. To make the former record evidence a previous conviction must be alleged in the present complaint. *Tuttle* v. *Commonwealth*, 2 Gray, 507.

II. The court erred in not charging the jury as requested, that

if no traffic was carried on in the dwelling house, the complaint could not be sustained.

Whenever a complaint alleges that liquors are kept unlawfully, and intended for sale in a dwelling house "some part of which is used as an inn or shop," it is necessary to prove the latter fact. If no part of the house is used as an inn or shop, the complaint is not sustained. No "traffic" of any kind, much less in intoxicating liquors, was carried on in the dwelling house of the defendant, but this question the jury were not allowed to consider. Suppose the proof was that the dwelling house was situated on the northerly and not southerly side of Adams street? Would not that be a fact for the jury, and would not the variance be fatal? The complaint against the dwelling house was improperly issued. It should have alleged that said dwelling house was used in part as a shop or inn, or that "traffic in intoxicating liquors" was carried on in said house. A traffic in millinery goods by the wife would not authorize a search of a dwelling house. But this warrant omits the words "traffic in intoxicating liquors." The insertion of the simple word "traffic" alone doesn't authorize the search of a dwelling house, occupied as such. There would be no safeguard or protection of one's home if the mere word "traffic" would authorize the search of a dwelling. Preliminary evidence should be had and that inserted in the complaint, that intoxicating liquors were kept there intended for sale. R. S., c. 27, § 38.

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

APPLETON, C. J. This is a search and seizure complaint. The building to be searched was the dwelling house of the defendant. The proceedings are in due form of law. The essential facts to justify such search were duly set forth. The jury, upon satisfactory evidence, have rendered a verdict against the defendant and the liquors found. In other words, the defendant is guilty of having liquors with intent to sell the same in violation of law. The offence is established. The liquors are liable to forfeiture—the defendant to the penalty provided by the statute.

The affidavit required by R. S., c. 27, § 35, is a condition precedent to the issuing of a search warrant. The statements it contains as to matter of belief are not issuable facts. The inquiry was not whether the complainant was right in testifying to the facts which led to the search and upon the search to the finding and seizure of liquors. The question to be tried was whether the liquors so found were liable to forfeiture and the person keeping them to the penalty established by the statute.

The possession of spirituous and intoxicating liquors with intent to sell in violation of law, is an offence. The defendant's possession with such intent was unlawful, wherever he kept his liquors.

In *Commonwealth* v. *Dana*, 2 Metc., 337, lottery tickets seized were offered in evidence on the trial of the defendant. It was objected that they were not admissible. "Admitting," observes Wilde, J., "that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were." A collateral issue will not be raised to determine whether or not proof, in itself competent, was lawfully or unlawfully obtained. *Legatt* v. *Tollervey*, 14 East., 302; *Commonwealth* v. *Welsh*, 110 Mass., 360.

If the liquors were kept in violation of law, they were none the less liable to forfeiture, because the possession of them was wrongfully or illegally obtained. *State* v. *McCann*, 61 Maine, 116. The defendant is none the less guilty, however the government may obtain possession of his person. If a complaint is made against one for larceny and a search warrant is granted, and the stolen goods found, the thief is not to be discharged when his guilt is fully established, because the officer in serving the warrant may have exceeded his authority, or the complainant may not have had sufficient reasons for the belief upon which his complaint

was based. In the case at bar, the offence was committed wherever the liquors were kept and deposited, if kept by and deposited with the defendant for unlawful sale within the state. The offence is committed, whether they were in his store or his dwelling. The guilt of the respondent is not converted into innocence, though the belief of the complainant as to some of the allegations in the complaint were not well founded, or the officer, in its service, exceeded his authority.

The government offered in evidence the record of a prior conviction, to the admission of which the counsel for the defendant objected. Neither the purposes for which it was offered nor the reasons for the objection taken to its admission are disclosed. It does not seem to have been the subject of allusion in the charge of the judge, which is fully reported. When objection is made to the admission of evidence, which of itself is competent generally, the grounds upon which the objecting party relies, should be stated. "Not having disclosed the character and ground of his objection," observes Barrows, J., in *State* v. *Bowe*, 61 Maine, 171, "at the time when, if it had any substance, he should have done so, he cannot be permitted to lie in wait with it as a cause for a new trial."

But one of the questions involved, was the intent of the respondent. When a complaint was made for keeping liquors on a day certain with intent to sell, evidence is admissible of sales made in the defendant's shop before that day, and of his statements five months previously that he was the owner of the same. *Commonwealth* v. *Dearborn*, 109 Mass., 369. So in *Commonwealth* v. *Stoehr*, 109 Mass., 365, on a trial of a complaint for keeping intoxicating liquors on a certain day with intent to sell, evidence of a seizure of such liquor before that day at the place kept by the defendant and of sales made three weeks before is admissible, "because it tended to prove that the liquors found on the premises on the day named in the complaint were kept by the defendant with intent to sell them in violation of law." In case of an indictment for keeping a nuisance, evidence is admissible to show

that the defendant made sales in the tenement eight weeks before the first date mentioned in the indictment. *Commonwealth* v. *Kelley*, 116 Mass., 341. The record introduced showed that to a complaint similar to the one under consideration the defendant had by plea admitted his guilt. It was admissible on the question of intent. *Exceptions overruled.*

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

ELIAS THOMAS *vs.* LEWIS JOHNSON.

Execution—levy of.

If the execution debtor, upon being notified by the officer holding the precept to choose an appraiser to act in an extent of it refuses to make a choice, the officer need not wait till the expiration of the time stated in the notice before selecting the appraisers and proceeding to complete the levy.

ON EXCEPTIONS.

REAL ACTION. Both parties claim under William B. Freeman, a former owner of the demanded premises; the demandant by virtue of a levy made December 12, 1872, and the tenant under a deed from Freeman to him dated and delivered March 29, 1871, but not recorded till August 12, 1872. The only question is whether the levy was invalidated by reason of the statement of the officer in his return upon the execution under date of December 12, 1872, that he gave notice to said Freeman to choose an appraiser and allowed him a reasonable specified time therefor, to wit, two days, and upon his refusal to select, chose one for him and completed the levy. At the time the land was conveyed by Freeman to Johnson, the latter mortgaged it back to Freeman, and this mortgage was forthwith recorded. The tenant claimed that the demandant, at the time of the attachment upon the original writ, had actual knowledge of the deed from Freeman to him; but this Mr. Thomas denied, though he admitted he knew

of it before making the levy. The question of actual notice was left to the jury who found for the demandant under an instruction by the court "that so far as the trial of this case was concerned the levy was legal; that all the forms of law necessary in order to make a legal levy had been complied with;" to which the tenant excepted.

John A. Waterman for the tenant.

Under date of December 12, 1872, the officer returns that he notified the debtor that he was allowed two days for the choice of an appraiser, and then proceeded himself to choose for the debtor. If it be said that we may infer that the notice was given two days before the twelfth, the answer is that in these proceedings nothing can be left to inference but upon their face they must show a clear legal title, especially as against a tenant in possession under a warrantee deed. *Boynton* v. *Grant*, 52 Maine, 229.

Suppose through petulance or perversity the debtor did, at the first reception of the notice, refuse to select his appraiser, and say he would make no choice; he was entitled to the allotted two days, within which to reflect upon it and determine his course and his selection.

T. H. Haskell for the demandant.

DANFORTH, J. The plaintiff's title to the land in question depends upon the validity of his levy, to which a single objection is made, viz: an insufficiency in the notice by the officer to the debtor to choose an appraiser, or a non-compliance with its terms on the part of the officer in not waiting for the expiration of the two days allowed. Whether he did so or not, may not be entirely certain from the language of the return, but upon the authority of *Fitch* v. *Tyler*, 34 Maine, 468, and *Howe* v. *Wildes*, Id., 574, the subsequent statement in the return "the said debtor refusing to choose an appraiser," renders it entirely immaterial; as such a refusal is a waiver of the debtor's rights in that respect.

Exceptions overruled.

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

JAMES WHITNEY *vs.* INHABITANTS OF CUMBERLAND.

Defective way; evidence of.

At the foot of a hill a highway became comparatively level and the travel passed, for several rods, upon each side of the middle track, as well as in it, the side tracks being largely used. In October, 1870, the town constructed a culvert across the centre of the located way, about eighteen feet long, with the surface of the covering stones about six feet wide and eighteen inches above the general level of the ground. Earth was carted in to make the grade on each approach to the culvert for a distance of six to fifteen feet, but the stones of one side of the culvert were exposed. The culvert, thus constructed, left ample space for teams to pass along the easterly side of it, in the old side track. The earth used to fill the approaches became very muddy with the fall rains, and was then trodden up and frozen in a very rough condition. The embankment of the culvert was not railed or guarded. To avoid the bad place in the middle of the road, thus caused, teams used to sheer to the east, pass the end of the culvert and then re-enter the main road. After the snow came the wind swept it from the culvert and, to avoid the bare place, teams continued to follow the side track. The plaintiff was familiar with the road before the building of the culvert but had not passed it afterwards until the time of the injury, which happened about ten o'clock of the night of the fifteenth of February, 1871, and was caused by his driving along the eastern side track so near to the culvert that one runner of the sleigh struck the exposed stones, whereby he was thrown out and injured. Under these circumstances a finding by the jury that the way was so defective as to make the town liable for the injury was not so clearly unsupported by the evidence as to justify setting aside the verdict.

Upon this state of facts, the defendants asked to have the jury instructed that "if Whitney was driving at the rate of five or six miles an hour, as he testifies, in as dark a night as he describes that of the accident, then he was not in the exercise of due care." This instruction was properly refused, the question of ordinary care having been left to the jury under correct instructions.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

CASE for an injury received by the plaintiff on the night of the fifteenth of February, 1871, while riding along a way in the defendant town which it was bound to keep in repair but which was alleged then to have been so defective as to occasion the accident. The substance of the testimony is given in the opinion. The next summer after the accident the road was banked up so as

to confine travel to the middle track. This action was brought December 15, 1871, and entered at the February term, 1872, of the superior court where it was three times tried, the jury twice failing to agree. At the last trial the plaintiff had a verdict for fifteen hundred dollars, rendered April 27, 1874.

The defendants moved to have this verdict set aside as against law and evidence, and their arguments were principally directed to the maintenance of this proposition. Only one request for instructions was made, which was this; the defendants requested the court to instruct the jury upon the evidence as set forth in the opinion, as follows:—

"If Whitney was driving at the rate of five or six miles an hour, as he testifies, in as dark a night as he describes that of the accident, then he was not in the exercise of due care."

Which request was refused by the court; but the court did give the jury proper instructions as to what constituted due care, and what are the requirements of the law touching the care and prudence necessary to be established by the evidence on the part of the plaintiff to entitle him to recover in said action, and left it to the jury to determine, from the evidence in the case, whether the plaintiff was or not in the exercise of due care at the time of the injury. To all which rulings and instructions and refusals to instruct, the defendants excepted.

Strout & Gage for the defendants.

The facts were ably and elaborately argued. It was contended that there was no hidden defect, as in *Cobb* v. *Standish*, 14 Maine, 198, but the path taken was just what it appeared to be, a snow track in the ditch to avoid bare ground in the road. The plaintiff drove out of the road and upon this snow track, in a dark night, and was injured by running into the road too soon, as he hit the foundation stone of the culvert, which was westerly of the snow path the travel had made there. He was out of the track wrought by the town, itself safe and convenient. He had a right to go where he did, but at his own risk. The town was not in

fault in not preventing the use of the snow track; in fact it had no right to do so there being no pitfall or trap in it. *Dickey* v. *Maine Telegraph Company*, 46 Maine, 485.

The proposition that where there is a safe and suitably prepared track, and the traveller goes out of that to find snow, and is injured, the town is not liable is too clear for argument. *Rice* v. *Montpelier*, 19 Vt., 470; *Tisdale* v. *Norton*, 8 Metc., 388; *Shepardson* v. *Colerain*, 13 Metc., 55.

This was not, as plaintiff contended for the first time at the last trial, a case of two parallel roads, as in *Hall* v. *Unity*, 57 Maine, 532, 535, both of which the town was bound to keep in repair: it was simply a turn-out; as distinct as any ever made to a watering-place. Thousands of such are found everywhere, when snow begins to leave the road, and if towns are to be held liable for injuries in such snow-tracks, their only safety is to grade the whole width of the location, which the law does not require.

To drive as Mr. Whitney did, upon so dark a night, was so obviously careless that a nonsuit should have been ordered. *Brown* v. *E. & N. A. Railway Company*, 58 Maine, 384.

And as no such motion was made, the court should have instructed the jury as requested.

Strout & Holmes for the plaintiff.

The exceptions should be overruled. *Webb* v. *Portland and Kennebec Railroad Company*, 57 Maine, 131.

The facts were then carefully considered and the arguments of the defendants replied to. It was claimed that this case is like that of *Hayden* v. *Inhabitants of Attleborough*, 7 Gray, 338, and that the instruction found upon page 342 of that volume, and approved by the court in Massachusetts, was wholly applicable to the present case.

VIRGIN, J. The general course of the highway is northerly and southerly. Near the foot of the hill in the vicinity of Herrick's house, the surface of the earth within the limits of the way

being comparatively level, the travel spread out easterly and westerly of the middle track some forty to fifty feet and several rods in length. To avoid the water which in wet seasons stood in, and sometimes ran across the main track, the town, in October, 1870, constructed a stone culvert directly across the centre of the located way, about eighteen feet in length, with the surface of the covering stones about six feet wide and eighteen to twenty inches above the general surface of the ground. To overcome this height, instead of turnpiking the road, earth was carted in on either side of the culvert making each grade six to fifteen feet long, but leaving the stones at the east end of the culvert exposed. The culvert thus constructed, left ample space for teams to pass and re-pass along the easterly side of the highway as they did before the culvert was built. The earth composing the approaches to the culvert, by the action of the fall rains and the passing of teams becoming "podged up," froze in that condition. There being no railing, embankment or other thing to prevent, teams for the purpose of avoiding the abruptness and roughness of the grades before the snows fell, continued to sheer to the east, pass the end of the culvert, and sweep gradually back into the main travelled path. After the snows came, the winds swept it from the culvert, and the principal travel continued to the eastward.

The plaintiff frequently passed along this highway before the culvert was built, but had no knowledge of the culvert until he was injured. About ten o'clock in the evening of February 15, 1871, while riding along that highway with his wife and daughter, in a pung sleigh, his horse instinctively following the principal path, took the eastern track, and he went so near to the easterly end of the culvert, that the sleigh runner struck the exposed stones of the culvert, whereby the plaintiff was thrown from his sleigh and injured.

The jury found the way defective; and we cannot say the verdict is against law. While a traveller in the day-time, might with ordinary care pass along that highway with safety and convenience, a stranger by night would be exposed to injury there. Had the

town adopted the precautions prior to February 15, which they did subsequently, this case would never have troubled them.

The requested instruction was properly denied.

Motion and exceptions overruled.

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

STATE OF MAINE *vs.* GEORGE E. WARD.

Plea in abatement must exclude all hypothesis consistent with legality.

The respondent pleaded in abatement to an indictment the disqualification of one of the grand jurors, by whom it was found, because his name was drawn from a box containing more than two names for every hundred inhabitants, of the city of his residence, according to the census of 1870; but the plea did not state that the box was prepared, or the jury drawn, after the census of 1870; and, though it was the duty of the municipal officers to prepare such a box after that time, the presumption of the performance of official obligation is one of fact, and not an implication of law; therefore, the omission of such statement renders the plea fatally defective. It was equally the duty of the municipal authorities to prepare a box in accordance with law as to the number of names, as it was to do it after the census of 1870. The defendant's plea assumes that they have omitted one of these duties; but which, it does not clearly indicate.

ON EXCEPTIONS.

INDICTMENT under R. S., c. 27, for violation of the liquor law. There were seven of these cases in which the pleadings were the same as in the case of Ward. In each the respondent seasonably filed a plea in abatement alleging the disqualification of a grand juror from Portland, one of the panel by which the indictment was found. To this plea the county attorney filed a special demurrer for the state, which was joined by the respondent. The demurrer was sustained, the plea adjudged bad and the respondent excepted. He plead anew by a demurrer to the indictment, which was also overruled and he again excepted.

The plea in abatement which was verified by the oath of the

respondent was as follows, omitting the caption, signature and jurat:

"And now the said George E. Ward in his own proper person cometh into court here, and having heard said pretended indictment read to him, says that he ought not to be held to answer to the same; because he says that George O. Batchelder, who acted as a pretended grand juror from the city of Portland in said county of Cumberland, in finding the said pretended indictment and in returning the same into said court at the said January term thereof, was not at the time said pretended indictment was found and returned into said court, and at the time he so acted as aforesaid, duly and legally qualified to act as such grand juror in this, that the last census of the number of persons in said city of Portland, was duly taken in the year of our Lord one thousand eight hundred and seventy. Yet the said city of Portland, at the time said George O. Batchelder was pretended to be drawn as grand juror for said court from said city of Portland, had no jury-box containing a number of names ready to be drawn when required for jurors, which did not contain more than two names for every hundred persons in said city of Portland, according to said census.

All which he is ready to verify. Wherefore he prays judgment and that the same may be quashed."

The prosecuting officer alleged as grounds of his demurrer that the plea was argumentative, not certain to every intent, was defective in form, double, uncertain, informal and otherwise defective.

Strout & Gage, *Mattocks & Fox*, *and M. P. Frank*, appeared for the several respondents in these cases, and in support of this plea.

A plea in abatement is the proper plea when objections to the qualifications of grand jurors is taken, as where the grand jury have not been selected according to the directions of the statute, and the objections can be taken in no other way. 1 Bishop's Crim. Proc., 749; *State* v. *Carver*, 49 Maine, 588.

The demurrer to the plea admits all the facts pleaded.

The facts alleged in the plea and admitted by the demurrer are sufficient to entitle the respondent to judgment as prayed for.

"The legislature shall provide by law a suitable and impartial mode of selecting juries." Constitution of Maine, Art. 1, Sec. 7.

The legislature has provided such suitable and impartial mode of selecting juries in R. S., c. 106. Sec. 1, provides that the "municipal officers, treasurer and clerk of each town, constitute a board for preparing lists of jurors to be laid before the town for their approval."

Sec. 5 requires that "each town shall provide, and constantly keep in the box a number of names ready to be drawn when required, not less than one nor more than two for every hundred persons in the town, according to the census taken next before preparing the box."

The word town includes cities, unless otherwise expressed. R. S., c. 1, § 4, XVII.

"The whole subject is within the control of the legislature." They may give such power to the courts and to towns as they deem advisable, but unless the power be given, it cannot be lawfully exercised. Neither is the statute merely directory. *State* v. *Symonds*, 36 Maine, 131.

They have not authorized any lists of jurors to be put in the jury-box, unless prepared by a designated board, once in every three years, approved by the town, and that such box shall not contain more than two names for every hundred persons in the town or city, according to the last census.

The box from which the juryman objected to was drawn, did contain, it is alleged and admitted, more than two names for every hundred persons, &c.

All the requisites of the statute must be carefully followed in order to constitute a legal grand jury.

"The proceedings of the department of the government, of counties and towns, and officers of counties and towns, are all brought into requisition in order to constitute the court." *State* v. *Carver*, 49 Maine, 592.

Indictments found by grand juries to whom similar objections have been made, have been frequently quashed by the court.

Indictment quashed for want of seal upon a venire; *State* v. *Lightbody*, 38 Maine, 200; because one of the witnesses before the grand jury was not sworn; *United States* v. *Cooledge*, 2 Gallison, 364; because the constable's return did not show that notice had been posted at least seven days; *State* v. *Williams*, 25 Maine, 561.

The special demurrer to the plea is defective in each of the five allegations. It is not sufficient to state that a plea is argumentative, not certain to every intent, defective in form, double and uncertain, informal and otherwise defective. It must state particularly wherein the defects consist, and must show specially in what point in particular the form is defective. 1 Chitty on Pleadings, *667; *Ryan* v. *Watson*, 2 Maine, 382.

The gist of the plea is that George O. Batchelder, one of the grand jurors who acted in finding the indictment, was not legally qualified to act as such grand juror. This is directly stated in the plea. The plea also sets forth definitely and by direct averments wherein he was not legally qualified, viz:

That he was from the city of Portland.

That the last census was taken in the year eighteen hundred and seventy.

That when he was drawn as such juror the city of Portland had no jury-box which did not contain more than two names for every hundred persons in said city according to said last census. Nothing further could have been averred without stating what the law itself would infer, which is never required in pleading.

All necessary facts must be set forth in the plea, but not inferences of law.

The foregoing facts being all that it is necessary to set forth, and being directly and positively stated, the plea is in proper form and indictment should be quashed, as the truth of these facts is admitted by the demurrer.

Charles F. Libby, county attorney, for the state, relied upon the objection to the plea sustained by the court in the opinion, and suggested other defects.

DANFORTH, J. Whether the plea in abatement in these cases is sufficient in substance, it is unnecessary now to decide, for it is clearly defective in form.

The material facts in the plea, stated in a somewhat objectionable form, are that at the time of the pretended drawing of George O. Bachelder, who acted as juryman in finding the several indictments in question, the city of Portland had no jury-box which did not contain more than two names for every hundred persons in said city according to the last census, taken in 1870. Now it is evident that these facts may all be true, and yet the jury-box be legally made up and the juryman legally drawn. The law requires that the number of names in the jury-box shall be "not less than one nor more than two for every hundred persons in the town, according to the census taken next before preparing the box." But in the plea we nowhere find any allegation that this box was prepared or the juror drawn after the census of 1870. It is, however, said that we must presume that this was so done, because the law requires it. This may be true; but in a plea of this kind every material fact must be clearly stated, and not be left to inference or presumption. The court will take knowledge of an implication of law, but not of an inference of fact. We might infer in this case that the municipal officers of Portland made up their jury-box at a period of time not more than three years from the census of 1870, and that Mr. Batchelder was drawn for the September term of the court holden in 1874. This however would not be a conclusion of law, but only an inference of fact, which might be a mistaken one. In this very case it is claimed that the municipal officers of Portland have neglected a legal duty. Admitting that it is so, what then? Is it the drawing of a juror from an improper box, or a neglect to prepare the box at the time fixed by law? We may infer from the facts stated that it is one of these, but which one is by no means made certain.

Admitting that it is certainly one or the other does not help the matter, for it is necessary to know which in order to make the proper answer.

As this is fatal to the plea, it is unnecessary to notice the other objections to it suggested by the attorney for the state.

Exceptions overruled.
Judgment for the state.

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

CHARLOTTE H. BIRD *vs.* LEONARD DECKER.

Amendment. Deed—execution of. Judgment for possession on mortgage.

In a real action, a declaration containing a description of the demanded premises, adjudged insufficient upon demurrer, may be amended by perfecting the description so as to identify the premises.

In an action upon a mortgage of the fee to recover the mortgaged premises an absolute judgment for them and for the waste committed thereon may be entered against a stranger.

A person unable to write may by parol authorize the affixing of his name by another person to a deed so as to convey his title to the premises therein mentioned.

ON EXCEPTIONS.

REAL ACTION, brought to recover land in Casco, thus described in the original writ, dated the eighth day of October, 1874: "a certain piece of land in said Casco, being a part of lot numbered fourteen in the seventh range, containing about one hundred acres, being the north-easterly half of said lot and the south-easterly part of the other half, adjoining land sold by William Decker to Aaron B. Holden; whereupon the plaintiff saith that she was seized of the demanded premises in her demesne as of fee within twenty years," &c., &c.

The declaration concluded with an averment of waste (under R. S., c. 104,) committed upon the premises between the first day

of September, 1873, and the date of the writ by entering thereon and cutting a large number of trees and removing them, and the staves, hoops, &c., made therefrom, from said land. *Ad damnum*, six hundred dollars. The tenant demurred to this declaration, giving as his reason the indefiniteness of the description of the premises, as given above. The demurrer was sustained, for the cause assigned in support of it, but the demandant had leave to amend upon payment of costs, and did so by inserting the word "simple" after "fee," and by this amendment to the description contained in the original declaration:

Insert "said southeasterly part of said other or southwesterly half lying between the southeasterly line of land sold as aforesaid to said Holden, and the southeasterly line of said lot numbered fourteen, and composing, with said land sold to said Holden as aforesaid, the whole of the southwesterly half of said lot fourteen."

The case was submitted to the presiding justice with the right to except.

To sustain her declaration the demandant introduced a quitclaim deed of the premises from the tenant to his father, William Decker, dated April 27, 1863, and a mortgage deed thereof, with the usual general covenants of warranty, dated April 29, 1867, given by said William Decker to the demandant.

The tenant read in evidence a quitclaim deed of this land from said William Decker to him, dated October 25, 1858.

Leonard Decker could not read nor write at the time the deed purporting to be from him to his father was given, April 27, 1863; but he caused this conveyance to be then made, having sold the land to his father for the consideration therein expressed, and received his pay, orally authorizing another person to sign his (the tenant's) name to the deed, which was done in his presence and he acknowledged it to be his deed, and delivered it as such to his father.

He afterwards entered upon the premises, claiming them as his own, and did disseize the demandant, and cut and made from and upon the premises nine thousand hoops worth $15. a thousand before manufacture.

The presiding justice ruled, as matter of law, that Leonard Decker did execute the deed of April 27, 1863, and that the demandant was entitled to a judgment for the land, and $135. for the waste.

To all the rulings of law adverse to him the tenant excepted.

A. B. Holden for the tenant.

I. The presiding judge should have directed a nonsuit on the motion of the defendant. The plaintiff neither set forth in her writ the estate she claimed in the premises, nor clearly described the land; both of which were necessary in order to entitle her to maintain her suit. R. S., c. 104, §§ 3 and 21. Those defects were not amendable.

II. The mortgage of William Decker did not support the allegations contained in the writ as amended, and at most could only entitle the plaintiff to conditional judgment, and the judge's decision that the plaintiff is entitled to judgment absolutely for the land is erroneous.

III. The plaintiff did not prove that she was entitled to such estate in the premises as she alleged in her writ, namely, in fee simple, and therefore was not entitled to judgment.

Butler & Libby for the demandant.

Appleton, C. J. The amendment was allowable within the discretion of the presiding justice, which was very properly exercised in allowing it.

The deed of April 27, 1863, from Leonard Decker to his father, William Decker, was the deed of Leonard Decker, even though his own hand did not affix his signature. It was his signature made by him, through the exercise of his will and judgment, though he employed in the manual act the hand of another. It was competent for him to do this. He recognized, adopted and ratified it after it was done, by his acknowledgment and delivery of the deed.

The mortgage deed was in fee simple. As to everybody but

the mortgagor and his representatives it conveyed an absolute title, and the right to possession as against everybody.

The judgment ordered to be entered was right and in conformity with law. *Exceptions overruled.*

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

GEORGE W. JOHNSON *vs.* MANASSEH SMITH.

Assault—punitive damages in; evidence of defendant's poverty admissible.

In case of a gross and malicious assault, the jury may, in their discretion, allow exemplary damages.

In cases where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages, it is equally competent for the defendant to show a want of it, to diminish them. Nor can he be deprived of this right by the omission of the plaintiff to offer any proof on that point or make any claim for damages on that ground.

ON EXCEPTIONS.

TRESPASS *vi et armis,* for an assault committed by the defendant upon the plaintiff, on the twentieth day of June, 1873. The writ was dated June 24, 1874, and returnable to the superior court, where it was tried at the ensuing September term. The *ad damnum* was $6,000. The defendant, in June, 1873, owned two valuable dogs, one a setter, and the other a Newfoundland. The Thursday before the assault these dogs were in Deering upon the farm of the plaintiff, and worried his geese, killing two of them. Thereupon Mr. Johnson took his gun and fired at the dogs, killing the Newfoundland and wounding the other. Upon the day of the assault Mr. Smith went out from his residence in Portland to Mr. Johnson's in Deering, hunted up the plaintiff and gave him a beating, knocking out a tooth and bruising him severely. These facts were not denied by the defence.

The exceptions state that, at the trial, "the defendant offered evidence of his property and means, as bearing upon the matter of punitive damages and in mitigation thereof. The plaintiff in-

troduced no evidence tending to show that the defendant had any property whatever, and did not claim that the damages should be increased by reason of wealth or any pecuniary ability on the part of the defendant. The court excluded this evidence offered by the defendant, and he excepted."

"The defendant also requested the judge to instruct the jury, that, the assault and battery being acts for which the defendant was subject to prosecution and punishment by a criminal action or indictment, they would not be authorized in this case to allow anything as exemplary or punitive damages; which instruction the judge refused to give, but did affirmatively instruct the jury that the law says that, in a case of gross and malicious assault, the jury may, in their discretion, if they deem proper, award exemplary damages, but there is no rule of law by which the plaintiff can claim it as a legal right." The verdict was for a thousand dollars damages.

Nathan Webb for the defendant.

T. H. Haskell for the plaintiff.

DANFORTH, J. The exception to the instruction to the jury, that "the law says that in a case of gross and malicious assault, or of gross and aggravated injury, the jury may, in their discretion, if they deem proper, award exemplary damages, but there is no rule of law by which the plaintiff can claim it as a legal right," must be overruled. Such law has become so well settled in this state, even in cases where the defendant is also liable to criminal prosecution, not only by the decided cases, but also by a uniform and in point of time a somewhat extended practice in our courts, that it is now too late to disturb it, unless by legislative enactment. *Goddard* v. *Grand Trunk Railway Company*, 57 Maine, 202, and cases there cited. Besides, to allow the exception contended for, and permit the plaintiff to recover exemplary damages for injury to his property, and refuse it under similar circumstances for an injury to his person, would introduce a greater inconsistency, and render the law more unsymmetrical than is now claimed for it.

The other exception must be sustained. It does not clearly appear whether the testimony offered would have tended to show defendant's general reputation as to property or his actual condition in that respect. In either event, it should have been received, as it was pertinent to the issue. So far as the cause of action rests upon an injury to the character, or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater. *Humphries* v. *Parker*, 52 Maine, 507–8; 2 Greenl. on Ev., § 269. But in such cases, as it is rather the reputation for, than the possession of, wealth, which is the cause of this increased rank, the testimony must correspond, and only the general question as to his circumstances can be asked, and not the detail. *Stanwood* v. *Whitmore*, 63 Maine, 209.

But when exemplary damages are claimed, a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury on the ground, that a given sum would be a much greater punishment to a man of small means than to one of larger. *McBride* v. *McLaughlin*, 5 Watts, 375. Upon this point actual wealth could only be material. As bearing upon this point the testimony was offered and excluded. This took from the jury an element proper for their consideration.

It is true the plaintiff offered no proof upon this point and claimed no damages by reason of defendant's "wealth or pecuniary ability;" but if it was competent for the plaintiff to prove defendant's wealth to increase his damages, it was equally competent for the defendant to show a want of it to diminish them; and the waiving of the right by the one, is no reason why it should be taken from the other. Nor does the mere non-claim of damages on that ground, the right to punitive damages being still insisted upon, take it from the consideration of the jury. Hence the exclusion of the testimony left them in darkness where they were entitled to light. If the plaintiff really intended to admit that

the defendant was without means, the testimony could have done him no harm; but such an admission was not distinctly made, and in the absence of it, the exclusion of the testimony would be injurious to the defendant. It certainly deprived him of a legal right. *Exceptions sustained.*

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

JACOB G. LORING *vs.* GEORGE S. LORING *et als.*

Contract—conditional, effect of.

The plaintiff and defendants made a special contract by which the former became master of the latters' ship, and as such earned wages and made certain disbursements. At the same time he contracted with one of the defendants for a portion of his interest in the vessel and from that time received the earnings of such portion, but was to have a bill of sale only when he had paid the price. The vessel was lost before the bill of sale was given. *Held*, that this was a conditional sale only and would not take away the plaintiff's right to maintain a suit at law to recover his wages and disbursements.

As the ship earned freights, the plaintiff from time to time appropriated a part thereof toward the payment of his wages, *Held*, that under his contract he had a legal right to do this, and on such payments, the law in the absence of any agreement to the contrary requires him to account only for the legal value of the coin received, whether foreign or domestic, whatever may have been its market value at home.

Owners of vessels are not liable for wages earned before they became owners. The action is therefore defaulted and to stand for the assessment of damages, which are to be for the amount of wages earned and disbursements made after these defendants became owners, with interest from the date of a demand therefor.

ON REPORT.

ASSUMPSIT. The declaration contained two counts; the first, upon an account annexed by which the ship Reaper and owners were charged with the plaintiff's wages as master from the second day of June, 1866, forty-three months and seven days at a hundred dollars per month, $4,323.33; and for $151.63 disbursed at

Carthagena, and $183.95 at Akyab, on the vessel's account, making a total of $4,658.91; and there were thirteen cash items credited, aggregating $2,820.35, being sums retained by the master, in as many foreign ports, towards his wages. Thus the balance was $1,838.56; on which interest after demand was computed, from November, 1868, to March 21, 1871, at $155.04, making the balance as stated to be due in this count nineteen hundred and eighty-five dollars and sixty cents, though it was footed up at $1,989.60, and neither of these sums would seem to be correct, computing the interest at the legal rate for the time indicated. The second count alleged that on the first day of November, 1868, the defendant with two other persons named, since deceased, "being indebted to the plaintiff in the sum of eighteen hundred and thirty-eight dollars and fifty-six cents for labor and services before then performed by the plaintiff as the master of the ship Reaper, for the defendants and said deceased persons, at their request, then and there, in consideration thereof, promised the plaintiff said sum on demand, with interest on the same till paid." The writ was dated March 27, 1871. The general issue was pleaded with a brief statement that the plaintiff and the defendants, with others, were the owners of the vessel at the time the items of the account annexed were made; that these accounts were unadjusted and, with other accounts, were proper subjects of a bill in equity between the several part owners.

The defendants named in the writ were owners in the vessel from February 17, 1865, and some of them before that day. Upon the ninth day of November, 1862, a bargain was made in New York between the ship's husband, George S. Loring, and the plaintiff, that the latter should go master of the vessel at a hundred dollars a month. Nothing was said as to the time or place of payment, nor whether this should be paid in currency or specie. In the account annexed Capt. Loring had given credit for the sums retained by him abroad upon the basis of $4.85 to the pound sterling. At the time the plaintiff took command of the Reaper, George S. Loring agreed to sell him three thirty-seconds of the

vessel for $2500, of which five hundred dollars were paid down, and the rest was remitted from time to time. The agreement was that the bill of sale was to be delivered when the $2500 were fully paid, but the vessel was wrecked at Akyab before the plaintiff came home, so that no bill of sale was ever made, but the plaintiff received from George S. Loring three thirty-seconds of the insurance upon the vessel.

Upon the evidence, the full court was to render such judgment as the legal rights of the parties might require.

Nathan Webb for the plaintiff.

After the loss of the Reaper, the master returned home and settled with the ship's husband, to their mutual satisfaction, all the accounts during his command of her, except the single item of his own wages. As to these, he claimed as they were due at each time when he retained moneys on account of them, he should give credit for these sums at the par of exchange only; while the owners contended that he should allow for the premium on gold in this country at the dates of the several credits. This is the main point in controversy between these litigants.

As the wages were due when and where he received these moneys, he was entitled to them in the currency of that time and place at its par of exchange.

In this country, there were two currencies, neither of which had any preference in law over the other. 5 U. S. Stats. at Large, 496; *Thompson* v. *Riggs*, 5 Wallace, 663; *Hussey* v. *Farlow*, 9 Allen, 263; *Bush* v. *Baldrey*, 11 Allen, 367; *Howe* v. *Nickerson*, 14 Allen, 403; *Stanwood* v. *Flagg*, 98 Mass., 124; *Carey* v. *Courtenay*, 103 Mass., 316; *Nelson* v. *Weeks*, 111 Mass., 223; *Frothingham* v. *Morse*, 45 N. H., 545.

Even if the plaintiff were a co-owner, as nothing remained unadjusted, and nothing unpaid except these wages, this action for them can be maintained. *Fanning* v. *Chadwick*, 3 Pick., 420; *Brinley* v. *Kupfer*, 6 Pick., 179; *Dickinson* v. *Granger*, 18 Pick., 315; *Rockwell* v. *Wilder*, 4 Metc., 556.

The promise to pay the master his wages is a special, personal one, and not to be postponed till the owners have all accounts as owners adjusted between them. *Paine* v. *Thacher*, 25 Wend., 450; *Bradford* v. *Kimberly*, 3 Johns. Ch., 431; *Townsend* v. *Goowey*, 19 Wend., 428; *Lewis* v. *Moffit*, 11 Ill., 392.

Strout & Holmes for the defendants.

The plaintiff owned three thirty-seconds of the Reaper. Upon a full settlement of all accounts he might be found indebted to them. Had there been such a settlement, recovery in this suit would unsettle it. Hence, it cannot be maintained, but resort must be had to equity. *Sturdivant* v. *Smith*, 29 Maine, 387; *Maguire* v. *Pingree*, 30 Maine, 508; *Hardy* v. *Sprowl*, 33 Maine, 508; *Dodge* v. *Hooper*, 35 Maine, 536.

Though it is true that, as to one not an owner, the master's wages are not ship's account, this is not true where the master is an owner, and the claim is the same as if he had paid out this amount to a third person in behalf of the owners. 35 Maine, 536; *Grant* v. *Poillon*, 20 Howard, 162; *Steamboat Orleans* v. *Phœbus*, 11 Peters, 175; The Larch, 2 Curtis Cir. Ct., 434; *Kellum* v. *Emerson*, Id., 85.

The plaintiff became a part-owner without a bill of sale. *Colson* v. *Bouzey*, 6 Maine, 474; *Pearce* v. *Norton*, 10 Maine, 252; *Lyman* v. *Redman*, 23 Maine, 289; *Badger* v. *Bank of Cumberland*, 26 Maine, 428.

Or, at all events, he was a partner in her business operations; and these wages grew directly out of—or were a part of—this business. Parsons on Partnership, 46, 571; Story on Partnership, §§ 219, 220, 221 and note, 441 and note, 449; 1 Parsons on Shipping & Ad., 93, 116; *Julio* v. *Ingalls*, 1 Allen, 41; *Bulfinch* v. *Winchenbach*, 3 Allen, 161; *Merritt* v. *Walsh*, 32 N. Y., 685.

The credits should have been made equivalent to currency, and not on the basis of $4.85 to the pound sterling. 12 U. S. Stats. at Large, 345; *Hepburn* v. *Griswold*, 8 Wallace, 603; *Trebilcock*, v. *Wilson*, 12 Wallace, 687; *Bronson* v. *Rodes*, 7 Wallace, 229.

DANFORTH, J. This is an action by the master against the owners of the ship Reaper to recover a balance alleged to be due as wages, and for disbursements for said ship.

On the part of the defendants two objections are made to the maintenance of the action.

The first is that the plaintiff, at the time the services were rendered and the disbursements made, was a part owner in the vessel, or at least a partner in the business in which the vessel was used, and that therefore his remedy is in equity alone.

There is nothing in the testimony that tends to show any partnership, but the reverse. The only business done was running the vessel on freight, or for hire, each receiving his own share of the earnings, having no interest whatever in the cargo, or in the profits and losses resulting therefrom. Their relation to each other was therefore the usual one of tenants in common and no question of partnership is involved. Story on Part., § 441.

Was the plaintiff a part owner of the vessel so that he can have no remedy at law under his contract?

His contract was a special one. Under it each owner would be liable, not for his portion only, but jointly for the full amount. A bill in equity would therefore be of no aid to the defendants in settling up the vessel's accounts, or if so it would be liable to deprive the plaintiff of some of his rights; for a judgment against them all jointly in equity would have no advantage over a similar one in law.

But we do not rest the decision of this case upon that ground. The plaintiff was not, as shown by the testimony, legally a part owner as respects his contract for services. There was, as between him and George S. Loring, a contract for the sale and purchase of a part of the vessel. The plaintiff was perhaps legally bound to pay the price agreed upon; for the purpose of receiving the profits, his ownership commenced at the time his services did; he after that time did receive the profits and, as master, had possession. Were this all the testimony upon this point we might fairly infer that he was a part owner, and the law might, certainly in

some respects, impose upon him the liabilities of an owner. But this is not conclusive. This "unexplained is a kind of proof of ownership, which may be highly satisfactory, and is proper for the consideration of a jury upon the question of title. Such evidence is by no means conclusive. It may not always be of so unequivocal a character as to amount to proof of ownership; or it may be qualified or entirely controlled by other evidence." *Badger* v. *Bank of Cumberland*, 26 Maine, 435.

In this case it is modified if not controlled by other testimony. What relates to the sale is found mainly in the letter of the vendor to the vendee of October 31, 1862. He there speaks of having "sold," and the time when the "ownership" commenced, but he also says: "when the note is paid, I am to give you a clear bill of sale," &c. The title then was to remain in the vendor. The sale and ownership were thus qualified and were, in fact, conditional only. If the vendee had failed to perform the condition, the vendor could have rescinded the contract, and retained the title which had never passed from him. He continued, as before, to have the control and direction of that interest, represented it as far as the other owners were concerned, and would as to them be subject to the legal liabilities attached to it.

This contract of sale was therefore a merely private matter between the parties to it, leaving the rights of the plaintiff and defendants in this action unaffected.

In other relations this contract of sale might impose certain liabilities or obligations upon the plaintiff, but none in respect to his contract with the ship's husband by which he became master. It was under that agreement that his services were rendered and the disbursements made and not in any sense as part owner.

The case of *Moore* v. *Curry*, 106 Mass., 409, is very much in point. The facts are similar and the only difference is, that while that is to recover damages for the breach of an unexecuted contract, this is to recover compensation for an executed one.

The disbursements rest upon the same ground as the wages. They were made by the plaintiff, not as owner, but as master and

under the contract with the owners by which he became master a contract, or the remedy under it, which can in no way be influenced by his relation with George S. Loring alone.

It is, however, claimed that the plaintiff has received all, or nearly all that he is entitled to. The amount of his wages and disbursements, is not in dispute. Nor is any question made as to what he has received. But a question is made as to the amount which should be credited for what was received. This difference, which is considerable, grows out of the greater market value of the currency received, than the paper currency of this country by which, as defendants say, they had a legal right to discharge their obligations under their contract with the plaintiff. As to the terms of this contract there is no conflict of testimony, nor are we aware of any difference of opinion as to the law involved in it.

It was made in this country, and is to be construed by the laws of this country. In it we find no provision as to the currency in which the payments were to be made. It necessarily follows, as contended by the defendants, that they had a right to discharge their obligations by a payment in any currency known to the law. Nor do we understand that this right is denied by the plaintiff. No question is made here as to payments to be made, but the question arises upon those which have been made. The credits which the plaintiff has allowed upon his account, are not so many specific quantities of gold, the value of which in currency he is to account for; but they are payments on the amount due him, made in a legal manner and in a currency equally as well known to the law, as that claimed by the defendants. In those credits the full legal value of the coin received has been allowed. This is all that is required. Where the law fixes the amount or value, it cannot be changed or affected by the fluctuations of the market. The defendants might have discharged the whole debt, as they may now discharge the balance due, in legal tender notes. But payments have been made in coin, whether in foreign or domestic is immaterial as long as its value is fixed by our law, and in the absence of any express agreement they are entitled only to the

amount fixed by law. *Howe* v. *Nickerson*, 14 Allen, 400; *Nelson* v. *Weeks*, 111 Mass., 223; *Thompson* v. *Riggs*, 5 Wallace, 663.

No serious question seems to be made as to the legal right of the plaintiff to appropriate the credits in payment of his debt, as he has done, nor can any such question be successfully made. In the contract no time was fixed for the payment of the wages; he had therefore, whether at home or abroad, an undoubted right, from time to time, to take from the earnings of the vessel and appropriate to his own payment such sums as might be necessary for that purpose. *Stanwood* v. *Flagg*, 98 Mass., 124.

He not only had the legal right to do so, but from the testimony it is clear that he did it with the knowledge and consent of the ship's husband.

It is conceded that a portion of the wages sued for were earned before some of the defendants became owners. For such sum the plaintiff could not recover in this suit. For the balance with the disbursements and interest from the date of a demand therefor, he would be entitled to recover, and to ascertain this sum a default may be entered and the action to stand for the assessment of damages. *Defendants defaulted.*

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

CHARLES YOUNG *vs.* JOHN W. JONES.

Accord and satisfaction. Agreement—effect of. Payment.

An agreement on the part of the plaintiff under his hand and seal to accept a certain per centage, less than the amount of a draft, on payment thereof, and to transfer the same on such payment within a certain time to a third person, and a seasonable tender and refusal of the stipulated per centage, will not constitute a payment of the draft, nor a defence to the same.

The contract relied upon negatives the idea of payment.

A debt which has been paid ceases to be a debt and is not transferable.

A plea of accord and satisfaction must allege not only a clear agreement and accord, but that it was executed by the acceptance of the consideration agreed upon.

On exceptions.

Assumpsit on an accepted draft. After the plaintiff had made out a case, the defendant offered to prove an agreement made under the hand and seal of the plaintiff with the defendant, after maturity of the draft, to accept a certain percentage less than the whole amount of the draft in payment thereof; and to transfer to some third party his debt on receipt of the percentage within a certain space of time; and that the said percentage was tendered him within the prescribed space of time, but he refused to accept it and subsequently brought this action. This evidence the court ruled to be inadmissible. To which ruling the defendant excepted.

Mattocks & Fox for the defendant.

I. An agreement to accept a portion of an accrued indebtedness in payment for the whole is, we admit, not binding without some consideration to support it. R. S., c. 82, § 38, applies only to the case of a demand settled by some payment, and is not applicable here.

The only consideration upon which we rely is that imported by the seal.

A seal in this state is a consideration; that is to say, it imports that a consideration has passed, and the presumption is one "*juris et de jure.*"

Our courts have never adopted the loose doctrine alluded to in 1 Parsons on Contracts, (5th ed.) 428, note c, "that want or failure of consideration may be a good defence against an action on a sealed contract."

That the seal imports a sufficient consideration for the contract is shown by the very nature of a release. The only thing that imparts validity to a technical release is the seal. Yet it has never been permitted to prove want of consideration. Not a single case can be found among the very large number of authorities, upon which plaintiff will perhaps rely, in which it has been even intimated that if the receipt acknowledging the partial payment to be in full had been under seal, the defence would have been bad. On the contrary, *vide* expressions "simple contract." *Bailey* v. *Day*,

26 Maine, 88. "On an instrument not under seal." *Drinkwater* v. *Jordan*, 46 Maine, 432.

"This writing is not technically a release not being under seal." *Lunt* v. *Stevens*, 24 Maine, 536, and the concise statement "this rule does not apply, where the acknowledgment of satisfaction is by deed." *Lee* v. *Oppenheimer*, 32 Maine, 254; *Bemis* v. *Hoseley*, 16 Gray, 63; *Ellsworth* v. *Fogg*, 35 Vt., 355; *Draper* v. *Hilt*, 43 Vt., 439.

II. The alleged agreement between plaintiff and defendant being a valid and binding agreement, and a tender of the amount due under that agreement having been made plaintiff within the time appointed, the question still remains whether or not the agreement and evidence of the tender were admissible to reduce the amount recoverable by the plaintiff on the draft, or whether the defendant to obtain his legal rights under the specialty in question is obliged to have recourse to a separate action for breach of covenant.

The tendency of modern decisions is certainly to avoid circuity of action because a contrary course tends both to encourage litigation, and oftentimes to deny the litigants at the end of a long, protracted law suit, that satisfaction in fact which they may have at length obtained in law.

That general principle will doubtless prevail in this case, unless some technical rule can be invoked to defeat it. And the aid which plaintiff will probably seek is that of the so-called doctrine of accord without satisfaction. An accord without satisfaction is void, and cannot be pleaded in defence. This we admit, but we doubt in the first place whether the doctrine of accord and satisfaction applies. See remarks of Justice Thompson in *Coit* v. *Houston*, 3 Johns. Cas., 243.

And we claim in the second place that, when a tender is made, and the debtor has done all in his power to carry out his part of the agreement, there is a virtual and legal satisfaction. A tender so far as the debtor's rights are concerned really pays the debt. If it were otherwise the creditor would be allowed to take advantage

of his own wrong. "It is true," the plaintiff says, "that I made a binding contract with defendant to accept 20 per cent of his indebtedness to me in full settlement, but when the time came I broke my agreement. By breaking it I have enabled myself to recover the whole debt, whereas if I had kept it, as an honest man should, I should have been 80 per cent out of pocket." This is not common sense. We think it is not sound law.

A very old case, *Case* v. *Barber*, Sir Thos. Raymond's Reps., 450, seems to make the true distinction: "formerly it hath been held that an accord cannot be pleaded unless it appears to be executed, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution, as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance." Yet judgment was for the plaintiff, because it did not appear that there was any consideration or that the agreement, although within the statute of frauds, was in writing. That is to say, if the agreement, which corresponds to the technical term accord, is for good consideration and the defendant has done all that is requisite on his part to the performance, plaintiff will not be allowed to ignore it—and recover the full sum, both because he has a good and sufficient remedy on the new contract, which is binding; and because, it is certain that that new contract will finally be the basis of settlement in a second if not in the first suit, and nothing is gained, and much lost, by such circuity of action. If however, the agreement of accord is without consideration then neither the plaintiff nor the defendant can have any remedy on the new contract and all that law can do is to give them their legal rights under the old.

The true theory of the law is elaborated with convincing logic in *Coit* v. *Houston*, 3 Johns. Cas., 243, in the opinions of Thompson and Livingston, JJ.

"The leading reason which appears to govern almost all the cases that determine that a plea of accord only is bad, is, that an action could not be sustained on the accord on the ground of a

nudum pactum, but this reason ceases where the agreement, set up as the substitute, will sustain an action and afford complete redress."

This principle seems to us well sustained by the reasoning of this court in *Jenness* v. *Lane*, 26 Maine, 475.

In that case a new note for a smaller amount with an indorser was taken for an old note then due, with agreement that if paid at maturity the old note should be discharged. The agreement was valid but the new note was not paid at maturity. The action was upon the old note and sustained, but only because of the non-tender at maturity of the amount of the smaller note. The court say: "To make out the defence it must be shown that the condition in the agreement of the 22d August, 1840, was performed, or that its performance was prevented by the wrong of the plaintiff's," (precisely our case) "or that they have adopted the new note in discharge of the old."

The case of *Clifton* v. *Litchfield*, 106 Mass., 34, seems to turn upon this distinction between a valid executory contract to discharge, upon tender, and an invalid one. The court say: "An executory agreement to discharge such a demand upon the giving of a promissory note by the debtor, or payment of a sum less than the amount actually due, is not binding upon the creditor, and cannot be enforced against him, or set up in bar of a suit upon the demand; therefore the mere offer of such note, or of such less sum in payment, will not operate to discharge the debt, unless it is accepted by the creditor." *Austin* v. *Smith*, 39 Maine, 203, is a similar case.

The cases of *Cushing* v. *Wyman*, 44 Maine, 121, and *Bragg* v. *Pierce*, 53 Maine, 65, even if we regard the executory contracts therein mentioned as valid, are not in point. In each of those cases there remained some other act to be done by each and both of the parties litigant, to wit, the offsetting of the notes and demands. In the one case this act was never even requested; in the other it was postponed on account of sickness. The accord remained executory, while in our case there was merely a certain

amount of money to be paid, which was in the eye of the law paid by the tender, and the accord was then executed.

Blake v. *Blake*, 110 Mass., 202, is very like our case. No question is made but that the agreement under seal is binding, but in that case the death of the debtor prevented the completion of the executory contract and no tender was made by his administrator.

It does not appear by the statement of facts in our case, that the tender was paid into court. If not, this can only affect the question of costs—defendant's rights under the specialty were established by the tender, and if plaintiff after tender was only entitled to the percentage legally tendered, the rulings of the court below were manifestly incorrect, and exceptions should be sustained.

S. C. Strout and *H. W. Gage* for the plaintiff.

The offer of defendant is too uncertain and indefinite to make it evidence, even if otherwise admissible. It does not state the percentage or the time of payment, or the party to whom the assignment was to be made. The proof must be admissible in the terms of the offer, or it is properly rejected. *Thomaston* v. *Warren*, 28 Maine, 298; *Tibbetts* v. *Baker*, 32 Maine, 26; *Bryant* v. *Crosby*, 40 Maine, 9; *Thurston* v. *Lowder*, Id., 197; *Marshall* v. *Oakes*, 51 Maine, 308.

No witness would be allowed to testify in the terms of this offer.

But the testimony was inadmissible, even if specific. No element of a general composition with various creditors is contained in the offer. Prior to the statute re-enacted in R. S., c. 82, § 38, an actual settlement of a larger claim, then due, for a less sum than the demand in money, did not bar a suit for the balance. *Bailey* v. *Day*, 26 Maine, 88; *Hinckley* v. *Arey*, 27 Maine, 362.

Under R. S., c. 82, § 38, such settlement when made, is binding and discharges the whole claim, but an executory agreement to take less is no bar, and does not preclude the creditor from claiming his whole debt. All defendant claims in this case is an

executory arrangement, without consideration, to take less than the debt then due in payment thereof, and to assign the same to a third party. But if made, such agreement was never executed, nothing was ever accepted by plaintiff under it, and the agreement itself was *nudum pactum*. The ruling was therefore correct. *Lee* v. *Oppenheimer*, 32 Maine, 253.

APPLETON, C. J. This is an action of assumpsit upon an accepted draft. After the plaintiff had made out his case the defendant offered to prove an agreement under the hand and seal of the plaintiff, after the maturity of the draft, to accept a certain percentage less than the amount of the draft, in payment thereof; and to transfer to some third person his debt on receipt of the same within a certain space of time; that the percentage agreed upon was tendered within the time limited, and that the plaintiff refused to accept the same, and brought this action.

The material question is whether these facts, if proved, would constitute a defence to the suit.

It is manifest they would not show payment. The plaintiff was to transfer his debt to a person agreed upon. The debt to be assigned must exist. If the debt was to be regarded by the parties as paid or discharged, it would cease to be a debt, and consequently would cease to be transferable. But as it was to be transferred, it is manifest that neither its payment nor its discharge was in the contemplation of the parties. It was to be held by the assignee for ulterior purposes.

Neither do the facts offered to be proved show accord and satisfaction. The agreement relied upon was executory. In *Hawley* v. *Foote*, 19 Wend., 517, it was held not a good plea of accord and satisfaction that the plaintiff agreed to accept the note of a third person in discharge of the demand in suit, which on being tendered him, he refused to accept. "There has been no satisfaction," observes Bronson, J., "the accord has not been executed, and the action is not barred." *Russell* v. *Lytle*, 6 Wend., 390; Com. Dig., B. 4. It has been said that a different rule was laid

down in *Coit* v. *Houston*, 3 Johns. Cas., 247, but the remark is not well founded. The question there was one of evidence, not of pleading. Thompson, J. said, "there were circumstances from which the jury might infer an actual acceptance at the place where the coal lay and that they were there at the risk of the plaintiff." The plea of accord to be good, must show an accord not executory at some future time, but one executed. *Cushing* v. *Wyman*, 44 Maine, 121. A mere readiness to perform the accord, or tender of performance, will not suffice, and a plea of accord tendered has been held bad on demurrer. A plea of accord and satisfaction must allege not only a clear agreement or accord, but that it was executed by the acceptance of the matter agreed upon in satisfaction. *Hearn* v. *Kiehl*, 38 Penn., 147. The facts do not show a consummated payment. *Mansur* v. *Keaton*, 46 Maine, 346.

The tender, if there was one, cannot avail the defendant as it has not been brought into court.

The remedy of the defendant is upon his contract, if the plaintiff has failed to perform it. *Exceptions overruled.*

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

AMOS D. STARBIRD *vs.* GEORGE W. HENDERSON.

Amendment. Practice.

Where the writ contains the money counts and a count upon a note payable in money, an amendment inserting a count on a similar note save that it is payable in labor, with the allegation of a demand and refusal of performance, is allowable.

When a cause is referred to the presiding justice with the right to except, his determination as to the facts is conclusive and not re-examinable upon a report of the evidence.

In such case, the facts as found by him and his rulings as to matters of law only, and not the evidence, should be reported.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT upon a promissory note for $37.50, dated June 9,

1863, payable to the plaintiff or order in one year with interest. Writ dated May 27, 1870. In the first count the note was stated as above, as if to be paid in money. The second count was the money counts. When the cause came on in order for trial, the plaintiff asked leave to amend his declaration by adding a count upon a note similar in amount, time and payee, to that described in the first count, but payable "in the labor of the said defendant, at cash price, with interest to be paid in one year from that date, a time long since elapsed; and the plaintiff avers that, at Freeman aforesaid, he was ready to receive the work or labor of the said defendant and requested the defendant to perform the same, but the said defendant did not perform the same, but neglected and still neglects so to do." This amendment was allowed and the defendant excepted.

The cause was then submitted to the presiding justice, reserving the right to except. He found for the plaintiff, and ordered judgment to be entered accordingly. The defendant made up a full report of the evidence, certified to be such by the judge, and moved to have the judgment set aside as against the evidence. It is unnecessary to report the testimony. There was no finding of facts by the justice to whom the cause was submitted.

S. Clifford Belcher for the defendant.

H. L. Whitcomb for the plaintiff.

APPLETON, C. J. This is an action of assumpsit. The writ contained a count upon a note signed by the defendant, dated June 9, 1863, for thirty-seven dollars and fifty cents payable to the plaintiff in one year from date with interest, together with the money counts, upon an account stated, and for work and labor.

The plaintiff was permitted, subject to exception by the defendant, to amend by inserting a count upon a note of hand similar in its terms to the one declared upon, save that it was payable in labor, and alleging a request on the part of the defendant to perform said labor and a refusal on his part so to do.

This amendment was properly allowed. The note in suit was not properly described. The misdescription was corrected.

The case was referred to the justice presiding with the right to except. No ruling is stated to which exception has been taken. The case comes before us upon a motion to set aside the judgment of the justice presiding as against evidence. But the evidence cannot properly be reported for the revision of the law court as to the correctness of his decision upon the facts. His adjudication upon them is final. *Motion and exceptions overruled.*

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

SARAH C. HUNTER, executrix, *vs.* JANE LOWELL.

When husband cannot testify in his wife's case.

The husband is not a competent witness for his wife where she is a party and the adverse party is a representative of a deceased person.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note bearing date January 3, 1866, made payable to the plaintiff's testator. The defence was payment of the note, and to prove such payment the defendant called her husband, James Lowell, who was husband of the defendant at the time the note was given and has been such ever since, but the court ruled he could not testify to any fact which happened in the life time of the plaintiff's testator, and his testimony was therefore excluded.

The verdict was for the plaintiff. The defendant excepted to the foregoing ruling.

H. L. Whitcomb for the defendant.

S. Clifford Belcher for the plaintiff.

At common law the husband could not testify. The only change

is by R. S., c. 82, § 82, which does not authorize it in cases like this. *Jones* v. *Simpson*, 59 Maine, 180.

DANFORTH, J. The husband is not a competent witness for the wife where the other party is an executrix as in this case.

The amendment of R. S., c. 82, § 82, by the Public Laws of 1873, c. 137, § 4 leaves the former subject to the provision of R. S., c. 82, § 87, and this case does not come within any of the exceptions therein mentioned.

Therefore the case of *Jones* v. *Simpson*, 59 Maine, 180, is decisive of this. *Exceptions overruled.*

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

LIONEL TRUE *vs.* INHABITANTS OF FREEMAN.

Way—location of.

Where county commissioners, upon petition of parties aggrieved by the unreasonable refusal of a town to accept a town way laid out by the selectmen, have located a way over the plaintiff's land one rod wider than, but in the course of, an old bridle road subject to gates and bars, and thereafterwards a gate upon his land has been removed by parties unknown to him, and the sill upon which it ran across the old bridle road has been removed by the crew working under a highway surveyor duly appointed by the town, and the road plowed and thrown up, and ever since used unincumbered by gates and bars, and the town by vote has directed the selectmen to settle the damages awarded to plaintiff by the commissioners, there is sufficient evidence that the plaintiff's land has been taken under the location, though the selectmen and highway surveyor testify that it was not their intention to make the town liable under the commissioners' location, and they designed only to repair the road as they had been accustomed to repair the old bridle road for more than twenty years.

In a suit against the town for the damages awarded by the commissioners, payable when the plaintiff's land has been thus taken by the town under the commissioners' location, the court will not inquire whether the commissioners' location might not be quashed on *certiorari*, where the case shows that the commissioners had jurisdiction, and no proceedings to quash the record have been instituted.

True *v.* Freeman.

A petition to the commissioners by "parties aggrieved" by the refusal of the town to accept a town way, describing the way generally by its termini and by reference to the dates of the action taken upon it by the selectmen and the town, and other particulars sufficient to identify it, and alleging that the town "unreasonably" refused to accept it, if presented within the time prescribed by R. S., c. 18, §§ 23 and 24, and followed by the required notices to parties interested, will give the commissioners jurisdiction to "proceed as provided in respect to highways," without specially alleging all the acts and facts which constitute an unreasonable refusal, or setting out the boundaries and admeasurements of the way as located by the selectmen, or averring that the original petitioners were inhabitants of the town or owners of improved land therein.

On report.

Debt, to recover $150 awarded to the plaintiff by the county commissioners as damages occasioned by the location of a way over his land in the manner and under the circumstances intimated in the syllabus and fully stated in the opinion.

The full court to enter such judgment upon the evidence as the legal rights of the parties required.

P. H. Stubbs for the plaintiff.

The location of the town way over the route of the bridle road was a discontinuance of the latter. *Commonwealth* v. *Westborough*, 3 Mass., 406; *Sprague* v *Waite*, 17 Pick., 309.

Then the plaintiff's right to damages was perfected by the taking of his land. The acts of the workmen upon this newly located road, done under the supervision of the surveyor, were his acts as a representative and agent of the town in that matter. *Elder* v. *Bemis*, 2 Metc., 599. And the location became a highway for general and unobstructed travel from the time it was turnpiked, the gate, sills, &c., thus removed by the surveyor and his men. *Loker* v. *Damon*, 17 Pick., 284.

Although the town was opposed to the location originally, and protested against it, yet if, instead of seeking to quash it for alleged errors, or to close it up by bars or indications that it is not open for general travel, its officers apparently acquiesce in establishing it, removing the bars already across it, and fitting it for use, the town will be held to all just responsibilities for all land

or other damages accruing from the construction and maintenance of the way. *Dewey* v. *Worcester*, 21 Pick., 449; *Bliss* v. *Deerfield*, 13 Pick., 102.

Interest should be allowed from the time the damages were payable under the judgment of the county commissioners; i. e., from the time the gate, sills, &c., were removed and the way made public, in May or June, 1871. *Gay* v. *City of Gardiner*, 54 Maine, 479.

In the petition to the county commissioners, the jurisdictional facts were sufficiently set out. *Goodwin* v. *County Commissioners*, 60 Maine, 328; *North Berwick* v. *County Commissioners*, 25 Maine, 69. The fact that the few rods where the location of the county commissioners deviated from that of the municipal officers was not built by the town, cannot prevent the way from being considered as opened. *Baker* v *Runnels*, 12 Maine, 235.

Being interested in the result, of course the plaintiff attended the hearings before the board of which he was a member, but, for the same reason, he did not take any part in its action, and his colleagues have joined him in a statement upon the record to that effect. *State* v. *Delesdernier*, 11 Maine, 473.

It is sufficient that the ultimate location corresponds substantially with that petitioned for. Slight deviations do not affect it. *Orrington* v. *County Commissioners*, 51 Maine, 570.

This same case answers the objection that the record does not show that the petitioners to the selectmen were inhabitants, &c. That is immaterial, since their location was not accepted. 51 Maine, 571.

But it does appear that it started from the dwelling house of said True in Freeman, and that he was a petitioner. *Plummer* v. *Waterville*, 32 Maine, 566.

S. Belcher for the defendants.

The proceedings of the county commissioners were void, because it does not appear from the record that the selectmen ever reported the way, as laid out by them to the town—but the implication

is to the contrary. *Small* v. *Pennell*, 31 Maine, 267; *Guilford* v. *County Commissioners*, 40 Maine, 296; *Goodwin* v. *County Commissioners*, 60 Maine, 330, and cases there cited.

Other necessary jurisdictional facts are not stated. See cases above cited.

As the way never has been opened by municipal authority, but only the same repairs as were previously made were continued upon the old bridle road, and the gate and sill were removed by some unauthorized person, the time appointed by the county commissioners for the payment of the damages has not arrived; and this action, even if one can ever be maintained, was prematurely commenced.

The plaintiff's name is affixed to the record of the proceedings of the county commissioners, as one of that board, in a case in which he is a party interested.

BARROWS, J. The records of the town and the county commissioners, produced by the plaintiff to support this action against the town for damages awarded him by said commissioners for land taken for a town way, exhibit the following facts: The selectmen of the town, on the thirteenth day of November, 1869, upon the petition of B. B. Harvey and others, after due notice, proceeded to lay out a town way three rods wide, "beginning at the south end of the town way near Lionel True's (the plaintiff's) house," and thence running, part of the way on the plaintiff's land, certain courses and distances specified in their report, to "the Valley Road." They awarded to the plaintiff and one other land owner certain sums as damages, filed their report of the laying out and the boundaries and measurements with the town clerk more than seven days before a town meeting held March 7, 1870, the warrant for which contained an article of the following tenor: "To see if the town will discontinue the private way leading from Lionel True's to the Valley Road. and *except* of a town way laid out by the selectmen." The town voted to pass over the article. Whereupon J. M. Burbank and thirty-nine others, on the first day of June, 1870, made a petition to the county commissioners, setting

forth under a "Whereas," a laying out by the selectmen on or about November 13, 1869, upon the petition of B. B. Harvey and others, of "a certain town way in said town of Freeman, commencing at the south end of the town way near the dwelling house of Lionel True, and thence running in a southwesterly direction, to the Valley Road, so called; and whereas the said town of Freeman has hitherto, to wit, at the annual meeting of said town held in the month of March, 1870, unreasonably refused to accept the town way so laid out by said selectmen as aforesaid, and voted to pass over the article in the warrant," &c., the petitioners, styling themselves "parties aggrieved by the aforesaid refusal," &c., pray the commissioners to "lay out the town way above described according to the statute," &c. Due and statute notice to the town and the public of a hearing on this petition was ordered by the county commissioners and given, and in regular course of proceeding, at the December term, 1870, they reported an examination and hearing in pursuance of the notices given, an adjudication that "common convenience and necessity do require the location of the way prayed for," and a laying out, in pursuance of that adjudication, of a way having substantially the same termini, but differing somewhat from that laid out by the selectmen in its courses and distances, and four rods wide instead of three. They ordered the town to pay the costs upon the petition, and awarded a larger sum in damages than was allowed by the selectmen, which they ordered to be "paid out of the treasury of the town of Freeman, when the land for which they are assessed is taken for said location." Their report was duly filed, continued till their next regular term in April, 1871, and no petition for increase of damages being interposed, the proceedings were then closed and entered upon the records.

It is for the damages thus awarded that this suit is brought. At the town meeting in March, 1872, the town, upon an appropriate article in the warrant, "voted that the selectmen settle with Lionel True and Simeon W. Weymouth in regard to the damage awarded them by the county commissioners in locating a town

road through their land." The road was within the limits assigned to the highway surveyors of District No. 9, in 1871 and 1872.

It is conceded by the plaintiff that where it crosses his land it follows the course of a bridle road subject to gates and bars which had been in use more than twenty years, and more or less wrought by the town, and had been assigned to highway surveyors before the location by the county commissioners.

On the other hand it appears that prior to the location there was a gate running upon trucks on a sill imbedded in the ground across this bridle road on the plaintiff's land; that after this location, in May or June, 1871, the gate was removed by some one unknown to the plaintiff; that two or three weeks later the sill was taken up and removed to the side of the road by the crew at work under the highway surveyor of that year, who was present when this was done, but neither directed nor forbade it; that at that time, said surveyor and his crew, one of whom was the plaintiff's son, worked on other parts of said town way, dug out stones, filled up the holes, plowed and threw up the road, and put the way in repair generally, both on the plaintiff's land and on other parts of the way located; that ever since it has been an open way, unincumbered with gates or bars, and traveled by the inhabitants of the town and others; and that plaintiff demanded the damages awarded him by the county commissioners of the treasurer of the town, May 3, 1873, and payment was refused.

The highway surveyor of 1871, and the selectmen testified that they did not intend to do anything to make the town liable under the location by the county commissioners, but assigned the road to the highway surveyor of that district, and proceeded to repair it after the location, as they had been accustomed to do before; that at one place, (not however, on the plaintiff's land) the county commissioners had made an entirely new location to avoid a hill and that this piece of new road had not been opened.

Hereupon the defendants' counsel contends:

I. That the county commissioners had no jurisdiction to lay out the town road there, and that their location is void, because

the records do not show that the selectmen reported their original laying out of the road with its boundaries and admeasurements to the town, and because the petition to the commissioners does not allege that the selectmen's written report thereof was filed with the town clerk in accordance with R. S., c. 18, § 20, nor that there was an article in the warrant for the acceptance of the road by the town; nor that there was a legal town meeting; and because the petition does not so describe the way located as to bring the location by the selectmen before the commissioners; and because the commissioners nowhere adjudged the refusal of the town to accept the road unreasonable, and there were not facts enough alleged in the petition to make it appear that such refusal was unreasonable; and because the plaintiff was one of the county commissioners at the time of the location by that board; and because it does not appear by the records that the location by the commissioners was substantially the same as that made by the selectmen; and finally because the petition to the county commissioners does not show that the petitioners were inhabitants of the town, nor that B. B. Harvey and others, on whose petition the selectmen made their location, were either inhabitants of the town, or owners of cultivated land therein.

II. The second ground taken in defence is that the case does not show that the way has been opened by the town, or the plaintiff's land taken for that purpose.

This we think is the first question to be considered and determined; for while it is clear on the one hand that if the plaintiff's land has not been taken in pursuance of the location, his suit must fail, inasmuch as by the adjudication of the commissioners his damages are made payable "when the land for which they are assessed is taken for said location," it may be doubted, on the other, how far the defendants ought to be heard to question the validity of an adjudication if they have acted under it, by their regularly constituted authorities and agents, to the damage of the plaintiff.

I. To support their position that the plaintiff's land has not

been taken by the town under the location, the defendants rely much upon the testimony of their selectmen and the highway surveyor of 1871, that they did not intend to do anything to make the town liable under the commissioner's location, that they designed only to proceed as before in the repair of the old bridle road, and that the evidence fails to connect them with the removal of the gate on the plaintiff's land, and that they have not built that part of the way located which deviates from the old bridle road.

The testimony derives much of its apparent force and significance from its amplification by counsel in argument. Whatever the intentions of the town authorities may have been, the vital fact still remains that, by acts done under their supervision, and herein before recited, the character and use of the way where it crosses the plaintiff's land have been essentially changed since the location, imposing additional burdens upon him.

Such being the fact, the testimony as to the intentions of the town officers cannot avail to prevent the natural and legitimate result of their acts. Though the original abstraction of the plaintiff's gate is not shown to have been an act of the town authorities, by the mere fact that it was done by some persons unknown to the plaintiff, it was followed by other acts done by the highway surveyors and those in their employ which amounted to a taking of the plaintiff's land there for a way unincumbered by gates and bars; and these acts seem to have been approved and ratified by the town, when, by a special vote, under a sufficient article in the warrant for their meeting, they directed their selectmen to settle these damages with the plaintiff.

We think the undisputed facts sufficient to settle this question of the taking of the plaintiff's land, prior to his demand upon the treasurer of the town for the payment of the damages, awarded him by the commissioners, against the defendants.

II. It becomes necessary then to inquire how far the defendants are at liberty to set up irregularities in the proceedings before the county commissioners to avoid the payment of damages for

the land taken by virtue of the adjudication of the commissioners appropriating it as a town way.

There are two classes of objections upon which the defendants rely to defeat the plaintiff's claim—the first class looking to complete avoidance of the adjudication of the commissioners on the ground of a want of jurisdiction—the second consisting of irregularities in their proceedings, supposed to be sufficient to make their doings liable to be quashed upon *certiorari*.

Of the second class, tending to show that the commissioners' adjudication is voidable merely, we think it clear that the defendants are not in a position to avail themselves. If they would avoid the payment of damages awarded, by reason of such defects, they should have proceeded to get the judgment annulled instead of availing themselves of it to take the plaintiff's land and open the road. While the judgment stands, its validity cannot be impeached in this suit if the commissioners had jurisdiction in the premises. We need not trouble ourselves to inquire what effect the want of any record of a direct adjudication by the commissioners that the refusal of the town to accept the road was unreasonable, or their deviations from the road laid out by the selectmen, or the alleged making of a substantially new location of a way one rod wider than that originally contemplated, might have had upon a petition for *certiorari*.

To ascertain whether the commissioners had jurisdiction we must look to the statute from which they derive their authority, the petition upon which they acted, and the notices which they gave to the parties interested.

R. S., c. 18, § 18, gives authority to the municipal officers of towns to lay out town or private ways "on petition therefor" and directs their mode of proceeding.

Section 23 provides as follows: "when the municipal officers unreasonably neglect or refuse to lay out or alter a town way or a private way, on petition of an inhabitant, or of an owner of land therein for a way leading from such land under improvement to a town or highway, the petitioner may within one year thereafter

present a petition stating the facts to the commissioners of the county at a regular session, who are to give notice thereof to all interested, and act thereon as is provided respecting highways."

The next section provides that "when a town unreasonably refuses to discontinue a town or private way, or to accept one laid out or altered by the selectmen, the parties thereby aggrieved may, within the time and in the manner stated in the preceding section, present a petition to the commissioners who shall in like manner proceed and act thereon, and cause their proceedings to be recorded by their own and by the town clerk; and the rights of all parties may be preserved and determined as provided in that section."

Some confusion has arisen from the condensation of statutes applicable to different classes of cases into fewer sections; and more perhaps, from careless dicta and citations of decisions applicable to one class in cases arising in another.

But the essential requirements to give the commissioners jurisdiction are not far to seek.

The true construction of § 18, and the distinction between what is thereby required for town and what for private ways, is given *Hall* v. *County Commissioners*, 62 Maine, 325.

Referring now to the petition to the commissioners in this case, we find the petitioners describing themselves as "parties aggrieved" by the refusal of the town. This is the language of the statute, (§ 24,) and it is sufficient in a petition for a town way without going on to assert that the original petitioners to the selectmen were inhabitants or owners of improved land. We find they give a general description of the town way respecting which action is proposed, sufficient to identify it, and enable all parties interested by reference to the report of the selectmen to ascertain the particulars of it, giving its termini, and general course, the name of the leading petitioner for it, and the date of the action of the town thereon, and they allege that the town "unreasonably refused" to accept it, and this we think is sufficient for jurisdictional requirements without proceeding to incumber their petition with a specific statement of all the acts and facts which go to make up an

"unreasonable refusal." It was not necessary to allege that the selectmen reported their location with its boundaries and admeasurements to the town, nor that their report was filed with the town clerk, nor that the town meeting at which the town refused to accept was a legal one, or that there was in the warrant an article for its acceptance, nor to give in the petition all the details of boundaries and admeasurements.

Upon this petition, as the commissioners' records show, they issued all the required notices, heard the parties, and made their adjudication, proceeding throughout thereon literally "as is provided respecting highways." There is no apparent want of jurisdiction.

The objection, that the plaintiff was at the time one of the commissioners, would have merit if the record did not also expressly declare that he took no part in the proceedings as commissioner. His subscription of the report containing this declaration does not militate against it.

Money made payable from the treasury of a town does not draw interest until after it has been demanded.

Judgment for the plaintiff for $150 *and interest from May* 3, 1873.

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

JOSEPH FRENCH, *et als.*, appellants, *vs.* COUNTY COMMISSIONERS.

Appeals—how made.

Upon appeals from the county commissioners to the supreme judicial court, the committee contemplated in the statute must be appointed during the term in which such appeal is entered. The only contingencies in which a subsequent appointment can be made are those provided for in the statute, viz: Where one of the committee dies, refuses to act, or becomes interested. These do not embrace a case where, for any cause, the presiding judge fails to make an appointment at the first term.

The appeal being given by the statute must be pursued in conformity with its limitations and restrictions.

If no committee is appointed at the first term, the appeal is liable to be dismissed on motion of the respondent at any subsequent term.

On exceptions.

Appeal from the decision of the county commissioners refusing to discontinue a certain way in Oxford, established by them, known as "the Hackett road." The petition for its discontinuance was filed with the commissioners on the twenty-third day of February, 1874, while a motion for the appointment of an agent to build it was pending before the board. A hearing was had on the nineteenth day of May, 1874, and upon the tenth day of June following the appellant's counsel was notified that the commissioners had decided not to discontinue the road, but would appoint an agent to open it. An adjourned session of the May term of the court of county commissioners was held the next day (June 11, 1874,) at which the appellants appeared and filed a notice of an appeal. The county commissioners hold but two terms of court in each year in Oxford county; on the second Tuesday of May, and the first Tuesday of September annually. At the term of the supreme judicial court holden at Paris, for Oxford county, on the third Tuesday of September, 1874, being its next session after said proceedings of June 10 and 11, 1874, were had—the appellants entered this appeal and moved for a committee. The respondents claimed that the return of the county commissioners had not been placed on file when the appeal was claimed and that it was therefore premature and the notice defective, and moved to dismiss the appeal. Without acting upon either motion the presiding justice directed a continuance of the case without its being requested by either party. At the ensuing December term the case was further continued to the March term, 1875, when both parties called up their respective motions and renewed them. The justice holding that term ruled that the appeal must be dismissed, and the appellants excepted.

John J. Perry for the appellants.

The county commissioners inform us explicitly that they "decide" not to discontinue the road. This was a declaration of a present determination of the matter and not an intimation of a purpose

to be subsequently executed. *Russell* v. *County Commissioners*, 51 Maine, 384. No notice of appeal is required by statute. All that is necessary is to enter it at the next term of the supreme court. R. S., c. 18, § 37.

The expression "not afterwards" in the statute, § 38, refers to the entry of the appeal and not to the appointment of the committee; and so the judge understood when he ordered it to be continued.

Alvah Black for the respondents.

The law, R. S., c. 18, § 5, was sufficient to inform the petitioners and their counsel that the return of the county commissioners could not be placed on file till their next September term; and that an appeal taken June 11 was premature.

The case of *Friend*, appellant, v. *County Commissioners of Penobscot County*, 56 Maine, 262, is conclusive that this appeal was rightly dismissed by reason of the failure to appoint a committee at the September term, 1874, when it was entered.

BARROWS, J. The true intent and construction of statutes which have been revised and condensed may often be best ascertained by an examination of the original enactment.

Especially, in the revision of 1857, the principal object being "to revise, collate and arrange all the public laws of the state, and, in revising, to condense as far as practicable"—a mere change of phraseology is not to be deemed a change of the law unless there was an evident intention in the legislature to work a change. *Hughes* v. *Farrar*, 45 Maine, 72.

The design of the legislature to secure a speedy determination of these appeals is perhaps more readily apparent, but hardly more certain, in the original statute than in the subsequent revisions. Public Laws of 1847, c. 28, by which these appeals were first granted, provides in § 1, that "any person or corporation aggrieved" in these cases may appeal "under the limitations and restrictions contained in this act;" in § 2, (among other things,) for the appearance of parties interested before the commissioners,

"either jointly or severally;" for an appeal to be taken by any party so appearing after the decision of the commissioners is entered on record, and before the term of court "then next to be holden in said county, and not afterwards;" for the entry of such appeal at that term, "and not afterwards;" in § 3, that "it shall be lawful for the court in such county, at the term when such appeal shall be entered as aforesaid, and not afterwards, to appoint a special committee," &c.

In the R. S., of 1857, c. 18, §§ 34 and 35, we find this triple repetition of the phrase "and not afterwards" avoided, and all these provisions together with those of chapter 152, laws of 1857, (authorizing a new appointment if one of the committee dies, refuses to act, or becomes interested,) greatly condensed, but without essential change. Their purport and effect remain the same. The construction of this revision was the vital point in *Friend*, appellant, v. *County Commissioners*, &c., 56 Maine, 262, and the court there held that it is for the appellant to see to it that a competent committee is appointed at the term when the appeal is entered. This was the ground of the decision, and not a *dictum* of the judge who drew the opinion, as the counsel for the appellants here claims. In that case the judge at *nisi prius* had appointed a new committee, viewing it as a matter addressed to his discretion, and the question directly before the court was whether it was lawful for him to make such appointment after the first term in any case except those expressly provided for in the statute where some member of the committee dies, refuses to act, or becomes interested; and it was held that it was not lawful. Had it been competent for him to make the appointment, his right to exercise his discretion could not have been questioned on exceptions.

This decision settled the construction of the statutes of 1857 on this point. When a statute has received a judicial construction, and is afterwards re-enacted in the same terms, it is to be understood that the legislature have adopted the construction given it. *Myrick* v. *Hasey*, 27 Maine, 9; *Osgood* v. *Holyoke*, 48 Maine, 414; *Rutland* v. *Mendon*, 1 Pick., 154.

Sections thirty-seven and thirty-eight of chapter eighteen in the revision of 1871, are exact transcripts of §§ 34 and 35 of chapter 18 of the R. S., of 1857, with a marginal reference to the case above cited, among others.

The words "not afterwards" have relation to the time and term when the court may appoint a committee. It is at the term when the appeal is entered, and not afterwards—exactly as originally provided with triple emphasis in chapter 28 of the Public Laws of 1847.

The legislature have not seen fit to make the prompt decision of these appeals in any manner dependant upon the caprice, carelessness, or procrastinating disposition of the parties or their counsel.

Neither have they made provision for a case where, for any cause, the presiding judge fails to appoint a committee at the term when the appeal is entered. The mandate of the statute is peremptory, and the only contingencies provided for are those therein named. It is not for us to add to them. The remedy, being given by the statute must be pursued "under the limitations and restrictions contained in the act." The appellants' counsel should have called the attention of the court to the case in season to have the motions acted on at the first term. He not only failed to do this, but allowed the second term to pass without action of any sort.

The appeal was rightfully dismissed, for the time had gone by when it was possible to prosecute it with effect.

It is not necessary in this case to determine whether the claim of appeal was radically defective or premature.

Exceptions overruled.

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

APPENDIX.

Opinions of the Justices of the Supreme Judicial Court.

Under R. S. 1871, c. 78, § 5, the governor and council can act only upon the returns signed and returned by the proper officers, except in reference to the number of votes and of the persons voted for.

At the September election in 1871, in the city of Ellsworth, the constable of ward one in said city notified the legal voters of said ward one to meet at the common council room in Hancock hall to give in their votes for governor, senator and county officers. Said meeting was held in said room, which room is within the limits of ward two in said city.

At the meeting in ward five in said Ellsworth, the votes were declared and immediately the meeting adjourned without day. After said meeting was adjourned the ward clerk made out the returns which were signed by the warden and the clerk, but not sealed. The deposition of the ward clerk taken on oath shows that he carried the returns unsealed until nine o'clock Tuesday forenoon, when not being able to find the city clerk or get into the city clerk's office to deliver them, he gave them to another gentleman unsealed who subsequently delivered them to the city clerk.

The meeting for the annual election of town officers in Frenchville in Aroostook county, was held in April, 1871, and the warrant calling said meeting was directed to the inhabitants of said town, signed by the selectmen of said town. No return was made upon said warrant. The clerk elected at that meeting was a foreigner, not having been naturalized. The return of the votes cast

at the September election in 1871, purports to have been signed by the selectmen and clerk. The deposition of the clerk given upon oath shows that he is not an American citizen, and that he cannot read or write in English; that he does not know the contents of the records. The records appear to have been kept at the house of another person other than the clerk and were not in his possession. It further appears that the check list was in the hands of a boy about twelve years old, a brother of one of the candidates. This boy had charge of the list for a number of hours when it was taken and held by another boy about fifteen years old. One of the voters of said town offered his vote and it was ascertained that his name was not upon the list when the boy passed the list to the voter who put his name upon it. At about one o'clock the check list was taken in charge by a man not a resident of said town or that representative district. Before the close of the meeting the votes were turned from the ballot box, counted and returned, no record being made at the time. The votes were laid in piles upon the tables and repeatedly handled by said persons before they were returned into the box after which the voting continued.

Upon the foregoing statement of facts the governor and council submitted the following questions to the court and requested an opinion thereon.

"I. Were the votes thus cast at the said several meetings as above stated legal within the meaning of the law?

"II. Is it the duty of the governor and council to inquire in regard to a compliance with the requirements of the statutes as to calling meetings and making returns of votes for state and county officers when properly requested, in order to determine their legality?

"III. When it appears upon inspection of the returns of the votes for any city or town and from other evidence, or either, that the returns are not signed by the proper officers, is it the duty of the governor and council to reject such votes? Have the governor and council any discretion in the premises?"

BANGOR, Nov. 28, 1871.

The undersigned justices of the supreme judicial court, have the honor to submit the following answer to the interrogatories proposed:

The power and duty of the governor and council in relation to the questions proposed are to be found in R. S. 1871, c. 78, § 5, by which after receiving the returns of votes duly sealed and attested, it is provided that "the governor and council on or before the first day of December in each year, shall open and compare the votes so returned and may receive testimony on oath to prove that the return from any town does not agree with the record of the vote of such town in the number of votes or the names of the persons voted for and to prove which is correct; and the return when found to be erroneous may be corrected by the record." It will be perceived that the authority of the governor and council in relation to the proof, which they may receive and upon which they must act, is restricted within very narrow limits.

In 1845, this court in answer to certain inquiries proposed by the governor, *held*, that the governor and council were not judges of the election of county officers. "If the legislature had deemed it expedient and had actually intended to constitute the governor and council judges generally of the election of county officers, it would have been easy for them to have been explicit to that effect; not having done so, it must be presumed that nothing of the kind was intended." Their authority as the law then was, extended only to opening and counting the votes duly returned. 25 Maine, 567.

In 1847 a question arose as to the election of register of deeds in York county, in *Bacon* v. *County Commissioners*, 26 Maine, 494. It was there held, that there was no substantial difference between the power delegated to the county commissioners and that given to the governor and council in relation to determining who had been chosen, and that the returns of the votes, signed and sealed in open town meeting, were the only evidence from

which to determine, who, if any one, was chosen, and that the county commissioners had no power to go beyond the return of the selectmen and town clerks, and receive other evidence, and from that decide, that a town meeting had been illegally called, and for that cause reject the votes of such town.

The reasoning as well as the conclusions of the court, in the instances referred to apply alike to the proceedings of the town meeting and of its officers, whether during said meeting or prior or subsequent thereto.

By the revision of Statutes 1857, c. 78, § 5, the powers of the governor and council were enlarged, but to a very limited extent. That is, they were authorized "to receive testimony on oath to prove that the return from any town does not agree with the record of the votes of such town, in the number of votes or the names of the persons voted for, and to prove which of them is correct; and the return when found to be erroneous may be corrected by the record."

In 1867 the opinion of this court was again asked on this subject and their answers were in entire conformity with the conclusions previously announced. 54 Maine, 602.

There are many irregularities and illegalities in the proceedings to which the questions proposed relate and which are assumed to be capable of proof; but unless they appear in the returns signed by the proper officers, the returns must control. If the returns do not appear to be signed by the proper officers, they must be disregarded. So if the names signed be forgeries, that fact may be shown, for forged returns are not those contemplated by the statute.

The result is that the governor and council can only act upon the returns signed and returned by the proper officers, except in reference to the number of votes and persons voted for, the statute permitting no discretion in the performance of their duty. There have been two revisions of the statutes, yet the legislature with a full knowledge of the construction given by the court to the provisions under and by virtue of which the action of the

governor and council is had, have not seen fit to modify or further enlarge their powers. We must therefore regard the opinions now and heretofore expressed as entirely in conformity with the judgment and intention of the legislature.

JOHN APPLETON,
EDWARD KENT,
JONAS CUTTING,
C. W. WALTON,
WM. G. BARROWS,
CHARLES DANFORTH.

HON. SIDNEY PERHAM,
Governor of Maine, Augusta.

OPINION *per* DICKERSON, J.

While I concur in the conclusion arrived at in the foregoing opinion, when the copies of lists of votes are in fact attested by the proper officers, and duly sealed up, I do not think that such copies are to be conclusively regarded as returns because they appear to be thus signed, even if no irregularity or illegality is apparent upon their face.

The constitution provides that "fair copies of the lists of votes shall be attested by the selectmen, and town clerks of towns . . . and sealed up in open town meetings." By "selectmen and town clerk," in this case as in all others, when mentioned in the constitution, are meant such persons only as are legally elected and qualified to act as such. No certified list of votes is a return unless it is attested by such officers.

Section four, chapter 78, of the R. S. of 1871, contains a similar provision, and section five requires the governor and council to open and compare the votes "so returned." The limitations of the powers of the governor and council provided in this latter section apply exclusively to valid returns.

Preliminarily to counting the votes of a town the governor and council must necessarily determine whether the paper purporting to be a copy of the list of votes of such town is a return within

the purview of the constitution. For this purpose they are not merely ministerial officers to give effect to whatever paper purports upon its face to be a copy of the list of votes attested by the proper officers, but judicial officers to determine both the genuineness and validity of such paper as a return, before it can be treated as such. Otherwise the constitutional safeguard upon this subject affords no security against mistake, illegality or fraud. In the absence of such authority the governor and council would be obliged to count the votes of towns or plantations that have never been duly organized where the copy of the list of the votes of each town or plantation appears to be attested by the proper officers. Two such lists might be returned from the same town: must the governor and council in such case reject the vote of the town, or have they authority to hear evidence *aliunde* and determine which is the return? If they have no such authority what right have they to reject a fraudulent or forged certificate of the list of votes of any town? Such certificate would appear to be signed by the proper officers. It is no answer to this argument that the constitution does not contemplate forged or fraudulent returns; for it does not contemplate illegal returns, or returns signed by persons who assume to act as certifying officers without legal right or authority.

I do not understand that these views are in conflict with the authorities upon this subject. The cases to which the attention of the court in this state has been called relate to the authority of the examining officers to go behind the returns, and inquire into the legality of the previous proceedings. I entirely concur in the doctrine of these cases, which, I understand, goes to this extent and no further, that when the certificate received is in fact attested by the proper officers, and duly sealed up, it constitutes a return and the examining officers have no right to go behind it, and inquire into the legality of the call of the meeting or its proceedings when the votes were cast. But there is a question behind this, and that is whether the certificate offered as a return is a return. Of this question, I hold that both the constitution and the law, as

well as reason and public policy, make the governor and council the judges. The supreme court in Massachusetts, in giving construction to a similar statute, expressly lay down this identical doctrine, that "the examiners must necessarily determine the genuineness and legality of the returns." *Strong, petitioner*, 20 Pick., 492.

My conclusion is that the governor and council have the right to determine whether any paper purporting to be a return of votes of any city, town or plantation is a return according to the requirements of the constitution and the laws, and that in adjudicating upon this question they have a right to hear and act upon other evidence than that contained in such paper.

I have the honor to be, yours, faithfully,

J. G. DICKERSON.

Augusta, December 8, 1871.

HON. SIDNEY PERHAM,
Governor of Maine, Augusta.

OPINION *per* TAPLEY, J.

I concur in the conclusion arrived at by my associates, and in conformity with the request annex the following opinion.

The powers granted to the governor and council over the proceedings of the electors in the choice of county officers are limited and express, and are found in the 4th and 5th sections of ch. 78, of the R. S. of 1871.

By these sections it will be perceived that they are to be governed by the returns of the municipal officers of the towns and cities, except when suggestion is made that the return does not agree with the record of which it should be a copy. In such case upon proper application the return may be corrected, and as corrected becomes the rule of action in that case; so that the final conclusion is purely and solely, a result deducible from the returns.

They are not otherwise judges of elections than to judge and determine who by the returns appear to be elected.

The "return" which is thus to be their guide, must be a true copy

of the record of the town or city, in "the names of the persons voted for, the number of votes for each, and the whole number of ballots received," "sealed and attested as returns of votes for senators," to wit, in towns, attested by the selectmen and town clerk, and sealed up in open town meeting; and in cities, attested by the warden, and ward clerk, and sealed up in open ward meeting. Cons. Maine, art. IV, part 2nd, sec. 3; Amend. Cons., art. 1.

Anything else is not a valid return.

Whether or not a paper presented is such a return is (in the first instance) a question for the governor and council. The decision of this question is involved in the duty to "open and compare the votes so returned," and the power so to do is recognized by the authority given to make the returns conform to the record.

When this question cannot be determined from an inspection of the paper, evidence *aliunde* may be received; and such evidence may be received to show that it is not the return required to be made of the proceedings of that meeting.

The decisions of this court bearing upon this question are sufficiently refered to in the opinion of my associates, one of which only, do I deem it necessary to refer to, and that is the opinion found in the 25th of Maine Reports, page 568. It is there said, if the governor and council "could receive evidence that the certificates were erroneous in one particular they might with equal propriety, do so in another; and so exercise the powers of judges of those elections generally and without restriction."

This relates not to the certificate itself as an instrument of evidence, but to the facts evidenced by it. So far as it certifies the action of the electors it is conclusive evidence of the facts certified when properly made; but as before remarked whether a paper offered is or not a return as thus defined, is a question in the first instance for the governor and council to settle. Unless they find it is such, they are not authorized to use it as evidence of the acts of the electors.

RUFUS P. TAPLEY, Jus. Sup. Jud. Ct.

Saco, Dec. 12, 1871.

Opinion of the Justices of the Supreme Judicial Court.

In canvassing votes returned to the secretary of state, the governor and council cannot include in the number of votes for William H. Smith, votes for W. H. Smith, or W. Smith.

Nor can the governor and council receive and consider any certificate of municipal officer that votes with different names were intended for same person.

R. S., c. 78, § 5, gives no power to governor and council to correct errors in returns of votes for senators or representatives.

A person elected to fill a vacancy in the office of register of deeds, holds the same only for the remainder of the term.

State of Maine,

In Council, Dec. 2, 1875.

Ordered. That the opinion of the supreme judicial court be requested on the following questions:

First. In the discharge of their duties as canvassers of lists of votes returned to the office of secretary of state as required by law, can the governor and council include in the number of votes for William H. Smith, for example, such other votes for the same office as are for W. H. Smith?

Second. Can the governor and council include in the number of votes for William H. Smith, for example, such other votes for the same office as are for William Smith?

Third. When the selectmen and clerk of any town make a return of lists of votes given in in such town showing that William H. Smith and W. H. Smith received votes for the same office, and accompany and seal up with such return a certificate which satisfies the governor and council that William H. Smith and W. H. Smith are one and the same person, can the governor and council count the votes for W. H. Smith as for William H. Smith?

Fourth. Can the governor and council receive evidence showing that the return of votes cast in any town for senators or representatives to the legislature does not agree with the record made by the clerk of such town, and allow the return to be so amended?

Fifth. Does a person elected to fill a vacancy in the office of register of deeds, hold the same only for the remainder of the term for which the prior register was chosen, or for a full term of five years?

BANGOR, Dec. 6, 1875.

The undersigned, justices of the supreme judicial court, have the honor to submit the following answers to the interrogatories proposed:

The governor and council, in comparing and examining the returns of votes and in declaring who are elected, act as a canvassing board. They only know what the returns indicate. In their investigations they are limited to the evidence derivable from the returns transmitted to them by the several clerks of the cities, towns or plantations of the state, except when their powers have been enlarged by statute. If the returns show that ballots were cast for John Smith and for J. Smith for the same office, it cannot be ascertained from any evidence before the canvassing board that the initial letter of the christian name, J., was intended for John rather than for Joseph or James or any other christian name beginning with such letter, which different persons bearing that common surname may have; so, if John Smith and James Smith were respectively candidates for the same office, no inspection of the returns, however accurate, would afford any clue to enable the governor and council to determine whether the vote for J. Smith should be counted for the one or the other of the contending candidates, or for some other Smith whose christian name began with J. The fact of different ballots would indicate that there were different individuals for whom such ballots were intended.

When there are abbreviations of the christian name in common and ordinary use, as Wm. for William, it is otherwise, for these abbreviations have a recognized and well understood meaning. So, when the name is misspelt but recognizable by the sound as that of a candidate, the misspelling cannot lead to any misunderstanding; the recognition of identity from the record will justify

the counting the name misspelt for the candidate for whom it was obviously intended.

So far as this question relates to the returns of votes for senators and representatives, it is comparatively unimportant, as the senate and house of representatives are the constitutional judges of the election of the members of their respective bodies, and have full power to receive and act upon the evidence necessary to enable them justly to determine the rights of the different claimants for the same seat. In the case of county officers the will of the voters may sometimes be defeated by their negligence in not designating with sufficient precision the names of their candidates. In respect to those officers the powers of the governor and council have been increased to a limited extent by R. S., c. 78, § 5. Whether a further enlargement of their powers may not be expedient is a matter for the consideration of the legislature.

To the first question proposed we answer in the negative.

II. The names of William H. Smith and William Smith are different. The ballots respectively bearing those names were cast by different persons and they are returned as the names of different candidates. Evidence from without the returns would be necessary to show that they were intended for the same person, but such evidence is not legally admissible.

The second question we answer in the negative.

III. By the tenth amendment to the constitution it is provided that "fair copies of the lists of votes shall be attested by the selectmen and town clerks of towns, and the assessors of plantations and sealed up in open town and plantation meetings; and the town and plantation clerks respectively shall cause the same to be delivered into the secretary's office thirty days at least before the first Wednesday of January annually, and the governor and council shall examine the returned copies of such lists, &c., &c., and twenty days before the said first Wednesday of January annually shall issue a summons to such persons as shall appear to be elected by a plurality of all the votes returned, to attend and take their seats," &c. By R. S., c. 4, § 33, the town clerk is required

to transmit to the secretary of state within a prescribed time "the returns of votes given in his town."

When the selectmen and town clerks of and the assessors of plantations attest "fair copies of the lists of votes," and seal up the same "in open town and plantation meetings," and cause the same to be delivered into the secretary's office as required by the constitution and the statutes, their duty is at an end. They are not certifying officers to the identity of candidates when that identity is not apparent from the returns transmitted, for the reason that the constitution has not made them such.

We answer the third question in the negative.

IV. By R. S., c. 78, § 5, the power of the governor and council is somewhat enlarged in relation to the election of county commissioners and the provisions of this act have been made applicable to other county officers. But this act gives no power to correct the errors which may exist in the returns of votes of senators. It is for the senate to see that such errors as are supposed to exist in and by this inquiry are duly corrected.

The fourth question we answer in the negative.

V. By R. S., c. 7, § 2, it is enacted that "in each county and in each registry district established by law, there shall be chosen by ballot by such persons as are qualified to vote for representatives at town meetings on the second Monday of September, in the year one thousand eight hundred and seventy-two, and every five years thence following, some person to be register of deeds."

By § 3, the person so chosen is to "hold for the term of five years from the first day of January thereafter and until another shall be chosen and qualified."

By § 5, "vacancies occurring in said office by death, resignation or otherwise, shall be filled by election . . at the September election next after their occurrence; and in the meantime the governor with the advice and consent of the council, may fill said vacancies by appointment, and the person so appointed shall hold his office until the first day of January thereafter."

It is apparent that the term of office of the register of deeds

was five years; that the elections were to be made every five years from a specified date, and that they were to be simultaneous throughout the state. So they ever have been. It follows that a vacancy to be filled by election could only be for the remainder of the term, as otherwise the election could not be "in each county and in each registry district established by law . . every five years thence following," that is "from the second Monday of September, 1872." Any other construction permits the choice of the register to begin in any one of the intervening five years and not in the five years thence following in consecutive series of that period.

That this is the true construction of the statute is made apparent by recurrence to preceding legislation. By St. 1821, c. 98, § 1, the register of deeds is to "hold his office for the term of five years and until some other person shall be chosen and qualified to act in his place." In case of vacancy, by § 5, "the person chosen to fill such vacancy shall be registers of deeds for such county until the time appointed by this act for the election of registers of deeds throughout the state." The time appointed for such election is by § 1, "at the town and plantation meetings, on the second Monday of September, in the year of our Lord one thousand eight hundred twenty-one, and every five years thence following." In the revision of 1840, and in every subsequent revision the election of register of deeds is to be on a particular day and "every five years thence following."

The practice from the first organization of the government has been to choose the register of deeds every five years throughout the state. In accordance with the views already expressed, it was held by this court in *Rose* v. *County Commissioners*, 50 Maine, 243, that the elections for this office were to be holden in 1857, and in every five years thence following.

Nor is anything here advanced at variance with the construction given to the sixth article of the constitution as amended by the ninth amendment, by which the office of register of probate is made elective. 61 Maine, 602. By this amendment the registers of probate are to "hold their offices for four years commenc-

ing on the first day of January next after their election," in whatsoever year that election may be. There is no provision prescribing that the general election for that office shall be every four years from a fixed date; but registers are required to be chosen at the September election next after a vacancy, and for a term "of five years commencing on the first day of January next after their election."

To the last question we answer that when a register of deeds is elected to fill a vacancy, the election is only for the unexpired term of the register whose place is thus filled.

JOHN APPLETON,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

HON. NELSON DINGLEY,
Governor of Maine, and
THE HONORABLE COUNCIL OF MAINE,
Augusta.

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1. Public Laws of 1874, chapter 171, purported to repeal R. S., c. 18, § 35, but was itself repealed by chapter 263 of the same session: *held*, that § 35 remained as if there has been no legislation with relation to it.

Coe v. *County Commissioners*, 31.

2. The words "already sustained," in the Act of 1874, c. 215, must be referred to the time when the act took effect and not to its date. In legal contemplation the words are spoken when it becomes the law.

Jackman v. *Garland*, 133.

3. R. S., c. 1, § 3, fixing the time when enactments become laws is a general law of the state affecting all subsequent legislation unless there be some indication of a contrary purpose. Though no legislature is bound by its provisions acquiescence will be presumed unless dissent be shown. *Ib.*

4. R. S., c. 82, § 39, only authorizes an attaching creditor in one suit to defend a prior suit, when both suits are pending. *Smart* v. *Smart*, 317.

See ATTORNEY, 2. BASTARDY PROCESS, 3. CORPORATION. WAY, 1–8. WAY, DEFECTIVE, 5.

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